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2016 Changes to Delaware Law Go into Effect

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- Limit certain *de minimis* appraisal claims and allow corporations to tender payment to stockholders to limit accrual of interest – Revised Section 262 (i) mandates dismissal of *de minimis* appraisal claims (i.e., where the number of shares entitled to appraisal does not exceed 1 percent of the shares eligible for appraisal or where the merger consideration for the shares entitled to appraisal does not exceed $1 million) in connection with public company transactions other than short-form mergers and (ii) permits corporations to pay each stockholder entitled to appraisal an amount of the corporation's choosing prior to a final judgment to reduce the accrual of interest owed to such stockholders.
- Clarify certain requirements and procedures with respect to short-form mergers – The amendments to Section 251(h) clarify eligibility for short-form mergers, requirements with respect to offers and procedures for determining whether an offeree has attained a sufficient number of shares, and whether stock has been "received."

The following sections review these changes in more detail, as well as other changes to the DGCL, the Delaware Limited Liability Company Act (the LLC Act), the Delaware Revised Uniform Limited Partnership Act (the LP Act) and the Delaware Revised Uniform Partnership Act (the GP Act).

Appraisal Proceedings Provision – Section 262

Section 262 of the DGCL was amended to limit appraisal rights for *de minimis* claims and to allow corporations to tender payment to appraisal claimants to reduce interest on appraisal awards, as further described below. The amendments to Section 262 apply only to

transactions consummated pursuant to merger and other transaction agreements entered into (or, in the case of mergers pursuant to Section 253 or 267, respectively, resolutions of the board entered into or authorizations provided) on or after August 1, 2016 (and appraisal proceedings arising out of such transactions).

- *Limitation on appraisal rights for de minimis claims*

The amendments to Section 262(g) limit the right to bring an appraisal proceeding against a corporation listed on a national securities exchange when the claim is *de minimis*. Accordingly, the amendments require the Court of Chancery to dismiss appraisal proceedings unless (i) the total number of shares entitled to appraisal exceeds 1 percent of the outstanding shares of the class or series that could have sought appraisal, (ii) the value of the merger consideration for the total number of shares entitled to appraisal exceeds $1 million, or (iii) the merger is a short-form merger approved under Section 253 or 267 of the DGCL.

This amendment is intended to prevent stockholders from exercising their appraisal rights to gain leverage in settlement negotiations in instances where the number of shares or value of the shares in question is small, but the desire to avoid litigation costs may encourage a corporation to settle an appraisal claim. Short-form mergers are not subject to this limitation because appraisal rights may be the only remedy available to stockholders in such a transaction.

- *Tender of payment*

As revised, Section 262(h) empowers corporations to limit the accrual of interest on appraisal awards by giving them the ability to make an early payment, in an amount decided by the corporation, to appraisal claimants at any time before a final judgment is entered in an appraisal proceeding. The amendments are intended to address the issue of "appraisal arbitrage"—the purchase of appraisal rights after a merger is announced, expecting a windfall from the appraisal award in addition to interest accrued on the entire amount of the award throughout the entire period from the effective date of the merger through a final judgment.

To take advantage of this amended provision, a corporation must make the payment to each appraisal claimant and may not choose to pay only certain claimants. After such payment is made, interest accrues only on (i) the difference between the amount paid and the fair value of the appraisal shares as finally determined by the court and (ii) the interest accrued prior to the date of payment (unless such interest is included in the payment itself). As it was before the 2016 amendments, interest is calculated from the effective date of the merger through

the date of payment following a final judgment, is compounded quarterly and accrues at an annual rate of 5 percent over the Federal Reserve discount rate.

Short-Form Merger Provision – Section 251(h)

Section 251(h) of the DGCL allows a target corporation (Offeree) to consummate a short-form merger with another corporation (the Offeror) without a stockholder vote (unless such a vote is expressly required by the certificate of incorporation of the Offeree), if certain requirements are met following a tender, exchange or other offer. The amendments to Section 251(h) are effective only for merger agreements entered into on or after August 1, 2016, and are intended to clarify the requirements and procedures as follows:

- Eligibility
    - To qualify for a Section 251(h) short-form merger, an Offeree must have **one or more** classes or series of stock (i) listed on a national securities exchange or (ii) held of record by more than 2,000 holders. It is not required that **all** classes and series of the Offeree's stock be so listed or held.
- Offers
    - An Offeror may condition a tender, exchange or other offer upon the tender of a minimum number or percentage of shares of stock (or any class or series of stock) of the Offeree.
    - If more than one class or series of stock is entitled to vote on the merger, an Offeror may achieve the offer for the Offeree's stock through separate offers for separate classes or series of stock.
    - An Offeror's offer may exclude Rollover Stock (defined below) and any of the Offeree's stock owned at the time of the offer by (i) the Offeror, (ii) the Offeree, or (iii) any Affiliate (as defined below) or subsidiary of the Offeror or Offeree, thereby providing a clear path for certain stockholders to roll over their shares.
- Sufficient shares to consummate the merger
    - The amendments clarify that, to determine whether a sufficient number of shares has been reached to approve a merger under Section 251(h), (i) shares of stock held by direct and indirect parent entities (or individuals) of the Offeree and direct or indirect wholly owned subsidiaries of any such parent entity (Affiliates) and (ii)

shares of Rollover Stock (defined below) are counted toward the total number of shares.

- "Rollover Stock" means shares of stock of the Offeree that are the subject of a written agreement requiring that such shares be transferred, contributed or delivered to the Offeror or any of its Affiliates in exchange for stock or other equity interests in the Offeror or any of its Affiliates. If such shares have not been transferred, contributed or delivered to the Offeror or any of its Affiliates immediately prior to the merger becoming effective, they are no longer considered Rollover Stock.

- Receipt of stock
  - Finally, the amendments clarify the methods by which shares of the Offeree's stock may be "received" for purposes of determining whether they are counted toward the required minimum of shares. Shares are received:
    - with respect to certificated shares, upon physical receipt of a stock certificate along with an executed letter of transmittal (unless the certificate was canceled prior to consummation of the offer)
    - with respect to uncertificated shares held of record by a clearing corporation as nominee, when they are transferred into the Offeror's agent's account by means of an agent's message (unless the shares were otherwise sold prior to consummation of the offer)
    - with respect to all other uncertificated shares, upon physical receipt by the Offeror's agent of an executed letter of transmittal (unless the shares were otherwise sold prior to consummation of the offer).

Other DGCL Amendments

The DGCL amendments also, among other things:

- *Expand the jurisdiction of the Delaware Court of Chancery* – The amendments to Section 111(a)(2) expand the jurisdiction of the Delaware Court of Chancery to include any civil action to interpret, apply, enforce or

determine the validity of any instrument, document or agreement entered into on or after August 1, 2016:

- to which a Delaware corporation and one or more of its stockholders are party, and pursuant to which any such stockholder(s) sell or offer to sell any stock of the corporation or
- by which a Delaware corporation agrees to sell, lease or exchange any of its property or assets, and pursuant to which one or more stockholders must approve of or consent to such sale, lease or exchange.
- *Clarify default quorum and voting requirements for committees and subcommittees* – Amended Section 141(c) clarifies that:
- *Quorum* – A majority of the directors then serving on a committee or subcommittee shall constitute a quorum, unless the organizational documents of the corporation or certain resolutions require a greater or lesser number, provided that the minimum number permitted to constitute a quorum is one-third of the directors then serving on such committee or subcommittee.
- *Voting* – The vote of the majority of the members of a committee or subcommittee present at a meeting at which a quorum is present is required, unless the organizational documents of the corporation or certain resolutions require a greater number (but not a lesser number).
- *Streamline references to committees and subcommittees* – Amendments to Section 141(c) streamline committee and subcommittee references such that references to board committees and committee members are deemed to include a reference to subcommittees and subcommittee members.
- *Allow any two authorized officers of a corporation to sign stock certificates* – The amendment to Section 158 deletes the provision specifying which officers must sign stock certificates and, instead, permits any two authorized officers to sign.
- *Clarify procedures for restoration and revival of certificates of incorporation and revocation of dissolution* – Amendments to Sections 311 and 312 provide procedures to restore a corporation's certificate of incorporation after it has expired by limitation and revoke a corporation's dissolution, and distinguish these procedures from those to restore a

corporation's certificate of incorporation after it has become forfeited or void.

Amendments to the LLC and Partnership Acts

- Recent amendments to the LLC Act, the LP Act and the GP Act, and collectively with the LLC Act and the LP Act, the LLC and Partnership Acts were also signed into law on June 22, 2016, and went into effect on August 1, 2016.[1] The most significant of these amendments:
- *Create a default rule regarding a sole member's assignment of its interest in a Delaware limited liability company* – When the sole member of a Delaware limited liability company voluntarily (not due to foreclosure or similar legal process) assigns all of its interests in the limited liability company to a single assignee, the assignee is deemed admitted as a member of the limited liability company, unless otherwise provided in the limited liability company agreement or otherwise.[2]
- *Clarify the ability of Delaware limited liability companies and limited partnerships (and series thereof) to guarantee debt* – Following the amendments, a Delaware limited liability company or limited partnership (or any series thereof) can agree, in the limited liability company agreement or limited partnership agreement or otherwise, to guarantee the debts, liabilities, obligations and expenses of the entire entity or another series of the entity.[3]
- *Remove the default rule in various sections of the LLC and Partnership Acts requiring a written vote or consent* – The amendments deleted the requirement that actions of the members, managers or partners, as applicable, of a Delaware entity require a written vote.[4]
- *Specify how service of process may be accomplished on a Delaware series limited liability company or series limited partnership* – The amendments to the LLC Act and LP Act outline procedures regarding service of process on series limited liability companies and series limited partnerships, and provide that, if service of process is made upon such limited liability company's or limited partnership's registered agent or upon the Secretary

of State on behalf of the series, such process shall include the name of the limited liability company or limited partnership and the name of the series.[5]

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[1] H.R. 367, 148th Gen. Assem., Reg. Sess. (Del. 2016) (revising the Delaware Revised Uniform Limited Partnership Act); H.R. 368, 148th Gen. Assem., Reg. Sess. (Del. 2016) (revising the Delaware Revised Uniform Partnership Act); H.R. 372, 148th Gen. Assem., Reg. Sess. (Del. 2016) (revising the Delaware Limited Liability Company Act).

[2] H.R. 372, 148th Gen. Assem., Reg. Sess. (Del. 2016).

[3] H.R. 367, 148th Gen. Assem., Reg. Sess. (Del. 2016); H.R. 372, 148th Gen. Assem., Reg. Sess. (Del. 2016).

[4] H.R. 367, 148th Gen. Assem., Reg. Sess. (Del. 2016); H.R. 368, 148th Gen. Assem., Reg. Sess. (Del. 2016); H.R. 372, 148th Gen. Assem., Reg. Sess. (Del. 2016).

[5] H.R. 367, 148th Gen. Assem., Reg. Sess. (Del. 2016); H.R. 372, 148th Gen. Assem., Reg. Sess. (Del. 2016).

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