INSIGHTS
The Corporate & Securities Law Advisor

VOLUME 31, NUMBER 4, APRIL 2017

CORPORATE LAW

2017 Proposed Amendments to the Delaware General Corporation Law

Proposed amendments to the General Corporation Law of the State of Delaware have been approved by the Corporation Law Section of the Delaware State Bar Association and are expected to be introduced to the Delaware General Assembly. The amendments address blockchain technology, stockholder consents, mergers and consolidations, and annual reporting.

By John Mark Zeberkiewicz and Brigitte V. Fresco

Legislation setting forth the 2017 proposed amendments to the General Corporation Law of the State of Delaware (DGCL) has been approved by the Corporation Law Section of the Delaware State Bar Association and is expected to be introduced to the Delaware General Assembly. If the amendments become effective, they will, among other things: (1) provide statutory authority for the use of "blockchain" or "distributed ledger" technology for the administration of corporate records; (2) dispense with the requirement that stockholder consents be individually dated, thereby eliminating a common "foot fault" for the validity of stockholder consents; (3) 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 (4) 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, if enacted, will be effective with respect to 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

The 2017 amendments will modify several sections of the DGCL 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

John Mark Zeberkiewicz *is a director, and* **Brigitte V. Fresco** *is counsel, at Richards, Layton & Finger, P.A., in Wilmington, DE. The views expressed herein are the views of the authors and are not necessarily the views of the firm or its clients.*

on a central source.[1] 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.[2]

Although at least one public Delaware corporation already has adopted distributed ledger technology for a series of its preferred stock,[3] the current DGCL does not expressly accommodate distributed ledger technology for the maintenance of corporate records, and it contains certain provisions requiring the corporation to maintain records. 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,[4] 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,[5] also is 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 any 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).[6] In addition, such records must record the information specified in Section 156, which deals with the amount of consideration for partly paid shares;[7] Section 159, which relates to the transfer of shares for collateral security, and not absolutely;[8] Section 217(a), which relates to the voting of shares subject to a pledge;[9] and Section 218, which deals with voting trusts.[10] Finally, such records must record transfers of stock as governed by Article 8 of the Delaware Uniform Commercial Code.[11]

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 statutory definition of which is being updated to specifically reference distributed electronic networks or databases.[12] 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),[13] 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,[14] as well as Section 364, which deals with notices given by public benefit corporations.[15]

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. For example, corporations that have certificated stock, which includes most public corporations, 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.[16] Although Section 158 of the DGCL allows the board of directors to provide by resolution that some or all of the shares of any class of stock shall be uncertificated, it provides that "[a]ny such resolution shall not apply to shares represented by a certificate until such certificate is surrendered to the corporation."[17] The 2017 amendments do not propose to effect changes to Section 158. 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,[18] 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.*, 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.[19] 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.[20] 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 60-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.[21] As amended, Section 228(c) will provide that the 60-day period commences on the first date a consent is delivered to the corporation.

Consistent with the foregoing, the 2017 amendments will eliminate from current Section 228(c) the 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."[22] 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 also will 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, these 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.

Mergers or Consolidations with Non-Delaware Entities

The 2017 amendments will make several changes to the sections of the DGCL dealing with mergers or consolidations involving non-Delaware entities (*i.e.*, Sections 252, 253, 254, 256, 258, 263, 264, and 267) in an effort to ensure that such sections are consistent in their scope and application.

First, Section 254, which deals with mergers or consolidations of domestic corporations and joint-stock or other associations;[23] Section 263, which deals with mergers or consolidations of domestic corporations and partnerships;[24] and Section 264, which deals with mergers or consolidations of domestic corporations and limited liability companies,[25] will be 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. This will make such provisions consistent, in that respect, with the corresponding provisions of existing Sections 252 and 253.[26]

Second, Section 252, which deals with mergers or consolidations of domestic and foreign corporations,[27] Section 253, which deals with short-form mergers involving corporations,[28] Section 258, which deals with mergers or consolidations of domestic and foreign stock and nonstock corporations,[29] and Section 267, which deals with short-form mergers involving a non-corporate parent entity,[30] are being amended to employ the use of the term "foreign corporation" as defined in Section 371(a) of the DGCL in reference to the non-Delaware constituent corporation. That subsection defines a "foreign corporation" as a "corporation organized under the laws of any jurisdiction other than [the State of Delaware]."[31]

Third, the sections of the DGCL governing mergers or consolidations, as applicable, with non-Delaware entities will be 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.[32] Providing that a merger or consolidation will be permitted if the laws of the non-Delaware jurisdiction do "not prohibit" it will provide assurances that a merger or consolidation will be valid under Delaware law, even if the laws of the non-Delaware jurisdiction do not expressly authorize the specific transaction.

Treatment of Fractional Interests in a Merger or Consolidation

Section 251, which deals with mergers between Delaware stock corporations,[33] will undergo several technical amendments,[34] the most notable of which deals with the treatment of fractional interests in a merger or consolidation. It 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.[35] Other applicable sections of the DGCL are being amended such that all are consistent in their treatment of fractional interests in a merger or consolidation.

Treatment of Memberships and Membership Interests in a Merger or Consolidation

Section 255, which deals with mergers or consolidations of domestic nonstock corporations;[36] Section 256, which deals with mergers or consolidations of domestic and foreign nonstock corporations;[37] and Section 257, which deals with mergers or consolidations of domestic stock and nonstock corporations,[38] 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.

Additional Conforming Changes in Terminology

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. 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,"[39] 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 this section."[40] 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."[41]

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 12 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. 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 Reporting

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.

Notes

1. For a more detailed description of distributed ledger technology, *see* D. Mills, et al., "Distributed Ledger Technology in Payments, Clearing, and Settlement," Finance and Economics Discussion Series 2016-095, Washington: Board of Governors of the Federal Reserve System (2016), available at *https://doi.org/10.17016/FEDS.2016.095*.
2. *See, e.g.*, Vice Chancellor J. Travis Laster, "*The Block Chain Plunger: Using Technology to Clean Up Proxy Plumbing and Take Back the Vote*," Keynote Speech, Council of Institutional Investors, Chicago, Sept. 29, 2016 (identifying various "problems with the voting and stockholding infrastructure of U.S. securities markets" and stating that "[d]istributed ledger technologies

can provide better accuracy, greater transparency, and superior efficiency for settling securities trades and voting in corporate elections" than the current system) (citations omitted). *See also In re Dole Food Company, Inc.*, 2017 WL 624843 (Del. Ch. Feb. 15, 2017). *In re Dole* involved a motion by class counsel in a breach of fiduciary duty suit challenging a going-private merger to modify the allocation procedure to authorize the distribution of settlement proceeds to members of the stockholder class. The Court noted that while there were only 36,793,758 shares in the class, facially valid claims for 49,164,415 shares had been submitted. The Court stated that "determining the actual ownership of the shares comprising the class still would require a forensic audit of herculean proportions," resulting in a process that "would be lengthy, arduous, cumbersome, expensive, and fundamentally uncertain." After noting that the problem "is an unintended consequence of the top-down federal solution to the paperwork crisis that threatened Wall Street in the 1970s" resulting in the current system, the Court stated that "[d]istributed ledger technology offers a potential technological solution by maintaining multiple, current copies of a single and comprehensive stock ownership ledger."

3. *See* Overstock.com, Inc., Current Report (Form 8-K) (Dec. 16, 2016).
4. *See* 8 Del. C. § 219 (2016).
5. 8 Del. C. § 224 (2016).
6. *See* 8 Del. C. § 220.
7. *See* 8 Del. C. § 156.
8. *See* 8 Del. C. § 159.
9. *See* 8 Del. C. § 217(a).
10. *See* 8 Del. C. § 218.
11. *See* 6 Del. C. §§ 8-101 *et seq*.
12. The provision of notice by electronic transmission is governed by existing Section 232 of the DGCL, subsection (c) of which currently 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." *See* 8 *Del. C.* § 232 (2016). The 2017 amendments would revise Section 232(c) to define "electronic transmission" to include "any form of communication, not directly involving the physical transmission of paper, *including the use of, or participation in, one or more electronic networks or databases (including one or more distributed electronic networks or databases)*, 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."
13. *See* 8 Del. C. § 151(f).
14. *See* 8 Del. C. § 202(a) (2016) (providing that a "written restriction or restrictions on the transfer or registration of transfer of a security of a corporation, or on the amount of the corporation's securities that may be owned by any person or group of persons, if permitted by [Section 202] and noted conspicuously on the certificate or certificates representing the security or securities so restricted or, in the case of uncertificated shares, contained in the notice or notices sent pursuant to [Section 151(f) of the DGCL], may be enforced against the holder of the restricted security or securities" and that "[u]nless noted conspicuously on the certificate or certificates representing the security or securities so restricted or, in the case of uncertificated shares, contained in the notice or notices sent pursuant to [Section 151(f)], a restriction, even though permitted by this section, is ineffective except against a person with actual knowledge of the restriction."). The 2017 amendments will provide that the notices pursuant to Section 151(f) under Section 202(a) may be "given," rather than "sent."
15. *See* 8 Del. C. § 364 (2016) (providing that "[a]ny stock certificate issued by a public benefit corporation shall note conspicuously that the corporation is a public benefit corporation" formed pursuant to subchapter XV of the DGCL and requiring that "[a]ny notice sent by a public benefit corporation pursuant to [Section 151(f) of the DGCL] shall state conspicuously that the corporation is a public benefit corporation" formed pursuant to such subchapter. As with the changes to Section 202(a), the 2017 amendments will provide that notices pursuant to Section 151(f) under Section 364 may be "given," rather than "sent."
16. *See* 6 Del. C. § 8-301(a) ("Delivery of a certificated security to a purchaser occurs when: (1) the purchaser

acquires possession of the security certificate; (2) another person, other than a securities intermediary, either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired possession of the certificate, acknowledges that it holds for the purchaser; or (3) a securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and is (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii) specially indorsed to the purchaser by an effective indorsement and has not been indorsed to the securities intermediary or in blank.").

17. 8 Del. C. § 158.
18. 8 Del. C. § 228.
19. 832 A.2d 129 (Del. Ch. 2003).
20. The *Wexford* Court stated: "Section 228(c) reads: 'Every written consent shall bear [the date of signature of each stockholder who signs the consent].' The word 'shall' is a mandatory term." *Id.* at 151. The Court explained that the dating requirement is designed for purposes of determining whether the timing requirement in Section 228(c)—that, for an action by written consent to be effective, consents signed by a sufficient number of holders to take the action must be duly delivered within 60 days of the earliest dated consent—has been met. *Id.* at 152.
21. 8 Del. C. § 228(c) (2016).
22. *Id*.
23. 8 Del. C. § 254
24. 8 Del. C. § 263.
25. 8 Del. C. § 264.
26. Section 263 was added to the DGCL in 1988 as part of Senate Bill 452 adopted by the 134th General Assembly. *See* S.B. 452, 134th Gen. Assem. (Del. 1988). Senate Bill 452 was amended to clarify that a Delaware corporation could only merge or consolidate with a partnership of "this State or any other state of states of the United States, or of the District of Columbia." *See* Synopsis to Amendment No. 1 to S.B. 452, 134th Gen. Assem. (1988) ("This amendment makes clear that a Delaware corporation may not merge into a foreign jurisdiction other than a state of the United States or the District of Columbia."). Section 264 was added to the DGCL in 1993. *See* S.B. 146, 137th Gen. Assem. (Del. 1993). The relevant language of Section 264 tracked that of Section 263, providing that a Delaware corporation could only merge or consolidate with a limited liability company of "this State or any other state of states of the United States, or of the District of Columbia." Notably, the legislation adopting Section 264 also effected amendments to Section 252 (mergers and consolidations of Delaware corporations and non-Delaware corporations) and Section 253 (short-form mergers) to authorize a Delaware corporation to merge directly with or into a non-U.S. corporation under Section 252 and 253. *Id.*
27. 8 Del. C. § 252.
28. 8 Del. C. § 253.
29. 8 Del. C. § 258.
30. 8 Del. C. § 258.
31. 8 Del. C. § 371(a). The amendments to Section 258 will specify that the term "foreign corporation" includes "a nonstock corporation organized under the laws of any jurisdiction" other than the State of Delaware.
32. For example, Section 252(a) provides that "[a]ny 1 or more corporations of this State may merge or consolidate with 1 or more other corporations of any other state or states of the United States, or of the District of Columbia *if the laws of the other state or states, or of the District permit a corporation of such jurisdiction to merge or consolidate with a corporation of another jurisdiction*," 8 Del. C. § 252(a) (2016) (emphasis added), while Section 263(a) provides that "[a]ny 1 or more corporations of this State may merge or consolidate with 1 or more partnerships (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), of this State or of any other state or states of the United States, or of the District of Columbia, *unless the laws of such other state or states or the District of Columbia forbid such merger or consolidation*," 8 Del. C. § 263(a) (2016) (emphasis added).
33. 8 Del. C. § 251.
34. Section 251 currently provides that any two or more corporations "existing under the laws of [the State of Delaware]" may merge or consolidate. 8 Del. C. § 251(a) (2016). 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(c) is 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.

35. Currently, Section 251(b)(6) provides that an agreement of merger or consolidation may contain "a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, interests or rights, or for any other arrangement with respect thereto, consistent with [Section 155]," without further elaboration regarding the entity whose fractional interests are at issue. 8 Del. C. § 251(b)(6) (2016).
36. 8 Del. C. § 255.
37. 8 Del. C. § 256.
38. 8 Del. C. § 257. 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. *See id.* § 258 ("The method and procedure to be followed by the constituent corporations so merging or consolidating shall be as prescribed in [Section 257] in the case of Delaware corporations.").
39. 8 Del. C. § 203.
40. 8 Del. C. § 203(b)(3) (2016).
41. *Id.*