

ANALYSIS OF THE 2012 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW

*By Jeffrey R. Wolters, Esq. and James D. Honaker, Esq.,
Morris, Nichols, Arsht & Tunnell LLP
Wilmington, Delaware*

The Delaware General Corporation Law (the “DGCL”) was amended in 2012 to make certain modernizing and technical changes, primarily addressing the information required to be included in filings related to mergers and other matters. As stated in the synopsis to the 2012 bill adopting the amendments, the changes continue the practice of amending the DGCL periodically “to keep it current and to maintain its national preeminence.” All the amendments became effective on August 1, 2012, except one minor change to Section 377 of the DGCL, discussed below, which does not become effective until August 1, 2013.¹

MERGERS AND CONVERSIONS

Merger or consolidation of domestic corporation with joint stock or other association [§ 254] or partnership [§ 263].—The DGCL has long permitted Delaware corporations to merge with different types of non-corporate entities existing under Delaware or non-Delaware law. For example, Section 254 permits a Delaware corporation to merge with a joint-stock association or “any unincorporated association, trust or enterprise having members or having outstanding shares of stock or other evidences of financial or beneficial interest therein.” Section 263 permits mergers with “partnerships (whether general (including a limited liability partnership) or limited (including a limited liability limited partnership)), of this State or of any other state or states of the United States, or of the District of Columbia.” After such mergers are approved in accordance with Section 254 or 263, as applicable, they are consummated by the surviving entity filing the agreement of merger, or, more typically, a simple “certificate of merger,” with the office of the Delaware Secretary of State. Sections 254 and 263 have been amended to require that such certificates of merger identify, with respect to each constituent entity in the merger, what type of legal entity such constituent entity is.

Merger of parent entity and subsidiary corporation or corporations [§ 267].—Section 267 of the DGCL permits a “short form” merger of a Delaware corporation with any other “entity” that owns at least 90% of each class of voting stock of the corporation. Several different types of “entity” are identified by the statute as permitted to employ such a merger. For example, a limited liability company (LLC) or limited partnership (LP) that owned 90% of a Delaware corporation could use Section 267 to effect a merger with that corporation. (Note that Section 267 only applies when the non-corporate entity is the “parent,” i.e., the 90% owner of the corporation, not vice versa.) Such a merger is consummated by the filing of a certificate of merger, which,

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; 1970; 1973-74; 1976; 1981; 1983-1988; and 1990-2011. 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; and James D. Honaker.

after the 2012 amendments, must identify the type of entity that the non-corporate entity is.

Conversion of other entities to a domestic corporation [§ 265].—The DGCL also permits other entities – including LLCs, statutory trusts, real estate investment trusts, partnerships and foreign corporations – to “convert” into a Delaware corporation by following the procedures set forth in Section 265 of the DGCL. Such a conversion is similar to merging into a Delaware corporation, except that in a conversion the Delaware corporation is deemed to be the “same entity” as the other entity that converted into it. Like a merger, a conversion is consummated by making a filing with the office of the Delaware Secretary of State. Such filings must now specify what type of entity the “other entity” is.

REVOCATION OF DISSOLUTION; RENEWAL OF CERTIFICATE OF INCORPORATION

Revocation of voluntary dissolution [§ 311].—Section 311 of the DGCL permits a dissolved Delaware corporation to revoke its dissolution at any time within three years of the dissolution date (or such longer period as may have been directed by the Court of Chancery pursuant to Section 278 of the DGCL). Such a revocation generally requires approval from the board of directors and a majority of the outstanding voting stock (the same vote as was required to approve the dissolution under Section 275 of the DGCL). Such a revocation is effected by making a filing with the office of the Delaware Secretary of State. This filing must now provide the name and address of the corporation’s registered agent in Delaware in accordance with Section 131(c) of the DGCL.

Renewal, revival, extension and restoration of certificate of incorporation [§ 312].—Somewhat similar to Section 311 of the DGCL, Section 312 permits a Delaware corporation whose certificate of incorporation “has become forfeited or void” to renew such certificate and thereby revive the corporation’s status as a Delaware corporation in good standing. The renewal process is most often used after a corporation has been “voided” for inadvertently failing to pay its annual franchise tax or file its Delaware annual report. Such a renewal requires the approval of the corporation’s board of directors and a filing with the office of the Delaware Secretary of State, which, after the 2012 amendments, must state the full address of the corporation’s registered agent in accordance with Section 131(c) of the DGCL.

QUALIFICATION TO DO BUSINESS IN DELAWARE BY NON-DELAWARE ENTITIES

Change of registered agent [§ 377].—Section 371 of the DGCL requires non-Delaware entities to appoint a registered agent located in Delaware in order to qualify to do business in Delaware. Section 377 permits the non-Delaware entity to change its registered agent by following certain procedures. Section 377 has been amended to clarify that the new registered agent may be any of the types of persons or entities identified in Section 371(b). Similarly, Section 377 permits a non-Delaware entity to reinstate its qualification to do business in Delaware, if such qualification has been forfeited, by making a filing with the office of the Delaware Secretary of State. Section 377 has been amended to include a process for reinstatement when the forfeiture was

caused by a resignation or judicial removal of the entity's Delaware registered agent; however, this amendment does not become effective until August 1, 2013.

Withdrawal of foreign corporation from State; procedure; service of process on Secretary of State [§ 381].—Section 381 of the DGCL permits a non-Delaware entity which has qualified to do business in Delaware to surrender such qualification by making a filing with the office of the Delaware Secretary of State. Under the 2012 amendments, this filing must either be a certificate stating that the non-Delaware entity surrenders such authority, or a copy of a court order dissolving such entity. A certificate evidencing such surrender shall then be issued by the Delaware Secretary of State to the non-Delaware entity.

Transfer, domestication or continuance of domestic corporations [§ 390].—Under Section 390 of the DGCL, a Delaware corporation may move its legal situs out of Delaware and into a foreign jurisdiction. The move may take the form of a “transfer, domestication or continuance” and the Delaware corporation may either cease to exist in Delaware (in which case it files a “certificate of transfer”) or, instead, continue its existence in Delaware while at the same time also becoming a non-Delaware entity (in which case it files a “certificate of transfer and domestic continuance”). Section 390(b)(5) has been amended to clarify that if the corporation shall cease to exist in Delaware, it must appoint the Delaware Secretary of State as its agent to receive service of process and must provide an address for receipt of such process, which may not be the address of the corporation's Delaware registered agent without such agent's consent.

FEES AND PENALTIES OWED TO DELAWARE SECRETARY OF STATE

Amounts payable to Secretary of State upon filing certificate or other paper [§ 391].—Section 391 of the DGCL, which sets forth various fees charged by the Delaware Secretary of State, has been amended to clarify that such charges are “fees and penalties,” but are not taxes, and has also been amended to set forth the fee for reinstating a foreign corporation.