

Update | Delaware Corporate Law

August 2023

Drafting of Corporate and M&A Documents for 2023 Delaware General Corporation Law Amendments

The 2023 amendments to the General Corporation Law of the State of Delaware (the “DGCL”) have become effective. These amendments make important changes that include:

- reducing or eliminating stockholder approval requirements for certain charter amendments subdividing and combining issued shares and changing the authorized number of shares under Section 242 of the DGCL;
- allowing certain sales, leases, or exchanges of collateral assets securing a mortgage or pledge without obtaining stockholder approval under Section 271 of the DGCL;
- reducing the stockholder approval standard under Section 390 of the DGCL for a domestication, transfer, or continuance from unanimous to majority, and allowing appraisal for such transactions;
- simplifying the procedure for certain ratifications of defective corporate acts;
- clarifying provisions for issuance of stock options and notice of stockholder action by consent; and
- permitting plans of conversion into or by a Delaware corporation and domestication by a Delaware corporation.

Although these changes do not represent all of the amendments, this GT Update discusses the impact of the legislation on corporate and M&A documents, including charter documents that are filed with the State of Delaware, bylaws, stock option issuance resolutions, stockholder notices, and new plans of conversion and domestication, and certain related drafting considerations.

Charter Documents

The following 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.

Charter Amendments. Section 242 requires approval by a majority of the outstanding stockholder voting power for most charter amendments and permits charter amendments reclassifying shares by subdividing or combining them (“forward split” and “reverse split,” respectively). Section 242 also requires approval by the outstanding stock of a class for amendments increasing or decreasing the authorized number of shares of that class unless the certificate of incorporation opts out of that class vote pursuant to the last sentence of Section 242(b)(2). In one of the most important amendments affecting publicly listed corporations, new Section 242(d) reduces or eliminates the applicable stockholder approval standards for these amendments, unless otherwise expressly required by the certificate of incorporation. New Section 242(d)(1) permits forward splits of issued shares of a class of stock into the same class of stock without stockholder approval if the corporation has only one class of stock outstanding and such class is not divided into series. New Section 242(d)(1) also permits a related increase in the number of authorized shares, up to an amount proportionate to the forward split, without stockholder approval but subject to the same condition that a corporation has only one class of stock outstanding and such class is not divided into series. New Section 242(d)(2) permits increases and decreases in the authorized number of shares and reverse splits of issued shares, if the shares are publicly listed and continue to meet listing standards and the votes cast for the amendment exceed the votes cast against the amendment. In addition, if the charter does not opt out of the class vote requirement under Section 242(b)(2), then a vote of the affected class is required on a class-wide votes-cast standard to change the

authorized number of shares under Section 242(d)(2). Companies and investors should consider whether to add a charter provision to expressly opt out of Section 242(d) votes or to expressly require the stockholder approvals under Section 242(b) with respect to charter amendments contemplated by Section 242(d). That sort of opt-out or requirement must be express in the charter and there is no deemed treatment concept as in other DGCL amendments.

Foreclosure Sale Protective Provisions. Section 272 permits a corporation to mortgage or pledge property and assets without the consent of stockholders. The potential overlap between this authority and the requirement under Section 271 that a corporation obtain stockholder consent to a sale, lease, or exchange of all or substantially of its assets was the subject of recent litigation in Delaware. The amendment to Section 272 provides that Section 271 will not apply to require stockholder approval of a sale, lease, or exchange of collateral assets or property that secure a mortgage or are pledged to a secured party if either the secured party exercises rights to effect such a transaction, or, under certain circumstances, the board authorizes the transaction as an alternative to reduce or eliminate the liabilities or obligations secured by such collateral property or assets. New Section 272(d) provides that a provision of the certificate of incorporation that first becomes effective on or after August 1, 2023 that requires stockholder approval of a sale, lease, or exchange of property or assets will not apply to a sale, lease, or exchange contemplated by Section 272 unless the provision expressly so requires. Thus, companies and investors should consider this change in drafting new charter-based protective provisions that are effective on or after

August 1, 2023. New Section 272(d) does not apply to charter-based protective provisions requiring stockholder approval of a sale, lease, or exchange that went into effect prior to August 1, 2023, and therefore companies and investors may consider whether such provisions ought to be amended to expressly exempt stockholder approval and permit the board to authorize a sale, lease, or exchange of collateral as contemplated by the amendments.

Domestication Provisions. Section 390 has been amended in a similar manner as Section 266 was amended in 2022. That is, the unanimous stockholder approval required by Section 390 for domestications, transfers, and continuances in a foreign jurisdiction outside of the United States has been reduced to a majority, and stockholders have appraisal rights under Section 262, as amended by the amendments. Because shares may be converted, exchanged, or cancelled, and the terms of the certificate of incorporation may be altered, in a domestication, charter provisions addressing domestications may take on similar importance as mergers, consolidations, and conversions. New Section 390(k) provides that, unless otherwise provided in the certificate of incorporation, any provision in the certificate of incorporation of a corporation incorporated before August 1, 2023 or any provision in any voting trust or other written agreement between such a corporation and its stockholders in effect on or before August 1, 2023 that restricts, conditions, or prohibits the consummation of a merger or consolidation shall be deemed to apply to a transfer, domestication, or continuance as if it were a merger or consolidation. This tracks the deemed-merger treatment of conversions under Section 266(k), but new Section

390(k) further provides that if the certificate of incorporation does not otherwise provide but does otherwise provide for conversions under Section 266(k), then the other provision applicable to conversions shall be deemed to apply to a transfer, domestication, or continuance as if it were a conversion. Although it may be advisable and appropriate to expressly provide for the intended treatment of domestications under charter provisions related to liquidation, voting, anti-dilution, and notice, parties can rely on the deemed-merger and deemed-conversion treatment of a domestication with respect to certain provisions that constitute a restriction, condition, or prohibition on the consummation of a merger, consolidation, or conversion. Companies and investors should therefore determine whether to include such provisions in charters and agreements.

Certificates of Validation. Section 204 permits ratification of defective corporate acts and requires a certificate of validation to be filed with the Delaware Secretary of State as part of certain ratifications. Amended Section 204(e) no longer requires a certificate of validation to be filed if a certificate was previously filed to effect the defective corporate act and no changes to that certificate are required to give effect to the defective corporate act. In addition, certificates of validation no longer need to describe the defective corporate act or nature of failures of authorization. Preparation of ratification resolutions and certificates of validation remains a complex task, but this amendment should reduce the number of certificates of validation that must be filed with the Delaware Secretary of State and simplify the certificates of validation that must be filed with the Delaware Secretary of State.

Appraisal Notices

The amendments make two changes to the appraisal provisions in Section 262. Those changes (1) establish appraisal rights for stockholders in a Delaware corporation in connection with the domestication of the Delaware corporation to a foreign corporation or to any other entity and (2) eliminate appraisal rights in a merger, consolidation, or conversion authorized by a plan of conversion under Section 265. Accordingly, appraisal rights notices for mergers, consolidations, conversions, and domestications effected or entered into on or after August 1, 2023 should be updated to reflect these statutory amendments.

Bylaws & Notices for Stockholder Action by Consent

Section 228 permits stockholder action by consent and requires that prompt notice of such action be given to any nonconsenting stockholders who were entitled to vote. The amendments provide that nonconsenting stockholders as of the record date for the action by consent who would have been entitled to notice of the meeting if the action had been taken at a meeting and the record date for the notice of the meeting were the record date for the action by consent are entitled to notice under Section 228(e). Bylaws tracking pre-amendment Section 228(e) should be revised to avoid an argument that the corporation has retained the pre-amendment notice requirements.

Resolutions for Stock Option Issuances

Section 157 permits the board to delegate to a person or body the authority to issue rights or options respecting stock. The amendment to Section 157 eliminates the

requirement that such delegating resolutions fix a maximum number of rights or options that may be issued (only requiring those resolutions to fix a maximum number of shares that may be issued upon exercise). The amendment also clarifies that the board resolutions fix time periods for both the issuance of the right and options, and the issuance of shares upon exercise of the rights and options.

Plans of Conversion and Domestication

Sections 265 and 266 provide for conversion of other entities (including, but not limited to, limited liability companies, limited partnerships, statutory trusts, and a non-Delaware corporation) to Delaware corporations and vice versa, and Section 390 provides for domestication of Delaware corporations as non-United States entities. The amendments to those three sections permit use of a plan of conversion or plan of domestication, as applicable, in a similar manner as was permitted by the 2022 amendments to the provisions of Section 388 for a plan of domestication in connection with a domestication as a Delaware corporation. The plans may state terms and conditions of the conversion or domestication, the manner of exchanging or converting securities of the converting or domesticating entity, and other provisions related to the conversion or domestication. Amended Section 265 also allows a plan of conversion to provide for corporate act to be taken by the converted Delaware corporation in connection with the conversion, in which case no further action is required by the board or stockholders of the converted corporation under the DGCL.

View 2023 DGCL Amendments

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