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2018 Delaware General Corporation Law Amendments

Executive Summary

The Corporate Law Section of the Delaware State Bar Association has proposed its annual amendments to the Delaware General Corporation Law (the “DGCL”). If the proposed amendments are approved by the Delaware legislature, Governor John C. Carney, Jr. could sign the amendments into law in August.

The following is a summary of the most important amendments impacting the creation, regulation, operation and dissolution of corporations. These amendments modify statutory provisions covering (i) the “market out” exception for statutory appraisal rights in “intermediate form” mergers undertaken without stockholder approval, (ii) clarifications regarding the process and effectiveness of ratification of defective corporate acts under Section 204 and (iii) the ability of nonstock corporations to utilize Sections 204 and 205.

The amendments discussed below would be effective as of August 1, 2018. However, the amendments to Section 262 are only effective for mergers entered into after August 1, 2018 and the amendments to Section 204 are only effective for ratifications adopted after August 1, 2018.

"Market Out" Exception for Appraisal Rights in Intermediate-Form Mergers

The proposed amendments to Section 262(b) would apply the "market out" exception to the availability of statutory appraisal rights in intermediate-form mergers undertaken pursuant to Section 251(h). In an intermediate-form merger under Section 251(h), a merger may be consummated without shareholder approval after a tender offer is made and certain other conditions are satisfied. Under the current market-out exception pursuant to 262(b)(3), if all of the stock of a target are not owned by the offeror immediately prior to the merger, appraisal rights will be available for the shares of the target. Effectively, the current statute permits appraisal rights for intermediate-form mergers even if the market out exception would apply to the analogous "long-form" merger, which requires shareholder approval. The proposed amendment would eliminate this illogical result and provide the same exception to appraisal rights for mergers under 251(h) as are provided for long-form mergers.

Under the proposed amendment to 262(b), in an intermediate form merger, appraisal rights will not be available for shares of the target that were listed on a national securities exchange or held of record by more than 2,000 holders immediately prior to the execution of the agreement of merger, so long as such holders are not required to accept for their shares anything except: (i) stock of the surviving corporation, (ii) stock of any other corporation that at the effective time of the merger will be listed on a national security exchange or held of record by

more than 2,000 holders, (iii) cash in lieu of fractional shares or fractional depository receipts in respect of the foregoing, or (iv) any combination of the foregoing.

Additionally, the proposed amendment to Section 262(e) would clarify the requirements with respect to the appraisal statement to be furnished by the surviving corporation to dissenting shareholders regarding the number of shares not voted in favor of the merger. Specifically, this amendment aims to recognize that, in the case of a merger under Section 251(h), no shares are "voted" for the adoption of the agreement of merger. This technical amendment states that an appraisal statement provided in connection with a merger under Section 251(h) must set forth the relevant shares *not tendered* for exchange, rather than the shares *not voted* for the merger.

Defective Corporate Acts under Section 204

The proposed amendments to Section 204 aim to clarify the requirements for ratification of defective corporate acts in certain specific circumstances, including where no valid stock is outstanding. Section 204 sets forth the requirements for ratifying defective corporate acts, which in some cases, include notice to, and/or a vote of, the stockholders. Under the current statute, only valid stock (as opposed to putative stock) is entitled to vote on the ratification. The amendments would clarify that Section 204 can still be used where there is no valid outstanding stock of the corporation.

The amendments also clarify that where a stockholder vote is being sought for the ratification of defective corporate acts at a meeting of the stockholders, the notice that is required to be given to holders of valid or putative stock as of the time of the defective corporate act may be given to the holders of valid stock or putative stock as of the record date for the defective corporate act if such defective corporate act involved the establishment of a record date. This amendment is meant to clarify the notice requirements where the stockholders at the time of the defective corporate act are different from the stockholders as of the record date used for determining the stockholders entitled to vote on the defective corporate act.

In addition, the proposed amendment to Section 204(h)(1) would clarify that any act or transaction within a corporation's power under the DGCL may be subject to ratification under Section 204. This amendment is a reaction to *Nguyen v. View, Inc.*¹, where the Delaware Court of Chancery adopted a narrower view of the applicability of Section 204. In *Nguyen*, the Court held that an act or transaction was not within a corporation's power if such act or transaction was not approved according to the corporation's organizational documents and the DGCL. Therefore, such an act was not within the corporation's power, which, according to the Court, must "be viewed in light of that operative reality." The amendment would clarify that Section 204 can be used to ratify any defective corporate acts that are within the broad powers granted to corporations under the DGCL, which are subject only to certain narrow exceptions such as engaging in banking.

Finally, the proposed amendments to Section 114 translate the provision of the DGCL to determine what provisions apply to nonstock corporations. Specifically, these amendments provide nonstock corporations with the ability to utilize Sections 204 and 205 to ratify potentially defective corporate acts.

¹ C.A. No. 11138-VCS (Del. Ch. June 6, 2017).

Other Amendments

In addition to the above-described legislative proposals, there are a number of other proposed amendments touching on the following topics: requirements for distinguishing a corporation's name from those of series of limited liability companies, the authority of the Delaware Attorney General to seek revocation of a corporation's charter and technical changes regarding the filing of certificates of revival for exempt corporations.

Berger Harris is a nationally-recognized law firm located in Wilmington, Delaware. A business law boutique firm, Berger Harris transactional attorneys specialize in a wide range of sophisticated financing transactions, including real estate financing, structured finance, investment fund transactions and securitizations. Our transactional attorneys have extensive experience rendering third-party legal opinions and advice as to matters of Delaware law relating to entity formation, business acquisitions, partnership matters and issues involving limited liability companies and corporations. Our litigation attorneys have in-depth experience representing plaintiffs and defendants in a broad range of high-stakes disputes in both state and federal courts, particularly in the Delaware Court of Chancery.

Chris Messa is a partner in the Corporate/Business Entity Counseling practice group of Berger Harris with significant expertise in Articles 8 and 9 of the Delaware Uniform Commercial Code. His practice focuses primarily on rendering advice and legal opinions relating to commercial transactions, including securitizations, structured finance, asset sale and purchase, cross-border transactions and secured transactions. Chris has extensive experience counseling clients with respect to the formation and operation of Delaware corporations, trusts, partnerships and limited liability companies.

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