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DELAWARE STATE SENATE

138TH GENERAL ASSEMBLY

SENATE BILL NO. 363 APR 25 1996

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE  
GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF  
DELAWARE (Two-thirds of all members elected to each house thereof concurring  
therein):

- 1 Section 1. Amend Section 103(d), Title 8, Delaware Code, by deleting the last  
2 sentence thereof and substituting the following sentence: "If any instrument filed in  
3 accordance with subsection (c) of this section provides for a future effective date or time  
4 and if the transaction is terminated or its terms are amended to change the future effective  
5 date or time prior to the future effective date or time, the instrument shall be terminated or  
6 amended by the filing, prior to the future effective date or time set forth in such instrument,

7 of a certificate of termination or amendment of the original instrument, executed in  
8 accordance with subsection (a) of this section, which shall identify the instrument which has  
9 been terminated or amended and shall state that the instrument has been terminated or the  
10 manner in which it has been amended."

11 Section 2. Amend Section 141(c), Title 8, Delaware Code, by denominating the  
12 current text thereof as subsection "(1)" of such section; by adding the following two  
13 sentences as the first two sentences of such section: "All corporations incorporated prior to  
14 July 1, 1996, shall be governed by subsection (1) of this section, provided that any such  
15 corporation may by a resolution adopted by a majority of the whole board elect to be  
16 governed by subsection (2) of this section, in which case subsection (1) of this section shall  
17 not apply to such corporation. All corporations incorporated on or after July 1, 1996, shall  
18 be governed by subsection (2) of this section."; and by adding the following as subsection  
19 (2) of such section: "(2) The board of directors may designate 1 or more committees, each  
20 committee to consist of 1 or more of the directors of the corporation. The board may  
21 designate one or more directors as alternate members of any committee, who may replace  
22 any absent or disqualified member at any meeting of the committee. The bylaws may  
23 provide that in the absence or disqualification of a member of a committee, the member or  
24 members present at any meeting and not disqualified from voting, whether or not such  
25 member or members constitute a quorum, may unanimously appoint another member of the  
26 board of directors to act at the meeting in the place of any such absent or disqualified  
27 member. Any such committee, to the extent provided in the resolution of the board of  
28 directors, or in the bylaws of the corporation, shall have and may exercise all the powers  
29 and authority of the board of directors in the management of the business and affairs of the  
30 corporation, and may authorize the seal of the corporation to be affixed to all papers which  
31 may require it; but no such committee shall have the power or authority in reference to the  
32 following matters: (i) approving or adopting, or recommending to the stockholders, any  
33 action or matter expressly required by this chapter to be submitted to stockholders for  
34 approval or (ii) adopting, amending or repealing any bylaw of the corporation."

35 Section 3. Amend Section 160(a)(1), Title 8, Delaware Code, by adding after the  
36 words "class or series of its stock" appearing in the first sentence the phrase ",or, if no  
37 shares entitled to such a preference are outstanding, any of its own shares,".

38 Section 4. Amend Section 228(d), Title 8, Delaware Code, by adding the following  
39 words at the end of the first sentence: "and who, if the action had been taken at a meeting,  
40 would have been entitled to notice of the meeting if the record date for such meeting had  
41 been the date that written consents signed by a sufficient number of holders or members to  
42 take the action were delivered to the corporation as provided in subsection (c) of this  
43 section"; and by deleting the following phrase from the end of the subsection: ", and that  
44 written notice has been given as provided in this section".

45 Section 5. Amend Section 242(a), Title 8, Delaware Code, by adding the words "  
46 subdivision, combination" immediately following the word "reclassification" in the two  
47 places where such word appears in Section 242(a).

48 Section 6. Amend Section 242(a)(3), Title 8, Delaware Code, by inserting  
49 immediately before "; or" at the end of such section the following: ", or by subdividing or  
50 combining the outstanding shares of any class or series of a class of shares into a greater or  
51 lesser number of outstanding shares".

52 Section 7. Amend Section 242(c), Title 8, Delaware Code, by adding the words  
53 "the effectiveness of" immediately following the words "prior to".

54 Section 8. Amend Section 251(b), Title 8, Delaware Code, by adding the following  
55 sentence at the end thereof: "The term 'facts,' as used in the preceding sentence, includes,  
56 but is not limited to, the occurrence of any event, including a determination or action by any  
57 person or body, including the corporation."

58 Section 9. Amend Section 252(b), Title 8, Delaware Code, by adding the  
59 following sentence at the end thereof: "The term 'facts,' as used in the preceding sentence,  
60 includes, but is not limited to, the occurrence of any event, including a determination or  
61 action by any person or body, including the corporation."

62 Section 10. Amend Section 253(a), Title 8, Delaware Code, by inserting the  
63 following immediately after the first sentence of subsection 253(a): "Any of the terms of the  
64 resolution of the board of directors to so merge may be made dependent upon facts

65 ascertainable outside of such resolution, provided that the manner in which such facts shall  
66 operate upon the terms of the resolution is clearly and expressly set forth in the resolution.  
67 The term 'facts', as used in the preceding sentence, includes, but is not limited to, the  
68 occurrence of any event, including a determination or action by any person or body,  
69 including the corporation."

70 Section 11. Amend Section 254(c), Title 8, Delaware Code, by adding the  
71 following sentence at the end thereof: "The term 'facts,' as used in the preceding sentence,  
72 includes, but is not limited to, the occurrence of any event, including a determination or  
73 action by any person or body, including the corporation."

74 Section 12. Amend Section 255(b), Title 8, Delaware Code, by adding the  
75 following sentence at the end thereof: "The term 'facts,' as used in the preceding sentence,  
76 includes, but is not limited to, the occurrence of any event, including a determination or  
77 action by any person or body, including the corporation."

78 Section 13. Amend Section 256(b), Title 8, Delaware Code by adding the following  
79 sentence at the end thereof: "The term 'facts,' as used in the preceding sentence, includes,  
80 but is not limited to, the occurrence of any event, including a determination or action by any  
81 person or body, including the corporation."

82 Section 14. Amend Section 257(b), Title 8, Delaware Code, by adding the  
83 following sentence at the end thereof: "The term 'facts,' as used in the preceding sentence,  
84 includes, but is not limited to, the occurrence of any event, including a determination or  
85 action by any person or body, including the corporation."

86 Section 15. Amend Section 263(b), Title 8, Delaware Code, by adding the  
87 following sentence at the end thereof: "The term 'facts,' as used in the preceding sentence,  
88 includes, but is not limited to, the occurrence of any event, including a determination or  
89 action by any person or body, including the corporation."

90 Section 16. Amend Section 264(b), Title 8, Delaware Code, by adding the  
91 following sentence at the end thereof: "The term 'facts,' as used in the preceding sentence,  
92 includes, but is not limited to, the occurrence of any event, including a determination or  
93 action by any person or body, including the corporation."

94 Section 17. Amend Section 251(c)(6), Title 8, Delaware Code, by deleting the  
95 words "the principal place of business" and inserting in lieu thereof the words "an office".

96 Section 18. Amend Section 252(c)(6), Title 8, Delaware Code, by deleting the  
97 words "the principal place of business" and inserting in lieu thereof the words "an office".

98 Section 19. Amend Section 254(d)(6), Title 8, Delaware Code, by deleting the  
99 words "the principal place of business" and inserting in lieu thereof the words "an office".

100 Section 20. Amend Section 263(c)(6), Title 8, Delaware Code, by deleting the  
101 words "the principal place of business" and inserting in lieu thereof the words "an office".

102 Section 21. Amend Section 264(c)(6), Title 8, Delaware Code, by deleting the  
103 words "the principal place of business" and inserting in lieu thereof the words "an office".

104 Section 22. Amend Section 262(d)(2), Title 8, Delaware Code, by deleting its text  
105 and substituting the following text: "If the merger or consolidation was approved pursuant  
106 to § 228 or § 253 of this title, each constituent corporation, either before the effective date  
107 of the merger or consolidation or within ten days thereafter, shall notify each of the holders  
108 of any class or series of stock of such constituent corporation who are entitled to appraisal  
109 rights of the approval of the merger or consolidation and that appraisal rights are available  
110 for any or all shares of such class or series of stock of such constituent corporation, and  
111 shall include in such notice a copy of this section; provided that, if the notice is given on or  
112 after the effective date of the merger or consolidation, such notice shall be given by the  
113 surviving or resulting corporation to all such holders of any class or series of stock of a  
114 constituent corporation that are entitled to appraisal rights. Such notice may, and, if given  
115 on or after the effective date of the merger or consolidation, shall, also notify such  
116 stockholders of the effective date of the merger or consolidation. Any stockholder entitled  
117 to appraisal rights may, within twenty days after the date of mailing of such notice, demand  
118 in writing from the surviving or resulting corporation the appraisal of such holder's shares.  
119 Such demand will be sufficient if it reasonably informs the corporation of the identity of the  
120 stockholder and that the stockholder intends thereby to demand the appraisal of such  
121 holder's shares. If such notice did not notify stockholders of the effective date of the merger  
122 or consolidation, either (i) each such constituent corporation shall send a second notice  
123 before the effective date of the merger or consolidation notifying each of the holders of any

124 class or series of stock of such constituent corporation that are entitled to appraisal rights of  
125 the effective date of the merger or consolidation or (ii) the surviving or resulting corporation  
126 shall send such a second notice to all such holders on or within 10 days after such effective  
127 date; provided, however, that if such second notice is sent more than 20 days following the  
128 sending of the first notice, such second notice need only be sent to each stockholder who is  
129 entitled to appraisal rights and who has demanded appraisal of such holder's shares in  
130 accordance with this subsection. An affidavit of the secretary or assistant secretary or of the  
131 transfer agent of the corporation that is required to give either notice that such notice has  
132 been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein.  
133 For purposes of determining the stockholders entitled to receive either notice, each  
134 constituent corporation may fix, in advance, a record date that shall be not more than 10  
135 days prior to the date the notice is given; provided that, if the notice is given on or after the  
136 effective date of the merger or consolidation, the record date shall be such effective date. If  
137 no record date is fixed and the notice is given prior to the effective date, the record date  
138 shall be the close of business on the day next preceding the day on which the notice is  
139 given.

140 Section 23. Amend Section 273(a), Title 8, Delaware Code, by adding the words "  
141 unless otherwise provided in the certificate of incorporation of the corporation or in a  
142 written agreement between the stockholders," immediately after the words "either  
143 stockholder may".

144 Section 24. This Act shall be effective on July 1, 1996.

#### SYNOPSIS

This legislation continues the practice of amending the General Corporation Law of the State of Delaware (the "Act") to keep it current and to maintain its national preeminence.

Section 1. The 1995 amendments to Section 103(d) allowed a certificate of merger or consolidation to be terminated or amended before the future effective date or time stated therein by filing a Certificate of Termination or Amendment of a Certificate of Merger or Consolidation.- This amendment specifies the procedures whereby corporations may terminate or amend filings which have future effective dates or times by the filing of a Certificate of Termination or Amendment of the original instrument before its future effective date or time.

Section 2. This amendment is intended to simplify Section 141(c) and expand for corporations incorporated on or after July 1, 1996, the powers and authority that a board of directors may delegate to a committee of the board and to eliminate for such corporations the requirement that a committee of the board be formed by resolution passed by a majority

of the whole board. Any corporation formed prior to July 1, 1996 will continue to be governed by the provisions of Section 141(c) in effect prior to this amendment, unless it elects to be governed by the new provisions.

Section 3. This amendment permits a corporation to purchase shares of its common stock out of capital if no shares of preferred stock are outstanding and the shares will be retired upon their acquisition and the capital of the corporation will be reduced in accordance with §§ 243 and 244.

Section 4. This amendment eliminates the requirement that, prior to the filing of a certificate under another section of the statute to effectuate an action by written consent, the notice of such action required by this subsection be given to stockholders who have not consented in writing (although the requirement that "prompt" notice be given remains unchanged). The amendment also clarifies that the stockholders entitled to receive such notice are the stockholders who would have been entitled to receive notice of a stockholders meeting if the action had been taken at a meeting.

Sections 5-6. These amendments make clear that an amendment to the certificate of incorporation is necessary in connection with a forward or reverse stock split. A stock dividend, sometimes referred to as a "stock split in the nature of a dividend," is unaffected by these amendments.

Section 7. This amendment is intended to conform with the 1996 amendment to Section 103(d) which enables corporations to terminate or amend all filings which have future effective dates or times by the filing of a Certificate of Termination or Amendment of the original instrument before its future effective date or time.

Sections 8-9, 11-16. The amendments to Sections 251(b), 252(b), 254(c), 255(b), 256(b), 257(b), 263(b), and 264(b) are intended to conform these sections with the 1994 amendment to Section 151(a). The amendments make clear that a "fact" can include an event or a determination or action by any person or body, including an event or determination within the control of the corporation or a person or body affiliated with the corporation, such as a decision by its board of directors or one of its officers or agents. These amendments are not intended to alter the fiduciary duties of a board of directors in authorizing a merger agreement with terms that turn on determinations or actions made by any person or body, or in making any determination or taking any action constituting a fact under these sections.

Section 10. The amendment to Section 253(a) is meant to conform Section 253(a) with the 1974 amendment to Section 251(b) and the 1994 amendment to Section 151(a). The amendment makes clear that the terms of the merger may be made dependent upon facts ascertainable outside of the resolution of the board of directors to so merge, so long that it is made clear in the resolution the precise way that these facts will affect the terms of the resolution. The amendment to Section 253(a) also makes clear that a "fact" can include an event or a determination or action by any person or body, including an event or determination within the control of the corporation or a person or body affiliated with the corporation, such as a decision by its board of directors or one of its officers or agents. This amendment is not intended to alter the fiduciary duties of a board of directors in adopting such a merger resolution with terms that turn on determinations or actions made by any person or body, or in making any determination or taking any action constituting a fact under this section.

Sections 17-21. The amendments to Sections 251(c)(6), 252(c)(6), 254(d)(6), 263(c)(6) and 264(c)(6) eliminate the requirement that the executed agreement of consolidation or merger be on file at the principal place of business of the surviving corporation or entity in cases where a certificate of merger or consolidation is filed with the Secretary of State in lieu of the agreement of consolidation or merger. The amendment permits the executed agreement of consolidation or merger to be on file at any office of the surviving corporation or entity, whether or not its principal place of business.

Section 22. The amendment to Section 262(d) provides a mechanism for sending separate notices with respect to (a) the approval and (b) the effective date of a merger or consolidation approved pursuant to Section 228 or Section 253, in order to permit the start of the twenty day period for appraisal demands where the effective date is not known at the time the notice of the approval of the merger is sent. The amendment also (1) provides for the fixing of a record date for determining the stockholders to whom the notices provided for in this subsection shall be sent (and provides that notices given prior to the effective date shall be given by the appropriate constituent corporation rather than by the surviving corporation, as previously provided), and (2) eliminates the requirement that notices be sent by certified or registered mail, return receipt requested (and provides that, as in Section 222(b), an affidavit of the Secretary, Assistant Secretary or Transfer Agent shall constitute evidence of the giving of such notice).

Sections 23. This amendment provides that stockholders of joint venture corporations may, by provision in the certificate of incorporation or written agreement, opt out of the dissolution procedure otherwise afforded by Section 273.

Section 24. This Section provides that the amendments will be effective on July 1, 1996.

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