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# Mergers in the California Marketplace

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There have been literally thousands of new corporations established in California during the past decade, as Silicon Valley in Northern California, the “Biotechnology Corridors” in and around San Diego, and several California universities have continued to be a hotbed for start-up companies and corresponding venture capital investments. Although many of these ventures have failed for one reason or another, several have succeeded (oftentimes becoming public companies, and sometimes exceeding their founders’ wildest imaginations) and others have encountered slower growth or stagnation but remain in existence today. To survive, many have required additional rounds of investment capital, and so-called “down-rounds” of financing have necessitated, in a number of cases, the establishment of multiple classes of capital stock. Some of these California-based corporations have been organized under the California General Corporation Law, and many—not surprisingly, given the ease of doing so and many legal practitioners’ familiarity with Delaware law—have been incorporated in the state of Delaware. Still others have been formed under the laws of other jurisdictions.

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As part of the natural evolution of these companies and the life cycle of the venture capital and private equity funds that have invested into these entities, it is now the case that some owners of these companies have been concentrating on various exit strategies to obtain liquidity from their investments. One common exit strategy, especially given the significant number of stockholders that some of these entities have, is the consummation of a statutory merger transaction. The legal practitioners involved in pursuing mergers or other exit strategies on behalf of their clients are forced to focus on—and, often for the first time, learn about—various peculiarities of the California Corporations Code, which seemingly affect not only those corporations that were organized under the laws of the state of California but also those incorporated outside of California.

## Requisite Shareholder Approvals in Connection With a Merger

The first somewhat unusual California requirement that has an impact on the ability of a California corporation (or, for reasons discussed more fully below, a California-based corporation) to consummate a merger transaction is Section 1201(a) of the California Corporations Code, which mandates that the principal terms of a reorganization must be approved by the outstanding shares of *each* class of each corporation, the approval of whose board of directors is required in connection with the transaction, regardless of whether such class would ordinarily have voting rights or

not. A “reorganization” is defined under Section 181 of the California Corporations Code to include a statutory merger (other than a short-form merger involving, for example, a parent and its subsidiary).

The separate class vote requirement of Section 1201(a) is interestingly divergent from that of Delaware and many other jurisdictions with respect to mergers. There is no allowance under Section 1201(a) for a corporation to have the ability to provide differently in its articles of incorporation to deviate from the separate class vote required in connection with a merger. Even if a California corporation purports to provide that a class of its capital stock is non-voting or is only to vote in limited and clearly defined circumstances not including a merger, Section 1201(a) renders such provisions meaningless for purposes of the separate class vote requirement in connection with a merger.

Given the nature of many native California-incorporated corporations, Section 1201(a) creates a potential trap for the unwary in the form of potentially providing an unintended veto right to a minority (and perhaps otherwise non-voting) shareholder. As mentioned above, California is home to a vast number of corporations that began their existence through multiple venture capital and private equity financings involving the issuance of different classes of capital stock. Frequently, the only purpose of the corporation having created a second or third class of preferred stock was merely to provide for a different conversion price into common stock—and often the notion that the creation of such additional class of capital stock might result in a new investor or group of investors having “veto” or “hold-up” power over a future merger transaction may not have been considered. While this issue can be ameliorated through appropriate contractual commitments among the various class shareholders,<sup>1</sup> if corporate counsel is not sensitized to this issue at the outset of the issuance of the shares of the separate class of stock, the California corporation may have inadvertently created an additional, and sometimes insurmountable, hurdle to being able to readily complete a merger transaction later.

It should be noted that this separate class vote rule is distinguishable from the voting rules attributable to a

California limited liability company in Section 15551(a) of the California Corporations Code, which require approval of a majority in interest of the members (unless the limited liability operating agreement or articles of organization require a higher threshold), regardless of the existence or number of different classes of membership interests.

### **Dissenters’ Rights**

California law’s second notable difference from Delaware corporate law that impacts how merger transactions can be accomplished is the manner in which shareholders not favoring a proposed merger transaction are to be handled.

Historically, during the early evolution of corporate law in the United States, major corporate actions—such as mergers—required the unanimous consent of the corporation’s shareholders under the common-law theory that each shareholder had a vested property right in the terms of the corporation’s charter and that property right could not be altered without the individual shareholder’s consent. This presented a serious complication for efficient operation and effective corporate action and allowed the minority—even a single shareholder—to frustrate the will of the majority and/or engage in strategic action to exact special consideration in certain circumstances. The dissenters’ rights remedy (or right to appraisal, as it is known in some states) developed as a legislative remedy to protect minority shareholders from being forced out of their investment at an unfairly low price and to compensate them for the loss of their common-law right to preclude a major corporate action, while at the same time operating to facilitate the occurrence of mergers. Today, the dissenters’ rights/appraisal remedy is available in all fifty states and the District of Columbia, and while there are numerous variations among the disparate state dissenters’ rights/appraisal statutes, the ultimate remedy is essentially the same, namely to provide shareholders who dissent from a merger or other specified major corporate action with

<sup>1</sup> For example, the various stockholder class groups could enter into a stockholders’ agreement with appropriate “drag-along” rights whereby the minority class holders have committed themselves to vote/sell their shares as dictated by the majority.

an independent judicial determination of the fair value of their shares.

The California dissenters' rights statute is set forth in Chapter 13 of the California Corporations Code, and a few characteristics of it are especially noteworthy, given their substantive differences with the laws of many other jurisdictions. California corporate law on dissenters' rights contains a specific limitation on judicial discretion that is in most cases favorable to the corporation (and ultimately its acquirer-by-merger), to the detriment of dissenting shareholders, and is not found in the corporate law of Delaware. Section 1300(a) of the California Corporations Code dictates that the fair market value of a dissenting shareholder's shares is to be determined as of the day before the first announcement of the terms of the merger specifically "excluding any appreciation or depreciation in consequence of the proposed action ..."<sup>2</sup> Since most announced merger transactions involving publicly held companies typically include some premium over the previous trading price of the target company's shares, Section 1300(a) may very well operate as a disincentive to a California target company's shareholders to seek dissenters' rights, because the amount of that premium is presumably excluded by statute from the judicial determination of fair market value. As the judicially determined fair market value of the dissenting shareholder's shares could be more than, the same as or less than the value of the consideration to be paid in the transaction, statutorily denying the value of any premium puts a dissenting shareholder at particular risk that the value of such holder's dissenting shares will be found to be less than the value such holder would have received as consideration in connection with the transaction from which the holder is dissenting.

Another notable difference of California's dissenters' rights provisions is that, if the California target company is listed on a national securities exchange (such as the New York Stock Exchange or American Stock Exchange) or the National Market System of the NASDAQ Stock Mar-

<sup>2</sup> Interestingly, this standard is also different from the standard set forth in the California Limited Liability Company Act. See Section 17601(a) of the California Corporations Code, which states that the value should be determined excluding "any appreciation or depreciation in consequence of the proposed reorganization *unless exclusion would be inequitable*" [italics added].

ket, Section 1300(b)(1) of the California Corporations Code creates another hurdle for any minority shareholder who wishes to dissent from a transaction. Holders of publicly traded capital stock of a California corporation are entitled to perfect their dissenters' rights only if either of the following criteria are satisfied:

- (a) holders of 5 percent or more of the outstanding shares of the relevant class of stock dissent from the proposed transaction and demand appraisal, in which case all holders of such class will have the right to dissent and seek appraisal for their shares of such class; or
- (b) the stock for which dissenters' rights are sought is subject to restrictions on transfer imposed by the corporation or by any law or regulation (e.g., if the shares are "restricted securities" not registered pursuant to the Securities Act of 1933, as amended, and not then eligible for unrestricted resale pursuant to Rule 144(k) of the Securities Act) in which case holders of stock that are subject to such restrictions have the right to dissent and seek appraisal for their shares of such class.

The rationale for these exclusions from the exercise of dissenters' rights appears to be that, where a readily tradeable market exists into which the minority shareholder is able to sell his or her shares prior to the merger, the minority shareholder should be protected merely by selling shares and receiving fair value in the marketplace—so long as the number of minority shareholders is small enough (e.g., less than 5 percent of the number of outstanding shares) so that the volume of such sellers would not itself adversely affect the price that can be obtained by all such minority shareholders. This 5 percent limitation is very helpful to a publicly traded California corporation (and its acquirer-by-merger) by relieving it from the necessity of dealing with nettlesome small holders who, for whatever reason, may attempt to perfect their dissenters' rights. Absent one or more larger and dissatisfied holders, or enough smaller holders submitting valid claims exercising dissenters' rights, a California incorporated public company not having restrictions on transfer applicable to its outstanding shares of stock faces minimal risk that it will be confronted with any dissenting holders who will

ultimately be able to perfect their dissenters' rights under California law.

Another facet of California dissenters' rights law is the apparent exclusive nature of the remedy under California law. Section 1312(a) of the California Corporations Code contains limitations on the ability of shareholders of a California company to attack, set aside or rescind a merger or reorganization.<sup>3</sup> In *Steinberg v. Amplica, Inc.*,<sup>4</sup> the California Supreme Court interpreted Section 1312(a) to mean that statutory dissenters' rights are the exclusive remedy of a minority shareholder who alleges fraud or breach of fiduciary duty if such shareholder "is aware of all facts leading to his cause of action for alleged misconduct in connection with the terms of the merger prior to the time the merger was consummated but deliberately opted to sue for damages instead of seeking appraisal."<sup>5</sup> The California Supreme Court determined that the issue of misconduct could simply be considered in the appraisal proceeding in determining the fair market value of the dissenting shares. Therefore, as long as all of the terms of the merger are disclosed prior to the merger (along with all the facts which lead to the shareholder's cause of action), the only remedy available to the shareholder of a California corporation appears to be to dissent and seek appraisal of such shareholder's shares. The *Steinberg* decision has interesting repercussions for strike suits in California alleging fraud, breach of fiduciary duty, and other assorted allegations that are not infrequently filed by plaintiff's lawyers in other jurisdictions in connection with a merger transaction involving a publicly traded company. Such actions for compensatory or exemplary damages with respect to a California corporation are effectively cut off under the Court's reasoning in *Steinberg* regarding the exclusive nature of California's dissenters' rights remedy.

It should be noted that the *Steinberg* case dates back to 1986 and was decided by the seven members of the California Supreme Court by a slim margin of 4 to 3. Cases involving the same basic issues have been decided in other jurisdictions, including Delaware,<sup>6</sup> with a contrary result. As a result, it is possible that a subsequent California Supreme Court reviewing the issue under somewhat different or more egregious circumstances than those present in the original *Steinberg* case might

reach a different conclusion, but for now *Steinberg* appears to stand very strongly for the proposition that, once a merger transaction is consummated, former holders of capital stock of the relevant corporation who feel aggrieved by the transaction will be left with little, if any, recourse against anyone unless they have, prior to the closing of the merger complied in full with the strict and numerous conditions under California law for a proper exercise of dissenters' rights. These conditions include, in the case of a corporation whose shares are publicly traded, that the aggrieved shareholder actually vote "no" on the merger proposal at any shareholders' meeting called for such purpose—which is another notable difference between California corporate law and Delaware's, which provides that a shareholder of a Delaware corporation may abstain from voting on a proposed merger, rather than actually voting against it.

### Section 2115 and the "Quasi-California" Corporation

As part of California's own corporation statute, there is a corporate long-arm statute (California Corporations Code Section 2115) that purports to be applicable to privately held corporations having significant connections to California. By its terms, Section 2115 applies if (1) the average of the corporation's property factor, payroll factor and sales factor (each as defined in the California Revenue and Taxation Code) are more than 50 percent during the corporation's last full income year and (2) more than one-half of its outstanding voting securities are held of record by persons having addresses in California. If a corporation that is not publicly traded<sup>7</sup> meets

<sup>3</sup> Section 1312(a) provides, in pertinent part, that "No shareholder of a corporation who has a right under this chapter to demand payment of cash for the shares held by the shareholder shall have any right at law or in equity to attack the validity of the reorganization or short-form merger, or to have the reorganization or short-form merger set aside or rescinded, except in an action to test whether the number of shares required to authorize or approve the reorganization have been legally voted in favor thereof. . . ."

<sup>4</sup> *Steinberg v. Amplica, Inc.*, 42 Cal.3d 1198 (1986).

<sup>5</sup> *Id.* at 1214.

<sup>6</sup> See *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), *aff'd*, 497 A.2d 792 (Del. 1985) and *Rabkin v. Phillip A. Hunt Chemical Corp.*, 498 A.2d 1099 (Del. 1985), and their progeny.

<sup>7</sup> Section 2115 is not applicable to a corporation (1) with outstanding securities listed on the New York Stock Exchange, or American Stock Exchange; (2) with outstanding securities designated as qualified for trading on the NASDAQ National Market; or (3) if all of its voting shares are owned directly or indirectly by a corporation or corporations not subject to Section 2115.

this statutory test, despite the fact that the corporation is incorporated in a state other than California, Section 2115 applies a laundry list of corporation matters and actions that are nevertheless deemed to be controlled by California law, including, among other things: the annual election of directors; removal of directors; directors' standards of care; limitations on corporate distributions in cash or property; requirements relating to asset sales, mergers and reorganizations; cumulative voting for directors (which, in contrast to most other states' corporate law, applies automatically to all corporations other than those whose stock is publicly traded); the conditions when a supermajority vote is required; and dissenters' rights. This long-arm statute even purports to apply to a corporation that itself does not have property, payroll, or sales in California (but whose subsidiary corporation does); in other words, the statute is also targeted at "holding" companies which conduct no business of their own in California (or otherwise) but merely hold shares of the corporation with nexus to California.<sup>8</sup>

When one looks carefully at the multitude of corporations that have commenced business and remain based primarily in California (and that, in large part, count as their investors "angel investors" or venture capital and private equity firms headquartered or having an office in California), one realizes that there are most likely numerous Delaware and other corporations that may be required, pursuant to the California statute, to govern themselves in part by the standards and requirements of California corporation law. This, coupled with the notable differences between the California and Delaware corporate laws, can prove complex both for the corporation and its legal practitioners, who are forced to deal sometimes with conflicting requirements and unforeseen consequences arising between the two different sets of law. To add further complexity, depending on the geographic source of its sales (or the composition of its shareholders and whether they continue to have California addresses) from one year to the next, an out-of-state corporation might end up being subject entirely to its

<sup>8</sup> Section 2115(a) of the California Corporations Code specifically covers within its scope "a foreign parent corporation even though it does not itself transact intrastate business [in California]."

<sup>9</sup> *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108 (2005).

own laws part of the time but subject to conflicting California requirements at other times.

So how is a legal advisor to counsel a privately held corporation incorporated in a state other than California but having a sufficient California nexus under Section 2115? Is this "quasi-California" corporation supposed to serve the two different masters of California corporate law and the corporate law of its state of incorporation? In some circumstances, such as regarding dissenters'/appraisal rights, it is conceivable that the "quasi-California" corporation could comply with the different actions required by California law, and separately, by the law of its state of incorporation, but full compliance with both statutes would nevertheless certainly be confusing (e.g., with the corporation being required to send to its stockholders both a copy of the appraisal rights statute of Delaware and the dissenters' rights statute of California and ask them to comply with both). Still, in other circumstances, such as requirements relating to the authorization and approval of mergers and reorganizations, the provisions of California corporate law may be directly contradictory to what the law of the corporation's state of incorporation provides. Complicating matters is the fact that Section 2115(b) of the California Corporations Code provides that the long list of corporate actions to be governed by California law are to be so governed "to the exclusion of the law of the jurisdiction in which [the corporation] is incorporated." If given effect, this provision would trump the law of the state of incorporation of the quasi-California corporation.

Recently, the Delaware Supreme Court weighed in on this very issue, in what the authors view as a helpful and well-decided case in *VantagePoint Venture Partners 1996 v. Examen, Inc.*<sup>9</sup> The facts in the *VantagePoint* case involved *Examen, Inc.*, an entity incorporated in Delaware, that satisfied the Section 2115 tests to be treated as a quasi-California corporation. *Examen* was to be acquired by means of a merger, and *VantagePoint Venture Partners, Inc.*, a holder of 83.4 percent of *Examen's* Series A Preferred Stock, did not desire that the contemplated merger transaction proceed. If Delaware law applied, then pursuant to *Examen's* certificate of incorporation, the holders of preferred stock would vote together with the holders of common stock as a

single class on the merger agreement, and, in such case, VantagePoint (with approximately 13.5 percent of the vote on an as-converted basis with the common stock) would not be able to block the merger unilaterally. If California law applied, then the merger could only go through if it were approved by the holders of the common stock, on one hand, and holders of the preferred, on the other hand, voting separately as two classes; so the relevant provision of California law (discussed in the first section of this article) would essentially grant VantagePoint—given its holdings of a majority of Examen’s preferred stock—a veto over the merger, notwithstanding that Delaware law would not.

In *VantagePoint*, the Delaware Supreme Court upheld the Delaware Court of Chancery’s determination that the issue was governed by the “internal affairs doctrine” and therefore the law of Delaware should apply to the exclusion of California’s. The “internal affairs doctrine” is a long-standing choice of law principle that one state should have the authority to regulate a corporation’s “internal affairs”—namely, the state of incorporation.<sup>10</sup> The Delaware Supreme Court, citing historical U.S. Supreme Court cases, as well scholarly analysis concerning Section 2115 of the California Corporations Code, firmly resisted the notion that a corporation should be subject to inconsistent legal standards or that a corporation’s internal affairs should rest with multiple jurisdictions.<sup>11</sup> Although the result of the *VantagePoint* case is binding only in Delaware currently, given the deference oftentimes afforded Delaware courts by other jurisdictions in making their own decisions on matters of corporate law, it would not be surprising in the future to find other states taking a similar position to that of the Delaware Supreme Court. That being said, until the U.S. Supreme Court or another federal court rules on the applicability of Section 2115 to quasi-California corporations (or until a California court takes a position similar to that of the Delaware Supreme Court), outside of Delaware there remains some uncertainty as to whether the California corporate law provisions delineated in Section 2115 or the corporate laws of the jurisdiction of incorporation govern a quasi-California corporation. There is also uncertainty as to whether the state of California will, for its own purposes (e.g., acknowledging the occurrence of a merger involving an out-of-state corpora-

tion registered to do business in California as a foreign corporation), recognize the validity of a corporate action that was taken only in accordance with the requirements of the out-of-state jurisdiction and ignoring California’s particular standards for approval.

As a result, for now, the authors suggest that practitioners in California proceed cautiously in this area. A conservative approach appears to be to attempt to comply with both the California and out-of-state corporate law requirements, where it is possible to do so, because in the absence of doing so, there is some risk that an aggrieved party could bring suit in California challenging a merger or similar transaction not effected in accordance with California law, and the ensuing litigation might result in a court decision contrary to Delaware’s *VantagePoint* decision. One interesting question is whether, in the event that the corporation at issue properly notifies shareholders in accordance with California law of their dissenters’ rights and how to exercise them, a California court might—in reliance on the *Steinberg* case discussed above—hold that, after the consummation of the merger, those dissenters’ rights are the exclusive remedy to a plaintiff attempting to challenge the merger as having not been approved in accordance with the California merger requirements.

The authors also note that the California limited liability company act does not contain an equivalent long-arm statute to that found in Section 2115, so that a limited liability company organized out-of-state need not concern itself with the possibility of becoming caught up in a conflicting set of governing standards.

### California Fairness Hearings

Another somewhat unique aspect of California’s corporate law that can help facilitate the timing of, and

<sup>10</sup> Id. at 1118 citing *McDermott Inc. v. Lewis*, 531 A.2d 206 (Del. 1987).

<sup>11</sup> The Delaware Supreme Court referred for support to the reasoning in U.S. Supreme Court cases *Edgar v. Mite Corp.*, 457 U.S. 624 (1982) and *CTS Corp. v. Dynamics Corporation of America*, 481 U.S. 69 (1987). In addition, the Court pointed out that in her “comprehensive analysis of the internal affairs doctrine, Professor Deborah A. DeMott examined Section 2115 of the California Corporations Code” in her article *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 *Law & Contemporary Problems* 166 (1985) and found “In contrast to the certainty with which the state of incorporation may be determined, the criteria upon which the applicability of Section 2115 hinges are not constants . . . Thus, a corporation might be subject to Section 2115 one year but not the next, depending on its situation at the time . . .”



ability to consummate, certain merger transactions is California Corporations Code Section 25142, which allows companies interested in issuing securities in a merger or share exchange transaction to seek a “fairness hearing” as part of its application for qualification of the offer and sale of securities. This provision of California corporate securities law—which very few other states have adopted—provides an avenue by which a potential acquirer that desires to use its securities as consideration in the acquisition of target can avoid the time and expense of registering such securities under the federal securities laws. Under the Section 25142 process, the potential acquirer can take advantage of the exemption provided by Section 3(a)(10) of the Securities Act of 1933, as amended, which provides exemption from registration for securities issued in exchange for outstanding securities of an issuer, if done pursuant to a fairness hearing. Though often thought of in the context of hearings that are relatively common in certain international jurisdictions, Section 3(a)(10) also permits a U.S. state law hearing on the fairness of the terms and conditions of the proposed issuance or exchange of securities.

Other than California, there are only five other states that offer this kind of “fairness hearing” review and approval process for the offer and sale of securities pursuant to a securities law, and the state of Delaware is not one of the other five.<sup>12</sup> While seemingly a lesser-known provision of California law to many mergers and acquisitions practitioners (particularly those practitioners without a substantial California practice), California Corporations Code Section 25142 is far from uncharted territory. A number of well-known California companies have taken advantage of the fairness hearing process, and the market

<sup>12</sup> Currently the other states are Idaho, North Carolina, Ohio, Oregon, and Utah.

<sup>13</sup> Dollar value is per the California Department of Corporations. According to the California Department of Corporations, in Fiscal Years 2002-03, 2003-04 and 2004-though 6/30/05 the amount of separate fairness hearings numbered 43, 39, and 30 respectively. A few of the well-known companies listed by the California Department of Corporations as undertaking the California Corporations Code Section 25142 process within the last four years include Agilent Technologies, Inc., Alcatel, Cisco Systems, Inc., e-Bay, Inc., Jupiter Network, Inc., Motorola, Inc., Oracle Corporation, Sun Microsystems, Inc., and VeriSign, Inc.

<sup>14</sup> Basically “covered securities” generally refers to securities traded on a national securities exchange or listed on NASDAQ or securities that are sold in a transaction exempt from registration under any of a number of different Securities Act exemptions.

value of the securities for fairness hearings filed in Fiscal Year 2004-05 was approximately \$3.088 billion.<sup>13</sup>

The California Corporations Code Section 25142 process involves an application for a permit made to the California commissioner of corporations who is “expressly authorized to approve the terms and conditions such issuance and exchange ... and the fairness of such terms and conditions, and is expressly authorized to hold a hearing upon the fairness of such terms and conditions ...” Under the California statute, those persons to whom it is proposed to issue securities in the exchange have the right to appear (and express their concerns, if any) at the fairness hearing.

This potentially faster and more cost-efficient alternative to federal registration, was nearly lost when the National Securities Markets Improvement Act of 1996 (NSMIA) was enacted. In the wake of the NSMIA, the Securities and Exchange Commission took the view that Section 18(b)(4)(C) of the Securities Act preempted any state from registering securities that were “covered securities”<sup>14</sup> before such a hearing and therefore the NSMIA preempted the state law authorizing that hearing. In SEC Staff Legal Bulletin No. 3, the division of corporation finance staff stated: “When a state fairness hearing relates to the registration, or exemption from registration, of securities that are ‘covered securities’ before the hearing, Section 18 preempts the state law authorizing that hearing. An issuer, therefore, cannot use that hearing as a basis for relying on the Section 3(a)(10) exemption for securities that are ‘covered securities’ before the hearing.” This SEC position led Congress to amend Section 18 of the Securities Act, through Section 302 of the Securities Litigation Uniform Standards Act of 1998 (SLUSA), in order to add securities issued under Section 3(a)(10) of the Securities Act as a category of securities exempt from the definition of covered securities. Accordingly, as a result of Section 302 of SLUSA, an issuer may now rely upon a fairness hearing conducted under state securities law to perfect an exemption under Section 3(a)(10) for securities that otherwise would be covered securities, and the California Corporations Code Section 25142 process remains a viable means by which a potential acquirer can circumvent the time, expense, and potential

SEC-engendered hassles sometimes involved in registering securities under the Securities Act.

The authors have seen this particular provision of the California statute put to good use to help facilitate a transaction that otherwise might have been difficult to accomplish, given concerns both about potential time and cost that would have been required in the absence of the California fairness hearing process. Section 25142 can easily be overlooked by practitioners not accustomed to practicing in California on a regular basis, but should be kept in mind given its many benefits.

### **Conclusion**

The matters described in this article are just a few of the areas in which some fairly unique aspects of California corporation law differ significantly from the laws of many other jurisdictions. It can be seen that these particular differences alone require legal practitioners involved in structuring merger or similar transactions involving California-based corporations (or even “holding” companies having no ties to California, other than ownership of all or part of a California-based corporation) to be very mindful when structuring or proceeding with the proposed transactions, and also when structuring an initial investment into a corporation when no merger or similar exit transaction is at all on the horizon. The key differences between California corporate law and that of Delaware or other jurisdictions on these points can become a trap for the unwary, and consequently need to be taken into account at the earliest possible stage of any proposed transaction.

The differences between the corporation law of the state of California and its limited liability company act (which does not present many of the same problems described in this article), coupled with the ability of a limited liability company to elect, for tax purposes, to be treated as a corporation, lead the authors to speculate whether limited liability companies may at some point in the future become a preferred vehicle of choice for start-up ventures having ties to California. ☺



