

SPONSOR:

[HOUSE OF REPRESENTATIVES/DELAWARE STATE SENATE]  
148th GENERAL ASSEMBLY

[HOUSE/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):

1           Section 1. Amend § 102(a)(1), Title 8 of the Delaware Code, by making insertions as shown by underline  
2 and deletions as shown by strike through as follows:

3           § 102 Contents of certificate of incorporation.

4           (a) The certificate of incorporation shall set forth:

5                   (1) The name of the corporation, which (i) shall contain 1 of the words "association," "company,"  
6 "corporation," "club," "foundation," "fund," "incorporated," "institute," "society," "union," "syndicate," or "limited,"  
7 (or abbreviations thereof, with or without punctuation), or words (or abbreviations thereof, with or without  
8 punctuation) of like import of foreign countries or jurisdictions (provided they are written in roman characters or  
9 letters); provided, however, that the Division of Corporations in the Department of State may waive such  
10 requirement (unless it determines that such name is, or might otherwise appear to be, that of a natural person) if such  
11 corporation executes, acknowledges and files with the Secretary of State in accordance with § 103 of this title a  
12 certificate stating that its total assets, as defined in § 503(i) of this title, are not less than \$10,000,000, or, in the sole  
13 discretion of the Division of Corporations in the Department of State, if the corporation is both a nonprofit nonstock  
14 corporation and an association of professionals, (ii) shall be such as to distinguish it upon the records in the office of  
15 the Division of Corporations in the Department of State from the names that are reserved on such records and from  
16 the names on such records of each other corporation, partnership, limited partnership, limited liability company or  
17 statutory trust organized or registered as a domestic or foreign corporation, partnership, limited partnership, limited  
18 liability company or statutory trust under the laws of this State, except with the written consent of the person who  
19 has reserved such name or such other foreign corporation or domestic or foreign partnership, limited partnership,  
20 limited liability company or statutory trust, executed, acknowledged and filed with the Secretary of State in  
21 accordance with § 103 of this title, or except that, without prejudicing any rights of the person who has reserved

22 such name or such other foreign corporation or domestic or foreign partnership, limited partnership, limited liability  
23 company or statutory trust, the Division of Corporations in the Department of State may waive such requirement if  
24 the corporation demonstrates to the satisfaction of the Secretary of State that the corporation or a predecessor entity  
25 previously has made substantial use of such name or a substantially similar name, that the corporation has made  
26 reasonable efforts to secure such written consent, and that such waiver is in the interest of the State. (iii) except as  
27 permitted by § 395 of this title, shall not contain the word "trust," and (iv) shall not contain the word "bank," or any  
28 variation thereof, except for the name of a bank reporting to and under the supervision of the State Bank  
29 Commissioner of this State or a subsidiary of a bank or savings association (as those terms are defined in the Federal  
30 Deposit Insurance Act, as amended, at 12 U.S.C. § 1813), or a corporation regulated under the Bank Holding  
31 Company Act of 1956, as amended, 12 U.S.C. § 1841 et seq., or the Home Owners' Loan Act, as amended, 12  
32 U.S.C. § 1461 et seq.; provided, however, that this section shall not be construed to prevent the use of the word  
33 "bank," or any variation thereof, in a context clearly not purporting to refer to a banking business or otherwise likely  
34 to mislead the public about the nature of the business of the corporation or to lead to a pattern and practice of abuse  
35 that might cause harm to the interests of the public or the State as determined by the Division of Corporations in the  
36 Department of State;

37 Section 2. Amend § 102, Title 8 of the Delaware Code, by adding a new section, § 102(f), shown by  
38 underline as follows:

39 (f) The certificate of incorporation may not contain any provision that would impose liability on a  
40 stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an  
41 intracorporate claim, as defined in § 115 of this title.

42 Section 3. Amend § 109(b), Title 8 of the Delaware Code, by making insertions as shown by underline as  
43 follows:

44 (b) The bylaws may contain any provision, not inconsistent with law or with the certificate of  
45 incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers  
46 or the rights or powers of its stockholders, directors, officers or employees. The bylaws may not contain  
47 any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the  
48 corporation or any other party in connection with an intracorporate claim, as defined in § 115 of this title.

49 Section 4. Amend § 114(b), Title 8 of the Delaware Code, by making insertions as shown by underline as  
50 follows:

51 (b) Subsection (a) of this section shall not apply to:

52 (1) Sections 102(a)(4), (b)(1) and (2), 109(a), 114, 141, 154, 215, 228, 230(b), 241, 242, 253, 254,  
53 255, 256, 257, 258, 271, 276, 311, 312, 313, 390, and 503 of this title, which apply to nonstock corporations by their  
54 terms;

55 (2) Sections 102(f), 109(b) (last sentence), 151, 152, 153, 155, 156, 157(d), 158, 161, 162, 163,  
56 164, 165, 166, 167, 168, 203, 204, 205, 211, 212, 213, 214, 216, 219, 222, 231, 243, 244, 251, 252, 267, 274, 275,  
57 324, 364, 366(a), 391 and 502(a)(5) of this title; and

58 (3) Subchapter XIV and subchapter XVI of this chapter.

59 Section 5. Amend Title 8 of the Delaware Code by adding a new section, § 115, shown by underline as  
60 follows:

61 § 115. Forum selection provisions.

62 The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional  
63 requirements, that any or all intracorporate claims shall be brought solely and exclusively in any or all of the courts  
64 in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in  
65 the courts of this State. "Intracorporate claims" means claims, including claims in the right of the corporation, (i)  
66 that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or  
67 (ii) as to which this title confers jurisdiction upon the Court of Chancery.

68 Section 6. Amend § 245(c), Title 8 of the Delaware Code, by making insertions as shown by underline as  
69 follows:

70 (c) A restated certificate of incorporation shall be specifically designated as such in its heading. It shall  
71 state, either in its heading or in an introductory paragraph, the corporation's present name, and, if it has been  
72 changed, the name under which it was originally incorporated, and the date of filing of its original certificate of  
73 incorporation with the Secretary of State. A restated certificate shall also state that it was duly adopted in accordance  
74 with this section. If it was adopted by the board of directors without a vote of the stockholders (unless it was adopted  
75 pursuant to § 241 of this title or without a vote of members pursuant to § 242(b)(3) of this title), it shall state that it  
76 only restates and integrates and does not further amend (except, if applicable, as permitted under § 242(a)(1) and §

77 242(b)(1) of this title the provisions of the corporation's certificate of incorporation as theretofore amended or  
78 supplemented, and that there is no discrepancy between those provisions and the provisions of the restated  
79 certificate. A restated certificate of incorporation may omit (a) such provisions of the original certificate of  
80 incorporation which named the incorporator or incorporators, the initial board of directors and the original  
81 subscribers for shares, and (b) such provisions contained in any amendment to the certificate of incorporation as  
82 were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if  
83 such change, exchange, reclassification, subdivision, combination or cancellation has become effective. Any such  
84 omissions shall not be deemed a further amendment.

85 Section 7. Amend § 363(a), Title 8 of the Delaware Code, by making insertions as shown by underline and  
86 deletions as shown by strike through as follows:

87 § 363 Certain amendments and mergers; votes required; appraisal rights.

88 (a) Notwithstanding any other provisions of this chapter, a corporation that is not a public benefit  
89 corporation, may not, without the approval of 90%<sup>2/3</sup> of the outstanding ~~shares of each class of the~~ stock of the  
90 corporation ~~of which there are outstanding shares, whether voting or nonvoting~~entitled to vote thereon:

91 (1) Amend its certificate of incorporation to include a provision authorized by § 362(a)(1) of this  
92 title; or

93 (2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation,  
94 the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or  
95 other equity interests in a domestic or foreign public benefit corporation or similar entity.

96 The restrictions of this section shall not apply prior to the time that the corporation has received payment for any of  
97 its capital stock, or in the case of a nonstock corporation, prior to the time that it has members.

98 Section 8. Amend § 363(c), Title 8 of the Delaware Code, by making insertions as shown by underline and  
99 deletions as shown by strike through as follows:

100 (c) Notwithstanding any other provisions of this chapter, a corporation that is a public benefit corporation  
101 may not, without the approval of 2/3 of the outstanding ~~shares of each class of the~~ stock of the corporation ~~of which~~  
102 ~~there are outstanding shares, whether voting or nonvoting~~entitled to vote thereon:

103 (1) Amend its certificate of incorporation to delete or amend a provision authorized by §  
104 362(a)(1) or § 366(c) of this title; or

105 (2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation,  
106 the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or  
107 other equity interests in a domestic or foreign corporation that is not a public benefit corporation or similar entity  
108 and the certificate of incorporation (or similar governing instrument) of which does not contain the identical  
109 provisions identifying the public benefit or public benefits pursuant to § 362(a) of this title or imposing requirements  
110 pursuant to § 366(c) of this title.

111 Section 9. Amend § 391(c), Title 8 of the Delaware Code, by making insertions as shown by underline and  
112 deletions as shown by strike through as follows:

113 (c) The Secretary of State may issue photocopies or electronic image copies of instruments on file, as well  
114 as instruments, documents and other papers not on file, and for all such photocopies or electronic image copies  
115 which are not certified by the Secretary of State, a fee of \$10 shall be paid for the first page and \$2.00 for each  
116 additional page. ~~The Secretary of State may also issue microfiche copies of instruments on file as well as~~  
117 ~~instruments, documents and other papers not on file, and for each such microfiche a fee of \$2.00 shall be paid~~  
118 ~~therefor.~~ Notwithstanding Delaware's Freedom of Information Act [Chapter 100 of Title 29] or any other provision  
119 of law granting access to public records, the Secretary of State upon request shall issue only photocopies, ~~microfiche~~  
120 or electronic image copies of public records in exchange for the fees described ~~above~~ in this section, and in no case  
121 shall the Secretary of State be required to provide copies (or access to copies) of such public records (including  
122 without limitation bulk data, digital copies of instruments, documents and other papers, databases or other  
123 information) in an electronic medium or in any form other than photocopies or electronic image copies of such  
124 public records in exchange, as applicable, for the fees described in this section or § 2318 of Title 29 for each such  
125 record associated with a file number.

126 Section 10. Sections 1 through 8 shall be effective on August 1, 2015. Section 9 shall be effective upon its  
127 enactment into law.

### **SYNOPSIS**

Section 1. Section 1 amends Section 102(a)(1) to enable the Division of Corporations in the Department of State to waive the requirement under Section 102(a)(1)(ii) in certain limited circumstances.

Section 2. In *ATP Tours, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), the Delaware Supreme Court upheld as facially valid a bylaw imposing liability for certain legal fees of the nonstock corporation on certain members who participated in the litigation. In combination with the amendments to Sections 109(b) and 114(b)(2), new subsection (f) does not disturb that ruling in relation to nonstock corporations. In order to preserve the efficacy of the enforcement of fiduciary duties in stock corporations, however, new subsection (f) would invalidate a provision in the certificate of incorporation of a stock corporation that purports to impose liability upon a

stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an intracorporate claim, as defined in new Section 115. New subsection (f) is not intended, however, to prevent the application of such provisions pursuant to a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.

Section 3. Like the concurrent amendment to Section 102, the new last sentence of subsection (b) would invalidate a provision in the bylaws of a stock corporation that purports to impose liability upon a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an intracorporate claim, as defined in new Section 115. The new last sentence of subsection (b) is not intended, however, to prevent the application of any provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.

Section 4. The amendment to Section 114 has the effect of avoiding the application to nonstock corporations of new Section 102(f) and the new last sentence of Section 109(b).

Section 5. New Section 115 confirms, as held in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, 73 A.2d 934 (Del. Ch. 2013), that the certificate of incorporation and bylaws of the corporation may effectively specify, consistent with applicable jurisdictional requirements, that claims arising under the DGCL, including claims of breach of fiduciary duty by current or former directors or officers or controlling stockholders of the corporation, or persons who aid and abet such a breach, must be brought only in the courts (including the federal court) in this State. Section 115 does not address the validity of a provision of the certificate of incorporation or bylaws that selects a forum other than the Delaware courts as an additional forum in which intracorporate claims may be brought, but it invalidates such a provision selecting the courts in a different State, or an arbitral forum, if it would preclude litigating such claims in the Delaware courts. Section 115 is not intended, however, to prevent the application of any such provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced. Section 115 is not intended to foreclose evaluation of whether the specific terms and manner of adoption of a particular provision authorized by Section 115 comport with any relevant fiduciary obligation or operate reasonably in the circumstances presented. For example, such a provision may not be enforceable if the Delaware courts lack jurisdiction over indispensable parties or core elements of the subject matter of the litigation. Section 115 is also not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction, nor is Section 115 intended to limit or expand the jurisdiction of the Court of Chancery or the Superior Court.

Section 6. The amendment to Section 245(c) clarifies that a restated certificate is not required to state that it does not further amend the provisions of the corporation's certificate of incorporation if the only amendment thereto is to change the corporation's name without a vote of the stockholders.

Section 7. Section 7 amends Section 363(a) to change the approval required under that Section.

Section 8. Section 8 amends Section 363(c) to change the approval required under that Section.

Section 9. Section 9 amends Section 391(c) to confirm that in exchange for the fees described the Secretary of State may issue public records in the form of photocopies or electronic image copies and need not provide public records in any other form.

Section 10. Section 10 provides that the effective date of Sections 1 through 8 is August 1, 2015, and that Section 9 shall be effective upon its enactment into law.