

SPONSOR: Rep. M. Smith & Rep. Lynn & Sen. Henry & Sen.
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HOUSE OF REPRESENTATIVES
148th GENERAL ASSEMBLY

HOUSE BILL NO. 371

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):

Section 1. Amend § 104, Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 104. Certificate of incorporation; definition.

The term “certificate of incorporation,” as used in this chapter, unless the context requires otherwise, includes not only the original certificate of incorporation filed to create a corporation but also all other certificates, agreements of merger or consolidation, plans of reorganization, or other instruments, howsoever designated, which are filed pursuant to § 102, §§ 133-136, § 151, §§ 241-243, § 245, §§ 251-258, §§ 263-264, § 267, § 303, ~~§§ 311-313~~, or any other section of this title, and which have the effect of amending or supplementing in some respect a corporation’s ~~original~~ certificate of incorporation.

Section 2. Amend § 111(a), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 111. Jurisdiction to interpret, apply, enforce or determine the validity of corporate instruments and provisions of this title.

(a) Any civil action to interpret, apply, enforce or determine the validity of the provisions of:

(2) Any instrument, document or agreement (i) by which a corporation creates or sells, or offers to create or sell, any of its stock, or any rights or options respecting its stock, or (ii) to which a corporation and one or more holders of its stock are parties, and pursuant to which any such holder or holders sell or offer to sell any of such stock, or (iii) by which a corporation agrees to sell, lease or exchange any of its property or assets, and which by its terms provides that one or more holders of its stock approve of or consent to such sale, lease or exchange;

may be brought in the Court of Chancery, except to the extent that a statute confers exclusive jurisdiction on a court, agency or tribunal other than the Court of Chancery.

Section 3. Amend § 141(b), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 141. Board of directors; powers; number, qualifications, terms and quorum; committees; classes of directors; nonstock corporations; reliance upon books; action without meeting; removal.

(b) The board of directors of a corporation shall consist of 1 or more members, each of whom shall be a natural person. The number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by amendment of the certificate. Directors need not be stockholders unless so required by the certificate of incorporation or the bylaws. The certificate of incorporation or bylaws may prescribe other qualifications for directors. Each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal. Any director may resign at any time upon notice given in writing or by electronic transmission to the corporation. A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable. A majority of the total number of directors shall constitute a quorum for the transaction of business unless the certificate of incorporation or the bylaws require a greater number. Unless the certificate of incorporation provides otherwise, the bylaws may provide that a number less than a majority shall constitute a quorum which in no case shall be less than 1/3 of the total number of directors ~~except that when a board of 1 director is authorized under this section, then 1 director shall constitute a quorum~~. The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number

Section 4. Amend § 141(c), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 141. Board of directors; powers; number, qualifications, terms and quorum; committees; classes of directors; nonstock corporations; reliance upon books; action without meeting; removal.

(c)(3) Unless otherwise provided in the certificate of incorporation, the bylaws or the resolution of the board of directors designating the committee, a committee may create 1 or more subcommittees, each subcommittee to consist of 1 or more members of the committee, and delegate to a subcommittee any or all of the powers and authority of the committee. Except for references to committees and members of committees in subsection (c) of this section, every reference in this chapter to a committee of the board of directors or a member of a committee shall be deemed to include a reference to a subcommittee or member of a subcommittee.

(4) A majority of the directors then serving on a committee of the board of directors or on a subcommittee of a committee shall constitute a quorum for the transaction of business by the committee or subcommittee, unless the certificate of incorporation, the bylaws, a resolution of the board of directors or a resolution of a committee that created the subcommittee requires a greater or lesser number, provided that in no case shall a quorum be less than 1/3 of the directors then serving on the committee or subcommittee. The vote of the majority of the members of a committee or subcommittee present at a meeting at which a quorum is present shall be the act of the committee or subcommittee, unless the certificate

of incorporation, the bylaws, a resolution of the board of directors or a resolution of a committee that created the subcommittee requires a greater number.

Section 5. Amend §141(d), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 141. Board of directors; powers; number, qualifications, terms and quorum; committees; classes of directors; nonstock corporations; reliance upon books; action without meeting; removal.

(d) The directors of any corporation organized under this chapter may, by the certificate of incorporation or by an initial bylaw, or by a bylaw adopted by a vote of the stockholders, be divided into 1, 2 or 3 classes; the term of office of those of the first class to expire at the first annual meeting held after such classification becomes effective; of the second class 1 year thereafter; of the third class 2 years thereafter; and at each annual election held after such classification becomes effective, directors shall be chosen for a full term, as the case may be, to succeed those whose terms expire. The certificate of incorporation or bylaw provision dividing the directors into classes may authorize the board of directors to assign members of the board already in office to such classes at the time such classification becomes effective. The certificate of incorporation may confer upon holders of any class or series of stock the right to elect 1 or more directors who shall serve for such term, and have such voting powers as shall be stated in the certificate of incorporation. The terms of office and voting powers of the directors elected separately by the holders of any class or series of stock may be greater than or less than those of any other director or class of directors. In addition, the certificate of incorporation may confer upon 1 or more directors, whether or not elected separately by the holders of any class or series of stock, voting powers greater than or less than those of other directors. Any such provision conferring greater or lesser voting power shall apply to voting in any committee ~~or subcommittee~~, unless otherwise provided in the certificate of incorporation or bylaws. If the certificate of incorporation provides that 1 or more directors shall have more or less than 1 vote per director on any matter, every reference in this chapter to a majority or other proportion of the directors shall refer to a majority or other proportion of the votes of the directors.

Section 6. Amend § 158, Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 158. Stock certificates; uncertificated shares.

The shares of a corporation shall be represented by certificates, provided that the board of directors of the corporation may provide by resolution or resolutions that some or all of any or all classes or series of its stock shall be uncertificated shares. Any such resolution shall not apply to shares represented by a certificate until such certificate is surrendered to the corporation. Every holder of stock represented by certificates shall be entitled to have a certificate signed by, or in the name of, the corporation by ~~the chairperson or vice chairperson of the board of directors, or the president or vice president, and by the treasurer or an assistant treasurer, or the secretary or an assistant secretary of such~~ any two authorized officers of the corporation representing the number of shares registered in certificate form. Any or all the signatures on the certificate may be a facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by

the corporation with the same effect as if such person were such officer, transfer agent or registrar at the date of issue. A corporation shall not have power to issue a certificate in bearer form.

Section 7. Amend § 251(h), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 251. Merger or consolidation of domestic corporations.

(h) Notwithstanding the requirements of subsection (c) of this section, unless expressly required by its certificate of incorporation, no vote of stockholders of a constituent corporation ~~whose shares are~~ that has a class or series of stock that is listed on a national securities exchange or held of record by more than 2,000 holders immediately prior to the execution of the agreement of merger by such constituent corporation shall be necessary to authorize a merger if:

(1) The agreement of merger expressly:

a. Permits or requires such merger to be effected under this subsection; and

b. Provides that such merger shall be effected as soon as practicable following the consummation of the offer referred to in paragraph (h)(2) of this section if such merger is effected under this subsection;

(2) A corporation consummates ~~a tender or exchange~~ an offer for any and all of the outstanding stock of such constituent corporation on the terms provided in such agreement of merger that, absent this subsection, would be entitled to vote on the adoption or rejection of the agreement of merger; provided, however, that such offer may ~~exclude stock of such constituent corporation that is owned at the commencement of such offer by~~ be conditioned on the tender of a minimum number or percentage of shares of the stock of such constituent corporation, or of any class or series thereof, and such offer may exclude any excluded stock and provided further that the corporation may consummate separate offers for separate classes or series of the stock of such constituent corporation;

~~a. Such constituent corporation;~~

~~b. The corporation making such offer;~~

~~c. Any person that owns, directly or indirectly, all of the outstanding stock of the corporation making such offer; or~~

~~d. Any direct or indirect wholly owned subsidiary of any of the foregoing;~~

(3) ~~Following~~ Immediately following the consummation of the offer referred to in paragraph (h)(2) of this section, the stock irrevocably accepted for purchase or exchange pursuant to such offer and received by the depository prior to expiration of such offer, ~~plus~~ together with the stock otherwise owned by the consummating corporation or its affiliates and any rollover stock, equals at least such percentage of the shares of stock of such constituent corporation, and of each class or series thereof, ~~of such constituent corporation~~ that, absent this subsection, would be required to adopt the agreement of merger by this chapter and by the certificate of incorporation of such constituent corporation;

(4) The corporation consummating the offer referred to in paragraph (h)(2) of this section merges with or into such constituent corporation pursuant to such agreement; and

(5) Each outstanding share (other than shares of excluded stock) of each class or series of stock of ~~the~~ such constituent corporation that is the subject of and is not irrevocably accepted for purchase or exchange in the offer referred to in paragraph (h)(2) of this section is to be converted in such merger into, or into the right to receive, the same amount and kind of cash, property, rights or securities to be paid for shares of such class or series of stock of such constituent corporation irrevocably accepted for purchase or exchange in such offer.

(6) As used in this section only, the term:

a. “Affiliate” means, in respect of the corporation making the offer referred to in paragraph (h)(2) of this section, any person that (i) owns, directly or indirectly, all of the outstanding stock of such corporation or (ii) is a direct or indirect wholly-owned subsidiary of such corporation or of any person referred to in clause (i) of this definition;

b. “Consummates” (and with correlative meaning, “consummation” and “consummating”) means irrevocably accepts for purchase or exchange stock tendered pursuant to a ~~tender or exchange~~ offer;

b c. “Depository” means an agent, including a depository, appointed to facilitate consummation of the offer referred to in paragraph (h)(2) of this section;

d. “Excluded Stock” means (i) stock of such constituent corporation that is owned at the commencement of the offer referred to in paragraph (h)(2) of this section by such constituent corporation, the corporation making the offer referred to in paragraph (h)(2) of this section, any person that owns, directly or indirectly, all of the outstanding stock of the corporation making such offer, or any direct or indirect wholly-owned subsidiary of any of the foregoing and (ii) rollover stock;

e e. “Person” means any individual, corporation, partnership, limited liability company, unincorporated association or other entity;~~and~~

d f. “Received” (solely for purposes of paragraph (h)(3) of this section) means (a) with respect to certificated shares, physical receipt of a stock certificate ~~in the case of certificated shares and transfer into the depository’s account, or an agent’s message being received by the depository, in the case of uncertificated shares,~~ accompanied by an executed letter of transmittal, (b) with respect to uncertificated shares held of record by a clearing corporation as nominee, transfer into the depository’s account by means of an agent’s message, and (c) with respect to uncertificated shares held of record by a person other than a clearing corporation as nominee, physical receipt of an executed letter of transmittal by the depository; provided, however, that shares shall cease to be “received” (i) with respect to certificated shares, if the certificate representing such shares was canceled prior to consummation of the offer referred to in paragraph (h)(2) of this section, or (ii) with respect to uncertificated shares, to the extent such uncertificated shares have been reduced or eliminated due to any sale of such shares prior to consummation of the offer referred to in paragraph (h)(2) of this section; and

g. “Rollover stock” means any shares of stock of such constituent corporation that are the subject of a written agreement requiring such shares to be transferred, contributed or delivered to the consummating corporation or any of its affiliates in exchange for stock or other equity interests in such consummating corporation or an affiliate

thereof, provided, however, that such shares of stock shall cease to be rollover stock for purposes of paragraph (h)(3) of this section if, immediately prior to the time the merger becomes effective under this chapter, such shares have not been transferred, contributed or delivered to the consummating corporation or any of its affiliates pursuant to such written agreement.

If an agreement of merger is adopted without the vote of stockholders of a corporation pursuant to this subsection, the secretary or assistant secretary of the surviving corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and that the conditions specified in this subsection (other than the condition listed in paragraph (h)(4) of this section) have been satisfied; provided that such certification on the agreement shall not be required if a certificate of merger is filed in lieu of filing the agreement. The agreement so adopted and certified shall then be filed and shall become effective, in accordance with § 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

Section 8. Amend § 262(c), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 262. Appraisal rights.

(c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section shall be available for the shares of any class or series of its stock as a result of an amendment to its certificate of incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or substantially all of the assets of the corporation. If the certificate of incorporation contains such a provision, the ~~procedures provisions~~ provisions of this section, including those set forth in subsections (d), ~~and (e), and (g)~~ (e) of this section, shall apply as nearly as is practicable.

Section 9. Amend § 262(d), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 262. Appraisal rights.

(d) Appraisal rights shall be perfected as follows:

(2) If the merger or consolidation was approved pursuant to § 228, § 251(h), § 253, or § 267 of this title, then either a constituent corporation before the effective date of the merger or consolidation or the surviving or resulting corporation within 10 days thereafter shall notify each of the holders of any class or series of stock of such constituent corporation who are entitled to appraisal rights of the approval of the merger or consolidation and that appraisal rights are available for any or all shares of such class or series of stock of such constituent corporation, and shall include in such notice a copy of this section and, if 1 of the constituent corporations is a nonstock corporation, a copy of § 114 of this title. Such notice may, and, if given on or after the effective date of the merger or consolidation, shall, also notify such stockholders of the effective date of the merger or consolidation. Any stockholder entitled to appraisal rights may, within 20 days after the date of mailing of such notice or, in the case of a merger approved pursuant to § 251(h) of this title, within the later of the consummation of the ~~tender or exchange~~ offer contemplated by § 251(h) of this title and 20 days after the date of mailing of such notice, demand in writing from the surviving or resulting corporation the appraisal of such holder's shares. Such demand 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 such holder's shares. If such notice did not notify stockholders of the effective date of the merger or consolidation, either (i) each such constituent corporation shall send a second notice before the effective date of the merger or consolidation notifying each of the holders of any class or series of stock of such constituent corporation that are entitled to appraisal rights of the effective date of the merger or consolidation or (ii) the surviving or resulting corporation shall send such a second notice to all such holders on or within 10 days after such effective date; provided, however, that if such second notice is sent more than 20 days following the sending of the first notice or, in the case of a merger approved pursuant to § 251(h) of this title, later than the later of the consummation of the ~~tender or exchange~~ offer contemplated by § 251(h) of this title and 20 days following the sending of the first notice, such second notice need only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal of such holder's shares in accordance with this subsection. An affidavit of the secretary or assistant secretary or of the transfer agent of the corporation that is required to give either notice that such notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein. For purposes of determining the stockholders entitled to receive either notice, each constituent corporation may fix, in advance, a record date that shall be not more than 10 days prior to the date the notice is given, provided, that if the notice is given on or after the effective date of the merger or consolidation, the record date shall be such effective date. If no record date is fixed and the notice is given prior to the effective date, the record date shall be the close of business on the day next preceding the day on which the notice is given.

Section 10. Amend § 262(g), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 262. Appraisal rights.

(g) At the hearing on such petition, the Court shall determine the stockholders who have complied with this section and who have become entitled to appraisal rights. The Court may require the stockholders who have demanded an appraisal for their shares and who hold stock represented by certificates to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder. If immediately before the merger or consolidation the shares of the class or series of stock of the constituent corporation as to which appraisal rights are available were listed on a national securities exchange, the Court shall dismiss the proceedings as to all holders of such shares who are otherwise entitled to appraisal rights unless (1) the total number of shares entitled to appraisal exceeds 1% of the outstanding shares of the class or series eligible for appraisal, (2) the value of the consideration provided in the merger or consolidation for such total number of shares exceeds \$1 million, or (3) the merger was approved pursuant to § 253 or § 267 of this title.

Section 11. Amend § 262(h), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 262. Appraisal rights.

(h) After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing appraisal proceedings. Through such proceeding the Court shall determine the fair value of the shares exclusive of any element of value arising from the

accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. Unless the Court in its discretion determines otherwise for good cause shown, and except as provided in this subsection, interest from the effective date of the merger through the date of payment of the judgment shall be compounded quarterly and shall accrue at 5% over the Federal Reserve discount rate (including any surcharge) as established from time to time during the period between the effective date of the merger and the date of payment of the judgment. At any time before the entry of judgment in the proceedings, the surviving corporation may pay to each stockholder entitled to appraisal an amount in cash, in which case interest shall accrue thereafter as provided herein only upon the sum of (1) the difference, if any, between the amount so paid and the fair value of the shares as determined by the Court, and (2) interest theretofore accrued, unless paid at that time. Upon application by the surviving or resulting corporation or by any stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, proceed to trial upon the appraisal prior to the final determination of the stockholders entitled to an appraisal. Any stockholder whose name appears on the list filed by the surviving or resulting corporation pursuant to subsection (f) of this section and who has submitted such stockholder's certificates of stock to the Register in Chancery, if such is required, may participate fully in all proceedings until it is finally determined that such stockholder is not entitled to appraisal rights under this section.

Section 12. Amend § 311, Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 311. Revocation of voluntary dissolution; restoration of expired certificate of incorporation.

(a) At any time prior to the expiration of 3 years following the dissolution of a corporation pursuant to § 275 of this title, ~~or, or such longer period as the Court of Chancery may have directed pursuant to § 278 of this title, or at any time prior to the expiration of 3 years following the expiration of the time limited for the corporation's existence as provided in its certificate of incorporation~~ or such longer period as the Court of Chancery may have directed pursuant to § 278 of this title, a corporation may revoke the dissolution theretofore effected by it or restore its certificate of incorporation after it has expired by its own limitation in the following manner:

(1) For purposes of this section, the term "stockholders" shall mean the stockholders of record on the date the dissolution became effective or the date of expiration by limitation.

(2) The board of directors shall adopt a resolution recommending that the dissolution be revoked in the case of a dissolution or that the certificate of incorporation be restored in the case of an expiration by limitation and directing that the question of the revocation or restoration be submitted to a vote at a special meeting of stockholders.

(3) Notice of the special meeting of stockholders shall be given in accordance with § 222 of this title to each of the stockholders.

(4) At the meeting a vote of the stockholders shall be taken on a resolution to revoke the dissolution in the case of a dissolution or to restore the certificate of incorporation in the case of an expiration by limitation. If a majority of the stock of the corporation which was outstanding and entitled to vote upon a dissolution at the time of its dissolution, in the case of a revocation of dissolution, or which was outstanding and entitled to vote upon an amendment to the certificate of

incorporation to change the period of the corporation's duration at the time of its expiration by limitation, in the case of a restoration, shall be voted for the resolution, a certificate of revocation of dissolution or a certificate of restoration shall be executed, and acknowledged and filed in accordance with § 103 of this title, which shall be specifically designated as a certificate of revocation of dissolution or a certificate of restoration in its heading and shall state:

a. The name of the corporation;

b. The address (which shall be stated in accordance with § 131(c) of this title) of the corporation's registered office in this State, and the name of its registered agent at such address;

c. The names and respective addresses of its officers;

d. The names and respective addresses of its directors;

e. That a majority of the stock of the corporation which was outstanding and entitled to vote upon a dissolution at the time of its dissolution have voted in favor of a resolution to revoke the dissolution, in the case of a revocation of dissolution, or that a majority of the stock of the corporation which was outstanding and entitled to vote upon an amendment to the certificate of incorporation to change the period of the corporation's duration at the time of its expiration by limitation, in the case of a restoration, have voted in favor of a resolution to restore the certificate of incorporation; or, if it be the fact, that, in lieu of a meeting and vote of stockholders, the stockholders have given their written consent to the revocation or restoration in accordance with § 228 of this title; and

f. In the case of a restoration, the new specified date limiting the duration of the corporation's existence or that the corporation shall have perpetual existence.

(b) Upon the effective time of the filing in the office of the Secretary of State of the certificate of revocation of dissolution, the Secretary of State, upon being satisfied that the requirements of this section have been complied with, shall issue a certificate that the dissolution has been revoked. Upon the issuance of such certificate by the Secretary of the State or the certificate of restoration, the revocation of the dissolution or the restoration of the corporation shall become effective and the corporation may again carry on its business.

(c) Upon the issuance of the certificate by the Secretary of State to which effectiveness of the revocation of the dissolution or the restoration of the corporation as provided in subsection (b) of this section refers, the provisions of § 211(c) of this title shall govern, and the period of time the corporation was in dissolution or was expired by limitation shall be included within the calculation of the 30-day and 13-month periods to which § 211(c) of this title refers. An election of directors, however, may be held at the special meeting of stockholders to which subsection (a) of this section refers, and in that event, that meeting of stockholders shall be deemed an annual meeting of stockholders for purposes of § 211(c) of this title.

(d) If after the dissolution became effective or after the expiration by limitation any other corporation organized under the laws of this State shall have adopted the same name as the corporation, or shall have adopted a name so nearly similar thereto as not to distinguish it from the corporation, or any foreign corporation shall have qualified to do business in this State under the same name as the corporation or under a name so nearly similar thereto as not to distinguish it from the corporation, then, in such case, the corporation shall not be reinstated under the same name which it bore when its dissolution became effective or it expired by limitation, but shall adopt and be reinstated or restored under some other name, and in such case the

certificate to be filed under this section shall set forth the name borne by the corporation at the time its dissolution became effective or it expired by limitation and the new name under which the corporation is to be reinstated or restored.

(e) Nothing in this section shall be construed to affect the jurisdiction or power of the Court of Chancery under § 279 or § 280 of this title.

(f) At any time prior to the expiration of 3 years following the dissolution of a nonstock corporation pursuant to § 276 of this title, ~~or, or such longer period as the Court of Chancery may have directed pursuant to § 278 of this title, or at any time prior to the expiration of 3 years following the expiration of the time limited for a nonstock corporation's existence as provided in its certificate of incorporation or such longer period as the Court of Chancery may have directed pursuant to § 278 of this title,~~ a nonstock corporation may revoke the dissolution theretofore effected by it or restore its certificate of incorporation after it has expired by limitation in a manner analogous to that by which the dissolution was authorized or, in the case of a restoration, in the manner in which an amendment to the certificate of incorporation to change the period of the corporation's duration would have been authorized at the time of its expiration by limitation including (i) if applicable, a vote of the members entitled to vote, if any, on the dissolution or the amendment and (ii) the filing of a certificate of revocation of dissolution or a certificate of restoration containing information comparable to that required by paragraph (a)(4) of this section. Notwithstanding the foregoing, only subsections (b), (d), and (e) of this section shall apply to nonstock corporations.

(g) Any corporation that revokes its dissolution or restores its certificate of incorporation pursuant to this section shall file all annual franchise tax reports that the corporation would have had to file if it had not dissolved or expired and shall pay all franchise taxes that the corporation would have had to pay if it had not dissolved or expired. No payment made pursuant to this subsection shall reduce the amount of franchise tax due under Chapter 5 of this title for the year in which such revocation or restoration is effected.

Section 13. Amend § 312, Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 312. ~~Renewal, revival, extension and restoration~~ Revival of certificate of incorporation.

(a) As used in this section, the term "certificate of incorporation" includes the charter of a corporation organized under any special act or any law of this State.

(b) Any ~~corporation may, at any time before the expiration of the time limited for its existence and any corporation whose certificate of incorporation has become forfeited or void pursuant to this title and any corporation whose certificate of incorporation has expired by reason of failure to renew it~~ or whose certificate of incorporation has been ~~renewed~~ revived, but, through failure to comply strictly with the provisions of this chapter, the validity of whose ~~renewal~~ revival has been brought into question, may at any time procure ~~an extension, restoration, renewal or a~~ revival of its certificate of incorporation, together with all the rights, franchises, privileges and immunities and subject to all of its duties, debts and liabilities which had been secured or imposed by its original certificate of incorporation and all amendments thereto, by complying with the requirements of this section. Notwithstanding the foregoing, this section shall not be applicable to a corporation whose certificate of incorporation has been revoked or forfeited pursuant to § 284 of this title.

(c) The ~~extension, restoration, renewal or~~ revival of the certificate of incorporation may be procured as authorized by the board of directors or members of the governing body of the corporation in accordance with § 312(h) and by executing, acknowledging and filing a certificate of revival in accordance with § 103 of this title.

(d) The certificate required by subsection (c) of this section shall state:

(1) The ~~name date of filing of the corporation, which shall be the existing corporation's original certificate of incorporation; the name under which the corporation was originally incorporated; the name of the corporation or at the name it bore when time~~ its certificate of incorporation ~~expired, except as provided in~~ became forfeited or void pursuant to this title; and the new name under which the corporation is to be revived to the extent required by subsection (f) of this section, and the date of filing of its original certificate of incorporation with the Secretary of State;

(2) The address (which shall be stated in accordance with § 131(c) of this title) of the corporation's registered office in this State and the name of its registered agent at such address;

(3) ~~Whether or not the renewal, restoration or revival is to be perpetual and if not perpetual the time for which the renewal, restoration or revival is to continue and, in case of renewal before the expiration of the time limited for its existence, the date when the renewal is to commence, which shall be prior to the date of the expiration of the old certificate of incorporation which it is desired to renew;~~

(4) ~~(3)~~ That the corporation desiring to be ~~renewed or~~ revived and so ~~renewing or~~ reviving its certificate of incorporation was organized under the laws of this State;

(5) ~~(4)~~ The date when the certificate of incorporation ~~would expire, if such is the case, or such other facts as may show that the certificate of incorporation has become~~ became forfeited or void pursuant to this title, or that the validity of any renewal revival has been brought into question; and

(6) ~~(5)~~ That the certificate ~~for renewal or of~~ revival is filed by authority of ~~those who were directors or members of the governing body of the corporation at the time its certificate of incorporation expired or who were elected the board of directors or members of the governing body of the corporation as provided in subsection (h) in accordance with § 312(h) of this section.~~

(e) Upon the filing of the certificate in accordance with § 103 of this title the corporation shall be ~~renewed and~~ revived with the same force and effect as if its certificate of incorporation had not been forfeited or void pursuant to this title, ~~or had not expired by limitation~~. Such ~~reinstatement~~ revival shall validate all contracts, acts, matters and things made, done and performed within the scope of its certificate of incorporation by the corporation, its directors or members of its governing body, officers ~~and~~ agents and stockholders or members during the time when its certificate of incorporation was forfeited or void pursuant to this title, ~~or after its expiration by limitation~~, with the same force and effect and to all intents and purposes as if the certificate of incorporation had at all times remained in full force and effect. All real and personal property, rights and credits, which belonged to the corporation at the time its certificate of incorporation became forfeited or void pursuant to this title, ~~or expired by limitation~~ and which were not disposed of prior to the time of its revival ~~or renewal shall be vested in the corporation, after its revival and renewal, as fully and amply as they were held by the corporation at and before the time its certificate of incorporation became forfeited or void pursuant to this title, or expired by limitation, and~~ and all real and personal property,

rights and credits acquired by the corporation after its ~~renewal and~~ certificate of incorporation became forfeited or void pursuant to this title shall be vested in the corporation, after its revival, as if its certificate of incorporation had at all times remained in full force and effect, and the corporation after its revival shall be as exclusively liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its directors or members of its governing body, officers and agents and stockholders or members prior to its ~~reinstatement~~ revival, as if its certificate of incorporation had at all times remained in full force and effect.

(f) If, since the certificate of incorporation became forfeited or void pursuant to this title, ~~or expired by limitation~~, any other corporation organized under the laws of this State shall have adopted the same name as the corporation sought to be ~~renewed or~~ revived or shall have adopted a name so nearly similar thereto as not to distinguish it from the corporation to be ~~renewed or~~ revived or any foreign corporation qualified in accordance with § 371 of this title shall have adopted the same name as the corporation sought to be ~~renewed or~~ revived or shall have adopted a name so nearly similar thereto as not to distinguish it from the corporation to be ~~renewed or~~ revived, then in such case the corporation to be ~~renewed or~~ revived shall not be ~~renewed~~ revived under the same name which it bore when its certificate of incorporation became forfeited or void pursuant to this title, ~~or expired~~ but shall ~~adopt or be renewed~~ be revived under some other name ~~and in such case as set forth in~~ the certificate to be filed ~~under the provisions of this section shall set forth the name borne by the corporation at the time its certificate of incorporation became forfeited or void pursuant to this title, or expired and the new name under which the corporation is to be~~ renewed or revived pursuant to subsection (c) of this section.

(g) Any corporation that ~~renews or~~ revives its certificate of incorporation under this chapter shall pay to this State a sum equal to all franchise taxes, penalties and interest thereon due at the time its certificate of incorporation became forfeited or void pursuant to this title, ~~or expired by limitation or otherwise~~; provided, however, that any corporation that ~~renews or~~ revives its certificate of incorporation under this chapter whose certificate of incorporation has been forfeited, ~~or void or expired~~ for more than 5 years shall, in lieu of the payment of the franchise taxes and penalties otherwise required by this subsection, pay a sum equal to 3 times the amount of the annual franchise tax that would be due and payable by such corporation for the year in which the ~~renewal or~~ revival is effected, computed at the then current rate of taxation. No payment made pursuant to this subsection shall reduce the amount of franchise tax due under Chapter 5 of this title for the year in which the ~~renewal or~~ revival is effected.

(h) ~~If a sufficient number of the last acting officers of any corporation desiring to renew or revive its certificate of incorporation are not available by reason of death, unknown address or refusal or neglect to act, the directors of the corporation or those remaining on the board, even if only 1, may elect successors to such officers. For purposes of this section and § 502(a) of this title, the board of directors or governing body of the corporation shall be comprised of the persons, who, but for the certificate of incorporation having become forfeited or void pursuant to this title, would be the duly elected or appointed directors or members of the governing body of the corporation. The requirement for authorization by the board of directors under subsection (c) of this section shall be satisfied if a majority of the directors or members of the governing body then in office, even though less than a quorum, or the sole director or member of the governing body then in office, authorizes the revival of the certificate of incorporation of the corporation and the filing of the certificate required by subsection (c) of this~~

section. In any case where there shall be no directors of the corporation available for the purposes aforesaid, the stockholders may elect a full board of directors, as provided by the bylaws of the corporation, and the board ~~shall then elect such officers as are provided by law, by so elected may then authorize the revival of the certificate of incorporation or by the bylaws to carry on the business and affairs of the corporation and the filing of the certificate required by subsection (c) of this section.~~ A special meeting of the stockholders for the ~~purposes~~ purpose of electing directors may be called by any officer, ~~director~~ or stockholder upon notice given in accordance with § 222 of this title. For purposes of this section, the bylaws shall be the bylaws of the corporation that, but for the certificate of incorporation having become forfeited or void pursuant to this title, would be the duly adopted bylaws of the corporation.

(i) After a ~~renewal or~~ revival of the certificate of incorporation of the corporation shall have been effected, the provisions of § 211(c) of this title shall govern and the period of time during which the certificate of incorporation of the corporation was forfeited or void pursuant to this title, ~~or after its expiration by limitation,~~ shall be included within the calculation of the 30-day and 13-month periods to which § 211(c) of this title refers. A special meeting of stockholders held in accordance with subsection (h) of this section shall be deemed an annual meeting of stockholders for purposes of § 211(c) of this title.

(j) Except as otherwise provided in § 313 of this title, whenever it shall be desired to ~~renew or~~ revive the certificate of incorporation of any nonstock corporation, the governing body shall perform all the acts necessary for the ~~renewal or~~ revival of the ~~charter~~ certificate of incorporation of the corporation which are performed by the board of directors in the case of a corporation having capital stock, and the members of any nonstock corporation who are entitled to vote for the election of members of its governing body and any other members entitled to vote for dissolution under the certificate of incorporation or the bylaws of such corporation, shall perform all the acts necessary for the ~~renewal or~~ revival of the certificate of incorporation of the corporation which are performed by the stockholders in the case of a corporation having capital stock. Except as otherwise provided in § 313 of this title, in all other respects, the procedure for the ~~renewal or~~ revival of the certificate of incorporation of a nonstock corporation shall conform, as nearly as may be applicable, to the procedure prescribed in this section for the ~~renewal or~~ revival of the certificate of incorporation of a corporation having capital stock; provided, however, that subsection (i) of this section shall not apply to nonstock corporations.

Section 14. Amend § 313, Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 313. ~~Renewal~~ Revival of certificate of incorporation or charter of exempt corporations.

(a) Every exempt corporation whose certificate of incorporation or charter has become inoperative and void, by operation of § 510 of this title for failure to file annual franchise tax reports required, and for failure to pay taxes or penalties from which it would have been exempt if the reports had been filed, shall be deemed to have filed all the reports and be relieved of all the taxes and penalties, upon satisfactory proof submitted to the Secretary of State of its right to be classified as an exempt corporation pursuant to § 501(b) of this title, and upon filing with the Secretary of State a certificate of ~~renewal and~~ revival in manner and form as required by § 312 of this title.

(b) Upon the filing by the corporation of the proof of classification as required by subsection (a) of this section, the filing of the certificate of ~~renewal and~~ revival and payment of the required filing fees, the Secretary of State shall issue a certificate that the corporation's certificate of incorporation or charter has been ~~renewed and~~ revived as of the date of the certificate and the corporation shall be ~~renewed and~~ revived with the same force and effect as provided in § 312(e) of this title for other corporations.

(c) As used in this section, the term "exempt corporation" shall have the meaning given to it in § 501(b) of this title. Nothing contained in this section relieves any exempt corporation from filing the annual report required by § 502 of this title.

Section 15. Amend § 314, Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 314. Status of corporation.

Any corporation desiring to renew, extend and continue its corporate existence, shall, upon complying with applicable constitutional provisions of this State, continue for the time stated as provided in its certificate ~~of renewal, effecting the foregoing~~ as a corporation and shall, in addition to the rights, privileges and immunities conferred by its charter, possess and enjoy all the benefits of this chapter, which are applicable to the nature of its business, and shall be subject to the restrictions and liabilities by this chapter imposed on such corporations.

Section 16. Sections 1, 3 through 6, and 12 through 15 shall be effective on August 1, 2016.

Section 17. Section 2 shall be effective only with respect to instruments, documents and agreements entered into on or after August 1, 2016. Section 7 shall be effective only with respect to merger agreements entered into on or after August 1, 2016.

Section 18. Sections 8 through 11 shall be effective only with respect to transactions consummated pursuant to agreements entered into on or after August 1, 2016 (or, in the case of mergers pursuant to Section 253, resolutions of the board of directors adopted on or after August 1, 2016 or, in the case of mergers pursuant to Section 267, authorizations provided on or after August 1, 2016 in accordance with an entity's (as defined in Section 267) governing documents (as defined in Section 267) and the laws of the jurisdiction under which such entity is formed or organized), and appraisal proceedings arising out of such transactions

SYNOPSIS

This bill's changes to the corporations law are recommended by the Delaware State Bar Association.

Section 1. Section 104 is amended in connection with the amendments to Sections 311, 312 and 313.

Section 2. The amendment to Section 111(a)(2) permits the Court of Chancery to exercise non-exclusive subject matter jurisdiction over civil actions involving certain instruments, documents, or agreements, including (i) those to which a Delaware corporation is a party and pursuant to which one or more holders of the corporation's stock sell or offer to sell any of such stock, and (ii) those by which a Delaware corporation agrees, subject to specified conditions, to sell, lease or exchange any of its property or assets. The amendment does not affect the concurrent subject matter jurisdiction of the Superior Court over civil actions at law involving such matters.

Section 3. Section 141(b) is being amended to eliminate surplus language that addresses the minimum quorum requirement for a one-person board of directors.

Section 4. Section 141(c) is being amended to specify default quorum and voting requirements for committees of a board of directors and subcommittees of committees of a board. Section 141(c)(3) is being amended to clarify that references in the General Corporation Law to board committees (and committee members) will be deemed to include references to subcommittees (and subcommittee members).

Section 5. Section 141(d) is being amended to eliminate the express reference to subcommittees of committees of a board. The eliminated reference is unnecessary given the amendments to Section 141(c)(3).

Section 6. The amendment to Section 158 provides that any two officers of the corporation who are authorized to do so may execute stock certificates on behalf of the corporation. The amendment is not intended to change the existing law that the signatures on a stock certificate may be the signatures of the same person, so long as each signature is made in a separate officer capacity of such person.

Section 7. Section 7 amends Section 251(h) in several respects. It clarifies that Section 251(h) is applicable to a constituent corporation that has a class or series of stock that is listed on a national securities exchange or held of record by more than 2,000 holders immediately prior to the execution of the agreement of merger, even if not all classes or series of stock of such constituent corporation are so listed or held. Relatedly, Section 7 clarifies that the offer contemplated by paragraph (2) (the "Offer") may be effected through separate offers for separate classes or series of stock.

The amendments to Section 251(h) also clarify that the Offer may be conditioned on the tender of a minimum number or percentage of the shares of the stock of the constituent corporation, or of any class or series thereof.

Section 7 permits, for purposes of determining whether the requirement in paragraph (3) (the "Statutory Minimum Tender Condition") is satisfied, the inclusion of shares of stock of the constituent corporation held by any person that owns, directly or indirectly, all of the outstanding stock of the corporation making the Offer (the "Offeror"), or that is a direct or indirect wholly-owned subsidiary of such person or persons or of the Offeror (such owners and such subsidiaries, collectively, the "Offeror Affiliates"). Section 251(h), as amended, similarly permits shares of stock of the constituent corporation that are the subject of a written agreement requiring such shares to be transferred, contributed or delivered to the Offeror or any Offeror Affiliate in exchange for stock or other equity interests in the Offeror or any Offeror Affiliate to be counted for purposes of determining satisfaction of the Statutory Minimum Tender Condition, so long as such shares are in fact so transferred, contributed or delivered prior to the effective time of the merger (such shares in fact so transferred, contributed or delivered, "Rollover Stock").

Further, Section 7 provides that Rollover Stock and shares of the constituent corporation held by such constituent corporation in treasury, by any direct or indirect wholly-owned subsidiary of such constituent corporation, or by the Offer or Offeror Affiliates are excluded from the requirement that they be converted in the merger into, or into the right to receive, the same consideration paid in the Offer.

Finally, Section 7 clarifies the methods by which shares of stock of the constituent corporation may be "received" for purposes of the Statutory Minimum Tender Condition. With respect to certificated shares, such shares will be "received" upon physical receipt of a stock certificate accompanied by an executed letter of transmittal so long as the certificate representing such shares was not cancelled prior to consummation of the Offer. With respect to uncertificated shares held of record by a clearing corporation as nominee, such shares will be "received" by transfer into the depository's account by means of an agent's message. With respect to uncertificated shares not so held, such shares will be "received" by physical receipt of an executed letter of transmittal by the depository. Regardless of how uncertificated shares are held, they will cease to be "received" to the extent such uncertificated shares have been reduced or eliminated due to any sale of such shares prior to the consummation of the Offer. For purposes of the foregoing, an "agent's message" is a message transmitted by the clearing corporation acting as nominee, received by the depository, and forming part of the book-entry confirmation, which states that such clearing corporation has received an express acknowledgment from a stockholder that such stockholder has received the Offer and agrees to be bound by the terms of the Offer, and that the Offeror may enforce such agreement against such stockholder.

Section 8. The amendment to Section 262(c) is intended to clarify that where a provision of the certificate of incorporation confers appraisal rights where those rights otherwise do not exist, an appraisal proceeding must be dismissed under the new provisions of subsection (g) of Section 262, if applicable.

Section 9. The amendments to Section 262(d) conform to Section 251(h) as amended.

Section 10. The amendment to Section 262(g) limits the availability of a judicial determination and award of fair value where the corporation's shares had been traded on a national securities exchange. In that circumstance appraisal rights are essentially precluded unless the dispute with regard to valuation is substantial and involves little risk that the petition for appraisal will be used to achieve a settlement because of the nuisance value of discovery and other burdens of litigation. In a short-form merger under Section 253 or Section 267, however, there is no requirement of approval by the corporation's board of directors and therefore no obligation on the part of directors to approve and recommend the merger, and appraisal may be the only remedy. Accordingly, the limitation in new subsection (g) also is not applicable to mergers accomplished pursuant to Section 253 or Section 267.

Section 11. The amendment to Section 262(h) provides an option to the surviving corporation to pay to the stockholders seeking appraisal a sum of money, the amount of which is to be determined in the sole discretion of the surviving corporation, at any time before judgment is entered in the appraisal proceeding, with the result of avoiding the need to pay subsequently accruing interest on that sum. There is no requirement or inference that the amount so paid by the surviving corporation is equal to, greater than, or less than the fair value of the shares to be appraised. Where one or more stockholders' entitlement to appraisal is contested in good faith, the corporation may elect to pay such amount only to those stockholders whose entitlement to appraisal is uncontested.

Section 12. Section 311 is amended to include a procedure to restore a corporation's certificate of incorporation after it has expired by limitation. This change is consistent with Section 278 which provides that Sections 279 through 282,

relating to dissolved corporations, apply to any corporation that has expired by its own limitation. Section 311 is also amended to clarify that a corporation desiring to revoke its dissolution or restore its certificate of incorporation must file all annual franchise tax reports that the corporation would have had to file if it had not dissolved or expired by limitation and pay all franchise taxes that the corporation would have had to pay if it had not dissolved or expired.

Section 13. Section 312 is amended to distinguish the procedure to extend the term of a corporation's certificate of incorporation or to restore a corporation's certificate of incorporation if it has expired by limitation from the procedure to revive a corporation's certificate of incorporation when it has become forfeited or void. Section 312, as amended, only applies to a corporation whose certificate of incorporation has become forfeited or void and now uses only the term "revival" to reflect this process. The terms "renewal", "extension" and "restoration" have been eliminated. The amendment to Section 312, however, does not invalidate or otherwise change the effect of filings to "revive", "renew", "restore" or "extend" a corporation that were made pursuant to Section 312 prior to the effective time of the amendment to Section 312. The amendment to Section 312 also does not affect the procedure for a corporation formed by a special act of the General Assembly to renew, revive and continue its corporate existence.

The procedure to extend a corporation's duration is now solely governed by Section 242 which sets forth the manner in which a corporation's certificate of incorporation is amended, including for the purpose of changing the period of duration of the corporation. Section 311 as amended sets forth the procedure to restore a corporation's certificate of incorporation that has expired by limitation.

The other amendments to Section 312 clarify and simplify the procedures to be followed by a Delaware corporation to revive its certificate of incorporation which became forfeited or void. The amendments clarify that the provisions of Section 312 do not apply to a corporation whose certificate of incorporation has been forfeited or revoked by the Court of Chancery pursuant to Section 284. Amended Section 312 also clarifies and streamlines the process to approve a revival of the certificate of incorporation by providing that a majority of the directors then in office, even if less than a quorum, or the sole director in office, may authorize the revival of the certificate of incorporation. Further, Section 312 identifies such directors as those who, but for the certificate of incorporation having become forfeited or void, would be the duly elected or appointed directors of the corporation. The amendments also clarify the process for elections of directors if none are in office and the effect of a revival with respect to actions taken by the corporation's directors or members of the governing body, officers, agents and stockholders or members.

Section 14. The amendments to Section 313 conform to the amendments to Section 312 which provide that a corporation files a certificate of revival when its certificate of incorporation has become void or forfeited.

Section 15. Section 314 is amended in connection with the amendments to Sections 311, 312 and 313.

Sections 16, 17 and 18. Section 16 provides that the effective date of Sections 1, 3 through 6 and 12 through 15 is August 1, 2016. Section 17 provides that Section 2 shall be effective only with respect to instruments, documents and agreements entered into on or after August 1, 2016, and that Section 7 shall be effective only with respect to merger agreements entered into on or after August 1, 2016. Pursuant to Section 18, Sections 8 through 11 shall be effective only with respect to transactions consummated pursuant to agreements entered into on or after August 1, 2016 (or, in the case of mergers pursuant to Section 253, resolutions of the board of directors adopted on or after August 1, 2016 or, in the case of mergers pursuant to Section 267, authorizations provided on or after August 1, 2016 in accordance with an entity's (as defined in Section 267) governing documents (as defined in Section 267) and the laws of the jurisdiction under which such entity is formed or organized), and appraisal proceedings arising out of such transactions.