The 1976 Amendments to the Delaware Corporation Law

By

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ANALYSIS OF THE 1976 AMENDMENTS TO THE DELAWARE CORPORATION LAW

By S. Samuel Arsht and Lewis S. Black of the Delaware Bar Partners: Morris, Nichols, Arsht & Tunnell and members of the Corporation Law Committee of the Delaware State Bar Association

INTRODUCTION

The Delaware General Corporation Law was amended on April 24, 1976, as it has been in almost every year since its comprehensive revision in 1967. As in the case of all prior year amendments, the 1976 amendments were drafted by the Corporation Law Committee of the Delaware State Bar Association and were thereafter approved by the Bar Association before submission to the Delaware Legislature. They reflect a continuing joint effort by the Delaware Bar and the State Legislature to keep the Delaware Corporation Law up to date. This effort results from a belief, as one major corporation recently stated in connection with its move to Delaware, that "continued year-by-year revisions of the Delaware laws governing corporations have resulted in what many consider to be the most modern and flexible corporation law of any state." This article calls attention to each of the changes made by the 1976 legislation and supplements earlier articles published by Prentice-Hall, Inc. on the comprehensive revision of the statute in 1967 and the 1969, 1970, 1973 and 1974 amendments.* As in each of those articles, the organization of this supplement follows that of the Delaware General Corporation Law to facilitate reference to the statute where more detail is desired. The 1976 amendments adding Section 203 to the Corporation Law and amending Sections 502 and 504 of the Franchise Tax Law have an effective date of May 1, 1976. The other 1976 amendments, of Sections 253, 262, 284 and 371 of the Corporation Law and Section 503 of the Franchise Tax Law have an effective date of July 1, 1976.

FORMATION

No Change.

POWERS

No Change.

REGISTERED OFFICE AND REGISTERED AGENT

No Change.

DIRECTORS AND OFFICERS

No Change.

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*Arsht and Stapleton, Analysis of the New Delaware Corporation Law, Analysis of the 1969 Amendments to the Delaware Corporation Law, The 1970 Amendments to the Delaware Corporation Law, and Arsht and Black, Analysis of the 1973 Amendments to the Delaware Corporation Law, Analysis of the 1974 Amendments to the Delaware Corporation Law, Prentice-Hall, Inc., 1967, 1969, 1970, 1973 and 1974, respectively.

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STOCK AND DIVIDENDS

No Change.

STOCK TRANSFERS

Tender offers [§ 203].—The most important of the 1976 amendments is a new section, 203, which regulates tender offers for equity securities of a Delaware corporation. Thus, Delaware became the fifteenth state to adopt legislation governing "takeovers", although Delaware, unlike the other states which have enacted such legislation, assiduously avoids using that loaded term.*

Section 203 applies to a tender offer for equity securities of a Delaware corporation that is made to more than 30 holders if, after consummation of the offer, "the offeror and any associate of the offeror would own beneficially, directly or indirectly, more than five percent of any class of the outstanding equity securities of the corporation." An equity security is "any stock, bond or other obligation the holder of which has the right to vote, or any security convertible into, or any right, option or warrant to purchase, any such stock, bond or other obligation."

Section 203(a) prohibits the making of a tender offer to which the Section applies unless "not less than 20 nor more than 60 days before the date the tender offer is to be made" the offeror delivers a written statement of its intention to make the offer to the corporation whose securities are to be purchased ("target corporation") at its registered office in Delaware or at its principal place of business. Section 203(a) prescribes the information which the written statement must contain, including a description of the securities to be purchased, the consideration to be offered, the duration of the offer and whether the offeror will unconditionally accept all or any part of the securities tendered. If the offer will permit the purchase of less than all of the target corporation's outstanding securities, copies of a balance sheet of the offeror at the end of its last fiscal year and its income statements for the three fiscal years preceding the offer must accompany the written statement. These financial statements need not be audited.

Section 203(a)(2) provides that a tender offer must remain open at least 20 days and that during such period a stockholder may withdraw any

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* The Corporation Law Committee of the Delaware Bar Association recommended that Delaware enact a tender offer statute after considering the subject over a two year period. In 1974 and 1975, the Committee voted against recommending such legislation. The Committee reversed its position when it concluded that the balanced scheme of regulation envisioned by the federal Williams Act [adding §§ 13(d) and (e) and 14(d), (e) and (f) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f)] had become unbalanced in favor of offerors. Nevertheless, the Delaware statute was drafted with a bias to mild regulation. Its aim is to give stockholders additional time to determine whether to accept an offer and it eschews regulatory devices such as administrative hearings by state agencies which are common in other state statutes. Several recent articles have compared the state statutes existing at this writing. See Note, *Commerce Clause Limitation Upon State Regulation of Tender Offers,* 47 *S.Cal. L. Rev.* 1133 (1974); Moylan, *State Regulation of Tender Offers,* 58 *Marquette L. Rev.* 687 (1975); Vaughan, *State Tender Offer Regulation,* 9 *Rev. Sec. Reg.* 969 (1976); *The Tender Trap: State Takeover Bid Legislation,* 27 *The Corporation Journal* 291 (1976). In light of the fact that express federal preemption of state tender offer legislation appears unlikely, it seems that the proliferation of state laws governing tender offers will continue, at least for the time being. See *ABA Section of Corporation Banking and Business Law Holds First Annual Spring Meeting,* 348 *Sec. Reg. & Law Rep.* A-10, A-11 (April 14, 1976).

security he has tendered. A correlative provision, Section 203(a)(3) prohibits the offeror or an associate from purchasing any tendered security during such 20 days period. Where a tender offer is amended to change the amount or type of consideration offered or the number of securities for which the offer is made, the amended offer must stay open for at least 10 days. If more securities are tendered than the offeror is willing to purchase, Section 203(a)(3) requires the offeror to purchase the securities tendered by each offeree on a pro rata basis.

In a provision apparently unique to the Delaware statute, Section 203(b) provides that where one offeror has delivered to the target corporation the required written statement disclosing its intention to make a tender offer, a subsequent offeror who has delivered its required statement to the target corporation may make an offer for the securities covered in the earlier offer at or after the date the original offeror is permitted to make an offer. If the original offeror has made an offer in compliance with Section 203, the subsequent offer may close and the subsequent offeror may purchase securities tendered on the same date provided in the original offer at the date the subsequent offer is made.

This provision is designed to counteract the pressure put on stockholders to accept a less favorable offer simply because that offer has an earlier closing date than an offer made subsequently. It also appears to give a subsequent offeror who carefully employs the time limits in the statute a marked advantage over one whose offer it seeks to top—an advantage that the draftsmen neither intended nor anticipated. By waiting until the first offeror has actually made its offer before filing its written statement and making its own offer,* a competitor who offers a higher price would present the first offeror with a choice of withdrawing its offer (unless it is precluded from doing so), amending the offer to top the subsequent bid or letting its offer stand. In the event the first offeror offers a higher price, it would apparently be precluded, pursuant to Section 203(a)(3), from taking down securities tendered to it for a period of 10 days after the amended offer is made. This could be a date *after* the subsequent offeror would be permitted to purchase securities tendered in response to its offer. In order to keep the bidding open, to the obvious advantage of the stockholders, perhaps the statute could be construed as permitting the first offeror, after a subsequent offer has been made, to file a second written statement which will be deemed a subsequent statement entitling the offer therein disclosed to be treated in all respects as a subsequent offer (subsequent to the last previous offer) and not as an amendment or revision of the original offer.

Section 203 contains few exemptions in comparison with other state tender offer laws. Section 203(c)(3) excludes from the statute's coverage offers by a corporation to purchase its own or its subsidiary's securities and offers by a registered broker-dealer where neither the principal nor the broker solicits orders to sell the securities. In addition, since, as indicated above, the statute applies only to offers to more than 30 persons and then

*Section 203(c)(4) provides that a tender offer is "made" when it is first published or sent or given to the holders of equity securities. As a rule, in order to avoid violations of the federal securities laws and state law relating to fiduciary duties, the target company will publicly announce the filing of the written statement of the offeror's intention to make a tender offer. Moreover, while at least as of the time of this writing, the Securities and Exchange Commission has not taken the position that the type of notification envisioned by Section 203 is, itself, a tender offer, it has been common practice for offerors to file Schedule 13D with the SEC at the same time they have given notice to the target company.

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only to offers the consummation of which would result in the offeror or an associate owning more than five percent of any class of equity securities, there is, in effect, an exemption for offers which do not exceed these statutory limits. Moreover, Section 203 does not apply to mergers or consolidations which generally have not been regarded as involving a tender offer. On the other hand, the Delaware statute does apply to a number of transactions often expressly exempted by other state tender offer statutes, such as so-called friendly takeovers in which the board of directors of the target company approves the offer and recommends that it be accepted.

Section 203(d) gives a corporation an opportunity to exempt itself from the operation of the Section by providing in its certificate of incorporation that tender offers for its equity securities will not be subject to the provisions of Section 203.

Section 203(e) vests exclusive jurisdiction in the Delaware Court of Chancery "summarily to hear and determine alleged violations of this Section" and to award such relief as it deems proper, "including directing the corporation to refuse to transfer on its books and to refuse to recognize the vote with respect to any equity security acquired pursuant to a tender offer which does not comply with or is not exempt under the provisions of this Section."

MEETINGS, ELECTIONS, VOTING AND NOTICE

No Change.

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

No Change.

MERGER OR CONSOLIDATION

Appraisal rights in parent-subsidiary mergers [§ 253(d)].—In connection with the extensive revision of Section 262 discussed below, the provisions in subsection (d) of Section 253, which dealt with the procedure for perfecting appraisal rights in the limited case of a short form merger of a parent with its at least 90% owned subsidiary, have been moved to Section 262(b) and conformed to the new procedural rules relating to appraisals set forth in that section. This consolidates in Section 262(b) all of the provisions in the statute relating to the procedure for appraisal. Section 253(d) still contains the substantive provisions conferring appraisal rights in connection with the short form merger of a parent and its at least 90% owned subsidiary. As amended, it provides that the stockholders of "the subsidiary Delaware corporation party to the merger" under Section 253 shall have appraisal rights. Hence the statute, as amended, continues the policy of old Section 253(d), which granted appraisal rights in a parent-subsidiary merger to stockholders of the subsidiary but not to stockholders of the parent. Amended Section 253(d) goes on to direct the surviving corporation in a parent-subsidiary merger to give notice of the merger to stockholders in accordance with Section 262(b)(2) and provides that the surviving corporation and the stockholders have the rights and duties and must follow the procedures set forth in Section 262.

Appraisal rights [§ 262(a), (b), (c), (e), (f), (g), (h), (i), (k), (l)].—The procedure for perfecting appraisal rights in connection with a merger was simplified by the 1976 amendments of Section 262, which is the section of the Corporation Law which deals comprehensively with appraisal rights. In this discussion, "merger" includes both a merger and a consolidation.

Under old Section 262, a stockholder electing to exercise his appraisal

right rather than accept the merger, was required as a first step to object in writing to the merger before the stockholders voted on the merger at their meeting. Following receipt of a notice from the surviving corporation that the merger had become effective, the objecting stockholder was required to submit a written demand for payment of the value of his stock. Under amended Section 262, a record stockholder qualifies for appraisal of his stock by (a) delivering to his corporation before the stockholders have voted on the merger a written demand for appraisal of his shares and (b) not voting for the merger.

As before, stock which is listed on a stock exchange or held by at least 2,000 holders does not have an appraisal right unless expressly given in the certificate of incorporation or under the terms of the merger the stock is not converted solely into stock (or cash in lieu of a fractional share) which will be listed on a stock exchange or held by at least 2,000 holders.

As amended, Section 262(b) requires a corporation submitting a merger for approval by stockholders at a meeting to notify its stockholders having appraisal rights, not less than 20 days prior to the meeting, of the availability of appraisal rights and to include in such notice a copy of Section 262. As stated above, a stockholder electing to exercise his appraisal right qualifies for appraisal by not voting in favor of the merger and delivering to his corporation before the stockholders have voted on the merger his written demand for appraisal of his shares. Within 10 days after the merger has become effective, the surviving corporation must notify each stockholder who has qualified for appraisal of his shares that the merger has become effective.

The procedure for perfecting the appraisal right is different where stockholder approval of the merger is obtained by written consent without a stockholders meeting, as permitted by Section 228, and where the merger is a short form merger under Section 253 of a parent and its at least 90% owned subsidiary where no vote of stockholders occurs. In these two situations, Section 262(b)(2) requires the surviving corporation, "either before the effective date of the merger or within 10 days thereafter", to notify each stockholder entitled to an appraisal of the effective date of the merger and the availability of appraisal rights and to include with the notice a copy of Section 262. Any such stockholder may "within 20 days after the date of mailing of the notice, demand in writing from the surviving corporation the appraisal of his shares".

The written demand for appraisal does not have to be in any particular form. In a clear signal to the courts, which had from time to time found purported pre-vote objections or post-merger demands deficient because of unclear wording, Section 262(b), as amended, declares that a demand for appraisal "will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of his shares, . . ." However, the sentence continues as follows: "provided, however, that such demand must be *in addition to and* separate from any proxy or vote against the merger." This is an unfortunate choice of words because the words "in addition to and" could be construed as requiring *both* a demand for appraisal and avote against the merger, which is not what the draftsmen intended. The draftsmen intended only to emphasize that a proxy or vote against the merger would not suffice as the written demand for appraisal and that a separate written demand for appraisal was necessary even if the stockholder delivered a proxy or vote against the merger. It was not the draftsmen's intent to require a vote against the merger in order to qualify for appraisal. How-

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ever, a vote in favor of the merger disqualifies the voter for appraisal.

The requirements in Section 262(b) that in advance of the meeting a corporation notify its stockholders of their entitlement to appraisal rights and that it send them a copy of Section 262 are new to the Delaware statute. However, this provision codifies existing practice, at least insofar as corporations subject to the federal proxy rules are concerned, since merger proxy statements routinely inform stockholders of the availability of and how to perfect appraisal rights, if any, and append a copy of the relevant state law.

Section 262(c), as amended, provides that within 120 days after the effective date of a merger either the corporation or any stockholder who has qualified for an appraisal of his shares may file a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. This simple provision replaces the time limits in old Section 262 which, by a circuitous route, allowed a period of four months for the filing of a petition seeking appraisal after the expiration of a 30 day period (in which the surviving corporation and a dissenting stockholder had failed to agree on value) preceded by a 20 day period (in which the stockholder was required to file his demand for payment).

While amended Section 262(c) permits the filing of a petition for appraisal immediately after a merger becomes effective, it also permits a stockholder who has perfected his right to an appraisal to change his mind. It provides that within 60 days after the effective date of the merger, a stockholder may withdraw his demand for appraisal and accept the merger terms.

Subsections (e), (f) and (g) of Section 262 are at the heart of the appraisal process in that they require the Court of Chancery to decide who is entitled to an appraisal, to make that appraisal, and to require payment.

New subsection (e) is a composite of the first sentence of old subsection (e) and all of old subsection (g). It provides that, after a hearing on the petition for appraisal, the court shall determine which stockholders have become entitled to appraisal rights. In addition, it authorizes the court to require such stockholders to submit their stock certificates to the Register in Chancery for notation thereon that the shares evidenced thereby are the subject of the appraisal proceeding and to dismiss the proceeding as to any stockholder who fails to do so.

A major change in the appraisal process is the directive in new subsection (f) that the appraisal shall be made by the court rather than, as heretofore, by an appraiser appointed by the court whose determination of value was reviewed by the court both on the law and facts. This will accelerate the proceeding and reduce its cost. New subsection (f) declares that the shares shall be appraised by the court at "their fair value exclusive of any element of value arising from the acomplishment or expectation of the merger." The adjective "fair" before "value" did not appear in the pre-amended statute. However, its addition in the 1976 amendment was not intended to effect a substantive change.

New subsection (g) states that the court's judgment "shall direct the payment of the appraised value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto upon the surrender to the corporation of the certificates representing such stock". It also provides that the judgment may be enforced as other judgments in the Court of Chancery, whether the surviving corporation be a Delaware corporation or of another state. New subsection (g) is, in substance, the last sentence of old subsection (f).

New subsection (h) effects major changes in the appraisal statute. The

new subsection authorizes the court in its judgment to determine (a) the costs of the proceeding and to tax them "upon the parties as the Court deems equitable in the circumstances"; (b) the amount of interest, if any, to be paid upon the appraised value of the stock, and (c) whether expenses incurred by a stockholder in connection with the appraisal proceeding, including the fees and expenses of attorneys and experts, should be charged pro rata against the appraised value of all of the shares involved in the proceeding.

The first sentence of old subsection (h) expressly excluded as an item of taxable costs the fees of counsel and experts paid by any party. New (h) does not contain such express exclusion. Nevertheless, the term "costs of the proceeding", which new (h) authorizes the court to determine and tax "upon the parties as the Court deems equitable in the circumstances", includes only such items as are traditionally and conventionally taxed as court costs in American jurisprudence and does not include fees paid by a party to his counsel or experts. The first sentence of old (h) also provided that the costs of publishing and mailing to stockholders the notice of the commencement of the appraisal proceeding, required by subsection (d), was to be paid by the corporation. This provision was inadvertently omitted from the amended statute. It is probable that the cost of publishing and mailing the notice of the proceeding will continue to be paid by the corporation in the first instance and, should the question arise, taxed against the corporation as "equitable in the circumstances". The question is not likely to arise, however, as there has never been an appraisal proceeding in Delaware in which costs have been taxed against a stockholder.

While new (h) does not authorize the court to tax against the corporation the litigation expenses incurred by a stockholder, it does authorize the court to charge such expenses pro rata against the fund payable to all stockholders who exercised appraisal rights—as in a class action where a plaintiff's counsel fees and other litigation expenses are allowed by the court and charged against the fund distributable to all members of the class. This provision has no counterpart in the old statute.

New (h), like the last sentence of old (h), authorizes the court to "determine the amount of interest, if any, to be paid upon the value of the stock". However, new (h) adds this sentence: "In making its determination with respect to interest, the Court may consider all relevant factors, including the rate of interest which the corporation has paid for money it has borrowed, if any, during the pendency of the proceeding". The addition of this sentence significantly changes the rule that the court has heretofore followed in determining the amount of interest to be added to the appraised value of the stock.

New subsection (i), as did old (i), precludes a stockholder who has demanded an appraisal from voting or receiving dividends but terminates his right to an appraisal (and restores his voting and dividend rights) if neither the corporation nor a stockholder files an appraisal proceeding within 120 days after the merger becomes effective or if the stockholder (unilaterally within 60 days after the merger and thereafter with the corporation's approval) withdraws his demand for appraisal and accepts the merger. The provision permitting a stockholder to unilaterally withdraw his demand for appraisal was added to reflect a corresponding change in subsection (c). Another change in new (i) is the addition of a provision that "no appraisal proceeding . . . shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just". This provision codifies two

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recent decisions of the Court of Chancery that an appraisal proceeding must be treated as a class action for purposes of dismissal and is subject to Rule 23(e) of the Court of Chancery requiring court approval of the dismissal or settlement of a class action.

No substantive change was made in subsection (k) which stated when appraisal rights were and were not available. However, the subsection was divided into two subsections, (k) and (1), to remedy its cumbersome structure and its wording was changed somewhat in the hope of improving its clarity. The first sentence of old (k) which denies appraisal rights in connection with a merger to the holders of shares of a constituent corporation where, inter alia, the shares are listed on a national stock exchange or held of record by not less than 2,000 stockholders has been split into two sentences which comprise new subsection (k). The second sentence of old subsection (k) which revokes the denial of appraisal rights, i.e., gives appraisal rights, where holders of shares of a constitutent corporation are required to accept in the merger anything other than stock (and cash in lieu of a fractional share) of the surviving corporation or of any other corporation whose stock is listed on a national securities exchange or held by not less than 2,000 stockholders, has become a new subsection (1).

SALES OF ASSETS, DISSOLUTION AND WINDING UP

Publication of order dissolving corporation

[§ 284].—Section 284 has been amended to delete the requirement that the Secretary of State publish a decree or judgment of the Court of Chancery dissolving a corporation or forfeiting its charter. Prior to amendment, Section 284 required such publication "in the next volume of laws which [the Secretary of State] shall cause to be published" in addition to notation of the dissolution or forfeiture on the corporation's certificate of incorporation on the index of corporations. The occasion for this change was the transfer of the responsibility for publishing laws enacted by the General Assembly of the State of Delaware from the Secretary of State to the Legislative Council.

INSOLVENCY, RECEIVERS AND TRUSTEES

No Change.

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

No Change.

SUITS AGAINST CORPORATIONS, DIRECTORS, OFFICERS OR STOCKHOLDERS

No Change.

CLOSE CORPORATIONS; SPECIAL PROVISIONS

No Change.

FOREIGN CORPORATIONS

Qualification by corporations to do business in Delaware [§ 371(b)].—Section 371(b) has been amended to delete the requirement that the statement to be filed in the Secretary of State's office by a foreign corporation incident to its initial qualification to do business in Delaware be "sworn" and to add a sentence providing that the statement shall be acknowledge in

accordance with Section 103. This brings Section 371 into line with the other provisions of the statute which prior to the general revision in 1967 variously specified the form of acknowledgment and thereafter made reference to the provisions of Section 103 setting forth a uniform procedure for execution of documents, filing and acknowledgment.

MISCELLANEOUS PROVISIONS

No Change.

CORPORATION FRANCHISE TAX

(Chapter 5 of Title 8 of the Delaware Code)

Annual franchise tax report [§ 502(c)(d)(e)].—Section 502 requires any corporation incorporated in Delaware to file an annual franchise tax report with the Secretary of State. Minor changes in wording have been made in subsections (c)(d) and (e) of Section 502 to delete all reference to the payment of franchise taxes on an annual basis in order to conform the provisions of that section with the amendments to Section 504 discussed below requiring certain corporations to pay franchise taxes quarterly.

Payment of franchise taxes [§ 504(a)(c)(e)(f)].—Prior to the 1976 amendments, Section 504(a) provided that the francise tax imposed upon Delaware corporations pursuant to Section 503 became due and payable on the first day of March. The March 1 due date, which was advanced from April 15 to March 1 in 1972 and from May 15 to April 15 in 1970, has been retained for most Delaware corporations. However, the 1976 amendments create an exception for corporations "whose franchise tax liability for the current calendar year is estimated to exceed $5,000." The approximately 2,100 Delaware corporations which fall into this category are required by Section 504(a), as amended, to file "tentative tax returns" and to pay quarterly estimated taxes on June 1, September 1 and December 1. Since the franchise tax paid by Delaware corporations on March 1 covers their license for the corporate franchise granted by the state for the past year, the new estimated tax allows the state to collect taxes on a current basis from the class of corporations subject to quarterly payments. The franchise tax rate has not been changed by the 1976 amendments.

Two new subsections have been added to Section 504. New subsection (e) provides that the estimated tax shall be based on the annual franchise tax for the preceding year. New subsection (f) provides that the same penalties for nonpayment apply to the "tentative" franchise tax as apply to nonpayment of franchise taxes in general.

Review and refund of franchise taxes; jurisdiction of the Secretary of State [§ 505(b)(c)(d)(f)].—Section 505 provides a procedure for a corporate taxpayer to petition the Secretary of State for a reduction or refund of taxes, penalties or interest claimed to have been erroneously assessed or paid. It also provides for a review de novo by the Court of Chancery of the Secretary of State's action on such a petition. The time for filing a petition seeking a reduction of franchise taxes is 60 days. Section 505(a) provides that the petition must be filed within 60 days after the Secretary of State fixes the amount due (in lieu of the self-assessment and filing the statute contemplates) and has notified the taxpayer of the amount owing.* The

* Section 505(a) provides

"Any corporation may, within the period of 60 days after the Secretary of State has notified the taxpayer of the fixing or determination of the tax, pursuant to

[Footnote continued on following page]

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1976 amendments add two new subsections to Section 505 liberalizing the time limits which govern applications for relief from franchise taxes.

New subsection (b) of Section 505 applies to the renewal or revival of a corporation whose certificate of incorporation has been voided for nonpayment of taxes or has expired or been forfeited or became inoperative for other reasons. As a condition to reviving the charter of such a corporation, Section 312(g) requires that the corporation pay all franchise taxes and penalties due at the time its charter became void. New Section 505(b) permits such a corporation to petition the Secretary of State for a reduction of taxes which the state claims are due to it under Section 312(g) prior to the time the corporation files its certificate of renewal or revival. The power conferred by this provision is particularly useful since, prior to the 1976 amendments, the Secretary of State had no authority to consider the application of a corporation seeking to revive its charter, after the limitation period set forth in Section 505(a) had run, even if the assessment which led to the forfeiture of its charter in the first place was illegal or erroneous.

New Section 505(f) empowers the Secretary of State, where good cause is shown, to permit the filing of a petition for a reduction or refund of taxes for an additional two years after the 60 days period provided in Section 505(a). This provision codifies existing practice in the Secretary of State's office since the 60 day time limitation has proven inadequate to permit some corporations to determine whether or not they have a basis to petition for a tax reduction or repayment. If the existing practice continues, the requirement that good cause be shown in order to have a petition considered after the 60 day time limit will be liberally construed.

In order to insert new subsection (b) the existing subsections (b), (c) and (d) of Section 505 have been redesignated (c)(d) and (e) and minor changes in wording have been made in new subsections (d) and (e) to refer to subsection (b).

[Footnote continued]

§§ 502(c) and 504(a) of this chapter, or after the payment of taxes imposed by this chapter, petition the Secretary of State for a reduction or refund of taxes. . ."

The Secretary of State takes the position that the 60 day period in Section 505(a) delimits the time within which a petition must be filed in both instances mentioned in Section 505(a), i.e., (1) after notice of the fixing of the tax by the Secretary or (2) after actual payment of the taxes, although the placement of the commas in Section 505(a) appears to establish that period of limitations with respect to notices by the Secretary of State only.

The Secretary of State only determines the amount of the franchise tax and notifies the taxpayer when the tax is not paid on time. When the franchise tax is not paid when due, Section 502(c) requires the Secretary of State to determine the tax "upon a basis by him deemed to be most practicable." Inasmuch as the Secretary of State always uses the simpler of the two alnernative methods to compute the tax set forth in Section 503, without attempting to ascertain which will produce the least tax liability, notice of the Secretary of State's assessment frequently produces applications for a reduction.

If you want more information about the Corporation Service (in which this article has been published), write Prentice-Hall, Inc., Attention: Arthur Sabatini, Englewood Cliffs, N.J. 07632.