

2005 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 2005, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2005 amendments to the DGCL were contained in Delaware State House Bill No. 150, and became effective August 1, 2005. *See* 75 Del. Laws, c. 30. Among the provisions of the DGCL that have been amended are those concerning: voting power of directors; stock certificates; conversion; transfer and domestication; and sale of all or substantially all assets of a corporation.

Voting power of directors [§ 141]. A sentence has been added to Section 141(d) of the DGCL, stating explicitly that the certificate of incorporation may confer upon one or more directors voting powers greater or lesser than those of other directors, irrespective of whether such directors are elected separately by the holders of a class or series of stock. Previously, Section 141(d) provided only that directors elected by a class or series of stock could have disparate voting powers. This amendment provides greater certainty regarding the effectiveness of provisions establishing different voting powers for directors who are not elected separately by a class or series.

Stock certificates [§ 158]. As previously in effect, Section 158 of the DGCL entitled a holder of uncertificated shares of stock to receive upon request a stock certificate for such shares. The 2005 amendments to Section 158 eliminate this entitlement. A corporation that has uncertificated shares, however, remains free to provide a certificate in such circumstances although it is not obligated to do so.

Conversion [§§ 265 and 266]. Section 265 of the DGCL governs the statutory conversion of another business form (such as, for example, a limited liability company, a partnership, or a statutory trust) to a Delaware corporation. Section 266 governs the conversion of a Delaware corporation to another business form. The 2005 amendments to these Sections address various matters in regard to such conversions. For example, the additions of new Sections 265(f) and 266(h) clarify the legal effects of a conversion. Notably, the amendments permit a non-Delaware entity to convert to a Delaware corporation, and permit a Delaware corporation to convert to a non-Delaware business form. Previously, the DGCL did not allow a “cross-jurisdiction” conversion. As amended, Sections 265 and 266 more closely resemble provisions in Delaware’s alternative entity statutes that deal with conversions.

Transfer and domestication [§§ 388 and 390]. Sections 388 and 390 of the DGCL govern transfer and domestication. Section 388 permits the domestication of a “non-United States entity” as a Delaware corporation, and Section 390 permits a Delaware corporation to transfer to or domesticate in a foreign jurisdiction. Each of these Sections has been amended in 2005. The amendments address a variety of matters relating to transfers and domestications. New subsection (i) in Section 388, for example, clarifies the legal effects of a domestication under that Section, and new subsection (f) in Section 390 provides similar clarification as to the legal effects of a Delaware corporation’s transfer or domestication. Sections 388 and 390, as amended, more nearly parallel provisions in Delaware’s alternative entity statutes regarding transfers and domestications.

Sale of all or substantially all assets [§ 271]. Section 271(a) of the DGCL requires that stockholders of a corporation must approve the sale, lease, or exchange of all or substantially all of the corporation’s assets. Section 271(c), newly added to the DGCL in 2005, establishes an exception to this rule, providing a clear answer to a question that periodically arises. Now, pursuant to Section 271(c), no vote of stockholders is required to authorize a corporation’s transfer of assets to a direct or indirect wholly-owned and controlled subsidiary, unless the certificate of incorporation provides otherwise. New Section 271(c) also establishes that, for purposes of Section 271 only, the assets of such a wholly-owned and controlled subsidiary are to be treated as assets of the ultimate parent corporation. Thus, for purposes of determining whether a stockholder vote in accordance with Section 271(a) is required for a particular sale, lease, or exchange, the assets of the corporation include those of any such subsidiary. This amendment resolves uncertainties in the law that were addressed in the Delaware Court of Chancery’s opinion in *Hollinger Inc. v. Hollinger International, Inc.*, 858 A.2d 342 (Del. Ch. 2004).