

2007 AMENDMENTS TO THE GENERAL CORPORATION LAW OF THE STATE OF DELAWARE

By *Matthew J. O'Toole, Esquire* and *Robert L. Symonds, Jr., Esquire*
Stevens & Lee
Wilmington, Delaware

Introduction

The General Corporation Law of the State of Delaware, 8 *Del. C.* § 101 *et seq.* (the “DGCL”), has been amended in 2007, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2007 amendments to the DGCL were contained in Delaware State House Bill No. 160, and generally became effective on August 1, 2007.¹ *See* 76 *Del. Laws*, c. 145. Among the provisions of the DGCL that have been amended are those concerning: director voting power; stockholder voting for election of directors; merger and consolidation; and appraisal.

Director voting power [§ 141]. A new sentence has been added to DGCL Section 141(d) to clarify that if the certificate of incorporation endows some directors with greater or lesser voting power than other directors, then that differentiation of voting power applies not only to voting by the board of directors but also to voting by committees of the board and subcommittees thereof, unless the certificate of incorporation or the bylaws provide otherwise.

Stockholder voting for election of directors [§ 216]. House Bill No. 160 amended Section 216(4) of the DGCL in 2007 to clarify that, where one or more classes or series of stock vote separately on the election of directors, the vote required for election is a plurality, rather than a majority, unless otherwise provided in the certificate of incorporation or the bylaws.

Merger or consolidation [§§ 251, 255 and 258]. Various provisions in Sections 251 and 255 of the DGCL have been amended to eliminate, in circumstances where a certificate of merger or consolidation is filed in lieu of filing the agreement of merger or consolidation, the requirement that such agreement must include a certification by the secretary or assistant secretary of the corporation as to either the adoption of the agreement by the requisite vote of stockholders (or members) or the approval thereof otherwise in accordance with Section 251 of the DGCL without such a vote. This certification requirement for a Delaware corporation is also eliminated from Sections 252, 254, 256, 257, 258, 263 and 264 of the DGCL by virtue of the cross-references in those Sections to Sections 251 and 255. Any certification required under other applicable law is not affected by these amendments. The amendment to Section 258(b) of the DGCL clarifies that the agreement of merger or consolidation must be certified by each of the constituent foreign corporations in accordance with the laws under which each was formed.

¹ The amendments to DGCL Section 262, however, became effective only with respect to transactions consummated pursuant to agreements entered into after August 1, 2007 (or, in the case of mergers pursuant to DGCL Section 253, board resolutions adopted after that date), and appraisal proceedings arising out of such transactions.

Appraisal [§ 262]. The 2007 amendments to Sections 262(e) and 262(k) of the DGCL clarify the right of a stockholder who has demanded appraisal to withdraw that demand and receive the merger consideration at any time within 60 days after the effective date of the merger, even if a petition for appraisal has been filed, so long as that stockholder has not filed such a petition or otherwise joined the proceeding as a named party. Another amendment to Section 262(e) enables beneficial owners of stock held in street name to file petitions for appraisal, and to request a statement 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. Amendments to Sections 262(h) and 262(i) revise the approach to awarding interest in appraisal proceedings. As amended, these subsections establish a presumption that interest is to be awarded for the period from the effective date of the merger until the date of payment of judgment, compounded quarterly and accruing at the rate of 5% over the Federal Reserve discount rate, and giving effect to any variation in that rate during that period. The amendments provide, however, that the Court of Chancery may depart from this presumptive approach for good cause (for example, to avoid an inequitable result such as rewarding, or insufficiently compensating for, improper delay of the proceeding or unreasonable or bad faith assertion of valuation claims). The amendments to DGCL Section 262(h) also clarify that the Court of Chancery in appraisal proceedings does not determine the fair value of shares on its own initiative, and that such proceedings are adversary proceedings to be litigated in accordance with generally applicable rules of the Court.