RICHARDS LAYTON & FINGER

Delaware Corporate Law Update

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2023 Proposed Amendments to the General Corporation Law of the State of Delaware

Legislation proposing to amend the General Corporation Law of the State of Delaware (the "DGCL") is expected to be introduced to the Delaware General Assembly for consideration during its 2023 regular session. If enacted, the 2023 amendments to the DGCL will, among other things, make the following changes:

- Sections 152, 153 and 157 (as well as Section 160(b)) will be revised to make clarifying changes with respect to the creation and issuance of stock and rights and options to purchase stock, including confirming that a corporation is not required to receive the statutory minimum consideration (typically the par value) for a disposition of treasury shares.

- Section 204 will be revised to simplify the requirements for the filing of certificates of validation in connection with the ratification of certain defective corporate acts.

- Section 228(e) will be revised to provide greater certainty as to the stockholders to whom notice of a non-unanimous action by consent of stockholders must be given.

- Section 242 will be revised to (i) eliminate the need to obtain the default vote of stockholders for charter amendments effecting specified types of forward stock splits and associated increases in the authorized number of shares, and (ii) reduce the minimum stockholder vote required to authorize a charter amendment increasing or decreasing the authorized shares of a class, or effecting a reverse split of the shares of a class, in circumstances where the shares of such class are listed on a national securities exchange immediately before the amendment becomes effective and meet the listing requirements of such exchange after the amendment becomes effective.

- Section 260 will be revised to confirm that a corporation continuing or resulting from a conversion or domestication will have the same power to issue bonds, other obligations and securities as a corporation surviving or resulting from a merger or consolidation.

- Section 265 will be revised to authorize the adoption of a plan by which an other entity may convert to a Delaware corporation and to provide that certain acts and transactions effected pursuant to such plan may be accomplished without a further

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vote of the board of directors or stockholders of the Delaware corporation continuing after the conversion.

- Section 266 will be amended to clarify that a corporation may adopt a plan of conversion specifying, among other things, the terms of the conversion, the provisions of the organizational documents of the entity continuing after the conversion, the treatment of stock converted or exchanged in the conversion, and other matters.

- Section 390 will be amended to reduce the vote required to consummate a domestication, transfer or continuance of a Delaware corporation to a non-U.S. entity from a unanimous vote of all stockholders (voting and non-voting) to a majority in voting power of the outstanding stock entitled to vote and to clarify that the corporation may adopt a plan of domestication.

- Section 262 will be amended to revise the provisions governing statutory appraisal rights, including to provide that such rights are available in connection with a transfer, continuance or domestication of a Delaware corporation to a non-U.S. entity.

- Section 272 will be amended to provide that no vote of stockholders is required to authorize a sale, lease or exchange of collateral securing a mortgage or pledge under specified circumstances.

If enacted, the 2023 amendments will become effective on August 1, 2023, except that (i) the amendments to Section 262 will be effective with respect to (A) a merger or consolidation consummated pursuant to an agreement of merger or consolidation entered into on or after August 1, 2023, (B) a "short-form" merger authorized on or after August 1, 2023, or (C) a conversion, transfer, continuance or domestication effected on or after August 1, 2023; (ii) the amendments to Section 265 will apply only to conversions effected pursuant to a plan of conversion entered into on or after August 1, 2023 (or, if no plan of conversion is entered into, a corporation with respect to which the authorization of the conversion under the DGCL is obtained on or after August 1, 2023); and (iii) the amendments to Section 390 will apply only to domestications, transfers or continuances authorized by the board on or after August 1, 2023.

Sections 152, 153, 157 and 160: Creation and Issuance of Stock and Rights and Options to Purchase Stock; Disposition of Treasury Shares

In 2022, Sections 152 and 153 of the DGCL, which deal with the creation and issuance of stock, and Section 157 of the DGCL, which deals with the creation and issuance of rights and options to purchase stock, were amended to harmonize the procedures by which stock, and rights and options to purchase stock, could be authorized for issuance, including with respect to the power of the board of directors (or a duly empowered committee of the board) to delegate its powers under those statutes to officers and others. The 2023 amendments make certain clarifying changes to Sections 152, 153, 157 and 160 to build on the changes enacted in 2022.

In connection with the 2022 amendments to the DGCL, Section 153 was amended to make clear that the procedures governing the power of the board (or a committee) to delegate the authority to issue stock applied equally to a disposition of treasury shares. (Treasury shares are those that have been issued but are no longer outstanding because they have been redeemed, purchased or otherwise reacquired by the corporation and have not been retired or cancelled.) Because the 2022 amendments to Section 153 provided that treasury shares could be disposed in the same manner as shares could be issued under Section 152, there was a question as to whether a corporation needed to receive, for a disposition of treasury shares, the minimum consideration that would be required for an issuance of stock (which, for shares having a par value, is consideration having a value at least equal to the par value of the shares). Historically, the principal distinction between an original issuance of stock, on the one hand, and the disposition of treasury shares, on the other, was that the corporation was not required to receive the statutory minimum consideration for the disposition of treasury shares. The longstanding view was that, when disposing of treasury shares, the corporation was not required to receive the par value in respect of the shares, since the shares had already been fully paid upon the corporation's receipt of consideration at least equal to the par value thereof in connection with their original issuance. As no change to this basic construct was intended by the 2022 amendments, Sections 152 and 153 are being amended to clarify that treasury shares may be disposed without the need for the corporation to receive consideration at least equal to the par value. Section 152 is being amended to clarify that the minimum consideration for which shares may be issued may not be less than the consideration, *if any*, required under Section 153. Section 153 is being amended to state that the consideration received for treasury shares may be greater than, less than, or equal to the par value of the shares. Section 153 is being further amended to confirm that, as with an issuance of stock, the corporation may receive for a disposition of treasury shares consideration consisting of cash, tangible or intangible property, or any benefit to the corporation (or any combination of the foregoing).

In connection with this change, Section 160(b) is being amended in a few technical respects. Currently, Section 160(b) provides that nothing in Section 160, which governs a corporation's power to deal in its own stock, limits or affects the corporation's right to resell shares that have been purchased or redeemed but have not been retired for such consideration as is fixed by the board. The amendments to Section 160(b) make clear that nothing in Section 160 limits or affects the corporation's right to resell, under Section 153, shares that have been purchased or redeemed by the corporation and have not been retired, or are not required by the certificate of incorporation to be retired.

The 2023 amendments make clarifying changes to Section 157. As noted above, in 2022, Section 157 was amended to harmonize the procedures for issuing rights and options to purchase or acquire stock with the procedures applicable to the issuance of stock. Those amendments authorized the board of directors (or a duly empowered committee of the board) to delegate to one or more other persons or bodies (*e.g.*, officers and others) the power to issue rights and options, subject to the adoption of a resolution fixing (i) the maximum number of rights or options, and the maximum number of shares issuable upon exercise thereof, (ii) a time period during which the rights or options, and during which the shares issuable upon exercise thereof, may be issued, and (iii) a minimum amount of consideration (if any) for which the rights or options may be issued and the minimum amount of consideration for the shares issuable upon exercise thereof. The 2023 amendments preserve this basic construct, albeit with some technical

enhancements. The language in Section 157(c), which permits the board to adopt resolutions delegating to other persons and bodies the power to enter into transactions to issue rights or options, is being expanded to make clear that the board (or committee) may in such resolutions delegate the power to fix the terms upon which shares may be acquired from the corporation upon the exercise of rights or options. Accordingly, under revised Section 157, a resolution of the board (or duly empowered committee) delegating the power to issue rights or options to officers or others could include, for example, the power to fix the vesting terms of the grant, including whether any grant may be accelerated. Amended Section 157(c) also provides that the board's (or committee's) delegating resolutions must continue to fix the maximum number of shares issuable upon exercise of the rights or options issued pursuant to the delegation, but do not otherwise need to fix the maximum number of rights or options issuable under the delegation. Additionally, amended Section 157(c) clarifies that such delegating resolutions must establish two separate time periods: one time period during which the delegate can issue rights or options and another time period during which shares may be issued upon the exercise of the rights or options. Those time periods may be expressed in terms of specific dates or time horizons, or they may be made dependent upon extrinsic facts. Thus, it would be sufficient for the resolutions to state, for example, that a person or body may issue options under an incentive plan for the duration of the plan and that shares may be issued upon the exercise of such options for a period of ten years following the grant date. Section 157(e), which deals with the consideration payable upon the exercise of rights or options, is also being amended to reference the minimum consideration (if any) required by Section 153 of the DGCL.

Section 204: Ratification of Defective Corporate Acts

Section 204, which relates to the ratification of defective corporate acts (*i.e.*, corporate acts that, due to a failure in authorization, are void or voidable), is being amended in several respects, principally to streamline the filings associated with the ratification of defective corporate acts that require the filing of an instrument with the Delaware Secretary of State. Currently, under Section 204, if the defective corporate act being ratified would have required under any section of the DGCL the filing of a certificate with the Delaware Secretary of State, the corporation must file a certificate of validation with the Delaware Secretary of State (even if a certificate was previously filed and no changes need to be made to such certificate to give effect to the ratification). The current statute requires that the certificate of validation include specified information, including (i) the identification of each defective corporate act that is the subject of the certificate of validation (including, in the case of an act involving the issuance of putative stock, the number and type of shares of putative stock issued and the date or dates upon which the putative shares were purported to be issued), the date of the defective act, and the nature of the failure of authorization in respect of each such act; (ii) a statement that the defective corporate act was ratified in accordance with Section 204, including the date on which the board ratified the act and the date, if any, on which the stockholders ratified the act; and (iii) (A) if a certificate was previously filed with the Delaware Secretary of State and no change is required to give effect to the defective corporate act, the name, title and filing date of the prior certificate as well as a copy of such certificate (and any certificates of correction that were filed to correct that prior certificate), (B) if a certificate was previously filed and that certificate requires some change to give effect to the defective corporate act, the name, title and filing date of the prior certificate, a statement that a certificate containing the information required to be included under the applicable provision of the DGCL to give effect to the defective corporate act is attached as

an exhibit to the certificate of validation (with the exhibit so attached), and the date and time that such certificate is deemed to become effective, and (C) if no certificate was previously filed, a statement that a certificate containing all information required by the applicable provision of the DGCL is attached as an exhibit to the certificate of validation (with the exhibit so attached), and the date and time that such certificate is deemed to become effective.

The relative complexity of the certificate of validation, along with the lack of uniformity in the practice of preparing such certificates, has resulted in delays in the processing of certificates of validation. In an effort to alleviate some of the administrative burdens associated with such filings, the 2023 amendments seek to streamline the procedures relating to the preparation and filing of certificates of validation. First, the amendments to Section 204(e) dispense with the need for filing a certificate of validation in circumstances where the underlying defective corporate act required the filing of a certificate under another section of the DGCL and such a certificate has already been filed and requires no change to give effect to the defective corporate act. As an example, under the current law, if the board, acting by less than unanimous written consent, approved an amendment to the certificate of incorporation to effect a stock split, and such amendment was adopted by stockholders and duly filed with the Delaware Secretary of State at the appropriate time, the corporation, after ratifying the stock split, would be required to file a certificate of validation attaching that previously filed instrument, even though no change was required to give effect to the underlying act. Under the 2023 amendments, no such certificate of validation would be required. Dispensing with the need to file a certificate of validation in these circumstances does not prejudice the rights of any parties in interest, as Section 204 still requires notice of the ratification to be given to holders of valid stock and putative stock as of all relevant times.

Second, the 2023 amendments greatly simplify the contents of a certificate of validation in circumstances where one is required. (A certificate of validation is required under circumstances where the certificate on file with the Delaware Secretary of State requires some change to give effect to the defective corporate act and where no certificate was previously filed but the underlying act requires recordation with the Delaware Secretary of State.) Specifically, the amendments eliminate the need for the certificate of validation to identify the underlying defective corporate acts, the nature of the failure of authorization relating to those acts and matters relating to any shares of putative stock arising from those acts. In addition, the amendments eliminate the need for the certificate of validation to specifically state that the board and, if applicable, stockholders have approved the ratification of the acts and the date(s) on which the ratification was so approved. Instead, the certificate of validation need only state that the corporation has ratified one or more defective acts that would have required the filing of a certificate under another provision of the DGCL, that each act has been ratified in accordance with Section 204, and, in the case where a certificate has previously been filed, the name, title and filing date of the certificate, a statement that a certificate containing the information required to be included under such other provision of the DGCL to give effect to the defective corporate act is attached as an exhibit, and the date and time that the certificate is deemed to become effective or, in the case where no certificate has previously been filed, a statement that a certificate containing the information required under the other provision of the DGCL is attached as an exhibit and the date and time such certificate is deemed to become effective.

Section 204 is also being amended to clarify technical procedural requirements in circumstances where no valid stock is outstanding and entitled to vote on the ratification. Currently, Section 204(c)(2) dispenses with the need for a vote of stockholders in circumstances where no valid stock is outstanding and entitled to vote on the ratification. That provision, however, currently states that no such vote is needed if there are no shares of valid stock outstanding and entitled to vote on the ratification "as of the record date for determining the stockholders entitled to vote on the ratification." Because the use of the construct of a record date is inapposite in circumstances where no vote of stockholders is being taken, the language of Section 204(c)(2) is being clarified to provide that the determination as to whether any shares of valid stock are outstanding and entitled to vote on the ratification must be made at the time the board adopts the resolutions approving the defective corporate act. Section 204(d), which currently specifies that shares of "putative stock" outstanding as of the record date for determining stockholders entitled to vote on a ratification are neither entitled to vote on the ratification nor counted for quorum purposes in any ratification vote, is being similarly amended to dispense with the concept of a record date and to fix the board's adoption of the resolutions ratifying the defective corporate act as the time for determining which shares constitute valid stock and which shares constitute putative stock entitled to vote on the adoption of the ratification of a defective corporate act requiring a vote of the holders of valid stock.

Section 228: Action by Consent of Stockholders in Lieu of a Meeting

Under Section 228 of the DGCL, unless the certificate of incorporation otherwise provides, stockholders may take action by consent in lieu of a meeting without prior notice and without a vote, provided that valid consents of the requisite number of votes of stockholders are delivered to the corporation in accordance with law. As no prior notice is required for such action to be taken, Section 228(e) requires prompt notice to be given to non-consenting stockholders after an action is taken. Specifically, Section 228(e) currently requires notice of the taking of corporate action by consent to be given to those stockholders who have not consented to the action and who, if the action had been taken at a meeting, would have been entitled to notice of the meeting if the record date for notice of the meeting had been the date that consents signed by a sufficient number of holders to take the action were delivered to the corporation as provided in Section 228.

Under the current law, the date for notice to non-consenting stockholders differs from the record date for determining stockholders entitled to act by consent. Under Section 213(b) of the DGCL, which governs the fixing of a record date for action by consent of stockholders in lieu of a meeting, there are three different record dates that could be used for determining stockholders entitled to act on a consent. (These include (i) a record date fixed by the board, which date may not precede the date upon which the board fixes the record date and which may not be more than ten days after the date of such resolution, (ii) if no record date is fixed by the board, and no prior action of the board is required by the DGCL, the first date on which a signed consent is delivered to the corporation, and (iii) if no record date is fixed by the board and prior action of the board is required under the DGCL, the date on which the board adopts the resolutions taking such prior action.) As revised by the 2023 amendments, Section 228(e) would harmonize the notice requirements to non-consenting stockholders with the provisions governing the record date for determining stockholders entitled to consent to an action. Specifically, amended Section 228(e) provides that notice of action by consent of stockholders in lieu of a meeting must be given to

those non-consenting stockholders as of the record date for the action by consent who would have been entitled to notice of a meeting held to take such action if the record date for the notice of the meeting was the record date for the action by consent.

The amendments to Section 228(e) also provide that a notice that constitutes a notice of internet availability of proxy materials for purposes of the federal Securities Exchange Act will satisfy the notice requirements of Section 228(e) for corporations entitled to use such notices under the relevant regulation promulgated under the Securities Exchange Act.

Section 242: Amendments to Certificates of Incorporation

Section 242, which governs the procedures by which a corporation may implement amendments to its certificate of incorporation, is being amended in several important respects. In general, after a corporation has received payment for its stock, an amendment to the certificate of incorporation must be approved by the board and then adopted by the holders of a majority in voting power of the outstanding stock entitled to vote thereon and by the holders of a majority in voting power of each class entitled to vote thereon as a class, subject to limited exceptions.

The 2023 amendments add a new Section 242(d) governing the circumstances in which a vote of stockholders otherwise required by Section 242(b) may be eliminated or reduced. Section 242(b)(1) currently contains provisions that eliminate the need for a vote of stockholders to adopt an amendment in limited circumstances, such as an amendment to effect a name change (unless the certificate of incorporation requires such a vote) or an amendment to delete provisions that named the incorporator, the initial directors or initial subscribers for stock or provisions contained in any amendment to effect a change, exchange, reclassification subdivision, combination or cancellation of stock that has already become effective. As those provisions relate to circumstances where an amendment does not require a vote of stockholders, they have been moved to new Section 242(d)(1). New Section 242(d)(1) then creates additional categories of amendments for which no vote of stockholders is required. Under new Section 242(d)(1), no vote of stockholders is required for an amendment that subdivides the issued shares of a class of stock into a greater number of issued shares (*i.e.*, a forward stock split), so long as such class is the only class of such corporation's capital stock then outstanding and such class is not divided into series. New subsection 242(d)(1) further provides that no vote of stockholders is required in connection with any such forward stock split in order to increase the authorized number of shares of such class up to an amount proportionate to the subdivision. By way of example, if a corporation with only common stock outstanding has 100 shares of common stock authorized, 50 of which are issued, the corporation could effect a 3:1 forward stock split. In connection with that split, the corporation would be required to increase its authorized shares of common stock to at least 150 authorized shares, but it could increase its authorized shares of common stock to up to 300 authorized shares.

Next, new Section 242(d)(2) reduces the default stockholder vote required to approve an amendment to increase or decrease the authorized number of shares of a class of stock, or an amendment to reclassify the outstanding shares of a class into a lesser number of shares of the class (*i.e.*, a reverse stock split), under specified circumstances. In recent years, due to a wider dispersion of shares among retail holders and policies in which brokerage firms decline to exercise their discretionary authority to vote shares held in "street name," many public

corporations have encountered significant difficulty in securing various stockholder votes and, in particular, a vote necessary to effect a reverse stock split to help a corporation maintain the minimum share price amount necessary to be listed on a national securities exchange. The lack of interest and participation among stockholders and beneficial owners in these critical votes is often attributable not to the merits of the proposal—few stockholders, it would seem, would support a de-listing that would assuredly diminish the liquidity of the stock—but to "rational apathy" among retail and other dispersed investors, each of whom individually owns too few shares to have a vested interest in the corporation but all of whom collectively represent a significant portion of the voting base. New Section 242(d)(2) provides that a corporation may amend its certificate of incorporation to increase or decrease the authorized shares of a class of stock, or to effect a reverse stock split in respect of a class of stock, without obtaining the vote or votes otherwise required by Section 242(b) (*i.e.*, at least a majority in voting power of the outstanding stock entitled to vote thereon) if (i) the shares subject to the reverse stock split are listed on a national exchange immediately before the amendment becomes effective and such corporation meets the listing requirement of such exchange relating to the minimum number of holders immediately after the amendment becomes effective, (ii) at a meeting of stockholders at which a vote is taken for and against the proposed amendment, the votes cast for the amendment exceed the votes cast against the amendment, and (iii) the amendment increases or decreases the number of shares of a class of stock that has not opted out of the class vote pursuant to the last sentence of Section 242(b)(2) (which sentence provides that an amendment to the certificate of incorporation to increase or decrease the authorized shares of a class, which would otherwise require a separate vote of the holders of the class, may be approved by the holders of the stock entitled to vote), the votes cast for the amendment by the holders of such class exceed the votes cast against the amendment by the holders of such class. As new Section 242(d)(2) refers only to votes cast for or against an amendment, it makes clear that abstentions have no effect on whether the required approval is obtained. The addition of subsection (d) does not eliminate the stockholder vote required to change the par value of a class of stock, whether or not in connection with any reclassification, subdivision or combination. Thus, if the par value of the shares of a class is changed, even proportionately with the split, a separate vote of the holders of a majority in voting power of the outstanding shares of such class would still be required under Section 242(b)(2) of the DGCL.

In connection with the foregoing amendments to Section 242(d) dealing with forward and reverse stock splits, Section 242(a)(3), which currently governs amendments that reclassify outstanding stock, is also being amended to require that reclassifications by way of subdividing and combining (*i.e.*, forward stock splits and reverse stock splits) must reclassify both outstanding shares and shares held in treasury. That is, when a corporation effects a forward or reverse stock split, the split will apply to all issued shares, whether they are outstanding or held by the corporation in treasury.

New Section 242(d) contains lead-in language (*i.e.*, "unless otherwise expressly required by the certificate of incorporation") that permits a corporation to "opt in" to the stockholder votes that otherwise would be required under subsection (b) in connection with any reclassification, subdivision or combination of the issued shares or increase or decrease in the authorized number of shares contemplated by Section 242(d). To make use of such lead-in language, though, the provision of the certificate of incorporation must expressly state that the vote of stockholders otherwise required under Section 242(b) is required to adopt any

amendment to the certificate of incorporation specified in Section 242(d), or it must expressly "opt out" of the provisions of Section 242(d).

Section 260: Powers of Surviving, Resulting, Converted or Domesticated Corporations

Section 260 of the DGCL currently gives surviving or resulting corporations of a merger or consolidation broad power to issue bonds and other obligations, to an amount sufficient with its capital stock to provide for the payments it will be required to make, or obligations it will be required to assume, to effect the merger. It also specifies that it is lawful for the surviving corporation to mortgage its franchise, rights, privileges and property to secure such obligations. It then provides that a surviving or resulting corporation may issue certificates for shares of capital stock or uncertified shares and other securities to the stockholders of the constituent corporation in exchange or payment for the original shares as required by the agreement of merger or consolidation.

The 2023 amendments apply the empowering provisions of Section 260 to both conversions and domestications, given that virtually any changes in a capital structure that may be effected through a merger or consolidation may also be effected through a conversion or domestication.

Section 265: Conversion of Other Entities to Delaware Corporations

Similar to amendments made in 2022 to Section 388 of the DGCL (which relates to domestications of non-U.S. entities to Delaware), the 2023 amendments to Section 265 provide that a plan of conversion adopted under Section 265 in connection with the conversion of another entity to a Delaware corporation may set forth corporate action to be taken by the converted corporation in connection with the conversion. Those additional corporate actions must be approved prior to the conversion in accordance with the legal requirements applicable to the entity prior to the conversion. Once so approved, any such corporate action that is within the power of a Delaware corporation under the DGCL that are set forth in the plan of conversion will be deemed authorized, adopted and approved, as applicable, by the converted Delaware corporation and its board of directors and stockholders, without further action by the board or stockholders. In the event that any such follow-on action requires the filing of a certificate under any other section of the DGCL, such other certificate must state that, pursuant to Section 265, no action by the board of directors or stockholders is required.

Section 266: Conversion of Delaware Corporations to Other Entities

The 2023 amendments revise Section 266, which relates to a conversion of a Delaware corporation to an other entity, to clarify that a corporation may adopt a plan of conversion specifying, among other things, the terms of the conversion, the provisions of the organizational documents of the other entity continuing after the conversion, the treatment of stock converted or exchanged in the conversion, and other matters. Currently, Section 266 provides that the board must adopt resolutions approving a conversion of the corporation to an other entity and submit the resolutions to the stockholders for their adoption. As amended, Section 266 provides that if a plan is to be adopted in connection with any conversion, the plan must be approved by the board

and the stockholders in the manner prescribed in Section 266 together with the resolution approving the conversion.

Section 390: Transfer, Continuance and Domestication of Delaware Corporations to Non-U.S. Entities

Consistent with changes made in 2022 to Section 266, which allows Delaware corporations to convert to other entities, the 2023 amendments change the requirement in Section 390 for stockholder approval of the transfer, domestication or continuance of a corporation in a non-U.S. jurisdiction from all of the outstanding shares of stock of the corporation (voting or non-voting) to a majority in voting power of the outstanding shares of stock entitled to vote on the transfer, domestication or continuance. If the corporation is transferring, domesticating or continuing as a partnership with one or more general partners, the transfer, domestication or continuance requires the approval of each stockholder that is to become a general partner of the partnership.

Given that many stockholders, including preferred stockholders, will have invested in Delaware corporations on the basis that domestications, transfers and continuances would be practically impossible to consummate (and will have negotiated protective provisions or other rights with that premise in mind), the amendments make clear that any provision of the certificate of incorporation of a corporation incorporated before August 1, 2023, or voting agreement or other written agreement between the corporation and any stockholder entered into before that date, that restricts or prohibits the consummation of a merger, consolidation or conversion shall be deemed to apply to a domestication, transfer or continuance unless the certificate of incorporation or agreement expressly otherwise provides. Thus, for example, protective provisions of existing corporations that require a separate vote of the holders of preferred stock (or one or more series thereof) to approve a merger will be construed to require the same vote to effect a domestication, transfer or continuance. Nevertheless, going forward, if investors want to obtain veto rights over domestications, transfers or continuances, they must specifically negotiate for blocking rights in the certificate of incorporation over those transactions. Without those express rights, investors run the risk of having their shares cancelled or converted into another form of consideration (either cash, securities or other property) in a transfer, domestication, or continuance of the corporation. Investors should also review the terms of any “deemed liquidation” provisions to ensure that they will obtain the rights they seek to receive if the corporation consummates a transfer, domestication or continuance that changes the nature of their investment. Although investors should consider negotiating for such rights, they will not be entirely unprotected. As described below, Section 262 of the DGCL is being amended to give stockholders appraisal rights in connection with any transfer, domestication or continuance. From a practical standpoint, the availability of appraisal rights will have the effect of deterring many private corporations from effecting a transfer, domestication or continuance in a non-U.S. jurisdiction, as the prospect of a liquidity event will make it economically infeasible to complete the transaction.

As with Section 266, Section 390 is being amended to clarify that a corporation may adopt a plan of transfer, domestication or continuance specifying, among other things, the terms of the transfer, domestication or continuance, the mode of carrying it into effect, the provisions of the organizational documents of the resulting entity, the treatment of stock converted or

exchanged in the transfer, domestication or continuance, and other matters, including any provisions required to be set forth therein under the laws applicable to the resulting entity.

Section 262: Appraisal Rights

The 2023 amendments effect several changes to Section 262, which currently provides stockholders with a right to seek a judicial appraisal of the fair value of their stock in connection with specified mergers, consolidations and conversions in which the corporation is a constituent entity or is the converting entity. Principally, the 2023 amendments would give appraisal rights to stockholders in connection with a domestication, transfer or continuance of a Delaware corporation to a non-U.S. jurisdiction under Section 390 of the DGCL. As noted above, Section 390 of the DGCL is being amended to reduce the statutory voting requirement necessary to effect a domestication, transfer or continuance from a unanimous vote of all stockholders, voting and non-voting, to the holders of a majority in voting power of the outstanding stock. As any change in stock that may be effected through a merger, consolidation or conversion can likewise be effected through a domestication, transfer or continuance, it was deemed appropriate, in light of the reduction in the voting threshold, to provide objecting stockholders with appraisal rights. A domestication, transfer or continuance, however, will not give rise to appraisal rights where the current "market out" exception in Section 262(b)(2) applies. (In general, current Section 262(b)(2) provides that, where shares of stock are listed on a national securities exchange or held of record by more than 2,000 stockholders on the record date for determining stockholders entitled to notice of the meeting of stockholders to vote upon the merger or consolidation or conversion, those holders will not be entitled to appraisal rights in such merger or consolidation or conversion unless their shares are converted into anything other than shares of the surviving corporation, shares of stock of another corporation (or depository receipts in respect thereof) that are listed on a national securities exchange or held of record by more than 2,000 stockholders, cash in lieu of fractional shares or any combination of the foregoing.)

Next, in connection with the changes to Section 265, Section 262 is being amended to deny appraisal rights in connection with a merger, consolidation, conversion, transfer, domestication or continuance that is approved in connection with a plan adopted by an entity that has converted or domesticated to a Delaware corporation.

Finally, Section 262(k) is being amended to clarify that an appraisal demand may be withdrawn more than 60 days after the effective date of the transaction resulting in appraisal rights if the withdrawal is approved by the corporation. The amendment does not, however, change the existing rule that appraisal rights cease if a petition for appraisal is not filed under Section 262(e).

Section 272: Mortgages, Pledges and Foreclosures

The 2023 amendments revise Section 272 of the DGCL to add a new "safe harbor" provision for the sale, lease or exchange of collateral assets that secure a mortgage or pledge. Notably, this safe harbor under amended Section 272(b) is not intended to affect a secured party's obligation to comply with Article 9 of the Uniform Commercial Code (as applicable), real property law or other applicable law.

Currently, Section 271 of the DGCL requires a vote of stockholders to authorize a sale, lease or exchange of all or substantially all of the assets of the corporation. Section 272 of the DGCL currently specifies that the authorization or consent of stockholders to the mortgage or pledge of a corporation's property or assets shall not be necessary, except to the extent provided in the certificate of incorporation. But current Section 272 of the DGCL does not, at least by its express terms, state that no stockholder vote is required to authorize a sale, lease or exchange of all or substantially all of a corporation's assets.

As amended, Section 272(b)(1) clarifies that stockholder approval of a sale, lease or exchange of collateral securing a mortgage or pledge is not required if such transaction is being effected through the secured party's exercise of its rights under the law governing the mortgage or pledge (or other applicable law, including under Article 9 of the Uniform Commercial Code, real property law or other law) without the corporation's consent. Alternatively, Section 272(b)(2) permits the secured party and the corporation, with the approval of its board of directors, to agree to an alternative transaction not prohibited by the law governing the mortgage or pledge (*e.g.*, a strict foreclosure or sale to a third party), without obtaining a vote of stockholders under Section 271, so long as the value of the assets sold, leased or exchanged is less than or equal to the amount of the liability or obligation being reduced or eliminated as a result of the transaction. The amended statute does not prescribe a specific method for valuing assets for this purpose. Section 272(b)(2) does, however, provide that there is not a presumption that a transaction fails this asset test because it involves consideration being paid to or received by the corporation or its stockholders. This could include, for example, transactions in which consideration is paid to those parties in the ordinary course of similar matters or paid as "nuisance value" to avoid claims in litigation.

New Section 272(c) expands on the effect of this asset test, providing that, after a transaction is completed, the transaction cannot be invalidated for failure to satisfy the asset value test if the transferee of the assets provided value therefor and acted in good faith (as defined in Section 1-201(b)(20) of Title 6 of the Delaware Code). Section 272(c) clarifies, however, that a transaction may be enjoined before consummation and that the statute does not preclude any claim for monetary damages (including a claim in the right of the corporation based on a breach of fiduciary duty by a director, officer or stockholder). New Section 272(c) does not alter the fiduciary duties of directors or officers (or, as applicable, stockholders) in connection with a sale, lease or exchange of assets, or the level of judicial scrutiny that will apply to the decision to enter into a sale, lease or exchange of assets, each of which will be determined based on the common law of fiduciary duty, including the duty of loyalty. Additionally, new Section 272(c) does not eliminate defenses otherwise available, including based on Section 141(e) of DGCL (providing directors with "full protection" for good faith reliance on the books and records of the corporation, officers, board committees and experts selected with reasonable care) or a provision in the corporation's certificate of incorporation adopted under Section 102(b)(7) that exculpates directors or officers against monetary damages for breach of fiduciary duty, subject to specified limitations and exceptions. The adoption of Section 272(c) is also not intended to preclude application of a similar remedies scheme for a violation of Section 271.

Under new Section 272(d), a certificate of incorporation provision that requires stockholder authorization of a sale, lease or exchange of assets does not apply to a sale, lease or exchange permitted by Section 272(b) unless the certificate of incorporation expressly so

provides. Nevertheless, a provision of a certificate of incorporation that extends to transactions beyond Section 271 and requires the vote or consent of stockholders for "dispositions" of assets may result in such transaction being denied the full benefit of Section 272(b)'s safe harbor. New Section 272(d) applies only to certificate of incorporation provisions that first become effective after August 1, 2023.

Notably, amended Section 272 does not create a general insolvency exception to Section 271 akin to that the Delaware Supreme Court declined to adopt in *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323 (Del. 2022). The amendments to Section 272 instead establish specified safe harbors for when stockholder approval is not required under Section 271. In doing so, amended Section 272 does not preclude further case law developments on which transactions constitute a "sale, lease or exchange" of assets for purposes of Section 271, and is not intended to preclude further development of the quantitative and qualitative analyses used by the Delaware courts in interpreting and applying Section 271.

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The 2023 amendments to the DGCL make several important changes, continuing Delaware's commitment to updating its corporate law annually to address issues affecting corporations and practitioners.