

Proposed 2022 DGCL Amendments Include Significant Changes Addressing Exculpation of Officers, Appraisal Rights and Domestication-Related Transactions

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On April 12, 2022, the Corporation Law Section of the Delaware State Bar Association (DSBA) approved proposed amendments to the Delaware General Corporation Law (DGCL) that include provisions that, if enacted, would authorize exculpation clauses limiting or eliminating the monetary liability of certain officers, make appraisal rights available to beneficial owners of stock and facilitate domestications of non-U.S. entities and consummations of other corporate transactions related to domestications.

Exculpation of Senior Officers

Since its adoption in 1986, Section 102(b)(7) has authorized a corporation's certificate of incorporation to contain an exculpation clause that limits or eliminates the personal liability of its directors for monetary damages arising out of breaches of the fiduciary duty of care. The protection from monetary liability afforded by Section 102(b)(7) historically has been expressly limited to directors, and not available for officers. In recent years, the prevalence of fiduciary duty claims against officers has increased significantly, particularly in the context of class action M&A litigation seeking monetary damages. In many instances, the same breach of fiduciary duty claims are brought against both directors and officers, and while directors are able to have such claims dismissed based on Section 102(b)(7) exculpation clauses, officers are not. In some circumstances, individuals that serve a dual role as both director and officer will have such claims dismissed in their capacity as a director based on a Section 102(b)(7) exculpation clause, but they will remain in the case and subject to liability in their capacity as an officer with respect to the very same underlying allegations.

The proposed amendments to Section 102(b)(7) seek to reduce (but do not eliminate) this imbalance in the treatment of directors and officers. Notably, the proposed amendments would authorize exculpation of officers only in connection with direct claims brought by stockholders, including class actions, but would not eliminate monetary liability of officers for breach of fiduciary duty arising out of claims brought by the corporation itself or for derivative claims brought by stockholders in the name of the corporation.

In addition, not all officers would be entitled to the protection of an exculpation clause. Rather, only the following senior officers may be entitled to the benefit of an exculpation clause: the CEO, president, CFO, COO, chief legal officer, controller, treasurer and chief accounting officer, as well as any other persons identified as "named executive officers" in the corporation's most recent SEC filings. Moreover, the same exclusions from exculpation applicable to directors (*i.e.*, liability arising out of a breach of the duty of loyalty, acts or omissions not in good faith, or involving intentional misconduct or knowing violation of law or transactions from which the director derives an improper personal benefit) also would apply to officers under the proposed amendments, other than the exclusion for liability for unlawful dividends, since only directors are authorized to declare and cause the corporation to pay dividends.

If the proposed amendments are enacted, corporations should consult with their Skadden contact to consider whether to amend their certificate of incorporation to provide for exculpation of their senior officers.

Domestications

Delaware has experienced an increase in the number of non-U.S. entities domesticating to Delaware in recent years, due in part to the prevalence of domestications in connection with de-SPAC transactions. Upon effectiveness of a domestication, a non-U.S. entity

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becomes a Delaware corporation, subject to all provisions of the DGCL. Promptly following a domestication, related corporate transactions (such as mergers, stock issuances or charter amendments) often occur.

There is some uncertainty as to whether approval by the pre-domestication board and stockholders satisfies the DGCL's requirements for board and/or stockholder approval of such corporate transactions for the Delaware corporation. Given timing constraints, however, it is often impracticable to hold a board or stockholders' meetings to approve such matters following the domestication. Moreover, given that such matters are authorized in accordance with applicable non-U.S. laws prior to effectiveness of the domestication, there does not appear to be a strong public policy rationale for delaying or impeding such transactions to obtain board and stockholder approvals already obtained, albeit under another jurisdiction's laws.

The proposed amendments to Section 388 address this uncertainty and facilitate consummation of such other corporate actions swiftly following the domestication, without the requirement for additional board or stockholder approvals of the post-domestication Delaware corporation. The amendments would permit a domesticating non-U.S. entity to adopt a plan of domestication setting forth the terms and conditions of the domestication. A plan of domestication also may set forth any corporate actions to be taken by the domesticated Delaware corporation "in connection with" the domestication, including mergers, stock issuances and amendments to the Delaware certificate of incorporation. A plan of domestication, and any corporate actions set forth therein, must be approved prior to effectiveness of the domestication in accordance with the requirements of all applicable non-U.S. laws. The proposed amendments to Section 388 provide that, once such approvals have been obtained, any corporate action set forth in the plan of domestication that is within the power of a Delaware corporation under the DGCL shall be "deemed authorized, adopted and approved by the domesticated corporation and its board of directors, stockholders or members," and no further action of the board, stockholders or members of the domesticated corporation is required under the DGCL.

Appraisal Rights for Beneficial Owners

The proposed amendments to Section 262 would entitle beneficial owners of stock to exercise appraisal rights directly, rather than requiring them to cause the record holder of their shares to demand appraisal on their behalf. In order to assert appraisal rights with respect to any shares, a beneficial owner must maintain continuous beneficial ownership of such shares from the

date of the demand through the effective date of merger, consolidation or conversion, as applicable, and provide documentary evidence of such ownership.

Conversions of Delaware Corporations

The conversion of a Delaware corporation into another entity presently requires unanimous approval of stockholders. Where it is impracticable to obtain such approval, however, the corporation may be merged with and into another entity, with such other entity surviving the merger, thus achieving the same result as in a conversion by way of merger, which generally requires approval of a majority of the corporation's outstanding shares entitled to vote thereon. The proposed amendments would harmonize these divergent voting requirements by reducing the required stockholder vote to approve a conversion from a unanimous vote to a majority of the outstanding shares entitled to vote on such conversion, *provided* that if the corporation is converting to a partnership with one or more general partners, approval of each stockholder who will become a general partner also is required to authorize such conversion.

In connection with such reduction in the required vote to approve a conversion, Section 262 also would be amended to provide appraisal rights in connection with any conversion of a corporation for stockholders who do not vote in favor of such conversion, unless appraisal rights are denied pursuant to the "market out" exception applicable to publicly traded shares. For a corporation first organized prior to August 1, 2022, if its certificate of incorporation, or any voting trust agreement or other written agreement between the corporation and one or more stockholders, contains any provision that restricts, conditions or prohibits consummation of a merger or consolidation, such provision is also deemed to apply to a conversion, unless the certificate of incorporation or such agreement expressly provides otherwise.

Delegation of Authority To Issue Stock or Options

The proposed amendments would provide flexibility by permitting the board of directors to delegate to a person or body the authority to issue stock under Section 152, sell treasury shares under Section 153 and issue rights or options to acquire stock under Section 157. Under the proposed amendments, the board of directors may delegate such authority by adopting a resolution fixing (i) the maximum number of shares of stock, rights or options that the delegate may issue or sell, (ii) a time period during which the issuances or sales may occur and (iii) the minimum amount of consideration to be received for the issuances or sales. Any person or entity to whom such authority is delegated would not have the power to issue shares, options or rights to themselves.

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Access to Stockholder List

Finally, the proposed amendments eliminate the requirement that a corporation make a stocklist available, during any stockholders' meeting, for inspection by all stockholders present at such meeting. The stocklist must still be made available, however, for inspection by stockholders during the 10-day period immediately preceding the meeting date.

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[A copy of the proposed legislation is available here.](#) The proposed amendments will be introduced in the General Assembly for consideration and, if adopted and signed into law by the governor,

the amendments would become effective on August 1, 2022, except for (i) the amendments relating to appraisal rights, which would become effective for mergers, consolidations and conversions for which the agreement or plan is entered into on or after August 1, 2022, or the required authorizations thereof are adopted on or after August 1, 2022, as applicable, and (ii) the amendments relating to domestication, which would become effective for domestications if a plan of domestication is entered into on or after August 1, 2022, or, if there is no such plan, if the required authorizations thereof are adopted on or after August 1, 2022.