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The 2016 amendments to the Delaware General Corporation Law (the "DGCL") were recently enacted.[2] Amendments to Delaware's appraisal statute addressed concerns about "appraisal arbitrage" in merger transactions. The "medium form" merger provisions of Section 251(h) were improved, and continue to allow for a publicly held target corporation to be acquired by a tender or exchange offer and follow-on merger without a stockholder meeting. The Delaware Court of Chancery's jurisdiction has been expanded to allow the Court to resolve disputes concerning additional types of transactions. Default quorum and voting requirements were added for director committees and subcommittees. Finally, the procedures for reviving dormant and dissolved corporations have been clarified and improved.

Except where noted otherwise, the 2016 amendments became effective on August 1, 2016.

Jurisdiction to interpret, apply, enforce or determine the validity of corporate instruments and provisions of the DGCL [§ 111].—Section 111 vests the Delaware Court of Chancery with jurisdiction to address specific actions and transactions involving Delaware corporations (such as merger agreements to which a Delaware corporation is a constituent party and voting agreements among stockholders of a Delaware corporation). The 2016 amendments expanded the Delaware Court of Chancery's jurisdiction under Section 111 to empower the Court to interpret, apply, enforce or determine the validity of (i) stock purchase agreements whereby one or more stockholders of the corporation sell or offer to sell their stock, and to which the stockholder or holders and the corporation are parties (i.e., stock transactions), and (ii) agreements to sell, lease or exchange the corporation's property or assets, which, by the terms of the agreement, requires that one or more of the corporation's stockholders approve of or consent to the sale, lease or exchange (i.e., asset transactions). The provision conferring jurisdiction regarding asset transactions applies only if the terms of the transaction require stockholder approval. So, for example, an asset sale that requires stockholder approval in order to satisfy the DGCL or the terms of a preferred stock would qualify as a transaction covered by amended Section 111.[3] The language of amended Section 111 is also broad enough to confer jurisdiction on the Delaware Court of Chancery if the parties to the asset sale voluntarily require stockholder approval of the transaction; that is, even if the approval or consent is not required by the corporation's governing documents or the DGCL. The synopsis of the amendment to Section 111 noted that

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[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 1990-2015. 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] All section references are to the DGCL. Any reference to a synopsis refers to the official synopsis accompanying the legislative bill enacting the 2016 amendments.

[3] Section 271 requires stockholder approval in order for a corporation to sell, lease or exchange all or substantially all of its property or assets.

the amendment does not affect the concurrent subject matter jurisdiction of the Superior Court of Delaware over civil actions at law that involve these stock and asset transactions.

There is a growing body of case law from the Delaware Court of Chancery resolving fraud and breach of representation and warranty claims. These claims often arise in connection with the acquisition of privately held Delaware corporations, where the former stockholders of the acquired corporation provide indemnification to the buyer for certain liabilities during a time period after closing. The 2016 amendments allow parties to select the Delaware Court of Chancery as the exclusive forum to hear these types of claims for not only merger transactions but now also for qualifying stock and asset transactions.

The amendments to Section 111 are effective only with respect to transactions entered into on or after August 1, 2016.

Board of directors; powers; number, qualifications, terms and quorum; committees; classes of directors; nonstock corporations; reliance upon books; action without meeting; removal [§ 141].—The 2016 amendments added default quorum and voting requirements for committees of the board of directors and subcommittees of committees. Previously, Section 141(c) did not provide any default quorum or voting requirements for committees and subcommittees. As amended, Section 141(c) provides that a majority of the members then serving on a committee or subcommittee constitute a quorum to transact business. Under this default rule, vacancies on a committee are not counted for purposes of determining a quorum. Under the new default voting requirement an action is taken by a committee or subcommittee if it is approved by a majority of the members of the committee or subcommittee present at a meeting at which a quorum is present. A corporation's certificate of incorporation or bylaws, or a board resolution, may provide for a greater or lesser quorum requirement or for a greater voting requirement. A board committee can also adopt a resolution to depart from the default quorum and voting requirements for any subcommittee created by that committee. However, the quorum requirement may not be less than 1/3 of the directors then serving on the committee or subcommittee. In choosing to follow, or depart from, these default rules by board or committee resolution, practitioners should be sure to check the corporation's certificate of incorporation and bylaws for any quorum or voting requirements. These provisions would trump any board or committee resolution attempting to adopt a contrary requirement.

The 2016 amendments amended Section 141(c) to include a translator provision, which clarifies that any reference in the DGCL to a committee or a member of a committee is deemed to include a reference to a subcommittee or member of a subcommittee. The 2016 amendments deleted an express reference to subcommittees in Section 141(d). That reference is no longer necessary given the new translator provisions of amended Section 141(c).

Finally, Section 141(b) was amended to delete surplus language stating that, when a board is comprised of one authorized directorship, the single director constitutes a quorum. That (self-evident) result is already provided for in the remaining default quorum requirements of Section 141(b).

Stock certificates; uncertificated shares [§ 158].—Section 158 was amended to expand the group of officers who may be authorized to sign stock certificates. Previously, stockholders with certificated shares were entitled to a stock certificate signed by or in the name of the corporation by the

chairperson or vice-chairperson of the board of directors, or the president or vice-president, and by the treasurer or an assistant treasurer or the secretary or an assistant secretary. As amended, Section 158 allows any two authorized officers of the corporation to sign stock certificates. The synopsis of Section 158 notes that the amendments do not affect the existing law that both signatures may be from the same person, provided that each signature is made in a separate officer capacity of such person.

Merger or consolidation of domestic corporations [§251].—Section 251(h) generally allows a publicly listed corporation to dispense with the requirement of holding a stockholder meeting or soliciting stockholder consents to approve a merger if the corporation is acquired by another corporation through a qualifying first-step tender or exchange offer and second-step merger. The concept behind Section 251(h) is straightforward: if an acquiror commences a tender or exchange offer for the target corporation's stock and, as a result of consummating the offer, owns a number of shares of each class and series of stock that would have been required to vote for the merger at a stockholder meeting (which we refer to here as satisfying the minimum tender requirement), then a second-step merger can be effected without formal stockholder approval. Under Section 251(h), the tender of shares is considered the functional equivalent of a stockholder vote on the transaction. The consideration received by stockholders in the second-step merger generally must be the same as the consideration paid in the first-step offer.

The 2016 amendments clarified that a target corporation is eligible for Section 251(h) if it has at least one class or series of stock publicly listed (that is, listed on a national securities exchange) or held of record by more than 2,000 stockholders immediately prior to the execution of the merger agreement. Before the amendments, it was not entirely clear whether each class and series (as opposed to only one class or series) of the target corporation's stock had to satisfy these listing/widely held requirements in order for Section 251(h) to be applicable. Amended Section 251(h) now clearly provides that a target corporation with publicly listed common stock may enter into a Section 251(h) transaction even if it has another class or series of stock outstanding that is unlisted and held by 2,000 or fewer holders. Section 251(h) requires that an offer must be made to each class of stock. Outstanding shares within the same class or series of stock need to receive the same consideration in the first-step offer and the second-step merger. But, the consideration for one class or series can be different from the consideration paid for other classes and series.

Section 251(h) was also amended to clarify that the first-step offer must be for "all" shares, but need not be for "any and all shares" (which was the predecessor language in the statute), and amended Section 251(h) now expressly states that the offer may be conditioned on receipt of a minimum number or percentage of shares of one or more classes or series of stock of the target corporation.

Amended Section 251(h) clarifies the options available to the merger parties on how to treat "hook shares" (that is, shares of stock of the target corporation that, as of the commencement of the offer, are owned by one of the target's wholly owned subsidiaries) and "toe-hold" shares (that is, shares of the target that, as of the commencement of the offer, are owned by the acquiring corporation making the offer, its 100% parent or wholly-owned subsidiaries of the acquiror or its 100% parent).[4]

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[4] The terms "hook shares" and "toe-hold shares" are not used in Section 251(h), but are used in corporate parlance and employed here for ease of reference.

Section 251(h) uses the term "excluded stock" when referring to shares that may be excluded from the offer. As used in Section 251(h), excluded stock means hook shares, toe-hold shares, rollover stock (discussed below) and any shares owned by the target.

Amended Section 251(h) now expressly provides that hook shares and toe-hold shares do not need to be converted into the merger consideration that other stockholders receive in the transaction. Accordingly, this amendment allows the merger parties to provide, among other things, for the cancellation of these shares in the merger or the conversion of such shares to shares of the surviving corporation. Amended Section 251(h) also permits toe-hold shares to be counted toward the shares owned by the acquiring corporation making the offer, for purposes of satisfying the minimum tender requirement, even if the shares are not actually transferred to the acquiror.

Amended Section 251(h) also provides expressly for treatment of "rollover stock," such as stock held by target management that will not be cashed out in the merger but instead will be exchanged for equity of the acquiror or its parent. Amended Section 251(h) defines rollover stock as shares of the target corporation that are the subject of a written agreement requiring the shares to be transferred, contributed or delivered to the acquiror or an affiliate of the acquiror in exchange for stock or equity interest in the acquiror or one of its affiliates. Under amended Section 251(h), shares of rollover stock are effectively treated as shares owned by the acquiror for purposes of satisfying the minimum tender requirement, even though the rollover stock is not required to be transferred, contributed or delivered to the acquiror until the time after the consummation of the offer and before consummation of the merger. However, the shares of rollover stock cease to be classified as rollover stock if they have not been transferred, contributed or delivered to the acquiror before the consummation of the merger. Under amended Section 251(h), the merger agreement does not need to provide for the conversion of rollover stock into the consideration received by other stockholders. The parties may, for example, provide for cancellation of the rollover stock in the merger.

The 2016 amendments clarified the manner in which shares are deemed to be received by the acquiror in the offer, in order for the shares to count toward satisfying the minimum tender requirement. For certificated shares, shares are "received" once the depository (that is, the agent appointed to facilitate closing the offer) has physically received the stock certificate representing the shares along with an executed letter of transmittal. Uncertificated shares held of record by a clearing corporation as nominee are "received" when the shares are transferred into the depository's account pursuant to an agent's message.[5] All other uncertificated shares (that is, not held by a clearing corporation) are deemed received when the depository physically receives a letter of transmittal. Certificated shares cease to be deemed received if the share certificate is cancelled prior to the consummation of the offer, and uncertificated shares cease to be deemed received if the shares are sold prior to the consummation of the offer.

The 2016 amendments to Section 251(h) apply only to merger agreements that are entered into on or after August 1, 2016.

Appraisal rights [§ 262].—Subject to limited exceptions, when a corporation is merged or consolidated with another entity, the stockholders of the corporation who do not vote in favor of the transaction are entitled to commence an action to have the Delaware Court of Chancery determine

[5] The synopsis of Section 251(h) states that "an 'agent's message' is a message transmitted by the clearing corporation acting as nominee, received by the depository, and forming part of the book-entry confirmation, which states that such clearing corporation has received an express acknowledgment from a stockholder that such stockholder has received the Offer and agrees to be bound by the terms of the Offer, and that the Offeror may enforce such agreement against such stockholder."

the "fair value" of their shares as of the time of the merger or consolidation. In recent years, M&A practitioners have observed that investors are buying stock in the open market after the announcement of a merger transaction for the purpose of pursuing appraisal rights. Certain practitioners have expressed concern that the structural aspects of an appraisal proceeding have allowed appraisal seekers to opportunistically target corporations for settlements of threatened appraisal claims, even if those claims lack merit. The 2016 amendments are intended to address some of these concerns.

In one change to Section 262, the 2016 amendments addressed concerns about the default interest rate that accrues on an appraisal award. Section 262 sets a default interest rate of 5% over the Federal Reserve discount rate.[6] Interest accrues from the date of the merger through the date of payment of the appraisal award and compounds quarterly. Because an appraisal proceeding can take as long as 2-3 years to litigate, certain practitioners expressed concern that a corporation would be incentivized to settle a non-meritorious appraisal claim because of the looming interest payment. Amended Section 262(h) addresses this concern by allowing corporations to defray interest accrual on appraisal awards through prepayments of cash amounts, which will be deducted from the ultimate fair value award for purposes of determining the interest owed. Any prepayment is optional and not required. The synopsis of Section 262(h) states that there is no inference or requirement that the prepayment is equal to, greater than or less than the fair value of the shares. The synopsis also notes that if a corporation, in good faith, contests an appraisal seeker's entitlement to appraisal, the corporation can elect to make prepayments "only to those stockholders whose entitlement to appraisal is uncontested." Amended Section 262(h) does not provide a mechanism for a corporation to recover any of the amount paid to defray the interest in the event that the appraisal award exceeds the amount prepaid.

In another change to Section 262, the 2016 amendments imposed a ban on de minimis appraisal claims that might otherwise impose disproportionate defense costs on corporations. Appraisal actions can be costly to defend. Certain practitioners have highlighted a concern that appraisal seekers might make non-meritorious claims to force a settlement of the claims because a corporation will be incentivized to offer a settlement that is less than the estimated defense costs. Amended Section 262(g) addresses this concern by denying stockholders appraisal rights for publicly listed stock where (i) the appraisal demands represent 1% or less of the stock outstanding and (ii) the total value of the demands (as implied by the merger price) is $1 million or less. The synopsis of Section 262(g) notes that, as a result of the amendments, "appraisal rights are essentially precluded unless the dispute with regard to valuation is substantial and involves little risk that the petition for appraisal will be used to achieve a settlement because of the nuisance value of discovery and other burdens of litigation." This ban on de minimis claims does not apply to short-form mergers effected pursuant to Section 253 or 267. As noted in the synopsis of Section 262(g), appraisal rights may be the only remedy available to stockholders in a short-form merger transaction, so the de minimis ban does not apply in those instances. As a result of an amendment to Section 262(c), the ban does apply to contractual appraisal rights conferred by provisions in a corporation's certificate of incorporation.

The 2016 amendments also enacted a minor change to Section 262(d)(2), to streamline the references to the first-step offer in a Section 251(h) transaction. The references to "tender or exchange offer" now refer simply to an "offer" effected under Section 251(h).

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[6] The Court of Chancery may choose a different interest rate for "good cause," but the courts do not often depart from the default rate.

The 2016 amendments to Section 262 apply only with respect to transactions consummated pursuant to agreements entered into on or after August 1, 2016. In the case of mergers effected under Section 253, the amendments to Section 262 are effective with respect to transactions consummated pursuant to resolutions of the board of directors of the parent corporation adopted on or after August 1, 2016; and in the case of mergers effected under Section 267, the Section 262 amendments are effective with respect to transactions consummated pursuant to authorizations adopted by the parent entity on or after August 1, 2016 in accordance with the entity's governing documents and the laws of the jurisdiction under which the entity is formed or organized.

Revocation of voluntary dissolution; restoration of expired certificate of incorporation [§ 311].—Corporations have the option of including in their certificates of incorporation a provision limiting the duration of the corporation's existence to a specific time period.[7] After that time period has expired, the corporation should wind up its affairs in accordance with Section 278. The 2016 amendments added to Section 311 comprehensive procedures to "restore" a corporation to allow it to continue its business as a valid entity. A corporation can be restored during the three year winding up period provided by Section 278 (that is, within three years of when the corporation's existence expired under the certificate of incorporation), or such longer time as ordered by the Delaware Court of Chancery.[8]

Broadly, restoration requires the approval of the board and approval by the holders of a majority of the outstanding stock that would have been entitled to vote on an amendment to the certificate of incorporation provision that specified the limited term of existence. The restoration documents can provide for a new time period or provide that the corporation's existence will be perpetual. A certificate of restoration, along with the payment of certain franchise taxes, must be submitted to the Office of the Secretary of State of the State of Delaware to complete the restoration.

Section 311 also specifies the procedures for revoking a voluntary dissolution of a corporation. The 2016 amendments enact clarifying changes to the process for revoking a dissolution.

Revival of certificate of incorporation [§ 312].—The 2016 amendments to Section 312 deleted references to restoring a corporation that has expired by its own limitation because restoration is now addressed in Section 311. The pre-amendment version of Section 312 also addressed the procedures for extending the existence of a corporation if it has a limited term and the term has not yet expired. The drafters of the 2016 amendments considered these references unnecessary, because a corporation can follow the provisions of Section 242 to simply amend its certificate of incorporation to extend the corporation's duration of existence. As amended, Section 312 now deals exclusively with the procedures for reviving a corporation that has become forfeit or void for failure to comply with certain Delaware state law requirements (failure to pay franchise taxes (Section 510), failure to file an annual franchise tax report within one year of the filing deadline (Section 510) or failure to maintain a registered agent in Delaware (Section 136)). The 2016 amendments enacted

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[7] Section 102(b)(5) allows for a corporation's certificate of incorporation to limit the duration of the corporation's existence to a specified date. If no such limitation is provided, the corporation will have perpetual existence.

[8] After the winding up period, a corporation's existence can be extended as provided by Section 279, which allows the Delaware Court of Chancery to appoint a trustee or receiver, for as long as the Court deems necessary, "to take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid."

technical and clarifying improvements to the revival process and the director approvals necessary to revive a corporation.

Certificate of incorporation; definition [§ 104]; revival of certificate of incorporation or charter of exempt corporations [§ 313]; and status of corporation [§ 314].—The amendments conform Section 313 to amended Section 312, and update Sections 104 and 314 to conform to the amendments to Sections 311 through 313.

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