ANALYSIS OF THE 2010 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW

Jeffrey R. Wolters, Esq.
and
James D. Honaker, Esq.

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CORPORATION

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By Jeffrey R. Wolters, Esq.
and
James D. Honaker, Esq.
Morris, Nichols, Arsht & Tunnell LLP
Wilmington, Delaware

Several amendments to the Delaware General Corporation Law (the "DGCL") took effect in August 2010. The amendments do not make major changes in law or policy. However, they show Delaware's commitment to keeping the DGCL up to date as an "enabling statute" for transaction planners. For example, in the area of mergers, the amendments permit "short form" mergers between parent companies and 90%-owned subsidiaries, even when the parent is a non-corporate entity such as a limited liability company or limited partnership; previously, such short form mergers were only permitted when both the parent and subsidiary were corporations. In the area of dissolution, the amendments clarify that when a corporation is dissolved as a result of a "limited life" provision in its charter, it still has three years after the dissolution to wind up its affairs and make distributions to creditors and stockholders. This clarification should be useful to entities such as special purpose acquisition companies (so-called "SPACs"), which often have limited life provisions in their charters and promise their investors that they will dissolve and liquidate if they are not able to arrange an acquisition by the time of the limited life deadline. Other changes adopted in 2010 refine and clarify the rules governing Delaware nonstock corporations. While these entities generally have "members" instead of stockholders, the 2010 amendments clarify that most of the rules in the DGCL governing stockholders will automatically apply to such members. These and other changes are discussed in more detail below.

The amendments relating to nonstock corporations became effective on August 1, 2010. Amendments relating to Sections 280 and 281 of the DGCL are effective only with respect to dissolutions made effective after August 1, 2010, and to the filing of claims arising out of such dissolutions. Amendments to Section 262 (the appraisal statute) are effective only with respect to transactions consummated pursuant to agreements entered into after, or authorized by resolutions adopted after, August 1, 2010, and to appraisal proceedings arising out of such transactions. All other amendments became effective on August 2, 2010.[1]

NONSTOCK CORPORATIONS

Application of the DGCL to nonstock corporations [§114].—In addition to traditional stock corporations, Delaware has a venerable history of nonstock corporations,

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; 1970; 1973-74; 1976; 1981; 1983-1988; and 1990-2009. 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.

including approximately 18,000 registered in Delaware today. Many of these are non-profit, such as charitable foundations organized to comply with Section 501(c)(3) of the Internal Revenue Code. Many other Delaware nonstock corporations are very much for profit; for example, leading credit card companies are organized as Delaware nonstock corporations, and most of the major United States stock exchanges were organized as Delaware nonstock corporations (although many have "demutualized" to become Delaware stock corporations).

Despite its long history with nonstock corporations, until the 2010 amendments, the DGCL lacked a comprehensive approach to such entities. Instead, nonstock corporations were regulated by a handful of rules interspersed with the sections of the DGCL governing stock corporations. Section 114 of the DGCL was added in 2010 to provide greater clarity concerning the rules governing nonstock corporations. Section 114 sets forth a general rule, subject to certain exceptions, that the provisions of the DGCL that address stockholders and boards of directors shall also be equally applicable to the "members" and "governing bodies" of nonstock corporations. In addition, Section 102 of the DGCL was amended to clarify that nonstock corporations are required to have members; however, if members are not expressly provided for in the corporation's certificate of incorporation or bylaws, then the members are deemed to be whoever is entitled to vote for the election of the corporation's governing body. Other changes were made to address such matters as the voting rights of members (which now may be set forth in either the corporation's certificate of incorporation or its bylaws), record dates for voting purposes, "surplus" for dividends and redemption of membership interests, "short form" mergers and appraisal rights in mergers. In total, changes were made to 41 sections of the DGCL as part of the 2010 amendments relating to nonstock corporations. (The amended sections are sections 102, 109, 114 (new), 141, 144, 154, 160, 170, 215, 220, 223, 225, 226, 227, 232, 233, 241, 242, 245, 253, 255, 256, 257, 258, 262, 263, 264, 266, 271, 273, 276, 280, 281, 311, 312, 313, 390, 391, 501, 503 and 505.)

REGISTERED AGENT

Registered agent in Delaware [§132].—A clarifying amendment makes clear that the provisions of Section 132(b) relating to registered agents' obligation to, *inter alia*, accept service of process for the corporations for whom they serve apply to registered agents for both domestic and foreign corporations.

INDEMNIFICATION

Indemnification and advancement of expenses to persons serving at the request of the corporation as directors, officers, employees or agents of another entity such as a subsidiary [§145].—Section 145 of the DGCL authorizes a corporation to indemnify its directors, officers, employees and agents, as well as persons serving at the request of the corporation as directors, officers, employees or agents of another entity such as a subsidiary or an employee stock trust. Under Section 145(d), a prerequisite for indemnification of directors and officers is that a particular decision-making body, such as the disinterested directors or independent counsel, determine that the director or officer seeking indemnification has met a statutory standard of good faith conduct. Section 145(d) has been amended to clarify that the requirement that this

determination be made by a particular decision-making body only applies with respect to persons serving as directors or officers of the corporation itself at the time such determination is made (i.e., it does not apply with respect to persons serving as directors or officers of another entity such as a subsidiary, or to former directors or officers). Further, Section 145(e) has been amended to clarify that persons serving at the request of the corporation as directors, officers, employees or agents of another entity may receive advancement of expenses (such as attorneys' fees incurred in defending a lawsuit) from the corporation on such terms and conditions as the corporation deems appropriate. It remains the case that while advancement may be made without any determination as to the statutory good faith standard, indemnification cannot be made unless the good faith standard has been met.

APPROVAL OF CHARTER AMENDMENTS AND MERGER AGREEMENTS

Process of adoption [§§242, 251].—Both board and stockholder approval is required to adopt either a charter amendment under Section 242 or to adopt most merger agreements under Section 251. One of the statutory requirements in connection with the stockholder vote is that a copy or summary of the amendment or merger agreement, as applicable, be provided to stockholders. The statute has been amended to provide that the choice between providing the actual amendment or merger agreement, or instead a summary of the same, need not be made by the board. Thus, this decision, like the sending of notice, could be left to the officers, while other actions, such as approving and declaring advisable the amendment or merger agreement and fixing the record date for the meeting, remain duties of the board.

Another helpful technical change with respect to mergers and charter amendments has also been made in 2010. Specifically, the merger statute has long permitted a corporation to effect amendments to its certificate of incorporation as part of the approval and filing of a merger. The practice that evolved was to attach the amendments as an exhibit to the certificate of merger that was filed to effectuate the merger. However, the entire certificate of incorporation could not be formally "restated" in the merger filing. The 2010 amendments fill this gap and allow the adoption of a formal restated certificate of incorporation as part of a merger.

SERVICE OF PROCESS ON THE SECRETARY OF STATE

Service of process on the Secretary of State of Delaware by electronic transmission [§§252(d), 256(d), 263(d), 264(d), 266(c)(6), 321(b), 376(b), 381(c), 381(d), 382(a), 382(c) and 390(b)(5)].—These amendments permit service of process under these sections upon the Secretary of State by means of electronic transmission, but only as the Secretary of State may provide. The Secretary of State is authorized to issue such rules and regulations concerning this service of process as the Secretary of State deems necessary and appropriate.

SHORT FORM MERGERS AND APPRAISAL RIGHTS

Expansion of "short form" mergers; changes to appraisal rights statute [§§253, 262 and 267].—Section 253 of the DGCL permits a corporation to effect a "short form"

merger with a subsidiary—that is, a merger without a stockholder vote by the subsidiary's stockholders—if the parent owns 90% or more of each class of voting stock of the subsidiary. In addition to not requiring a formal stockholder vote, such mergers are also generally not subject to challenge for breach of fiduciary duty, unlike most other transactions between a corporation and a controlling stockholder; instead, appraisal rights under Section 262 of the DGCL are generally the exclusive remedy of minority stockholders following a short form merger. *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 247-48 (Del. 2001). The 2010 amendments add a new Section 267 to the DGCL to permit such short form mergers to be effected between a non-corporate parent entity (such as a limited liability company or limited partnership) and a corporate subsidiary. This should be useful to transaction planners who wish to use a non-corporate entity as the parent entity, such as when, for example, an LLC is used as the purchasing vehicle in a first-step tender offer to acquire 90% of another corporation. Practitioners should take note that the law concerning the duties of a controlling stockholder in making such an offer to get to 90% remains in some flux. *See In re CNX Gas S'holders Litig.*, 2010 WL 2291842 (Del. Ch. May 25, 2010).

Practitioners should also note that the addition of Section 267, as well as the changes to the sections of the DGCL concerning nonstock corporations, have necessitated minor conforming changes to Section 262, the appraisal rights statute. Because a copy of this statute must be sent to stockholders in connection with the notice of merger required by Section 262, practitioners should take care to send the new version of the appraisal statute for any merger effected pursuant to a merger agreement (or short form merger resolutions) adopted after August 1, 2010. There have been decided cases where the Delaware Court of Chancery has found a violation of the DGCL and of a board's fiduciary disclosure duties when the wrong appraisal statute was mailed to stockholders. *Berger v. Pubco Corp.*, 2008 WL 2224107, at *3 (Del. Ch. May 30, 2008) (outdated version of Section 262), *rev'd on other grounds*, 976 A.2d 132 (Del. 2009); *Nebel v. Southwest Bancorp., Inc.*, 1995 WL 405750, at *6 (Del. Ch. July 5, 1995) (page of a different state's appraisal statute inserted into appraisal notice).

Finally, Section 267 will not apply to nonstock corporations, but such entities will be able to effect short form mergers as the parent entity under new Section 253(f), so long as the nonstock corporation is the surviving entity in the merger and, if it is a charitable nonstock corporation, its charitable status is not lost or impaired in the merger.

DISSOLUTION

Dissolution and subsequent three year winding up period [§§274, 275(d) and 278].—Section 278 of the DGCL provides that after a corporation is dissolved, it remains in existence for three years to wind up its affairs, liquidate its assets and make distributions to creditors and stockholders. The typical way for a corporation to dissolve, and therefore transition into Section 278's three year "winding up" period, is to obtain board and stockholder approval of the dissolution. However, under Section 102(b)(5) of the DGCL, a corporation's existence may expire automatically, on a date certain, if its charter contains a "limited life" provision. Section 278 has been amended to clarify that such limited life corporations shall, upon their expiration, be treated as dissolved corporations subject to Section 278 and its automatic three year winding up period. This should add clarity to "end of life" situations, including for corporations

organized as special purpose acquisition companies ("SPACs"), whose charters may include a limited life expiration date for the purpose of requiring the SPAC to wind up—and return any of its available funds to investors—if the SPAC has not engaged in an acquisition transaction prior to the expiration date. The changes to Section 278 would not require a distribution to stockholders prior to the end of the three year winding up period; therefore, creators of corporate SPACs may need to consider other devices to dictate the timing of such distributions.

The 2010 DGCL amendments also revise Sections 274 and 275(d) to require that a certificate of dissolution specify the date on which the dissolving corporation filed its original certificate of incorporation.

FOREIGN CORPORATIONS

Qualification of foreign corporations to do business in Delaware [§371].—The certificate that a foreign corporation is required to file with the Delaware Secretary of State from its jurisdiction of incorporation evidencing its corporate existence is now required to be dated no earlier than six months prior to the filing date. Additionally, the types of entities that may serve as a registered agent for a foreign corporation have been expanded from only an individual who is a resident of Delaware or a corporation authorized to do business therein to a broad list including domestic and foreign alternative entities and the foreign corporation itself.

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