
ANALYSIS OF THE 2006 AMENDMENTS ^{TO}_{THE} DELAWARE GENERAL CORPORATION LAW

Jeffrey R. Wolters, Esq.
and
James D. Honaker, Esq.

Reprinted From
Aspen Publishers

CORPORATION

Copyright © 2006 Aspen Publishers. All Rights Reserved.

ANALYSIS OF THE 2006 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW

*By Jeffrey R. Wolters, Esq.
and
James D. Honaker, Esq.
Morris, Nichols, Arsht & Tunnell LLP
Wilmington, Delaware*

INTRODUCTION

The 2006 amendments to the Delaware General Corporation Law implement important changes and clarifications. In particular, revisions to Sections 141(b) and 216 facilitate “majority voting” for the election of directors, which some corporations have chosen in order to opt out of the plurality voting default rule set forth in Section 216. Amendments to Section 141(d) clarify that a classified board structure can “spring” into being upon a future event, such as an initial public offering of stock, and provide that the charter or bylaw provision dividing the board of directors into classes may authorize the directors to assign themselves to such classes at the time the classification of the board becomes effective. The 2006 amendments also institute changes regarding the process for reserving a corporate name, the scope of responsibilities for registered agents, the contents of an annual franchise tax report and the consequences of failing to timely file a complete annual franchise tax report with the Secretary of State. Unless otherwise noted, all amendments took effect on August 1, 2006.¹

1. This article supplements previous reports published by Aspen Publishers and its predecessor, Prentice Hall Law & Business, describing amendments to the General Corporation Law. See Arsht and Stapleton: Analysis of the New Delaware Corporation Law; Analysis of the 1967 Amendments to the Delaware Corporation Law; The 1969 Amendments to the Delaware Corporation Law; The 1970 Amendments to the Delaware Corporation Law; Arsht and Black: The 1973 Amendments to the Delaware Corporation Law; The 1974 Amendments to the Delaware Corporation Law; The 1976 Amendments to the Delaware Corporation Law; 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; 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 1994 Amendments to the Delaware General Corporation Law; 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; Alexander and Wolters: Analysis of the 2004 Amendments to the Delaware General Corporation Law; Analysis of the 2005 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, 2003, 2004 and 2005, respectively.)

FORMATION

Contents of Certificate of Incorporation [§102].—The 2006 amendments add a new Section 102(e), which clarifies who may reserve a corporate name for use by a Delaware corporation or foreign corporation doing business in Delaware and provides the procedures to be followed by an applicant to reserve a name on the records of the Division of Corporations in the Department of State (the “Division of Corporations”). Under this new provision, a name can be reserved for 120 days and can be renewed for successive 120-day periods. Name reservations can also be terminated or transferred to others.

Section 102(a)(1) has also been amended to require that the name of a Delaware corporation be distinguishable from a reserved name unless the person who has made a reservation consents in writing to the use of such name by the Delaware corporation.

REGISTERED OFFICE AND REGISTERED AGENT

Registered Agent in State; Resident Agent [§132].—Effective January 1, 2007, Section 132 will be amended in several important respects. Among the changes, the amendments broaden the list of entities that may serve as registered agents and expand the duties of a registered agent. The amendments also impose special obligations on “Commercial Registered Agents,” who are defined as persons who serve as registered agents for more than 50 entities. Amended Section 132 will also expressly authorize the Secretary of State to issue regulations to enforce these statutory provisions, to make a list of registered agents available to the public and to bring a lawsuit in the Delaware Court of Chancery to enjoin a person from acting as a registered agent, or as an officer, director or managing agent of a registered agent under certain circumstances.

DIRECTORS AND OFFICERS

Boards of Directors; Director Resignations [§141].—Amended Section 141(b) clarifies that a director may tender a resignation that is effective upon a later date or upon the happening of an event or events. Amended Section 141(b) also now provides that a resignation conditioned upon a director’s failure to receive a specified vote for reelection may be made irrevocable.

These amendments provide directors a means by which they can give effect to majority voting policies and bylaws that seek to unseat a director who fails to receive a majority vote in an election. Director resignations are an essential complement to a majority voting bylaw because, pursuant to another provision of Section 141(b), even if an incumbent director fails to receive the required vote under a majority voting bylaw, he or she would hold over in office until a successor is elected and qualified. Accordingly, many corporations have enacted policies that purportedly require a holdover director to tender a resignation upon the failure to receive the required majority vote for reelection. In addition, other corporations have retained the plurality voting rule but have adopted policies that purportedly require a director to resign (despite election by a plurality vote) if he or she does not receive a specified majority vote. Prior to the 2006 amendments, however, it was questionable whether a director, as a fiduciary, could irrevocably agree

to resign under such pre-arranged circumstances. The amendments resolve this uncertainty by allowing directors to tender irrevocable resignations conditioned on the failure to receive a specified vote in an election. However, the amendments do not authorize board policies or bylaws that force a director to resign without his or her prior consent.

Although the amendments to Section 141(b) offer clarity in the majority voting context, they do not address whether director resignations submitted in other circumstances may be made irrevocable.

Boards of Directors; Classes of Directors [§141].—Section 141(d) permits a corporation to divide its directors into two or three classes, with only one class of directors facing election each year. One amendment to Section 141(d) clarifies that the classified terms of directors commence after the classification of the board becomes effective, thereby expressly permitting certificate of incorporation or bylaw provisions that provide for classification effective at a point in time after such provisions are adopted. A second amendment to Section 141(d) permits a corporation to include, in the charter or bylaw provision that divides the directors into classes, language authorizing the board to assign directors who are already in office to the new board classes at the time the classification becomes effective.

MEETINGS, ELECTIONS, VOTING AND NOTICE

Required Vote for Stock Corporations [§216].—The 2006 amendments add a new provision to Section 216 specifying that a bylaw adopted by a vote of stockholders that establishes the required vote for the election of directors may not be altered or repealed by the board of directors. This amendment imposes a narrow statutory limit on charter provisions (which have been adopted by most Delaware corporations) that empower the board to amend the corporation's bylaws.

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

Renewal, Revival, Extension and Restoration of Certificate of Incorporation [§312].—The net effect of the amendment to Section 312, which will become effective on January 1, 2007, will be to provide that a corporation whose charter has become void for failure to file a complete annual franchise tax report may renew its charter by following the procedures set forth in Section 312.

FOREIGN CORPORATIONS

Qualification to do Business in Delaware [§371].—The 2006 amendments to Section 371(c) require that the name of a foreign corporation qualifying to do business in Delaware be distinguishable from names reserved with the Division of Corporations and from the names of any domestic or foreign corporation, partnership, limited partnership, limited liability company or statutory trust already organized or registered under Delaware law. Prior to these amendments, Section 371(c) required that the name of a foreign corporation applying to qualify to do business in Delaware needed to be distinguishable only from the

name of any other domestic or prior-filed foreign corporation or limited partnership. Section 371 continues to permit a foreign corporation to seek the written consent of such a domestic or prior-filed foreign entity or other person who has reserved a corporate name in order to use a name that would otherwise be prohibited by Section 371.

MISCELLANEOUS PROVISIONS

Taxes and Fees [§391].—Section 391 has been amended to provide for a fee of up to \$75 to be paid to the Secretary of State for accepting a corporate name reservation application, an application for renewal of a corporate name reservation or a notice of transfer or cancellation of a corporate name reservation.

CORPORATION FRANCHISE TAX

Annual Franchise Tax Report [§502].—Section 502 requires a Delaware corporation to file an annual franchise tax report with the Secretary of State on or before March 1 of each year. The 2006 amendments to Section 502(a) make minor alterations to the information that a Delaware corporation must disclose in its annual franchise tax report. Under amended Section 502(a), a Delaware corporation: will no longer be required to include in its report when the terms of directors and certain officers of the corporation expire; will no longer be required to disclose the names and addresses of two officers of the corporation, and instead must disclose only the name and address of the officer signing the report; will need to disclose the location of the corporation's principal place of business whether it is outside Delaware (which disclosure is required under the pre-amendment version of Section 502(a)) or whether it is inside Delaware (which is a new requirement under the 2006 amendments); and will no longer be required to disclose the number of shares currently issued, and instead must disclose only additional information that the Secretary of State requires to determine the corporation's annual franchise tax amount due to the State.

Because amended Section 510 will provide that a corporation's charter will automatically become void for failing to file a complete annual franchise tax report within one year of the filing deadline, the 2006 amendments also delete the provisions that currently appear in Section 502(e), which authorize the Secretary of State to investigate the reasons that a report was not filed and to refer the matter to the Attorney General of Delaware to initiate proceedings to revoke a corporation's charter for failure to file an annual report if the Secretary of State believes the facts warrant such action.

Pursuant to the 2006 amendments, Section 502(f) will be re-designated as Section 502(e) and will continue to provide that the information in a company's annual franchise tax report be made available to the public. However, the additional information required to calculate a company's annual franchise tax (pursuant to the new provision in Section 502(a)) will not be deemed publicly available if included in any tax report filed after tax year 2006.

Finally, consistent with the other 2006 amendments imposing stiffer penalties on corporations for failing to file a complete annual franchise tax report, Section 502(f) (which currently appears as Section 502(g)) will be amended to prohibit the Secretary of State from issuing a certificate of good standing to a corporation that has not timely filed a complete annual report for the relevant time period.

The amendments to Section 502 will become effective on January 1, 2008.

Rates and Computation of Franchise Tax [§503].—Section 503(b) will be amended, effective January 1, 2008, to provide that a corporation's franchise tax will be calculated using the corporation's number of authorized shares (pursuant to Section 503(a)(1)) unless the corporation discloses the amount of its total gross assets and the number of issued shares in the annual franchise tax report. Section 503(a) provides that a corporation's annual franchise tax amount is the lesser of (i) an amount calculated based on the corporation's number of authorized shares under Section 503(a)(1) and (ii) an amount calculated using an "alternative method" under Section 503(a)(2), which requires knowledge of the gross asset amount and the number of issued shares. Amended Section 502(b) makes clear that the corporation's gross asset amount and the number of its issued shares must be included in the annual franchise tax report in order for a corporation to take advantage of a lesser tax amount that might be obtained under the alternative method.

Failure to Pay Tax or File a Complete Annual Report for 1 Year [§510].—Effective January 1, 2008, Section 510 will provide that a corporation's charter will become void if the corporation fails to file a complete annual franchise tax report within one year of the March 1 filing deadline unless the Secretary of State grants a time extension for filing.

Repeal of Charter [§511].—Section 511 requires the Secretary of State to file a report with the Governor of Delaware on or before June 30 of each year which lists the corporations that have neglected to pay their franchise taxes for one year. The Governor of Delaware is then required to issue a proclamation declaring the charters of each corporation listed in such report repealed. The 2006 amendments to Section 511, which will become effective on January 1, 2008, require the Secretary of State to include in such report, and therefore require the Governor of Delaware to repeal the charters of, corporations that, for one year next preceding such report by the Secretary of State, did not file a complete annual franchise tax report.

Mistakes in Proclamations Repealing A Charter [§514].—Effective January 1, 2008, Section 514 will be amended to authorize the Secretary of State to restore the rights and powers of a corporation whose charter has been repealed if the Governor of Delaware determines that the corporation did not neglect to timely file a complete annual franchise tax report or that the Secretary of State mistakenly reported such corporation as having failed to file such report.

Duties of Attorney General [§517].—The net effect of the amendment to Section 517, which will become effective on January 1, 2008, will be to permit the Attorney General of Delaware to collect franchise taxes and penalties from corporations whose charters have become void for failing to file a complete annual franchise tax report.

For more information about **Corporation**, write: Customer Service Department, Aspen Publishers, Inc., 7201 McKinney Circle, Frederick, MD 21704; or call toll free 1-800-901-9074.

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