

## The 2007 Amendments to the Delaware General Corporation Law: Not a Sea-Change, But Worth Noting

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The Delaware General Corporation Law is amended every year, and the Delaware General Assembly recently passed legislation enacting amendments for 2007. This year, many of the amendments are technical in nature and serve to clarify the existing Delaware law. Still, several important, substantive changes have been made, particularly with respect to appraisal rights and voting by classified boards of directors. Most notably, the legislation liberalizes access to and withdrawal from the appraisal process, presents an approach to awarding interest in appraisal proceedings, and clarifies the rules for applying differential director voting rights to director committee actions. The 2007 amendments also clarify the default voting standard for the election of directors elected separately by a class or series of stock, and eliminate references to the NASDAQ in recognition of its status as a national securities exchange.

Consistent with past practice, the amendments to Section 262 (the appraisal statute) only apply to appraisal proceedings relating to merger agreements entered into after August 1, 2007, while the other amendments took effect on August 1, 2007.

### Appraisal Rights

The appraisal statute (Section 262) provides stockholders involved in a cash merger with the

opportunity to decline the consideration payable in the merger and, instead, receive for their shares the fair value as determined by the Delaware Court of Chancery. After much debate, Section 262 was amended, most notably, to (i) allow street name stockholders to file a petition for appraisal without the need to name the record holder as a nominal plaintiff and (ii) provide for more liberal rights to withdraw from the appraisal process. An amendment to Section 262(e) enables owners of shares of stock held in street name to file petitions for appraisal and to request statements of shares with respect to which demands for appraisal have been received in their own name rather than in the name of the stockholder of record, provided that such holders concurrently file information and documentation identifying the stockholder of record and demonstrating beneficial ownership. Accordingly, institutions such as Cede & Co. will no longer have to serve as nominal petitioners in public company appraisal actions. The amendments, however, do not alter the requirement that the record owner must deliver to the corporation the appraisal demand required by Section 262(d).

A further amendment to Section 262(e) and an amendment to Section 262(k) clarify the right of a stockholder who has demanded appraisal, but has not itself filed a petition for appraisal or otherwise joined a proceeding as a named party,

to withdraw that demand and accept the terms offered in the merger or consolidation at any time within sixty days after the effective date of the merger.

### **Interest Awards in Appraisal Proceedings**

Parties to appraisal actions have often spent considerable time and expense litigating over the appropriate interest rate, whether to compound, over what period, etc. The amendments to Section 262(h) create a presumptive approach to awarding interest in appraisal proceedings, providing that “unless the Court [of Chancery] in its discretion determines otherwise for good cause shown,” interest is to be awarded from the effective date of the merger through the date of payment of the judgment, compounded quarterly and accruing at a rate of five percent (5%) over the Federal Reserve discount rate, taking into consideration any fluctuations in the rate during that period. Under 6 Del. C. § 2301, this rate has been the default legal rate of interest for some time in Delaware. It is hoped that establishing a presumptive approach to awards of interest may deter unproductive litigation on the interest issue and the accompanying counterproductive expenditure of resources.

The amendments to Section 262(h) also clarify that appraisal proceedings are adversary proceedings to be litigated in accordance with generally applicable rules of the Court of Chancery, and that the Court of Chancery determines the fair value of shares in appraisal proceedings only upon application by the surviving or resulting corporation or by any

stockholder entitled to participate in the appraisal proceeding.

It will be interesting to see whether these amendments, coupled with a recent decision by Chancellor Chandler, will serve to encourage more stockholders to pursue their appraisal rights. In *In re: Appraisal of Transkaryotic Therapies, Inc.*, Civ. A. No. 1554-CC, 2007 WL 1378345 (Del. Ch. May 2, 2007), Chancellor Chandler held that investors who buy target company shares in street name after the record date for voting on a merger may assert appraisal rights so long as the aggregate number of street name shares for which appraisal is being sought is less than the aggregate number of shares that either voted against or did not vote on the merger.

### **Differential Voting By Directors**

Among other things, Section 141(d) of the DGCL permits companies, in the certificate of incorporation, to allow directors elected by certain voting groups to have more than one vote on matters brought before the board. The 2007 amendment to Section 141(d) clarifies that when a provision of the certificate of incorporation provides for differential voting rights among directors, that differentiation of voting power applies both in voting at the board level and in voting by committees and subcommittees of the board, unless otherwise provided in the certificate of incorporation or bylaws. This amendment is consistent with the General Corporation Law’s enabling approach, as it will provide increased flexibility in implementing

differential voting rights and facilitate the adoption of corporate bylaws and policies with respect to decision-making at the board, committee and subcommittee levels. For example, a corporation's charter could authorize the election by particular stockholders of a director with supervoting powers, but also provide that per capita voting will prevail in any votes by director committees, thereby affording the corporation the option of having a supervoting director sit on a committee but not control the outcome of decisions by that committee.

### **Plurality Voting Standard for Directors**

In response to efforts by institutional investors to compel corporations to adopt and maintain majority voting provisions (the so called "majority vote movement"), the 2006 legislation amended Section 216 to provide a mechanism by which a corporation and its stockholders may implement and enforce alternative voting standards, in particular by replacing the default plurality vote standard with a majority vote standard. The 2007 amendment to Section 216 clarifies that, unless otherwise provided in the certificate of incorporation or bylaws, the plurality standard (and not a majority vote standard) remains the default standard for the election of directors where one or more classes or series of stock votes as a separate class or series on the election of directors. This amendment is intended to have no effect on the 2006 amendments.

### **Certification of an Agreement of Merger or Consolidation**

Prior to 2007, the merger provisions of the DGCL required that an agreement of merger or consolidation include a certification by the secretary or assistant secretary of each constituent Delaware corporation that the agreement of merger has been adopted by the requisite vote of the stockholders or members. The 2007 amendments eliminate this requirement, provided that a certificate of merger or consolidation is filed with the Delaware Secretary of State in lieu of filing the agreement of merger. Thus, the certificate of merger or consolidation may serve as the required certification.

The requirement is eliminated from Sections 251 and 255 and, by cross-reference, to Sections 252, 254, 256, 257, 258, 263 and 264. Any certification required under other applicable law is not affected by the amendments to Sections 251 and 255. Indeed, the legislative synopsis expressly states that an agreement of merger or consolidation under Section 258 must be certified by each of the constituent foreign corporations in accordance with the laws under which each is formed. The elimination of the certification requirement where a certificate of merger is filed, as is almost universally the case, will also eliminate any technical concerns raised by the failure to actually complete and attach secretary's certificates to executed merger agreements after their adoption by stockholders.

## Securities Trading Markets

Because NASDAQ has been reorganized, under federal securities law, as a “national securities exchange,” all references to a “national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc.” have been deleted from the so-called “market out” provisions of Section 262(b)(1) and (2). Similarly, Section 203, which deals with business combinations with interested stockholders, has been amended to remove reference to “The NASDAQ Stock Market.”

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