

**The 1970 Amendments  
to the Delaware  
Corporation Law**

**By**

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## THE 1970 AMENDMENTS TO THE DELAWARE CORPORATION LAW

*By S. Samuel Arsht and Walter K. Stapleton\**

### INTRODUCTION

Delaware's Corporation Law was recently amended by three statutes. The first two became effective on July 1, 1970,\*\* and the last on July 15, 1970.\*\*\* While the changes made by these statutes are not as extensive as those made in 1969 and in the general revision of 1967, a number of them are significant. A brief description of each of the changes made by the 1970 amendments will be given in this article which supplements the authors' 1967 and 1969 articles on Delaware's General Corporation Law published by Prentice-Hall.\*\*\*\* As in each of those articles, the organization of this supplement follows the organization of the General Corporation Law.

### FORMATION

No Change.

### POWERS

No Change.

### REGISTERED OFFICE AND REGISTERED AGENT

No Change.

### DIRECTORS AND OFFICERS

**The governing body of non-stock corporations [§ 141(j)].**—A new subsection has been added to Section 141 of the General Corporation Law authorizing a non-stock corporation to provide in its certificate of incorporation that its business and affairs shall be managed in a manner different from that prescribed in that section for stock corporations and providing that when the certificate of incorporation contains no such provisions, the rules of Section 141 governing the powers, composition, and organization of the board of directors of a stock corporation shall also apply to a non-stock corporation. The new subsection embodies what had been the generally accepted construction of the pre-existing law.

**Officers and their titles [§ 142].**—Section 142 has been reorganized, and one change of substance has been effected. Before the amendment, Section 142 required every corporation to have a president, a secretary, and treasurer. It now permits each corporation, whether it be a stock or non-stock corporation, to determine for itself what officers it shall have and what their titles and duties shall be. The only restrictions are that each corporation must have such officers as will enable it to sign stock certificates and other instruments provided for in the General Corporation Law and

\* Members of the Delaware Bar.

\*\* 57 Del. L., Ch. 421; 57 Del. L., Ch. 649.

\*\*\* 125th General Assembly of State of Delaware, 2nd Session: H.B. 811. This bill affects only the changes discussed in the last two paragraphs of this article.

\*\*\*\* Arsht and Stapleton, *Analysis of the New Delaware Corporation Law*, and *Analysis of the 1969 Amendments to the Delaware Corporation Law*, Prentice-Hall, Inc., 1967 and 1969 respectively.

## 360—Corp. DELAWARE—The 1970 Amendments to G.C.L.

must also have an officer whose responsibility it is to record the proceedings of meetings of stockholders and directors. The new statute thus provides substantially increased flexibility in structuring the management of a Delaware corporation. If, for example, a corporation has a Chairman of the Board of Directors and a Secretary, the remaining officers of the corporation may be assigned any titles and it is not necessary to have someone called "President" or someone called "Treasurer." The reorganized section does not change the existing law that any number of offices may be held by the same person unless the certificate of incorporation or bylaws otherwise provide.

**Indemnification [§ 145].**—Section 145 authorizes a Delaware corporation under certain circumstances to indemnify its directors, officers, employees, agents, and any other persons serving at the request of the corporation as an officer, director, employee, or agent of another business enterprise. A new Subsection (h) has been added to this section to define the words "the corporation" when used in the section as including all constituent corporations absorbed in a consolidation or merger as well as the resulting or surviving corporation so that any person who served a constituent corporation in any of the above capacities now stands in the same position with respect to the resulting or surviving corporation as he would if he had served the resulting or surviving corporation in the same capacity. The new subsection does not require indemnification of persons so associated with an acquired enterprise, but its effect is to empower a Delaware corporation to provide indemnification if it so desires.

### STOCK AND DIVIDENDS

**Issuance of redeemable stock [§ 151(b)].**—Section 151 has for many years authorized the issuance of preferred or special stock which is subject to redemption. Because of the wording of the section, however, it was not clear whether a Delaware corporation could create a class or series of such stock which was redeemable at the option of the holder rather than at the option of the corporation or whether consideration other than cash could be used to redeem stock where the certificate of incorporation so provided. Subsection (b), as now amended, makes it clear that preferred or special stock may be made "redeemable for cash, property, or rights, including securities of any other corporation, at the option of either the holder or the corporation or upon the happening of a specified event." As in the case of cash redemption, redemptions for consideration other than cash are subject to the restrictions of Section 243 regarding distributions from capital.

In addition, some of the language of this subsection which merely duplicated the provisions of the preceding subsection has been deleted in the revised statute.

**Effective date of certificates of designation, etc., of series stock [§ 151(g)].**—Section 151(g) provides for the filing of certificates setting forth the powers, designation, preferences, and other rights of classes or series of stock where they are fixed by a resolution of the board of directors pursuant to authority in the certificate of incorporation. Prior to its recent amendment, it was capable of being construed as providing that such a certificate could not become effective until a certified copy was recorded in a recorder's office. As amended, the statute provides that these certificates, like all other instruments effecting corporate action under the General Corporation Law, become effective upon filing with the Secretary

of State or at such later time, within 90 days of such filing, as may be specified in the certificate.

**Voting of stock held by the corporation or an affiliated corporation [§ 160].**—The amendment to Section 160 provides express answers to two questions which arose repeatedly under the prior version of that section. The prior statute disenfranchised stock of a parent held by a first tier subsidiary but did not, at least when read literally, disenfranchise stock of a parent held by a second or third tier subsidiary. The amended statute answers in the affirmative the question of whether stock held by a second or third tier subsidiary is similarly disenfranchised.

The second question dealt with stock held by a corporation in a fiduciary capacity. The prior statute expressly provided that a corporation holding its own stock in a fiduciary capacity, could vote that stock. It was unclear, however, whether stock of a corporation held by its subsidiary in a fiduciary capacity could be voted. The amended version of Section 160 makes it clear that stock is not disenfranchised in this circumstance.

### MEETINGS, ELECTIONS, VOTING AND NOTICE

**Part-time cumulative voting [§ 214].**—Section 214, as it existed prior to the recent amendments, authorized a corporation to provide in its certificate of incorporation for cumulative voting “at all elections of directors.” An acceptable construction of the language of this section was that cumulative voting could not be used at some, but not all, elections. The amended statute authorizes a corporation to have a charter provision permitting cumulative voting at all elections of directors or “at elections held under specified circumstances.” Thus, for example, a Delaware corporation may now clearly have a provision in its certificate of incorporation stating that stockholders shall be entitled to cumulate votes at any election of directors where, on a record date for the meeting, more than a specified percentage of the outstanding stock of the corporation is held by a single stockholder or by a defined group of stockholders.

**Voting, inspection, and other rights of bond and debenture holders [§ 221].**—The amendment to Section 221 resolves what was arguably an internal conflict in the statute. That section authorizes Delaware corporations to bestow the power to vote, as well as other stockholder rights, upon bond and debenture holders. While this authority was clear, its relationship to the other sections of the statute requiring stockholder approval of organic changes was not clear, e.g., 8 Del. C. §§ 242, 251, 271, and 275. Those sections state the required stockholder vote in terms of a proportion of the outstanding stock entitled to vote upon the transaction. Accordingly, it was questionable whether a certificate of incorporation could provide that the holders of voting debentures would vote together with the stockholders as one class on these matters or, indeed, could provide that under specified circumstances bond and debenture holders might be accorded the exclusive right to vote on organic changes. The amendment answers these questions by providing that, when the certificate of incorporation so provides, holders of debt obligations “shall be deemed to be stockholders, and their bonds, debentures, and other obligations shall be deemed to be shares of stock, for the purpose of any provision of the General Corporation Law requiring the vote of stockholders as a prerequisite to any corporate action.” The amended section further expressly provides that a certificate of incorporation may divest the holders of capital stock of the right to vote on “any corporate matter whatsoever,” other than a charter amendment of a type which must be approved by a class or series of stock voting separately as a class under the provisions of Section 242(c).

**AMENDMENTS OF CERTIFICATE OF INCORPORATION;  
CHANGES IN CAPITAL AND CAPITAL STOCK**

Redemption, purchase or retirement of stock [§ 243].—Section 243, which deals with the redemption, purchase, and retirement of stock, has been reorganized and reworded in the interest of simplification and clarity. No substantive change has been made.

**MERGER OR CONSOLIDATION**

Merger of stock corporations [§ 251].—Two changes have been made in the statutory sections dealing with the merger of stock corporations. The first, found in subsection (c) of Section 251, was made merely to emphasize the frequently unnoticed fact that a merger agreement must be executed by the corporation's officers on two occasions: once following the original approval of the merger agreement by the board of directors, and once after stockholder approval has been given and before the instrument is filed with the Secretary of State.

The second change in this area is of more significance. Since 1967, subsection (f) of Section 251 has provided that no vote of the stockholders of a Delaware corporation is necessary to effect a merger where the corporation will be the surviving corporation, will not have its certificate of incorporation amended in the merger, and will not issue or deliver in the merger shares of stock in an amount exceeding 15% of the shares of the same class outstanding immediately prior to the merger. This provision was intended to dispense with the necessity for a meeting of stockholders of a Delaware corporation when it was making a relatively minor acquisition by merger and its stockholders had previously authorized the issuance of sufficient stock to effectuate the acquisition. As worded, however, this subsection proved too narrow in some respects and too broad in others to implement its intended purpose.

First, the limitation on the amount of stock which could be issued in the merger imposed a standard related to the number of shares of the "same class" outstanding prior to the merger, and, accordingly, rendered the provision inapplicable in any instance where a new class of stock was being utilized in the merger. Similarly, the subsection was not applicable where the shares of stock to be issued in the merger represented a very minor interest in the corporation, but nonetheless, numbered more than 15% of the shares of their particular class previously issued. In order to carry out the objective of the statute, the standard has now been changed. Insofar as the number of shares that may be issued is concerned, the statute now provides that no vote of stockholders is required where either (1) no shares of common stock of the surviving corporation and no securities convertible into such stock are to be issued or delivered, or (2) the shares of common stock to be issued or delivered, plus those initially issuable upon conversion of any other convertible securities issued or delivered do not exceed 20% of the shares of common stock of the corporation outstanding immediately prior to the effective date of the merger.

As previously noted, subsection (f) of Section 251 was originally intended to apply where a corporation was merging a relatively small corporation into itself. Read literally, however, this section arguably applied also to some so-called "third party mergers." When so applied, it held the potential of depriving stockholders of a vote on a merger which substantially changed their position and, accordingly, was contrary to the statute's intended purpose. For this reason, a fourth requirement was added

to the statute. In order to dispense with the stockholder vote under the amended statute, the corporation must not only be the surviving corporation, have its certificate of incorporation remain unchanged in the merger, and issue its securities in conformity with the subsection, but also each share of stock of the corporation outstanding immediately prior to the merger must “remain outstanding immediately after the merger as an identical share of the surviving corporation.”

**Merger or consolidation of a domestic corporation and joint-stock or other association [§ 254].**—For many years, Subsection (b) of Section 254 of the General Corporation Law has provided authority for “one or more [Delaware] corporations” to “merge or consolidate with one or more joint stock associations, except a joint-stock association formed under the laws of the state which forbids such consolidating or merger.” The authorization seemed broad enough to permit a merger or consolidation of a Delaware stock or non-stock corporation with a joint-stock association, whether the surviving or resulting corporation be a stock or non-stock corporation. However, the mechanics provided in Subsections (c) and (d) of that section for effecting the merger or consolidation were phrased in such a manner as to limit its operation to mergers or consolidations of joint stock associations with stock corporations in which the surviving or resulting corporation was a stock corporation. The procedural requirements have now been modified to make them consistent with the possibility a non-stock corporation’s being a constituent as well as a surviving or resulting corporation.

The recent amendment to section 254 also eliminates from the definition of a joint-stock association any reference to the previously existing requirement that there be outstanding certificates evidencing membership interests. Finally, the amended section includes a new subsection providing that the section does not authorize a merger of a corporation which is qualified as charitable for tax purposes into a stock corporation if the former’s charitable status will be impaired.

#### **SALE OF ASSETS, DISSOLUTION AND WINDING UP**

No Change.

#### **INSOLVENCY; RECEIVERS AND TRUSTEES**

No Change.

#### **RENEWAL, REVIVAL, EXTENSION AND RESTORATION OF CERTIFICATE OF INCORPORATION OR CHARTER**

No Change.

#### **SUITS AGAINST CORPORATIONS, DIRECTORS, OFFICERS OR STOCKHOLDERS**

No Change.

#### **CLOSE CORPORATIONS; SPECIAL PROVISIONS**

No Change.

#### **FOREIGN CORPORATIONS**

**Filings required of a foreign corporation upon its qualification and thereafter [ §§ 371, 372 ].**—Heretofore, any foreign corporation seeking to qualify to do business in Delaware was required by Section 371 to file a certified copy of its certificate of incorporation with the Secretary of State of Delaware. Section 372 required a foreign corporation which had previously qualified in Delaware to file with the Secretary of State a certified copy of any charter amendment or merger agreement. These requirements have now been deleted from the statute. A foreign corporation seeking to qualify must now file a “Certificate of Existence”, executed

## 364—Corp. DELAWARE—The 1970 Amendments to G.C.L.

by an authorized officer of the corporation, which states the name and address of the corporation's registered agent in Delaware, its assets and liabilities as of a date not earlier than six months prior to the filing, and the nature of the business it proposes to do in Delaware. After qualifying, a foreign corporation must file a certificate describing any change in its corporate name, registered agent in Delaware, or the nature of the business that it proposes to do in Delaware. If it is a party to a merger, it must also file a certificate, issued by the proper officer of the jurisdiction of its incorporation, which attests to the fact that a merger has taken place. 8 Del. C. §§ 371, 372, 377.

### MISCELLANEOUS PROVISIONS

**Time of payment of filing fees and filing taxes [§ 391].**—Section 391 of the statute has been amended to expressly authorize the Secretary of State to accept an instrument for filing without simultaneously receiving the filing taxes and filing fees due whenever he sees fit to extend credit for these amounts. This amendment provides an express statutory sanction for the pre-existing practice.

**Franchise tax schedule [ §§ 502, 504, 506 ].**—The date upon which interest on the annual franchise tax begins to accrue and several other associated dates have been changed. Now, the penalty for late filing of an annual report is assessed if it is not filed by February 1. Franchise taxes become due, as before, on April 15, but the date when unpaid franchise taxes begin to accrue interest has been changed to June 1. Franchise tax notices will be mailed on or before April 15.

**Franchise tax refund account [ § 506 ].**—The Secretary of State is required to maintain a fund for the payment of franchise tax refunds. Section 506 of the franchise tax statute has been amended to provide that the amount of this fund shall be "at least \$5,000, but not more than \$70,000."

**Franchise tax on professional corporations [ § 618 ].**—Section 618 of the franchise tax statute has been amended to make it clear that professional corporations are subject to its provisions.

**Waiver of penalty and interest for late filing of annual report [ § 505 (d) ].**—Under the prior law, the Secretary of State, at his discretion, could remit the \$25 penalty and interest provided for late filing of an annual report. This authority has now been limited to non-profit and other corporations which are exempt from franchise taxes and the Secretary of State, accordingly, may no longer remit a penalty and interest thereon due from an ordinary stock corporation organized for profit.

**Forfeiture of charter for non-payment of franchise taxes [ §§ 509, 510, 511, 114 ].**—The 1970 amendments shortened from two years to one year the period of franchise tax delinquency after which the charter of a Delaware corporation will be forfeited. Under the prior law, which remains in effect with respect to franchise taxes for 1969 (ie. those which became due on April 15, 1970) and for all prior years, a corporation which does not pay its 1969 franchise tax will have its charter forfeited on April 15, 1972. Under the new law, a corporation which does not pay its 1970 franchise tax will also have its charter forfeited on April 15, 1972, one year after it became due. In conjunction with this change, the 1970 amendments inserted a new statutory requirement that a special notice be sent by the Secretary of State on or before the last day of February in each year to each corporation which is in danger of losing its charter on April 15th of that year.

Ed. Note: See tab card "State Taxes."