SPONSOR: Sen. Sharp
Sens. Vaughn, Amick & Winslow;
Reps. Spence, Valihura, Wagner & DiLiberto

DELAWARE STATE SENATE

140th GENERAL ASSEMBLY

SENATE BILL NO.

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 Section 102(a)(1), Title 8, Delaware Code, by deleting the phrase ", or 1 of the abbreviations ['co.,' 'corp.,' 'inc.,' 'ltd.'], or words or abbreviations of like import in other languages" appearing in clause (i) thereof and substituting in lieu of said phrase the following: "(or abbreviations thereof, with or without punctuation), or words (or abbreviations thereof, with or without punctuation) of like import of foreign countries or jurisdictions".

Section 2. Amend Title 8, Delaware Code, by adding a new section 111, which shall read as follows:

"§111. Interpretation and enforcement of the certificate of incorporation and bylaws.

Any action to interpret, apply or enforce the provisions of the certificate of incorporation or the bylaws of a corporation may be brought in the Court of Chancery."

Section 3. Amend Section 170(a), Title 8, Delaware Code, by deleting from the first sentence the words "organized for profit".

Section 4. Amend Section 202, Title 8, Delaware Code, by deleting Section 202 (including the heading thereto) in its entirety and inserting in lieu thereof the following:

"§202. Restrictions on transfer and ownership of securities.

(a) A written restriction or restrictions on the transfer or registration of transfer of a security of a corporation, or on the amount of the corporation's securities that may be owned by any person or group of persons, if permitted by this section and noted conspicuously on the certificate or certificates representing the security or securities so restricted or, in the case of uncertificated shares, contained in the notice or notices sent pursuant to subsection (f) of §151 of this title, may be enforced against the holder of the restricted security or securities or any successor or transferee of the holder including an executor, administrator, trustee, guardian or other fiduciary entrusted with like responsibility for the person or estate of the holder. Unless noted conspicuously on the certificate or certificates representing the security or securities so restricted or, in the case of uncertificated shares, contained in the notice or notices sent pursuant to subsection (f) of §151 of this title, a restriction, even though permitted by this section, is ineffective except against a person with actual knowledge of the restriction.

(b) A restriction on the transfer or registration of transfer of securities of a corporation, or on the amount of a corporation's securities that may be owned by any person or group of persons, may be imposed by the certificate of incorporation or by the bylaws or by an agreement among any number of security holders or among such holders and the corporation. No restrictions so imposed shall be binding with respect to securities issued prior to the adoption of the restriction unless the holders of the securities are parties to an agreement or voted in favor of the restriction.

(c) A restriction on the transfer or registration of transfer of securities of a corporation or on the amount of such securities that may be owned by any person or group of persons is permitted by this section if it:

(1) Obligates the holder of the restricted securities to offer to the corporation or to any other holders of securities of the corporation or to any other person or to any combination of the foregoing, a prior opportunity, to be exercised within a reasonable time, to acquire the restricted securities; or

(2) Obligates the corporation or any holder of securities of the corporation or any other person or any combination of the foregoing, to purchase the securities which are the subject of an agreement respecting the purchase and sale of the restricted securities; or

(3) Requires the corporation or the holders of any class or series of securities of the corporation to consent to any proposed transfer of the restricted securities or to approve the proposed transferee of the restricted securities, or to approve the amount of securities of the corporation that may be owned by an person or group of persons; or

(4) Obligates the holder of the restricted securities to sell or transfer an amount of restricted securities to the corporation or to any other holders of securities of the corporation or to any other person or to any combination of the foregoing, or causes or results in the automatic sale or transfer of an amount of restricted securities to the corporation or to any other holders of securities of the corporation or to any other person or to any combination of the foregoing; or

(5) Prohibits or restricts the transfer of the restricted securities to, or the ownership of restricted securities by, designated persons or classes of persons or groups of persons, and such designation is not manifestly unreasonable.

(d) Any restriction on the transfer or the registration of transfer of the securities of a corporation, or on the amount of securities of a corporation that may be owned by a person or group of persons, for any of the following purposes shall be conclusively presumed to be for a reasonable purpose:

(1) maintaining any local, state, federal, or foreign tax advantage to the corporation or its stockholders, including without limitation (i) maintaining the corporation's status as an electing small business corporation under subchapter S of the United States Internal Revenue Code [26 U.S.C.A. §1371 et seq.], or (ii) maintaining or preserving any tax attribute (including

without limitation net operating losses), or (iii) qualifying or maintaining the qualification of the corporation as a real estate investment trust pursuant to the United States Internal Revenue Code or regulations adopted pursuant to the United States Internal Revenue Code, or

(2) maintaining any statutory or regulatory advantage or complying with any statutory or regulatory requirements under applicable local, state, federal, or foreign law.

(e) Any other lawful restriction on transfer or registration of transfer of securities, or on the amount of securities that may be owned by any person or group of persons, is permitted by this section."

Section 5. Amend Section 242(b)(3), Title 8, Delaware Code, by deleting from the second sentence the words "at a subsequent meeting, held, on notice stating the purpose thereof, not earlier than 15 days and not later than 60 days from the meeting at which such resolution has been passed,"; by deleting from the first clause of the third sentence the words "only 1 meeting of the governing body thereof shall be necessary, and"; by adding in the second clause of the third sentence after the words "in the event of the adoption thereof" the words "by such members"; by adding in the second clause of the third sentence after the words "shall be executed," the words "acknowledged and"; and by deleting from the second clause of the third sentence after the word "filed" the words "and acknowledged".

Section 6. Amend Title 8, Delaware Code, by changing the heading for Subchapter IX so that it reads as follows:

"MERGER, CONSOLIDATION OR CONVERSION".

Section 7. Amend Section 251(g), Title 8, Delaware Code, by adding the phrase "other than the election or removal of directors of the surviving corporation" after the words "surviving corporation" in subsection (7)(i) of the first paragraph thereof and adding the following sentence to the end of the first paragraph of subsection (g): "Neither subsection (g)(7)(i) hereof nor any provision of a surviving corporation's certificate of incorporation required by subsection (g)(7)(i) shall be deemed or construed to require approval of the stockholders of the holding company to elect or remove directors of the surviving corporation."

Section 8. Amend Section 253(a), Title 8, Delaware Code, by adding the phrase ", of which class there are outstanding shares that, absent this subsection, would be entitled to vote on such merger," immediately following the parenthetical clause appearing in the first sentence thereof.

Section 9. Amend Section 255(c), Title 8, Delaware Code, by deleting from the end of the fourth sentence the words ", each member who has the right to vote for the election of the members of the governing body of the corporation being entitled to 1 vote" and by deleting after the word "If" at the beginning of the fifth sentence the words "the votes of two thirds of the total number" and substituting therefor the words "a majority of the voting power".

Section 10. Amend Title 8, Delaware Code, by adding a new section 265, which shall read as follows:

"§265. Conversion of other entities to a domestic corporation.

(a) As used in this section, the term 'other entity' means a limited liability company, limited partnership or business trust of this State.

(b) Any other entity may convert to a corporation incorporated under the laws of this State by complying with subsection (g) of this section and filing in the office of the Secretary of State:

(1) A certificate of conversion that has been executed in accordance with subsection (h) of this section and filed in accordance with § 103 of this title; and

(2) A certificate of incorporation that has been executed, acknowledged and filed in accordance with § 103 of this title.

(c) The certificate of conversion shall state:

(1) The date on which the other entity was first formed;

(2) The name of the other entity immediately prior to the filing of the certificate of conversion;

(3) The name of the corporation as set forth in its certificate of incorporation filed in accordance with subsection (b) of this section; and

(4) The fact that the other entity is a limited liability company, limited partnership or business trust of this State.

(d) Upon the effective time of the certificate of conversion and the certificate of incorporation, the other entity shall be converted into a corporation of this State and the corporation shall thereafter be subject to all of the provisions of this title, except that notwithstanding § 106 of this title, the existence of the corporation shall be deemed to have commenced on the date the other entity commenced its existence.

(e) The conversion of any other entity into a corporation of this State shall not be deemed to affect any obligations or liabilities of the other entity incurred prior to its conversion to a corporation of this State or the personal liability of any person incurred prior to such conversion.

(f) Unless otherwise agreed or otherwise provided by any laws of this State applicable to the converting limited liability company, limited partnership or business trust, the converting other entity shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the conversion shall not be deemed to constitute a dissolution of such other entity and shall constitute a continuation of the existence of the converting other entity in the form of a corporation of this State.

(g) Prior to filing a certificate of conversion with the office of the Secretary of State, the conversion shall be approved in the manner provided for by the document, instrument, agreement or other writing, as the case may be, governing the internal affairs of the other entity and the conduct of its business or by applicable law, as appropriate, and a certificate of incorporation shall be approved by the same authorization required to approve the conversion.

(h) The certificate of conversion shall be signed by any officer, director, trustee, manager, partner or other person performing functions equivalent to those of an officer or director of a corporation of this State, however named or described, and who is authorized to sign the certificate of conversion on behalf of the other entity."

Section 11. Amend Title 8, Delaware Code, by adding a new section 226, which shall read as follows:

"§266. Conversion of a domestic corporation to other entities.

(a) A corporation of this State may, upon the authorization of such conversion in accordance with this section, convert to a limited liability company, limited partnership or business trust of this State.

(b) The board of directors of the corporation which desires to convert under this section shall adopt a resolution approving such conversion, specifying the type of entity into which the corporation shall be converted and recommending the approval of such conversion by the stockholders of the corporation. Such resolution shall be submitted to the stockholders of the corporation at an annual or special meeting. Due notice of the time, and purpose of the meeting shall be mailed to each holder of stock, whether voting or nonvoting, of the corporation at the address of the stockholder as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. At the meeting, the resolution shall be considered and a vote taken for its adoption or rejection. If all outstanding shares of stock of the corporation, whether voting or nonvoting, shall be voted for the adoption of the resolution, the corporation shall file with the Secretary of State a certificate of conversion executed in accordance with § 103 of this title, which certifies:

(1) The name of the corporation, and if it has been changed, the name under which it was originally incorporated;

(2) The date of filing of its original certificate of incorporation with the Secretary of State;

(3) The name of the limited liability company, limited partnership or business trust into which the corporation shall be converted; and

(4) That the conversion has been approved in accordance with the provisions of this section.

(c) Upon the filing of a certificate of conversion in accordance with subsection (b) of this section and payment to the Secretary of State of all fees prescribed under this title, the Secretary of State shall certify that the corporation has filed all documents and paid all fees required by this title, and thereupon the corporation shall cease to exist as a corporation of this State at the time the certificate of conversion becomes effective in accordance with § 103 of this title. Such certificate of the Secretary of State shall be prima facie evidence of the conversion by such corporation.

(d) The conversion of a corporation pursuant to a certificate of conversion under this section shall not be deemed to affect any obligations or liabilities of the corporation incurred prior to such conversion or the personal liability of any person incurred prior to such conversion.

(e) After the time the certificate of conversion becomes effective the corporation shall continue to exist as a limited liability company, limited partnership or business trust of this State, and the laws of this State shall apply to the entity to the same extent as prior to such time.

(f) Unless otherwise provided in a resolution of conversion adopted in accordance with this section, the converting corporation shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the conversion shall not constitute a dissolution of such corporation and shall constitute a continuation of the existence of the converting corporation in the form of the applicable other entity of this State."

Section 12. Amend Section 391(a), Title 8, Delaware Code, by adding new paragraphs (25) and (26), which paragraphs shall read as follows:

"(25) For receiving and filing and/or indexing by the Secretary of State of a certificate of conversion and certificate of incorporation prescribed in § 265 of this title, a fee of $50, plus the tax and fee payable upon the receipt for filing of an original certificate of incorporation, shall be paid.

(26) For receiving and filing and/or indexing by the Secretary of State of a certificate of conversion prescribed in § 266 of this title, a fee of $50 shall be paid."

Section 13. This Act shall become effective July 1, 1999.

SYNOPSIS

Section 1. The amendment to Section 102(a)(1) provides that punctuation is optional in abbreviations of corporate names and that words (or abbreviations thereof) of foreign countries or jurisdictions, including, but not limited to, foreign countries or jurisdictions using the English language, designating corporate status are acceptable for purposes of Section 102(a)(1).

Section 2. Section 111 is new. It clarifies that the Court of Chancery may entertain actions to interpret, apply or enforce any provision of the certificate of incorporation or bylaws of a corporation, regardless of whether there is some independent basis for subject matter jurisdiction in that court. Section 111 is not intended to limit in any way the subject matter jurisdiction of the Court of Chancery established under preexisting law.

Section 3. The language of Section 170(a) has been revised to make clear that dividends may be declared and paid by nonstock nonprofit corporations as well as nonstock for profit corporations.

Section 4. The amendments to Section 202 clarify that reasonable written restrictions on the amount of a corporation's securities that may be owned by any person or group of persons are permitted under the General Corporation Law. Subsection (c) of Section 202 has been amended to provide that a restriction on transfer or ownership generally is permitted by Section 202 if it obligates the holder of restricted securities to sell or transfer restricted securities or if it causes or results in the automatic sale or transfer of restricted securities. The amendment to subsection (d) clarifies that maintaining or preserving tax attributes (including net operating losses) and qualifying a corporation as a real estate investment trust are among the tax advantages that are conclusively presumed to constitute a reasonable purpose for imposing restrictions on transfer or ownership. Subsection (d) also has been amended to provide that restrictions imposed for the purpose of maintaining any statutory or regulatory advantage or complying with any statutory or regulatory requirements under applicable law are conclusively presumed to be for a reasonable purpose.

The amendments to Section 202 regarding restrictions on the amounts of securities that may be owned by any person or group are not intended to impact existing law relating to other types of limitations or restrictions on the rights of security holders based on the amount of securities owned, such as limitations on voting rights, conversion rights, or redemption rights.

Section 5. The amendments to Section 242(b)(3) are intended to delete as redundant the requirement for a second meeting of the governing body of a nonstock corporation in connection with the amendment of its certificate of incorporation and to clarify the procedures for adopting such an amendment where a vote of the members of such corporation is required by the certificate of incorporation.

Section 6. This section retitles Subchapter IX of the General Corporation Law to include the concept of conversion, conforming to the addition of new §§ 265 and 266 to such subchapter.

Section 7. The amendment to Section 251(g) clarifies that a vote of the holding company's stockholders is not required to elect or remove directors of a subsidiary (surviving) corporation and that the certificate of incorporation of a subsidiary (surviving) corporation need not be amended to so provide.

Section 8. The amendment to Section 253(a) provides that the 90% ownership requirement applies only to a class of stock of which there are outstanding shares that would otherwise be entitled to vote on the merger, so that, if the only outstanding shares of a class of stock are shares that would otherwise not be entitled to vote on the merger, then the 90% ownership requirement for effecting a short form merger would not apply to such class of stock.

Section 9. The amendment to Section 255(c) conforms the vote of the members required to approve a merger of a nonstock corporation to the vote required to approve a merger of a stock corporation by changing the required vote from a two-thirds vote to a majority vote of the members.

Section 10. This section adds a new § 265 of the Act which provides that any limited liability company, limited partnership or business trust of this State may convert to a corporation of this State upon obtaining the requisite approval of a certificate of conversion and a certificate of incorporation by such converting entity, and the filing of such certificate of conversion and certificate of incorporation with the Secretary of State. Such conversion shall not affect any obligations or liabilities of the converting entity incurred prior to its conversion or the personal liability of any person incurred prior to such conversion.

Section 11. This section adds a new § 266 of the Act which provides that any corporation of this State may convert to a limited liability company, limited partnership or business trust of this State upon obtaining the requisite approval, including the approval of the holders of all outstanding shares of stock of the corporation, whether voting

or nonvoting, and the filing of a certificate of conversion with the Secretary of State. Such conversion shall not affect any obligations or liabilities of the converting corporation incurred prior to its conversion or the personal liability of any person incurred prior to such conversion.

Section 12. The additions of subsections (a)(25) and (a)(26) to § 391 provide the applicable fees in connection with filings under §§ 265 and 266.

Section 13. Section 13 provides for an effective date of July 1, 1999.

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