

SPONSOR:

[HOUSE OF REPRESENTATIVES/DELAWARE STATE SENATE]  
148th GENERAL ASSEMBLY

[HOUSE/SENATE] BILL NO. \_\_\_\_

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

1           Section 1. Amend § 262(c), Title 8 of the Delaware Code, by making insertions as shown by underline and  
2 deletions as shown by strike through as follows:

3           (c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section  
4 shall be available for the shares of any class or series of its stock as a result of an amendment to its certificate of  
5 incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or  
6 substantially all of the assets of the corporation. If the certificate of incorporation contains such a provision, the  
7 ~~procedures~~ provisions of this section, including those set forth in subsections (d), ~~and (e), and (g)~~ of this section,  
8 shall apply as nearly as is practicable.

9           Section 2. Amend § 262(g), Title 8 of the Delaware Code, by making insertions as shown by underline and  
10 deletions as shown by strike through as follows:

11           (g) At the hearing on such petition, the Court shall determine the stockholders who have complied with  
12 this section and who have become entitled to appraisal rights. The Court may require the stockholders who have  
13 demanded an appraisal for their shares and who hold stock represented by certificates to submit their certificates of  
14 stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any  
15 stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder. If  
16 immediately before the merger or consolidation the shares of the class or series of stock of the constituent  
17 corporation as to which appraisal rights are available were listed on a national securities exchange, the Court shall  
18 dismiss the proceedings as to all holders of such shares who are otherwise entitled to appraisal rights unless (1) the  
19 total number of shares entitled to appraisal exceeds 1% of the outstanding shares of the class or series entitled to  
20 appraisal, (2) the value of the consideration provided in the merger or consolidation for such total number of shares  
21 exceeds \$1 million, or (3) the merger was approved pursuant to § 253 or § 267 of this title.

22 Section 3. Amend § 262(h), Title 8 of the Delaware Code, by making insertions as shown by underline and  
23 deletions as shown by strike through as follows:

24 (h) After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be  
25 conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing  
26 appraisal proceedings. Through such proceeding the Court shall determine the fair value of the shares exclusive of  
27 any element of value arising from the accomplishment or expectation of the merger or consolidation, together with  
28 interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court  
29 shall take into account all relevant factors. Unless the Court in its discretion determines otherwise for good cause  
30 shown, and except as provided in this subsection, interest from the effective date of the merger through the date of  
31 payment of the judgment shall be compounded quarterly and shall accrue at 5% over the Federal Reserve discount  
32 rate (including any surcharge) as established from time to time during the period between the effective date of the  
33 merger and the date of payment of the judgment. At any time before the entry of judgment in the proceedings, the  
34 surviving corporation may pay to each stockholder entitled to appraisal an amount in cash, in which case interest  
35 shall accrue thereafter as provided herein only upon the difference, if any, between the amount so paid and the fair  
36 value of the shares as determined by the Court. Upon application by the surviving or resulting corporation or by any  
37 stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, proceed to trial upon  
38 the appraisal prior to the final determination of the stockholders entitled to an appraisal. Any stockholder whose  
39 name appears on the list filed by the surviving or resulting corporation pursuant to subsection (f) of this section and  
40 who has submitted such stockholder's certificates of stock to the Register in Chancery, if such is required, may  
41 participate fully in all proceedings until it is finally determined that such stockholder is not entitled to appraisal  
42 rights under this section.

43 Section 4. Sections 1 through 3 shall be effective only with respect to transactions consummated pursuant  
44 to agreements entered into on or after August 1, 2015 (or, in the case of mergers pursuant to Section 253, resolutions  
45 of the board of directors adopted on or after August 1, 2015 or, in the case of mergers pursuant to Section 267,  
46 authorizations provided on or after August 1, 2015 in accordance with an entity's (as defined in Section 267)  
47 governing documents (as defined in Section 267) and the laws of the jurisdiction under which such entity is formed  
48 or organized), and appraisal proceedings arising out of such transactions.

#### **SYNOPSIS**

Section 1. The amendment to Section 262(c) is intended to clarify that where a provision of the certificate of incorporation confers appraisal rights where those rights otherwise do not exist, an appraisal proceeding must be dismissed under the new provisions of subsection (g) of Section 262, if applicable.

Section 2. The amendment to Section 262(g) limits the availability of a judicial determination and award of fair value where the corporation's shares had been traded on a national securities exchange. In that circumstance 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. In a short-form merger under Section 253 or Section 267, however, there is no requirement of approval by the corporation's board of directors and therefore no obligation on the part of directors to approve and recommend the merger, and appraisal may be the only remedy. Accordingly, the limitation in new subsection (g) also is not applicable to mergers accomplished pursuant to Section 253 or Section 267.

Section 3. The amendment to Section 262(h) provides an option to the surviving corporation to pay to the stockholders seeking appraisal a sum of money, the amount of which is to be determined in the sole discretion of the surviving corporation, at any time before judgment is entered in the appraisal proceeding, with the result of avoiding the need to pay subsequently accruing interest on that sum. There is no requirement or inference that the amount so paid by the surviving corporation is equal to, greater than, or less than the fair value of the shares to be appraised. Where one or more stockholders' entitlement to appraisal is contested in good faith, the corporation may elect to pay such amount only to those stockholders whose entitlement to appraisal is uncontested.

Section 4. Section 4 provides that these amendments shall be effective only with respect to transactions consummated pursuant to agreements entered into on or after August 1, 2015 (or, in the case of mergers pursuant to Section 253, resolutions of the board of directors adopted on or after August 1, 2015 or, in the case of mergers pursuant to Section 267, authorizations provided on or after August 1, 2015 in accordance with an entity's (as defined in Section 267) governing documents (as defined in Section 267) and the laws of the jurisdiction under which such entity is formed or organized), and appraisal proceedings arising out of such transactions.