

May 28, 2010

Delaware Court Enjoins Stockholder Vote Pending Additional Disclosure Regarding Financial Analyses, Management Projections and Discussions Regarding Post-Closing Employment

In its recent decision in *Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc.*, the Delaware Chancery Court enjoined the PLATO Learning stockholders from voting on the acquisition of PLATO Learning by Thoma Bravo until certain corrective disclosures were made to the proxy statement. Vice Chancellor Strine's opinion provides guidance as to the disclosures relating to financial advisors' fairness opinion analyses, management projections and pre-signing discussions between an acquiror and the target company's management regarding post-closing employment.

Background

The plaintiff sought a preliminary injunction to prevent the acquisition of PLATO Learning by Thoma Bravo in an all-cash merger. Craig-Hallum Capital Group LLC ("Craig-Hallum") provided a fairness opinion to the special committee of the PLATO Learning board of directors with respect to the merger consideration. The Court rejected plaintiff's allegations that the PLATO Learning board breached its fiduciary duties under Revlon, but then held that the proxy statement, dated April 20, 2010, that was sent to PLATO Learning's stockholders reflected three disclosure deficiencies, and enjoined the stockholder vote until the deficiencies were corrected.

Description of Calculation of Discount Rate

First, the Court held that the proxy statement contained a materially misleading explanation of how Craig-Hallum established the discount rate used in its discounted cash flow (or "DCF") analysis. The proxy statement reported that Craig-Hallum chose discount rates "based upon an analysis of PLATO Learning's weighted average cost of capital" ("WACC") and then went on to describe that the DCF analysis used a range of discount rates from 23% to 27%. The Court stated that while this 23% to 27% range was the range used in the DCF analysis, it was not the actual range that resulted from the analysis of PLATO Learning's WACC (which was 22.5% to 22.6%). The Court noted that by using the higher discount rate range in the DCF analysis, Craig-Hallum was able to make the merger consideration appear to be more favorable to PLATO Learning's stockholders. The Court also appeared distrustful of how Craig-Hallum calculated the higher discount rates, and noted that Craig-Hallum never disclosed to the special committee why it had used a range of 23%-27%, rather than 22.5% to 22.6%. The Court held that the proxy statement's disclosure that the discount rate range was derived from PLATO Learning's WACC was misleading and therefore that corrective disclosure must be made prior to a stockholder vote.

Selective Disclosure of Projections

Second, the Court found that the PLATO Learning proxy statement improperly omitted the free cash flow estimates of PLATO Learning's management that had been provided to Craig-Hallum. The Court asserted that "management's best estimate of the future cash flow of a corporation ... is clearly material information", and should have been provided to stockholders so that they can make an informed decision about whether to accept the merger consideration. The Court held that the merger would be enjoined until supplemental disclosure of the estimated free cash flows of PLATO Learning's management was made.

Disclosure of Discussions Between Thoma Bravo and Management Regarding Post-Merger Employment

Lastly, the Court held that the disclosure in the proxy statement that the special committee and the board of directors took into account "the fact that Thoma Bravo did not negotiate terms of employment...with [PLATO's] management for the period after the merger closes" was materially misleading. The Court declared that while there may not have been formal "negotiations" with respect to post-closing employment contracts, there was significant dialogue between Thoma Bravo and PLATO Learning's CEO with respect to the compensation packages Thoma Bravo had provided to management in comparable transactions, and Thoma Bravo had indicated that it typically wanted management to remain with the company following the closing. Thus, the Court held that corrective disclosure was required to clarify the discussions that actually occurred between Thoma Bravo and PLATO Learning's CEO.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.