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Analysis of the 2022 Amendments to the Delaware General Corporation Law

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The 2022 amendments to the Delaware General Corporation Law (the "DGCL") were recently enacted.[2] These amendments, among other matters: clarify the DGCL's provisions regarding the issuance, sale and grant of stock and options and other rights to acquire stock to align those provisions for consistency and confirm a board's ability to delegate authority to other persons over such issuances, grants and sales within specific parameters and to base the terms of such issuances, grants and sales upon formulas and other external facts; make several amendments to the appraisal statute, including to permit beneficial owners to directly make an appraisal demand and permit an appraisal notice to include a link to the appraisal statute on a website in lieu of including a copy of the statute; and authorize statutory conversions of Delaware corporations to non-corporate or non-Delaware entities with a majority (instead of unanimous) stockholder vote. The 2022 amendments are further discussed below. Except as otherwise noted, the amendments became effective on August 1, 2022. In addition to these amendments, the DGCL was amended earlier this year to allow corporations to implement captive insurance to provide director and officer liability insurance coverage, including for non-indemnifiable amounts.

Contents of certificate of incorporation [§ 102].—Section 102 has long permitted a charter to include an exculpatory provision limiting personal liability of directors for certain breaches of fiduciary duty. The 2022 amendments to the DGCL expand the availability of such exculpation to specific officers (generally defined as individuals who qualify as "officers" under 10 *Del. C.* § 3114(b), Delaware's long-arm statute) for certain breaches of fiduciary duty. Significantly, in addition to the limitations on exculpation applicable to directors—breaches of the duty of loyalty, acts not in good faith or involving intentional misconduct or knowing violations of law or transactions from which an individual derives an improper personal benefit[3]—officers cannot be exculpated for claims brought by or in the right of the company, such as derivative claims. Typical derivative claims include, among other things, so-called *Caremark* or "oversight"

1 This article supplements prior reports published by Aspen Publishers and its predecessor, Prentice Hall Law & Business, describing amendments to the Delaware General Corporation Law enacted in each of calendar years 1967; 1969-70; 1973-74; 1976; 1981; 1983-1988; 1990-2021. The authors of one or more of the prior reports are: S. Samuel Arsht; Walter K. Stapleton; Lewis S. Black, Jr.; A. Gilchrist Sparks, III; Frederick H. Alexander; Jeffrey R. Wolters; James D. Honaker; and Daniel D. Matthews.

2 All section references are to the DGCL. Any reference to a synopsis refers to the official synopsis accompanying the legislative bill enacting the 2022 amendments. "Charter" refers to a certificate of incorporation; "Delaware Secretary of State" refers to the Office of the Secretary of State of the State of Delaware; and "Court of Chancery" refers to the Court of Chancery of the State of Delaware.

3 In addition, directors cannot be exculpated for violations of Section 174 dealing with unlawful dividends and stock repurchases, which is inapplicable to officers.

claims, which although still challenging to pursue, have been an increased focus of litigation in recent years.[4]

Execution, acknowledgment, filing, recording and effective date of original certificate of incorporation and other instruments; exceptions [§ 103].—Section 103 governs the mechanics for filing an instrument with the Delaware Secretary of State. Execution of an instrument under Section 103 generally constitutes an acknowledgement of the signatory that the facts stated therein are true. The 2022 amendments amend Section 103(b)(2) to clarify that this acknowledgement as to the truth of the facts stated in an instrument filed with the Delaware Secretary of State speaks as of the time the instrument becomes effective (which may be up to 90 days after filing), rather than as of execution or filing. This clarification facilitates greater flexibility for transaction planners when obtaining approvals of reorganizations and other complex transactions and coordinating the requisite filings with the Delaware Secretary of State. Section 103(c)(5) was amended to conform to current administrative practices.

Indemnification of officers, directors, employees and agents; insurance [§ 145].—Section 145 authorizes a corporation to, in certain circumstances, indemnify and advance expenses to current and former directors, officers and agents of the corporation and persons who are or were serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise (collectively, "corporate personnel"). Under Section 145(b), a corporation lacks the power to indemnify corporate personnel against amounts paid in settlement or liability resulting from a claim brought by or in the right of the corporation (such as a derivative claim). Section 145(g), in turn, authorizes a corporation to purchase and maintain insurance (often referred to as "D&O insurance") on behalf of corporate personnel against liability asserted against and incurred by such personnel by reason of their corporate status, whether or not the corporation has the power to indemnify such personnel (e.g., for any amounts paid in settlement or liability resulting from a derivative action). The 2022 amendments to Section 145(g) expressly authorize a corporation to purchase and maintain insurance through use of a "captive insurance company"; that is, an insurer that is directly or indirectly owned, controlled and funded by the corporation, which insurer is licensed in Delaware or another jurisdiction. A captive insurance policy can provide corporate personnel with insurance coverage for liabilities incurred whether or not the corporation has the power to indemnify such personnel for such liabilities. The synopsis to Section 145(g) notes that the amendments to Section 145(g) are not intended to prohibit any other form of insurance permitted under pre-amendment Section 145(g).

Like commercial D&O insurance policies, amended Section 145 requires a captive policy to include certain conduct exclusions that would prohibit payment in respect of any loss arising out of, based upon or attributable to any personal profit or financial advantage to which the covered person was not legally entitled, any deliberate criminal or deliberate fraudulent act or any knowing violation of law; but, a corporation may include additional coverage limitations and exclusions. The legislative synopsis to amended Section 145(g) clarifies that the conduct exclusion for coverage relating to a knowing violation of law does not prohibit coverage for non-exculpable oversight (or *Caremark*) claims so long as there is not otherwise a finding that a director knowingly caused the corporation to violate the law. Note that these conduct exclusions apply only if such conduct has been established in a final, non-appealable adjudication in the underlying proceeding in respect of the claim (which would not include any ancillary proceeding by the insurer or insured to determine coverage), meaning that amounts paid in settlement of a proceeding (i.e., prior to a final judgment) alleging conduct subject to one of these exclusions may be covered under such a policy. Further, these conduct exclusions will not apply if the corporation is otherwise

4 *E.g.*, *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019) (reversing Court of Chancery's dismissal and holding plaintiff adequately alleged an "utter failure" *Caremark* claim against directors by pleading facts supporting inference that no board-level system of monitoring or reporting on food safety existed); *In re Boeing Co. Derivative Litig.*, No. CV 2019-0907-MTZ (Del. Ch. Sept. 7, 2021) (finding plaintiffs adequately stated claims under both prongs of *Caremark* in connection with Boeing board's oversight of airplane safety, brought to light by two mass-casualty crashes months apart that were the result of the same faulty software system). *But see, e.g.*, *Richardson as Tr. of Richardson Living Tr. v. Clark*, No. CV 2019-1015-SG (Del. Ch. Dec. 31, 2020) (dismissing plaintiff's fiduciary derivative claims because plaintiff failed to plead with particularity the bad faith scienter requirement under *Caremark* and its progeny, and emphasizing that "bad oversight" did not amount to "bad-faith oversight"); *City of Detroit Police & Fire Ret. Sys. on Behalf of NiSource, Inc. v. Hamrock*, No. CV 2021-0370-KSJM (Del. Ch. June 30, 2022) (dismissing dual-prong *Caremark* claim after establishing that boards are afforded wide latitude in establishing reporting systems and explaining that general risks, in this case related to pipeline subsidiaries' previous violations of pipeline safety laws, are not "red flags" of specific corporate trauma).

entitled to indemnify the insured person under the provisions of Section 145. In addition, amended Section 145 provides that the conduct of one insured person will not be imputed to other insured persons for purposes of determining whether a conduct exclusion applies.

Amended Section 145(g) requires any conduct determination under a captive policy to be made by either an independent claims administrator or by one of the following: (i) a majority vote of the directors who are not parties to such action, suit or proceeding, even though less than a quorum, (ii) a committee of such directors designated by majority vote of such directors, even though less than a quorum, (iii) if there are no such directors, or if such directors so direct, independent legal counsel in a written opinion or (iv) the stockholders.

Amended Section 145(g) also imposes a disclosure requirement in the event of a payment under a captive policy in connection with the dismissal or compromise of any action, suit or proceeding by or in the right of the corporation (e.g., a derivative claim) that requires notice to stockholders. Such a notice must include notice that payment is proposed to be made under the captive policy.

A captive insurance company will not, by virtue of the amendments to Section 145(g), be subject to the provisions of Title 18 of the Delaware Code regulating insurance companies.

The 2022 amendments to Section 145(g) became effective on February 7, 2022.

Issuance of stock; lawful consideration; fully paid stock [§ 152]; Consideration for stock [§ 153]; and Rights and options respecting stock [§ 157].—Sections 152, 153 and 157, setting forth the requirements for the issuance of stock and options and other rights to acquire stock (such as restricted stock units and warrants) and the sale of treasury stock, were amended in several respects, including to make these provisions consistent with each other to confirm that similar rules apply for a board of directors to delegate authority to another person to issue stock under Section 152, grant options or rights under Section 157 or sell treasury stock under Section 153.[5] As amended, these sections generally provide that a board of directors may delegate authority to another person or body[6] to issue stock, grant options or rights, or sell treasury stock if the board adopts resolutions fixing the following parameters:

- The maximum number of shares, options or rights that the delegate can issue, grant or sell.
- A time period during which the issuances, grants or sales may occur.
- A minimum amount of consideration to be received for the shares, options or rights issued, granted or sold.

For grants of options or other rights to acquire stock, the board resolutions must fix these parameters for both the grant of the option or right and the shares issuable upon exercise;[7] provided that the board need not fix a minimum amount of consideration for the grant of the option or right (as opposed to the shares issued upon exercise or settlement thereof). The minimum consideration for which newly-issued shares are issued (or issued upon the exercise or settlement of options or other rights) must, for par value stock, exceed the aggregate par value of the shares issued under Section 153. A person or body to whom authority to issue, grant or sell stock, options or rights is delegated under Section 152, 153 or 157 may not issue, grant or sell themselves stock, options or other rights.

The 2022 amendments to Section 152 also clarified the extent to which a board of directors may base the terms of a stock issuance upon a formula or other "facts ascertainable," such as by reference to a trading price on a date or an average trading price over a specific time period. Further, when the board authorizes a stock issuance, the terms of the issuance (including the number of shares to be issued and consideration to be paid) can be based upon the terms of a stock purchase agreement or other transaction agreement and by the determination of a person or body. This flexibility facilitates closing of complex financing and M&A transactions involving stock issuances where the terms of the issuance may be based upon formulas and subject to complex adjustment provisions by permitting delegation to an expert of authority under the applicable agreement to make

5 The 2022 amendments also clarify that the board of directors can delegate to a person or body the authority to sell treasury stock.

6 Note, because generally any powers of a board of directors may be delegated to a board committee under Section 141(c), the rules in amended Sections 152, 153 and 157 relating to delegations to other persons or bodies do not apply to board's delegation of authority to a board committee.

7 In other words, practitioners should be aware that a delegation to grant or issue options or rights to acquire stock should include a fixed time period for the delegate to make grants under such delegation, and a time period during which such rights or options must be exercised or settled, which need not be the same time period.

determinations that result in adjustments to the number of shares to be issued.

Note, the "facts ascertainable" language in amended Section 157 conforms the prior language to generally be consistent with the approach of Section 152. For companies that have a prior delegation policy in place compliant with pre-amendment Section 157, those policies likely would be expected to continue to comply with amended Section 157.

As amended, Section 157 also eliminates the requirement that the terms of a right or option be set forth or incorporated by reference in an instrument approved by the board of directors. In doing so, amended Section 157 provides more flexibility in that it eliminates the requirement that the board fix the terms of the option or right. The 2022 amendments to Section 157 also clarify that rights or options may be issued in book entry or electronic form.

List of stockholders entitled to vote; penalty for refusal to produce; stock ledger [§ 219].—Section 219(a) requires a corporation make available a list of stockholders entitled to vote at every meeting of stockholders for a 10-day period prior to the meeting. The amendments to Section 219(a) clarify the calculation of the start and end point of this period. Prior to the 2022 amendments, Section 219 also required a stock list be available for inspection during a stockholder meeting. The amendments to Section 219(a) eliminated that requirement.

Notice of meetings and adjourned meetings [§ 222].—The 2022 amendments to the DGCL included certain refinements to facilitate the growing use of remotely-held stockholder meetings. Section 222(c) was amended to permit adjournment of a remotely held stockholder meeting in the event of technical complications without additional notice, if the electronic network for the meeting (like a website) displays, or the meeting notice includes, the information regarding when and how the meeting will be reconvened. The amendments also clarify that notice of a stockholder meeting may be given by any means permitted by Section 232.

Consent of stockholders or members in lieu of meeting [§ 228].—Section 228 by default rule permits stockholder action by consent in lieu of a meeting. Section 228(c) was amended to clarify that a stockholder signing a "springing" consent that becomes effective at a future time does not need to be the record holder as of execution of the consent, and instead must be a stockholder of record as of the applicable record date for such consent.

Appraisal Rights [§ 262].—Section 262 provides a stockholder of a Delaware corporation the ability to demand, in certain contexts, that the Court of Chancery appraise the fair value of the stockholder's shares. The 2022 amendments to the DGCL amended Section 262 in several respects, including the following:

- As discussed further below, the 2022 amendments amend Section 266 to permit Delaware corporations to convert to Delaware non-corporate or non-Delaware entities with a majority, rather than a unanimous, stockholder vote. Section 262 was amended to provide stockholders who do not approve the conversion with appraisal rights generally consistent with the circumstances in which appraisal rights are available for mergers.

- In connection with a domestication of a non-United States entity to a Delaware corporation, the 2022 amendments, as discussed below, provide that any corporate action to be taken by the domesticated Delaware corporation in connection with the domestication may be authorized in a plan of domestication adopted in accordance with the applicable non-United States law and that such acts shall be deemed approved without the need for further action by the Delaware corporation. In connection with the amendments to Section 388, Section 262 was amended to eliminate appraisal rights for mergers, consolidations or conversions approved in connection with a domestication in accordance with these provisions of Section 388.

- Prior to the 2022 amendments, only stockholders of record, as opposed to beneficial owners, had been entitled to demand appraisal.8 The 2022 amendments make several changes to permit beneficial owners to demand appraisal on their own, eliminating the prior requirement that to demand appraisal a beneficial owner had to cause the record owner to demand appraisal on the beneficial owner's behalf. In order to demand appraisal, a beneficial owner must (a) generally comply with the procedural requirements of Section 262, (b) continuously own the subject shares through the effective date of

8 The Delaware legislature previously amended Section 262 in 2007 to allow beneficial owners to file an appraisal petition and to request from the corporation the verified list of the aggregated number of shares not voted in favor of the merger or consolidation (or not tendered and accepted for purchase or exchange, in the case of a merger effected pursuant to Section 251(h)) for which appraisal demands have been received and the aggregate number of holders of such shares.

the applicable merger, consolidation or conversion (consistent with the traditional "continuous ownership" requirement applicable to record owners) and (c) in its demand reasonably identify the record owners, include documentary evidence of beneficial ownership and provide an address for receiving certain notice.

- Section 262 generally denies appraisal rights in cases for stockholders of a public company in connection with stock-for-stock mergers. Section 262(b) was amended to clarify the application of the so-called "market out" exception to mergers approved by stockholder consent rather than at a stockholder meeting.

- Historically, Section 262(d) has required that any notice of appraisal rights include a copy of Section 262. This requirement had been strictly enforced by the Delaware courts and, in certain cases, the courts had concluded that the failure to comply with this requirement may require providing all stockholders a "quasi-appraisal" remedy without needing to comply with the standard requirements of Section 262.[9] As an alternative to including a copy of the statute in the appraisal notice and consistent with amendments over the last several years liberalizing the DGCL's approach to electronic documentation and communication, Section 262(d) was amended to permit a notice of appraisal rights to include, in lieu of an actual copy of Section 262, information directing stockholders to a publicly available electronic resource to access, without subscription or cost, Section 262 (such as a website link).[10] When preparing an appraisal notice, it likely would be prudent to confirm that, as of the distribution of the appraisal notice, the applicable website sets forth the current version of Section 262.
- Amendments were made to subsections (j) and (k) to clarify how stockholder expenses related to an appraisal may be charged against the value of the appraised shares. Amendments to Section 262(k) also clarify that an appraisal demand may be withdrawn with respect to less than all the shares originally subject to the appraisal demand.[11]

Amendments to Section 262 will be effective only with respect to mergers, consolidations or conversions adopted or entered into, as applicable, on or after August 1, 2022.

Conversion of other entities to a domestic corporation [§ 265].—Section 265 outlines the process and requirements for converting a Delaware non-corporate entity or a non-Delaware entity into a Delaware corporation. Section 265(h) was amended, consistent with the amendments to Section 103(b)(2), to clarify that a conversion to a Delaware corporation only needs to be approved prior to the effectiveness of the applicable certificate of conversion, rather than prior to execution of the certificate.

Conversion of a domestic corporation to other entities [§ 266].—Section 266 outlines the process and requirements for converting a Delaware corporation into other Delaware business entities or non-Delaware entities. Previously, Section 266 required a conversion be unanimously approved by all voting and non-voting stock. As amended, Section 266 only requires a conversion from a Delaware corporation to another form of business entity be approved by a majority of the shares entitled to vote on the conversion.[12] Subsection (c) was also amended to require that, in a certificate of conversion, the converting corporation agrees to service of process in Delaware (and to appoint the Delaware Secretary of State to accept such service of process) in suits to enforce obligations of the entity resulting from the conversion arising from the conversion (including appraisal proceedings brought in connection with such conversion under amended Section 262).

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9 E.g., *Nebel v. Sw. Bancorp, Inc.*, No. CIV. A. 13618 (Del. Ch. July 5, 1995).

10 In the case of merger of a nonstock corporation to which appraisal rights are applicable, a notice of appraisal rights is also required to include a copy of Section 114, which under the 2022 amendments may also be provided by direction to a publicly available electronic resource.

11 Section 262 generally permits withdrawal of an appraisal demand without court approval so long as the withdrawal is made within 60 days of the appraisal demand or thereafter with the consent of the corporation but, in either case, prior to the filing of an appraisal petition with approval of the corporation. The 2022 amendments deleted the express reference previously found in subsection (k) to withdrawing an appraisal demand with the corporation's consent more than 60 days after the appraisal demand. Based on the synopsis, no change to Delaware's long-standing rule permitting withdrawal with corporate consent more than 60 days after the demand appears to have been intended, and such a withdrawal appears to be still permitted and contemplated by the statute via subsection (f)'s acknowledgment that, where a stockholder and the corporation reach an agreement on the value of the stockholder's shares—which would generally be substantively indistinguishable from a withdrawal of an appraisal demand with corporate approval—those shares are excluded from the list of stockholders deemed to have properly perfected appraisal rights.

12 In the case of a conversion to a partnership with one or more general partners, the conversion must also be approved by the stockholder or stockholders who will become the general partners.

Given the prior unanimity requirement, corporate drafters would not typically have addressed the consequences of a conversion in a corporation's charter or governance agreements and investors would not have bargained for consent rights over conversions (because each stockholder had a veto over any conversion). To address this potential drafting gap, a new subsection (k) provides a translator provision that provides that any provision in the charter of a corporation incorporated prior to August 1, 2022, and any provision in a voting trust agreement or other agreement between or among the corporation and one or more stockholders that is in effect on or before August 1, 2022, that restricts, conditions or prohibits the consummation of a merger or consolidation (such as many deemed liquidation provisions and consent rights over mergers) are deemed to apply to a conversion as if it were a merger or consolidation, unless the charter or agreement expressly provides otherwise. For corporations incorporated after August 1, 2022, practitioners may wish to evaluate whether to add express references to conversion to charter and other governance agreement provisions that typically address mergers to avoid a drafting gap and prevent a corporation from effecting significant transactions (e.g., a cash-out via conversion) only with approval from a majority of the corporation's voting stock.

Amendments to Section 266 will be effective only with respect to conversions approved by a board of directors in resolutions adopted on or after August 1, 2022.

Dissolution generally; procedure [§ 275] and Dissolution of nonstock corporation; procedure [§ 276].—Sections 275 and 276 dictate the processes by which Delaware corporations are dissolved. The 2022 amendments to the DGCL revised the procedural requirements for dissolution of a corporation with an expiration date for corporate existence specified in its charter. Section 275 was amended to delete old subsection (f) and replace it with a new subsection (f) which requires any corporation whose charter includes a provision limiting corporate existence to file a certificate of dissolution within 90 days before that date. Under amended Section 275(f), a failure to comply with the new requirement will not affect the expiration of the corporation's existence on the specified date or eliminate the requirement to file certificate of dissolution. A new subsection, (g), was added providing that a corporation will be dissolved as of the earlier of the date specified in its charter or the effectiveness of the certificate of dissolution filed pursuant to Section 275.

Section 276, which addresses dissolutions of nonstock (i.e., "membership") corporations, was amended to add a new subsection, (c), which largely mirrors the requirements in new Section 275(f) and (g).

Revival of certificate of incorporation [§ 312].—Section 312, setting forth the process for reviving a corporate charter that has become void—e.g., for failure to file annual reports or pay required franchise taxes—was amended to delete from the definition of "void" corporations unnecessary references to corporations that had procured defective revivals of their charter.

Domestication of non-United States entities [§ 388].—Section 388 permits a non-United States entity to domesticate as a Delaware corporation. In cases of a more complex domestication, it may be necessary for the Delaware corporation to take significant corporate acts immediately following the domestication that would generally require board or stockholder approval of the domesticated Delaware corporation, such as amending the corporation's charter, issuing additional shares of stock or effecting a second-step merger in which the domesticated Delaware corporation is a constituent entity. Obtaining such approvals may be logistically challenging or impractical in a complex transaction. The 2022 amendments add an express concept of a "plan of domestication" to clarify that so long as such acts are approved in connection with the domestication through a duly adopted plan of domestication, such acts are deemed to be duly authorized by the domesticated Delaware corporation (without the need for further corporate action by the board or stockholders of the Delaware corporation).

Specifically, a new subsection (l) was added to Section 388 permitting (but not requiring) the adoption of a plan of domestication which may specify, among other things, the terms and conditions of the domestication and the manner, if any, of converting or exchanging stock and other securities of the non-United States entity for stock or other securities of the domesticated corporation. The plan of domestication may also set forth corporate acts to be taken by the domesticated corporation in connection with the domestication, which must be approved in accordance with the applicable non-United States law (including any approval required under such non-United States law to take the type of corporate acts referred to in the plan of domestication). Similar to certain other provisions of the DGCL, any term of the plan of domestication may be dependent on facts ascertainable outside the plan. In connection with the addition of new subsection (l), a new subsection (m) was added providing that any corporate action outlined in a plan of

domestication approved pursuant to Section 388(l) shall be deemed to be authorized, adopted and approved, as applicable, without need for further action under the DGCL by the board and stockholders. Section 388(c), relating to the contents of a certificate of domestication, was also amended to require the inclusion of a certification that the plan of domestication related to the applicable domestication (if any) was adopted in accordance with subsection (l).

In addition, Section 388(h) was amended, consistent with the amendments to Section 103(b)(2), to clarify that a domestication to a Delaware corporation only needs to be approved prior to the effectiveness of the applicable certificate of domestication, rather than prior to execution of the certificate.

Amendments to Section 388 were effective with respect to corporations as to which a plan of domestication was entered into on or after August 1, 2022, or, if no plan of domestication was entered into in connection with the domestication, any such corporations with respect to which the approvals required by Section 388(h), as amended, were obtained on or after August 1, 2022.

Annual franchise tax report; contents; failure to file and pay tax; duties of Secretary of State [§ 502].—Section 502(a)(3) was amended to generally prohibit listing a registered agent's address as a corporation's principal place of business in a corporation's annual franchise tax report.

Rates and computation of franchise tax [§ 503].—Section 503 relating to annual franchise taxes was amended to make changes to subsection (c) related to changing the designation of a corporation as a large corporate filer (which are required to pay higher maximum franchise taxes). Section 503(i) was amended to delete language referring to the use of generally accepted accounting principles in valuing interests in consolidated entities for franchise tax purposes because the relevant figures are identified in certain specific United States tax forms.