

# INSIGHTS

---

## THE CORPORATE & SECURITIES LAW ADVISOR

---

ASPEN PUBLISHERS

Volume 25 Number 8, August 2011

---

---

### STATE CORNER

#### 2011 Amendments to the General Corporation Law of the State of Delaware

By William J. Haubert and Brigitte V. Fresco

Legislation amending the General Corporation Law of the State of Delaware (DGCL) was adopted by the Delaware General Assembly and was signed by the Governor of the State of Delaware on July 7, 2011. The DGCL amendments became effective on August 1, 2011. The DGCL amendments are designed to keep Delaware law current and address issues raised by practitioners, the judiciary, and legislators with respect to the current language or interpretation of the DGCL.

#### Corporate Names

**Contents of Certificate of Incorporation.** Section 102 of the DGCL sets forth the required contents of a certificate of incorporation. Under Section 102(a)(1) of the DGCL, the name of a corporation: (a) shall contain certain “corporate” endings, such as “company,” “corporation,” or “incorporated” (or abbreviations thereof) unless

waived by the Division of Corporations Department of State upon the certification by the corporation that its total assets are not less than \$10,000,000; (b) shall be distinguishable upon the records in the office of the Divisions of Corporation in the Department of State from the names that are reserved and from the names on records for other entities; and (c) shall not contain the word “bank” or any variation thereof, except in certain circumstances.

Section 102(a)(1) was amended in two respects. First, Section 102(a)(1) was amended to allow the Division of Corporations in the Department of State, in its sole discretion, to waive the requirement that a corporation’s name contain certain “corporate” endings (or abbreviations thereof) if the corporation is both a non-profit nonstock corporation and an association of professionals.

Second, Section 102(a)(1) was amended, in conjunction with amendments to Section 395 of the DGCL, to give the Director of the Divisions of Corporations and the State Bank Commissioner the discretion to waive certain requirements and restrictions that apply when a corporation uses the word “trust” in its name, so long as the use of the word “trust” is clearly not purporting to refer to a trust business. In that connection, Section 102(a)(1) was amended to specifically provide that, except as provided in Section 395 of the DGCL, the name of a corporation shall not include the word “trust.”

---

William J. Haubert is a Director and Brigitte V. Fresco is Counsel at Richards, Layton & Finger, P.A. in Wilmington, DE. The views expressed herein are the views of the authors and are not necessarily the views of the firm or its clients.

---

**Corporations Using “trust” in Name.** Section 395 of the DGCL, which sets forth when a Delaware corporation may use the word “trust” in its name, also was amended. The amendments to Section 395 include adding a new subsection (d) providing that the limitations on the use of the word “trust” as part of the corporation’s name shall not apply to a corporation that is not subject to the supervision of the State Bank Commissioner of the State of Delaware and that is not regulated under the Bank Holding Company Act of 1956 or Section 10 of the Home Owners’ Loan Act, and where the use of the word “trust” clearly (a) does not refer to a trust business; (b) is not likely to mislead the public into believing that the nature of the business of the corporation includes activities that fall under the supervision of the State Bank Commissioner of the State of Delaware or that are regulated under the Bank Holding Company Act of 1956 or Section 10 of the Home Owners’ Loan Act; and (c) will not otherwise lead to a pattern and practice of abuse that might cause harm to the interests of the public or the State of Delaware, as determined by the Director of the Division of Corporations and the State Bank Commissioner. The amendments to Section 395 also updated statutory references to the Savings and Loan Holding Company Act, which was moved to Section 10 of the Home Owners’ Loan Act.

### **Address of Registered Office**

**Contents of Certificate of Incorporation.** Prior to the amendments, under Section 102(a)(2) of the DGCL, a corporation’s certificate of incorporation had to include the address (which was to include the street, number, city, and county) of the corporation’s registered office in the State of Delaware and the name of the registered agent at such address. Section 102(a)(2) was amended in connection with the amendment to Section 131 of the DGCL. Section 102(a)(2) now requires the address of the registered office to be stated in accordance with Section 131(c) of the DGCL, which added the requirement that the postal code be included in such address.

### **Execution, Acknowledgement, Filing, Recording, and Effective Date of Original Certificate of Incorporation and Other Instruments; Exceptions.**

Section 103 of the DGCL sets forth the requirements to file documents with the Secretary of State of the State of Delaware (Secretary of State). Section 103 was amended in connection with the amendments to Sections 102(a)(2), 131, and 374 of the DGCL by adding a new subsection (j) to clarify that it is not necessary for a Delaware corporation to amend its certificate of incorporation, or any other document, that has been filed with the Secretary of State prior to August 1, 2011, to add the postal code to the address of its registered office as is required pursuant to the amendments to Sections 102(a)(2), 131, and 374. However, any certificate or other document filed on or after August 1, 2011, that changes the address of the registered agent must comply with Section 131(c) (*i.e.*, such address must include the postal code).

**Registered Office in State.** Section 131 of the DGCL provides that every corporation must maintain a registered office in the State of Delaware. Section 131 was amended to add a new subsection (c) which provides that the address of the registered office contained in any certificate of incorporation or other document filed with the Secretary of State shall include the street, number, city, county, and postal code. Sections 102(a)(2) and Section 374 were both amended to cross reference Section 131(c) with respect to the contents of the address of the registered office of the corporation.

**Annual Report.** Section 374 requires a foreign corporation doing business in the State of Delaware to file an annual report with the Secretary of State. Such annual report must include, among other things, the address of the corporation’s registered office in the State of Delaware. Section 374 was amended to add a cross reference to new Section 131(c) to clarify that the address of the registered office must contain all the information required by Section 131(c), which now must include the postal code.

---

## Indemnification

**Indemnification of Officers, Directors, Employees and Agents; Insurance.** Section 145 of the DGCL provides that a Delaware corporation may provide indemnification and advancement of expenses to its officers, directors, employees and agents. In 2009, Section 145(f) was amended to provide that a right to indemnification and advancement of expenses under a provision in the certificate of incorporation or bylaws could not be eliminated or impaired by an amendment to such provision after the occurrence of the act or omission giving rise to the indemnification or advancement claim, unless the provision contained, at the time of the act or omission, an explicit provision permitting such elimination or limitation. Section 145(f) was amended to clarify that indemnification and advancement of expenses under a provision of a certificate of incorporation or bylaw cannot be eliminated or impaired by an amendment to the certificate of incorporation or the bylaws after the occurrence of the act or omission to which the indemnification or advancement of expenses relates, unless the provision, at the time of the act or omission, explicitly authorizes such elimination or limitation. Thus, for example, a corporation may not circumvent an indemnification or advancement of expenses provision in a bylaw by adopting an amendment to its certificate of incorporation.

## Conversion and Domestication

**Conversion of Other Entities to a Domestic Corporation and Domestication of Non-United States Entities.** Section 265 of the DGCL permits “other entities” to convert to a Delaware corporation by filing a certificate of conversion and a certificate of incorporation with the Secretary of State. Section 388 of the DGCL permits a non-United States entity to become domesticated as a Delaware corporation by filing a certificate of corporate domestication and a certificate of incorporation with the Secretary

of State. Both Sections 265(b) and 388(b) were amended to clarify that the certificate of incorporation and the certificate of conversion or certificate of corporate domestication, as applicable, must be filed simultaneously with the Secretary of State and, to the extent such certificate of incorporation and certificate of conversion or certificate of corporate domestication, as applicable, are to have a post-filing effective date or time, such certificates must provide for the same effective date or time.

## Payment of Franchise Taxes

Prior to the amendments, Section 277 of the DGCL provided that no corporation shall be dissolved or merged until all franchise taxes due or assessable, including all franchise taxes that would be due or assessable for the entire calendar month during which the dissolution or merger becomes effective, have been paid. Section 277 also was amended to include conversions of corporations to other entities pursuant to Section 266 of the DGCL and transfers to foreign jurisdictions (without continuing its existence as a corporation of the State of Delaware) pursuant to Section 390 of the DGCL. In addition, the amendment clarified that the corporation must file all annual franchise tax reports, including the final franchise tax report for the year in which the dissolution, merger, transfer, or conversion becomes effective. Notwithstanding the foregoing, the amendments to Section 277 provide that if the Secretary of State certifies an instrument effecting a dissolution, merger, transfer or conversion, the corporation will be dissolved, merged, transferred or converted at the effective time of the instrument.

## Exempt Corporations

**Renewal of Certificate of Incorporation or Charter of Religious, Charitable, Educational, etc., Corporations.** Section 313 of the DGCL governs how religious, charitable, educational, and certain other corporations whose purpose is for the public

---

welfare may renew its certificate of incorporation that has become inoperative or void. In order to conform Section 313 to the amendments made to Section 501(b), Section 313 was amended to use the term “exempt corporation.”

**Taxes and Fees.** Section 391 of the DGCL sets forth the taxes and fees payable to the Secretary of State in connection with the filing of certain documents with the Secretary of State. Like Section 313, Section 391(a)(3) was amended to use the term “exempt corporations” instead of “corporations created solely for religious and charitable purposes” in order to conform Section 391 to the amendments made to Section 501.

**Franchise Taxes.** Section 501 of the DGCL sets forth which corporations are subject to annual franchise taxes and which corporations are exempt. Section 501 was amended in two ways. First, Section 501(a) was amended to clarify that captive insurance companies licensed under chapter 69 of Title 18 of the Delaware Code are not required to pay annual franchise taxes. Second, Section 501(b)(5) was amended to clarify that the definition of “exempt corporation” includes a religious corporation or purely charitable or educational association, and a company, association, or society, which, by its certificate of incorporation, has for its object the assistance of sick, needy, or disabled members, or to provide for the wants of the widows and families after the death of its members.

Copyright © 2011 CCH Incorporated. All Rights Reserved.  
Reprinted from *Insights* August 2011, Volume 25, Number 8, pages 39-42,  
with permission from Aspen Publishers, a Wolters Kluwer business, New York, NY,  
1-800-638-8437, [www.aspenpublishers.com](http://www.aspenpublishers.com).

