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DELAWARE UPDATE

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PROPOSED AMENDMENTS TO THE DGCL AND THE STATUTE OF LIMITATIONS

On April 13, 2014, the Corporation Law Section of the Delaware State Bar Association (the "DSBA") was provided with proposed amendments to the Delaware General Corporation Law (the "DGCL"). On the same day, the Commercial Law Section of the DSBA was provided with a proposed revision to Delaware's contractual statute of limitations that may have a significant effect on corporate practice. Assuming that these amendments are approved by the relevant Sections, as well as the Executive Committee of the DSBA, the amendments will be considered by the Delaware General Assembly during its current session. The effective date for the proposed amendments would be August 1, 2014. The proposed amendments include several important changes, including amendments to Section 251(h), the medium-form merger statute adopted last year, which has been used in 26 public company mergers to date. The proposed amendments are as follows:

Absent Incorporator

A new Section 108(d) would be added to the statute to address the situation where action by an incorporator is necessary to perfect the organization of a corporation, but the person who acted as incorporator is no longer available. The new provision will allow any person for whom or on whose behalf the incorporator was acting as an employee or agent to take any action that the incorporator could have taken. This provision should allow a corporation that discovers that its incorporator failed to take action necessary to organize the corporation, such as appointing an initial board of directors, to address the gap created by that failure.

Actions by Written Consent

Delaware case law has called into question the execution of written consents of directors in advance, particularly in the case of individuals signing such consents prior to the time that they are in fact directors. The possible inability to execute documents in advance has made it more difficult for transactional attorneys to organize closings that may involve the execution of a significant number of documents and that require the careful ordering of the steps involved in the closing.

As amended, Section 141(f) would permit a person, whether or not then a director, to execute a consent and provide, through an instruction to an agent or otherwise, that the consent will be effective at a future time, not more than 60 days after such instruction is given. The statute expressly provides that such a consent must be revocable prior to the time that it becomes effective. In addition, a parallel change to Section 228(c) has been proposed to authorize similar instructions to be made with respect to a written consent of stockholders with the effective time of the consent being deemed the date of signature. Any such stockholder consent may provide that it is revocable prior to its becoming effective.

Voting Trusts

Sections 218(a) and (b) govern the now rarely used voting trust, which allows stockholders to deposit stock into a trust and for that trust to become the record owner of the shares and to have the authority over voting, while the beneficiaries of the trust retain the economic interest in the shares. Currently, a copy of the trust must be delivered to the corporation's registered office in Delaware and be available for inspection there. The proposed amendments provide that, alternatively, the voting trust agreement may be delivered to and made available at the corporation's principal place of business.

Charter Amendments

A certificate of incorporation may generally be amended pursuant to Section 242 if an amendment is approved by the board of directors and thereafter by the stockholders. The proposed amendments to Section 242 will permit an amendment to the certificate of incorporation that changes the corporation's name without a stockholder vote. Currently, such an amendment can be effected

without a stockholder vote, but only through a procedure involving the merger of a wholly owned subsidiary into the corporation pursuant to Section 253, the short-form merger provision. The amendment would eliminate the need to go through this cumbersome procedure in order for a corporation to change its name without a stockholder vote.

In addition, a provision would be added to Section 242 to allow a corporation, without stockholder approval, to eliminate certain provisions regarding the incorporator, initial directors and stock subscribers and provisions regarding previous reclassifications or stock splits. Under current law, these historical provisions may be eliminated without a stockholder vote pursuant to Section 245, which governs restatements of certificates of incorporation. The proposed amendments will allow the corporation to eliminate these historical provisions without a stockholder vote and without restating the entire certificate of incorporation.

Finally, a change has been proposed to the notice provisions under Section 242(b)(1). That Section requires that the notice of a stockholder meeting at which an amendment to the certificate of incorporation is to be proposed must include either a copy of the amendment or a brief summary of the changes to be effected by the amendment. The proposed amendments will eliminate that requirement when the meeting is being noticed under the notice and access procedures available to companies registered under the Securities and Exchange Act of 1934. Under those procedures, publicly traded companies may send out a very short notice of a stockholder meeting that alerts stockholders to the availability of a full proxy statement, which stockholders may request a hard copy of or retrieve electronically. As the full proxy statement would include a copy of the amendment or a summary thereof (as well as pertinent disclosure relating thereto), the requirement that the separate meeting notice include such information is not needed. This change will conform the statute to current notice and access disclosure practice.

Mergers

The proposed amendments also revise Section 251(h) of the DGCL, which was added to the statute in 2013. Section 251(h) eliminates the need for stockholder approval of a back-end merger in a two-step acquisition after the first-step tender offer has been consummated, but only if a number of requirements are met. As currently in effect, Section 251(h) is unavailable if, at the time the target board approves the merger, a party to the merger agreement is an "interested stockholder," as that term is used in Section 203 of the DGCL. The proposed amendments would eliminate this limitation. In addition, the requirement that the acquiror owns sufficient shares to approve the offer in a long-form merger following the tender offer has been clarified to provide that any shares irrevocably accepted and received by a depository will count toward that total. This change would clarify there is no impediment in the statute to simultaneously funding the front-end offer and back-end merger upon the effectiveness of the merger. The change would also clarify that shares tendered by notice of guaranteed delivery, but not yet received, do not count toward the necessary total. Finally, the amendments will allow shares owned at the commencement of the offer by either constituent corporation or by certain affiliates to be treated differently than other shares, thus allowing those shares to be converted into surviving corporation shares if desired (including for tax purposes). The proposed amendments to Section 251(h) will be effective with respect to merger agreements entered into on or after August 1, 2014.

Statute of Limitations

Section 8106 of Title 10 currently provides for a three year statute of limitations for breach of contract claims and Section 2-275 of Title 6 currently provides for a four year statute of limitations for breach of contracts governed by Article 2 of the Delaware UCC. Alternatively, under common law, parties to a contract could opt into a 20 years limitations period for breach of contract claims by entering into a contract under seal. The proposed amendment to Section 8106 would add a new subsection (c) to permit parties to a written contract or agreement involving at least $100,000 to provide that any action based on such contract or agreement may be brought within a period specified therein so long as the action is brought before the expiration of 20 years from the accrual of the cause of action. This change allows contracting parties to opt out of the three or four year statute of limitations period that would otherwise apply and gives effect to a longer limitations period without requiring the parties to enter into a contract under seal.