Potter Anderson & Corroon LLP

Top-Up Options and Short Form Mergers

Introduction

In the past year, tender offers once again have captured the attention (and review) of the Delaware courts.[2] This renewed interest has resulted in clarification of the law as applied to tender offers and, consequently, opened the door for tender offerors to pursue certain transactions with more confidence. In *In re Siliconix Inc. Shareholders Litig.*,[3] the Court of Chancery held that a controlling stockholder who initiates an unnegotiated tender offer will have no duty to offer a fair price,[4] absent evidence that material information concerning its tender offer has been withheld or misrepresented or that the offer is coercive in some significant way.[5]

The *Siliconix* decision is particularly interesting when read together with the Chancery Court's earlier decision in *In re Unocal Exploration Corp.* Shareholder's Litig.[6] In *Unocal Exploration I*, the Chancery Court held that a controlling stockholder's decision to effect a short form merger[7] would not implicate an entire fairness review and, absent fraud, overreaching or illegality in connection with the merger, the minority stockholders' sole remedy will be appraisal. When viewed together, *Siliconix* and *Unocal Exploration I and II* appear to offer controlling stockholders a clear path for accomplishing a going private transaction that lacks the support of the target board, without assuming the heavy burden of proving entire fairness.[8]

In the vast majority of tender offers, however, the bidder negotiates the terms of its tender offer (and any follow up transaction) with the target board (or committee of the target board when the bidder is a controlling stockholder). In negotiated tender offers, the transaction is typically structured so that the back end merger will be either a long form merger (in which case the target company will convene a stockholders meeting after the tender offer closes and have the stockholders approve the merger with the bidder)[9] or, if the bidder holds 90% or more of the target's capital stock after closing its tender offer, as a short form merger (in which case the merger will occur without the further involvement of the target board or stockholders).

Realistically, however, even when it has negotiated its tender offer, the bidder often faces an uphill battle in its effort to acquire enough shares to enable it to effect a short form merger. A combination of factors, including the size of the premium offered, the profile of the company's stockholders, and the effectiveness of the solicitation firm may each impact the bidder's success in convincing the holders of the target company's capital stock to tender enough shares. Where a bidder's tender falls short of the 90% ownership level, the target still must

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Mark A. Morton and **John F. Grossbauer** are partners in the Wilmington, Delaware law firm of Potter Anderson & Corroon LLP. This article was originally published in the April 2002 issue of *Deal Points*: The Newsletter of the Committee on Mergers and Acquisitions of the Business Law Section of the American Bar Association. The views expressed are those of the authors and may not be representative of those of the firm or its clients.

1313 North Market Street

P.O. Box 951

Wilmington, DE 19899-0951

(302) 984-6000

www.potteranderson.com

either hold a stockholder's meeting to approve the second step merger or approve the merger by stockholder consent, which requires an information statement and a twenty day delay before it becomes effective. It is not surprising, therefore, that bidders, when negotiating the terms of its tender offer, increasingly ask for a "top-up" option, a new deal device that enables the bidder to utilize the short form merger statute even though the bidder, after closing its tender offer, holds less than 90% of the target's capital stock.

What Is a "Top-Up" Option?[10]

A "top-up" option is a stock option granted by the board of directors of a target corporation to a bidder which has agreed to commence a tender offer, in most cases for all of the outstanding shares of the target corporation.[11] The "top-up" option, when exercised, enables the bidder to purchase that number of newly issued shares of the target corporation's capital stock which, when added to the number of shares of capital stock owned by the bidder immediately following the tender offer, constitutes at least 90% of the outstanding shares of capital stock on a fully diluted basis. As a result, when a bidder holds a "top-up" option, the bidder will be able to complete a short form merger even though the bidder, after closing the tender offer, may not hold 90% of target's capital stock.

By design, a "top-up" option may be exercised only after the tender offer closes and generally is exercisable for the same consideration per share that the bidder offered in the offer. In most cases, a "top-up" option will provide that it may be exercised only if the bidder's tender offer succeeds in acquiring some threshold amount of the target's capital stock.[12]

In many cases, both the target and bidder may benefit from the use of a "top-up" option. In the typical case, a bidder will have a dominant equity position in the target after its tender offer closes and, as a result, the approval of the merger proposal at the meeting of target's stockholders is a fait accompli. If the bidder is prepared to effect the short form merger immediately after closing its tender offer, the target board may prefer to eliminate the market risk to which the target stockholders are exposed when a stockholder meeting delays the back-end merger. In light of these apparent mutual benefits, it is not surprising then that "top-up" options have found some purchase in negotiated tender offers.

Notwithstanding these benefits, however, "top-up" options still raise a myriad of issues under Delaware law that a target board should consider, nearly all of which require a contextually specific analysis. Certain issues may turn on the specific terms of the target company's certificate of incorporation. The resolution of other issues, by contrast, may depend upon the status of the person receiving the option.[13] Thus, the factual circumstances in which a "top-up" option is granted likely will define the parameters of the fiduciary duties owed by the target board of directors. While the discussion that follows cannot anticipate every factual circumstance, it does reflect the authors' attempt to provide a starting point for the target board's analysis.

Statistory Considerations

Authority to Grant Options

Section 157 of the DGCL authorizes a board of directors to create and issue options entitling the holders of such options to purchase from the corporation any shares of its capital stock of any class or classes. The price and other terms of such options must be stated separately in either the corporation's certificate of incorporation or in a resolution adopted by the board of directors providing for the creation and issuance of such options and, in every case, must be set forth or incorporated by reference in the instrument or instruments evidencing such options.[14] The price terms of the option should, therefore, be included in the board resolutions, since it will not, typically, be set forth in the certificate of incorporation.

The Amount and Type of Consideration Received

Section 157 of the DGCL also sets forth specific requirements covering the consideration required for both options and the purchase of stock upon exercise of such options. Importantly, separate consideration is required for both the issuance of the option and the issuance of stock upon the exercise of the option.[15] Section 157 provides that the judgment of the directors, absent fraud in the transaction, as to the consideration for the issuance of the option and the sufficiency thereof "shall be conclusive."[16] A recent decision of the Court of Chancery[17] suggests, however, that despite this seemingly broad grant of discretion to the board, a Delaware court may nevertheless scrutinize the board's judgment both as to the consideration for the issuance of the option and as to the issuance of shares pursuant to the option. In *Parfi Holding AB v. Mirror Image Internet, Inc.*, a plaintiff alleged that the defendant directors caused the company to issue additional shares of the company's stock to its controlling stockholder at an unfair price.[18] Despite similar statutory language concerning the "conclusiveness" of the directors' judgment with respect to the price to be paid upon the issuance of stock pursuant to Section 152 of the DGCL,[19] the court still engaged in a fiduciary duty analysis of the directors' decision to issue the shares.[20] Moreover, the court made it clear that, despite the language of Section 152, the directors' judgment to issue additional shares to the controlling stockholder would be reviewed for entire fairness. In the court's view, "fiduciary duty concepts ... permit a judgment against [the controlling stockholder] if it cannot be shown that the Challenged Transactions are fair, because the Transactions implicate the entire fairness standard."[21] Although the *Parfi* decision addressed a stock issuance as opposed to an option issuance, it analyzed a comparable standard ("judgment ... shall be conclusive"). Thus, it appears likely that a Delaware court would apply a fiduciary analysis when reviewing either the grant of a "top-up" option or the issuance of shares pursuant to the option[22] and, if the bidder was a controlling stockholder, that the court would review the target board's judgment to grant the option for entire fairness.

Since the Delaware courts may employ a fiduciary duty analysis when reviewing the target board's judgment as to the consideration for the grant of the option and the issuance of shares pursuant to the option, the target board must carefully consider whether it is appropriate for the option to be exercisable at a price different than the price offered by the bidder for target shares in the tender. If the target board agrees to an exercise price lower then the price offered in the tender, then the target board's decision may be subject to an attack on fiduciary grounds.[23]

Even if the "top-up" option's exercise price is the same as the price offered by the bidder in the tender, the "top-up" option may be challenged as being coercive. Since the "top-up" option will be exercised, and the underlying shares issued, prior to the effective time of the short form merger, the Court may consider the dilution caused by the "top-up" option when it determines the "fair value" of each target share in an appraisal. In that case, the nontendering stockholders who are entitled to seek appraisal could argue that the issuance of the shares pursuant to the exercise of the "top-up" option, by diluting their proportionate share of the "fair value" of the corporation to be determined in an appraisal, unfairly coerces stockholders to tender their shares.[24] It remains to be seen whether a Delaware court would find any merit in this argument.

The target board also may have to consider the form of consideration to be delivered to the company. For example, a bidder may insist on paying the exercise price with a note, rather than cash. Under Delaware law, payment with a full recourse note is valid consideration for issuance of stock as long as cash consideration is received for the aggregate par value of the stock.[25] However, if the target board accepted an *unsecured promissory note* as consideration for the issuance of the option shares, one could argue that the target failed to receive adequate constitutional consideration. To avoid such a challenge, the target board should insist on a *full recourse note* when a bidder wishes to use a note as the consideration for the exercise of the option.

Authorized Stock

Before creating and issuing a "top-up" option, the target board must determine whether the target has a sufficient number of authorized but unissued shares to cover the option.[26] This determination is more complicated than it first may appear. For example, suppose that the target is only authorized to issue 10,000 shares of common stock and there are currently 5,000 shares of its common stock issued and outstanding. A bidder approaches the target and negotiates the terms of a tender offer for all of the outstanding shares of target common stock. As part of its negotiations, the bidder also requests (and receives) a "top-up" option from the target. Assume further that 88% (or 4,400 shares) of the target's outstanding common stock has been tendered when the offer closes, resulting in a 2% shortfall of the amount needed (4,500 shares) to consummate a short form merger. While the shortfall is statistically insignificant (100 shares), the number of shares to be issued to the bidder pursuant to the “top-up” option (1,000) is not. By issuing 1,000 shares to the bidder, the total number of shares held by the bidder would increase to 5,400 shares, thereby representing 90% of the 6,000 issued and outstanding shares of target capital stock. As a rule, for every 1% that a bidder’s tender offer falls short of 90%, a “top-up” option will require the target to issue that number of shares which is equal to 10% of its outstanding stock prior to the tender offer. In this hypothetical, unless at least 80% of the target’s shares are tendered, the target will not have a sufficient number of authorized but unissued shares to allow for the exercise of the “top-up” option.[27]

A target board also should recognize that a “top-up” option may cause the target to breach its stock exchange listing requirements. For example, under the NYSE and NASDAQ rules, if a target is to avoid delisting, it must obtain stockholder approval when issuing more than 20% of the number of shares of common stock outstanding before the new issuance.[28] If the “top-up” option bridges more than a 2% gap in the percentage of tendered shares, then this 20% threshold will be surpassed and stockholder approval will be necessary to preserve the target’s listing. Since a delisting would negatively impact the marketability and market price of the nontendered target shares, it is important that the target either control the timing of the short form merger or obtain the covenant of the bidder to use its best efforts to effect the short form merger as soon as practicable after the close of the tender offer.

Fiduciary Considerations

Even if the target board determines that it can meet the statutory prerequisites for the grant of a “top-up” option, the board still must analyze the fiduciary duties that “overlay the exercise of even undoubted legal power.”[29] As with any other decision, the target board’s decision to grant a “top-up” option must be consistent with its duty of care. In an effort to satisfy its duty of care, the target board should understand all of the consequences of granting a “top-up” option, including, the substantive considerations discussed below.

Timing

When negotiating for a “top-up” option, most bidders agree to use their best efforts to consummate the back-end, short form merger. Bidders reserve, however, the discretion to set the precise date and time for that closing. In a cash deal, if the bidder effects the short form merger immediately after closing its tender offer, then the nontendering target stockholders will benefit from that decision because the “present value” of the merger consideration will closely approximate the value of the consideration offered in the tender offer. Conversely, if the bidder delays the consummation of the short form merger, then the nontendering target stockholders will receive a sum of cash that, due to the time value of money, is worth slightly less than that which was received in the tender offer. The market risk created by a delay in closing the short form merger may be amplified even more in an exchange offer. In that case, if the bidder has the discretion to delay the closing of the back end merger (at least in the context of a merger with a fixed exchange ratio), the bidder's delay may result in target's nontendering stockholders getting more or less than the tendering stockholders received in the tender offer. To eliminate that risk, the target board can negotiate for the discretion to dictate when the short form merger will occur or, alternatively, negotiate for a covenant from the bidder to consummate the short form merger on the next business day after the tender offer closes.

Standard of Review

Unocal Exploration I and II held that when a controlling stockholder effects a short form merger, then the merger will not be reviewed for entire fairness because "no 'dealing' is required."[30] The Vice Chancellor in *Unocal Exploration I* went on, however, to say:

> I recognize that some 'short-form' mergers occur as the second step of a two-step negotiated transaction in which a less than 90 percent parent acquires the remainder of the subsidiary's equity. While those mergers may, ultimately, take the form of a [short-form] merger, their terms were the subject of negotiation with the target company board of directors and should, where appropriate, be examined by using the entire fairness analysis.[31]

The Delaware Supreme Court did not address this issue in its opinion in *Unocal Exploration II*. However, like the Chancery Court, the Supreme Court's decision that entire fairness review was not appropriate turned on the fact that a short form merger would not require the subsidiary board's participation or its assent.[32] For that reason, where a transaction between a controlling stockholder and its subsidiary requires the subsidiary board's participation and/or assent - as it would with a negotiated tender offer and the granting of a "top-up" option - the Delaware Supreme Court would likely subject those transactions to review under the entire fairness standard.[33]

By contrast, when a target and a bidder which is not a controlling stockholder negotiate the terms of a tender offer, a "top-up" option and a short form merger, there is nothing in the *Unocal Exploration I and II* decisions to suggest that the Delaware courts would review the transactions for entire fairness. However, if the target board negotiates the sale of the company to a bidder, the target board's action would likely be subject to an enhanced scrutiny review.[34] For example, if the court concluded that the negotiated transaction constituted a change of control, the court would review the target board's actions under *Revlon* to determine whether the target board had obtained the highest price reasonably available.[35] Moreover, depending upon the circumstances, the court may review the target board's decision to grant a "top-up" option, as well as the substantive terms of the option under the *Unocal* heightened scrutiny test.[36] In that respect, when a target board is negotiating with a noncontrolling stockholder, its duties will mirror the duties that it would have in connection with any other merger transaction that does not involve a controlling stockholder.

Due Diligence Considerations

In addition to a host of statutory and fiduciary considerations, a target board also should undertake due diligence through its counsel to satisfy itself that the grant of a "top-up" option will not trigger any adverse consequences under existing contracts or agreements of the target.

If the target has preferred stock outstanding, the target board should determine what, if any, consequence the issuance of target shares pursuant to a "top-up" option would have on the target's preferred stock. It is common for the terms of preferred stock to include a conversion adjustment provision pursuant to which the conversion rights of the preferred stock are adjusted for certain events in order to protect the preferred stock from dilution. To the extent that the granting of a "top-up" option triggers a conversion adjustment under the terms of the preferred stock, that adjustment would dilute the outstanding common stock and negatively impact its value.

For the same reason, counsel for the target board should review the target's option plans, debt instruments, loan agreements and stockholder agreements to determine whether they (i) prohibit the grant of the "top-up" option or the issuance of common stock upon the exercise of the "top-up" option, or (ii) otherwise are affected by the granting of the "top-up" option and the issuance of the shares underlying the option.

Conclusion

"Top-up" options are a relative newcomer to the corporate world. Before a target board agrees to grant a "top-up" option, both the bidder and target board should consider the issues discussed above. While the "top-up" option has been viewed as a convenient device for facilitating short form mergers, thereby saving companies both time and money, there remains a number of risks associated with the device that have yet to be resolved by the courts.

Exhibit A

Agreement and Plan of Merger dated as of April 6, 2001, by and among Universal Music Group, Inc., Universal Acquisition Corp., and Emusic.com Inc. is set forth in Exhibit A hereto.

Section 5.8 Option to Acquire Additional Shares

(a) The Company hereby grants to Parent and Purchaser an irrevocable option (the“Purchaser Option”) to purchase up to that number of newly issued shares of the Company Common Stock (the “Purchaser Option Shares”) equal to the number of shares of Company Common Stock that, when added to the number of shares of Company Common Stock owned by Parent, Purchaser and their affiliates immediately following consummation of the Offer, shall constitute one share more than ninety percent (90%) of the shares of Company Common Stock then outstanding on a fully diluted basis (after giving effect to the issuance of the Purchaser Option Shares) for a consideration per Purchaser Option Share equal to the Offer Price.

(b) Such Purchaser Option shall be exercisable only after the purchase of and payment for shares of Company Common Stock pursuant to the Offer by Parent or Purchaser as a result of which Parent, Purchaser and their affiliates own beneficially at least 80% of the outstanding shares of the Company Common Stock. Such Purchaser Option shall not be exercisable if the number of shares of Company Common Stock subject thereto exceeds the number of authorized shares of Company Common Stock available for issuance.

(c) In the event Parent and Purchaser wish to exercise the Purchaser Option, Purchaser shall give the Company one-day prior written notice specifying the number of shares of the Company Common Stock that are or will be owned by Parent, Purchaser and their affiliates immediately following consummation of the Offer and specifying a place and a time for the closing of such purchase. The Company shall, as soon as practicable following receipt of such notice, deliver written notice to Purchaser specifying the number of Purchaser Option Shares. At the closing of the purchase of the Purchaser Option Shares, the portion of the purchase price owing upon exercise of such Purchaser Option which equals the product of (x) the number of shares of Company Common Stock purchased pursuant to such Purchaser Option, multiplied by (y) the Offer Price, shall be paid to the Company in cash by wire transfer or cashier’s check.

Notes

1. For stylistic reasons, the authors generally refer throughout only to tender offers even though the references in some cases would have equal application to an exchange offer.

2. Del. Ch., C.A. No. 18700, Noble, V.C., Mem. Op. at 17 (July 19, 2001)("*Siliconix*").

3. Fair price is one component of the entire fairness standard, which requires directors to establish that a transaction was the product of both fair dealing (how the transaction was timed, initiated, structured, negotiated, disclosed and approved) and fair price (all elements of value). *See, e.g., Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

4. *Siliconix*, Mem. Op. at 17. The Chancery Court reaffirmed this principle more recently in its decision in *In re Aquila Inc. Shareholders Litig.*, Del. Ch., C.A. No. 19237, Lamb, V.C., Mem. Op. at 11 (January 3, 2002). ("Delaware law does not impose a duty of entire fairness on controlling stockholders making a noncoercive tender or exchange offer to acquire shares directly from the minority holders").

5. Del. Ch., C.A. No. 12453, Lamb, V.C. (June 13, 2000) ("*Unocal Exploration I*"), *aff'd sub nom Glassman v. Unocal Exploration Corp.*, No. 390, 2000, Berger, J. (July 25, 2001) ("*Unocal Exploration II*").

6. As used throughout this article, a "short form merger" means a merger effectuated pursuant to Section 253 of the General Corporation Law of the State of Delaware (the "DGCL"). Section 253 authorizes a Delaware corporation that owns 90% or more of each of the outstanding classes of stock of a subsidiary that are entitled to vote on a merger to merge the subsidiary into the parent without any requirement for action by the board of directors of the subsidiary. 8 *Del. C.* § 253. For purposes of this article, the authors have assumed a "target" company with only one class of capital stock outstanding.

7. John F. Grossbauer and Janine M. Salomone, "Entire Fairness Standard of Review Does Not Apply In Short Form Mergers," *The Corporate Governance Advisor*, Vol. 9:6, (November/December 2001).

8. 8 *Del. C.* §§ 251-52.

9. For purposes of this discussion and unless otherwise noted, the authors have assumed that the "target" company discussed herein has only one class of capital stock issued and outstanding.

10. A sample "top-up" option clause from the Agreement and Plan of Merger dated as of April 6, 2001, by and among Universal Music Group, Inc., Universal Acquisition Corp., and Emusic.com Inc. is set forth in Exhibit A hereto. While the terms of "top-up" options are generally set forth in the merger agreement for the back end merger, they also may be set forth in a separate agreement or instrument.

11. "Top-up" options typically require that the bidder, after closing its tender offer, must own somewhere between 75% and 85% of target's outstanding shares. The exact number of shares to be issued upon exercise of the "top-up" option is determined by calculating the number of shares that would need to be purchased to enable the bidder to hold at least 90% of the common stock on a fully diluted basis after exercising the option.

12. For example, a "top-up" granted to a controlling shareholder may implicate fairness issues, while a "top-up" granted to a bidder who is not a controlling stockholder may

implicate enhanced scrutiny under either *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) or *Unocal Corp. v Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

13. 8 *Del. C.* §157(b); see *Niehenke v. Right O Way Transp., Inc.*, Del. Ch., C.A. Nos. 14392, 14444, Allen, C. (Dec. 28, 1995) (finding option void and unenforceable where terms of option allegedly granted by board for the benefit of a director's wife were not stated separately in either the certificate of incorporation or in a resolution adopted by the board).

14. *Bennett v. Breuil Petroleum Corp.*, 99 A.2d 236, 238 (Del. Ch. 1953). See also 8 *Del. C.* § 152.

15. 8 *Del. C.* § 157(b).

16. See *Parfi Holding AB v. Mirror Image Internet, Inc.*, Del. Ch., C.A. No. 18507, Strine, V.C. (Dec. 20, 2001).

17. *Id.* at 1.

18. Section 152 provides, in pertinent part, that the consideration for the purchase of "capital stock to be issued by a corporation shall be paid in such form and in such manner as the board of directors shall determine. In the absence of actual fraud in the transaction, the judgment of the directors to the value of such consideration shall be conclusive." 8 *Del. C.* § 152.

19. *Parfi*, Mem. Op. at 47-48. ("The law of fiduciary duty provides a flexible and plaintiff-friendly remedy for situations where conflicted directors issue additional shares to a majority stockholder for inadequate consideration.")

20. *Id.* at 51.

21. See *Frankel v. Donovan*, 120 A.2d 311, 316 (Del. Ch. 1956) (stating that the addition of the "actual fraud" language to Section 157 was intended "to place the judgment of directors on the consideration for the issuance of options on a par with their judgment on the consideration for the issuance of stock"). *Cf. Paramount Communications, Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1994) (invalidating an option agreement on fiduciary, not statutory, grounds).

22. *See Parfi, supra* at 10. As a practical matter, where a bidder and target have agreed on the price to be offered by the bidder in its tender offer, the target board arguably has determined the price that it considers to be appropriate for the target shares. If the target board then agreed to issue additional shares to the bidder at a discount to that price, it would not be surprising to see a plaintiff stockholder challenge the issuance.

23. 8 *Del. C.* § 262. In addition, there is also an issue as to how the Court would treat such dilution if a nontendering stockholder elected to seek appraisal. Would the consideration paid for the option shares be used by the court in its calculations to dilute the target's "fair value" as determined in the appraisal?

24. *See* Del. Const. art. IX, § 3 ("No corporation shall issue stock, except for money paid, labor done or personal property, or real estate or leases thereof actually acquired by such corporation."); 8 *Del. C.* § 157(d) (regarding grant of option); 8 *Del. C.* § 153(a) (regarding issuance of stock); *Sohland v. Baker*, 141 A. 277 (Del. 1927) (promissory note secured

only by issued stock is not legal consideration for issuance of stock).

25. *See* 8 *Del. C.* § 102(a)(4); 8 *Del. C.* § 161. Of course, the certificate of incorporation may be amended pursuant to Section 242 of the DGCL to increase the authorized number of shares of capital stock. Such amendment requires a resolution of the board of directors and approval by a majority of the outstanding stock entitled to vote thereon. 8 *Del. C.* § 242.

26. Interestingly, a bidder may face a similar arithmetic quandary in connection with an exchange offer. If the bidder bargains to use its own stock as the consideration for the exercise of the “top-up” option, it must to confirm that it will have sufficient authorized but unissued shares to allow it to issue a similarly large block of stock to fund the exercise of the option.

27. *See* NYSE Rule 312.03; NASDAQ Rule 4350.

28. *Schnell v. Chris Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971).

29. *Unocal Exploration I*, Mem. Op. at 16.

30. *Id.* at 16 n. 26.

31. *Unocal Exploration I*, Mem. Op. at 16; *Unocal Exploration II*, Mem. Op. at 13.

32. Another reading of *Unocal Exploration I and II* would require the Delaware courts to review the terms of the negotiated tender and “top-up” option, but not the short form merger, for entire fairness. It is difficult to imagine, however, a set of circumstances where such a distinction could be meaningful. If the court were to conclude that the bidder’s actions in negotiating the tender and “top-up” option survived review for entire fairness, then the court’s reluctance to review the short form merger would not be consequential. Similarly, if the court were to conclude that the bidder’s actions in negotiating the tender offer or “top-up” did not meet the requirements of fair dealing or fair price, then the court would have no need to evaluate the bidder’s conduct in negotiating the short form merger terms.

33. *Unocal*, 493 A.2d 946; *Revlon*, 506 A.2d 173.

34. *Revlon*, 506 A.2d at 184.

35. *Unocal*, 493 A.2d at 955.