

---

# **ANALYSIS OF THE 2004 AMENDMENTS <sup>TO</sup> <sub>THE</sub> DELAWARE GENERAL CORPORATION LAW**

Frederick H. Alexander, Esq.  
and  
Jeffrey R. Wolters, Esq.

Reprinted From  
Aspen Publishers

**CORPORATION**

Copyright © 2004 by Aspen Publishers, Inc.

---

## ANALYSIS OF THE 2004 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW

By *Frederick H. Alexander*

and

*Jeffrey R. Wolters*

*Morris, Nichols, Arsht & Tunnell*  
*Wilmington, Delaware*

### INTRODUCTION

The Delaware General Assembly adopted several amendments to the Delaware General Corporation Law that became effective August 1, 2004. Certain of these amendments, together with an amendment to the Delaware Constitution, eliminate the longstanding requirement that a corporation only issue shares in exchange for particular types of consideration. This change will give boards of directors the ability to issue shares for entirely non-monetary, intangible consideration. Other 2004 amendments clarify the extent to which a corporation's certificate of incorporation may contain formulaic provisions that depend on facts and circumstances outside the document. The amendments also make clear that it is permissible to give board committees the power to recommend the nomination and removal of directors. Finally, the amendments clarify the circumstances in which corporate action may be taken without board or stockholder approval in the context of a bankruptcy proceeding. This article describes the changes effected by these amendments and supplements previous reports published by Aspen Publishers and its predecessor, Prentice Hall Law & Business, describing amendments to the Delaware General Corporation Law.<sup>1</sup>

- 
1. Arsht and Stapleton: *Analysis of the New Delaware Corporation Law*; *Analysis of the 1967 Amendments to the Delaware Corporation Law*; *Analysis of the 1969 Amendments to the Delaware Corporation Law*; *Analysis of the 1970 Amendments to the Delaware Corporation Law*; *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*; *Black and Spinks: 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*; *Analysis of the 1990 Amendments to the Delaware General Corporation Law*; *Analysis of the 1991 Amendments to the Delaware General Corporation Law*; *Analysis of the 1992 Amendments to the Delaware General Corporation Law*; *Analysis of the 1993 Amendments to the Delaware General Corporation Law*; *Black and Alexander: Analysis of the 1995 Amendments to the Delaware General Corporation Law*; *Analysis of the 1996 Amendments to the Delaware General Corporation Law*; *Analysis of the 1997 Amendments to the Delaware General Corporation Law*; *Analysis of the 1998 Amendments to the Delaware General Corporation Law*; *Analysis of the 1999 Amendments to the Delaware General Corporation Law*; *Analysis of the 2000 Amendments to the Delaware General Corporation Law*; *Analysis of the 2001 Amendments to the Delaware General Corporation Law*; *Analysis of the 2002 Amendments to the Delaware General Corporation Law*; *Analysis of the 2003 Amendments to the Delaware General Corporation Law* (Prentice Hall, Inc. 1967, 1969, 1970, 1973, 1974, 1976, 1981, 1983, 1984, 1985, 1986, 1987, 1988, 1990, 1991, 1992, and 1993, Aspen Publishers, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, and 2003, respectively.)

the use of committees of the board. Clause (1) of subsection (c) deals with corporations incorporated prior to July 1, 1996 that have not opted to be governed by the updated provisions of clause (2). Clause (2) provides that a committee of the board of directors can take any action that the full board may take, other than (1) approving or adopting, or recommending to the stockholders, any action expressly required by the DGCL to be submitted for stockholder approval or (2) adopting, amending or repealing by-laws. The first exception was intended to require that the full board of directors approve matters such as mergers and charter amendments, which must also be approved by stockholders following board approval. However, a number of practitioners had raised a concern that a literal reading of the prohibition against committees approving matters that also require a stockholder vote might preclude the use of nominating committees, since the directors nominated by such committees are ultimately voted on by stockholders. The 2004 amendments clarify that this is not the intent of the statute by inserting an exception which provides that committees are not prohibited from recommending the election or removal of directors.

### STOCK AND DIVIDENDS

**Issuance of stock; lawful consideration; fully paid stock [§ 152].**— Since the nineteenth century, the Delaware Constitution has required that certain types of consideration be received by a Delaware corporation in exchange for the issuance of its shares. Specifically, the Constitution, and corresponding provisions of the DGCL, have required that the corporation receive consideration, with a value at least equal to the par value of shares being issued, in one of three forms: cash, property or services rendered. These provisions reflect a historical concern with “watered stock,” which was perceived to be a particular risk if corporations could issue additional stock (and thus dilute existing stockholders) for intangible or speculative consideration. Although it is debatable how necessary or effective this rule ever was, it clearly became an anachronism when corporations began issuing shares with only nominal par value, which is the nearly universal practice today.

Nevertheless, the nineteenth century “constitutional consideration” requirement has remained on the books and, in fact, has been somewhat of a trap for the unwary, particularly in circumstances where shares were being issued largely for notes or similar “future” consideration. In 2004, a constitutional amendment was adopted that eliminated the constitutional consideration requirement. Section 152 of the DGCL, which governs the issuance of stock, has been amended to implement this constitutional change. As amended, the statute now permits capital stock to be issued “for consideration consisting of cash, any tangible or intangible property or any benefit to the corporation or any combination thereof.” Section 153 of the DGCL has not been changed, so that shares with a par value still cannot be issued for consideration less than such par value (although such consideration may be in any of the forms now authorized by Section 152).

As amended, Section 152 is intended to give directors the broadest authority possible with respect to the types of consideration acceptable under Delaware law for the issuance of shares. The amendment does not, however, affect the fiduciary duties of directors in connection with such issuances.

**Determination of the amount of capital; capital, surplus and net assets defined [§154].**—Section 154 includes the definitions of several terms, all of which are necessary to determine whether a corporation has sufficient surplus with which to pay dividends or repurchase stock under Sections 160 and 170 of the DGCL. (These definitions are of great significance due to the statutory provision imposing personal liability on directors for illegal dividends or repurchases. *See 8 Del. C. §174.*) The 2004 amendments simply conform the language of Section 154 to the changes to Section 152 by substituting the word “consideration” for the word “property” in describing what stock may be issued for. The modified sentence provides that the board of directors may determine what portion of the consideration for which shares are issued should be assigned to the corporation's capital account (which counts against its surplus in connection with the calculation of funds available to pay a dividend or repurchase stock).

**Rights and options respecting stock [§157].**—Section 157 governs the issuance of options to purchase stock. The terms of Section 157 had incorporated the constitutional consideration requirement of Section 152 and provided that shares issued pursuant to stock options could not be issued for less than the par value of the shares in the form of constitutional consideration. The language incorporating these requirements was deleted by the 2004 amendments so that references to the “price” of shares purchased pursuant to options has been replaced with the word “consideration.” In addition, subsection (d) of Section 157 has been amended to provide that the value of the consideration to be received upon the exercise of an option must be not less than the par value thereof, but the requirement of particular types of consideration has been deleted. This change to Section 157, combined with other recent amendments allowing the board of directors to delegate to officers the right to make certain determinations with respect to the issuance of options, greatly increases the flexibility of the option provisions of the DGCL.

**Proceeding under the Federal Bankruptcy Code of the United States; effectuation [§ 303].**—In order to effect the orders of a bankruptcy court, Delaware corporations in bankruptcy must often taken actions that would generally require the approval of directors and/or stockholders. For example, the bankruptcy court might order changes to the bankrupt corporation's charter and by-laws or order a sale of all or substantially all of the corporation's assets. Such actions would require director and/or stockholder approval under other sections of the DGCL. *See 8 Del. C. §§109, 251 & 271.* Section 303 authorizes those actions to be taken by a corporation without obtaining the required approvals. Where the action requires the filing of a certificate with the Delaware Secretary of State, subsection (c) of Section 303 specifically provides that the certificate may certify that it was filed pursuant to the decree or order of a bankruptcy court.

Although Section 303 has long provided the authority summarized above, the extent of such authority was not entirely clear because of the arguably limited language of Section 303, which suggested that its authority only extended to companies in reorganization (as opposed to liquidation) and only if a plan of reorganization was, in fact, ultimately ordered.

In order to clarify that the statute applies to any type of federal bankruptcy proceeding, and that the validity of the action taken is not dependent on the existence of a confirmed plan of reorganization, the language of the statute was broadened and now provides that corporations may put into effect “any decrees and orders of the court or judge in such bankruptcy proceeding and may take any corporate action provided or directed by such decrees and orders, without further action by its directors and stockholders.”

For more information about **Corporation**, write: Customer Service Department, Aspen Publishers, Inc., 7201 McKinney Circle, Frederick, MD 21704; or call toll free 1-800-234-1660.

If you want additional copies of the article, please contact the authors.