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INTRODUCTION

The Delaware General Assembly adopted a number of amendments to the Delaware General Corporation Law effective July 1, 2000. Two of the amendments are relatively simple and deal with the incorporation process itself. A third amendment is meant to clearly establish that a corporation may, through its board of directors, or its certificate of incorporation, prospectively decline to pursue certain opportunities or classes of opportunities; as discussed below, this amendment should provide significant comfort to corporate practitioners. The rest of the amendments all address, in one way or another, the interaction of recent advances in communications technology and the corporation law.

This article describes the changes effected by the 2000 amendments and supplements previous reports published by Aspen Law & Business and its predecessor, Prentice Hall Law & Business, describing amendments to the General Corporation Law. [1]

FORMATION

Contents of certificate of incorporation [§ 102].—Section 102 generally governs the contents of the certificate of incorporation of a Delaware corporation that must be filed with the Delaware Secretary of State in order to form a Delaware corporation. Section 102(a)(1) establishes specific requirements for the name of a Delaware corporation, including certain requirements as to the distinguishability of the name. The 2000

1. Arsht and Stapleton: Analysis of the New Delaware Corporation Law; Analysis of the 1967 Amendments to the Delaware Corporation Law; Analysis of the 1969 Amendments to the Delaware Corporation Law; Analysis of the 1970 Amendments to the Delaware Corporation Law; Arsht and Black: Analysis of the 1973 Amendments to the Delaware Corporation Law; Analysis of the 1974 Amendments to the Delaware Corporation Law; Analysis of the 1976 Amendments to the Delaware Corporation Law; Black and Sparks: Analysis of the 1981 Amendments to the Delaware Corporation Law; Analysis of the 1983 Amendments to the Delaware Corporation Law; Analysis of the 1984 Amendments to the Delaware Corporation Law; Analysis of the 1985 Amendments to the Delaware Corporation Law; Analysis of the 1986 Amendments to the Delaware Corporation Law; Analysis of the 1987 Amendments to the Delaware Corporation Law; Analysis of the 1988 Amendments to the Delaware General Corporation Law; Analysis of the 1990 Amendments to the Delaware General Corporation Law; Analysis of the 1991 Amendments to the Delaware General Corporation Law; Analysis of the 1992 Amendments to the Delaware General Corporation Law; Analysis of the 1993 Amendments to the Delaware General Corporation Law; Black and Alexander: Analysis of the 1995 Amendments to the Delaware General Corporation Law; Analysis of the 1996 Amendments to the Delaware General Corporation Law; Analysis of the 1997 Amendments to the Delaware General Corporation Law; Analysis of the 1998 Amendments to the Delaware General Corporation Law; Analysis of the 1999 Amendments to the Delaware General Corporation Law (Prentice Hall, Inc. 1967, 1969, 1970, 1973, 1974, 1976, 1981, 1983, 1984, 1985, 1986, 1987, 1988, 1990, 1991, 1992, and 1993, Aspen Law & Business, 1994, 1995, 1996, 1997, 1998, and 1999, respectively.)

amendments provide that the corporation's name must be sufficiently unique as to permit it to be distinguished on the Secretary of State's records from the names of limited liability companies and business trusts that are organized or qualified to do business in Delaware. Previously, the statutory requirement of distinguishability applied only to other corporations and limited partnerships so organized or qualified.

Execution, acknowledgment, filing, recording and effective date of original certificate of incorporation and other instruments; exceptions [§ 103].—Section 103(a)(1) of the General Corporation Law authorizes the incorporator or incorporators of a corporation to sign any document that must be filed with the Secretary of State prior to the initial election of a corporation's board of directors. Where an individual acts as an incorporator, but becomes unavailable prior to the election of directors, this provision can create a type of "corporate limbo." The 2000 amendments provide that if the individual incorporator was working as employee or agent (for example, for a corporate service company or law firm) the employer may act on behalf of the incorporator in the event of such unavailability. The filed document must recite the reason that the original incorporator is unavailable and that he or she was acting directly or indirectly as an employee or agent of the new signatory.

POWERS

Specific powers [§ 122].—The 2000 amendments add a new paragraph 17 to Section 122 of the General Corporation Law, which enumerates the specific powers that a corporation may exercise. The new paragraph provides that a corporation may, in advance, renounce its interest or expectancy in "specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or stockholders." This change in the statute is intended to give corporations the flexibility to permit officers, directors or controlling stockholders to pursue business opportunities without first offering those opportunities to the corporation as they might otherwise have to do because of their status as fiduciaries.

As noted in the synopsis accompanying the legislation, this provision is intended to "eliminate uncertainty regarding the power of a corporation to renounce corporate opportunities in advance. ... " This uncertainty derives from uncertainty about the reach of the corporate opportunity doctrine, a common law concept requiring fiduciaries to offer corporate opportunities to a corporation under certain conditions before exploiting the opportunity themselves. The doctrine is somewhat amorphous but is potentially far-reaching. In at least one case construing a corporate charter provision meant to allocate corporate opportunities between corporations which shared certain directors and officers, the Delaware Court of Chancery questioned the ability of corporations to make such a determination in advance. *See Siegman v. Tri-Star Pictures, Inc.*, Del. Ch., C.A. 9477, (May 5, 1989, revised May 30, 1989).

Under the new provision, a subsidiary could be incorporated with a charter provision permitting the parent corporation to take corporate opportunities that might be of interest to the subsidiary without first offering them to the subsidiary. Such a provision would enable the parent corporation to sell minority interests in the subsidiary without concern that its continuing majority stock ownership would restrict its own ability to grow. Similarly, an investor could be induced to serve on a corporation's board with a provision permitting him or her to pursue other investments, even investments in

competing businesses. The legislative synopsis explicitly provides that the amendment is not intended to change the application of fiduciary duties to the renunciation of corporate opportunities itself, which may still be subject to duty of loyalty issues. Of course, if such a provision is adopted at a time that the corporation is a wholly-owned subsidiary, or in its original charter, such duties should not be implicated.

DIRECTORS AND OFFICERS

Board of directors [§ 141].—Three changes were made to Section 141 as part of the package of amendments addressing communication technology issues. Section 141(b), which provided that the resignation of a director must be "written," is expanded by the amendments to provide that the resignation may be given by "electronic transmission." The definition of electronic transmission is contained in new Section 232, which is discussed below.

Section 141(f) provides for the taking of director action by unanimous written consent. As with resignations, the requirement of a writing has been expressly liberalized, so that directors may give their consent either in writing or by electronic transmission.

Finally, Section 141(i), which previously permitted directors to attend board or committee meetings by means of conference telephone or similar communications equipment as long as all the directors can hear one another, was amended to provide that the communications equipment need not be "similar" to telephonic equipment so as to accommodate all types of voice communication. Retention of the requirement that directors be able to hear the proceedings was purposeful since it was thought that that requirement fostered the kind of debate which sometimes results in good decision-making.

MEETINGS, ELECTIONS, VOTING AND NOTICE

Meetings of stockholders [§ 211].—Section 211 governs stockholder meetings. Prior to the 2000 amendments, Section 211(a) provided simply that meetings of stockholders were to be held at the place designated by, or in the manner provided in, a corporation's by-laws or, if not so designated, at the company's registered office in Delaware. Section 211(a) has been completely revised to authorize stockholder meetings to be held wholly or partially "by means of remote communication." The decision whether a meeting should be conducted remotely is completely within the discretion of directors. Accordingly, stockholders cannot require that meetings be held by remote communication, even through by-law amendments. The drafters thought this was important, given the potential complications inherent in holding "cyberspace" meetings, and given the fact that it is likely that, at least initially, public companies may find the convenience of such meetings to be outweighed by the logistical problems.

When directors choose to hold meetings remotely, the statute requires (1) that the corporation implement reasonable measures to verify that persons deemed present and voting at a meeting are in fact stockholders or proxyholders, (2) that such stockholders and proxyholders are offered a reasonable opportunity to participate and to vote, and (3) that such persons are afforded an opportunity to read or hear the proceedings of the meeting substantially concurrently with the proceedings. Finally, the corporation must retain a record of remote votes or other actions. While this last requirement calls for certain recordkeeping, it is important to note that "remote communications" do not have to meet

the retention, retrieval, review and reproduction requirements of "electronic transmissions." See Notice; electronic transmission [§232], *supra*. This may permit corporations to hold stockholder meetings by conference call.

The 2000 amendments also removed from Section 211(a) the anachronistic requirement that if a corporation's charter and by-laws are silent as to the place of a meeting, all stockholders meetings must be held at the corporation's registered office in Delaware.

Prior to the 2000 amendments, Section 211(e) of the Delaware General Corporation Law required that elections of directors be by written ballot, unless otherwise provided in a corporation's certificate of incorporation. That subsection has been amended to provide that this ballot requirement, if applicable, can be satisfied by electronic transmission, provided that the transmission includes information showing that the transmission was authorized by the stockholder or proxyholder.

List of stockholders entitled to vote; penalty for refusal to produce; stock ledger [§ 219].—Section 219 requires that a corporation make a list of all stockholders entitled to vote at a stockholder meeting available for a ten-day period prior to the meeting. Prior to the 2000 amendments, the list had to be physically available either at the place of the meeting or within the city where the meeting was to be held. Section 219 also mandates that the list be produced and made available at the meeting itself. The 2000 amendments modify the place where the list must be kept and also provide for making the list available electronically.

As amended, Section 219 gives corporations the option of making the list available either at the company's principal place of business or by posting the list on an electronic network. This relieves a corporation from having to find a place to deposit its stockholder list when the meeting is to be held in a city where its headquarters is not located. When the list is made available on an electronic network, the corporation is authorized to take reasonable steps to insure that the information is available only to stockholders. The amendments also provide that if a meeting is to be held solely by remote communication (as permitted by new Section 211), then during the meeting, a list of stockholders shall be made available on an electronic network. The amendments also include conforming language for Section 219(b), which provides that directors shall be ineligible for election if they willfully neglect or refuse to make a stock list available at a meeting.

Notice of meetings, and adjourned meetings [§ 222].—Section 222 sets forth certain requirements respecting the noticing and adjournment of stockholders meetings. Section 222(a) was amended by the 2000 amendments to conform to the changes to Section 211, which provide that meetings may not necessarily have a place. The amendments also mandate that if a meeting is held by means of remote communication, the notice must set forth such means. Similar conforming changes were made to subsection (c), which addresses notices of adjourned meetings. In addition, subsection (b) was amended to clarify that the responsibility for sending out notice of a meeting may be delegated to any agent of a corporation, and not only a transfer agent.

Form of records [§ 224].—Section 224 is a somewhat obscure section of the statute authorizing corporations to maintain their records in non-paper form, and addressing the admissibility of such non-paper records in evidence. The amendments modernize and simplify the terminology used in the statute and relax the requirement that the corporation must convert such non-paper records to "clearly legible written form" upon the request of any person entitled to inspection.

Consent of stockholders or members in lieu of meeting [§ 228].—Section 228 authorizes stockholders to act by written consent in lieu of holding a meeting, unless the certificate of incorporation has eliminated the right of stockholders to so act. The 2000 amendments include an entirely new Section 228(d), which liberalizes the means by which a stockholder may express consent. Prior to the amendments, a stockholder acting by written consent had to deliver a signed written consent to a corporation's registered agent in Delaware, its principal place of business, or the corporate officer who has charge of the corporation's minute books. There was no express language in Section 228 authorizing the use of electronic consents or the delivery of copies or facsimiles of consents. This permitted the argument that consent solicitations were governed by a different set of rules than proxy solicitations, because, since 1990, Section 212(c) has clearly authorized electronic transmission of proxies and the use of copies and facsimiles of proxies.

New Section 228(d) addresses these inconsistencies by authorizing consents by electronic transmission and the use of copies, facsimiles or other reliable reproductions of a consent. However, unless the board of directors otherwise provides, an electronic consent must be reproduced in paper form and delivered in that form. For example, a stockholder may consent to corporate action by sending an e-mail or a telecopy to a proxy solicitor, but generally that e-mail or telecopy must be printed out and then delivered. This mechanic should limit the confusion that could result if corporations were obligated to accept e-mailed and faxed consents directly. The drafters believed that the amendment would make it easier for stockholders to give consent, while allowing corporations to maintain an orderly process.

New Section 228(d) does permit the board of directors to authorize direct electronic transmission of consents to the corporation. The drafters believed that, particularly in the private company context, it still might be efficient to permit such delivery. The decision to do so is entirely within the discretion of the board of directors.

Waiver of notice [§ 229].—Section 229 of the Delaware General Corporation Law provides that a written waiver of notice is equivalent to notice wherever notice is required to be given under the statute or the certificate of incorporation or by-laws of a corporation. The 2000 amendments provide that such a waiver may also be by electronic transmission.

Exceptions to requirements of notice [§ 230].—Section 230(b) provides that whenever notice is required to be given to any stockholder by the Delaware General Corporation Law or a corporation's certificate of incorporation or by-laws, notice need not be given to stockholders where two consecutive annual meeting notices or two consecutive dividend payments have been mailed to the person's address but returned as undeliverable. The 2000 amendments add a new subsection (c), which specifically provides that the return of undeliverable electronic notices does not give rise to this statutory exception to notice.

Voting procedures and inspectors of elections [§ 231].—Prior to the 2000 amendments, Section 231(d) provided that in counting proxies and ballots and determining their validity, inspectors of elections could look only to a corporation's regular books and records, the ballots and proxies themselves, and envelopes and information provided in accordance with Section 212(c)(2), which requires electronic proxies to be submitted with information from which it can be determined that the electronic proxy was authorized by the stockholder. The 2000 amendments expand the types of information that inspectors

may consider in order to conform to the new provisions of the statute that permit electronic balloting and meetings held by remote communication. Accordingly, inspectors may look at the information submitted along with electronic ballots from which it can be determined that the ballot was authorized by a stockholder or proxyholder, as well as the information provided to verify that persons present at meetings by means of remote communications were, in fact, stockholders or proxyholders, and the records of the votes of such persons.

Notice; electronic transmission [§ 232].—Section 232 is entirely new. In accordance with Section 232, corporations may deliver notices by electronic transmission to any stockholder, but only if the stockholder has consented to delivery of notice in such form. Specific standards are included as to when notice by electronic transmission will be deemed given. In particular, notices delivered to stockholders by telecopy or e-mail are deemed given when "directed" to the proper phone number or e-mail address. The use of the term "directed" is intended to avoid the invalidation of a meeting or other action where the corporation had in good faith directed the electronic transmissions properly.

Because of the frequency with which electronic addresses change, Section 232(a) specifically provides that consent to receipt of electronic notice is to be deemed revoked when it comes to the attention of the person responsible for giving notice that two consecutive notices could not be delivered. The inadvertent failure to effect a revocation for this reason will not invalidate any meeting or other action. The amendments also permit electronic waivers of notice.

Section 232 also contains what might be viewed as the heart of the 2000 amendments modernizing Delaware corporation law in terms of communications technology, the definition of "electronic transmission." The definition is intended to include any technology that allows communication without physically transmitting paper, but which nevertheless creates a record that can be retained, retrieved and reviewed by the recipient of the communication and, furthermore, that may be "directly reproduced in paper form" by the recipient through an "automated process." Thus, an e-mail clearly meets the definition, since the recipient can retain, retrieve and review an e-mail and, furthermore, may automatically reproduce the e-mail by printing it out. This can be contrasted with an orally transmitted message which, in general, may not be retained, retrieved and reviewed. On the other hand, an oral message recorded through an answering machine or a voice-mail technology may be retained, retrieved or reviewed by its recipient; nevertheless, current voice recognition technology does not permit the reproduction of such messages in paper form through an "automated" process, although such technology is likely to become available eventually.

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