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Proposed Amendments to DGCL Broaden Corporate Autonomy and Stockholders' Rights

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Delaware's General Assembly will soon consider significant changes to the Delaware General Corporation Law (DGCL). The proposed amendments include, among others, the introduction of exculpation for officers, the broadening of the authority to delegate the issuance of stock and options, and the expansion of appraisal rights. If adopted, the proposed amendments will go into effect on August 1, except that the amendments to the appraisal and conversion statutes will only apply to transactions entered into on or after August 1.

Officer Exculpation

Perhaps the most impactful change under consideration is an amendment to Section 102(b)(7) of the DGCL, which currently allows corporations to eliminate or limit directors' personal liability for monetary damages for breach of the fiduciary duty of care. As proposed, the amendment to Section 102(b)(7) would allow corporations to extend similar protections to their officers as well.

An important exception, however, is that officers may not receive exculpation resulting from derivative claims (*i.e.*, those brought by or on behalf of the corporation). Instead, under the proposed amendments, officers can only be exculpated for direct claims (*i.e.*, those brought against them by stockholders alleging direct harm to the stockholders). Additionally, such protection will extend only to certain senior officers: the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer, chief accounting officer, or any other person who has, by written agreement with the corporation, consented to be identified as an officer.

Stockholder plaintiffs in corporate litigation often cast a wide net when asserting claims against defendants. It has become increasingly common for senior-level officers to be accused of corporate wrongdoing alongside the board of directors. Often, directors and officers can serve in both capacities. Corporations will now have the option to protect certain officers from stockholder suits largely to the same extent that they can protect their directors.

Broadening of Authority Concerning Stock, Treasury Share, and Option Issuances

The proposed amendments would expand 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 they would clarify the parameters of such delegations of authority concerning issuances across Sections 152, 153, and 157 of the DGCL. Moreover, under the proposed amendments, a delegation of authority by the board of directors must fix (1) the maximum number of rights, options, and shares that may be issued; (2) a time period

during which such rights, options, and shares may be issued; and (3) a minimum amount of consideration to be received for those issuances. The persons who are delegated such authority may not issue rights, options, or shares to themselves.

Amendments to Appraisal Statute

The proposed amendments will expand stockholder appraisal rights under Section 262 in two material respects. First, the amendments insert a new section that permits a beneficial owner of stock to demand appraisal directly, instead of requiring that the record holder of the stock make the demand on behalf of the beneficial owner. An appraisal demand under this section would require the beneficial owner who demands appraisal, not just the record holder, to continuously maintain beneficial ownership of the stock. Second, the amendments would provide appraisal rights to stockholders in connection with a conversion of the corporation to a non-Delaware corporation or any other entity. This expands the right to appraisal beyond mergers and consolidations.

Changes Concerning List of Stockholders

A proposed amendment to Section 219 of the DGCL will eliminate the current requirement to make a list of stockholders available at stockholder meetings. However, corporations will still have to maintain a stocklist as a general matter, and the requirement to make the stocklist available to stockholders 10 days before a meeting has not been eliminated.

Stockholder Approval of Conversion

Section 266 of the DGCL would be amended to change the stockholder consent requirement for a corporation to convert to another entity type, such as a limited liability company or limited partnership. Currently, Section 266 requires unanimous stockholder approval for a conversion. An amendment would change that approval requirement to a majority of stockholders entitled to vote thereon. Another caveat of this amendment is that if a corporation wishes to convert to a limited partnership, any stockholder that is to become a general partner in the limited partnership must vote in favor of the conversion.

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