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PERSPECTIVE

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Delaware update: amendments to General Corporation Law

By Marc Boiron

The most recent amendments to the General Corporation Law of the State of Delaware became effective on Aug. 1. Two of those amendments have important practical implications for private corporations and create a framework for significant changes that likely will impact Delaware corporations and practitioners advising them in the years to come.

Written Consent of Stockholders

Historically, stockholders of Delaware corporations have been required to individually date written consents for those consents to be valid. The source of that requirement was the language of Section 228 of the DGCL, which provided that every written consent must “bear the date of signature of each stockholder” who signs the consent and every consent had to be delivered to the corporation “within 60 days of the earliest dated consent.” Case law interpreting Section 228 determined that the foregoing language was to be strictly interpreted, which led to ambiguity even around the use of certain seemingly inconsequential words, such as stating that the consent was signed “as of” rather than “on” the date set forth below a stockholder’s name.

The actions that stockholders take are generally related to matters core to the corporation’s existence: governance and capitalization. As a result of the Delaware courts’ interpretation of Section 228, it was common for stockholder consents to be invalid, which put the corporation in an uncomfortable position because of the difficulty of ratifying many acts related to a corporation’s governance or capitalization.

Fortunately, an amendment to Section 228 relieves the concerns existing as a result of the prior language and its interpretation. Section 228 has been amended to provide that a written consent of stockholders will be effective only if a sufficient number of written consents “are delivered to the corpo-

ration in the manner required by this section within 60 days of the first date on which a written consent is so delivered to the corporation.” Therefore, the requirement that a written consent of stockholders be dated has been eliminated in its entirety, which will help avoid many unexpected issues for Delaware corporations, especially private corporations that make much greater use of written consent than public corporations.

Notwithstanding the fact that a written consent no longer needs to be dated, as a practical matter — for record keeping purposes — written consents should continue to be dated but may be done anywhere in the document. Moreover, when due diligence is performed on corporations, attention will need to be paid to the date on which stockholder consents are signed when analyzing their validity because consents signed before Aug. 1, 2017, will need to be individually dated to be effective but those signed after that date will not need to be dated.

Blockchain

Delaware has been known for staying abreast of new business and legal developments when developing its corporate laws. In the past few years, the literature on the impact that blockchain will have on almost every industry, including the financial services and legal industries, has grown rapidly. On June 10, 2016, the then-Delaware Gov. Jack Markell announced the creation of the Delaware Blockchain Initiative, which is intended to ensure, among other things, that Delaware’s laws permit the blockchain industry to develop without hindrance. The Delaware Blockchain Initiative’s first action was to collaborate with the Delaware Corporation Law Council to develop a new legal framework to permit the issuance and maintenance of shares on the blockchain.

In furtherance of those efforts, Sections 151(f), 202(a), 219, 224, 232(c), and 364 of the DGCL were amended. The key amendments were to Sections 219 and 224. Section 219 was amend-

ed to add a definition of “stock ledger,” which means “1 or more records administered by or on behalf of the corporation in which ... all issuances and transfers of stock of the corporation are recorded” in accordance with Section 224. Therefore, an officer of the corporation no longer needs to be directly in charge of maintaining the corporation’s stock ledger.

Similarly, Section 224 was amended to provide that “records administered by or on behalf of the corporation,” such as its stock ledger and a minute book, may be kept in any form, including on “1 or more electronic networks or databases (including 1 or more distributed electronic networks or databases).” The corporation’s records must continue to be able to be converted into a clearly legible paper form.

The cumulative effect of the blockchain-related amendments is to permit all capitalization matters of a corporation, which includes recording the issuance and transfer of shares, to occur using blockchain technology. Certain additional amendments will need to be made to the DGCL before voting can occur using blockchain technology.

Going forward, Delaware’s efforts to advance the use of blockchain technology will have a profound impact on both private and public companies. Specifically, with respect to private companies:

- cap tables will be more accurate and easier to manage;
- shares will not be issued in excess of the authorized shares and equity awards will not be granted in excess of the reserved shares for those awards;
- the annual report and franchise tax process in Delaware will be automated;
- agreements, such as limited liability company and partnership agreements, will be on the blockchain, which will lessen the likelihood of disputes over the applicable agreement and members of the company; and
- UCC-1 financing statements, used to perfect lenders’ rights in collateral, will become more accurate and

many customary processes, such as renewals, terminations, notices for changed addresses, changes to collateral descriptions, continuations and adding secured parties, will become automated.

The most significant impact in the short term likely will be on newly-formed companies, which, once Delaware has fully-implemented blockchain technology, will be able to incorporate on the blockchain and establish a ledger thereon. In addition, private corporations with only a few stockholders should be able to have all stockholders return their stock certificates to the corporations, as required by Delaware law, so that replacement uncertificated shares of stock are issued in digital form on the blockchain can be held by stockholders to take advantage of the benefits of blockchain technology.

Conclusion

The amendment to Section 228 was important to simplify the process for stockholders to act by written consent and to avoid the unexpected consequences of stockholder consents that were invalid because they were not properly dated.

The blockchain-related amendments together with Delaware’s investment in blockchain technology create an important platform on which companies will be able to rely on a more accurate, efficient and secure process than the one that exists today.

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