

# DELAWARE PROPOSES NEW LEGISLATION ADDRESSING ELECTRONIC DATABASES FOR CORPORATE RECORDS, DATING REQUIREMENT FOR STOCKHOLDER CONSENTS, AND MORE

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## Corporate/M&A Alert

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The Corporation Law Section of the Delaware State Bar Association recently approved amendments (the "Proposed DGCL Amendments") to the General Corporation Law of the State of Delaware (the "DGCL"), which would allow Delaware corporations to use networks of electronic databases — so-called "distributed ledgers" or "blockchain" — to manage corporate records, including stock lists. The Proposed DGCL Amendments also remove a previous requirement that stockholder consents under Section 228 of the DGCL bear the date of each stockholder's signature and amend various sections of the DGCL to allow for mergers of Delaware corporations with entities organized outside the laws of the United States. Finally, Delaware's business combination statute will be amended to clarify the effective time of amendments to a corporation's certificate of incorporation opting out of the restrictions imposed by the statute. If approved by the Delaware General Assembly, as it relates to the amendments to the requirements for stockholder consents, the Proposed DGCL Amendments will become effective on or after August 1, 2017, for stockholder action taken by consent having a record date for purposes of determining stockholders entitled to consent on that date. The remaining amendments will become effective on August 1, 2017.

## ELECTRONIC DATABASES AUTHORIZED FOR MAINTENANCE OF CORPORATE RECORDS

If adopted, the Proposed DGCL Amendments will make it possible for Delaware corporations to maintain their corporate records by utilizing networks of electronic databases, known colloquially as "blockchain." The primary effect of this new statutory authority would be to allow Delaware corporations to record and transfer stock ownership by utilizing a decentralized electronic database instead of relying on a more traditional paper stock ledger. Section 219(c) of the DGCL currently provides that the stock ledger is the only evidence for determining which stockholders of a corporation are entitled to vote and which stockholders are entitled to examine the list of stockholders entitled to vote at a meeting of the stockholders. Generally, by adopting this automated "blockchain" technology, corporations will be able to streamline the process through which they track and record the transfer of stock by eliminating delays between intermediaries involved with corporate transactions and manual error that may occur in such transactions.

To accomplish the main purpose behind the Proposed DGCL Amendments, Section 224, which governs the form of records that a corporation must maintain, will be amended to clarify that records "administered by or on behalf

of the corporation" are permitted to be maintained on "one or more electronic networks or databases (including one or more distributed electronic networks or databases) . . ." This language is consistent with the concept of a decentralized electronic database because such records could be "administered . . . *on behalf of the corporation*" rather than only by the corporation itself as Section 224 currently contemplates. With respect to the stock ledger, the Proposed DGCL Amendments specify that electronic networks may be used to (i) prepare the list of stockholders required by Section 219 with respect to meetings of stockholders and Section 220 with respect to the inspection of the corporation's books and records and (ii) record transfers of stock governed by Article 8 of the Uniform Commercial Code of Delaware. The records must be convertible into "clearly legible paper form upon the request of any person entitled to inspect such records pursuant to any provision" of the DGCL.

Finally, the Proposed DGCL Amendments make changes to several sections of the DGCL that allow electronic notice to be given to holders of uncertificated shares. If Delaware corporations adopt a "blockchain" approach to the maintenance of their corporate records, uncertificated shares may be used more frequently given the electronic and automated nature of such technology, which may diminish the importance of paper stock certificates.

## STOCKHOLDER CONSENT DATING REQUIREMENT REMOVED

Currently, Section 228, which deals with written (or electronic) consents of stockholders, states that "[e]very written consent shall bear the date of signature of each stockholder" signing the consent.<sup>[1]</sup> In *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129 (Del. Ch. 2003), the Court of Chancery concluded that, under the plain language of that section, written or electronic consents of stockholders must be individually dated to be valid. As a result of the *H-M Wexford LLC* decision, the dating requirement in Section 228 became a potential trap for practitioners who were unaware of Section 228's mandate regarding dating.

The Proposed DGCL Amendments would remove the requirement under Section 228 that stockholders who act by written (or electronic) consent must also individually date their signature. The Proposed DGCL Amendments also provide that stockholder consents must be delivered to the corporation within 60 days of the first date on which a written consent is delivered to the corporation. By contrast, Section 228 currently provides that "[n]o written consent shall be effective to take the corporate action referred to therein unless, *within 60 days of the earliest dated consent delivered* in the manner required by this section to the corporation," written consents executed by the requisite number of stockholders required to take such corporate action are delivered to the corporation.<sup>[2]</sup> Calculating the 60-day period under the statute based upon the first day on which a written (or electronic) consent is delivered to the corporation, rather than according to the earliest dated written (or electronic) consent, is consistent with the elimination of the individual dating requirement contemplated by the Proposed DGCL Amendments.

## MERGER STATUTE AMENDMENTS

The Proposed DGCL Amendments amend Sections 254, 263, and 264, each of which deals with mergers or consolidations of domestic corporations and joint-stock or other associations, mergers or consolidations of domestic corporations, and partnerships and mergers or consolidations of domestic corporations and limited liability companies, to allow for mergers of Delaware corporations with joint-stock or other associations, limited

liability companies, as well as partnerships formed or organized under the laws of a jurisdiction outside the United States.

## EFFECTIVE TIME OF SECTION 203 OPT-OUT PROVISIONS

The Proposed DGCL Amendments add new language to Section 203 of the DGCL, Delaware's business combination statute, addressing the effectiveness of opt-out provisions. Specifically, Section 203(b) of the DGCL will be amended to provide that, in the case of a corporation that has never had a class of voting stock listed on a national securities exchange or stock held of record by more than 2,000 holders and has not elected through its original certificate incorporation or any amendment thereto to be governed by Section 203, an amendment to a corporation's certificate of incorporation opting out of the restrictions under Section 203 becomes effective upon filing with the Secretary of State of the State of Delaware under Section 103 of the DGCL. In the case of all other corporations not meeting the foregoing criteria, such amendments will be effective 12 months after the effective date of such amendment. As currently drafted, Section 203(b) provides that such an amendment would be effective upon the *adoption* of the amendment by the stockholders of the corporation, either immediately or 12 months thereafter, respectively.

## ANNUAL REPORTS

Under the Proposed DGCL Amendments, Section 374 of the DGCL would be amended to clarify the contents of the annual report required to be filed by a foreign corporation doing business in Delaware. Specifically, the annual report must contain the following information: (i) the location of its registered office in Delaware, including the street, number, city, and postal code; (ii) the name of the agent upon whom service of process against the corporation can be served; (iii) the location of the principal place of business of the corporation (meeting the address requirements set forth in (i) above); and (iv) the names and addresses of all directors of the corporation as of the filing date of the annual report and the name and address of the officer who executes such report. Finally, the Proposed DGCL Amendments also amend Section 502(a) to clarify the information required to be furnished to the Secretary of State of the State of Delaware by domestic corporations in their annual franchise tax reports with respect to the address of the corporation's registered office in Delaware and the address of the corporation's principal place of business. Specifically, the amendment would make clear that the street, number, city, and postal code of the corporation's registered office in Delaware must be included in such report and that the street, number, city, state, or foreign country of the corporation's principal place of business also be included.

### Notes:

[1] See 8 Del. C. § 228(c).

[2] *Id.* (emphasis added).

## KEY CONTACTS



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