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INTRODUCTION

The 2014 amendments to the Delaware General Corporation Law (the "DGCL") implement relatively minor, but important, improvements to existing provisions. Among other things, the 2014 amendments refine the "two-step" merger provisions of Section 251(h) and clarify the rules for enabling directors and stockholders to place consents in escrow.

Except as noted below, all of the amendments became effective on August 1, 2014. All section references are to the DGCL.

Execution, acknowledgment, filing, recording and effective date of original certificate of incorporation and other instruments; exceptions [§ 103].—Section 103 was amended to facilitate filings with the Delaware Secretary of State when an incorporator is not available. Section 103 specifies that when documents are filed with the Secretary of State during the period before directors are elected, the documents must be signed by the incorporator of the corporation. Since 2000, Section 103 has provided that, if an incorporator is not available "by reason of death, incapacity, unknown address, or refusal or neglect to act," then any instrument that is required to be signed by the incorporator may instead be executed by any person for whom or on whose behalf the incorporator was acting directly or indirectly as an employee or agent. The 2014 amendments deleted the enumerated preconditions just quoted, and now Section 103 broadly permits the employee or principal of the incorporator to execute instruments if the incorporator is not available for any reason.

Organization meeting of incorporators or directors named in certificate of incorporation [§ 108].—Like amended Section 103, amended Section 108 permits corporate actions to be taken when an incorporator is unavailable. Under Section 108, if directors are not named in the certificate of incorporation, the incorporator must elect the initial directors and adopt the initial bylaws of the corporation. The 2014 amendments added a new Section 108(d), which provides that, if the incorporator is unavailable for any reason, then the actions contemplated to be taken by an incorporator under Section 108 or Section 107 [2] may instead be taken by any person for whom or on whose

[1] This article supplements prior reports published by Aspen Publishers and its predecessor, Prentice Hall Law & Business, describing amendments to the Delaware General Corporation Law enacted in each of calendar years 1967; 1969-70; 1973-74; 1976; 1981; 1983-1988; and 1990-2013. The authors of one or more of the prior reports are: S. Samuel Arsht; Walter K. Stapleton; Lewis S. Black, Jr.; A. Gilchrist Sparks, III; Frederick H. Alexander; Jeffrey R. Wolters; and James D. Honaker.

[2] Section 107 empowers an incorporator to manage the corporation, and perfect the organization of the corporation, during the period before the initial directors are elected.

behalf the incorporator was acting directly or indirectly as an employee or agent. The language identifying who may act instead of the incorporator is the same as the language in Section 103.

Board of directors; powers; number, qualifications, terms and quorum; committees; classes of directors; nonstock corporations; reliance upon books; action without meeting; removal [§ 141].—Section 141(f) was amended to clarify that director consents may be placed in escrow and may become effective at a future date or upon the happening of a future event. A recent U.S. Federal District Court case, *U.S. Bank National Association v. Verizon Communications Inc.,*[3] suggested that a non-director could not sign a director consent with instructions that the consent be released from escrow at the time the person became a director.[4] This case suggested that a person had to be a director at the literal moment that the "wet signature" is placed on the consent. This ruling was troubling to practitioners, particularly for third-party M&A transactions. For example, a "post-acquisition" board may need to approve documents or take other actions (such as approve loan documents to finance a transaction) at the moment they are elected to the board. More broadly, documents are commonly held in escrow by lawyers in order to facilitate the approval of complex corporate actions in precise sequence and at specific moments in time.

Section 141(f) was amended to remove any doubt about the validity of placing director consents in escrow. Amended Section 141(f) permits a person to sign a consent before he or she is a director, so long as the consent is effective at a future time when he or she is serving on the board. Relatedly, a consent may provide (such as in the body of the consent or in a signature block) that it is effective at a future time or upon the happening of a future event. Amended Section 141(f) also specifically permits a person to make provision for the future effectiveness of a consent "through instruction to an agent or otherwise," which means (among other things) that the effectiveness of a consent may be addressed in an email or other communication to an agent to hold the consent in escrow.

There are two requirements that practitioners should remember when drafting a consent to be effective at a future time or otherwise to be held in escrow. First, the consent must become effective within 60 days after the escrow instructions, or provisions for future effective time, are made. Second, any consent to be held in escrow or effective at a future time is revocable by the person signing the consent.

The amendments to Section 141(f) should not be read as implying any limitation on the practice of officers (or soon-to-be-officers) signing documents and placing them in escrow for release at a future date or time.

[3] C.A. No. 3:10-CV-1842-G (N.D. Tex. Aug. 8, 2012).

[4] In that decision, a person signed a written consent of director to ratify a spin-off dividend before he became a director of the corporation. The corporation defending the validity of the spin-off contended that the soon-to-be director signed the consent with instructions to hold the consent in escrow until he became a director. Relying on reasoning from an earlier Delaware Court of Chancery decision, *AGR Halifax Fund, Inc. v. Fiscina,* 743 A.2d 1188 (Del. Ch. 1999), the court in *Verizon* held that, even if the director provided for his consent to be held in escrow, the director consent was invalid because the consent was literally signed before the signer became a director. In *AGR Halifax,* the Court of Chancery held that persons could not act as the board of directors to adopt a charter amendment during a time at which they had not been elected to the board.

Voting trusts and other voting agreements [§ 218].—Section 218 permits stockholders to place their shares in specially defined statutory voting trusts. To qualify as a statutory voting trust, the voting trust agreement underlying the trust relationship must be provided to the corporation and open to inspection by other stockholders and by the beneficiaries of the voting trust under certain circumstances. Section 218 was amended to allow a voting trust agreement (and amendments thereto) to be delivered to the corporation's principal place of business. Section 218 continues to permit voting trust agreements and amendments to be delivered to the registered office of the corporation located in Delaware.

Consent of stockholders or members in lieu of meeting [§ 228].—Section 228 was amended to expressly enable stockholders to place written consents of stockholders in escrow. Amended Section 228(c) expressly permits a person executing a consent to provide that the consent will be effective at a future time or upon the happening of a future event. Section 228(c) was amended to avoid any negative implication that the amendments to Section 141(f) signaled an intention to prohibit escrow arrangements for stockholder consents. However, even before the 2014 amendments, practitioners would provide for stockholder consents to be held in escrow.

Under amended Section 228(c), a stockholder consent may provide (such as in the body of the consent or in the signature block) that the consent will be effective at a future time or upon the happening of a future event. A person executing a consent may instead provide for future effectiveness through instructions to an agent, but evidence of that instruction must be provided to the corporation so that it will know when the consent is effective. The consent must become effective within 60 days after the escrow instructions, or provisions for future effective time, are made. Amended Section 228(c) also specifies that a consent providing for future effectiveness is revocable prior to effectiveness "unless otherwise provided." Accordingly, unlike director consents, a future-effective stockholder consent may provide that it is irrevocable upon placing the written consent in escrow. The ability to tender irrevocable consents would not immunize that action from challenge on equitable grounds, however.[5]

Because Section 228(c) continues to require that a stockholder consent include the date of signature of the stockholder signing the consent, the amendment to Section 228(c) specifies that, when a consent is to be effective at a future time or upon the happening of a future event, that effective time shall serve as the date of signature for purposes of Section 228. The date of signature is significant for timing purposes if the consent at issue is the first consent delivered to the corporation with respect to a corporate action. Under Section 228, all other consents regarding that action must be delivered within 60 days of that first dated consent. Amended Section 228(c) makes clear that, if the first consent delivered to the corporation contains a provision for a future effective time, then the 60 day delivery requirement for all other consents will commence at the future effective time. The synopsis to Section 228 also notes that the written consent should include the "actual date of signature," i.e., the date that the person actually signs the consent even if it is to be effective in the future.

[5] *See Omnicare, Inc. v. NCS Healthcare, Inc.,* 818 A.2d 914, 936 (Del. 2003).

Although amended Section 228(c) does not expressly provide that a person may execute a stockholder consent at a time when he or she is not a stockholder, the synopsis accompanying the amendment expressly notes that the signer need only be a stockholder as of the record date (fixed in accordance with Section 213(b)) for purposes of determining the stockholders entitled to take the action in question by consent.

Practitioners should find amended Section 228(c) especially helpful in obtaining stockholder consents for corporate actions that must occur in precise sequence. For example, the adoption of a merger agreement requires a specific sequence of approval under Section 251. First, the corporation's board must adopt the agreement, then it must be executed on behalf of the corporation, and only after that may the agreement be approved and adopted by stockholders. Amended Section 228(c) will enable stockholders to execute a written consent to approve and adopt a merger agreement before the board approves the agreement, so long as the stockholder consent, or other escrow arrangement, specifies that the stockholder consent is effective following execution of the merger agreement by the corporation.

Amendment of certificate of incorporation after receipt of payment for stock; nonstock corporations [§ 242].—The 2014 amendments effect three changes to Section 242, which is the statute that addresses amendments to a corporation's certificate of incorporation following the issuance of stock. First, Section 242 was amended to permit a corporation to change its corporate name without a vote of stockholders, unless a stockholder vote is expressly required by the certificate of incorporation. Prior to the 2014 amendments, a corporation could change its name without stockholder approval by causing a statutory short-form merger of a wholly owned subsidiary into the corporation pursuant to Section 253.[6] Now, corporations may effect a name change without stockholder approval by means of a straight-forward amendment, without having to resort to an amendment accomplished by short-form merger.

Second, Section 242 was amended to provide that the statutory notice of a stockholder meeting does not need to contain the text, or a summary, of an amendment to the certificate of incorporation if the corporation is availing itself of the Securities and Exchange Commission's "Notice and Access" rules promulgated under the Federal securities laws for that meeting.

Finally, Section 242 was amended to enable boards of directors to adopt, without stockholder approval, amendments to the certificate of incorporation to delete provisions that are no longer effective, such as the name of the incorporator and provisions relating to reclassifications or stock splits that have already occurred. These changes are similar to the provisions of Section 245(c), which permit a board of directors to unilaterally adopt a restated certificate of incorporation if only these types of non-substantive changes are being effected.

Merger or consolidation of domestic corporations [§ 251].—The 2014 amendments also refined Section 251(h), a provision that was adopted in 2013 to facilitate second-step mergers that follow first-step tender or exchange offers. Broadly, Section 251(h) permits a publicly listed corporation to effect a merger without stockholder approval if the merger is provided for in an agreement that calls

[6] *See* Section 253(b), which permits name changes to corporations surviving a short-form merger.

for a first-step tender or exchange offer for stock of the corporation. The consideration provided to stockholders in the second-step merger must be the same as the per share offer price in the first-step offer, and the acquiror in the transaction must own, following consummation of the offer, a number of shares that would have been required to approve the merger if it were voted on at a stockholder meeting.

The 2014 amendments eliminated the prohibition on entering into a Section 251(h) merger with an "interested stockholder" as defined in Section 203 (e.g., a 15% or more stockholder). Prior to the 2014 amendments, a corporation could not effect a Section 251(h) merger if the acquiror was an interested stockholder as of the time the corporation entered into the merger agreement. Eliminating the interested stockholder prohibition will provide greater flexibility in instances where an acquiror wishes to enter into voting or other agreements with management or significant stockholders that might cause the acqurior to become an interested stockholder for purposes of Section 203. The synopsis to the 2014 amendments notes that the amendments do not affect the common law principles of fiduciary duties or judicial scrutiny that will apply to a Section 251(h) merger.

The 2014 amendments also permit parties to enter into a merger agreement that provides the parties the option to effect the merger under Section 251(h) or by other means (such as obtaining a stockholder vote under Section 251(c) or by effecting a short-form merger under Section 253).

Another amendment to Section 251(h) provides that the first-step tender or exchange offer that must be made for "any and all" shares of the target corporation may exclude shares owned, as of the commencement of the offer, by the target corporation (including any of its wholly owned subsidiaries) or by the party making the offer (including such party's direct or indirect 100% parent or such party's wholly owned subsidiaries). The 2014 amendments to what is now Section 251(h)(5) also clarify that shares owned by these target/acquiror/parent/subsidiary entities do not need to be converted into merger consideration that is the same as the consideration provided to public stockholders in the tender or exchange offer. This latter change will enable these shares to be treated differently for tax or other reasons (e.g., to be converted into stock of the surviving entity).

Before the 2014 amendments, Section 251(h) required that, following the tender or exchange offer, the offeror must "own" a number of shares equal to the number of shares that would have needed to vote for the merger if the merger were approved by stockholders at a meeting. Practitioners questioned at what moment in time, following the close of a tender or exchange offer, that an acquiror would be deemed to own stock. The 2014 amendments resolve this issue by clarifying that the ownership tally includes stock that has irrevocably been accepted for purchase or exchange and "received" (as defined in Section 251(h)) by the depository prior to the expiration of the offer. Relatedly, the 2014 amendments clarify when a tender or exchange offer is deemed consummated for purposes of Section 251(h).

The 2014 amendments to Section 251(h) apply to merger agreements that are entered into on or after August 1, 2014.

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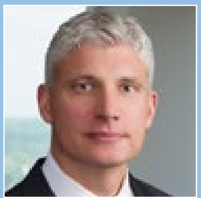

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