

## Analyzing the Latest Amendments to the Delaware General Corporation Law

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For 2010, two bills containing amendments to the Delaware General Corporation Law (the “DGCL”) have been proposed by the Delaware State Bar Association and introduced into the Delaware legislature. One bill, addressing non-stock corporations, has been signed into law by the Governor. As discussed more fully below, all amendments will become effective in August 2010.

The 2010 amendments include a comprehensive revision of the DGCL with respect to non-stock corporations, which is intended to ensure that the provisions of the DGCL are consistently applied to non-stock corporations. In addition, the 2010 amendments add a new Section 267 to the DGCL, which permits a short-form merger between a subsidiary Delaware corporation and a non-corporate parent entity.

Also included among the 2010 amendments are changes to Section 145 to clarify the application of indemnification and advancement rights to persons other than a corporation’s current directors and officers, a revision of Section 251 to permit the certificate of incorporation of a surviving corporation to be restated in a merger, changes to Section 278 to confirm that the provisions of the DGCL governing the winding-up of corporations apply to corporations that have expired by their terms, revisions to Sections 242 and 251 of the DGCL to streamline the board process for submitting certificates of amendment and merger agreements to stockholders, and revisions to various sections of the DGCL to modernize the manner in which service of process may be made upon the Delaware Secretary of State.

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### Non-stock Corporations

The 2010 amendments create a new section of the DGCL applying all provisions of the DGCL to non-stock corporations, except as otherwise expressly provided. Section 114 “translates” the terms of the DGCL that apply to stock corporations into non-stock corporation terms. For example, if applicable to a non-stock corporation, a section of the DGCL referring to “stockholders” will be deemed to refer to “members” of a non-stock corporation, and a DGCL reference to the “board of directors” will be deemed to refer to “the governing body” of a non-stock corporation.

The 2010 non-stock corporation amendments modify various sections of the DGCL to ensure the clear application of the DGCL to non-stock corporations and to make certain changes to enhance the “user-friendliness” of non-stock corporations. For example, an amendment to Section 144 codifies the Delaware Supreme Court’s decision in *Oberly v. Kirby*, 592 A.2d 445 (Del. 1991), by prohibiting members of non-profit non-stock corporations from ratifying transactions under Section 144(a)(2) because such members have no financial interest in such corporations. Section 253, which enables short-form mergers, was amended to permit a non-stock corporation to effect a short-form merger when the non-stock corporation is the parent and the surviving corporation, but no merger may impair the charitable status of a charitable non-stock corporation. The non-stock corporation amendments also amended existing Section 215(f) to provide a statutory presumption that the record date for determining the members of non-stock corporations entitled to vote at a meeting of members will be the date of the meeting or corporate action, but this presumption may be altered. Section 255, which currently governs the merger or consolidation of domestic non-stock corporations, was amended

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to eliminate the need for two votes of the governing body if the members of a non-stock corporation do not have the right to vote on the merger.

In addition, the 2010 non-stock corporation amendments revised the existing law governing non-stock corporations in several respects. Non-stock corporations will be required to have members, but the failure to have members will not invalidate such corporations. Also, if a non-stock corporation does not specify its conditions of membership in its certificate of incorporation or bylaws, its members will be deemed to be those who elect the governing body's members. The 2010 amendments expressly distinguish between memberships for non-profit non-stock corporations and membership interests for all other non-stock corporations and provide that members cannot take an equity interest in non-profit non-stock corporations. Non-stock corporations (other than those that are nonprofit) may pay dividends and repurchase membership interests without calculating capital because the capital will be deemed to be zero, although the relevant surplus and/or net profits tests otherwise will apply.

## **Registered Agent in Delaware**

Section 132(b) was amended to clarify that the DGCL's provisions governing registered agents apply to registered agents for both domestic and foreign corporations.

## **Indemnification**

The 2010 amendments to Section 145 distinguish between the indemnification rights of a corporation's current directors and officers and the indemnification rights of a former officer or director or persons serving at the request of the corporation as directors, officers, employees, or agents of other entities. The revision to Section 145(d) clarifies that the provision in that Section requiring a specific determination that indemnification is proper in certain circumstances applies only when the

person requesting indemnification is a director or officer of the corporation at the time the determination is made (as opposed to when the person so requesting is a director, officer, agent, or employee of another entity or a former director or officer). The changes to Section 145(e) clarify that persons serving at the request of the corporation as directors, officers, employees or agents of another entity may receive advancement of expenses from the corporation on such terms and conditions, if any, as the corporation deems appropriate. Section 145(e) previously had expressly authorized advancement only to persons serving as directors, officers, employees, and agents of the corporation itself, leading to some ambiguity as to the source of the authority to provide advancement to persons serving "at the request" of the corporation.

## **Notice of Proposed Amendments to Certificates of Incorporation and of Merger Agreements**

Section 242(b)(2) was amended to provide that, when seeking stockholder approval of an amendment to a corporation's certificate of incorporation, the decision to include either a copy or a summary of the proposed amendment in the notice of a stockholder meeting does not have to be approved by a specific act of the corporation's board of directors. This amendment provides corporations more freedom by permitting non-directors to make this decision, but it does not define or limit the board's duty of disclosure to stockholders with respect to any amendment to a certificate of incorporation. Similar amendments were made to Section 251(c), which also contains an option for a corporation to submit to stockholders either a merger agreement or a summary thereof.

## **Amending a Certificate of Incorporation in Connection with a Merger**

The DGCL currently permits the amendment of the certificate of incorporation of a

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surviving corporation in a merger pursuant to the terms of the merger agreement. The 2010 amendments provide that a certificate of incorporation of a surviving corporation in a merger also may be restated pursuant to the terms of the merger agreement as well. These amendments eliminate the necessity of making two filings with the Delaware Secretary of State when a surviving corporation that had not previously filed a restated certificate of incorporation wishes to designate its certificate of incorporation, as amended in a merger, as a “restated certificate of incorporation.” These amendments required corresponding changes to Sections 252(c)(4), 254 (d)(4), 263 (c)(4), and 264(c)(4).

## **Short-Form Mergers**

Section 253 of the DGCL currently provides that a corporation may merge with its subsidiary corporations without holding a meeting of stockholders of the subsidiary or parent corporation if the parent owns at least 90 percent of the outstanding shares of each class of stock that otherwise would be entitled to vote on the merger. The 2010 amendments create a new Section 267, which will permit such short-form mergers between a subsidiary corporation and a non-corporate parent entity meeting such ownership requirements. This amendment will provide greater flexibility for structuring corporate transactions and will eliminate the need to hold stockholder meetings to accomplish “back-end” or “clean-up” mergers with or into vehicles such as limited liability companies and partnerships. The non-corporate entities listed in new Section 267 include partnerships (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), limited liability companies, joint-stock associations, and certain unincorporated entities or trusts. This list does not include non-stock corporations, which are covered in Section 253 through the “translator” provisions of Section 114.

The addition of Section 267 required conforming amendments to Sections 104, 111(a)

(6), 253(a), 262(b)(3) and 262(d)(2). Thus, practitioners should be aware that a new version of Section 262 will need to be attached to merger notices and proxy statements for mergers approved after August 1, 2010.

## **Dissolution**

A corporation that wishes to dissolve must file a certificate of dissolution with the Delaware Secretary of State. The 2010 amendments revise Sections 274 and 275(d) to require that a certificate of dissolution set forth the date of the filing of the corporation’s original certificate of incorporation with the Delaware Secretary of State. The amendments to Section 278 confirm that Sections 279-282 of the DGCL (which set forth procedures governing the winding-up of dissolved corporations) apply to a corporation that has expired by its terms (such as a special purpose acquisition company or “SPAC”).

## **Service of Process upon the Delaware Secretary of State by Electronic Transmission**

The 2010 amendments revised various sections of the DGCL to modernize the manner in which service of process may be made upon the Delaware Secretary of State by authorizing the Delaware Secretary of State to prescribe rules permitting such service of process to be made by electronic transmission. The amendments give greater freedom to the Delaware Secretary of State to adopt such rules with respect to service of process as it deems necessary or appropriate.

## **Foreign Corporations Qualified to Do Business in Delaware**

Currently, Section 371 requires that non-Delaware corporations must make certain filings with the Delaware Secretary of State to qualify to do business in Delaware, including a certificate evidencing a foreign corporation’s

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existence issued by an authorized officer of the jurisdiction of such corporation's incorporation. The 2010 amendments to Section 371(b)(1) require that such a certificate must be issued as of a date not earlier than six months prior to the date on which it is filed with the Delaware Secretary of State. The amendments to Section 371(b)(2) expand the type of entities that may serve as registered agents for foreign corporations qualified to do business in Delaware.

## **Effectiveness of 2010 Amendments**

The non-stock corporation amendments will become effective on August 1, 2010. All other amendments will become effective on August 2, 2010, and the amendments revising Sections 253 and creating new Section 267 will be effective only with respect to transactions consummated pursuant to board resolutions adopted after August 1, 2010 and appraisal proceedings arising out of such transactions.