

Professional Perspective

Amendments to Delaware General Corporation Law in 2022

Melissa A. DiVincenzo and Matthew R. Darby, Morris, Nichols, Arsht & Tunnell

**Bloomberg
Law**

[Read Professional Perspectives](#) | [Become a Contributor](#)

Reproduced with permission. Published October 2022. Copyright © 2022 The Bureau of National Affairs, Inc.
800.372.1033. For further use, please contact permissions@bloombergindustry.com

Amendments to Delaware General Corporation Law in 2022

Contributed by [Melissa A. DiVincenzo](#) and [Matthew R. Darby](#), *Morris, Nichols, Arsht & Tunnell*

In its 2022 session, the Delaware legislature passed a number of amendments to the [Delaware General Corporation Law](#) (DGCL) and the Delaware “alternative entity” statutes. The amendments to the DGCL became effective on Aug. 1, 2022.

The amendments to the DGCL effected a number of substantive, technical, and clarifying changes. Most notably, the amendments enable corporations to exculpate certain officers from personal liability for breaches of the duty of care. The amendments also include significant revisions relevant to appraisal rights and the authorization of equity issuances.

Exculpatory Provisions

Section 102(b)(7), which permits a corporation to include in its certificate of incorporation a provision that eliminates the personal liability of directors for certain acts and omissions, has been amended to permit the exculpation of officers. As amended, Section 102(b)(7) permits certain officers to be exculpated to the same extent as directors except that officers cannot be exculpated for liability in any action brought by the corporation or in the right of the corporation—i.e., a derivative suit.

As a result, in direct actions brought by the corporation and in derivative actions, officers remain subject to personal liability for breaches of the duty of care. As is the case for directors, the liability of an officer cannot be limited or eliminated with respect to:

- Breaches of the duty of loyalty.
- Acts or omissions not in good faith or involving intentional misconduct or knowing violation of law.
- Payment of unlawful dividends or unlawful stock repurchases or redemptions.
- Transactions in which the officer received an improper personal benefit.

Additionally, the only officers who may be exculpated are those who can be sued in Delaware under the state's long-arm statute. These officers include:

- Any president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer, or chief accounting officer.
- Any person identified in the corporation's public filings as one of the most highly compensated executive officers of the corporation.
- Any person who has, by written agreement with the corporation, consented to be identified as an officer for purposes of Delaware's long-arm statute.

Importantly, the exculpation of officers is only available to the extent it is provided for in the corporation's certificate of incorporation. Accordingly, for existing corporations, the extension of exculpation protection to officers will require an amendment to the certificate of incorporation—unless the existing provisions are broad enough to cover officers.

Appraisal Rights

Section 262 has been amended in several respects. Under Section 262, a stockholder who complies with the necessary formalities is entitled to receive from the Delaware Court of Chancery an appraisal of the value of its shares following certain mergers and consolidations, such that the stockholder will receive the appraised value of its shares in cash rather than the merger consideration.

Prior to the amendments, beneficial owners could file an appraisal petition with the Chancery Court, but first had to cause the record holder—often Cede & Co.—to make the appraisal demand. As amended, Section 262 permits beneficial owners to demand appraisal directly, thereby eliminating the need to cause the record holder to demand appraisal on behalf of the beneficial owner.

To be eligible to demand appraisal directly, among other requirements, beneficial owners are required to continuously own their shares through the effective time of the transaction and provide documentary evidence of their ownership to the surviving corporation. In connection with the amendments to the conversion statute—Section 266 of the DGCL—and domestication statute—Section 388 of the DGCL—discussed below, Section 262 now provides for appraisal rights in conversions—unless appraisal rights would be denied under Section 262's market-out exception—and denies appraisal rights in mergers, consolidations and conversions that are authorized pursuant to a plan of domestication under Section 388.

The amendments also impact appraisal notice requirements. Corporations no longer have to include a copy of Section 262 in a notice of appraisal rights, provided that the notice includes directions for accessing the statute electronically—such as through the State of Delaware website. The amendments to Section 262 are effective only with respect to mergers, consolidations or conversions adopted or entered into, as applicable, on or after Aug. 1, 2022.

Authority to Issue Stock, Rights & Options

Sections 152, 153, and 157, which govern the requirements for issuances of stock, rights, and options, have been amended to provide a consistent framework for boards and committees to delegate to a person or body—such as an officer—authority to issue stock, sell treasury shares, and issue rights and options.

For stock issuances, the delegation must set forth a maximum number of shares that may be issued, a time period during which the shares may be issued, and the minimum amount of consideration for which the shares may be issued. Similarly, for rights and options, the delegation must set forth:

- A maximum number of rights or options to be issued and the maximum number of shares issuable upon exercise thereof.
- A time period during which the rights or options, and during which the shares issuable upon exercise thereof, may be issued.
- A minimum amount of consideration—if any—for which the rights or options may be issued and a minimum amount of consideration for the shares issuable upon exercise thereof.

Treasury shares may be sold pursuant to a delegation in the same manner as stock issuances. Any of the parameters described above may be set by reference to facts ascertainable outside the delegation—other than facts dependent on a determination or action by the person or body to whom authority is delegated—such as a formula dependent on the stock trading price.

Notably, the amendments eliminate the requirement in Section 157 that the board approve the instrument evidencing the right or option and clarify that rights or options may be issued in book entry or electronic form.

Conversions

Section 266, which governs the conversion of a Delaware corporation to another type of entity, such as a limited liability company, partnership or foreign corporation, has been amended to modify the approval requirements for effecting a conversion. Prior to the amendments, conversions under Section 266 required unanimous stockholder approval—in addition to board approval.

The amendments reduce the stockholder approval standard to a majority, subject to several exceptions. Importantly, any pre-amendment provisions in a certificate of incorporation or any other written agreement that restrict mergers would be deemed to restrict conversions in the same manner—unless the provision expressly provides otherwise. Thus, to the extent an existing provision requires a corporation to obtain a higher vote to effect a merger, that same higher vote would be required to effect a conversion. Additionally, with respect to a conversion to a partnership, any stockholder that would become a general partner as a result of the conversion must approve the conversion.

The amendments to Section 266 are effective only with respect to conversions approved by a board on or after Aug. 1, 2022.

Domestications

Section 388, which permits foreign entities to domesticate as a Delaware corporation, has been amended to facilitate the authorization of post-domestication corporate actions. The amendments allow a foreign entity to adopt a plan of domestication that describes corporate actions to be taken by the domesticated corporation in Delaware in connection with the domestication—such as a second step merger or charter amendment.

If the corporate actions described in the plan of domestication are approved in accordance with relevant non-US laws, including any approvals required for the type of corporate action specified in the plan, then such corporate actions will be duly authorized for purposes of Delaware law and will not require separate approval from the Delaware board of directors or stockholders following the domestication. If any corporate action specified in the plan of domestication requires a certificate to be filed with the Delaware Secretary of State, then the certificate must state that no action by the directors or stockholders is required by Section 388.

The amendments to Section 388 are effective only with respect to domestications approved on or after Aug. 1, 2022.

Stockholder Meetings

The amendments include several revisions relevant to stockholder meetings. Section 219 has been amended to eliminate the requirement that the corporation's stocklist be made available during the meeting. Section 222 has been amended to clarify that a virtual meeting adjourned because of technical problems does not need to be re-noticed if information about when and how the meeting will be reconvened is provided in the original meeting notice or displayed on the meeting website during the time scheduled for the meeting.

Director & Officer Insurance

Section 145, which governs the indemnification and advancement rights of directors and officers, has been amended to authorize captive insurance arrangements. In general, Section 145 authorizes corporations to indemnify directors, officers, and other persons for losses they incur by reason of their service to the corporation. Section 145 prohibits indemnification for losses attributable to bad faith actions and for settlements in derivative actions, but allows corporations to maintain insurance on behalf of its directors, officers, employees and agents to pay for such losses.

The amendments authorize captive insurance arrangements, meaning insurance created and funded through an entity controlled by the corporation. Such insurance may be used to pay for losses incurred by directors, officers, employees, and agents, even if Section 145 would prohibit indemnification for such losses. However, captive insurance arrangements may not be used to pay for losses attributable to certain self-dealing, deliberate criminal or fraudulent acts or knowing violations of law.

The amendments to Section 145 became effective on Feb. 7, 2022.

Other Clarifying Amendments

Several sections have been amended to confirm and clarify the use of future effective times in consents and instruments.

- Section 103 provides that a person's signature on an instrument filed with the Delaware Secretary of State constitutes an acknowledgement that the facts in such instrument are true. However, for filings that specify a future effective time, the facts in the instrument may not be true until the effective time. The amendments clarify that such acknowledgement relates to the time that the instrument becomes effective.
- Section 265 has been amended to clarify that a conversion effected under that section must be approved prior to the time the certificate of conversion becomes effective, rather than the time the certificate of conversion is filed.
- Section 228, which permits a stockholder to provide that its consent to corporate actions will be effective at a future time, has been amended to clarify that a person can execute such a consent before becoming a stockholder so long as the person is a stockholder as of the applicable record date.

- Section 275, which provides the procedures for dissolving a corporation, has been amended to clarify the dissolution procedures applicable to limited duration corporations. If a corporation has a provision in its certificate of incorporation that limits its existence to a specified date, the corporation must file a certificate of dissolution within 90 days of that date. Conforming amendments have been made to Section 276, which provides the procedures for dissolving a nonstock corporation.
- Section 503, which governs annual reports and franchise taxes, has been amended to provide that a large corporate filer will continue to be designated as such until it submits evidence to the Delaware Secretary of State of its change in status. Large corporate filers are public corporations whose revenue or asset values exceed specified thresholds.

Conclusion

Practitioners should consider these changes when drafting or amending corporate documents or advising clients on matters of Delaware corporate law.

In particular, attorneys should update any form appraisal rights summaries and consider whether changes should be made to form resolutions approving option grants or equity issuances. When drafting or amending certificates of incorporation for Delaware corporations, attorneys will want to consider whether to include exculpation for officers. Relatedly, attorneys will want to consider whether to reference conversions when drafting consent rights in certificates of incorporation and agreements.