

2010 AMENDMENTS TO THE  
GENERAL CORPORATION LAW OF THE STATE OF DELAWARE

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The General Corporation Law of the State of Delaware, 8 *Del. C.* § 101 *et seq.* (the “DGCL”), has been amended in 2010, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. Certain amendments to the DGCL (and to the chapter of the Delaware Code regarding the corporation franchise tax), constituting a comprehensive package of statutory revisions with respect to nonstock corporations, were included in Delaware State House Bill No. 341. 77 *Del. Laws*, c. 253. Other amendments to the DGCL were contained in Delaware State House Bill No. 375, as amended by House Amendment No. 1. 77 *Del. Laws*, c. 290. The amendments set forth in House Bill No. 341 became effective (subject to a few exceptions) August 1, 2010. The amendments contained in House Bill No. 375 took effect August 2, 2010 (again with certain limited exceptions). In addition to the nonstock corporation amendments, the 2010 statutory revisions to the DGCL address topics including indemnification and advancement of expenses, amendment of the certificate of incorporation, merger, dissolution and winding up, and various matters pertaining to the Delaware Secretary of State.

**Nonstock corporations [Multiple Sections].** An expansive set of amendments, affecting numerous provisions in the DGCL and Chapter 5 of Delaware Code Title 8 (regarding the corporation franchise tax), has been enacted in 2010 to clarify and harmonize the statutory treatment of nonstock corporations (that is, corporations that are not authorized to issue capital stock). The DGCL heretofore has not addressed nonstock corporations in a comprehensive manner. The changes set forth in House Bill No. 341 will provide valuable guidance to Delaware nonstock corporations and their constituents and advisors. Central among these amendments is the addition of new DGCL Section 114. This “translator” section identifies those provisions in the DGCL that apply to nonstock corporations generally and those that apply to non-profit nonstock corporations specifically, indicates the manner in which such DGCL provisions apply to nonstock corporations, and defines certain terms applicable in the nonstock corporation context. Except for the changes to Sections 313 and 391 of the DGCL and Section 501 of Title 8, none of these amendments is intended to affect, either directly or by negative implication, the law with respect to stock corporations. The nonstock corporation amendments in House Bill No. 341 became effective August 1, 2010, except that amendments to DGCL Section 262 shall be effective only with respect to transactions consummated pursuant to agreements entered into (or, in the case of “short form” mergers pursuant to DGCL Section 253, board resolutions adopted) after August 1, 2010 and appraisal proceedings arising out of such transactions, and except that new DGCL Sections 280(g) and 281(f) shall be effective only with respect to dissolutions made effective after August 1, 2010 and the filing of claims arising out of such dissolutions.

**Indemnification and advancement rights [§ 145].** DGCL Section 145(d) requires that one of several specified decision-makers must make a determination that indemnification is proper in certain circumstances. House Bill No. 375, as amended by House Amendment No. 1, amended Section 145(d) to clarify that this requirement applies when the person seeking indemnification is a director or officer of the corporation at the time of such determination (as opposed to when the person requesting indemnification is not then a director or officer of the corporation but is serving at the corporation's request as a director or officer of another corporation, partnership, joint venture, trust or other enterprise). Section 145(e) of the DGCL also was amended in 2010, to clarify that the first sentence of such subsection, requiring an undertaking to repay as a condition to advancement, is intended to apply to advancement of expenses to present officers and directors of the corporation that is providing the advancement (and not to advancement to persons serving at the request of the advancing corporation as officers and directors of another corporation, partnership, joint venture, trust or other enterprise), and to make clear that expenses may be advanced to persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise upon such terms and conditions, if any, as the corporation deems appropriate.

**Amendment of the certificate of incorporation [§§ 242, 251, 252, 254, 263, and 264].** The 2010 amendment to DGCL Section 242(b) clarifies that the decision to include in a notice of a stockholder meeting either a copy of a proposed amendment to the certificate of incorporation, or a summary thereof, need not be approved by a specific act of the board of directors. This amendment is not intended to define or limit any duty of directors relating to disclosure to stockholders in connection with the transaction. Sections 251(b)(3), 251(c)(4), 252(c)(4), 254(d)(4), 263(c)(4), and 264(c)(4) also were amended by House Bill No. 375, as amended by House Amendment No. 1, to clarify that in a merger the certificate of incorporation of the surviving corporation may be amended and restated in its entirety.

**Merger [§§104, 111, 114, 251, 252, 253, 254, 262, 263, 264, and 267].** As noted above, House Bill No. 375, as amended by House Amendment No. 1, amended DGCL Sections 251(b)(3), 251(c)(4), 252(c)(4), 254(d)(4), 263(c)(4), and 264(c)(4), respectively, to clarify that the certificate of incorporation of the surviving corporation may be amended and restated in its entirety in a merger. Further, Section 251(c) was updated to clarify that the decision to include either a copy or a summary of an agreement of merger or consolidation in a notice of a stockholder meeting need not be approved by a specific act of the board of directors. This amendment is not intended to define or limit any duty of directors relating to disclosure to stockholders in connection with the transaction. Finally, a new Section 267 has been added to the DGCL. This new Section provides a mechanism enabling a "short form" merger of a subsidiary corporation or corporations with a parent that is a non-corporate entity (for example, a limited liability company). Related amendments were made to DGCL Sections 104, 111(a)(6), 114(b)(2), 253(a), 262(b)(3), and 262(d)(2), respectively, to conform with or reflect new Section 267. (Unlike the other revisions contained in House Bill No. 375, which became effective August 2, 2010, the amendments to DGCL Sections 262(b)(3) and 262(d)(2) shall be effective only with respect to transactions consummated pursuant to agreements entered into (or in the case of mergers pursuant to Section 253, board resolutions adopted, or in the case of mergers

pursuant to new Section 267, mergers authorized) after August 1, 2010 and appraisal proceedings arising out of such transactions.)

**Dissolution and winding up [ §§ 274, 275, and 278 ].** DGCL Sections 274 and 275(d) were amended by House Bill No. 375, as amended by House Amendment No. 1, to require that a certificate of dissolution filed under either such Section must state the date on which the corporation's original certificate of incorporation was filed with the Delaware Secretary of State. The 2010 amendment to Section 278 confirms that DGCL Sections 279 through 282, including those provisions dealing with the corporation's winding up, apply to a corporation that has expired by its own limitation.

**Various matters pertaining to the Delaware Secretary of State [ §§ 252, 256, 263, 264, 266, 321, 376, 381, 382, and 390 ].** DGCL Sections 252(d), 256(d), 263(d), 264(d), 266(c)(6), 321(b), 376(b), 381(c) and (d), 382(a) and (c), and 390(b)(5), respectively, have been amended to allow for service of process upon the Delaware Secretary of State thereunder by means of electronic transmission (but only as prescribed by the Secretary of State), to authorize the Secretary of State to issue such rules and regulations with respect to such service as are deemed necessary or appropriate, and to enable the Secretary of State, in the event that service is effected through the Secretary of State in accordance therewith, to provide notice of service by letter sent by a mail or courier service that includes a record of mailing or deposit with the courier and a record of delivery evidenced by the signature of the recipient.