



SPONSOR: Sen. Vaughn; Rep. Wagner
Rep. Valihura

DELAWARE STATE SENATE

142nd GENERAL ASSEMBLY

SENATE SUBSTITUTE NO. 1

FOR

SENATE BILL NO. 272

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, Title 8, Delaware Code, by adding a new subsection (d) thereto as follows

(d) Except for provisions included pursuant to sections 102(a)(1), 102(a)(2), 102(a)(5), 102(a)(6), 102(b)(2), 102(b)(5), 102(b)(7) of this chapter, and provisions included pursuant to section 102(a)(4) specifying the classes, number of shares, and par value of shares the corporation is authorized to issue, any provision of the certificate of incorporation may be made dependent upon facts ascertainable outside such instrument, provided that the manner in which such facts shall operate upon the provision is clearly and explicitly set forth therein. The term "facts," as used in this subsection, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

Section 2. Amend Section 141(c)(2), Title 8, Delaware Code, by inserting the words "(other than the election or removal of directors)" immediately after the words "any action or matter".

Section 3. Amend Section 152, Title 8, Delaware Code by deleting the text thereof in its entirety and inserting in lieu thereof, the following:

"The consideration, as determined pursuant to subsections (a) and (b) of § 153 of this title, for subscriptions to, or the purchase of, the capital stock to be issued by a corporation shall be paid in such form and in such manner as the board of directors shall determine. The board of directors may authorize capital stock to be issued for consideration consisting of cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof. In the absence of actual fraud in the transaction, the judgment of the directors as to the value of such consideration shall be conclusive. The capital stock so issued shall be deemed to be fully paid and nonassessable stock upon receipt

by the corporation of such consideration; provided, however, nothing contained herein shall prevent the board of directors from issuing partly paid shares under § 156 of this title."

Section 4. Amend Section 154, Title 8, Delaware Code, by deleting the word "property" in the third sentence thereof and adding the word "consideration" in lieu thereof.

Section 5. Amend Section 157(a), Title 8, Delaware Code, by deleting the word "purchase" therefrom and adding the word "acquire" in lieu thereof.

Section 6. Amend Section 157(b), Title 8, Delaware Code, by deleting the text of the first sentence thereof in its entirety and inserting in lieu thereof, the following:

"The terms upon which, including the time or times which may be limited or unlimited in duration, at or within which, and the consideration (including a formula by which such consideration may be determined) for which any such shares may be acquired from the corporation upon the exercise of any such right or option, shall be such as shall be stated in the certificate of incorporation, or in a resolution adopted by the board of directors providing for the creation and issue of such rights or options, and, in every case, shall be set forth or incorporated by reference in the instrument or instruments evidencing such rights or options."

Section 7. Amend Section 157(d), Title 8, Delaware Code, by deleting the text of the first sentence thereof in its entirety and inserting in lieu thereof, the following:

"In case the shares of stock of the corporation to be issued upon the exercise of such rights or options shall be shares having a par value, the consideration so to be received therefor shall have a value not less than the par value thereof."

Section 8. Amend Section 303, Title 8, Delaware Code, by deleting the title and the text thereof in their entirety and inserting in lieu thereof, the following:

“§303. Proceeding under the Federal Bankruptcy Code of the United States; effectuation.

(a) Any corporation of this State, an order for relief with respect to which has been entered pursuant to the Federal Bankruptcy Code, 11 U.S.C. §§101, et seq., or any successor statute, may put into effect and carry out any decrees and orders of the court or judge in such bankruptcy proceeding and may take any corporate action provided or directed by such decrees and orders, without further action by its directors or stockholders. Such power and authority may be exercised, and such corporate action may be taken, as may be directed by such decrees or orders, by the trustee or trustees of such corporation appointed or elected in the bankruptcy proceeding (or a majority thereof), or if none be appointed or elected and acting, by designated officers of the

46 corporation, or by a representative appointed by the court or judge, with like effect as if exercised and taken
47 by unanimous action of the directors and stockholders of the corporation.

48 (b) Such corporation may, in the manner provided in subsection (a) of this section, but without limiting the
49 generality or effect of the foregoing, alter, amend or repeal its bylaws; constitute or reconstitute and classify
50 or reclassify its board of directors, and name, constitute or appoint directors and officers in place of or in
51 addition to all or some of the directors or officers then in office; amend its certificate of incorporation, and
52 make any change in its capital or capital stock, or any other amendment, change, or alteration, or provision,
53 authorized by this chapter; be dissolved, transfer all or part of its assets, merge or consolidate as permitted by
54 this chapter, in which case, however, no stockholder shall have any statutory right of appraisal of such
55 stockholder's stock; change the location of its registered office, change its registered agent, and remove or
56 appoint any agent to receive service of process; authorize and fix the terms, manner and conditions of, the
57 issuance of bonds, debentures or other obligations, whether or not convertible into stock of any class, or
58 bearing warrants or other evidences of optional rights to purchase or subscribe for stock of any class; or lease
59 its property and franchises to any corporation, if permitted by law.

60 (c) A certificate of any amendment, change or alteration, or of dissolution, or any agreement of merger or
61 consolidation, made by such corporation pursuant to the foregoing provisions, shall be filed with the
62 Secretary of State in accordance with §103 of this title, and, subject to subsection (d) of said §103, shall
63 thereupon become effective in accordance with its terms and the provisions hereof. Such certificate,
64 agreement of merger or other instrument shall be made, executed and acknowledged, as may be directed by
65 such decrees or orders, by the trustee or trustees appointed or elected in the bankruptcy proceeding (or a
66 majority thereof), or, if none be appointed or elected and acting, by the officers of the corporation, or by a
67 representative appointed by the court or judge, and shall certify that provision for the making of such
68 certificate, agreement or instrument is contained in a decree or order of a court or judge having jurisdiction of
69 a proceeding under such Federal Bankruptcy Code or successor statute.

70 (d) This section shall cease to apply to such corporation upon the entry of a final decree in the bankruptcy
71 proceeding closing the case and discharging the trustee or trustees, if any; provided, however, that the closing
72 of a case and discharge of trustee or trustees, if any, will not affect the validity of any act previously
73 performed pursuant to subsections (a)-(c) above.

74 (e) On filing any certificate, agreement, report or other paper made or executed pursuant to this section, there
75 shall be paid to the Secretary of State for the use of the State the same fees as are payable by corporations not
76 in bankruptcy upon the filing of like certificates, agreements, reports or other papers.”
77 Section 9. This Act shall become effective August 1, 2004.

SYNOPSIS

Section 1. New Section 102(d), which is consistent with changes previously made to Section 151, involving the terms of stock, and Subchapter IX, involving mergers and consolidations, confirms that a corporation's certificate of incorporation may, subject to certain exceptions, include provisions dependent on facts ascertainable outside the certificate of incorporation. The amendment is intended to negate any implication that the publicly filed nature of a certificate of incorporation precludes the inclusion of such provisions

Section 2. The amendment to Section 141(c)(2) clarifies the authority to establish a committee with delegated power to recommend the nomination or removal of members of the board of directors.

Section 3. The amendment to Section 152 eliminates the requirement that the consideration paid for newly issued stock consist, either entirely or in part, of consideration in the form required by Section 3 of Article IX of the Constitution of the State of Delaware of 1897, as amended. That provision is being deleted from the Constitution of the State of Delaware of 1897, as amended, contemporaneously with the effective date of the amendment to Section 152.

Section 4. The amendment to Section 154 is consistent with the amendment to Section 152 and clarifies that the consideration paid for stock need not consist of property or cash.

Sections 5, 6 and 7. The amendments to Section 157 are consistent with the amendment to Section 152 and clarify that the consideration to be paid for stock issued upon the exercise of rights or options need not consist of property or cash.

Section 8. The amendments to Section 303 are intended to clarify that the provisions of the statute apply to any type of federal bankruptcy proceeding, whether liquidation or reorganization, and that the validity of corporate action undertaken pursuant to the statute is not dependent upon the existence or pendency of a confirmed plan of reorganization.

Section 9. This section provides for an effective date of August 1, 2004

Author: Senator Vaughn