

**DELAWARE GENERAL CORPORATION
LAW AMENDED AUGUST 1, 2013**

In its latest session, the Delaware legislature enacted several amendments to the General Corporation Law (the “DGCL”). Unless otherwise noted, the amendments will become effective today.

The amendments are significant because several new provisions have been added to the DGCL, including provisions that (1) permit a second-step merger to be completed following a tender or exchange offer without a stockholder vote if certain conditions are satisfied and (2) create new procedures to allow corporations to ratify defective corporate acts. The amendments also make a number of technical and clarifying changes.

Below are the principal changes to the DGCL.

Stockholder Vote for Second-Step Mergers

[DGCL §251(h); DGCL §262(d)(2)]. New Section 251(h) permits an acquirer to complete a second-step merger following a tender or exchange offer without a stockholder vote (unless the target’s charter expressly requires otherwise) if the merger agreement so provides. Prior to the adoption of Section 251(h), an acquirer that desired to complete such a transaction was required to go through a stockholders’ meeting (or solicit consents) to approve the merger—even if the acquirer owned sufficient shares to assure such approval will be obtained—unless the acquirer owned at least 90

percent of each class of the target’s voting stock and could complete a short-form merger. To make completion of a merger more efficient in those circumstances, targets had often granted acquirers a top-up option or provided for a subsequent offering period. If the conditions of Section 251(h) described below are satisfied, an acquirer that fails to reach the 90 percent ownership threshold in the first step of the offer may now eliminate the need to go through a stockholders’ meeting (or solicit consents).

Section 251(h) is only available if the target’s shares are listed on a national securities exchange or are held of record by more than 2,000 holders. In addition, the following conditions must be satisfied: (1) the merger agreement specifies that Section 251(h) will apply and that the merger will be effected as soon as practicable following the completion of the offer; (2) the offer is for any and all of the target’s outstanding voting stock; (3) following the completion of the offer, the acquirer owns at least the percentage of stock that would have been required to adopt the merger agreement (under the DGCL and the target’s charter); (4) no other party to the agreement is an “interested stockholder” (as defined in Section 203 of the DGCL) at the time the board of directors approved the agreement; (5) the acquirer effects the merger pursuant to the agreement; and (6) the target’s outstanding shares that are not cancelled are entitled to receive as a result of the merger the same amount and kind of consideration paid in the tender or exchange offer.

Concomitant amendments to the Delaware appraisal statute (Section 262 of the DGCL) provide that, if

a merger is approved using new Section 251(h), the target may use its Schedule 14d-9 to satisfy the statutory requirement to deliver a notice of appraisal rights.

Ratification of Defective Corporate Acts and Stock

[DGCL §204]. New Section 204 creates a statutory procedure for a corporation to ratify a defective corporate act or putative stock issuance that occurs solely as a result of a failure of authorization (even if the act or issuance would have been void or voidable under common law). The board of directors is required to adopt ratification resolutions. The stockholders are also required to adopt the resolutions unless (1) no stockholder approval is currently required or would have been required at the time of the defective act and (2) the defective act did not result from non-compliance with Section 203 of the DGCL.

Section 204(e) creates a new corporate filing called a “certificate of validation”, which must be filed with the Delaware Secretary of State if the defective act would have required a filing. Section 204(f) provides that, unless the Delaware Court of Chancery determines otherwise, as of the validation effective time, the defective act and the shares of putative stock issued pursuant to the defective act are no longer void or voidable and such validation relates back to the time of the defective act or issuance. Section 204(i) explicitly states that the new Section 204 ratification procedures are not the exclusive means of ratification or validation under Delaware law.

[DGCL §205]. New Section 205 grants the Court of Chancery exclusive jurisdiction to determine the validity of ratification undertaken pursuant

to Section 204 (and corporate acts ratified thereunder), and the validity of corporate acts not ratified in connection with Section 204. Section 205(b) gives the Court of Chancery broad powers to determine the validity of a defective act or invalid stock issuance, including the power to modify the procedures in Section 204. The Court of Chancery is authorized, among other things, to craft remedies to avoid harm to persons who are substantially and adversely affected and to issue other orders that it deems proper under the circumstances. Section 205(d) gives the Court of Chancery broad latitude to consider all factors that it “deems just and equitable”. Absent certain circumstances, Section 205(f) requires lawsuits challenging a Section 204 ratification to be brought within 120 days of the validation effective time. Sections 204-205 become effective April 1, 2014.

Consideration for the Issuance of Stock

[DGCL §152]. Section 152 was amended to clarify that the board of directors may approve the consideration for the issuance of stock by establishing a formula (e.g., by reference to the trading price of stock over a specified period of time) in lieu of approving a fixed final price.

Public Benefit Corporations

Beginning today, the DGCL will authorize the formation of public benefit corporations (“PBCs”). The new provisions will allow entrepreneurs and investors to create for-profit Delaware corporations that are charged with promoting public benefits. These provisions modify the fiduciary duties of directors of PBCs by requiring them to balance such benefits with the economic interests of stockholders. See our separate update titled,

“Delaware General Corporation Law Amended to Authorize Public Benefit Corporations”, dated July 25, 2013, for more information.

Amendments to Deter Use of “Shelf” Corporations

[DGCL §312(b); DGCL §502(a)]. Sections 312(b) and 502(a) were amended to discourage the formation of “shelf” corporations, which have no current activities, directors or stockholders. Section 312(b) now requires that a renewal or

revival of a certificate of incorporation be approved by the corporation’s directors (and therefore not its incorporator). In addition, amended Section 502(a) only permits the incorporator to sign the initial annual report and generally requires that annual reports list a director.

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