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Focus
Delaware Law

Amendments Adopted to the Delaware Corporation Law

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Several amendments to the Delaware General Corporation Law (the ''DGCL'') were recently adopted. Amendments relating to (i) reserving a corporate name, (ii) allowing a foreign corporation to use its name to do business in Delaware, (iii) director resignations, (iv) stockholder-adopted bylaws establishing the stockholder vote for director elections, and (v) classified boards of directors will become effective on Aug. 1, 2006. Other amendments governing the conduct of registered agents will become effective on Jan. 1, 2007. Finally, amendments relating to the information that appears in a corporation's annual franchise tax report, and the consequences of failing to file a complete report, will become effective on Jan. 1, 2008.

Reserving a Corporate Name

Section 391(a)(24) [1] permits the Secretary of State to charge a fee to allow a person to reserve a corporate name. Prior to the 2006 amendments, however, the other provisions of the DGCL did not expressly treat reserved names as unavailable for use by other corporations. Under newly adopted Section 102(e), a corporate name can be reserved on the records of the Division of Corporations in the Department of State of the State of Delaware (the ''Division of Corporations'') for a 120-day period by (i) any person intending to organize, or contemplating the organization of, a Delaware corporation, (ii) any Delaware corporation or foreign corporation qualified to do business in Delaware intending to change, or contemplating changing, its name, (iii) any foreign corporation intending to qualify, or contemplating qualification, to do business in Delaware, and (iv) any person intending to organize, or contemplating the organization of, a foreign corporation that will seek qualification to do business in Delaware.

Unlike the informal procedure referred to in the pre-amendment version of Section 391(a)(24), which permitted a person to reserve a corporate name by telephone, mail, or hand delivery, a person can reserve a corporate name under new Section 102(e) only by filing an application with the Secretary of State specifying the reserved name and the name and address of the applicant and certifying that the name is being reserved by or on behalf of one of the persons entitled to reserve a name under the new provision. According to the Secretary of State, persons interested in reserving a name must submit a written application to the Secretary unless a registered agent submits the application on their behalf. Registered agents may submit a name reservation application electronically.

Section 102(e) also permits a person to renew the 120-day reserve period for successive 120-day periods, to cancel the reservation and to transfer the right to use the reserved name to another person through appropriate filings with the Secretary of State.

To give effect to the reservation process, a conforming amendment to Section 102(a)(1) specifies that a Delaware corporation must have a name that is distinguishable from a reserved name, and another conforming amendment to Section 371(c) specifies that a foreign corporation qualifying to do business in Delaware must have a name that is distinguishable from a reserved name, unless the person who has reserved the name executes a written consent permitting the Delaware corporation or the foreign corporation to use the reserved name.

Amended Section 391(a)(24) authorizes the Secretary of State to charge a fee of up to $75 in order for a person to reserve a corporate name and to renew, transfer, or cancel that reservation. The Secretary of State has indicated that a person submitting a name reservation must pay a $75 fee unless a registered agent submits the reservation on that person's behalf (in which case the Secretary will not charge a fee), and each renewal, transfer, or cancellation of a name reservation will cost $75, regardless of whether the renewal, transfer, or cancellation is submitted by a registered agent or another person.

Foreign Corporation Names

Section 371(c) requires that a foreign corporation applying to qualify to do business in Delaware have a corporate name distinguishable from the name of any other Delaware corporation or Delaware limited partnership and from the name of any foreign corporation or foreign limited partnership already qualified to do business in Delaware. An amendment to Section 371(c) expands this requirement by providing that the name of the applicant foreign corporation be distinguishable from any name reserved on the records in the office of the Division of Corporations and from the name of any domestic or foreign corporation, partnership, limited partnership, limited liability

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[1] All section references in this article refer to sections of the DGCL. In addition, all references to the ''Secretary of State'' and to the ''Secretary'' refer to the Secretary of State of the State of Delaware.

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company, or statutory trust already organized or registered under the laws of Delaware.

Section 371(c) will continue to provide that a foreign corporation applying to do business in Delaware may use a name that conflicts with the name of a domestic or prior-filed foreign corporation or limited partnership if the latter corporation or partnership consents to such use, and, consistent with the other amendments to this section, persons who have reserved a corporate name and domestic and prior-filed foreign partnerships, limited liability companies, and statutory trusts may also grant the same consent. Amended Section 371(c) will also continue to permit a foreign corporation to use an assumed name to do business in Delaware in lieu of a name that conflicts with a reserved name or the name of a domestic or prior-filed foreign entity.

Director Resignations

Section 141(b) permits a director of a Delaware corporation to resign at any time by giving a notice of resignation to the corporation either in writing or by electronic transmission. The first amendment to Section 141(b) clarifies that a director may tender a resignation that is effective at a future date or upon ''the happening of an event or events.'' Prior to this amendment, the DGCL only indirectly addressed advance resignations of directors, as Section 223(d) permits directors to act in advance to fill a board vacancy that will be created by a resignation that is ''effective at a future date.''

The foregoing amendment incorporates the advance resignation concept into Section 141(b) and expressly permits a director to tender an advance resignation that is conditioned on either a future date or the happening of a future event. Amended Section 141(b) also provides that, if a resignation does not specify that it is effective at a future date or upon the happening of a future event, the resignation is effective when it is delivered to the corporation.

The second amendment to Section 141(b) adds a new provision that permits a director to tender an irrevocable resignation if it is ''conditioned upon the director failing to receive a specified vote for reelection as a director.'' This amendment is a response to the recent adoption, by a significant number of public corporations, of requirements that directors be elected by a majority vote to remain in office.

Some corporations have adopted policies providing that, even though directors are elected by a plurality vote, a director is obligated to resign if he or she fails to receive a majority vote. Other corporations have amended their bylaws to provide that directors are elected by a majority vote (instead of a plurality vote) but also provide that directors must tender a resignation following the failure to receive the majority vote because these directors would otherwise ''hold over'' in office even if they were not reelected under the majority voting standard.

Section 216 has been amended to provide that a stockholder-adopted bylaw specifying the votes necessary to elect directors may not be further amended or repealed by the directors.

Because directors are fiduciaries, the enforceability of arrangements by which a director irrevocably agrees to resign at a future time has been questioned. The amendment to Section 141(b) resolves this uncertainty as it applies to majority voting by expressly permitting a director to tender an irrevocable resignation that is conditioned on the failure to receive a specified vote for reelection. Amended Section 141(b) does not authorize director policies or bylaws that require a director to resign without the director's prior consent, however.

Stockholder-Adopted Bylaws

Section 216 has been amended to provide that a stockholder-adopted bylaw specifying the votes necessary to elect directors may not be further amended or repealed by the directors. The amendment to Section 216 is also a response to the recent trend in which corporations have adopted bylaws requiring a majority stockholder vote to elect directors.

Section 109 gives stockholders the full authority to amend bylaws, but also authorizes corporations to adopt a charter provision giving directors equal power to amend the bylaws. Virtually all public Delaware corporations include such a provision in their charters. This new provision in Section 216 will provide a limited check on such board authority.

Classified Boards of Directors

Section 141(d) permits a Delaware corporation to divide its directors into two or three classes, with only one class of directors facing election each year. The first amendment to Section 141(d) clarifies that the classified terms of directors commence after the classification of the board ''becomes effective,'' thereby expressly permitting charter or bylaw provisions specifying that a board of directors will not be divided into classes until a time after adoption of such provisions. This amendment is consistent with Delaware Court of Chancery decisions that upheld charter and bylaw provisions specifying that a classified board became effective at a future time.[2]

The second amendment to Section 141(d) enables a corporation to include, in the charter or bylaw provision dividing the directors into classes, a provision that empowers the incumbent directors to assign themselves to director classes at the time the classification of the board becomes effective. Dicta from a 2001 decision of the Delaware Court of Chancery questioned the validity of such a provision under the pre-amendment language of Section 141(d), noting that it was unclear whether the charter or bylaws could authorize directors to essentially elect themselves to new terms in office.[3]

Amended Section 141(d) provides Delaware corporations the flexibility to authorize directors to assign themselves to classes, even though some of the new classified terms to which directors will be assigned will not expire until the second or (if applicable) third annual meeting following the effective time of the classification.

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[2] *See* Lions Gate Entm't Corp. v. Image Entm't Inc., Del. Ch., C.A. No. 2011-N, Chandler, C. (June 5, 2006); Comac Partners, L.P. v. Ghaznavi, 793 A.2d 372 (Del. Ch. 2001).

[3] *See Comac, supra.*

Registered Agent Requirements

The 2006 amendments also include a number of changes to the DGCL (which will become effective on Jan. 1, 2007) that will be of interest primarily to registered agents of Delaware corporations and registered agents of foreign corporations authorized to transact business in Delaware. Among other things, the amendments modify the duties of registered agents, establish a new category of ''Commercial Registered Agent'' for registered agents serving on behalf of more than 50 entities and provide the Secretary of State with regulatory authority to enforce the new provisions.

Annual Franchise Tax Report Filing

Section 502 requires a corporation to file, on or before March 1 of each year, an annual franchise tax report with the Secretary of State that sets forth the location of the corporation's registered office in Delaware, the name of the agent authorized to accept service of process against the corporation, the location of its principal place of business outside Delaware, the name and business addresses of its directors, the names and addresses of not more than two officers of the corporation (including any officer signing the report), the time when the term of each such director and officer expires, any facts that entitle the corporation to a tax exemption, the number of shares and par value (or no par value designation) of each class of stock the corporation is authorized to issue, and the number of shares of each class of stock actually issued.

Section 502(a) will be amended (effective Jan. 1, 2008) to eliminate the requirement that all corporations include in their report when the terms of office of the directors and officers listed in the report expire, and, as to corporate officers, to require disclosure of only the name and address of the officer signing the report. The amendment will also require a corporation to disclose the location of its principal place of business regardless of whether it is located inside or outside of Delaware.

Amended Section 502(a) also will no longer require a corporation to disclose the number of issued shares of each class of its stock and, instead, will require disclosure only of additional information, schedules, and attachments that the Secretary of State requires to ascertain the annual franchise tax owed by the corporation.

Following the effective date of these amendments, corporations that calculate their franchise taxes based only on the number of authorized shares of stock (under Section 503(a)(1)) need not disclose the number of issued shares in their annual report. However, corporations that intend to calculate their franchise taxes under the ''alternative method'' (under Section 503(a)(2)), which is based on the value of the corporation's gross assets and the number of issued shares, must continue to disclose that information in their report.

The amendments will impose penalties on corporations that do not timely file the required information in an annual report.

The pre-amendment version of Section 503(b) provides that, if a corporation does not disclose to the Secretary of State the amount of its gross assets at the time it files its annual report, the corporation will pay franchise taxes based on the number of shares of stock the charter authorizes the corporation to issue.

Because disclosure of the number of issued shares will no longer be required under amended Section 502(a), Section 503(b) will be amended to provide that a corporation's franchise taxes will be calculated based on the authorized number of shares if the corporation fails to disclose to the Secretary of State either the gross asset amount or the number of issued shares.

Amended Section 502(e) (which currently appears as Section 502(f)) will expressly require the Secretary of State to make publicly available to Delaware citizens (pursuant to Delaware's Freedom of Information Act) [4] the information included in an annual report. However, any of the additional information required to calculate the corporation's franchise tax (pursuant to the amendments to Section 502(a)) that is included in any annual report filed after tax year 2006 will not be deemed public. Prior to the effective date of this amendment, a corporation's annual report is simply ''open to the inspection of all persons at proper hours.''

Corporate Penalties

The 2006 amendments will also impose several penalties on corporations that do not timely file the required information in an annual report. Amended Section 502(f) (which currently appears as Section 502(g)) will prohibit the Secretary of State from issuing a certificate of good standing to a corporation that has not filed a complete annual report.

Amended Section 510 will provide that the charter of a corporation will be void if the corporation fails to file, for one year, a complete annual report (unless the Secretary of State grants a time extension to file the report), and amended Section 511 will require the Governor of Delaware to repeal the charter of any corporation that has failed to file its report by June 30 of the year following the year the report was due.[5] Prior to these amendments, a charter would be declared void and would be repealed only if the corporation failed to pay its franchise taxes.

Finally, the 2006 amendments will delete the provisions that currently appear in Section 502(e), which allows the Secretary of State to investigate the reasons a corporation failed to file its annual report and to refer the matter to the Attorney General of Delaware to initiate proceedings to revoke the corporation's charter. This provision will be unnecessary because amended Section 510 will automatically void the charter of a corporation that fails to file, for one year, a complete report unless the Secretary of State provides the corporation a filing extension.

[4] *See* 29 Del. Code §§ 10001 *et. seq.*

[5] The 2006 amendments also include changes designed to conform other provisions of the DGCL to the amendments to Sections 510 and 511. Specifically, Section 312 will be amended (effective Jan. 1, 2007) to permit renewal of a charter that has become void for any reason (including the failure to file a report); Section 514 will be amended (effective Jan. 1, 2008) to permit the Secretary of State to restore the rights and powers of a corporation whose charter has been repealed as a result of any report to the Governor of Delaware mistakenly listing the corporation as not filing a completed annual report; and Section 517 will be amended (effective Jan. 1, 2008) to empower the Attorney General of Delaware to collect franchise taxes and penalties from corporations whose charters have been declared void for any reason (including the failure to file a report).

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