

1985

DELAWARE CORPORATION LAW AMENDMENTS

**THE GENERAL CORPORATION LAW OF DELAWARE
CHAPTER 1, TITLE 8, DELAWARE CODE OF 1953**

**AMENDMENTS BY THE FIRST REGULAR SESSION OF
THE 133rd GENERAL ASSEMBLY OF
THE STATE OF DELAWARE**

This pamphlet contains amendments to the Delaware General Corporation Law enacted by the first regular session of the 133rd General Assembly.

The amendments were enacted in Senate Bill No. 116, Ch. 127, Laws of 1985. The legislative commentary which accompanied the bill is reproduced after each section.

DELAWARE CORPORATION LAW AMENDMENTS

Senate Bill No. 116, Ch. 127, Laws of 1985:

Section 1. Amend paragraph (4) of subsection (a) of §102, Title 8, Delaware Code, by deleting the second sentence thereof in its entirety and substituting in lieu thereof the following:

“If the corporation is to be authorized to issue more than one class of stock, the certificate of incorporation shall set forth the total number of shares of all classes of stock which the corporation shall have authority to issue and the number of shares of each class, and shall specify with respect to each class those shares that are to be without par value and those shares that are to have a par value and the par value of each share of each such class. The certificate of incorporation shall also set forth a statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, which are permitted by §151 of this Title in respect of any class or classes of stock or any series of any class of stock of the corporation and the fixing of which by the certificate of incorporation is desired, and an express grant of such authority as it may then be desired to grant to the board of directors to fix by resolution or resolutions any thereof that may be desired but which shall not be fixed by the certificate of incorporation. Such grant of authority may include the power to specify the number of shares of any series.”

Commentary on Section 102:

Paragraph (a)(4) has been amended to provide that a certificate of incorporation must specify the number of shares of each class and to authorize specifically the inclusion in the certificate of incorporation of a grant of authority to directors to specify the number of shares of any series of a class for which blank stock powers have been authorized.

Section 2. Amend §122, Title 8, Delaware Code, deleting the period at the end of paragraph (13) thereof and substituting a comma therefor and adding thereto the following:

“and make other contracts of guaranty and suretyship which are necessary or convenient to the conduct, promotion or attainment of the business of the contracting corporation;”

Commentary on Section 122(13):

A clause has been added to Section 122(13) to correct a misimpression which may have resulted from the legislative synopsis to the 1983 amendment to this Section and confirm that pre-existing law remains applicable to guarantees and pledges involving less than wholly-owned subsidiaries and other entities.

Section 3. Amend subsection (c) of §141, Title 8, Delaware Code, by inserting in the fourth sentence thereof the phrase “the designations and” between the word “fix” and the word “any” and by inserting the phrase “or fix the number of shares of any series of stock or authorize the increase or decrease of the shares of any series” at the end of and within the parenthetical phrase in such sentence.

Commentary on Section 141(c):

A phrase has been added to the fourth sentence of Section 141(c) to grant a committee of the board the power, to the extent authorized in the resolution or resolutions providing for the issuance of shares of stock adopted by the board of directors as provided in 8 Del. C. §151(a), to fix the designations of such shares. The amendment also makes clear that a board committee has the power to fix the number of shares in a series of blank stock.

Section 4. Amend subsection (g) of §151, Title 8, Delaware Code, by deleting such subsection in its entirety and inserting in lieu thereof the following:

“When any corporation desires to issue any shares of stock of any class or of any series of any class of which the powers, designations, preferences and relative, participating, optional or other rights, if any, or the qualifications, limitations or restrictions thereof, if any, shall not have been set forth in the certificate of incorporation or in any amendment thereto but shall be provided for in a resolution or resolutions adopted by the board of

directors pursuant to authority expressly vested in it by the provisions of the certificate of incorporation or any amendment thereto, a certificate of designations setting forth a copy of such resolution or resolutions and the number of shares of stock of such class or series as to which the resolution or resolutions apply shall be executed, acknowledged, filed, recorded, and shall become effective, in accordance with §103 of this Title. Unless otherwise provided in any such resolution or resolutions, the number of shares of stock of any such class or series to which such resolution or resolutions apply may be increased (but not above the number of shares of the class authorized by the certificate of incorporation with respect to which the powers, designations, preferences and rights have not been set forth) or decreased (but not below the number of shares thereof then outstanding) by a certificate likewise executed, acknowledged, filed and recorded setting forth a statement that a specified increase or decrease therein had been authorized and directed by a resolution or resolutions likewise adopted by the board of directors. In case the number of such shares shall be decreased the number of shares so specified in the certificate shall resume the status which they had prior to the adoption of the first resolution or resolutions. When no shares of any such class or series are outstanding, either because none were issued or because no issued shares of any such class or series remain outstanding, a certificate setting forth a resolution or resolutions adopted by the board of directors that none of the authorized shares of such class or series are outstanding, and that none will be issued subject to the certificate of designations previously filed with respect to such class or series, may be executed, acknowledged, filed and recorded in accordance with §103 of this Title and, when such certificate becomes effective, it shall have the effect of eliminating from the certificate of incorporation all matters set forth in the certificate of designations with respect to such class or series of stock.

When any certificate filed under this subsection becomes effective, it shall have the effect of amending the certificate of incorporation.”

Commentary on Section 151:

Paragraph (g) has been amended to denominate the certificate filed with the Secretary of State setting forth the powers, designations, preferences and rights of stock as a “certificate of designations” and to make

clear that the concept of "powers" referred to in the paragraph is the same as that set forth in Section 102(a)(4). In addition, paragraph (g), as amended, provides that the number of shares of a class or series as to which a certificate of designations has been filed may not be increased by board action above that number of shares of the class authorized by the certificate of incorporation as to which the powers, designations, preferences and rights have not been already set. Finally, the amendment makes clear that the filing of a certificate setting forth a board resolution that no shares of a class or series as to which a certificate of designation has been filed are outstanding does not have the effect of reducing the number of authorized shares of a class, but instead results in such shares resuming the status they had prior to the filing of the certificate of designations.

Section 5. Amend §173, Title 8, Delaware Code, by deleting from the third sentence thereof the phrase "transferred from surplus to the capital account" and inserting in lieu thereof the phrase "designated as capital" and by deleting from the fourth sentence thereof the phrase "No transfer from surplus to capital" and inserting in lieu thereof the phrase "No such designation as capital".

Commentary on Section 173:

The amendment to Section 173 makes clear that stock dividends may be distributed by a corporation even in the event the corporation has no surplus, so long as it has net profits for the fiscal year in which the dividend is declared and/or the preceding fiscal year, as provided by Section 170.

Section 6. Amend §221, Title 8, Delaware Code, by changing the reference to "§242(c)(2)" in the last sentence thereof to "§242(b)(2)".

Commentary on Section 221:

The reference to 8 Del. C. §242(c)(2) in the last sentence of Section 221 has been changed to conform to the present order of the subsections of Section 242. No substantive change is intended.

Section 7. Amend §225, Title 8, Delaware Code, by designating the first paragraph thereof as subsection (a), by inserting in the first

sentence thereof the phrase “or any officer whose title to office is contested,” immediately following the phrase “Upon application of any stockholder or director,” and by adding a new subsection (b) thereto as follows:

“(b) Upon application of any stockholder or any member of a corporation without capital stock, the Court of Chancery may hear and determine the result of any vote of stockholders or members, as the case may be, upon matters other than the election of directors, officers or members of the governing body. Service of the application upon the registered agent of the corporation shall be deemed to be service upon the corporation, and no other party need be joined in order for the Court to adjudicate the result of the vote. The Court may make such order respecting notice of the application as it deems proper under the circumstances.”

Commentary on Section 225:

Although Section 225 permitted the Court of Chancery to hear and determine the validity of an election of an officer, it did not heretofore provide a mechanism by which a person who believes that he had been elected could assert that claim. Accordingly, Section 225 has been amended to provide such a mechanism by including persons whose title to office is contested in the category of persons who may apply to the Court of Chancery for a determination of the validity of such election.

Section 225 has been further amended to add a new subsection (b) to establish a procedure for the determination by the Court of Chancery of disputed votes of stockholders upon matters other than those addressed in what will now be designated as Section 225(a). New subsection (b) expressly provides that it is not necessary to join any party other than the corporation in order to adjudicate the results of a stockholder vote.

Section 8. Amend §230, Title 8, Delaware Code, by designating the first paragraph thereof as subsection (a) and by adding a new subsection (b) thereto to read as follows:

“(b) Whenever notice is required to be given, under any provision of this Chapter or the certificate of incorporation or by-laws of any corporation, to any stockholder or, if the corporation is a non-stock corporation, to any member, to whom (i) notice of two consecutive annual meetings, and all notices of meetings or

of the taking of action by written consent without a meeting to such person during the period between such two consecutive annual meetings, or (ii) all, and at least two, payments (if sent by first class mail) of dividends or interest on securities during a twelve month period, have been mailed addressed to such person at his address as shown on the records of the corporation and have been returned undeliverable, the giving of such notice to such person shall not be required. Any action or meeting which shall be taken or held without notice to such person shall have the same force and effect as if such notice had been duly given. If any such person shall deliver to the corporation a written notice setting forth his then current address, the requirement that notice be given to such person shall be reinstated. In the event that the action taken by the corporation is such as to require the filing of a certificate under any of the other sections of this Title, the certificate need not state that notice was not given to persons to whom notice was not required to be given pursuant to this subsection."

Commentary on Section 230:

The amendment to Section 230 is intended to relieve corporations of the expense of sending notices to stockholders or members for whom the corporation has no current address and provides that action taken without notice to such persons has the same force and effect as if notice had been given to them. The applicable notice requirements are reinstated once a stockholder or member delivers to the corporation a written notice informing it of his current address.

Section 9. Amend subsection (a) of §271, Title 8, Delaware Code, by inserting the phrase "the holders of" between the phrase "resolution adopted by" and the phrase "a majority of the outstanding stock".

Commentary on Section 271:

Section 271 (a) has been amended to correct a grammatical defect. No substantive change is intended.

Section 10. Amend §349, Title 8, Delaware Code, by deleting the last sentence thereof in its entirety.

Commentary on Section 349:

The last sentence of Section 349 has been deleted in its entirety since 8 Del. C. §262 no longer provides for the appointment of appraisers.

Section 11. Amend §388, Title 8, Delaware Code, by deleting the phrase "and acknowledged" from subsection (b) thereof and by deleting the phrase "and (3)" from subsection (c) thereof and inserting in lieu thereof the phrase "(3) the name of the corporation as set forth in its certificate of incorporation filed in accordance with subsection (b) and (4)".

Commentary on Section 388:

Subsection (b) of Section 388 has been amended to conform the subsection to Section 388(g), which does not require that a certificate of domestication be acknowledged. Subsection (c) of Section 388 has been amended to make clear that a corporation may change its name in connection with a domestication effected pursuant to Section 388.

Section 12. Amend subsection (a) of §391, Title 8, Delaware Code, by deleting paragraph (22) thereof in its entirety and substituting in lieu thereof the following:

"(22) In the case of non-stock corporations and of religious, charitable or other non-profit corporations organized under the laws of the State of Delaware, the total fees payable to the Secretary of State upon the filing of a Certificate of Change of Registered Agent and/or Registered Office shall be \$5.00."

Commentary on Section 391:

Section 391(a)(22) has been rephrased to avoid any implication that non-stock corporations organized under Delaware law must be non-profit corporations. No substantive change is intended.

Section 13. All rights, privileges and immunities vested or accrued by and under any laws enacted prior to the adoption or amendment of this Act, all suits pending, all rights of action conferred, and all duties, restrictions, liabilities and penalties imposed or required by and under laws enacted prior to the adoption or amendment of this Act, shall not be impaired, diminished or affected by this Act.

Section 14. The provisions of this Act shall become effective on July 1, 1985. Without limiting the foregoing, Section 7 of this Act shall be effective only as to elections and votes of stockholders occurring on or after July 1, 1985 and Section 8 of this Act shall be effective as to all notices required to be given in connection with stockholder action for which the record date is on or after July 1, 1985.

NOTES



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