

Corporate Alert

July 23, 2014

2014 Changes to Delaware Corporate Law

Earlier this month, several significant amendments to the Delaware General Corporation Law (the DGCL) were approved. These amendments are substantially the same as the amendments originally proposed in April 2014 and will generally go into effect on August 1, 2014, as described below. In addition to certain clarifying or procedural general amendments, the main substantive amendments are:

Short Form Mergers – Section 251(h)

Section 251(h) of the DGCL was enacted in August 2013 to simplify and accelerate the two-step merger process.¹ Section 251(h) currently provides that, if certain requirements are met, it is no longer necessary to go through the burdensome process of obtaining a stockholder vote for approval of a second-step merger subsequent to a public tender offer.²

To further the goal of streamlining the two-step merger process, the recent amendments revise and clarify certain requirements of using Section 251(h) to effect a merger.³ Notably, the amendments completely eliminate Section 251(h)(4), which prohibited using Section 251(h) to effect a merger agreement when a party to said agreement was an “interested stockholder” as defined in Section 203 of the DGCL. Generally, an “interested stockholder” is a person, other than the corporation and any direct or indirect majority-owned subsidiary of the corporation, who owns 15 percent or more of the outstanding voting stock of the corporation.⁴

By adding the language “permits or requires” to Section 251(h)(1), the amendments clarify that a merger can also be effected under a different statutory provision, such as Section 251(g), which permits mergers between a parent entity and its subsidiary without a stockholder vote.⁵ Prior to this amendment, it was unclear whether the parties to a merger agreement that expressly stated the merger was to be governed by Section 251(h) could decide to effect the merger pursuant to an alternative statutory provision. The amendments also provide that if the merger is not in fact effected under Section 251(h), the requirement that the merger be effected as soon as practicable following the consummation of the offer does not apply.⁶

The amendments add additional language to Section 251(h)(2) to clarify that certain categories of stock can be excluded from the tender offer and that such offer would still satisfy the requirement of being “for

¹ Del. Code Ann. tit. 8, § 251(h) (West 2013).

² Del. Code Ann. tit. 8, § 251(h) (West 2013).

³ H.R. 329, 147 Gen. Assemb., Reg. Sess. (Del. 2014).

⁴ H.R. 329, 147 Gen. Assemb., Reg. Sess. (Del. 2014); Del. Code Ann. tit. 8, § 203 (West 2009).

⁵ H.R. 329, 147 Gen. Assemb., Reg. Sess. (Del. 2014).

⁶ *Id.*

any and all of the outstanding stock” of the target.⁷ These categories include stock of the target corporation that is owned at the commencement of the tender offer by: (1) the target corporation, (2) the corporation making the offer, (3) any person that owns, directly or indirectly, all of the outstanding stock of the corporation making the offer, or (4) any direct or indirect wholly-owned subsidiary of any of the foregoing.⁸ Finally, the amendments make clear that shares of stock tendered in an offer referred to in Section 251(h)(2) are not counted towards the requisite percentage ownership amount in 251(h)(3) unless irrevocably accepted for exchange and received by the depositary before the expiration of such offer.⁹

Escrowing Director and Stockholder Consents – Sections 141(f) and 228(c)

This amendment to Section 141(f) clarifies, subject to certain restrictions, that when obtaining the requisite unanimous written consent to take a proposed action without a meeting of the board of directors or other committee, any person, even if they are not a director at the time, can provide consent that will be effective at a future date.¹⁰ The restrictions provide that such consent cannot be held in escrow (or a comparable arrangement) for a period greater than 60 days, such person must be a director at the time the consent becomes effective, and such person can revoke the consent at any point prior to the effective time.¹¹ This is particularly helpful in the context of an acquisition, which typically results in changes to the acquired company’s board of directors—under the amended Section 141(f), the post-acquisition slate of directors can provide written consent that will be effective immediately upon the consummation of the transaction.

Similar to the amendment to Section 141(f), the change to Section 228(c) clarifies that any person, even if not then a stockholder, may execute a consent to become effective at a later date, and that such consent may be held in escrow (or a comparable arrangement) for a period not greater than 60 days.¹² The subsequent effective date is treated as the date the consent was signed, and such person can revoke the consent at any point prior to the effective date.¹³

Amendments to Certificates of Incorporation Without Stockholder Approval – Section 242

The amendments to Section 242 authorize a corporation to amend its certificate of incorporation without submitting such amendments to its stockholders for approval (unless otherwise expressly required by its certificate of incorporation) to (1) change its name, (2) delete historical references to its incorporator, initial board of directors or initial subscriber for shares, or (3) delete provisions in any amendment to its certificate of incorporation effecting a change, exchange, reclassification, subdivision, combination or cancellation of stock if such change, exchange, reclassification, subdivision, combination or cancellation

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

has become effective.¹⁴ Additionally, it is no longer necessary to include a copy or brief summary of the amendment in the notice of the meeting in which said amendment is to be voted on if the notice given constitutes a notice of internet availability of proxy materials for the purposes of the Securities Exchange Act of 1934, as amended.¹⁵

Filing Voting Trusts – Section 218

The amendment to Section 218 permits voting trust agreements, and any amendment thereto, to be delivered to the corporation's principal place of business instead of its registered office. Previously, Section 218 of the DGCL required that a voting trust agreement, and any amendment thereto, be filed with the corporation's registered office in the State of Delaware.

Incorporator Unavailability – Section 103(a)(1) and Section 108(d)

Amended Section 103(a) provides that if the incorporator is absent for any reason (other than the more limited set of reasons prior to the amendments), instruments that are to be filed before the election of the initial board of directors (besides the certificate of incorporation) may, subject to certain required disclosures, be signed "by any person for whom or on whose behalf such incorporator, in executing the certificate of incorporation, was acting directly or indirectly as employee or agent."¹⁶ These amendments will only affect corporations that do not name the initial board of directors in their certificate of incorporation because if the board of directors is named, they, rather than the incorporator, are charged with the task of perfecting the organization of the corporation.

The addition of Section 108(d) authorizes any person on whose behalf the incorporator was acting directly or indirectly as employee or agent to take any action that the incorporator would have been authorized to take under Section 107 or Section 108.¹⁷ Under Section 108(a), if the board of directors is not named in the certificate of incorporation, the incorporator(s) are tasked with holding an organizational meeting to implement the bylaws and elect officers.¹⁸ Section 108(c) states that any action permitted to be taken at the organizational meeting may be taken without a meeting if each incorporator(s) signs an instrument stating the action to be taken.¹⁹ With the addition of Section 108(d), if the incorporator is unavailable for any reason (e.g., if the incorporator was an associate at a law firm and is no longer with such law firm), "any person for whom or on whose behalf the incorporator was acting directly or indirectly as employee or agent" can implement actions permitted to be taken at the organizational meeting without a meeting by signing an instrument stating the action to be taken.²⁰ The amendments to Section 103(a)(1) and the addition of Section 108(d) will simplify the process of completing the organization of a corporation when the incorporator becomes unavailable prior to taking all of the necessary actions.

¹⁴ H.R. 329, 147 Gen. Assemb., Reg. Sess. (Del. 2014).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Del. Code Ann. tit. 8, § 108(a) (West 20013).

¹⁹ Del. Code Ann. tit. 8, § 108(c) (West 20013).

²⁰ Del. Code Ann. tit. 8, § 108(c) (West 2013). See H.R. 329, 147 Gen. Assemb., Reg. Sess. (Del. 2014).

Effectiveness

Each of the above amendments, other than the Section 251(h) amendments, will become effective August 1, 2014.²¹ Amendments relating to Section 251(h) only apply to merger agreements entered into on or after August 1, 2014.²²

²¹ H.R. 329, 147 Gen. Assemb., Reg. Sess. (Del. 2014).

²² *Id.*

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