

Update | Delaware Corporate Law

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Preparation of Corporate and M&A Documents for Proposed 2022 Delaware Corporate Law Amendments

The Delaware General Assembly has proposed amendments to the Delaware General Corporation Law (the DGCL). These proposed amendments would make important changes that include:

- allowing for an exculpatory charter provision to limit personal liability of senior officers;
- allowing beneficial owners, instead of record holders, to directly assert appraisal rights;
- extending appraisal rights to stockholders in connection with a conversion of a Delaware corporation to a foreign corporation or to any other entity; and
- revising requirements related to stock and option issuances and notices and stockholder lists for stockholder meetings.

This proposed legislation will impact corporate and M&A documents, including charter documents that are filed with the State of Delaware, bylaws, appraisal notices, stock and option issuance resolutions, stockholder consents, new plans of domestication, and annual franchise tax reports. Although these amendments remain subject to adoption by the legislature and the governor and will not be effective until August 1, 2022, if adopted, counsel should budget sufficient lead time prior

to August 1, 2022, to review and prepare changes to such documents and for relevant parties to approve. This GT Update outlines certain considerations related to drafting and revising those corporate and M&A documents, while encouraging boards, investors, and counsel to take a thoughtful approach to these amendments and such revisions.

Charter Documents

The following proposed DGCL amendments implicate provisions of the certificate of incorporation and other certificates that are filed with the Delaware Secretary of State. To the extent that these changes involve a charter amendment, they would typically require board and stockholder approval and a filing with the Delaware Secretary of State's office.

Exculpation of Senior Officers. Section 102(b)(7) (all section references in this GT Update refer to the DGCL) currently allows the certificate of incorporation to include a provision eliminating directors' personal liability for monetary damages arising from breaches of fiduciary duty with certain exceptions. A proposed amendment to Section 102(b)(7) would also permit a degree of exculpation for senior officers. The proposed amendment to Section 102(b)(7) would permit a corporation to include a charter provision that exculpates senior officers for monetary damages for breach of fiduciary duties (subject to certain exceptions) arising from a direct claim or class

actions brought by stockholders but, unlike for directors, not in any action brought by or derivatively in the right of the corporation. The officers who may be exculpated are limited to the president, CEO, COO, CFO, chief legal officer, controller, treasurer, chief accounting officer, and any other persons identified as “named executive officers” in the corporation’s most recent SEC filings. Boards considering a charter amendment to exculpate senior officers should think carefully about the market for officer insurance, stockholder sentiment, views of proxy advisors, and other issues when deciding whether to pursue such exculpation. The board should also consider how this expansion of exculpation could apply to individuals who act as a director and an officer and currently lack exculpation for actions that are arguably attributable to their officer capacity.

Conversion Protective Provisions. Another important aspect of the proposed legislation is the amendment to the authorization of a conversion under Section 266. That amendment would reduce the stockholder approval required for a conversion from a Delaware corporation to a foreign corporation or to any other entity from unanimity to a majority of the outstanding stock (other than for conversion to a partnership, which also requires approval by any stockholder that will be a general partner). This amendment would align the authorization of a conversion with that of other significant transactions such as a merger. New subsection (k) of Section 266 would provide that provisions in the certificate of incorporation of a Delaware corporation incorporated before August 1, 2022 (and in voting agreements and other agreements in effect before August 1, 2022) restricting, conditioning, or prohibiting a merger will be deemed to also apply to conversions unless expressly provided otherwise. Parties may seek comfort from such deemed treatment of provisions intended to restrict, condition, or prohibit a merger, but the precise drafting of those provisions should be closely examined. For greater certainty regarding applicability of protective provisions to conversions, it may be prudent to amend those documents to expressly

provide for rights and authorizations related to a conversion. In addition, the certificate of incorporation of corporations incorporated (and voting and other agreements) after August 1, 2022, will not benefit from the statutory deemed treatment and must specifically address conversions according to the parties’ intent.

Dissolution upon Expiration of Corporate Existence. Section 102(b)(5) currently allows the certificate of incorporation to limit the duration of the corporate existence. The proposed amendments to Sections 275(f) and 276(c) would require corporations and non-stock corporations with such charter provisions to file a certificate of dissolution within 90 days before the expiration fixed by the charter. Corporations with expiration provisions should be aware of this additional filing requirement and prepare appropriate certificates of dissolution. Failure to file this certificate of dissolution before the expiration time will not affect the expiration as provided in the certificate of incorporation or the requirement to file the certificate of dissolution.

Certified Affirmations. Section 103 provides the manner in which certificates and other instruments must be executed and filed with the Delaware Secretary of State. The proposed amendment to Section 103(b)(2) clarifies that a person’s signature constitutes the affirmation, under the penalty of perjury, that the instrument will be true at the time such instrument becomes effective (which may be different than the time such instrument is filed). This clarification is important to bear in mind when drafting and executing certificates, and particularly in the context of transactions involving multiple steps or filings and provisions for future effectiveness.

Bylaws

The proposed DGCL amendments related to typical bylaw provisions are less substantial and may only require board or stockholder approval (depending on the provisions of existing governing documents).

Stockholder List. Section 219 currently requires the corporation to make the stockholder list for a meeting available during the meeting. The proposed amendment to Section 219(a) would eliminate this requirement while retaining the requirement that the list be available for inspection during the 10 days before the meeting. Revision of bylaws to reflect this amendment would avoid an argument that the corporation had retained the pre-amendment requirements regarding the availability of the stockholder list.

Stockholder Meeting Notice. Section 222, regarding notice of a stockholder meeting, would be amended to clarify the method of notice. Most significantly, amended Section 222(c) would extend the exception to giving notice of an adjourned meeting to circumstances where the applicable time, place, and remote communications are either displayed on the electronic network for meeting during the time scheduled for the meeting, or set forth in the meeting notice. In addition to bylaw revisions based on this amendment, there may be benefit to revising stockholder meeting notices to take advantage of this latter exception.

Captive Insurance. Earlier in 2022, by separate legislation, Section 145(g) was amended to allow a corporation to use a captive insurer, including for D&O insurance and certain liabilities that cannot be exculpated or indemnified by the corporation, subject to certain safeguards. A corporation that is or may consider the use of a captive insurer might also consider updating the provisions of its bylaws dealing with indemnification and insurance to expressly reference the new statutory authorization of captive insurers.

Appraisal Rights Notice & Merger Agreements

The amendments propose broad changes to the appraisal provisions in Section 262. Three important substantive changes that have been proposed to Section 262, would (1) establish appraisal rights for stockholders in a Delaware

corporation in connection with the conversion of said Delaware corporation to a foreign corporation or to any other entity, (2) allow beneficial owners to exercise appraisal rights directly instead of through the record owner, and (3) eliminate appraisal rights in a merger, consolidation, or conversion authorized by a plan of domestication under Section 388. Notices of appraisal rights for merger agreements entered into on or after August 1, 2022, and conversions to other jurisdictions or entities approved by board resolutions adopted on or after that date, must reference the amended version of Section 262. Note, amended Section 262 provides an alternative to attaching the current version of Section 262, allowing appraisal rights notices to be drafted to include information directing the stockholders to a publicly available electronic resource at which Section 262 (and, Section 114, if applicable) may be accessed without subscription or cost. The legislative synopsis explains that an electronic resource would include the website maintained on behalf of the State of Delaware on which those statutes are posted.

Public Company Periodic Filings

The foregoing proposed amendments may also impact public company periodic filings, such as descriptions of exculpation and indemnification under the corporation's charter and bylaws. It is, therefore, important for corporations making changes to their governing documents based on the proposed DGCL amendments to also update the corresponding disclosures in SEC filings.

Resolutions for Stock and Option Issuances

Sections 152 and 153 provide for the issuance of stock, while Section 157 provides for the creation and issuance of rights and options respecting stock. Currently, there are certain differences in the authorization of issuances of stock, on the one hand, and rights and options, on the other hand. The proposed amendments would more closely align those two frameworks, which may make the task of drafting issuance resolutions

less prone to technical missteps. The legislative synopsis explains that, because rights and options would no longer be required to be set forth in an instrument, they may be issued in book entry or electronic form. These amended sections would allow the board to delegate to a person or body the authority to issue stock, rights, or options, provided that the board resolution fixes the maximum number of shares, rights, or options (as applicable) that may be issued, a time period for such issuances, and the minimum amount of consideration for such issuances. The amendments also expressly allow any provision in issuance or delegation resolutions to be made dependent on facts ascertainable outside the resolutions, such as the occurrence of an event or determination or action by any person or body.

Stockholder Consents

Section 228 permits stockholders to act by consent and to provide that a consent will be effective at a future time. Amended Section 228(c) would clarify that the person executing a consent must be a stockholder of record as of the record date for determining stockholders entitled to consent on the action. This confirms that consents may be drafted, in connection with a complex transaction, to be executed before the signer is a stockholder but to become effective at a time when that person is a stockholder.

Plan of Domestication

Section 388 provides for domestication of a non-United States entity as a Delaware corporation.

Unlike the Model Business Corporation Act, the DGCL has not previously contemplated a plan of domestication. The proposed amendments provide permissive authority for a domesticating entity to adopt a plan of domestication that may state terms and conditions of the domestication, the manner of exchanging or converting securities of the domesticating entity, and other provisions related to the domestication. Amended Section 388 would also allow a plan of domestication to provide for corporate action to be taken by the domesticated Delaware corporation in connection with the domestication, in which case no further action would be required by the board or stockholders of the domesticated corporation under the DGCL.

Annual Franchise Tax Reports

Proposed amendments to Sections 502 and 503 clarify requirements for annual franchise tax reports. Amended Section 502(a)(3) would prohibit the principal place of business address from being the address of the registered office unless the corporation maintains its principal place of business in Delaware and serves as its own registered agent. Amended Section 503 would incorporate changes regarding the large corporate filer status and the effectiveness of any re-designation thereof, including the requirement that large corporate filers must notify the Delaware Secretary of State if they cease to qualify as large corporate filers.

[View Proposed DGCL Amendments.](#)

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