

THE

DELAWARE

LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS

STATUTORY DESKBOOK
2016 EDITION

R. FRANKLIN BALOTTI
JESSE A. FINKELSTEIN



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SUMMARY TABLE OF CONTENTS

2015 Amendments to the General Corporation Law of the State of Delaware—Analysis	GCL-i
Index	Corp.—I
Constitution of the State of Delaware	Corp.—51
Delaware General Corporation Law	Corp.—101
Delaware Corporation Franchise Tax	Corp.—501
Delaware Professional Service Corporations	Corp.—551
2015 Amendments to the Delaware Limited Liability Company Act—Analysis	LLC-i
Delaware Limited Liability Company Act	Corp.—601
Delaware Statutory Trusts	Corp.—701
Delaware Code Provisions	Corp.—801
Delaware Court of Chancery Rules	Corp.—901
2015 Amendments to the Delaware Revised Uniform Limited Partnership Act—Analysis	DRULPA-i
Delaware Revised Uniform Limited Partnership Act ...	DE-35
2015 Amendments to the Delaware Revised Uniform Partnership Act—Analysis	DRUPA-i
Delaware Revised Uniform Partnership Act	DRUPA-1
Uniform Unincorporated Nonprofit Association Act ...	DE-NPC-1
Selected Taxes and Fees for Delaware Corporations ...	DE-TAX-1

INTRODUCTION

This statutory booklet contains the State of Delaware Constitution, Delaware General Corporation Law Annotated including Franchise Tax Law, the Limited Liability Company Act, selected Delaware Code Provisions including the Treatment of Statutory Trusts, the Revised Uniform Limited Partnership Act, the Delaware Revised Uniform Partnership Act, and the Uniform Unincorporated Nonprofit Association Act.

This statutory booklet is designed to be a convenient guide to Delaware corporations, limited partnerships, and limited liability companies and is able to be easily transported by the user as an extension of the current three-volume **The Delaware Law of Corporations and Business Organizations, Third Edition**. In addition, the accompanying CD-ROM contains the full contents of the statutory booklet, with a search mechanism that allows the user to make research more efficient.

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Neither the authors nor the firm of Richards, Layton & Finger have prepared the annotations which appear in this book. The annotations were prepared by the staff of Aspen Publishers.

2015 AMENDMENTS TO THE GENERAL CORPORATION LAW OF THE STATE OF DELAWARE—ANALYSIS

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I. INTRODUCTION

Senate Bill 75, which contains several important amendments to the General Corporation Law of the State of Delaware (the “DGCL”), was signed by Delaware Governor Jack Markell on June 24, 2015. As described in greater detail below, the 2015 amendments to the DGCL effect, among other things, the following changes:

- **Prohibition on Fee-Shifting.** The legislation amends Sections 102 and 109 to prohibit “fee shifting” provisions in certificates of incorporation and bylaws of stock corporations.
- **Authorization of Delaware Forum Selection Clauses.** The legislation adds new Section 115 to validate provisions in certificates of incorporation and bylaws that select the Delaware courts as the exclusive forum for “internal corporate claims.”
- **Flexibility in Stock and Option Issuances.** The legislation amends Section 152 to provide greater flexibility in stock issuances, and makes corresponding amendments to Section 157 in respect of the authorization of rights and options to purchase stock.
- **Ratification of Defective Corporate Acts and Stock.** The legislation amends Sections 204 and 205 to clarify and

streamline the procedures for ratifying defective corporate acts and stock.

- **Public Benefit Corporations.** The legislation amends Section 363 to loosen the restrictions on (x) an existing corporation becoming a “public benefit corporation” and (y) a public benefit corporation ceasing to be a public benefit corporation. It also adds a “market out” exception to the appraisal rights provided in Section 363(b) in connection with a corporation becoming a public benefit corporation.

The amendments (other than the amendments to Section 204, Section 205 and Section 363(b)) became effective on August 1, 2015. The amendments to Sections 204 and 205 became effective with respect to resolutions adopted by the board ratifying defective corporate acts or stock on or after August 1, 2015. The amendments to Section 363(b) became effective with respect to agreements of merger or consolidation entered into on or after August 1, 2015 and with respect to amendments to the certificate of incorporation approved by the board of directors on or after August 1, 2015.

II. PROHIBITION ON FEE-SHIFTING PROVISIONS

The 2015 legislation invalidates so-called fee-shifting provisions in certificates of incorporation and bylaws of stock corporations. The legislation was proposed in response to the Delaware Supreme Court’s ruling in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014). In ATP, the Court held that a bylaw that made the members of a nonstock corporation liable for the corporation’s legal expenses in certain intra-corporate disputes was facially valid—which is to say that, without regard to equitable considerations surrounding its adoption or use, the bylaw was not in contravention of law. The new legislation limits the ATP Court’s ruling to nonstock corporations.

To accomplish the foregoing, the legislation adds new Section 102(f) to the DGCL. The new subsection provides that a certificate of incorporation may not contain any provision imposing liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an "internal corporate claim," as defined in new Section 115 (discussed below). The legislation adds a similar restriction on fee-shifting provisions to Section 109(b) of the DGCL, which deals with the provisions that may be set forth in the bylaws. The legislation also amends Section 114 to provide that the restrictions on fee-shifting provisions do not apply to nonstock corporations.

Although it invalidates fee-shifting provisions in certificates of incorporation and bylaws of stock corporations, the legislation does not prevent the imposition of such provisions pursuant to any writing signed by a stockholder against whom the provision is to be enforced. Thus, corporations may continue to negotiate for fee-shifting provisions with one or more stockholders in private arrangements, including stock purchase agreements or stockholders' agreements.

III. FORUM-SELECTION PROVISIONS

The 2015 legislation adds new Section 115 to the DGCL, authorizing the certificate of incorporation or bylaws to include forum-selection provisions. Consistent with the Delaware Court of Chancery's holding in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, 73 A.3d 934 (Del. Ch. 2013), Section 115 confirms that the certificate of incorporation or bylaws of the corporation may specify that "internal corporate claims" (i.e., claims, including those brought in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which the DGCL confers jurisdiction upon

the Court of Chancery) must be brought solely and exclusively in the Delaware courts, including the federal court.

New Section 115 does not expressly authorize or prohibit provisions of the certificate of incorporation or bylaws that select a forum other than the Delaware courts as an additional forum in which an internal corporate claim may be brought, but it does invalidate any such provision selecting courts outside of Delaware, or any arbitral forum, to the extent such provision would purport to prohibit litigation of internal corporate claims in the Delaware courts. As with the fee-shifting amendments, however, Section 115 does not prevent the application of a provision selecting a forum other than the Delaware courts pursuant to a stockholders' agreement or other writing signed by the stockholder against whom the provision is to be enforced.

Section 115 is not intended to shield the manner in which a forum-selection provision has been adopted from equitable review, nor is it intended to foreclose judicial review as to whether the terms of any such provision operate reasonably under particular factual circumstances. Moreover, it is not intended to authorize a provision that would purport to foreclose suit in a federal court based on federal jurisdiction, nor is it intended to limit or expand the jurisdiction of the Delaware Court of Chancery or the Delaware Superior Court.

IV. STOCK ISSUANCE

The 2015 legislation amends Section 152 of the DGCL to clarify that the board of directors may authorize stock to be issued in one or more transactions in such numbers and at such times as is determined by a person or body other than the board of directors or a committee of the board, so long as the resolution of the board or committee, as applicable, authorizing the issuance fixes the maximum number of shares that may be issued as well as the time frame during which such shares may be issued and establishes a minimum amount of consideration for which such shares

may be issued. The minimum amount of consideration cannot be less than the consideration required pursuant to Section 153 of the DGCL, which, as a general matter, means that shares with par value may not be issued for consideration having a value less than the par value of the shares. The legislation clarifies that a formula by which the consideration for stock is determined may include reference to or be made dependent upon the operation of extrinsic facts, thereby confirming that the consideration may be based on, among other things, market prices on one or more dates or averages of market prices on one or more dates. Among other things, the legislation clarifies that the board (or duly empowered committee) may authorize stock to be issued pursuant to “at the market” programs without separately authorizing each individual stock issuance pursuant to the program. In addition, the legislation allows the board to delegate to officers the ability to issue restricted stock on the same basis that the board may delegate to officers the ability to issue rights or options under Section 157(c) of the DGCL.

V. CONSIDERATION FOR OPTIONS AND RIGHTS

Consistent with the amendments to Section 152, the 2015 legislation amends Section 157 of the DGCL, which deals with the creation and issuance of rights and options to purchase stock, to clarify that a formula by which the consideration for stock issued upon the exercise of rights and options is determined may include reference to or be made dependent upon the operation of extrinsic facts, such as market prices on one or more dates, or averages of market prices on one or more dates.

VI. RATIFICATION OF DEFECTIVE CORPORATE ACTS

The 2015 legislation makes several amendments to Section 204 of the DGCL, which sets forth the procedures for ratifying stock

or corporate acts that, due to a “failure of authorization,” would be void or voidable, to clarify and confirm various aspects of its operation and to provide additional guidance as to the specific requirements for the filing of certificates of validation. The legislation makes conforming amendments to Section 205 of the DGCL, which confers jurisdiction on the Court of Chancery to hear and determine, among other things, the validity of any ratification effected pursuant to Section 204 and the validity of any corporate act or transaction.

1. Multiple Defective Corporate Acts

The basic premise of Section 204 is that, to ratify a defective corporate act or stock, the board must first take action to effect the ratification. The board’s action must then be submitted to stockholders for adoption if the underlying act is one that requires a stockholder vote, or is one that would have required a stockholder vote, either at the time the ratification is submitted for adoption or at the time the original act was taken. Pre-amendment Section 204 requires that the board adopt a “resolution” setting forth, among other things, the defective corporate act being ratified and provides that, where a stockholder vote is or was required, the stockholders must adopt that resolution.

As amended, Section 204 dispenses with the notion of the board’s ratifying resolution, requiring instead that the board may initiate the ratification process by approving the ratification of one or more defective corporate acts. Under amended Section 204, it is clear that the board may ratify (or initiate the process to ratify) multiple defective corporate acts in a single set of resolutions. Section 204(c), which deals with the circumstances under which a defective corporate act must be approved by stockholders, has been revised to provide that each defective corporate act—rather than the board’s resolution ratifying a defective corporate act—that requires or required a vote of stockholders must be submitted to stockholders for their approval.

2. Ratification of the Failure of the Incorporator to Elect the Initial Board

New Section 204(b)(2) addresses the situation in which the corporation's initial directors have not been (and were not intended to be) elected in the original certificate of incorporation, and the original incorporator never elected the initial directors or evidence of such election cannot be located. Under the new subsection, the corporation's "de facto" directors may adopt a resolution that ratifies the election of those persons who, despite having not been named in the certificate of incorporation or duly elected by the incorporator as the initial directors, first took action on behalf of the corporation as the board of directors. The new subsection does not, by negative implication or otherwise, preclude the filing of a certificate of correction pursuant to Section 103(f) of the DGCL to correct a certificate of incorporation that was intended to (but did not) name the initial directors, nor does it prevent the incorporator from executing (albeit late) an instrument signed in the manner permitted by Section 108 of the DGCL to elect such initial directors.

3. Stockholder Approval

Section 204, as originally adopted, was intended to provide that only the holders of valid stock would be entitled to vote on any ratifying resolution required to be submitted to stockholders for adoption. Due to the retroactive effect that Section 204 provides to defective corporate acts, some practitioners raised the concern that the ratification of a defective corporate act arguably would cause putative stock that is "outstanding" at the time of the record date for determining stockholders entitled to vote to be retroactively cured such that holders of putative stock would be deemed to be holders of valid stock entitled to vote as of the earlier record date—and their putative shares would be counted

in the ratification vote for quorum and voting purposes. As amended, Section 204(d) makes clear that the only stockholders entitled to vote on the ratification of a defective corporate act, or be counted for purposes of a quorum for such vote, are the holders of record of valid stock as of the record date for determining stockholders entitled to vote thereon. Section 204(f), which provides the retroactive effect to defective corporate acts, has also been amended to clarify the point.

4. Certificates of Validation

Pre-amendment Section 204 provides that a certificate of validation must be filed with the Delaware Secretary of State whenever the underlying defective corporate act that is being ratified would have required the filing of an instrument under another section of the DGCL. Those certificates of validation must include a copy of the board's resolutions ratifying the defective corporate act as well as the information that would have been required by such other section of the DGCL. Due to the significant variation in defective corporate acts and the resolutions used to ratify them, certificates of validation, unlike most other instruments filed under the DGCL, tend to lack uniformity. As a result, Section 204(e) has been amended to clarify the requirements in respect of certificates of validation, with the ultimate goal of providing greater uniformity.

As amended, Section 204(e) no longer requires that a certificate of validation include a copy of the board's ratifying resolutions and instead provides that the certificate of validation must set forth specified information regarding the defective corporate act and the related failure of authorization. In addition, Section 204(e) requires different types of information to be set forth on or attached to the certificate of validation depending on the history of filings (or lack thereof) with the Delaware Secretary of State in respect of the applicable defective corporate act.

The circumstances under which the certificates would vary are as follows:

- Where a certificate in respect of the defective corporate act had previously been filed and no changes are required to give effect to the ratification of such act, Section 204(e) requires the certificate as previously filed with the Delaware Secretary of State to be attached to the certificate of validation as an exhibit.
- Where a certificate in respect of the defective corporate act had previously been filed and changes are required to that certificate to give effect to the ratification of such act, Section 204(e) requires that a certificate containing all of the information required under the other section of the DGCL, including the changes necessary to give effect to the ratification of the defective corporate act, be attached to the certificate of validation as an exhibit. In that case, the certificate of validation must state the date and time as of which the certificate attached to it would have become effective.
- Where no certificate had previously been filed and the filing of a certificate was required to give effect to the ratification of a defective corporate act, Section 204(e) requires that a certificate containing all of the information required under the other section of the DGCL be attached to the certificate of validation as an exhibit. In that case, the certificate of validation must also state the date and time as of which the certificate attached to it would have become effective.

5. Action by Written Consent and Notice

Section 204, as originally drafted, included concepts relating to the submission of the board's ratifying resolution to stockholders at a duly called and held meeting. As with virtually all other sections of the DGCL, Section 204 did not specifically reference the stockholders' power to act by written consent to approve any

ratifying resolution, as it was understood that, pursuant to Section 228 of the DGCL, unless otherwise restricted by the certificate of incorporation, stockholders could act by written consent in lieu of a meeting with respect to any matter required or permitted to be acted upon by stockholders at a meeting. Nevertheless, the procedures for notice in cases where stockholders are acting by written consent in lieu of a meeting were viewed as fairly difficult to parse under existing Section 204. The amendments to Section 204 clarify these procedures.

As amended, Section 204(g) expressly provides that, where the ratification of a defective corporate act is approved by consent of stockholders in lieu of a meeting, the notice required by Section 204(g) may be included in the notice required to be given pursuant to Section 228(e). Section 204(g) now clarifies that, where a notice sent pursuant to Section 204(g) is included in a notice sent pursuant to Section 228(e), the notice must be sent to the parties entitled to receive the notice under both Section 204(g) and Section 228(e). Section 204(g) further clarifies that no such notice need be provided to any holder of valid shares that acted by written consent in lieu of a meeting to approve the ratification of a defective corporate act or to any holder of putative shares who otherwise consented thereto in writing.

In addition, Section 204(g) provides that corporations that have a class of stock listed on a national securities exchange may give the notice required by Section 204(g) by means of a public filing with the Securities and Exchange Commission.

6. Validation Effective Time

Prior to the amendment, Section 204(h)(6) defined “validation effective time” as the later of (x) the time at which the ratification of the defective corporate act is approved by stockholders (or, if no vote is required, the time at which the notice required

by Section 204(g) is given) and (y) the time at which any certificate of validation has become effective. As amended, Section 204(h)(6) confirms that, in respect of the ratification of any defective corporate act for which the “validation effective time” is the time at which the stockholders approve the ratification of the defective corporate act, such validation effective time occurs at the time of stockholder approval regardless of whether the stockholders are acting at a meeting or by consent in lieu of a meeting pursuant to Section 228. Although the amendment clarifies that, in such cases, the validation effective time commences upon the stockholders’ approval of the ratification of the defective corporate act, a corresponding amendment to Section 204(g) confirms that the 120-day period during which stockholders may challenge the ratification of a defective corporate act commences from the later of the validation effective time and the time at which the notice required by Section 204(g) is given. In light of the corresponding amendment to the commencement of the 120-day challenge period in Section 204(g), Section 204(h)(6), as amended, further provides that where the ratification of the defective corporate act does not require stockholder approval or the filing of a certificate of validation, the validation effective time is the time at which the board of directors adopts the resolutions to approve the ratification of the defective corporate act.

The definition of “validation effective time” has also been amended in a manner that permits the board of directors to fix a future validation effective time for any defective corporate act that does not require the filing of a certificate of validation. Where the board of directors fixes a future validation effective time, such validation effective time may not precede the time at which a defective corporate act requiring a vote of stockholders is approved by stockholders. Again, the 120-day period during which challenges to the ratification may be brought would commence from the later of the validation effective time and the time

at which the notice required by Section 204(g) is given. The amendments are intended to obviate logistical issues that may arise in connection with the delivery of notices in situations where multiple defective corporate acts are being ratified at the same time. As amended, Section 204(h)(6) enables the board to set one date on which the ratification of all defective corporate acts approved by the board will be effective, regardless of when the notice under Section 204(g) is sent or when each defective corporate act would otherwise become effective under Section 204(h)(6).

7. 120-Day Challenge Period

Consistent with the amendments to Sections 204(g) and 204(h)(6) in respect of the validation effective time and the commencement of the 120-day period during which an action may be brought to challenge the ratification of a defective corporate act, Section 205(f) has been amended to provide that no such action may be brought after the expiration of 120 days from the later of the validation effective time and the time that notice of the ratification is given under Section 204(g), if notice is required to be given under such section.

VII. RESTATEMENTS OF CERTIFICATES OF INCORPORATION

In 2014, Section 242 of the DGCL was amended to eliminate the requirement to obtain a stockholder vote on an amendment to the certificate of incorporation to effect a change of the corporation's name. In furtherance of that amendment, Section 245(c) has been amended to clarify that a restated certificate of incorporation need not state that it does not further amend the provisions of the corporation's certificate of incorporation if the only amendment is to change the corporation's name without a vote of the stockholders.