
ANALYSIS OF THE 2005 AMENDMENTS ^{TO}_{THE} DELAWARE GENERAL CORPORATION LAW

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The 2005 amendments to the Delaware General Corporation Law, effective August 1, 2005, do not substantially revise the law, but they do implement certain important changes and clarifications. In particular, partly in response to a recent decision of the Delaware Court of Chancery, the 2005 amendments address long-standing questions concerning the applicability of Section 271—which requires a stockholder vote for the sale, lease or exchange of all or substantially all of the assets of a Delaware corporation—to certain transactions involving wholly-owned and controlled subsidiaries. The 2005 amendments also clarify and expand the scope of the sections of the statute dealing with the ability of non-Delaware entities to convert into or otherwise become Delaware corporations and the ability of Delaware corporations to convert into or otherwise become non-Delaware entities. Finally, the 2005 amendments make it clear that a certificate of incorporation may confer greater or lesser voting power on individual members of a board of directors, eliminate the requirement that Delaware corporations provide certificates to holders of uncertificated stock upon request, and allow the organizational documents of surviving entities in holding company mergers to be amended to eliminate a classified board structure. This article briefly describes the amendments and their effects.¹

1. This article supplements previous reports published by Aspen Publishers and its predecessor, Prentice Hall Law & Business, describing amendments to the General Corporation Law. See Arsht and Stapleton: Analysis of the New Delaware Corporation Law; Analysis of the 1967 Amendments to the Delaware Corporation Law; The 1969 Amendments to the Delaware Corporation Law; The 1970 Amendments to the Delaware Corporation Law; Arsht and Black: The 1973 Amendments to the Delaware Corporation Law; The 1974 Amendments to the Delaware Corporation Law; 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 1994 Amendments to the Delaware General Corporation Law; 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; Analysis of the 2000 Amendments to the Delaware General Corporation Law; Analysis of the 2001 Amendments to the Delaware General Corporation Law; Analysis of the 2002 Amendments to the Delaware General Corporation Law; Analysis of the 2003 Amendments to the Delaware General Corporation Law; Alexander and Wolters: Analysis of the 2004 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 Publishers, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, and 2004, respectively.)

DIRECTORS AND OFFICERS

Boards of Directors [§141].—Section 141 of the General Corporation Law governs such matters as the composition, structure and power of the board of directors. In addition to authorizing a classified board structure (*i.e.*, a “staggered” board), Section 141(d) permits a certificate of incorporation to provide that the holders of a particular class or series of stock shall vote separately to elect some or all of the directors (whether or not the board is classified). Section 141(d) also allows the charter to provide that the terms of office and voting powers of such separately-elected directors shall be greater than or less than those of any other directors or class of directors. It had been unclear, however, whether Section 141(d) permitted such differentiation among directors who had been elected by the stockholders generally rather than by a particular class or series of stock. The 2005 amendments expressly permit the certificate of incorporation to confer upon one or more directors, whether or not elected separately by the holders of any class or series of stock, voting powers greater than or less than those of other directors. The new provision does not expressly authorize such differentiation with respect to terms of office. Section 141(a) of the General Corporation Law continues to provide that every Delaware corporation shall be governed by a board of directors “except as may be otherwise provided in [the General Corporation Law] or in its certificate of incorporation.”

STOCK AND DIVIDENDS

Stock Certificates [§158].—The General Corporation Law has long permitted Delaware corporations to issue uncertificated stock. Section 158 nonetheless required every corporation to provide a stock certificate to any stockholder who requested one. The 2005 amendments eliminate the statutory requirement that corporations issue certificates for “certificateless” stock upon stockholder request.

MERGER, CONSOLIDATION OR CONVERSION

Merger or Consolidation of Domestic Corporations and Limited Liability Company [§251].—Section 251(g) of the General Corporation Law permits a Delaware corporation to convert to a holding company structure without a stockholder vote by merging with a direct or indirect wholly-owned subsidiary of a Delaware corporate holding company. As a result of such a merger, the corporation becomes a subsidiary of the holding company, and the stockholders of the corporation receive shares of the holding company in exchange for their pre-merger shares. The statute contains several requirements designed to ensure that such a merger does not change stockholder rights. Importantly, the charter and bylaws of the holding company must contain “provisions identical” to the governing documents of the pre-merger corporation, and the charter and bylaws of the corporation immediately after the merger (*i.e.*, after it has become a subsidiary of the holding company) must contain “provisions identical” to the corporation’s pre-merger governing documents.

In addition, the approval of the stockholders of the holding company is required for any amendment to the corporation’s (*i.e.*, the subsidiary’s) charter or any other trans-

action requiring stockholder approval at the subsidiary level. However, certain charter provisions, such as a “classified” board structure authorized by Section 141(d) of the General Corporation Law, typically make little sense for a subsidiary and serve no purpose in terms of protecting the interests of stockholders of the holding company. Accordingly, the 2005 amendments to Section 251(g) permit any provision of the certificate of incorporation of the subsidiary (*i.e.*, the pre-merger constituent corporation) authorized by Section 141(d) to be amended without any approval of the stockholders of the holding company. This is consistent with the existing provision of Section 251(g) permitting the certificate of incorporation of the subsidiary to be amended to decrease the number or type of shares that it may issue, without stockholder approval at the holding company level.

Conversion of Other Entities to a Domestic Corporation [§265].—Since 1999, the General Corporation Law has authorized the conversion of Delaware limited liability companies, limited partnerships and business trusts to Delaware corporations. In 2001, this authorization was extended to Delaware general partnerships. The 2005 amendments clarify certain aspects of the statute and further extend its scope—including allowing non-Delaware corporations to convert to Delaware corporations.

First, the 2005 amendments extend the availability of conversion to any unincorporated business, specifically referencing statutory trusts, business trusts or associations, real estate investment trusts, and common-law trusts. Second, prior to the 2005 amendments, the availability of conversion was limited to Delaware entities; non-Delaware entities seeking to reincorporate in Delaware had to go through the more cumbersome merger process or the domestication process (available to non-United States entities). The 2005 amendments extend the availability of conversion to foreign (*i.e.*, non-Delaware) entities—including non-Delaware corporations. Third, the 2005 amendments clarify that the Delaware corporation, following conversion, is the continuation of the existence of the entity that converted. Thus, the 2005 amendments make explicit that such a conversion, for purposes of the laws of Delaware, does not affect any of the converting entity’s property, debt, causes of action, liabilities, duties, rights, privileges and powers. Nor is the conversion to be deemed a “transfer” of any of the rights, privileges, powers and interest in property, or debts, liabilities and duties of the converting entity. Finally, the 2005 amendments add a new subsection (j), which allows the outstanding shares or other interests of the converting entity to be exchanged for or converted into cash, property, stock, rights or securities of the Delaware corporation or another entity, or to be cancelled. Subsection (j) thus confirms that a conversion transaction may be used in the same way as a merger to convert outstanding shares.

Conversion of a Domestic Corporation to Other Entities [§266].—Section 266 is the converse of Section 265, permitting the conversion of Delaware corporations to other entities. Like the 2005 amendments to Section 265, the 2005 amendments to Section 266 expand the definitions utilized in Section 266 to permit the conversion of a Delaware corporation to any other non-corporate entity, including non-Delaware entities. The 2005 amendments also permit conversion of a Delaware corporation to a foreign (*i.e.*, non-Delaware) corporation. Delaware corporations converting to non-

Delaware entities must file a certificate of conversion with the Secretary of State. Such certificate must include a consent to be served with process in Delaware for any action arising out of corporate acts while the entity was a Delaware corporation and appoint the Secretary of State of Delaware as the entity's agent for service of process.

Like the change to Section 265, the 2005 change to Section 266 makes explicit that the conversion does not affect any of the converting corporation's property, debt, causes of action, liabilities, duties, rights, privileges and powers and shall not be deemed a transfer of such property, debt, causes of action, liabilities, duties, rights, privileges and powers. Similarly, the 2005 amendments provide that the outstanding shares or other interests in the converting corporation may be exchanged for or converted into cash, property, stock, rights or securities of the converted entity or any other Delaware entity, or may be cancelled.

Finally, the 2005 amendments clarify that while generally, in order to effect a conversion under Section 266, board resolution followed by stockholder approval is required, if the converting corporation has not issued stock at the time of conversion, no vote of stockholders is required.

SALE OF ASSETS, DISSOLUTION AND WINDING UP

Sale, Lease or Exchange of Assets; Consideration; Procedure [§271].—Section 271 of the General Corporation Law requires stockholder approval for any sale, lease or exchange of all or substantially all of the assets of a Delaware corporation. Read literally, the statute would seem to have allowed holding companies, whose operating assets were held in subsidiaries, to dispose of such assets without any stockholder vote at the holding company level. The Delaware Court of Chancery questioned this result, although ultimately declined to decide the issue, in *Hollinger Inc. v. Hollinger International, Inc.*, 858 A.2d 342 (Del. Ch. 2004). The 2005 amendments add a new subsection (c) to Section 271. That subsection provides that for purposes of Section 271 only, the property and assets of a corporation include the property and assets of any of its subsidiaries, and that no stockholder vote is required for a sale, lease or exchange of assets of the corporation to a subsidiary (*i.e.*, a “drop down” of assets to a subsidiary). “Subsidiary” for Section 271 purposes means only wholly-owned and controlled entities. The 2005 amendments do not address whether a Section 271 vote is required for a sale, lease or exchange of assets by or to any entity that is not wholly-owned and controlled by the parent, such as a majority-owned subsidiary. Whether or not such a transaction would require a stockholder vote at the parent level would have to be assessed under the extensive caselaw interpreting Section 271.

DOMESTICATION AND TRANSFER

Domestication of non-United States Entities [§388].—The 2005 amendments clarify that any non-United States entity may domesticate in Delaware as a Delaware corporation; previously the statute referred solely to explicitly listed business forms and “similar entities.” Such a domestication must be approved in the manner provided for by the documents governing the internal affairs of the non-United States entity or by applicable non-Delaware law.

The changes to Section 388 in regard to the effects of domestication are similar to the clarifications in regard to the effects of conversion added to Sections 265 and 266. As a matter of Delaware law, the domestication does not affect any of the domesticating entity's property, debt, causes of action, liabilities, duties, rights, privileges and powers, and such rights, privileges, powers, and property, debt, causes of action, liabilities and duties are not deemed transferred as the result of any such domestication. Further, the amendments allow the outstanding shares or similar interests in the domesticating entity to be exchanged for or converted into cash, property, stock, rights or securities of the domesticated corporation or any other entity, or to be cancelled—similar to a merger or the conversion process authorized under Sections 265 and 266.

Prior to the 2005 amendments, the statute was ambiguous as to the effect domestication had on the pre-existing entity. Questions arose as to whether the domesticated entity could continue to exist under the laws of the foreign jurisdiction from which it came—*i.e.*, whether it could be “dually incorporated.” The 2005 amendments expressly acknowledge the possibility that the domesticated entity could remain an entity organized in another jurisdiction, and provide that the domestication, unless otherwise required under non-Delaware law, does not need to be followed by a winding up of the affairs of the domesticating entity. If a domesticating entity is to remain in existence in the foreign jurisdiction in which it was existing immediately prior to domestication, the domesticated corporation and the domesticating entity shall, under Delaware law, “constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable, and existing under the laws of the State of Delaware and the laws of such foreign jurisdiction.”

Temporary Transfer of Domicile Into This State [§389].—Section 389 allows the temporary transfer of domicile into Delaware of non-United States entities in the event of an “emergency condition” in the home country. The 2005 amendments are intended to reflect the newly broadened set of entities defined in Section 388 that may avail themselves of the statute.

Although the amendments broaden the scope of entities entitled to use the statute, Section 389(c)(1) requires a non-United States entity seeking to utilize Section 389 to submit to the Secretary of State “a copy of its certificate of incorporation and bylaws (or the equivalent thereof under applicable law).” This requirement may effectively limit the types of entities that can comply with Section 389, notwithstanding the newly broadened definitions. Subsection (i) of Section 389, which previously referred to the temporarily domesticating entity's “stockholders,” has been changed to refer to “holders of equity interests in such entity” and delete the reference to stockholders.

Transfer, Domestication or Continuance of Domestic Corporations [§390].—Section 390 authorizes Delaware corporations to leave the United States. Specifically, Section 390 allows the transfer, domestication or continuance of Delaware corporations in non-United States jurisdictions. When first enacted in 1995, Section 390 did not provide for transfer, domestication or continuance in a non-United States jurisdiction and the continued existence of the Delaware corporation. In 1997, Section 390 was amended to permit the continuation of the corporation under Delaware law—*i.e.*, the “dual incorporation” concept explicitly recognized in the 2005 amendments to Section 388.

The 2005 amendments clarify the method both of transferring, domesticating or continuing existence in a non-United States jurisdiction and of continuing the corporation's existence under Delaware law. Section 390 now contemplates two separate forms of filings: a certificate of transfer is filed if the corporation does not continue its existence in Delaware, and a certificate of transfer and domestic continuance is filed when the corporation intends to continue its existence as a Delaware corporation, as well as transfer, domesticate or continue in a non-United States jurisdiction. Should the Delaware corporation elect to continue as a Delaware corporation, "the continuing corporation and the resulting entity shall, for all purposes of the laws of the State of Delaware, constitute a single entity formed, incorporated, created or otherwise having come into being, as applicable, and existing under the laws of the State of Delaware and the laws of the foreign jurisdiction." Unless otherwise agreed to or provided in the Delaware corporation's certificate of incorporation, "the transfer, domestication or continuance of a corporation out of the State of Delaware in accordance with this section shall not require such corporation to wind up its affairs or pay its liabilities and distribute its assets under this title and shall not be deemed to constitute a dissolution of such corporation."

The 2005 amendments also confirm that a Delaware corporation may transfer, domesticate or continue into a non-corporate entity in the non-United States jurisdiction. Additionally, the amendments clarify that the resulting entity may have a name different from the name of the original entity, so long as the name of that entity is contained in the certificate filed with the Secretary of State.

Once again, the 2005 amendments clarify the effects of such transfer, domestication or continuance. The transfer, domestication or continuance does not affect any of the corporation's property, debt, causes of action, liabilities, duties, rights, powers and privileges, which remain in the transferring, domesticating or continuing corporation as well as in the corporation that has transferred, domesticated or continued so long as the corporation continues its existence in Delaware; and "the rights, privileges, powers and interests in property of the non-United States entity, as well as the debts, liabilities and duties of the non-United States entity, shall not be deemed, as a consequence of the domestication, to have been transferred to the corporation to which such non-United States entity has domesticated for any purpose of the laws of the State of Delaware." As under Section 388 and Sections 265 and 266, the outstanding shares or other interests of the transferring, domesticating or continuing corporation may be exchanged for or converted into cash, property, stock, rights or securities of the resulting entity or any other entity, or be cancelled.

Finally, the 2005 amendments provide that no stockholder vote is required if the transferring, domesticating or continuing corporation has not issued stock at the time of transfer, domestication or conversion.

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