
Significant Amendments to Delaware General Corporation Law Become Effective

The Delaware State Legislature recently approved several amendments to the Delaware General Corporation Law (the “DGCL”) affecting voting and approval requirements, certain of which should be of particular interest to lenders, participants in M&A transactions, and any company seeking to implement a stock split. The amendments relate to the following topics (among others):

- **Sale of Collateral** – the amendments expressly permit a corporation to sell mortgaged or pledged assets without stockholder approval, subject to certain conditions.
- **Domestications; Appraisal Rights** – the amendments lower the stockholder voting requirement for the transfer, domestication, or continuance of Delaware corporations into other jurisdictions from a unanimous vote to a majority vote.
- **Conversions** – the amendments eliminate the need for board or stockholder approval by a converted entity with a plan of conversion approved by the converting company’s board and stockholders.
- **Stock Splits** – the amendments include additional exceptions to the general requirement of a stockholder vote to effectuate a charter amendment relating to a forward or reverse stock split, so long as certain conditions are satisfied.

As more fully described below, the amendments generally became effective as of August 1, 2023.

I. Amendments

Sales of Collateral

Under Section 271 of the DGCL, stockholder approval is generally required for the sale of “all or substantially all” of a Delaware corporation’s assets. Although existing Section 272 provides that no stockholder approval is required for the mortgage or pledge of a corporation’s assets (unless required by the certificate of incorporation), prior to the current amendments the DGCL did not expressly address whether the stockholder approval requirement of Section 271 applied to assets mortgaged or pledged as permitted by Section 272.

The 2023 DGCL amendments include a new exception to the stockholder approval requirement of Section 271 that relates specifically to the sale, lease, or exchange of property or assets that secure a mortgage or are pledged to a third party, under certain conditions. A corporation may avail itself of this provision only if either (1) the secured party exercises its rights under applicable law to sell, exchange, or lease such property or assets without the consent of the corporation or (2) in lieu of the secured party exercising its rights, the board of directors authorizes an

alternative transaction (with the secured party or another party) that reduces or eliminates the secured liabilities so long as the value of such property or assets does not exceed the total amount of the reduced or eliminated liabilities, and such alternative transaction is not prohibited by applicable law. The amendments also provide that failure to meet the asset value test will not invalidate a transaction so long as the transferee provided value and acted in good faith, although proceedings to enjoin the transaction prior to its consummation are available.

Transfers, Domestications, and Continuances; Appraisal Rights

Previously, a unanimous vote of all stockholders was required to effectuate a transfer to, or domestication or continuance in, a foreign jurisdiction by a Delaware corporation. The 2023 DGCL amendments lower this threshold to a majority of the outstanding stock entitled to vote on such transaction, with certain exceptions. Notably, the same reduction in the voting threshold was implemented for conversions by Delaware corporations into other types of entities in the 2022 amendments to the DGCL, and the reduced threshold is intended to facilitate Delaware corporations domesticating in foreign jurisdictions without having to change to another U.S. jurisdiction that does not have a unanimous vote requirement.

The amendments also permit a corporation to adopt a plan of transfer, domestication, or continuance in substantially the same way as permitted in conversions of other types of entities into Delaware corporations, as described below, with one key difference being that for transfers, domestications, or continuances, the plan must be approved concurrently with the board resolution approving such transfer, domestication, or continuance.

The amendments also provide that the existing provisions of the DGCL regarding stockholders' rights to an appraisal by the Delaware Court of Chancery of the fair value of their shares now apply to transfers, domestications, and continuances (in addition to mergers, consolidations, and conversions).

Conversions

Certain of the 2023 DGCL amendments concern conversions of other types of entities into Delaware corporations and of Delaware corporations into other types of entities. The new amendments provide that both a non-corporate entity converting into a Delaware corporation and a Delaware corporation converting into another type of entity may (but are not obligated to) adopt a plan of conversion that lays out the terms and conditions of the conversion, the process of exchange or conversion of stocks, rights and securities of the converting entity (if any), any corporate action related to the conversion, and any other details deemed desirable under the law governing the converting entity. Under the amendments, any corporate action to be taken by a converted Delaware corporation that is included in the plan approved in accordance with applicable law will not require a further vote of the board, stockholders, or members of the converted entity, eliminating the need to have the board or stockholders approve these acts immediately upon effectiveness of the conversion.

Stock Splits

Under Section 242 of the current DGCL, amendments to a Delaware corporation's certificate of incorporation after the corporation has received payment for any of its capital stock generally require approval of the stockholders holding the majority of the outstanding shares, subject to certain exceptions. The 2023 amendments to the DGCL eliminate the need for stockholder approval when amending a certificate of incorporation to subdivide the issued shares of a class of stock into a greater number (a forward stock split) so long as the class to be split is the corporation's only outstanding class of stock and is not divided into series. A stockholder vote is also no longer required to increase the number of authorized shares in the class to be split up to an amount proportionate to the corresponding split.

The amendments also include changes to the stockholder approval requirements for charter amendments to combine the issued shares of a class of stock into a lesser number (a reverse stock split). The amendments provide that, unless otherwise required by the certificate of incorporation, the voting requirement is decreased from a majority of outstanding shares to a majority of votes cast. However, a corporation may only avail itself of this change if its shares are listed on a national securities exchange immediately before the charter amendment is effective and the listing requirements of such exchange are met immediately after the charter amendment becomes effective. In this way, the DGCL amendments are intended to facilitate reverse splits for the purpose of avoiding de-listing, which have proved challenging for corporations to obtain despite the fact that they are generally in the stockholders' best interest, and clarify that abstentions have no effect on the outcome of such a vote.

Corporations can still choose to include the stockholder approval provisions of existing Section 242 in their certificates of incorporation by affirmatively "opting in" to such provisions as provided in the DGCL amendments.

II. Conclusion

The 2023 DGCL amendments make significant changes to the statute. Companies, financing sources, and other interested parties are encouraged to consider any potential impact on any pending or contemplated transactions and related documentation and to discuss with counsel as appropriate. The amendments have been adopted and were signed into law on July 17, 2023, effective August 1, 2023, except that:

- the amendments relating to appraisal rights only apply to:
 - mergers, conversions, domestications, transfers, and continuances that are authorized by the board of directors on or after August 1, 2023,
 - "short form" mergers that are authorized on or after August 1, 2023, and
 - any other mergers or consolidations consummated pursuant to an agreement entered into on or after August 1, 2023,
- the amendments relating to conversions of non-corporate entities into Delaware corporations apply only to conversions pursuant to a plan of conversion entered into (or, if no such plan is entered into, conversions that are approved) on or after August 1, 2023, and
- the amendments relating to domestications, transfers, or continuances apply only to such transactions that are authorized by the board of directors on or after August 1, 2023.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Geoffrey E. Liebmann (partner) at 212.701.3313 or gliebmann@cahill.com; or David Fuchs (associate) at 212.701.3274 or dfuchs@cahill.com; or email publications@cahill.com.

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