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2023 Amendments to DGCL Streamline Ratification of Defective Corporate Acts, Stock Splits, and Other Corporate Actions

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The latest proposed amendments to the Delaware General Corporation Law (DGCL) will simplify the process for ratifying defective corporate acts; eliminate or reduce the stockholder vote required to authorize some types of stock splits and changes to the number of a corporation's authorized shares; harmonize required stockholder notice with the determination of the applicable record date; provide a safe harbor for the disposition of mortgaged or pledged assets; and expand appraisal rights for stockholders in domestications, transfers, and continuances to foreign jurisdictions. These amendments are set to take effect on August 1.

Ratification of Defective Corporate Acts

Section 204 of the DGCL provides the procedure by which corporations may ratify a defective corporate act that is otherwise void or voidable due to a failure to properly authorize these acts, such as officer or director appointments or stock issuances. While it is an effective self-help tool, it can often be cumbersome and expensive to use in practice depending on the type of defective act being ratified. For example, in many situations the current Section 204 requires corporations to file a certificate of validation with the Delaware Secretary of State, and that certificate must include detailed information concerning the defective act, ratification by the board of directors and (if necessary) the stockholders, as well as other information.

The amendments to Section 204 will streamline the ratification process by reducing the amount of information necessary for certificates of validation, or eliminating the need for them entirely in some situations. If the underlying defective act necessitated the filing of a certificate under another section of the DGCL, such certificate had been filed and no changes are necessary to the certificate, then no filing of a certificate of validation will be required to ratify the defective act. By contrast, if no such certificate was filed, or a certificate that was filed needs to be changed, then the filing of a certificate of validation will still be required, but it will be unnecessary to include much of the information that current Section 204 requires.

Stock Splits and Changes in the Number of Authorized Shares

The procedure by which a corporation may amend its certificate of incorporation is set forth in Section 242 of the DGCL. Generally, Section 242(b) provides that most amendments to a certificate of incorporation must be authorized by the board of directors and adopted by a majority of shareholders of outstanding stock entitled to vote and, as applicable, holders of a majority of each class of stock entitled to vote thereon as a separate class.

Section 242(b)(2) currently provides that such stockholder approval would not be required for certain enumerated actions, such as a name change or the deletion of provisions naming the corporation's incorporator.

The 2023 amendments will add new Section 242(d), which will carry over those exceptions from Section 242(b)(2), as well as add several more exceptions concerning stock splits and a change in the number of the corporation's authorized shares. Stock splits are typically categorized as forward (in which the number of shares is divided into a greater number) or reverse (in which the number of shares is divided into a smaller number), both of which are accomplished via an amendment to the certificate of incorporation to split the stock and change the number of authorized shares necessary to do so. Under the new Section 242(d), no stockholder approval will be required to amend the certificate of incorporation to effect a forward stock split or increase the number of authorized shares in order to do so, so long as the corporation has only one class of outstanding stock and that class is not divided into series. For reverse stock splits and other amendments to change the number of authorized shares, the necessary stockholder vote will be reduced from a majority of outstanding shares entitled to vote, to a majority of votes actually cast, which would have the effect of causing abstentions to have no effect on a stockholder vote. This change in voting standard will also apply to the required class vote for changes in the authorized share count of a class. This reduced vote, however, will only apply if the corporation's stock is listed on a national securities exchange and would continue to meet the listing requirements of the exchange immediately after giving effect to the amendment.

Stock Issuances and Consideration

The 2022 amendments to the DGCL expanded the ability of corporate boards to delegate authority concerning stock, treasury share, and option issuances beyond the corporation's officers to any designated person or body, and clarified the parameters of such delegations of authority concerning issuances across Sections 152, 153, and 157 of the DGCL. Under the 2023 amendments, Sections 152 and 153 will be amended to clarify that, when disposing of shares of treasury stock, the corporation need not receive consideration at least equal to par value of the shares.

Moreover, Section 157 is being further amended to remove the requirement that a board resolution delegating the authority to issue rights or options specifies the maximum number of rights or options that may be issued under the resolution, though it must still fix the maximum number of shares issuable under the resolution. This amendment also adds the further requirement that resolutions delegating this authority must establish separate time periods, one for the initial issuance of rights and options and one for the issuance of shares on the exercise of the rights or options. Section 157 is also being amended to provide that the board may delegate the power to fix the terms upon which shares may be acquired from the corporation upon the exercise of rights or options (such as vesting and acceleration terms).

Stockholder Notice

Section 228 of the DGCL, which governs actions by written consent of stockholders, will be amended to simplify the determination of the record date to be used for purposes of identifying the stockholders entitled to notice of action by written consent. As amended, notice of action by written consent must be given to those stockholders who did not consent to the action by consent, were stockholders as of the record date for the action by consent, and would have been entitled to notice of a meeting held to take such action if the record date for the notice of the

meeting was the record date for the action by consent.

Safe Harbor for Dispositions of Mortgaged or Pledged Assets

The amendments to Section 272 of the DGCL would add the new Section 272(b), which contains a safe harbor for selling, leasing, or exchanging collateral assets that secure a mortgage or pledge without requiring stockholder approval under Section 271. Under Section 271, stockholder approval is required for a sale of all or substantially all of a corporation's assets. While scholars and practitioners have debated whether an "insolvency exception" to Section 271, one which would permit an insolvent corporation to sell its assets without stockholder approval, existed, the Delaware Supreme Court ruled in *Stream TV Networks, Inc. v. SeeCubic, Inc.* that there is no such "insolvency exception."

Without overruling the court's opinion, these newest amendments would establish a safe harbor for insolvent corporations to sell mortgaged or pledged assets without stockholder approval. Section 272(b)(1) allows a sale without stockholder approval if the asset sale is being effected through the secured party's right to sell the collateral under applicable law governing the mortgage or pledge. Section 272(b)(2) allows the secured party and the corporation's board of directors to agree to an alternative transaction (e.g., a strict foreclosure or a sale to a third party) without stockholder approval, if the value of the assets is less than or equal to the amount of the liability or obligation being reduced as a result of the transaction. No methodology for valuing the assets would be mandated. Even in the presence of a provision in the corporation's certificate of incorporation requiring stockholder approval for asset sales, corporations would need to specifically opt out of the safe harbor provided by Section 272(b) and expressly provide in their certificate of incorporation that stockholder approval still applies to such transactions otherwise protected by the safe harbor.

Domestication, Transfer, and Continuance; Appraisal Rights

The 2023 amendments reduce the voting standard required under Section 390 of the DGCL to domesticate, transfer, or continue Delaware corporations to foreign jurisdictions from all of the outstanding shares of the corporation to a majority in voting power. Consistent with this amendment, the amendments also provide appraisal rights to stockholders in connection with any such domestication, transfer, or continuance.

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