



DIVISION OF RESEARCH MEMORANDUM

To: Interested Parties

From: Deborah Gottschalk, Senior Legislative Attorney, Division of Research

Date: 10/20/20

Document #: 2020-M-0003

Re: Constitutional Amendments Explained

QUESTION PRESENTED

What is the procedure for amending the Delaware Constitution and what is the effective date of amendments?

PROCEDURE

The procedure for amending the Delaware Constitution is set forth in § 1 of Article XVI of the Delaware Constitution, which states:

Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by two thirds of all the members elected to each House, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and the Secretary of State shall cause such proposed amendment or amendments to be published three months before the next general election in at least three newspapers in each county in which such newspapers shall be published; and if in the General Assembly next after the said election such proposed amendment or amendments shall upon yea and nay vote be agreed to by two thirds of all the members elected to each House, the same shall thereupon become part of the Constitution.¹

Courts have held that to amend the Delaware Constitution, including the Bill of Rights², both the Senate and House must pass a bill³ by a two thirds majority. Next, there must be substantial compliance with requirement that the proposed amendment or amendments be published three months before the

¹ Del. Const. art XVI, § 1.

² *State v. Bender*, 293 A.2d 551.

³ *State v. Lyons*, 40 Del. 77, 5 A.2d 495.

next general election in at least three newspapers in each County.⁴ Finally, if the next General Assembly passes the proposed amendment or amendments by a two thirds majority of the members of each House, the amendment or amendments become part of the Delaware Constitution upon the vote of the second chamber.⁵

AMENDMENT OR REVISION

It is important to note that the Delaware Constitution can be changed by amendment or revision. Amendments and revisions are distinguished by the type of change being proposed and there are different procedures to accomplish each. “A constitutional ‘revision’ makes substantial, basic, fundamental changes in the plan of government; it makes extensive alterations in the basic plan and substance of the existing document; it attains objectives and purposes beyond the lines of the present Constitution. A ‘revision’ is more than a mere reorganization, restatement, modernization, abbreviation, consolidation, simplification, or clarification of the existing document.”⁶ An amendment is “an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed.”⁷ In *Alexander*, the Delaware Supreme Court held that changing the Office of the Prothonotary from an elective to an appointive position was an amendment because the legislative intent was to improve the performance of both the Office of the Prothonotary and the Superior Court rather than to create or abolish an office.⁸

A revision requires a Convention⁹ that is established through a separate procedure that is not within the scope of this memorandum. A Convention can be convened to undertake either a full or

⁴ *In re Opinion of Justices*, 275 A.2d 558.

⁵ *Opinion of Justices*, 56 Del. 118, 190 A.2d 519.

⁶ *Opinion of Justices*, 264 A.2d 342.

⁷ *Opinion of Justices*, 264 A.2d 342; *Alexander v. Board of Elections*, 1990 Del. Super. LEXIS 320, 1990 WL 127898 (Del. Super. Ct. Aug. 15, 1990).

⁸ *Alexander v. Board of Elections*, 1990 Del. Super. LEXIS 320, 1990 WL 127898 (Del. Super. Ct. Aug. 15, 1990).

⁹ Del. Const. art XVI, § 2.

partial revision to the Constitution and the scope of the revision is set forth in the legislation establishing the Convention.¹⁰

NOTICE REQUIREMENT

After a General Assembly passes a proposed amendment to the Constitution, the Secretary of State must publish the proposed amendments in newspapers in each county three months before the next general election.¹¹ This provides the electorate an opportunity to react in favor or against the proposed amendments.¹²

SUBSTANTIAL COMPLIANCE

Publication requirements are mandatory, but subject to the substantial compliance rule.¹³ Substantial compliance must be determined on a case by case basis.¹⁴ The Supreme Court held that where publication occurred but was a few days short of the 90 day requirement, substantial compliance was found.¹⁵ However, where no publication occurred or where public hearings were held while the proposed amendment was pending but significant amendments were made by the General Assembly, there was not substantial compliance and the proposed amendments were not effective.¹⁶

EFFECTIVE DATE OF AMENDMENTS

A proposed amendment to the Delaware Constitution is effective “when final passage of a proposed amendment by ye and nay vote has taken place in both Houses of the General Assembly.”¹⁷ General Assembly rules that require certain officers of the Senate and House to certify acts which have

¹⁰ *Opinion of Justices*, 264 A.2d 342.

¹¹ Del. Const. art XVI, § 1; *In re Opinion of Justices*, 275 A.2d 558; 1971 Del. LEXIS 288 (Del. 1971).

¹² *In re Opinion of Justices*, 275 A.2d 558; 1971 Del. LEXIS 288 (Del. 1971).

¹³ *In re Opinion of Justices*, 275 A.2d 558; 1971 Del. LEXIS 288 (Del. 1971).

¹⁴ *Id.* at 562.

¹⁵ *Id.* at 562.

¹⁶ *Id.* at 563.

¹⁷ *Opinion of Justices*, 56 Del. 118, 190 A.2d 519, 1963 Del. LEXIS 179 (Del. 1963).

passed their respective Houses is not required in the case of Constitutional amendments, because those rules are created by the General Assembly and the procedure for amending the Constitution is set forth in the Constitution.¹⁸

¹⁸ *Id.* at 118, 519.