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Analysis of the 1990 Amendments to the Delaware General Corporation Law

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ANALYSIS OF THE 1990 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW

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INTRODUCTION

Amendments to the Delaware General Corporation Law were enacted in the Spring and Summer of 1990. The main package of amendments took effect on July 17, 1990. While a total of 20 sections of the statute were changed, only one new section was added. The principal changes include two major revisions affecting voting procedures at meetings of stockholders. Attempting to balance the General Corporation Law's abiding interest in facilitating stockholders' exercise of their voting powers with concerns expressed by the Court of Chancery for preventing manipulation of the proxy machinery, the legislature explicitly approved the use of so-called datagram proxies. At the same time, the legislature required that most public corporations appoint inspectors of election to conduct the vote count at stockholder meetings. In addition, the 1990 amendments permit Delaware corporations generally to issue redeemable common stock. Prior to 1990, with minor exceptions for the common stock of certain issuers, only preferred shares could be made redeemable.

Less substantive changes were made in the 1990 amendments to fine-tune existing provisions or accommodate emerging trends in corporate practice. This article describes the changes effected by the 1990 amendments and supplements previous reports published by Prentice Hall, Inc. on periodic amendments to the Delaware General Corporation Law.[1]

FORMATION

Certificate of incorporation; contents [§ 102].—Section 102(a)(4) of the General Corporation Law has been amended so as to dispel any suggestion that Delaware nonstock corporations may not be organized for profit. Historically, a number of sections of the Delaware General Corporation Law spoke of nonstock, nonprofit corporations or linked those terms in such a way as to suggest that Delaware membership corporations could only be not for profit. Amendments to the statute over the years have sought to correct this misimpression. The deletion of the words "which are not organized for profit and" in the fourth sentence of Section 102(a)(4), which excuses membership corporations from the requirement that their authorized capital be described in the certificate of incorporation, is consistent with this effort.

Execution, filing, recording of documents [§ 103].—Three changes have been made to Section 103, which governs the execution, filing and recording of documents with the Secretary of State. Section 103(c)(1) has been amended so as to abolish the requirement that a duplicate copy be supplied with any instrument filed with the Secretary of State. Section 103(c)(4), as amended, now requires the Secretary of State

to prepare a copy of any original signed instrument for certification. A conforming change has been made to Section 103(c)(5), striking the word "duplicate."

Certificate of incorporation; definition [§ 104].—Section 104 of the General Corporation Law provides that the term "certificate of incorporation" as used in the statute includes various instruments filed subsequent to the initial certificate of incorporation which have the effect of amending or supplementing the original certificate. The 1990 amendment to Section 104 deletes the reference to Section 244 governing reductions of capital, as filings with the Secretary of State are no longer required by Section 244 in order to effectuate a reduction of capital.

DIRECTORS AND OFFICERS

Indemnification of officers, directors, employees and agents; insurance [§ 145].—Section 145(e) of the General Corporation Law authorizes corporations to make advances against litigation expenses prior to any determination concerning a director's or officer's entitlement to indemnification under Section 145. Prior to the 1990 amendments it was at least arguable that advances could not be made in the case of administrative or investigative proceedings and that expenses that could be advanced did not include attorneys' fees. This is because Section 145(a), in authorizing indemnification generally, referred expressly to administrative and investigative proceedings while Section 145(e) did not and because Sections 145(a), (b) and (c) expressly provided for indemnification of expenses "including attorneys' fees," while Section 145(e) referred only to expenses. These inconsistencies were lapses in drafting and were not intended to narrow the types of proceedings as to which litigation expenses could be advanced or the types of expenses against which advances could be made. Indeed, as a practical matter, attorneys' fees are frequently the most significant cost incurred by persons who may ultimately be entitled to indemnification. The 1990 amendments put any contrary argument to rest by including language in Section 145(e) which parallels the other provisions of Section 145 described above.

STOCK AND DIVIDENDS

Classes and series of stock; rights, etc. [§ 151].—Section 151(b) of the General Corporation Law has been amended in its entirety to authorize Delaware corporations to create a class or series of redeemable common stock. Prior to this revision, Section 151(b) had provided that only preferred stock could be made redeemable. Exceptions in the prior statute allowed for redemption of common stock in two cases. In order to accommodate redemption of open-end mutual fund shares, where the issuer was registered under the Investment Company Act of 1940 the statute permitted common stock to be redeemed by the stockholder. The statute also permitted redemption of common stock to the extent necessary to allow a company to maintain compliance with governmental license or franchise requirements, or membership on a national securities exchange.

While Delaware corporations may now issue redeemable common stock, at the time of redemption the corporation must have outstanding at least one class or series of stock with full voting powers which are not redeemable. This requirement of a residual equity is similar to the provisions of the Model Business Corporation Act which first authorized redemption of shares of any class of a corporation's stock in 1984. Nonetheless, some

concern was expressed that permitting redeemable common stock might lead to abuse since shares held by the public could be made redeemable while the residual class or series of nonredeemable shares were held by one or a limited number of stockholders. This concern was thought to be outweighed by the added flexibility to arrange financing of corporations which the 1990 amendments to Section 151(b) confer, the recognition of redeemable common stock elsewhere and the fact that the same result could be achieved, albeit in a cumbersome way, by authorizing common stock convertible at the option of the corporation into shares of a redeemable preferred stock.

The 1990 amendments continue the special treatment of shares issued by investment companies and companies needing the ability to redeem shares in order to retain a governmental license or franchise or stock exchange membership insofar as such shares are relieved of the requirement that whenever they are redeemed the corporation must have outstanding non-redeemable shares with full voting powers. In addition, the amendments liberalize both of these exceptions. The stock of an investment company may now be made subject to redemption by the issuer as well as at the stockholder's option. The exception protecting licenses, franchises and memberships has been broadened so as to provide for redemption by the corporation in situations where the license, franchise or membership to be protected is held by it indirectly, *i.e.*, by a subsidiary.

Dividends; payment; wasting asset corporations [§ 170].—Prior to the 1990 amendments Section 170(a) authorized directors to declare and pay dividends "upon the shares" of a corporation's stock. The 1990 amendments add language recognizing that dividends may be paid to a corporation's members if it is a nonstock corporation organized for profit. No substantive change in law was intended. This amendment is merely part of a continuing effort to better accommodate the provisions of the General Corporation Law to the fact that, unlike the corporation laws of some other states, the Delaware statute governs both stock and nonstock corporations and corporations organized for profit as well as nonprofit corporations.

MEETINGS, ELECTIONS, VOTING, NOTICE

Voting rights of stockholders; proxies; limitations [§ 212].—Section 212 of the General Corporation Law deals with voting power of stockholders and, *inter alia*, authorizes stockholders to vote by proxy. The 1990 amendments create certain safe harbors relating to the means by which a stockholder may authorize another person to act as the stockholder's proxy. New Section 212(c)(1) of the statute[2] expressly recognizes that valid proxy authority may be conferred by the stockholder signing a writing or that the writing may be signed on behalf of the stockholder by an authorized officer, director, employee or agent, including a signature affixed by any reasonable means, including facsimile signature.

The 1990 amendments to Section 212 also expressly permit the use of datagram proxies as well as telecopied or photocopied proxies. The term "datagram" proxy refers to a range of procedures which have grown up in practice in the course of proxy contests to facilitate the solicitation of telegraphic proxies. Generally speaking, a solicitor will arrange for the creation of a toll-free telephone number staffed by operators to whom record holders are able to communicate their votes, which are then reduced to a telegram and delivered to the inspectors of election. The use of datagram proxies was called into question in 1989 by the Delaware Court of Chancery in *Parshalle v. Roy,* 567 A.2d 19

(1989), where the Court held that the datagram procedure employed in that case lacked the fundamental indicia of authenticity and genuineness needed to accord the datagrams a presumption of validity. The Court stopped short of saying that datagrams could never be a valid method for voting, but provided little guidance to contestants in devising appropriate procedures. *See also Concord Financial Group, Inc. v. Tri-State Motor Transit Co. of Delaware,* 567 A.2d 1 (Del. Ch. 1989).[3]

As amended, Section 212 expressly authorizes datagrams and provides guidance to contestants and inspectors of election as to their use. New Section 212(c) permits a stockholder to authorize another person or persons to act as the stockholder's proxy by transmitting or authorizing the transmission of a telegram, cablegram or other electronic transmission to the proxy holder or to a proxy solicitor or other person hired to receive the stockholder's instructions. However, the drafters chose not to codify any particular mechanics or procedures which would validate an electronic proxy. Given the evolving state of the technology involved, it was thought preferable to leave that matter to develop on a case by case basis.[4] Hence, Section 212(c) requires only that any datagram or telegraphic proxy be accompanied by, or set forth on its face, information sufficient to determine its authenticity. In turn, the inspectors of election are required to identify in their report of the meeting the authenticating information on which they relied in deciding to accept telegraphic proxies. This assures the kind of record necessary to determine any claims of fraud and also permits the case law development referred to above.

New Section 212(d) expressly authorizes the use of photocopies or telecopies of proxies in addition to the original proxy card, provided that both sides of the proxy card are photocopied or telecopied. This change also accommodates the evolving technology and gives approval to current practice, by recognizing that proxies may be telecopied to a meeting. This saves heroic last minute efforts to fly proxy cards to a distant meeting site and also makes unnecessary the need for parties to a contest to agree to recognize "proxy drops" at places remote to the place of the meeting.

Consent of stockholders or members in lieu of meeting [§ 228].—Section 228(b), which permits members of nonstock corporations to act by written consent in lieu of a meeting unless otherwise provided in the corporation's certificate of incorporation, has been corrected to change an inadvertent reference to "stockholders." Similarly, in order to make the language of the statute symmetrical, a reference to members has been added to Section 228(c) which calls for delivery of written consents to a corporation's registered office in Delaware, its principal place of business or to the officer or agent who has custody of the book in which the proceedings of meetings of stockholders "or members" are recorded.

Voting procedures and inspectors of elections [§ 231].—A new Section 231 was added to the General Corporation Law in 1990. Section 231(a) mandates the appointment of inspectors of election by most Delaware corporations having publicly traded shares in advance of every meeting of stockholders. Hence, the statute codifies a practice widely employed by publicly held corporations, in many cases pursuant to specific by-law provisions requiring the counting of votes by inspectors. In practice, many corporations hire independent inspectors to tally the votes at meetings of stockholders. Consideration was given to requiring that the inspectors to be appointed under Section 231 be "independent," but it was thought that such a rule would be too rigid given the

scope of coverage of the statute, *i.e.*, all corporations with shares listed on a national securities exchange, authorized for quotation on an interdealer quotation system of a registered national securities association or held of record by more than 2,000 stockholders.[5] Section 231(a) also provides for the designation of alternate inspectors and requires that inspectors take an oath to execute their duties with "strict impartiality."

New Section 231(b) specifies the duties of inspectors. The inspectors are responsible for determining the number of outstanding shares entitled to vote at the meeting and their voting power, the shares represented at the meeting and the validity of proxies and ballots, and for counting the votes and ballots and certifying their count of the shares present and their count of the votes. Where there is a formal challenge to any of their determinations, the inspectors are authorized to make a decision as to the challenge and are required to retain a record of its disposition.

New Section 231(c) requires that public companies announce at a meeting of stockholders the date and time of the opening and closing of the polls for each matter on which stockholders will vote at the meeting. Most notably, the statute provides that, absent a decision by the Court of Chancery to the contrary, no votes or revocations submitted after the closing of the polls will be counted. This rule removes one of the principal uncertainties in the voting process since Delaware had no definitive case law on the effect of closing the polls and decisions in certain other jurisdictions suggested that, notwithstanding the closing of the polls, proxies or ballots could either be submitted or changed at any point until the final tally was announced. Consideration was given in drafting Section 231(c) to fixing, by statute, a specific time that polls would close in connection with voting at any meeting of stockholders. While it is true that the polls are closed at most meetings during the course of the meeting when voting is completed, or at the close of the meeting, it was thought that an arbitrary cut-off would not accommodate all possible cases, such as voting at adjourned meetings. In any case, announcement at the meeting of the time when the polls will close should create a level playing field for all parties in the case of a contested vote and should discourage any attempt to manipulate the voting process.

New Section 231(d) specifies the information which inspectors may look to in determining the validity of proxies and ballots and counting them. That information is "limited to" the proxies and ballots themselves, any envelopes submitted with the proxies (in order to determine which of two or more proxies covering the same shares is the later), information provided in accordance with new Section 212(c)(2) to verify or validate electronic proxies and the regular corporate books and records. The inspectors' investigation is "limited" to this evidence since inspectors have historically been regarded as performing a ministerial role and the drafters of new Section 231 did not want to suggest that codifying their role gives the inspectors judicial powers. The statute makes one specific exception to the tight parameters governing the purview of the inspectors designed to deal with the problem caused by broker "overvotes." Broker overvotes result when a broker or other institution which holds shares for various accounts in "street" name votes more shares than the corporation's stockholder list reflects that it holds. The resulting discrepancy is called an overvote.[6] Whenever overvotes were found to exist a practice had grown up among inspectors of election to contact the various brokerage houses and other institutions to determine how they intended to distribute their votes. This practice was invalidated by the Court of Chancery

in *Concord Financial Group v. Tri-State Motor Transit Co.*, 567 A.2d 1 (1989). In contested elections following that decision, where an overvote came to light and the broker had not voted its entire position for one side or the other, all of that broker's votes had to be thrown out. While the *Tri-State* decision was consistent with the ministerial role ascribed to inspectors and the principle that, in performing their duties, inspectors may not look beyond a corporation's books and records, *see Williams v. Sterling Oil of Okla., Inc.*, 273 A.2d 267 (Del. 1971), it had the potential to disenfranchise large numbers of stockholders. New Section 231(d), in effect, reverses *Tri-State* and permits inspectors to consider "other reliable information for the limited purpose of reconciling proxies and ballots submitted by or on behalf of banks, brokers, their nominees or similar persons" in overvote situations. If the inspectors consider such information, they must set forth the authenticating details concerning that information in their report, including the names of the persons from whom they obtained the information. They must also state the basis for their belief that the information is accurate and reliable.

AMENDMENT OF CERTIFICATE OF INCORPORATION; CHANGES IN CAPITAL AND CAPITAL STOCK

Amendment of certificate of incorporation after receipt of payment for stock [§ 242].—A new subsection (c) has been added to Section 242 of the General Corporation Law authorizing the board of directors to abandon an amendment to a corporation's certificate of incorporation that has been approved by stockholders or members at any time prior to the filing of the amendment, provided that such authority is reserved in the resolution authorizing the proposed amendment. This brings the same flexibility to the procedure for charter amendments that was added to the statute in the case of mergers and asset sales in the general revision of 1967 and extended to dissolutions in 1987.

MERGER OR CONSOLIDATION

Merger or consolidation of domestic corporations [§ 251].—In connection with the 1990 amendments to the General Corporation Law, two changes were made in Section 251 dealing with merger or consolidation of domestic corporations. Language was added to Section 251(d) to make the language of the first sentence of that section consistent with the second sentence. The section now provides in both places that a merger may be abandoned by the board of directors prior to the filing of the agreement of merger "(or a certificate in lieu thereof)" notwithstanding stockholder approval.

In addition, Section 251(f) was amended to change the import of the Secretary's certificate which must accompany an agreement of merger when the merger has been approved by the directors of a constituent corporation without action by its stockholders as authorized by that section. The first sentence of Section 251(f) permits approval of a merger without submission to stockholders of the constituent corporation surviving the merger where (1) the corporation's certificate of incorporation is not amended, (2) its shares outstanding before the merger are identical shares or treasury shares after the merger, and (3) the shares or convertible securities it will issue in the merger do not exceed 20 percent of the shares outstanding before the merger. The second sentence of Section 251(f) permits approval of a merger by board action alone where no shares of a constituent corporation have been issued prior to the adoption by the board of directors of the resolution approving the agreement of merger. Prior to the 1990 amendments, the

third sentence of Section 251(f) required that where a merger was approved without action by the stockholders of the surviving corporation in accordance with subsection (f), the corporation's Secretary had to certify that "the outstanding shares of the corporation were such as to render this subsection applicable." That language was too cryptic to encompass both of the situations covered by subsection (f) in which stockholder approval of a merger may be excused. Hence, Section 251(f) has been amended to require a different certification as to the circumstances where a merger is effected pursuant to either sentence one or sentence two of Section 251(f).

Merger or consolidation of domestic corporation and joint-stock or other association [§ 254].—Section 254, which governs the merger or consolidation of Delaware corporations and joint-stock or other associations,[7] has been amended in several respects. First, subsection (b) has been amended to permit a corporation to merge into a joint-stock association or to consolidate with a joint-stock association to form a new joint-stock association. Prior to this amendment, the surviving entity of such a merger or consolidation had to be a corporation. Second, subsection (c) of Section 254 was revised to make appropriate provision in the agreement of merger required by that subsection for mergers in which a joint-stock association is the surviving or resulting entity by providing, *inter alia*, for the conversion of shares or membership interests in stock or nonstock corporations into shares, memberships or financial or beneficial interests in the joint-stock association surviving or resulting from the merger or consolidation. In addition, subsection (d) of Section 254 has been amended to provide for filing and recording the agreement of merger or consolidation "in accordance with the laws regulating the creation of joint-stock associations" where the surviving or resulting entity is a joint-stock association; and subsections (e) and (f) make conforming changes to take into account the possibility that the surviving or resulting entity in a combination involving a corporation and a joint-stock association may be a joint-stock association.

Merger or consolidation of domestic and foreign nonstock corporations [§ 256].—Section 256 has been amended to delete the words "nonprofit" from the title and wherever they appear in the text. This is consistent with other amendments in 1990 and in previous years to eliminate from the statute references which suggest that nonstock corporations may not be organized for profit.

Appraisal rights [§ 262].—Two changes were made to Section 262, which governs the availability of appraisal rights in connection with a merger or consolidation. Prior to the 1990 amendments, Section 262(d)(1) required that where a merger or consolidation in which appraisal rights would be available was to be submitted to stockholders, the corporation notify "each of its stockholders entitled to such appraisal rights" of the availability of appraisal rights. Since a stockholder's right to demand appraisal can be exercised until the vote on a merger is taken, this language suggested that corporations had a continuing duty to deliver the notice contemplated by Section 262(d)(1) right up to the meeting date. Section 262(d)(1) was amended in 1990 to make it clear that only stockholders of record as of the record date set for the meeting of stockholders at which a proposed merger or consolidation for which appraisal may be available is to be considered by stockholders must be given the required notice.

Subparagraph (2) of Section 262(d) was also amended to make it clear that no action other than delivery of a demand letter is required to effect a statutory demand for appraisal.

SALE OF ASSETS, DISSOLUTION AND WINDING UP

Notice to claimants; filing of claims [§ 280].—In connection with amendments which became effective in 1987, Sections 280, 281 and 282 were added to the General Corporation Law to facilitate winding up a dissolved corporation's affairs by introducing procedures designed to limit the exposure of directors and stockholders to claims which arise after the corporation has been dissolved and its assets have been distributed. These procedures involved some novel concepts which the 1990 amendments seek to clarify or to make more workable. Section 280 provides a procedure whereby a dissolved corporation may seek a judicial determination as to the form and amount of security required to satisfy certain unresolved claims against it. The 1990 amendments to Section 280 add language to subsection (a)(2) which harmonize its provisions establishing time periods within which a corporation or successor entity may reject claims preliminary to seeking such a judicial determination with Sections 295 and 296 of the statute and the Rules of the Court of Chancery in those cases where a receiver or trustee has been appointed for the corporation. In addition, subsection (b)(1) of Section 280 was amended to make clear that the persons with contingent claims to whom notice of the corporation's dissolution is required to be given by that subsection are those who have "contractual" claims, which term the amendment goes on to provide "shall not include any implied warranty as to any product manufactured, sold, distributed or handled by the dissolved corporation." Similarly, a conforming change was made to subsection (b)(2) of Section 280 to indicate that the contingent claims referred to there are claims based on a contract.

The 1990 amendments also amended subsection (c)(2) of Section 280 to change the scope of the security the Court of Chancery is asked to set by that subsection from security "sufficient to provide compensation to claimants whose claims are known to the corporation or successor entity but whose identities are unknown" to "which will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the corporation or that have not arisen but that, based on facts known to the corporation or successor entity, are likely to arise or to become known to the corporation or successor entity prior to the expiration of applicable statutes of limitation." That subsection was also amended to make discretionary rather than mandatory the appointment of a guardian *ad litem* in respect of a proceeding thereunder.

Finally, Section 280 was amended in 1990 to add a new subsection (f) providing that the time periods and notice requirements in the section are subject to variation pursuant to the Rules of the Court of Chancery where a trustee or receiver has been appointed for the corporation.

Payment and distribution to claimants and stockholders [§ 281].—Section 281(a) provides that a dissolved corporation which has followed the procedures set forth in Section 280 shall pay claims and post security, in accordance with the provisions of subsections (a), (b) and (c) of Section 280. Prior to the 1990 amendments, Section 281(a) provided that the corporation should also pay or make provision for all of its other

obligations. The term "obligations" has been replaced by the more precise "claims that are mature, known and uncontested or that have been finally determined to be owing."

Similarly to Section 280(b), Section 281(b) was amended in 1990 to make clear that the contingent, conditional or unmatured claims for which provision for payment must be made by a dissolved corporation which has not followed the procedures set forth in Section 280 include only contractual claims. In addition, Section 281(b) was amended to add the same language added to Section 280(c)(2) quoted above providing that dissolved corporations must make provision to pay claims that have not been made known to the corporation or that have not arisen only when the corporation is aware of facts demonstrating that such claims are likely to arise or to become known to the corporation prior to the expiration of applicable statutes of limitation.

Finally, a new subsection (e) was added to Section 281 to make clear that the determination of which claims to a dissolved corporation's assets have priority over others is not affected by the enumeration of claims in subparagraphs (1)-(4) of subsection (a) of that section. General contract and corporate law principles continue to govern these issues.

FOREIGN CORPORATIONS

Definition; qualification to do business in State; procedure [§ 371].—As part of a package of increases in fees and taxes collected by the Secretary of State, the 1990 amendments increase from $50 to $80 the filing fee to be paid by a non-Delaware corporation in order to become qualified to do business in Delaware.

Additional requirements in case of change of name, change of business purpose or merger or consolidation [§ 372].—Whenever a foreign corporation changes its corporate name, or changes the business which it proposes to do in Delaware, Section 372(a) requires the corporation to file with the Secretary of State a certificate detailing the change and to pay a fee. Similarly, Section 372(b) requires a foreign corporation to file a certificate attesting to the occurrence of a merger or consolidation and to pay a fee. The fee for filing and indexing such certificates has been increased from $25 to $50. An additional $20 fee (increased from $10) is levied for processing changes of corporate name certificates.

MISCELLANEOUS PROVISIONS

Taxes and fees payable to the Secretary of State upon filing certificate or other paper [§ 391].—The 1990 amendments to the General Corporation Law revise a number of the taxes and fees collected by the Secretary of State. Perhaps most importantly, the rate base used to calculate the filing tax payable by corporations upon their incorporation (based on a corporation's authorized capital stock) has been doubled. The statutorily prescribed minimum fee which must be paid on the filing of a certificate of amendment or a restated certificate of incorporation has also been doubled, going from $15.00 to $30.00. Section 391(a)(4), setting forth the tax applicable to filing a certificate of merger or consolidation, now requires a tax payment of no less than $75.00, as compared to the previous $20.00. The fee for filing a certificate of dissolution pursuant to Section 391(a)(5) has been raised to $40.00. The fee for receiving and filing and/or indexing the annual franchise tax report of a corporation (as provided for in Section 502) has been raised to $20.00. The minimum tax payable upon filing a

certificate of dissolution has been raised from $10.00 to $40.00. The fee for receiving and indexing charged by the Secretary of State's office has been increased from $25.00 to $50.00 for every document filed, with the exception of certificates of incorporation, for which the receiving and indexing fee remains $25.00. The charge for certifying copies of any document on file has been increased from $10.00 to $20.00. The fee for issuing the first certified copy of a certificate of incorporation, however, remains $10.00. The fee charged by the Secretary of State for issuing any certificate has been doubled to $20.00. This charge applies to "short form" good standing certificates. "Long form" good standing certificates, *i.e.*, certificates which attest that a corporation is in good standing and also list all documents filed with the Secretary of State since its original incorporation, will now cost $100.00. The fee assessed for provision of "preclearance" services has been raised from $50.00 to $250.00. A new subsection 391(a)(23) has been added, permitting the Secretary of State to assess a $10.00 fee for accepting a corporate name reservation "via telephone." In all cases where the Secretary of State accepts service of process against a corporation the fee imposed upon the plaintiff has been raised from $25.00 to $50.00.

Annual franchise tax report; contents; failure to file and pay tax [§ 502].—Three amendments were made to Section 502 in 1990. The Secretary of State's discretion to determine the franchise tax due where the annual franchise tax report has not been filed or the franchise tax has not been paid has been limited by the 1990 amendment to Section 502(c). The calculation of the franchise tax due and owing will now be done pursuant to the statutory formula found in Section 503(a).

The amendment to Section 502(e) is a technical correction. The old reference to Section 283 now refers to Section 284, reflecting the renumbering of Section 283 to 284 in the 1987 amendments to the statute. Section 502(g) has been amended to permit the Secretary of State to refuse to issue a good standing certificate for a corporation that has an unpaid franchise tax balance. For administrative purposes the Secretary of State has determined that unpaid franchise taxes of $1.00 or more will preclude issuance of a good standing certificate.

Rates and computation of franchise tax [§ 503].—Three technical corrections have been made to Section 503(b). First, the word "finance" has been stricken, and the word "franchise" substituted. Second, the phrase "as required by Section 502 of this title" has been deleted. Third, the word "such" has been substituted for the words "the current."

Review and refund of franchise tax; jurisdiction and power of the Secretary of State; appeal [§ 505].—Section 505 of the statute empowers the Secretary of State to consider challenges to franchise tax assessments or any penalties or interest incurred thereon. Two amendments to Section 505 were made in 1990 which mandate a substantially longer statute of limitations for the bringing of such challenges. New Section 505(a) provides that a petitioner must bring its claim no later than the first day of March of the second calendar year following the close of the contested calendar year. The previous formulation provided a 60 day challenge period. Section 505(f), which had provided a permissive extension of the 60 day challenge period "for good cause shown," has been deleted in its entirety.

Notes

1. Arsht and Stapleton, Analysis of the New Delaware Corporation Law, Analysis of the 1967 Amendments to the Delaware Corporation Law, Arsht and Stapleton, Analysis of the New Delaware Corporation Law, Analysis of the 1969 Amendments to the Delaware Corporation Law, Analysis of the 1970 Amendments to the Delaware Corporation Law; Arsht and Black, Analysis of the 1973 Amendments to the Delaware Corporation Law, Analysis of the 1974 Amendments to the Delaware Corporation Law, Analysis of the 1976 Amendments to the Delaware Corporation Law; and Black and Sparks, Analysis of the 1981 Amendments to the Delaware Corporation Law, Analysis of the 1983 Amendments to the Delaware Corporation Law, Analysis of the 1984 Amendments to the Delaware Corporation Law; Analysis of the 1985 Amendments to the Delaware Corporation Law, Analysis of the 1986 Amendments to the Delaware Corporation Law, Analysis of the 1987 Amendments to the Delaware Corporation Law, Analysis of the 1988 Amendments to the Delaware General Corporation Law (Prentice Hall, Inc. 1967, 1969, 1970, 1973, 1974, 1976, 1981, 1983, 1984, 1985, 1986, 1987 and 1988, respectively). Copies of these articles are available from Prentice Hall Law & Business, 270 Sylvan Avenue, Englewood Cliffs, NJ 07632, (201) 894-5016.

2. Old Section 212(c) has been renumbered as Section 212(e).

3. Concerns about the validity of datagram proxies had been raised when they first began to be widely used. *See* Black and Goldfus, *Corporate Voting*, 15 REV. OF SEC. REG. 879 (June 16, 1982).

4. *See* Doret, Crozier and Miller, *Datagram Proxies*, 23 REV. OF SEC. & COMMODITIES REG. 5 (March 14, 1990) and *Update on Datagram Proxies*, 4 DIG. FOR CORP & SEC. LAW (BOWNE) 4 (August 1990), discussing various means to assure reliability and verifiability of telephonic voting, and noting that one method suggested by the authors (use of the caller identification service offered by some telephone companies) may violate state right of privacy laws.

5. The language tracks section 203(b)(4), which was added to the statute in 1988 and which, in turn, is similar to Section 262(b). The former section excludes certain corporations from provisions of the statute imposing restrictions on business combinations with certain "interested stockholders." The latter section limits the availability of appraisal rights in connection with certain mergers.

6. In recent years, many brokers and institutions have contracted with companies such as Independent Election Company of America (IECA) to distribute voting material and to collect proxy cards from their beneficial owners. After tabulation, IECA creates a combined proxy form and submits the form to the corporation. In theory, such a system should provide for an orderly method of counting proxies. In practice, however, brokers and other institutions may act, after the submission of IECA's combined proxy, to submit further proxies.

7. Section 254(a) defines joint-stock association to include "any association of the kind commonly known as a joint-stock association or joint-stock company or any unincorporated association, trust or other enterprise having members or having outstanding shares of stock or other evidences of financial or beneficial interest therein."

For more information about **Corporation**, write: Customer Service, Prentice Hall Law & Business, 270 Sylvan Avenue, Englewood Cliffs, NJ 07632; or call toll-free 1-800-223-0231.

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