2017 Proposed Amendments to the General Corporation Law of the State of Delaware

March 14, 2017

Legislation proposing to amend the General Corporation Law of the State of Delaware (the “DGCL”) has been released by the Corporate Council of the Corporation Law Section of the Delaware State Bar Association and, if approved by the Corporation Law Section, is expected to be introduced to the Delaware General Assembly. If enacted, the amendments will, among other things, (i) provide statutory authority for the use of “blockchain” or “distributed ledger” technology for the administration of corporate records, (ii) dispense with the requirement that stockholder consents be individually dated, thereby eliminating a common “foot fault” for the validity of stockholder consents, (iii) update and harmonize the various provisions of the DGCL dealing with the authorization and accomplishment of mergers and consolidations involving different types and forms of entities, and (iv) make other clarifying technical changes.

If enacted, all of the amendments (other than the amendments relating to stockholder action by written consent) will be effective on August 1, 2017. The amendments relating to stockholder action by written consent will be effective only for actions taken by consent having a record date, for purposes of determining the stockholders entitled to consent, on or after August 1, 2017.

The “Blockchain” Amendments

Several sections of the DGCL have been revised to accommodate the use of “blockchain” or “distributed ledger” technology for the maintenance of corporate records. In general, blockchain or distributed ledger technology allows for the creation of a ledger of transactions shared among a network of participants, rather than relying on a central source. It has been suggested that distributed ledger technology, which has a wide range of applications, is particularly well suited to the maintenance of a stock ledger, as it has the potential to facilitate the timely and accurate settlement of stock issuances and transfers.

The core blockchain amendments, involving Sections 219 and 224 of the DGCL, address the fact that a distributed ledger does not involve a central database. Section 219, which currently requires the corporation to prepare and make a list of its stockholders and specifies the evidentiary effect of the stock ledger, is being revised to add a definition of the term “stock ledger.” As amended, Section 219(c) will define “stock ledger” as “one or more records administered by or on behalf of the corporation in which the names of all of the corporation’s stockholders of record, the address and number of shares registered in the name of each such stockholder, and all issuances and transfers of stock of the corporation are recorded in accordance with [Section 224 of the DGCL].”

Section 224, which currently provides that records “maintained” by the corporation may be kept on, by means of, or in the form of any information storage device or method, subject to specified requirements, is also being updated to
accommodate distributed ledger technology. As amended, Section 224 will provide that any records “administered by or on behalf of the corporation” may be kept on, by means of, or in the form of, any information storage device or method, “or one or more electronic networks or databases (including one or more distributed electronic networks or databases).” Section 224 will preserve the requirement that records so kept must be convertible into clearly legible paper form within a reasonable time. The amendments will further provide, with respect to the stock ledger, that the records so maintained must be able to be used to prepare the list of stockholders specified in Section 219 as well as in Section 220 (which deals with stockholder demands to inspect the corporation’s stock ledger, list of stockholders and other books and records). In addition, such records must record the information specified in Section 156 (dealing with the amount of consideration for partly paid shares), Section 159 (relating to the transfer of shares for collateral security, and not absolutely), Section 217(a) (relating to the voting of shares subject to a pledge), and Section 218 (dealing with voting trusts). Finally, such records must record transfers of stock as governed by Article 8 of the Delaware Uniform Commercial Code.

In conjunction with the core blockchain amendments, Sections 151, 202 and 364 of the DGCL are being amended to clarify that the written notices required by those sections may be given by “electronic transmission.” (The provision of notice by electronic transmission is governed by existing Section 232, subsection (c) of which defines “electronic transmission” as “any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process.”) Section 151(f), which currently provides for delivery of written notice to holders of uncertificated stock of the information otherwise required to be set forth on a stock certificate under that section as well as Sections 156, 202(a) and 218(a), is being updated to clarify that such notice may be given in writing or by electronic transmission. Corresponding changes are being made to Section 202(a), which deals with notice of restrictions on transfer and ownership of securities, as well as Section 364, which deals with notices given by public benefit corporations.

While the 2017 amendments will accommodate the use of distributed ledger technology, not all existing corporations that desire to adopt the technology will be able to administer their stock ledgers through such technology immediately and entirely. Corporations that have certificated stock, for example, will not be able to adopt the technology to administer their stock ledgers as long as their shares remain represented by certificates, as the transfer of certificated stock, under Article 8 of the Delaware Uniform Commercial Code, involves procedures inconsistent with the use of distributed ledger technology for such purposes. Moreover, although Section 158 of the DGCL allows the board of directors to provide by resolution that some or all of any or all classes or series of stock shall be uncertificated shares, it provides that “[a]ny such resolution shall not apply to shares represented by a certificate until such certificate is surrendered to the corporation.” No amendments to Section 158 are being made at this time. Accordingly, corporations with certificated stock that desire to make use of distributed ledger technology to administer their stock ledgers must first take measures to provide that their stock is and shall be uncertificated.

Stockholder Consents
Section 228 of the DGCL, which deals with stockholder action by consent in lieu of a meeting, is being amended to dispense with the requirement that each consent bear the date of signature of the stockholder executing the consent. The amendment will address the concerns stemming from *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129 (Del. Ch. 2003), where the Court of Chancery denied the defendants' motion to dismiss plaintiff's challenges to the validity of stockholder consents, which challenges were based on the fact that the consents had a “preprinted” date but were not individually dated by the stockholders providing them. The *Wexford* Court explained that Section 228(c)'s instruction that every written consent shall bear the date of signature of each stockholder is a statutory mandate, thus requiring each consent to be individually dated to be valid. Issues arising out of the *Wexford* Court's opinion have called into question the validity of corporate actions taken in reliance on consents that were not signed and dated by stockholders representing a sufficient number of votes to take the action.

Section 228(c), as amended, will continue to provide a sixty-day period for the delivery of consents representing a sufficient number of votes to take the action; however, the amendments will modify the provisions dealing with the commencement of such period. Section 228(c) currently provides that no written consent shall be effective to take corporate action unless, “within 60 days of the earliest dated consent delivered in the manner required by [Section 228],” written consents signed by a sufficient number of holders are delivered to the corporation. As amended, Section 228(c) will provide that the sixty-day period commences on the first date a consent is delivered to the corporation.

Consistent with the foregoing, the 2017 amendments will eliminate from Section 228(c) the current language providing that, where a stockholder has provided that its consent is to become effective at a later time (including a time determined upon the occurrence of an event), “such later effective time will serve as the date of signature.” The 2017 amendments will not change the requirement that, where instructions are given or provision is made for a later effective time, the later effective time must occur within 60 days after the instruction is given or provision is made. The amendments will also make technical conforming changes to Section 228(d)(1) to eliminate references to the “deemed” dates for electronic consents.

**Merger Amendments**

The 2017 amendments will revise the provisions of the DGCL dealing with the authorization and accomplishment of mergers and consolidations. Despite their length, the merger amendments are primarily technical and clarifying in nature. Most of the amendments are intended to provide consistency among the various sections of the DGCL governing mergers and consolidations, not to effect substantive changes.

First, Section 254 (dealing with mergers or consolidations of domestic corporations and joint-stock or other associations), Section 263 (dealing with mergers or consolidations of domestic corporations and partnerships) and Section 264 (dealing with mergers or consolidations of domestic corporations and limited liability companies) are being amended to expressly permit mergers and consolidations of Delaware corporations with joint-stock or other associations, partnerships and limited liability companies, respectively, formed or organized under the laws of a
non-U.S. jurisdiction.

Second, the sections of the DGCL governing mergers or consolidations, as applicable, with non-Delaware entities (i.e., Sections 252, 253, 254, 256, 258, 263, 264 and 267) are being amended to provide that such mergers or consolidations are permitted under Delaware law so long as the laws of the non-Delaware jurisdictions do not prohibit such mergers or consolidations. Currently, certain of those sections require that the laws of the other jurisdictions “permit” such mergers or consolidations, while others require that the other jurisdictions’ laws not “forbid” them. The 2017 amendments will help to ensure maximum flexibility with respect to mergers and consolidations with non-Delaware entities and provide for consistency among the applicable sections of the DGCL.

Third, minor technical amendments are being made to Section 251 (dealing with mergers or consolidations of domestic corporations). Section 251 currently provides that any two or more corporations “existing under the laws of [the State of Delaware]” may merge or consolidate. The 2017 amendments will eliminate the term “existing under the laws of this State,” using instead the phrase “corporations of this State”; no substantive change is intended by the amendment. In addition, Section 251(b)(6), which deals with the treatment of fractional interests in a merger or consolidation, is being amended to clarify and confirm the treatment of such interests, whether of the surviving corporation or of any other corporation or entity the shares, rights or other securities of which are to be received in the merger or consolidation; similar changes dealing with fractional interests are being made to the other applicable sections of the DGCL. Section 251(c) is also being revised to make clear the distinction between the “surviving corporation” of a merger and the “resulting corporation” of a consolidation; similar amendments clarifying the distinction are being made to the other applicable sections of the DGCL.

Fourth, Section 252 (dealing with mergers or consolidations of domestic and foreign corporations), Section 253 (dealing with short-form mergers involving corporations), Section 258 (dealing with mergers or consolidations of domestic and foreign stock and nonstock corporations) and Section 267 (dealing with short-form mergers involving a non-corporate parent entity) are being amended to employ the use of the term “foreign corporation” as it is defined in Section 371(a) of the DGCL. (Section 371(a) defines a “foreign corporation” as a “corporation organized under the laws of any jurisdiction other than [the State of Delaware].”) The amendments are generally designed to ensure that all such sections deal consistently with mergers or consolidations, as applicable, with a corporation organized under the laws of any jurisdiction other than the State of Delaware.

Fifth, Section 255 (dealing with mergers or consolidations of domestic nonstock corporations), Section 256 (dealing with mergers or consolidations of domestic and foreign nonstock corporations), and Section 257 (dealing with mergers or consolidations of domestic stock and nonstock corporations) are being amended to clarify and confirm the manner in which memberships and membership interests in a nonstock corporation may be treated in a merger. In addition, existing language in Section 257 dealing with the treatment of such interests is being eliminated, as it is redundant of the new language. (The key amendments to Section 257 apply by reference, in the case of Delaware corporations, to Section 258, which deals with mergers or consolidations of domestic and foreign stock and nonstock corporations).
Lastly, the 2017 amendments will update the applicable sections of the DGCL dealing with mergers and consolidations to adopt a consistent convention for the use of the terms “organized” and “formed” as they relate to constituent entities. Under the amendments, the term “organized” is used with respect to corporations and refers to the method by which a corporation is formed, incorporated, created or otherwise comes into being under the laws governing its internal affairs, while the term “formed” is used with respect to entities other than corporations and includes the method by which any such entity is formed, created or otherwise comes into being under the laws of the jurisdiction governing its internal affairs. (Both terms are used with respect to joint stock associations, as such associations may have attributes of being both “organized” and “formed,” depending on the laws of the jurisdiction governing them.)

**Effective Time of Section 203 “Opt-Out”**

Section 203 of the DGCL, which deals with restrictions on business combinations between a corporation and an “interested stockholder,” is being amended to clarify when an amendment to the certificate of incorporation or bylaws “opting out” of those restrictions becomes effective. Currently, Section 203(b)(3) provides that the restrictions shall not apply if “the corporation, by action of its stockholders, adopts an amendment to its certificate of incorporation or bylaws expressly electing not to be governed by [Section 203].” It then provides that any amendment so adopted shall be “effective immediately” with respect to corporations that (x) have never had a class of voting stock listed on a national securities exchange or held of record by more than 2,000 holders and (y) have not elected through their certificate of incorporation (or any amendment thereto) to be governed by Section 203 and that, in all other cases, the amendment “shall not be effective until 12 months after the adoption of such amendment, and shall not apply to any business combination between such corporation and any person who became an interested stockholder of such corporation on or prior to such adoption.”

The amendments to Section 203(b)(3) clarify that an amendment to the corporation’s certificate of incorporation opting out of the restrictions on business combinations becomes effective at the date and time such amendment becomes effective under Section 103 of the DGCL (in the case of a corporation that has never had a class of voting stock listed on a national securities exchange or held of record by more than 2,000 stockholders and that has not elected through its original certificate of incorporation or any amendment thereto to be governed by Section 203) or twelve months after the effective date and time of such amendment (in the case of all other corporations), rather than the time at which the amendment is adopted by a vote of stockholders. In the latter scenario, the amendment electing not to be governed by Section 203 will not apply to any business combination between the corporation and any person who became an interested stockholder of the corporation before, in the case of an amendment to the certificate of incorporation, the date and time at which the certificate filed in accordance with Section 103 becomes effective or, in the case of an amendment to the bylaws, the date of the adoption of such amendment.

**Annual Reports**

Section 374 of the DGCL is being amended to streamline the annual reporting requirements for corporations formed in...
another jurisdiction and qualifying to do business in the State of Delaware. In addition, Section 502 of Title 8 of the Delaware Code is being amended to clarify the information required to be disclosed in annual reports filed by Delaware corporations with the Secretary of State of the State of Delaware.

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