



SPONSOR: Sen. Sharp; Rep.
Wagner

DELAWARE STATE SENATE

139TH GENERAL ASSEMBLY

106 APR 29 1997

SENATE BILL NO. _____

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 102(a)(1), Title 8, Delaware Code, by deleting the word
2 "and" after the number "\$10,000,000" and inserting in lieu thereof a comma, and by
3 inserting at the end of that subparagraph, after the word "title" and before the semi-colon,
4 the following:

5 "and (iii) shall not contain the word "bank", or any variation
6 thereof, except for the name of a bank reporting to and under
7 the supervision of the State Bank Commissioner of this State,
8 or a subsidiary of a bank or savings association (as those
9 terms are defined in the Federal Deposit Insurance Act, as
10 amended, at 12 U.S.C. §1813), or a corporation regulated
11 under the Bank Holding Company Act of 1956, as amended,
12 12 U.S.C. § 1841 et seq., or the Home Owners' Loan Act, as
13 amended, 12 U.S.C. § 1461 et seq., provided, however, that
14 this section shall not be construed to prevent the use of the
15 word "bank", or any variation thereof, in a context clearly not
16 purporting to refer to a banking business or otherwise likely

17 to mislead the public about the nature of the business of the
18 corporation or to lead to a pattern and practice of abuse that
19 might cause harm to the interests of the public or the State as
20 determined by the Division of Corporations in the
21 Department of State".

22 Section 2. Amend Section 132(a), Title 8, Delaware Code, by deleting "either an
23 individual resident in this State whose business office is identical with the corporation's
24 registered office, or a domestic corporation (which may be itself), or a foreign corporation
25 authorized to transact business in this State, having a business office identical with such
26 registered office" and substituting in lieu thereof "any of (i) the corporation itself, (ii) an
27 individual resident in this State, (iii) a domestic corporation (other than the corporation
28 itself) or (iv) a foreign corporation authorized to transact business in this State, in each case,
29 having a business office identical with the office of such registered agent which generally is
30 open during normal business hours to accept service of process and otherwise perform the
31 functions of a registered agent."

32 Section 3. Amend Section 145(a), Title 8, Delaware Code, by deleting the word
33 "he" where it appears and in each instance substituting in lieu thereof the words "such
34 person", by deleting the word "him" and substituting in lieu thereof the words "such
35 person", and by deleting the word "his" where it appears and in each instance substituting in
36 lieu thereof the words "such person's".

37 Section 4. Amend Section 145(b), Title 8, Delaware Code, by deleting the word
38 "he" where it appears and in each instance substituting in lieu thereof the words "such
39 person", and by deleting the word "him" and substituting in lieu thereof the words "such
40 person".

41 Section 5. Amend Section 145(c), Title 8, Delaware Code, by adding the words
42 "present or former" immediately before the word "director", deleting the words ", officer,
43 employee or agent" and substituting in lieu thereof the words "or officer", deleting the word
44 "he" and substituting in lieu thereof the words "such person", and deleting the word "him"
45 and substituting in lieu thereof the words "such person".

46 Section 6. Amend Section 145(d), Title 8, Delaware Code, by adding the words
47 "present or former" immediately after the words "upon a determination that indemnification
48 of the" in the first sentence thereof, deleting the word "he" and substituting in lieu thereof
49 the words "such person", adding the words ", with respect to a person who is a director or
50 officer at the time of such determination," immediately after the words "Such determination
51 shall be made" in the second sentence thereof, by inserting the words "or (2) by a committee
52 of such directors designated by majority vote of such directors, even though less than a
53 quorum," immediately after the words "less than a quorum," in the second sentence thereof,
54 and by renumbering subparts (2) and (3) of the second sentence thereof as subparts (3) and
55 (4), respectively.

56 Section 7. Amend Section 145(e), Title 8, Delaware Code, by deleting the word
57 "he" and substituting in lieu thereof the words "such person", inserting the words "former
58 directors and officers or" immediately before the words "other employees and agents" in the
59 second sentence thereof, and deleting the words "board of directors" from that sentence and
60 substituting in lieu thereof the word "corporation".

61 Section 8. Amend Section 145(f), Title 8, Delaware Code, by deleting the word
62 "his" and substituting in lieu thereof the words "such person's".

63 Section 9. Amend Section 145(g), Title 8, Delaware Code, by deleting the word
64 "him" where it appears and in each instance substituting in lieu thereof the words "such
65 person", and by deleting the word "his" and substituting in lieu thereof the words "such
66 person's".

67 Section 10. Amend Section 145(h), Title 8, Delaware Code, by deleting the word
68 "he" and substituting in lieu thereof the words "such person".

69 Section 11. Amend Section 145(i), Title 8, Delaware Code, by deleting the word
70 "he" and substituting in lieu thereof the words "such person".

71 Section 12. Amend Section 211(b), Title 8, Delaware Code, by deleting the first
72 word of the first sentence thereof and inserting in lieu thereof the words "Unless directors
73 are elected by written consent in lieu of an annual meeting as permitted by this subsection,
74 an", and by inserting the following after the conclusion of the first sentence:

75 "Stockholders may, unless the certificate of incorporation
76 otherwise provides, act by written consent to elect directors;
77 provided, however, that, if such consent is less than
78 unanimous, such action by written consent may be in lieu of
79 holding an annual meeting only if all of the directorships to
80 which directors could be elected at an annual meeting held at
81 the effective time of such action are vacant and are filled by
82 such action."

83 Section 13. Amend Section 211(c), Title 8, Delaware Code, by inserting after the
84 word "therefor" in the second sentence the words "or action by written consent to elect
85 directors in lieu of an annual meeting has not been taken,"; deleting the word "thereafter" in
86 the second sentence; inserting after the word "as" in the second sentence the word "is";
87 inserting after the word "meeting" in the third sentence the words "or to take action by
88 written consent to elect directors in lieu of an annual meeting"; deleting the word "therefor"
89 in the third sentence and substituting the words "for the annual meeting"; inserting after the
90 words "13 months after the" in the third sentence the words "latest to occur of the"; deleting
91 after the word "corporation" in the third sentence the words "or after" and substituting a
92 comma; and inserting after the word "meeting" in the third sentence the words "or the last
93 action by written consent to elect directors in lieu of an annual meeting".

94 Section 14. Amend Section 254(e), Title 8, Delaware Code, by adding to the first
95 sentence the word "252(d)," immediately after the word "251(f),".

96 Section 15. Amend Section 262(b)(2)b, Title 8, Delaware Code, by adding the
97 parenthetical phrase "(or depository receipts in respect thereof)" immediately following the
98 words "which shares of stock".

99 Section 16. Amend Section 277, Title 8, Delaware Code, by inserting, "including
100 all franchise taxes due or which would be due or assessable for the entire calendar month
101 during which the dissolution or merger becomes effective", immediately following the word
102 "State."

103 Section 17. Amend Section 281(a), Chapter 1, Title 8, Delaware Code, by
104 substituting the word "assets" for the word "funds" in each place where the word "funds"
105 appears in Section 281(a).

106 Section 18. Amend Section 281(b), Chapter 1, Title 8, Delaware Code, by
107 substituting the word "assets" for the word "funds" in each place where the word "funds"
108 appears in Section 281(b).

109 Section 19. Amend Section 377(b), Title 8, Delaware Code, by deleting subsection
110 (b) in its entirety and inserting in lieu thereof the following:

111 "(b) Any individual or corporation designated by a foreign corporation as its
112 registered agent for service of process may resign by filing with the Secretary of State a
113 signed statement that the registered agent is unwilling to continue to act as the registered
114 agent of the corporation for service of process, including in the statement the post-office
115 address of the main or headquarters office of the foreign corporation; but such resignation
116 shall not become effective until 30 days after the statement is filed. The statement shall be
117 acknowledged by the registered agent and shall contain a representation that written notice
118 of resignation was given to the corporation at least 30 days prior to the filing of the
119 statement by mailing or delivering such notice to the corporation at its address given in the
120 statement."

121 Section 20. Amend Section 390, Title 8, Delaware Code, by deleting the word
122 "and" in the title of the Section and substituting in lieu thereof the word "or".

123 Section 21. Amend Section 390(a), Title 8, Delaware Code, by adding the words
124 "or domesticate or continue in" immediately after the words "may transfer to".

125 Section 22. Amend Section 390(b), Title 8, Delaware Code, by adding the words
126 "or domesticate or continue in" immediately after the words "desires to transfer to" in the
127 first sentence thereof, adding the words "or continuance" immediately after the words
128 "resolution approving such transfer" in the first sentence thereof, adding the words "to
129 which the corporation shall be transferred or" immediately after the words "specifying the
130 jurisdiction" in the first sentence thereof, adding the words "or domestication or
131 continuance" immediately after the words "recommending the approval of such transfer" in

132 the first sentence thereof, and adding the words "if its existence as a corporation of this
133 State is to cease, or a certificate of continuance if its existence as a corporation of this State
134 is to continue" immediately after the words "Secretary of State a certificate of transfer" in
135 the fifth sentence thereof.

136 Section 23. Amend Section 390(b)(3), Title 8, Delaware Code, by eliminating the
137 words "will transfer" and adding the words "shall be transferred" immediately after the
138 words "jurisdiction to which the corporation" and by eliminating the word "will" and
139 adding the word "shall" immediately after the words "in which it".

140 Section 24. Amend Section 390(b)(4), Title 8, Delaware Code, by adding the words
141 "or domestication or continuance" immediately after the words "That the transfer".

142 Section 25. Amend Section 390(b)(5), Title 8, Delaware Code, by deleting the first
143 word thereof and substituting in lieu thereof the words "In the case of a certificate of
144 transfer, (i) that the existence of the corporation as a corporation of this State shall cease
145 when the certificate of transfer becomes effective, and (ii) the".

146 Section 26. Amend Section 390(b), Title 8, Delaware Code, by adding a new
147 subsection (6) to read as follows:

148 "(6) In the case of a certificate of continuance, that the
149 corporation will continue to exist as a corporation of this
150 State after the certificate of continuance becomes effective."

151 Section 27. Amend Section 390(c), Title 8, Delaware Code, by deleting the words
152 "compliance by the corporation" and substituting in lieu thereof the words "the filing of a
153 certificate of transfer in accordance", and by adding the words "at the time the certificate of
154 transfer becomes effective in accordance with §103 of this title" at the end of the first
155 sentence thereof.

156 Section 28. Amend Section 390(d), Title 8, Delaware Code, by adding the words
157 "and the resulting cessation of its existence as a corporation of this State pursuant to a
158 certificate of transfer" immediately after the words "out of this State".

159 Section 29. Amend Section 390, Title 8, Delaware Code, by adding a new
160 subsection (e) to read as follows:

161 "(e) If a corporation files a certificate of continuance, after
162 the time the certificate of continuance becomes effective the
163 corporation shall continue to exist as a corporation of this
164 State, and the law of the State of Delaware, including the
165 provisions of this title, shall apply to the corporation, to the
166 same extent as prior to such time."

167 Section 30. Amend Section 391(a)(23), Title 8, Delaware Code, by adding the
168 words "mail or hand delivery," after the word "telephone."

169 Section 31. Amend Section 391(a)(24), Title 8, Delaware Code, by adding the
170 words "or a certificate of continuance" immediately after the words "certificate of transfer".

171 Section 32. This Act shall be effective on July 1, 1997, except that Section 5 of this
172 Act shall become effective with respect to indemnification of expenses (including attorneys'
173 fees) for acts or omissions occurring on or after July 1, 1997.

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 amendment to Section 102(a)(1) codifies in the statute the established practice of the Secretary of State in regulating the use of "bank" in the name of a Delaware corporation.

Section 2. The amendment to Section 132(a) clarifies those entities which can serve as registered agents and further requires that a registered office generally be open during normal business hours to accept service of process and otherwise to perform the functions of a registered agent.

Sections 3-11. The amendment to Section 145(c) establishes that the Act does not prescribe mandatory indemnification with respect to employees and agents of the corporation who are neither officers nor directors of the corporation. Mandatory indemnification for such persons who satisfy the statutory standard of conduct will continue to be permissible under the Act. The amendments to Section 145(d) also clarify that the determination whether indemnification of a director or officer is proper in the circumstances may be made by a committee of directors who are not parties to the action, suit or proceeding as to which indemnification is sought, where that committee is designated by majority vote of all such directors even though less than a quorum of the full board of directors. The amendments also eliminate the requirement that indemnification of employees and agents who are not directors or officers be authorized by directors, independent counsel or the stockholders. Under this amendment and the amendment to Section 145(e), indemnification of and advancement of expenses to such employees and agents, as well as former directors and officers, may be made by any person or persons having corporate authority to act on the matter, including those persons who are authorized by statute to determine whether to indemnify directors and officers. The amendments to Section 145(e) are not intended to alter the procedure for authorizing advancement of

expenses to directors and officers. The other amendments to Section 145 substitute gender neutral language for masculine terminology.

Sections 12-13. The amendments to subsections (b) and (c) of Section 211 are intended to address issues relating to the relationship between Sections 228 and 211 that have arisen in recent decisions by the Court of Chancery. Subsection (b) has been amended to provide that action by written consent to elect directors pursuant to Section 228 can be a substitute for an annual meeting but that, unless such action is unanimous, it will fulfill the annual meeting requirement only if all directorships corresponding to those to which directors could have been elected if an annual meeting had been held at the effective time of the written consent are filled by such action and only if at such effective time all such directorships are vacant. Thus, the replacement of sitting directors by less than unanimous stockholder action will require their removal or resignation prior to the effectiveness of the consent action that substitutes for the election of directors at the annual meeting. Unanimous written consent (as that term is used in subsection (d) of Section 228) may be taken in lieu of an annual meeting whether or not the directorships to be filled are then vacant (i.e. without the prior removal or resignation of sitting directors). Subsection (c) has been amended to provide that the remedy provided for in that subsection will not be available if action by written consent in lieu of a meeting is taken within the required time periods and that the thirteen month time period provided for therein will begin to run from the later of the organization of the corporation, the last annual meeting or the last action by written consent in lieu of an annual meeting.

Section 14. The amendment to Section 254(e) is meant to conform Section 254 to other sections relating to mergers and consolidations by requiring a non-Delaware joint-stock or other association surviving a merger or consolidation to appoint the Secretary of State as agent for service of process following the merger or consolidation.

Section 15. The amendment to Section 262(b)(2)b clarifies that, assuming the requirements of Section 262(b)(1) are satisfied, appraisal rights are not available for shares held by a depository if in the merger such shares are to be converted into or exchanged for shares of another corporation (whether or not widely-held or publicly traded) in respect of which depository receipts will be widely-held or publicly traded at the effective time.

Section 16. The amendment to Section 277 clarifies that upon a dissolution or merger the franchise tax for the entire calendar month during which the dissolution or merger takes place becomes due and payable at the time of dissolution or merger.

Section 17-18. The amendments to Section 281(a) and 281(b), respectively, conform the terminology of Section 281 to that of Sections 278, 280 and 282. The word "funds" created an unintended ambiguity concerning whether Section 281 altered existing law by prohibiting in kind distributions of property to stockholders following dissolution. The amendments eliminate that ambiguity.

Section 19. The amendment to Section 377(b) revises the procedure for resignation of a registered agent for a foreign corporation by adding a requirement that the registered agent give thirty days prior notice to the foreign corporation and eliminating the previous requirement that the Secretary of State give such notice upon receipt of the registered agent's resignation.

Sections 20-29. As originally enacted in 1995, Section 390 prescribed a procedure by which a Delaware corporation could transfer to a jurisdiction outside the United States, whereupon its existence as a Delaware corporation would terminate. That procedure remains available. The amendments to Section 390 add a new procedure by which a Delaware corporation may domesticate or continue in a jurisdiction outside the United States and also preserve its existence and status as a Delaware corporation. These amendments do not affect the validity of any action taken under other applicable law to

incorporate, or domesticate or continue, in another jurisdiction and continue to exist as a Delaware corporation.

Section 30. The amendment to Section 391(a)(23) adds corporate name reservations made by hand delivery or mail to telephone reservations subject to a fee of \$10.

Section 31. Section 391(a)(24) is amended to reflect the new procedure created by the amendment to Section 390.

Section 32. This Section provides that the amendments will be effective on July 1, 1997, except for amendments pursuant to Section 5 which will become effective only with respect to acts or omissions occurring on or after July 1, 1997.

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