2016 Amendments to the Delaware General Corporation Law and the Delaware Limited Liability Company Act Effective August 1, 2016

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Delaware Law Update

08.01.2016

In the event that you missed it, on June 16, 2016, Delaware Governor Jack Markell signed House Bill 371 into law, thereby amending the Delaware General Corporation Law (the "DGCL") in numerous significant respects. Also, on June 22, 2016, Governor Markell signed House Bill 372 into law, which amended the Delaware Limited Liability Company Act (the "LLC Act"). The amendments to the DGCL and the LLC Act as more fully described below will go into effect on or apply to mergers and transactions entered into on, or after, August 1, 2016.

2016 Amendments to the DGCL

While a number of the 2016 Amendments to the DGCL are significant, perhaps the most noteworthy are those (1) that relate to, and limit, appraisal proceedings under 8 Del. C. § 262; (2) that relate to mergers under 8 Del. C. § 251(h); and (3) that relate to the jurisdiction of the Court of Chancery under 8 Del. C. § 111.

Jurisdiction of the Court of Chancery under Section 111(a)

Section 111(a) of the DGCL generally governs the Court of Chancery's subject matter jurisdiction over civil actions regarding the interpretation, application, enforceability or validity of any "corporate instruments and provisions of" the DGCL, including, *inter alia*, the certificate of incorporation, bylaws, etc. 8 Del. C. § 111. Effective August 1, 2016, the 2016 Amendments to Section 111(a) (2) expand the Court's subject matter jurisdiction specifically to hear and decide civil actions relating to "any instrument document or agreement … (ii) to which a corporation and 1 or more holders of its stock are parties, and pursuant to which any such holder or holders sell or offer to sell any of such stock, or (iii) by which a corporation agrees to sell, lease or exchange any of its property or assets, and which by its terms provides that 1 or more holders of its stock approve of or consent to such sale, lease or exchange." This amendment will expand the Court of Chancery's subject matter jurisdiction, *inter alia*, to hear disputes regarding stock purchase agreements and asset purchase agreements regardless of the remedy requested.

Section 251(h) Mergers

In recent years, Section 251(h) gained popularity in accomplishing a tender offer in public M&A deals primarily because the need for

a back-end merger vote in a two-step merger involving a front-end tender or exchange offer was eliminated. The proposed amendments to Section 251(h) are designed largely to clarify the procedures and requirements of the subsection. Section 251(h) generally permits, under certain circumstances, the second step of a two-step merger to be consummated without the need for a stockholder vote, even if the buyer receives less than 90% of the acquired company's outstanding stock. The 2016 Amendments to Section 251(h) both clarify a number of the requirements under Section 251(h) and expand the availability of Section 251(h) as follows:

Eligibility – To be eligible to use Section 251(h), the target corporation's stock needs to be listed on a national exchange or be held by more than 2,000 stockholders immediately prior to the merger. The 2016 Amendment to Section 251(h) clarifies that this limitation applies to any target corporation "that has a class or series of stock that" meets those requirements, *i.e.*, listed on a national exchange or held by more than 2,000 holders. The addition of this amendment means that Section 251(h) mergers are applicable to any target corporation that has at least one class or series of stock that meets this requirement even if not all of the corporation's class or series of stock meets the requirements.

Additional Minimum Conditions – The 2016 Amendments to Section 251(h)(2) also clarify that the tender or exchange offer may "be conditioned on the tender of a minimum number or percentage of shares of stock" of the target corporation "or of any class or series thereof" and that the minimum number or percentage may be effected through separate offers.

Rollover Stock – The 2016 Amendments to Section 251(h)(3) allow the buyers to include (1) "rollover" stock and (2) shares of the target corporation's stock held in treasury, or by any direct or indirect subsidiary of the target corporation of the buyer to determine whether the minimum number or percentage of shares of stock has been met through the tender or exchange offer. "Rollover stock" is defined in amended Section 251(h)(6)(g) as "any shares of stock of such constituent corporation that are the subject of a written agreement requiring such shares to be transferred, contributed or delivered to the consummating corporation or any of its affiliates in exchange for stock or other equity interests in such consummating corporation or an affiliate thereof … ."

Receipt of Stock – The 2016 Amendments to Section 251(h)(6)(f) further clarify the definition of "received" for the purpose of determining whether the minimum number or percentage of shares of stock has been met through the tender or exchange offer and breaks down what "receipt" means based on whether the shares are (1) certificated; (2) uncertificated and held of record by a clearing corporation; or (3) uncertificated and held of record by a person other than a clearing corporation. First, with respect to certificated shares, receipt means physical receipt of the stock certificates along with an executed transmittal letter, provided that the shares have not been canceled prior to the consummation of the tender or exchange offer. Second, with respect to uncertificated shares held by a clearing corporation, receipt means "transfer[red] into the depository's account by means of an agent's message." Third, with respect to uncertificated shares held by a person other than a clearing corporation, receipt means physical receipt of an executed letter of transmittal by the depository, provided that with either type of uncertificated shares, those shares have not "been reduced or eliminated due to any sale of such shares prior to consummation of the offer[.]"

Appraisal Rights and Proceedings under Section 262

The 2016 Amendments to the DGCL also include two significant alterations to stockholders' appraisal rights under Section 262. First, the amendments limit *de minimis* appraisal actions in certain transactions involving public companies. Second, the amendments provide the surviving corporation with the option to limit the accrual of interest during the pendency of the appraisal litigation.

De Minimis Exception – The 2016 Amendments to Section 262(g) mandate that the Court of Chancery ***shall dismiss*** any appraisal proceedings in connection with the merger or consolidation of any corporation whose stock, or any class or series of stock, was listed on a national securities exchange immediately before that merger or consolidation as to all holders of such shares of the constituent corporation who would otherwise be entitled to appraisal unless "(1) the total number of shares entitled to appraisal exceeds 1% of the outstanding shares of the class or series eligible for appraisal, (2) the value of the consideration provided in the merger or consolidation for such total number of shares exceeds $1 million, or (3) the merger was approved pursuant to § 253 or § 267 of this title," *i.e.*, short-form mergers. According to the bill's synopsis, the reason for the *de minimis* exception to appraisal rights is to reduce the risk that appraisal proceedings where the share value is minimal will be used as settlement leverage, considering the litigation costs involved with appraisal proceedings. Additionally, the synopsis explains that the *de minimis* exception does not apply in short-form mergers because in such cases "appraisal may be the only remedy" available to stockholders.

Tender or Payment – The 2016 Amendments to Section 262(h) provide the surviving corporation with the ability to prepay any stockholders entitled to appraisal and thus avoid the accrual of interest during the pendency of the appraisal proceeding. Specifically the 2016 Amendments to Section 260(h) state that "[a]t any time before the entry of judgment in the [appraisal] proceedings, the surviving corporation may pay to each stockholder entitled to appraisal an amount in cash, in which case interest shall accrue thereafter as provided herein only upon the sum of (1) the difference, if any, between the amount so paid and the fair value of the shares as determined by the Court, and (2) interest theretofore accrued, unless paid at that time." The purpose of this amendment is an attempt to discourage the practice of "appraisal arbitrage."

Other Amendments

Default Quorums and Voting Requirements under Section 141 – The 2016 Amendments to Section 141(c) specify default quorum and voting requirements for committees of a board of directors and subcommittees of committees of a board to be a majority of the directors serving on that committee or subcommittee. This default rule can be changed via the certificate of incorporation, bylaws or board resolution so long as a quorum is no less than one-third of the directors serving on the committee or subcommittee. Additionally, the amendments to Section 141(c)(3) clarify that references in the DGCL to board committees (and committee members) will be deemed to include references to subcommittees (and subcommittee members). Lastly, the amendments to Section 141(d) eliminate the express reference to subcommittees of committees of a board, which are now unnecessary in light of the amendments to Section 141(c)(3).

Stock Certificates under Section 158 – The 2016 Amendments to Section 158 provide that any two officers of the corporation who are authorized to do so may execute stock certificates on behalf of the corporation. The synopsis clarifies that the amendment to Section 158 "is not intended to change the existing law that the signatures on a stock certificate may be the signatures of the same person, so long as each signature is made in a separate officer capacity of such person."

Restoration under Section 311 – The 2016 Amendments to Section 311 set forth a procedure whereby a corporation's certificate of incorporation may be restored after it has expired pursuant to its own limitation. The amendment to Section 311 is consistent with Section 278, which currently provides that Sections 279 through 282 of the DGCL, relating to corporations that have dissolved, apply to any corporation that has expired by its own limitation. The 2016 Amendments to Section 311 also clarify that if a corporation desires to restore its certificate of incorporation it must (1) file all annual franchise tax reports that the corporation would have

had to file if it had not expired by limitation and (2) pay all franchise taxes that the corporation would have had to pay if it had not expired.

Revival under Section 312 – The 2016 Amendments to Section 312 differentiate the procedure to extend the term of a corporation's certificate of incorporation or to restore a corporation's certificate of incorporation if it has expired by limitation from the procedure to revive a corporation's certificate of incorporation when it has become forfeited or void. Amended Section 312 applies only to a corporation whose certificate of incorporation has become forfeited or void and now uses only the term "revival" to reflect this process, while eliminating the terms "renewal," "extension" and "restoration." The amendments to Section 312 also establish that the procedure to extend a corporation's duration is governed exclusively by Section 242. Lastly, the amendments to Section 312 simplify and clarify the procedures to revive a certificate of incorporation that has become forfeited or void, including, *inter alia*, a mechanism whereby a majority of directors then in office, even if less than a quorum, or the sole director in office, if that is the case, can authorize the revival.

2016 Amendments to the LLC Act

There were a number of amendments to the Delaware LLC Act in 2016, including amendments to (1) eliminate the default rule requiring approval or consent to be in writing; (2) provide for the voluntary assignment by a sole member of all of the Delaware LLC interests to a single assignee; (3) provide for service of process on a series of a Delaware LLC; and (4) clarify that a series, or a limited liability company on behalf of a series, is not restricted from agreeing to be liable for any or all of the debts, liabilities, obligations or expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof.

Elimination of Default Rules Requiring Approval or Consent in Writing

The 2016 Amendments to the LLC Act removed the words "affirmative" and "written" from certain sections of the LLC Act: Section 18-215(k), Section 18-304, Section 18-702(a), Section 18-704(a), Section 18-801 and Section 18-806. The removal of the word "written" before "consent" now permits members to consent to certain actions "by means other than a writing." These amendments have changed the default rule in certain instances that required written approvals or written consents to now requiring only approvals or consents.

Voluntary Assignment of Delaware LLC Interests to a Single Assignee

The 2016 Amendments to Section 18-704(a) add new subsections that provide that in connection with a voluntary assignment by the sole member of an LLC of all the LLC interests in the LLC to a single assignee, the assignee will be admitted as a member of the LLC unless otherwise provided in connection with the assignment or unless otherwise provided in the limited liability company agreement by specific reference to Section 18-704(a)(3) of the LLC Act.

Service of Process on a Series of a Delaware LLC

The 2016 Amendments to Section 18-105 provide a method for effecting service of legal process upon a series of a limited liability company established pursuant to § 18-215(b) of the Delaware Act.

Clarification that a Series Can Agree to Be Liable for Debts

The 2016 Amendments to Section 18-215(b) confirm and clarify two propositions with respect to the Delaware LLC Act. First, they confirm that neither the first sentence of § 18-215(b), nor any language in a limited liability company agreement or certificate of formation that is included pursuant to that first sentence, is to be construed as restricting a series, or a limited liability company on behalf of a series, from agreeing to be liable for any or all of the debts, liabilities, obligations or expenses incurred, contracted for or otherwise existing with respect to the limited liability company generally or any other series thereof, or restricting a limited

liability company from agreeing to be liable for any or all of the debts, liabilities, obligations or expenses incurred, contracted for or otherwise existing with respect to a series. Second, they confirm that any reference in the Delaware LLC Act to assets of a series includes assets associated with a series and any reference to assets associated with a series includes assets of a series.