New Day for Nonstock Corporations: The 2010 Amendments to Delaware's General Corporation Law

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In August 2010, Delaware's General Corporation Law (DGCL) was amended to clarify the application of the DGCL to corporations not authorized to issue capital stock, commonly known as nonstock corporations. Delaware has thousands of nonstock corporations, including both for-profit and nonprofit entities, but the DGCL's focus has traditionally been on stock corporations. The largest amendments to the DGCL in more than forty years, the 2010 nonstock amendments covered nearly every area of the corporate law—clarifying, filling gaps in, and making consistent the DGCL's treatment of nonstock corporations. This article describes the impetus for the nonstock amendments and explains the structure and nuances of those amendments.

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Delaware law has changed dramatically for thousands of Delaware corporations—in a way that should change very little for them. That is, a large number of amendments have been made to the General Corporation Law of the State of Delaware ("DGCL"), but the effect of those amendments was chiefly to clarify the application of the DGCL to corporations not authorized to issue capital stock (commonly known as nonstock corporations). On April 28, 2010, Delaware's General Assembly approved House Bill 341, the legislation containing the nonstock amendments; the bill was signed by the Governor on May 3, 2010.[1] The amendments became effective on August 1, 2010.

The bill signed by Governor Jack Markell was a comprehensive set of amendments to many sections of the DGCL (and to Chapter 5 of Title 8 of the Delaware Code) to clarify, fill gaps in, and make consistent the DGCL's application to nonstock corporations. Delaware has not provided a separate statute for nonstock corporations, but has instead dealt with such corporations within the ambit of the DGCL, which is geared largely toward stock corporations. As a result, nonstock corporations have long faced difficult questions about the DGCL's application. The nonstock amendments were intended to provide clarity and consistency so that these entities and their advisors have the appropriate and necessary statutory guidance to organize their internal affairs and conduct their operations. Delaware's nonstock corporations now enjoy the advantages shared by Delaware's stock corporations: a complete and up-to-date statutory foundation.

1. 77 Del. Laws ch. 253 (2010).

The centerpiece of the nonstock amendments is new Section 114—a "translator" provision setting forth which provisions of the DGCL apply to all nonstock corporations and which of those provisions apply specifically to nonprofit nonstock corporations. Along with Section 114, the amendments wrought other changes; most of the changes were technical in nature, but some were substantive changes to the then-current law regarding nonstock corporations. Among the substantive changes, the amendments generally streamlined or modernized procedures applicable to nonstock corporations, extended new powers to nonstock corporations (e.g., the power to effect certain short-form mergers with a stock-corporation subsidiary), or codified preexisting features of nonstock corporation law (e.g., deeming the capital of nonstock corporations to be zero). The amendments also clarified the law and set forth a distinct statutory framework for nonprofit nonstock corporations, thereby providing (in substance, if not in form) a distinct Delaware law for not-for-profit entities, within the general corporate framework.

In this article, we review the reasons why Delaware enacted the nonstock amendments and explain the amendments themselves, with an eye toward providing practitioners insight into the strength and flexibility of Delaware's enhanced nonstock law. Entities headquartered around the globe take advantage of Delaware's nonstock law to ensure both the benefits of being incorporated in Delaware (including having access to Delaware's efficient and responsive Secretary of State for corporate filings as well as Delaware's world-renowned court system) and the benefits of operating not-for-profit. Those entities now have a stronger statutory foundation and will be able to manage their business and affairs in a more certain, secure, and flexible manner. But the real advantage is for those wishing to take advantage of Delaware's corporation laws without being subject to certain procedural requirements (such as annual meetings) necessary for stock corporations. The 2010 amendments,[2] and the legal certainty created thereby, should make the decision to incorporate small businesses as Delaware nonstock corporations an easy one. In this article, we will explain briefly the advantages to practitioners of Delaware's revised nonstock corporation law—for both nonprofit and for-profit entities and their managers.

I. Why Were the Nonstock Amendments Necessary?

Before explaining the changes Delaware made to its nonstock corporation law, it may be instructive to consider the reasons those changes were made. Although Delaware is home to many thousands of nonstock corporations, the law applicable to Delaware's nonstock corporations has never been as clear as that for stock corporations. As Professor Ernest Folk (one of the principal figures in Delaware's

2. As used in this article, the "2010 amendments" refer only to the 2010 nonstock amendments, 77 Del. Laws ch. 253 (2010), and not to the other amendments to the DGCL enacted in 2010, 77 Del. Laws ch. 290 (2010).

1967 revision of its general corporation law[3]) recognized in 1972, the DGCL, "although applicable to nonprofit and nonstock corporations alike, has not systematically treated this type of entity, although many such corporations are organized under the Delaware statute."[4]

Rather than having separate statutes for stock and nonstock corporations (or for for-profit and nonprofit corporations) like many other states, Delaware has instead chosen to retain a general corporation law that applies to both stock and nonstock corporations. The DGCL has contained provisions regarding nonstock corporations for more than 100 years. For example, Section 242 has included provisions regarding nonstock corporations since 1901,[5] and Section 215 has included provisions regarding nonprofit corporations since 1927.[6]

Part of the problem with Delaware's law regarding nonstock corporations is that the purpose of these entities was never perfectly clear. The provisions added to Section 215 in 1927 technically applied to nonprofit corporations, which were presumed to be nonstock corporations. Indeed, Professor Folk, when writing his report for the Delaware Corporation Law Revision Committee, made the converse presumption as well: that all nonstock corporations would be operated not for profit.[7] But nonprofit corporations are not synonymous with nonstock corporations; nonstock corporations may be operated either for profit or not for profit.

The DGCL was therefore stretched to include additional types of corporations, although its focus was squarely on stock corporations. Provisions regarding nonstock corporations were largely add-ons to provisions regarding stock corporations (such as subsection 141(j)) or were incomplete attempts to replicate (or modify, as necessary) other provisions regarding stock corporations (such as Sections 215 and 255). Either way, nonstock corporations had never been fully integrated into the DGCL, and only a small fraction of the sections in the DGCL expressly addressed nonstock corporations. This situation led, unsurprisingly, to a lack of clarity regarding the DGCL's application to nonstock corporations as a general matter.

Delaware has wrestled with these issues for some time. For example, current subsection 141(j) took several twists and turns before the drafters settled on a satisfactory solution:

> Prior to the 1967 revision, § 141 provided that none of its subsections governed nonprofit corporations except for the statutory authorization of director action by written consent in lieu of a meeting. Since this limiting language seemingly denied nonprofit entities many convenient and liberal rules found in § 141, the 1967 revision declared that § 141 would apply to nonprofit corporations to [a certain extent]. Section 141(h), as revised in 1967, also broadly authorized the nonprofit corporation

3. *See, e.g., Dogsbodies of the DGCL: Revisiting Roles in the Landmark Achievement*, Del. Law., Spring 2008, at 10, 12.

4. Ernest L. Folk, III, The Delaware General Corporation Law: A Commentary and Analysis 66 (1972).

5. 22 Del. Laws ch. 167, § 26 (1901).

6. 35 Del. Laws ch. 85, § 9 (1927).

7. *See* Ernest L. Folk, III, Review of the Delaware Corporation Law 136 n. (1965–1967) ("[T]he redraft makes Sections 212–214 inapplicable to non-stock non-profit corporations; by implication,

to organize and conduct its internal affairs as it saw fit by provisions of its certificate of incorporation.

Inexplicably, the 1969 amendments dropped § 141(h) entirely, presumably on the theory that it was unnecessary, since the 1969 amendment to § 141(a) allowed all corporations to depart from the corporate norm by charter provision. The effect of this deletion was to leave virtually no statutory base for the law relating to nonprofit corporations nor any guidance as to the expedient direction of its internal affairs.

The 1970 amendments reverse the 1969 action by substituting, in new § 141(j), an expanded and improved version of the 1967 provisions regarding nonprofit corporations.[8]

A. Issues of Interpretation

Among the most significant of the pre-amendment problems with the DGCL's treatment of nonstock corporations were the open questions of its applicability. Some provisions of the DGCL expressly addressed nonstock corporations, while others did not. That situation fed practitioners' confusion for two reasons: First, even if a given section arguably should have applied to nonstock corporations, practitioners could not know for certain that it applied—if it contained no express reference to nonstock corporations. Second, because some sections did contain language expressly relating to nonstock corporations, greater doubt was created that sections without such language also applied to nonstock corporations.

Often, the most logical conclusion—that a section referring to "stockholders" but not "members" did not apply to nonstock corporations—was unsatisfactory from a policy perspective. For example, Section 145, which provides a corporation with the power to indemnify and advance legal expenses to its directors, officers, employees, and agents (and sets forth the limitations on that power), contains references to "directors" and "stockholders," but it does not contain references to "members of the governing body" or "members."[9] Before the 2010 amendments, a logical interpretation could have been that nonstock corporations had no power to indemnify or advance legal expenses to the members of their governing bodies, officers, employees, or agents.

Furthermore, the Delaware courts—using standard canons of statutory interpretation—made the applicability issue explicit in specific instances. In 1994, the Delaware Court of Chancery in *Scattered Corp. v. Chicago Stock Exchange, Inc.* refused to "find that the Legislature intended that the term 'stockholder,' as used . . . throughout the DGCL, includes members of nonstock corporations except where otherwise provided."[10] For that reason, the court

they would apply to all stock corporations (profit and non-profit) and (*if such ever existed*) a non-stock corporation for profit. Again . . . , the redraft . . . states rules applicable to all non-stock corporations which will, in practice, *mean only non-profit enterprises*." (emphasis added)).

8. Folk, *supra* note 4, at 66–67 (footnotes omitted).

9. Del. Code Ann. tit. 8, § 145 (2010). All cites to the Delaware Code Annotated are to the Online Delaware Code, http://delcode.delaware.gov/ (last visited Dec. 13, 2010).

10. 671 A.2d 874, 877 (Del. Ch. 1994).

held that Section 220 (regarding demands for corporate books and records) did not apply to nonstock corporations.[11] As the court explained,

> if "stockholder" were intended automatically to include members of nonstock corporations . . . , then all sections of the DGCL that expressly include members of nonstock corporations would become surplusage. It is a fundamental rule of construction that a statute should not be construed in a manner that renders part of it surplusage.[12]

Similarly, the Delaware Supreme Court—when addressing a question of notice in the nonstock context—suggested that Section 222 (referring to "stockholders") would apply only "by analogy."[13] The Delaware Supreme Court also stated that Section 144 (which at the time referred to "shareholders"[14]) was "not, by its terms, directly applicable to a nonstock corporation."[15]

Efforts to address this DGCL-wide issue in specific instances only exacerbated the problem. For example, Section 220 was amended in 1995 to reverse the *Scattered Corp.* holding.[16] Before the 2010 amendments (in which this language was deleted), Section 220 contained language making express Section 220's application to nonstock corporations.[17] But that section-specific fix, by its very nature, suggested that, by not amending the *other* sections of the DGCL, Delaware's General Assembly truly intended that those other sections not apply to nonstock corporations.

This issue of interpretation led to a lack of confidence that many important provisions of the DGCL would apply to nonstock corporations. The 2010 amendments were designed, in large part, to rectify this situation and to make clear which sections of the DGCL applied to nonstock corporations and which did not.

B. Other Issues

The pre-amendment DGCL also contained other traps and gaps that required fixing. For example, the pre-amendment DGCL used several different phrases to refer to nonstock corporations.[18] While these terms were generally similar, argu-

11. *See id.* at 880.
12. *Id.* at 879.
13. Farahpour v. DCX, Inc., 635 A.2d 894, 900 (Del. 1994).
14. After the 2010 amendments, the term "shareholders" was replaced with the term "stockholders" for the sake of consistency and to ensure proper translation. The DGCL now refers only to "stockholders," and the term "shareholders" no longer appears in the DGCL.
15. Oberly v. Kirby, 592 A.2d 445, 467 (Del. 1991) ("8 *Del. C.* § 144 is not, by its terms, directly applicable to a nonstock corporation.").
16. S.B. 175, 138th Gen. Assem. (Del. 1995) ("These amendments to Section 220 are adopted in response to the decision of the Court of Chancery in *Scattered Corp. v. Chicago Stock Exchange, Inc.*, Del. Ch., C.A. No. 13703, Jacobs, V.C. (December 2, 1994) and expand the definitions of 'stockholder' and 'list of stockholders' to include members of nonstock corporations and lists of those members.").
17. Del. Code Ann. tit. 8, § 220 (2009), *amended by* 77 Del. Laws ch. 253, §§ 20–23 (2010).
18. *See, e.g., id.* §§ 102(a)(4) ("corporations which are not to have authority to issue capital stock"), 141(j) (corporations "which [are] not authorized to issue capital stock"), 215(a) ("corporations not authorized to issue stock"), 225(a) ("corporation[s] without capital stock"), 255(b) ("nonstock corporations"), 312(j) ("corporation[s] not for profit and having no capital stock").

ments could have been made that, for example, "nonstock corporations" were not the same as corporations "without capital stock" (which could refer to stock corporations that had not yet issued stock) or corporations "not authorized to issue stock."

Other inconsistencies had to do with basic requirements and terminology regarding members. Pre-amendment, the DGCL did not appear to require expressly that nonstock corporations have members. Subsection 102(a)(4) came the closest, requiring nonstock corporations to provide for the "conditions of membership."[19] But the pre-amendment DGCL provided no consequences for a nonstock corporation that lacked members or conditions of membership.[20] The 2010 amendments addressed these situations by providing nonstock corporations with clear guidance to remedy the defects. Furthermore, the pre-amendment DGCL referred to "memberships" and "membership interests," both in ways that seemed interchangeable and in ways that seemed distinct. The 2010 amendments drew an important distinction between the two terms.

Finally, the pre-amendment DGCL lacked (or appeared to lack) important guidance for nonstock corporations. Before the amendments, nonstock corporations and their advisors were without statutory guidance on record dates;[21] whether members of nonstock corporations could differ by class, type, or voting right;[22] and the differences between nonstock corporations operated for profit and those operated not for profit. The 2010 amendments were intended to address each of these issues as well.

II. The Nonstock Amendments

The 2010 nonstock corporation amendments contained a number of fixes, both substantive and technical. We will attempt to explain the amendments by first addressing the basic principles behind the amendments and then analyzing the amendments section by section. The first section we address is new Section 114, which is the key to the amendments, and then we proceed through the DGCL in order, discussing the changes made in each subchapter.

A. Basic Principles

The guiding principles behind the 2010 nonstock corporation amendments were several: (1) to "codify common sense"; (2) to "touch" as little as possible; and

19. *See also* Oberly v. Howard Hughes Med. Inst., 472 A.2d 366, 392 (Del. Ch. 1984) (suggesting that "the statutes require that a nonstock corporation have 'members' as opposed to shareholders" (citing Del. Code Ann. tit. 8, § 102(a)(4))).

20. *Cf.* Read v. Tidewater Coal Exch., Inc., 116 A. 898, 906 (Del. Ch. 1922) ("[I]f it be true that the conditions of membership were not sufficiently set out in the certificate, that one circumstance will not be allowed to render the assumed corporation a mere nullity.").

21. Pre-amendment Section 215 expressly provided that Section 213 did not apply to nonstock corporations.

22. Some provisions seemed to presume different classes of members, but the portion of pre-amendment subsection 102(a)(4) that provided for classes of stock expressly did not apply to nonstock corporations.

(3) to avoid imposing on existing nonstock corporations any new or additional burdens or obligations.

The nonstock amendments were intended to confirm that nonstocks operate in the way most practitioners have always thought they did[23]—not to effect a change in the way nonstocks operate. When possible, therefore, the amendments retained the result that, by logic or policy, was the most sensible result under the pre-amendment DGCL (notwithstanding the statutory construction issues noted above). With a few minor exceptions, the amendments were intended largely to *clarify and confirm* that the DGCL applies to nonstock corporations in a certain way.

The amendments rewrote as little of the DGCL as possible; existing language was generally left alone. Some changes were necessary, but most of them involved technical changes, such as deleting nonstock-specific language no longer necessary post-amendment,[24] changing phrases to allow[25] or prevent[26] the application of provisions generally applicable to stock corporations, and providing duplicate provisions where necessary.[27]

As a result of these principles, practitioners using the post-amendment DGCL to address stock corporations should notice very little difference from the pre-amendment DGCL. And practitioners using the post-amendment DGCL to address nonstock corporations should be able to employ not only their preexisting knowledge of Delaware nonstock law but also their knowledge of Delaware law regarding stock corporations. That said, most statutory questions involving Delaware nonstock corporations will begin with an analysis of Section 114, the translator provision.

B. Section 114—The Translator Provision

New Section 114 of the DGCL is the key to the nonstock amendments. It provides the method by which much of the DGCL applies to nonstock corporations, it sets forth the basic definitions governing nonstock corporations, and it provides (in effect) a comprehensive nonprofit law for Delaware nonstock corporations. The structure and operation of Section 114 may appear abstruse at first, but basic familiarity and a modicum of practice should make its use both intuitive and simple. We intend the following discussion to provide a helpful guide to the use and analysis of Section 114.

Several different options could have been chosen to address the issues with the pre-amendment DGCL. From one standpoint, the clearest solution might have been to create a completely new nonstock statute, one modeled after the DGCL, with appropriate revisions. But that might have required a third standalone stat-

23. As noted above, however, it is not perfectly clear that practitioners' practical understanding of nonstock law would have passed muster in the courts if challenged. *See, e.g.*, text accompanying *supra* notes 11–17.

24. *See, e.g.*, 77 Del. Laws ch. 253, §§ 29–30 (2010).

25. *See, e.g.*, *id.* §§ 12–14.

26. *See, e.g.*, *id.* § 16.

27. *See, e.g.*, *id.* §§ 3–4.

ute, to deal with nonprofit nonstock corporations, and would have departed from Delaware's historical practice of a single general corporation law. A new subchapter could have been created to cover all necessary nonstock provisions, but that would have been difficult to use and would have provided only a partial solution (as the subchapter would have had to include nearly the entire DGCL). The solution chosen was more efficient: a single new section that creates a nonstock corporation law (and, in effect, a nonprofit nonstock corporation law) largely by translating the current DGCL into nonstock-corporation terms.

Section 114 has four operative provisions. Subsection 114(a) generally provides that—except as set forth in subsections 114(b) or 114(c)—the provisions of the DGCL apply to nonstock corporations. It also sets forth the manner in which the DGCL applies to nonstock corporations by translating the stock-corporation terms in each applicable section into nonstock-corporation terms. Subsections 114(b) and 114(c) contain lists of sections and subchapters of the DGCL that are not translated by subsection 114(a). Through those three subsections, Section 114 creates, in effect, a complete corporation law applicable to nonstock corporations and another one applicable to nonprofit nonstock corporations. Finally, subsection 114(d) sets forth four crucial definitions relating to nonstock corporations: "nonstock corporation," "membership interest," "nonprofit nonstock corporation," and "charitable nonstock corporation." Each of the four subsections is discussed more thoroughly below, beginning with the definitions in subsection 114(d).

1. Subsection 114(d)—Definitions

Subsection 114(d) defines four key terms relating to nonstock corporations: "nonstock corporation," "membership interest," "nonprofit nonstock corporation," and "charitable nonstock corporation."

The first term, "nonstock corporation," is largely a definition of convenience, intended to replace the old phrase "corporation organized under this chapter that is not authorized to issue capital stock." No change in meaning from the pre-amendment DGCL is intended from the variety of phrases that were used to refer to such corporations.[28]

The second term, "membership interest," is more significant, since (as described below) it forms the difference between nonprofit nonstock corporations and all other nonstock corporations.[29] Based originally on the definition of "limited liability company interest" from the Delaware Limited Liability Company Act,[30] the nonstock "membership interest" definition relies on two basic concepts, either of

28. *See supra* note 18 (listing some of the phrases used to refer to nonstock corporations in the pre-amendment DGCL).

29. *See* DEL. CODE ANN. tit. 8, § 114(d)(3) (2010) (defining "nonprofit nonstock corporation").

30. DEL. CODE ANN. tit. 6, § 18-101(8) (2010) (defining the term to mean "a member's share of the profits and losses of a limited liability company and a member's right to receive distributions of the limited liability company's assets").

which (or both of which) may be sufficient: a share in the "profits and losses of a nonstock corporation," and a right to "receive distributions of the nonstock corporation's assets."[31] The definition is also flexible, allowing a nonstock corporation to provide otherwise in its certificate of incorporation.

Regardless of how a specific nonstock corporation's "membership interests" are defined, the definition of "nonprofit nonstock corporation" ensures that no nonstock corporation having membership interests, allowing its members to share in the profits or losses of the corporation, or affording its members the right to receive distributions of the corporation's assets, will be a nonprofit nonstock corporation.[32] As noted below,[33] the consequences of qualifying as a nonprofit nonstock corporation are generally that members hold memberships (not membership interests) that are not personal property, that members may not receive dividends, that the corporation may not sell its memberships, and that the corporation may not repurchase the members' memberships. Therefore, the negative definition of "nonprofit nonstock corporation" relies on the definition of "membership interest" to separate the two major types of nonstock corporations.[34]

The definition of "charitable nonstock corporation" is intended to clarify references to this type of nonstock corporation that existed in the pre-amendment DGCL, prohibiting mergers that would cause the charitable status of such corporations to be lost or impaired.[35] Any potential lack of clarity caused from the omission of phrases such as "religious" or "educational" in the pre-amendment DGCL is resolved by the reference to "any nonprofit nonstock corporation that is exempt from taxation under § 501(c)(3) of the United States Internal Revenue Code."[36]

In the post-amendment DGCL, the sections prohibiting mergers that would cause the charitable status of charitable nonstock corporations to be lost or impaired have been placed consistently throughout the merger provisions and added to related provisions, such as the conversion statute.[37] Furthermore, the new definition also bolsters the post-amendment DGCL's recognition of the Attorney General's traditional oversight role[38] over charitable nonstock corporations. The Attorney General must now be notified of certain significant events involving such corporations, including appointments of custodians or receivers;[39] disso-

31. Del. Code Ann. tit. 8, § 114(d)(2) (2010).
32. *Id.* § 114(d)(3).
33. *See infra* text accompanying notes 60–69 (discussing subsection 114(c)).
34. For one specific example, subsection 114(d)(3) effectively provides that members without the right to receive dividends are forbidden by law from receiving dividends, and vice versa.
35. *See, e.g.*, Del. Code Ann. tit. 8, § 258(d) (2010). The purpose for this language is to protect against the argument that the mere power to merge with a non-charitable entity would cause a charitable nonstock corporation to lose its exempt status. A similar argument was made in *Stevens Bros. Foundation, Inc. v. Commissioner*, 324 F.2d 633, 642–46 (8th Cir. 1963).
36. Del. Code Ann. tit. 8, § 114(d)(1) (2010).
37. *See, e.g.*, *id.* §§ 253(g), 255(g), 256(g), 257(f), 258(d), 263(f), 264(f), 266(j).
38. *See* cases cited at *infra* note 106.
39. Del. Code Ann. tit. 8, § 226(c) (2010).

lutions of certain two-member corporations;[40] and transfers, domestications, or continuances.[41]

2. Subsection 114(a)—Translation

Subsection 114(a) has three important components. Each of these work together, along with subsections 114(b) and 114(c), to form the new nonstock corporation law.

First, subsection 114(a) provides that "the provisions of this chapter shall apply to nonstock corporations in the manner specified in the following paragraphs (a)(1)–(4) of [Section 114]."[42] That is, the default rule for nonstock corporations is that every provision of the DGCL applies. Any confusion that previously existed as to whether, for example, Section 145 applied to nonstock corporations is now dispelled. As a general matter, managers and members of nonstock corporations (and their advisors) can be certain whether a given provision of the DGCL applies to their corporations. No longer can a case like *Scattered*[43] deprive members or managers of such corporations of the benefits of applicable provisions; the DGCL's application to nonstock corporations is mandated by statute.

Second, subsection 114(a) modifies that general rule in two key respects: the DGCL's general application is subject to "subsections (b) and (c) of [Section 114]."[44] As will be explained further below, this exception allows the DGCL to apply to nonstock corporations only as necessary. That is, the exception ensures that only the DGCL's provisions that should apply to nonstock corporations do actually apply.

Third, paragraphs (1) through (4) of subsection 114(a) set forth the actual translations:

> (1) All references to stockholders of the corporation shall be deemed to refer to members of the corporation;
>
> (2) All references to the board of directors of the corporation shall be deemed to refer to the governing body of the corporation;[45]
>
> (3) All references to directors or to members of the board of directors of the corporation shall be deemed to refer to members of the governing body of the corporation; and

40. *Id*. § 273(c).
41. *Id*. § 390(i).
42. *Id*. § 114(a).
43. *See supra* text accompanying notes 10–12.
44. DEL. CODE ANN. tit. 8, § 114(a) (2010).
45. It is important to note that, while a nonstock corporation may have a governing body titled as a board of directors, it is still a "governing body" for purposes of the DGCL. Just as the Spanish *perro* and the English *dog* refer to the same animal, the nonstock "governing body" and the stock "board of directors" each refer to the group of individuals charged with managing the corporation's business and affairs pursuant to subsection 141(a) of the DGCL. *Cf*. DEL. CODE ANN. tit. 8, § 141(j) (2009) (setting forth, even before the 2010 amendments, the equivalence of these two phrases in the different contexts); *infra* note 100.

> (4) All references to stock, capital stock, or shares thereof of a corporation authorized to issue capital stock shall be deemed to refer to memberships of a nonprofit nonstock corporation and to membership interests of any other nonstock corporation.[46]

These translations do the actual work of subsection 114(a). By these translations, the DGCL is both applied to nonstock corporations and applied in a manner that allows nonstock corporations to use the relevant provisions.

The operation of these translator provisions is relatively straightforward. For example, Section 146 provides, in full: "A corporation may agree to submit a matter to a vote of its stockholders whether or not the board of directors determines at any time subsequent to approving such matter that such matter is no longer advisable and recommends that the stockholders reject or vote against the matter."[47] After Section 114's translation, Section 146 applies to nonstock corporations as follows: "A corporation may agree to submit a matter to a vote of its **members** whether or not the **governing body** determines at any time subsequent to approving such matter that such matter is no longer advisable and recommends that the **members** reject or vote against the matter." The words in bold give effect to the translation pursuant to subsections 114(a)(1) and (a)(2). By this method, subsection 114(a) allows the DGCL—even those provisions containing terms referring to stock corporations—to apply to nonstock corporations. The provisions of the DGCL that contain no language referring exclusively to stock corporations (like Section 104) already apply to nonstock corporations by their own terms.[48]

Practitioners should be aware, however, of three specific applications of subsection 114(a) that may not appear clear on the face of the translation rules set forth in the statute: First, each of the four translator guides in subsections 114(a)(1)–(4) uses the terms "references" and "deemed to refer to," which were intended to show that the nonstock translations are concept-based, not merely word-based. Thus, some translations may not be verbatim and may require some rewording.[49] Second, each of the translator guides refers to the specific translated phrase with the limit-

46. Del. Code Ann. tit. 8, § 114(a)(1)–(4) (2010).

47. *Id*. § 146.

48. That is, general terms like "corporation" refer both to stock corporations and to nonstock corporations.

49. For example, subsection 144(a)(2) provides: "The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders." Del. Code Ann. tit. 8, § 144(a)(2) (2010). Because "director" translates to "member of the governing body," the word "director's" is difficult to translate. As translated, this subsection could read: "The material facts as to the **governing body member's** or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the **members** entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the **members**." Similarly, it could also read (with no intended change in meaning): "The material facts as to the officer's relationship or interest **or the relationship or interest of the member of the governing body** and as to the contract or transaction are disclosed or are known to the **members** entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the

ing language "of the corporation" (such as "stockholders of the corporation").[50] Third, some provisions of the DGCL contain language linked to the terms "stock corporation" or "corporation other than a nonstock corporation."[51] In such cases, translation pursuant to subsection 114(a) would work an absurd result and therefore does not operate.[52]

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members." *See id.* § 114(a)(3). Either way, the meaning and application of the translated language should be clear.

Similarly, the first sentence of subsection 223(a)(2) reads:

> Whenever the holders of any class or classes of stock or series thereof are entitled to elect 1 or more directors by the certificate of incorporation, vacancies and newly created directorships of such class or classes or series may be filled by a majority of the directors elected by such class or classes or series thereof then in office, or by a sole remaining director so elected.

Id. § 223(a)(2).
Properly translated, it would read:

> Whenever any **class or classes or series of members** are entitled to elect 1 or more **members of the governing body** by the certificate of incorporation, vacancies and newly created **memberships on the governing body** of such class or classes or series may be filled by a majority of the **members of the governing body** elected by such class or classes or series thereof then in office, or by a sole remaining **member of the governing body** so elected.

These translations are proper because "holders of any . . . stock" is a reference to "stockholders" and would therefore be translated pursuant to subsection 114(a)(1). The word "directorship" would have to be translated under subsection 114(a)(3) to make logical sense; the closest parallel would be "membership on the governing body," though such a term is only derived implicitly, and not explicitly, from subsection 114(a)(3).

50. *Id.* § 114(a)(1)–(4). As an example, one portion of subsection 144(a) refers to a "contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest." *Id.* § 144(a). That would properly translate to refer to a "contract or transaction between a corporation and 1 or more of its **members of the governing body** or officers, or between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its **members of the governing body** or officers, are *directors* or officers, or have a financial interest." The italicized word "directors" in that subsection does not translate because it does not refer to directors "of the corporation," but instead to directors of another corporation.

On the other hand, if a director of a stock corporation were to have engaged in an interested transaction with a nonstock corporation in which he or she was a member of the governing body, the translation would shift, as applicable, to correctly indicate which "corporation" was referred to. In that scenario, subsection 144(a) would be translated to refer to a "contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are **members of the governing body** or officers, or have a financial interest."

51. *See, e.g.*, *id.* §§ 102(b)(2), 102(d), 109(a), 160(a)(1), 220(b), 242(b)(4).

52. *See* Spielberg v. State, 558 A.2d 291, 293 (Del. 1989) ("[A] statute must be viewed as a whole, and literal or perceived interpretations which yield mischievous or absurd results are to be avoided."); *cf.* Coastal Barge Corp. v. Coastal Zone Indus. Control Bd. of Del., 492 A.2d 1242, 1247 (Del. 1985) ("The golden rule of statutory interpretation . . . is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result.").

For example, subsection 160(a)(1) provides that no corporation may:

> Purchase or redeem its own shares of capital stock for cash or other property when the capital of the corporation is impaired or when such purchase or redemption would cause any impairment of the capital of the corporation, except that a corporation other than a nonstock corporation may purchase or redeem out of capital any of its own shares which are entitled upon any distribution of its assets, whether by dividend or in liquidation, to a preference over another class or series

3. Subsection 114(b)—Carve-ins and Carve-outs

Subsection 114(a) provides generally that all provisions of the DGCL apply to nonstock corporations, but it is expressly subject to subsection 114(b). Subsection 114(b) serves as the mechanism by which the post-amendment DGCL molds the shape of the law applicable to nonstock corporations.

Subsection 114(b) splits the provisions of the DGCL into three categories: (1) those provisions made applicable to nonstock corporations by operation of subsection 114(a); (2) those provisions already applicable to nonstock corporations by their own terms; and (3) those provisions not made applicable to nonstock corporations by subsection 114(a).[53]

The first category of provisions was addressed in the previous discussion regarding subsection 114(a).[54]

Provisions in the second category—the provisions listed in subsection 114(b)(1)—are not translated by subsection 114(a) because they already apply specifically to nonstock corporations. Those provisions therefore need no translation (and need no further statutory enactment to make them apply to nonstock corporations). As noted above, one of the guiding principles of the 2010 nonstock amendments was to modify as little of the DGCL as possible.[55] While some of the provisions listed in subsection 114(b)(1) were amended,[56] practitioners generally may approach these provisions as they did before the amendments.

> of its stock, or, if no shares entitled to such a preference are outstanding, any of its own shares, if such shares will be retired upon their acquisition and the capital of the corporation reduced in accordance with §§ 243 and 244 of this title.

DEL. CODE ANN. tit. 8, § 160(a)(1) (2010).

Pursuant to subsection 114(a), this sentence translates as follows (for a nonstock corporation other than a nonprofit nonstock corporation):

> Purchase or redeem its own **membership interests** for cash or other property when the capital of the corporation is impaired or when such purchase or redemption would cause any impairment of the capital of the corporation, except that a corporation other than a nonstock corporation may purchase or redeem out of capital any of its own shares which are entitled upon any distribution of its assets, whether by dividend or in liquidation, to a preference over another class or series of its stock, or, if no shares entitled to such a preference are outstanding, any of its own shares, if such shares will be retired upon their acquisition and the capital of the corporation reduced in accordance with §§ 243 and 244 of this title.

None of the other terms in subsection 160(a)(1) are translated (such as "its own shares" or "its stock") because a "corporation other than a nonstock corporation" does not have membership interests. The limiting phrase "corporation other than a nonstock corporation" was designed to resist the translation imposed by Section 114. To override that intentional limitation would violate the nonstock amendments' policy of "codifying common sense" (*see* text accompanying *supra* note 23). The post-amendment DGCL is intended to apply to nonstock corporations in a common-sense manner, not in a way that would be unexpected, absurd, or illogical.

53. DEL. CODE ANN. tit. 8, 114(b) (2010). It should be noted that some of the sections listed in subsection 114(b)(2), although they are not translated by subsection 114(a), may nonetheless be made applicable to nonstock corporations by other provisions in the DGCL. *See, e.g.*, *id.* §§ 215(a), 255(e)–(f), 276. For example, while Section 211 is listed in subsection 114(b)(2), certain provisions of Section 211 apply to nonstock corporations, as translated by subsection 215(a). *See id.* §§ 114(b)(2), 215(a).

54. *See* text accompanying *supra* notes 42–52.

55. *See* text accompanying *supra* notes 24–27.

56. *See, e.g.*, DEL. CODE ANN. tit. 8, § 215(f) (2010) (as amended by 77 Del. Laws ch. 253, § 19 (2010)).

Similarly, provisions in the third category—the provisions listed in subsections 114(b)(2)–(3)—should also be treated as they were before the amendments: generally not applicable to nonstock corporations.[57] Subsection 114(b)(3) carves out from the translator provision in subsection 114(a) two subchapters of the DGCL, Subchapter XIV (dealing with close corporations) and Subchapter XV (dealing with foreign corporations). The general intent is that those subchapters would not apply to nonstock corporations, and subsection 114(b)(3) makes that clear. Subsection 114(b)(2) lists the individual provisions of the DGCL that do not generally apply to nonstock corporations. Any provision listed in subsection 114(b)(2) does not apply to nonstock corporations, unless made applicable somewhere else in the DGCL (such as by subsection 215(a), for example).

As a general matter, all provisions of the DGCL presumptively apply to nonstock corporations. Practically speaking, the law governing nonstock corporations is made up of the provisions listed in subsection 114(b)(1) and the provisions *not* listed in subsections 114(b)(2) and 114(b)(3).[58] Use of this structure should become simple after some practice, but statutory analysis for nonstock corporations should generally take the following path:

- Is the provision listed in subsection 114(b)(1)?
  - If yes, the provision applies by its terms.
  - If no, is the provision listed in subsections 114(b)(2) or 114(b)(3)?
    - If no, does the provision contain any language specific to stock corporations?
      - If yes, the provision applies as translated by subsection 114(a) (if translation is required).
      - If no, the provision applies by its terms.
    - If yes, does another provision in the DGCL render the provision applicable and/or provide a translation mechanism?
      - If yes, the provision applies as directed by the other provision.
      - If no, the provision is not translated and does not apply.

Following that process should make it easy to determine whether a given statute applies to nonstock corporations and, if it does apply, how it applies.[59]

57. Again, some of the sections listed in subsection 114(b)(2) may be made applicable to nonstock corporations by other provisions in the DGCL. *See supra* note 53.

58. Of course, all provisions referring generically to "corporations," without any language specific to stock corporations (such as Section 104), also apply to nonstock corporations. *See supra* note 48. It should also be noted that some of the sections listed in subsection 114(b)(2), although they are not translated by subsection 114(a), may nonetheless be made applicable to nonstock corporations by other provisions in the DGCL. *See supra* note 53.

59. A few examples may be instructive. Section 215 is listed in subsection 114(b)(1); it therefore applies to nonstock corporations by its terms, without translation. Section 110 is not listed in subsections 114(b)(1), (2), or (3), and it contains language specific to stock corporations ("board of directors"); it therefore applies to nonstock corporations as translated by subsection 114(a). Section 106 is not listed in subsections 114(b)(1), (2), or (3), and it does not contain language specific to stock corporations; it therefore applies to nonstock corporations by its terms. Section 211 is listed in subsection 114(b)(2), but subsection 215(a) renders subsection 211(a) applicable to nonstock corporations;

4. Subsection 114(c)—Nonprofit Nonstock Corporations

Subsection 114(c), which applies only to nonprofit nonstock corporations,[60] operates much in the way that subsection 114(b) does. It serves to create, by translation and specific exceptions, a modified subset of the DGCL that applies only to nonprofit nonstock corporations.[61]

Delaware's version of a nonprofit corporation statute is effectively created by two principal mechanisms: (1) subsection 114(a)(4) distinguishes between memberships in nonprofit nonstock corporations and membership interests in all other nonstock corporations, and (2) subsection 114(c) acts, on top of subsection 114(b), to restrict the application of certain provisions of the DGCL to nonprofit nonstock corporations.

First, subsection 114(a)(4) makes a crucial distinction between the two major types of nonstock corporations—members of nonprofit nonstock corporations have only memberships in their corporations, while members of all other nonstock corporations own membership interests in their corporations.[62] This distinction is important because the DGCL provides that *membership interests* are personal property,[63] while *memberships* in nonprofit nonstock corporations are not personal property.[64] The distinction is also important because only *membership interests* represent a member's share of the profits and losses of a nonstock corporation, and only *membership interests* allow a member to receive distributions of the nonstock corporation's assets.[65]

This distinction becomes clear when a provision of the DGCL is translated. For example, subsection 263(b)(3) of the DGCL, addressing mergers of Delaware corporations and partnerships, provides:

> The agreement shall state: . . . the manner, if any, of converting the shares of stock of each such corporation and the partnership interests of each such partnership into shares, partnership interests or other securities of the entity surviving or resulting from such merger or consolidation or of cancelling some or all of such shares or interests, and if any shares of any such corporation or any partnership interests of any such partnership are not to remain outstanding, to be converted solely into shares, partnership interests or other securities of the entity surviving or resulting from such

subsection 211(a) therefore applies to nonstock corporations as translated by subsection 215(a). Section 167 is listed in subsection 114(b)(2), and no other provision in the DGCL renders it applicable to nonstock corporations; it therefore does not apply to nonstock corporations.

60. Such corporations are defined in DEL. CODE ANN. tit. 8, § 114(d)(3) (2010).

61. *See id.* § 114(c).

62. *See id.* § 114(a)(4).

63. *Id.* § 159 (by translation under subsection 114(a)).

64. That is because subsection 114(c) provides that Section 159 does not apply to nonprofit nonstock corporations. *Id.* § 114(c)(3). Because memberships in nonprofit nonstock corporations are not personal property, they may not be transferred like personal property. Nevertheless, conditions of membership could be drafted to address this issue. For example, a member could be defined as "Acme Corporation, or its successor (whether by merger, consolidation, acquisition of all or substantially all of its assets, or otherwise)" or as "John Smith or, upon his death, any of his living heirs who, upon receipt of notice, indicate in writing their willingness to become a member within 30 days of such notice."

65. *Id.* § 114(d)(2).

> merger or consolidation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such shares or partnership interests are to receive in exchange for, or upon conversion of such shares or partnership interests and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of shares, partnership interests or other securities of the entity surviving or resulting from such merger or consolidation . . . .[66]

When translated for a nonprofit nonstock corporation, the same provision would read:

> The agreement shall state: . . . the manner, if any, of converting the **memberships** of each such corporation and the partnership interests of each such partnership into **memberships**, partnership interests or other securities of the entity surviving or resulting from such merger or consolidation or of cancelling some or all of such **memberships** or interests, and if any **memberships** of any such corporation or any partnership interests of any such partnership are not to remain outstanding, to be converted solely into **memberships**, partnership interests or other securities of the entity surviving or resulting from such merger or consolidation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such **memberships** or partnership interests are to receive in exchange for, or upon conversion of such **memberships** or partnership interests and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of **memberships**, partnership interests or other securities of the entity surviving or resulting from such merger or consolidation . . . .

On the other hand, when translated for any other nonstock corporation, the provision would read as follows:

> The agreement shall state: . . . the manner, if any, of converting the **membership interests** of each such corporation and the partnership interests of each such partnership into **membership interests**, partnership interests or other securities of the entity surviving or resulting from such merger or consolidation or of cancelling some or all of such **membership interests** or [partnership] interests, and if any **membership interests** of any such corporation or any partnership interests of any such partnership are not to remain outstanding, to be converted solely into **membership interests**, partnership interests or other securities of the entity surviving or resulting from such merger or consolidation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such **membership interests** or partnership interests are to receive in exchange for, or upon conversion of such **membership interests** or partnership interests and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of **membership interests**, partnership interests or other securities of the entity surviving or resulting from such merger or consolidation . . . .

Second, subsection 114(c) itself creates a distinction for nonprofit nonstock corporations. Its method of operation is first to exclude from application all

66. *Id.* § 263(b)(3).

provisions of the DGCL that do not apply to any nonstock corporation. Thus, as provided in subsection 114(c)(1) (which adopts the carve-outs listed in subsection 114(b)), nonprofit nonstock corporations are not subject to the DGCL provisions that do not apply to any other nonstock corporation. Subsections 114(c)(2) and (c)(3) then exclude other specified provisions from applying to nonprofit nonstock corporations. Members of nonprofit nonstock corporations therefore are not entitled to seek appraisal,[67] and nonprofit nonstock corporations are not authorized to make distributions to their members[68] or to purchase or redeem memberships in the corporation.[69]

C. Summary of the Nonstock Amendments to the DGCL

Section 114 provides the mechanism by which most of the DGCL is applied to nonstock corporations in an as-translated fashion, but the 2010 amendments also expanded certain powers of nonstock corporations and clarified some of the substantive law applicable to them. Those amendments are described in detail below.

1. Subchapter I—Formation

The nonstock amendments wrought significant changes to Subchapter I of the DGCL, particularly in the addition of new Section 114.[70] Subsection 102(a)(4) was also amended to provide a number of enabling provisions.[71] Other changes in Subchapter I were designed to ensure that Section 114's translator provision would function as intended, and the balance of Subchapter I was generally made applicable to nonstock corporations.[72]

a. Conditions and Criteria of Membership

Some of the more significant amendments to subsection 102(a)(4) relate to the concept—unique to nonstock corporations under the DGCL—of conditions of membership. Unlike stock corporations, in which the owners are identified through their ownership of shares (which are personal property representing undivided interests in the corporation's assets), nonstock corporations have traditionally been required to identify their members through "conditions of membership." Before the 2010 amendments, subsection 102(a)(4) required nonstock

67. *Id.* § 114(c)(2).
68. *Id.* § 114(c)(3).
69. *Id.*
70. *See supra* Part II.B.
71. Section 102 of the DGCL generally deals with organizational matters that are required to be included in the certificate of incorporation. But since subsection 102(a)(4) contained crucial provisions regarding the members of nonstock corporations, the 2010 amendments used the same subsection to provide for a number of related provisions even though those provisions might logically have been located elsewhere had the 2010 amendments been written on a blank slate.
72. *But see* Del. Code Ann. tit. 8, § 114(b)(1), (c)(2) (2010) (carving out a small number of provisions in Subchapter I).

corporations to state their "conditions of membership" in their certificates of incorporation or to provide in their certificates that the conditions "shall be stated in the bylaws."[73] This requirement was amended and other enabling provisions relating to membership were also added to subsection 102(a)(4).

First, subsection 102(a)(4) no longer refers only to "conditions of membership." Nonstock corporations may now state their conditions of membership "or other criteria for identifying members."[74] This expansion in terms clarifies the flexibility provided to nonstock corporations with regard to identifying their members. The prior "conditions of membership" language seemed to contemplate civic associations and other nonprofits with membership conditionally defined by location ("members shall be all residents of Normandy Manor"), affiliation ("members shall be all Wilmington residents interested in the care and upkeep of Rockford Park"),[75] or identification ("members shall be the members of the Board of Directors"). The new "criteria" language clarifies that other practices of identifying members, such as in a document similar to a stock register, are also acceptable.

Second, subsection 102(a)(4) was amended to make clear that these conditions or criteria may be stated "in the certificate of incorporation or the bylaws."[76] This is an expansion from the prior law, which required that, if the conditions were stated in the bylaws, the certificate of incorporation had to so provide. In recognition of the fact that many nonstock corporations had failed to so provide, the 2010 amendments provided this extra flexibility.

Third, the 2010 amendments made a further change to address both a minor uncertainty under the prior law and rampant failure to follow that law. Under the pre-amendment DGCL, it was not expressly required that a nonstock corporation have members, although that was largely presumed.[77] Regardless, many nonstock corporations failed to provide, in either their certificates or their bylaws, any conditions of membership. Whether this situation was due to a failure to understand that even nonprofit nonstock corporations needed members, or a failure to notice that such a crucial requirement was tucked into the last two sentences of an otherwise inapplicable subsection of the DGCL, the 2010 amendments were intended both to clarify the law and to protect against any negative effects of that clarification.[78] After the 2010 amendments, all nonstock corporations must have

73. Del. Code Ann. tit. 8, § 102(a)(4) (2009), *amended by* 75 Del. Laws ch. 253, § 1 (2010). The other requirement in old subsection 102(a)(4)—to provide in the certificate that the corporation is not authorized to issue capital stock—remains, and was not affected by the 2010 amendments.

74. Del. Code Ann. tit. 8, § 102(a)(4) (2010).

75. *Cf.* Durney v. St. Francis Hosp., Inc., 83 A.2d 753, 755 (Del. Super. Ct. 1951) (describing the following conditions of membership: "interest and zeal in the furtherance of the charitable work for which this corporation is organized and particularly active interest in the construction and maintenance of said Hospital" (internal quotation marks omitted)).

76. Del. Code Ann. tit. 8, § 102(a)(4) (2010).

77. *See, e.g.*, Oberly v. Howard Hughes Med. Inst., 472 A.2d 366, 392 (Del. Ch. 1984) (suggesting that "the statutes require that a nonstock corporation have 'members' as opposed to shareholders" (citing Del. Code Ann. tit. 8, § 102(a)(4))).

78. The 2010 amendments recognized the importance of providing for members to which the corporation is accountable or for whose benefit the corporation operates, but they acknowledged

members, but the failure to have members will not affect otherwise valid corporate acts or work a forfeiture or dissolution of the corporation.[79]

While this may seem like a mere technical fix designed to remedy isolated and innocent statutory violations, it has several important implications. First, although the statutory violation likely arose, in many cases, from an initial oversight, it nevertheless could have been significant, calling into question the validity of almost any corporate action.[80] Before the 2010 amendments, if a nonstock corporation's certificate of incorporation had been silent regarding the conditions of membership, the corporation technically would have had no members, even if the bylaws expressly identified the members or the criteria for membership. Many of those corporations, though, undoubtedly conducted meetings of members in which the governing body was purportedly elected. Except in the case of holdovers, the members of the governing body so "elected" would not have validly been in office and would arguably have had no clear legal authority to take action on behalf of the corporation. Moreover, because changes to the conditions or criteria of membership can operate as de facto restrictions on transfer and ownership,[81] the amendments to subsection 102(a)(4) require nonstock corporations to give greater thought to the delicate balance between the certificate of incorporation and bylaws, and the provisions regulating amendments to those instruments, in identifying its members.[82]

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the practical reality that the organizational documents of many small nonstock corporations (such as homeowners' associations and local nonprofit organizations) may not have set forth their conditions of membership in strict compliance with the law and may therefore have been operating without members. The 2010 amendments therefore clarified that the actions of these corporations will not be invalidated on that basis.

79. Del. Code Ann. tit. 8, § 102(a)(4) (2010). Among other things, this language would allow the governing body to amend the certificate of incorporation or bylaws of a nonstock corporation that, for whatever reason, has lost its last remaining member. Unlike stock corporations, in which the stock is still outstanding even if a stockholder dies, the membership conditions of nonstock corporations can result in a failure to have members. For example, a nonstock corporation could identify its members as "all residents of the building located at 1185 Commonwealth Avenue." If the building somehow became uninhabited, the corporation would not dissolve, and the governing body of that corporation could take further steps as necessary.

80. *Cf.* Read v. Tidewater Coal Exch., Inc., 116 A. 898, 906 (Del. Ch. 1922) ("[T]he corporate existence of this corporation cannot be successfully questioned in this proceeding, because of an omission to set out in more detail the conditions of membership therein, for the reason, as above stated, that it undoubtedly has at the least a de facto existence.").

81. *See infra* Part II.C.6.

82. As described in greater detail below, as is the case with stock corporations, the bylaws generally may be amended by the members of a nonstock corporation or by the governing body, but, unlike for stock corporations, a nonstock corporation's certificate of incorporation may be amended solely by its governing body, without a further vote of members unless the certificate expressly provides otherwise. Del. Code Ann. tit. 8, § 242(b)(3) (2010). If the certificate of incorporation and the bylaws conflict, the provisions of the certificate of incorporation will control. *Id.* § 109(b) ("The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."). Thus, whether a nonstock corporation elects to set forth its conditions or criteria of membership either in the certificate of incorporation or in the bylaws, it should also consider the need to impose limitations on the power of the governing body or the members to amend those conditions and should understand that the manner in which those

Finally, and largely for the reasons just noted, the 2010 amendments introduced a "gap filler" in subsection 102(a)(4) ensuring that nonstock corporations failing to include conditions of membership in their certificate of incorporation or the bylaws will nonetheless have members. In those cases, the members will be "deemed to be those entitled to vote for the election of the members of the governing body pursuant to the certificate of incorporation or bylaws of such corporation or otherwise."[83] The "otherwise" language was designed to assist, for example, a homeowners' association that failed to include conditions of membership in its organizational documents but has—by custom or practice, or through some other authority, such as the terms of a deed—extended to each resident in the neighborhood the right to vote in elections of the corporation's governing body. Under the gap filler, those residents are now deemed to be the corporation's members. That gap filler remains operative only until such time as the corporation amends its certificate of incorporation or bylaws to provide the conditions or criteria of membership in compliance with subsection 102(a)(4).[84]

b. Classes and Voting Rights

The scant language in the pre-amendment subsection 102(a)(4) relating to nonstock corporations stood in stark contrast to the detailed provisions of that subsection relating to stock corporations and the creation of multiple classes of stock with various rights, powers, and preferences. Thus, while a nonstock corporation had the authority to state its "conditions of membership" before the 2010 amendments, it did not have express statutory authority to provide for multiple classes of members or membership interests,[85] nor the express statutory authority to ascribe different rights and powers to those members or holders of membership interests.[86] The 2010 amendments address these deficiencies.

The amendments to subsection 102(a)(4) make clear that nonstock corporations may create different classes of members.[87] As part of the flexibility built into

limitations may be imposed is different than it would be in the case of a stock corporation. Without the proper limitation on amendments to the conditions or criteria of membership, members of a nonstock corporation subject themselves to changes to the terms of their membership interests, or to being divested of their membership, at the sole discretion of the governing body. *But cf*. Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) (stating that "inequitable action does not become permissible simply because it is legally possible").

83. DEL. CODE ANN. tit. 8, § 102(a)(4) (2010).

84. *Id*.

85. That said, the pre-amendment DGCL did include some language suggesting that nonstock corporations could provide for different classes of members and membership interests. *See, e.g.*, DEL. CODE ANN. tit. 8, § 242(b)(3) (2009) (referring to "the members or . . . any specified class of members"); *id*. § 257(b) (referring to the conversion of shares in a merger into "voting or nonvoting regular, life, general, special or other type of membership" in a nonstock corporation).

86. *See id*. § 102(a)(4).

87. DEL. CODE ANN. tit. 8, § 102(a)(4) (2010) ("Nonstock corporations may provide for classes or groups of members having relative rights, powers and duties, and may make provision for the future creation of additional classes or groups of members having such relative rights, powers and duties as may from time to time be established, including rights, powers and duties senior to existing classes and groups of members.").

the 2010 amendments, provisions creating classes of members may be set forth in the corporation's certificate or its bylaws.[88] A nonstock corporation may also, unless otherwise provided in the DGCL, provide in its certificate of incorporation or bylaws that:

> [A]ny member or class or group of members shall have full, limited, or no voting rights or powers, including that any member or class or group of members shall have the right to vote on a specified transaction even if that member or class or group of members does not have the right to vote for the election of the members of the governing body of the corporation.[89]

Voting by members of a nonstock corporation may also, as set forth in the corporation's certificate or bylaws, be on "a per capita, number, financial interest, class, group, or any other basis set forth."[90] Again, the 2010 amendments were intended to provide maximum flexibility and expressly contemplated, among other things, non-voting members. For example, a museum may have voting members who elect the members of the governing body (indeed, they may be the members of the governing body themselves), and it may have non-voting members who pay annual membership fees but do not get to vote on any corporate matter. Also, and particularly useful in the for-profit context, these voting provisions were designed to be as flexible as, and were based on, Delaware's Limited Liability Company Act.[91]

c. Optional Provisions in the Certificate of Incorporation

The 2010 amendments also made some changes to subsection 102(b) of the DGCL, which sets forth the various provisions that a corporation may include in its certificate of incorporation. With one exception, however, those changes were largely technical changes intended to ensure the application of those provisions either by their own terms (subsection 102(b)(1)) or by application of Section 114 (subsections 102(b)(6) and (b)(7)).

The one exception is the addition of specific language relating to nonstock corporations in the "compromise" provision included in subsection 102(b)(2). Before the 2010 amendments, subsection 102(b)(2) provided that a corporation could include in its certificate of incorporation a provision specifying that any creditor or stockholder of the corporation, or its receiver, may apply to the Delaware Court of Chancery for an order directing a meeting of the creditors of the corporation to

88. *Id*.

89. *Id*. The right to vote in the election of members of the governing body is the default voting right, and members with that right have the right to vote on all major transactions. *See, e.g.*, *id*. §§ 255(c), 271(a). This language in subsection 102(a)(4) allows a nonstock corporation to give voting rights to other members.

90. *Id*. § 102(a)(4).

91. *Compare, e.g.*, *id*. ("Voting by members of a nonstock corporation may be on a per capita, number, financial interest, class, group, or any other basis set forth."), *with* DEL. CODE ANN. tit. 6, § 18-302(b) (2010) ("Voting by members may be on a per capita, number, financial interest, class, group or any other basis.").

consider any proposed compromise between such creditors and the corporation, so long as it included that provision, *in haec verba*, in its certificate of incorporation.[92] Because one clear mandate of subsection 102(b)(2) was that the compromise provision had to be included *in haec verba*, the provision could not have been available to nonstock corporations. That is, a nonstock corporation including the language would have imported the inapplicable term "stockholder," while a nonstock corporation changing the term "stockholder" to "member" would have violated the statutory requirement of *in haec verba*.[93] To eliminate such confusion in the future, the 2010 amendments provided nonstock corporations with their own verbiage.[94]

d. Bylaws

In the 2010 amendments, subsection 109(a) was reworded for clarity, but no substantive changes were intended. The application of Section 114 to subsection 109(b),[95] however, addresses a minor lack of clarity in the pre-amendment DGCL. That is, the pre-amendment 109(a) expressly included language regarding nonstock corporations.[96] But the pre-amendment 109(b) did not, arguably rendering subsection 109(b) inapplicable to nonstock corporations.[97] Regardless of the latent confusion in the pre-amendment law, the 2010 amendments made clear that Section 109 applies in its entirety to nonstock corporations.

e. Jurisdiction

No changes were made to Section 111 of the DGCL in the 2010 amendments. But two subsections (111(a)(2) and (a)(3)) were carved out of the law applicable to nonprofit nonstock corporations[98] because such corporations may not sell their memberships ((a)(2)) or impose written transfer restrictions on their memberships under Section 202 of the DGCL ((a)(3)).

2. Subchapter II—Powers

No changes were made to any provisions in Subchapter II of the DGCL, which is made applicable through Section 114's translator provision to both for-profit and nonprofit nonstock corporations. But two specific effects of the 2010 amendments are worth noting.

First, the 2010 amendments clarified that certain of the specific powers listed in Section 122 using stock-corporation terms are available to nonstock cor-

92. *See* DEL. CODE ANN. tit. 8, § 102(b)(2) (2009), *amended by* 77 Del. Laws ch. 253, §§ 3–4 (2010).

93. Literally, "in these words," but generally read to mean "in these exact words."

94. *See* DEL. CODE ANN. tit. 8, § 102(b)(2)(ii) (2010).

95. *Cf. id.* § 114(b)(1) (carving out subsection 109(a), but not subsection 109(b), from the translation provision in subsection 114(a)).

96. DEL. CODE ANN. tit. 8, § 109(a) (2009), *amended by* 77 Del. Laws ch. 253, § 8 (2010).

97. *Id.* § 109(b); *see also* text accompanying *supra* notes 9–15.

98. DEL. CODE ANN. tit. 8, § 114(c)(2) (2010).

porations. Among these are important specific powers, such as the power to "[t]ransact any lawful business" in aid of governmental authority[99] (referring specifically to a "board of directors"[100]), the power to make intra-enterprise guarantees (referring to "stock"),[101] and the power to renounce certain classes or categories of business interests (referring to a "board of directors," "directors," and "stockholders").[102] The 2010 amendments also clarified—to the extent that it required clarification[103]—that Section 121 applies to nonstock corporations. One consequence of this aspect of the 2010 amendments is that, regarding the empowering provisions of the DGCL that apply to nonstock corporations—either by their express terms or through operation of Section 114—it is clear that nonstock corporations are not only entitled to exercise those powers, but are also subject to the restrictions.[104]

Second, the 2010 amendments clarified that Section 124 applies to nonstock corporations. Subsection 124(1) refers to a specific category of derivative suits.[105] It should be noted, however, that—even though Section 124 applies to nonprofit nonstock corporations—the 2010 amendments did not affirmatively grant to members of nonprofit or charitable nonstock corporations any right to sue derivatively.[106] Such a right is an equitable right granted by the courts,[107] and Section 114's application to Section 124 should not be considered an indication of whether members of nonprofit nonstock corporations have such a right.

3. Subchapter III—Registered Office and Registered Agent

No changes were made to Subchapter III of the DGCL in the 2010 amendments, and all provisions of Subchapter III apply to all nonstock corporations.

99. *Id.* § 122(12).

100. As noted at *supra* note 45, a nonstock corporation—regardless of what term it uses (board of directors, board of managers, board of trustees, management committee, etc.)—technically does not have a board of directors; it has a governing body. Before the 2010 amendments, as a pure matter of statutory interpretation, the specific power set forth in subsection 122(12) arguably referred only to stock corporations.

101. DEL. CODE ANN. tit. 8, § 122(13) (2010).

102. *Id.* § 122(17).

103. As a matter of statutory interpretation, *see* text accompanying *supra* notes 9–15, it could reasonably be argued that Section 121 (referring to "directors and stockholders") did not apply to nonstock corporations before the 2010 amendments. We believe that the 2010 amendments mooted any such argument and served to confirm, if necessary, that Section 121 applies fully to all nonstock corporations.

104. Subsection 121(b) provides that every corporation "shall be governed by the provisions and be subject to the restrictions and liabilities contained in this chapter." DEL. CODE ANN. tit. 8, § 121(b) (2010).

105. *See id.* § 124(1) (permitting derivative suits to enjoin ultra vires acts).

106. Certain cases suggest that the Attorney General's power to bring suit on behalf of a charitable corporation is exclusive. *See* Wier v. Howard Hughes Med. Inst., 407 A.2d 1051, 1057 (Del. Ch. 1979); *see also* Oberly v. Kirby, 592 A.2d 445, 468 (Del. 1991); Wier v. Howard Hughes Med. Inst., 404 A.2d 140, 145 (Del. Ch. 1979); Pollock v. Peterson, 271 A.2d 45, 49 (Del. Ch. 1970).

107. *See* Schoon v. Smith, 953 A.2d 196, 204 (Del. 2008) (noting that Section 327 is a *restriction* on this right—not an affirmative grant of the right).

4. Subchapter IV—Directors and Officers

The 2010 amendments made only technical changes to Subchapter IV of the DGCL, but several aspects and consequences of the 2010 amendments are worth noting. With two exceptions noted below, all the provisions in Subchapter IV are made applicable to nonstock corporations by Section 114.

At the outset, it should be made clear that the 2010 amendments were intended to have no effect on the fiduciary duties of members of nonstock corporations' governing bodies. Nor should the 2010 amendments be interpreted to change, in any way, the nature of fiduciary duties owed by members of the governing bodies of nonstock corporations—either of for-profit nonstock corporations or nonprofit nonstock corporations.[108]

It is important that Section 141 of the DGCL—the provision that grants the board of directors the authority to manage the business and affairs of the corporation and deals broadly with the composition, structure, and functioning of the board—is not translated by Section 114. Subsection 141(j) already contained provisions applicable to nonstock corporations (as well as its own "translator" provision), and it had been in place for many years.[109] The 2010 amendments therefore carved Section 141 out of Section 114's translator,[110] and made only minor changes to subsections 141(j) and (k). Subsection 141(j), which has long provided nonstock corporations with wide-ranging flexibility in arranging the management of their business and affairs, was amended solely to make its internal translator mechanism consistent with that in subsection 114(a).[111] Technical amendments to subsection 141(k) were also made for consistency.[112]

No specific changes were made to Section 142, which deals with the selection, duties, and terms of officers, but the 2010 amendments clarified that Section 142 applies to nonstock corporations.[113] Notably, by virtue of such application, nonstock corporations must have an officer charged with the duty of recording the proceedings of all meetings of the corporation's members.[114]

108. *See Oberly*, 592 A.2d at 461–62 (holding that corporate fiduciary principles, not trust fiduciary principles, apply to nonprofit and charitable nonstock corporations). *But cf. id.* at 458 (noting that the duties of members of governing bodies of charitable nonstock corporations run to the corporations' beneficiaries, not to their members).

109. *See* text accompanying *supra* note 8.

110. Del. Code Ann. tit. 8, § 114(b)(1) (2010).

111. One effect of this change was to clarify that the provisions of subsection 141(d) (relating to provisions of the certificate of incorporation conferring upon separate classes or series of stock the power to elect one or more directors) and subsection 141(k) (relating to the removal of directors by holders of a majority of the shares then entitled to vote at an election of directors, or by the holders of any class or series of stock) apply to nonstock corporations in the manner provided by the translator in subsection 141(j).

112. Also, the unduly restrictive word "nonprofit" in the title of Section 141 was changed to "nonstock." 77 Del. Laws ch. 253, § 10 (2010).

113. *See* Del. Code Ann. tit. 8, § 114 (2010).

114. *Id.* § 142(a). Of course, since nonstock corporations need not hold annual member meetings, this should not have the practical effect of imposing an obligation that did not exist heretofore. *See also id.* § 142(d) ("A failure to elect officers shall not dissolve or otherwise affect the corporation.").

The 2010 amendments effected minor technical changes to Section 144 of the DGCL to ensure the proper application of Section 114's translator mechanism. Section 144 provides three specific procedures by which certain "interested" contracts or transactions involving the corporation and its officers and directors may be insulated against a finding that they are void or voidable.[115] Generally speaking, those procedures include approval of the contract or transaction by a majority of the disinterested directors (subsection 144(a)(1)), approval of the contract or transaction by a majority of the disinterested stockholders (subsection 144(a)(2)),[116] or a judicial finding that the contract is fair to the corporation at the time it is authorized (subsection 144(a)(3)).

The 2010 amendments also made clear that the "safe harbor" procedure in subsection 144(a)(2) does not apply to nonprofit nonstock corporations.[117] That is, interested transactions involving nonprofit nonstock corporations may not be placed in Section 144's safe harbor by a majority vote of the corporations' members. This aspect of the 2010 amendments comports with the Delaware Supreme Court's decision in *Oberly v. Kirby*, in which the court held that, while Section 144's principles could generally be applied to a charitable nonstock corporation, subsection 144(a)(2) could not because such a corporation is not managed for the benefit of its members.[118]

5. Subchapter V—Stock and Dividends

Only a few changes were made to Subchapter V of the DCGL in the 2010 amendments. Furthermore, no provision in Subchapter V applies to any nonprofit nonstock corporation, and fewer than half apply to for-profit nonstock corporations.[119]

The key defining feature of all nonstock corporations, and the one that distinguishes those corporations from their stock counterparts, is that they are not authorized to issue capital stock. For this reason, many of the provisions of Sub-

115. *See generally* Blake Rohrbacher, John Mark Zeberkiewicz & Thomas A. Uebler, *Finding Safe Harbor: Clarifying the Limited Application of Section 144*, 33 DEL. J. CORP. L. 719 (2008) (discussing Section 144, its history, and its application).

116. While Section 144 itself contains no requirement that the stockholders be disinterested, *see id*. at 731–32, it has been so interpreted, *see id*. at 741 n.101; Gantler v. Stephens, 965 A.2d 695, 713 n.54 (Del. 2009) (referring to the Delaware Supreme Court's "jurisprudence governing the effect of an approving vote of disinterested shareholders under 8 *Del. C*. § 144").

117. DEL. CODE ANN. tit. 8, § 114(c)(2) (2010).

118. 592 A.2d 445, 467 (Del. 1991) ("Since a for-profit corporation is to be managed for the benefit of its stockholders, the statute sets out the conditions under which stockholders may assert that the directors have acted in their own interests rather those of the stockholders. The Foundation, however, must be managed on behalf of its beneficiaries, who are represented by the Attorney General. Since the statute does not address the roles of the beneficiaries or the Attorney General in challenging the conduct of the directors of charitable corporations, we cannot apply it directly to the Foundation."). Furthermore, since stockholders (and members of a for-profit nonstock corporation) have a financial interest in the corporation, their "skin in the game" should allow them, as a policy matter, to approve interested transactions. The members of nonprofit nonstock corporations have no such "skin in the game."

119. DEL. CODE ANN. tit. 8, § 114(b)(2), (c)(3) (2010).

chapter V relating to the creation and issuance of capital stock do not—by logic but also by definition—apply to nonstock corporations. That said, although it was often presumed that nonstock corporations would be organized as not-for-profit corporations,[120] no provision in the DGCL compelled such a conclusion. As a result, many for-profit corporations took advantage of the nonstock structure.[121] That the DGCL, as initially drafted, did not contemplate for-profit nonstock corporations is evident in the pre-amendment gaps in the various provisions of Subchapter V.[122]

The 2010 amendments sought to bring clarity to this entire area of the law and, in so doing, gave the DGCL an operative framework to distinguish between for-profit and nonprofit corporations and to specify the powers and limitations of each. In short, the 2010 amendments applied the relevant provisions of Subchapter V—provisions for dealing in the corporation's membership interests and declaring and paying dividends thereon—to for-profit nonstock corporations, while providing that Subchapter V does not apply at all to nonprofit nonstock corporations (i.e., those corporations that, by definition, do not have membership interests in which they may deal or on which they may declare and pay dividends). To implement this structure, the 2010 amendments effected a few amendments to the relevant provisions of Subchapter V.

Normally, when a corporation seeks to determine whether it has funds lawfully available to repurchase its shares or to declare or pay dividends, it must determine the amount of the corporation's "capital," which for stock corporations is derived by reference to its shares of capital stock. Since nonstock corporations—by definition—are not authorized to issue capital stock,[123] this determination posed somewhat of a problem. The 2010 amendments added a sentence to Section 154 to clarify that the "capital of any nonstock corporation shall be deemed to be zero."[124]

The amendment to Section 154 allowed a complementary amendment to Section 160, to permit for-profit nonstock corporations to purchase or redeem their membership interests for cash.[125] Subsection 160(a)(3) was also amended to address a technical issue regarding the redemption of membership interests. Before the 2010 amendments, Section 160 provided that a corporation could not redeem

120. *See supra* note 7.

121. Historically, many of the principal stock exchanges were organized as nonstock corporations. *See, e.g.*, *In re* Phila. Stock Exch., Inc., 945 A.2d 1123, 1130 (Del. 2008); Scattered Corp. v. Chi. Stock Exch., Inc., 671 A.2d 874, 875 (Del. Ch. 1994). In addition, corporations such as Visa and Mastercard, which were composed of their member banks, until relatively recently were also organized as nonstock corporations.

122. For example, even though the 1974 and 1987 amendments to the DGCL clarified that nonstock corporations could be operated for profit, Section 170, which provides Delaware corporations with the power to declare and pay dividends, did not mention nonstock corporations until 1990. *See* S.B. 467, 135th Gen. Assem. (Del. 1990).

123. Del. Code Ann. tit. 8, § 102(a)(4) (2010).

124. *Id.* § 154.

125. *Id.* § 160(a)(1). Since a nonstock corporation's capital is deemed to be zero, it cannot be impaired.

its shares unless their redemption was authorized by Section 151 (the provision relating to the expression, in the certificate of incorporation, of the rights, powers, and preferences of capital stock) and then only in accordance with Section 151 and the certificate of incorporation.[126] Because the rights, powers, and preferences of membership interests of nonstock corporations are not required to be expressed in the certificate of incorporation under Section 151 (which does not apply to any nonstock corporation), but are instead fixed pursuant to subsection 102(a)(4), the terms of Section 160 required a technical amendment to provide that membership interests could be redeemed only if the certificate of incorporation so provided and then only in accordance with the certificate of incorporation.[127]

Section 170 was also amended, but those amendments were largely technical changes to allow Section 114's translator provision to operate (with regard to for-profit nonstock corporations).[128] Because Section 154 now deems the capital of a nonstock corporation to be zero, nonstock corporations (other than nonprofit nonstock corporations) may pay dividends out of deemed surplus (i.e., net assets) or may pay nimble dividends (i.e., out of net profits for the fiscal year in which the dividend is declared and/or the preceding fiscal year). Because Sections 171 through 174 relate to dividends and redemption, the 2010 amendments provided that those sections apply to for-profit nonstock corporations pursuant to Section 114's translator provision.

The 2010 amendments also ensured that Section 157—with the exception of subsection 157(d), having to do with "par value" and consideration for no-par capital stock, concepts foreign to nonstock corporations—applies to for-profit nonstock corporations.[129] The 2010 amendments thereby clarified that for-profit nonstock corporations may create and issue rights and options regarding membership interests.

Finally, a significant aspect of the 2010 amendments regarding Subchapter V is the application (by translation) of Section 159 to for-profit nonstock corporations. By that amendment, the DGCL provides that members of nonprofit nonstock corporations have only memberships in their corporations, while members of for-profit nonstock corporations own membership interests in their corporations. In other words, the *membership interests* in for-profit nonstock corporations are

126. *See* Del. Code Ann. tit. 8, § 160(a)(3) (2009), *amended by* 77 Del. Laws ch. 253, § 17 (2010).

127. *See* Del. Code Ann. tit. 8, § 160(a)(3) (2010).

128. The 2010 amendments created a self-sealing definitional structure (a nonstock corporation without power to issue dividends is by definition a nonprofit nonstock corporation, which is precluded by law from paying dividends). While Section 170 was amended in 1999 to allow nonprofits to pay dividends, *see* S.B. 137, 140th Gen. Assem. (Del. 1999), the 2010 amendments prohibit nonprofit nonstock corporations from paying dividends under Section 170. Del. Code Ann. tit. 8, § 114(c)(3) (2010). Nevertheless, we believe it would be possible, if necessary, for a nonstock corporation operated not for profit to define its "membership interests" in such a way as to allow distributions of certain assets, yet retain a not-for-profit organizational structure, qualify as an "exempt corporation" under Delaware law, and qualify as a tax-exempt organization under federal law. *See id.* §§ 114(d)(2), 501(b)(6); I.R.C. § 501(c)(7) (2006).

129. Del. Code Ann. tit. 8, § 114(b)(2) (2010).

personal property,[130] while the *memberships* in nonprofit nonstock corporations are not personal property.[131]

6. Subchapter VI—Stock Transfers

The 2010 amendments made no changes to the provisions in Subchapter VI of the DGCL. While none of the provisions in Subchapter VI apply to nonprofit nonstock corporations, Sections 201 and 202 (but not 203) apply to for-profit nonstock corporations.[132]

Sections 201 and 202 generally provide that stock transfers shall be governed by Article 8 of the Delaware U.C.C.[133] and authorize corporations to impose restrictions on transfer and ownership, respectively. Thus, membership interests are treated the same as shares of capital stock for purposes of transfer, and membership interests may be made subject to restrictions on transfer and ownership pursuant to Section 202, subject to the limitations set forth therein. Although Section 202 empowers a for-profit nonstock corporation to impose restrictions on the transfer and ownership of its membership interests, it is not the exclusive means by which such restrictions may be implemented.

As indicated above, a nonstock corporation can determine the identity of its members by reference to the conditions or criteria of membership included in its certificate of incorporation or bylaws. As a result, a nonstock corporation may effectively impose restrictions on the transfer and ownership of its membership interests, or may restrict who may become a member without regard to Section 202, through the adoption of carefully drafted provisions in its certificate of incorporation and bylaws. In almost every way, these de facto restrictions on transfer and ownership are more effective than similar restrictions adopted under the auspices of Section 202, in large part because (subject to equitable limitations[134]) they can be made applicable to all members or holders of membership interests, regardless of whether those holders voted in favor of the restriction. Section 202, by contrast, provides that the restrictions imposed under its terms are not "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 restrictions."[135]

Under the 2010 amendments, Section 203 does not apply to any nonstock corporation.[136] Its application would be unnecessary for several reasons. Section 203 is generally viewed as Delaware's anti-takeover statute. There appears to be no

130. *Id.* § 159 (by translation under subsection 114(a)).

131. *See id.* § 114(c)(3) (providing that Section 159 does not apply to nonprofit nonstock corporations).

132. *Id.* § 114(b)(2), (c)(3).

133. *Cf.* DEL. CODE ANN. tit. 6, § 8-103(a) (2010) (referring to a "share or similar equity interest issued by a corporation").

134. *See* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) (stating that "inequitable action does not become permissible simply because it is legally possible").

135. DEL. CODE ANN. tit. 8, § 202(b) (2010).

136. *See id.* § 114(b)(2).

present need for such a statute for nonstock corporations,[137] and (as noted above) the conditions and criteria of membership can effectively prevent takeovers as well as or better than Section 203. Furthermore, though not exclusive to public companies, Section 203 generally applies only to such companies; in fact, it operates in large part to deter creeping public stock acquisitions and two-tiered, front-loaded abusive takeovers. The lack of a public market for membership interests renders inapplicable many of the concerns Section 203 was intended to address.[138]

7. Subchapter VII—Meetings, Elections, Voting, and Notice

The 2010 amendments wrought several changes to provisions in Subchapter VII, which applies to nonstock corporations in a number of important ways.

For years,[139] Section 215 of the DGCL has been one of the few provisions of the DGCL expressly governing the internal affairs of nonstock corporations; it addresses meetings and voting issues.[140] Subsection 215(a) renders inapplicable to nonstock corporations nearly all the stock-corporation provisions regarding meetings and voting (Sections 211 through 214, and Section 216), but it contains its own translator provision for the few provisions that do apply to nonstock corporations.[141] Before the 2010 amendments, subsection 215(a) adopted—through translation—three provisions: subsection 211(a) (determining the place, if any, of meetings), subsection 212(c) (authorizing the granting of proxies), and subsection 212(d) (authorizing copies of a proxy to be substituted for the original writing).[142]

In the 2010 amendments, Section 215 was amended in several notable respects.[143] As a technical matter, the translator provision in subsection 215(a) was amended to correspond to the translator provision in Section 114.[144] Then, subsections 211(d) and 211(e), which empower nonstock corporations to call special meetings of members and allow for the creation of irrevocable proxies, respectively, were added to the list of provisions translated by subsection 215(a).

137. Of the hostile tender offers launched in the past five years for which public data is available, not one involved a nonstock corporation.

138. *See* DEL. CODE ANN. tit. 8, § 203(b)(4) (2010).

139. *See* 35 Del. Laws ch. 85, § 9 (1927).

140. *See* DEL. CODE ANN. tit. 8, § 215 (2010).

141. *Id.* § 215(a).

142. DEL. CODE ANN. tit. 8, § 215(a) (2009).

143. Because Section 215 had long been an important provision for nonstock corporations, and because its rules had become incorporated in many nonstock corporations' organizational documents, the 2010 amendments retained the basic structure of Section 215, making only technical or enabling amendments.

144. Thus, in addition to translating "stockholders" and "board of directors" to "members" and "governing body" of a nonstock corporation, respectively, Section 215's translator provision now provides that "all references to stock, capital stock, or shares thereof shall be deemed to refer to memberships of a nonprofit nonstock corporation and to membership interests of any other nonstock corporation." DEL. CODE ANN. tit. 8, § 215 (2010); *see also id.* § 114(a)(4). This is quite similar to the amendment to subsection 141(j). *See* text accompanying *supra* note 111.

As noted above, subsection 102(a)(4) was amended to provide nonstock corporations with the express authority to create multiple classes of members and membership interests and to give such corporations maximum flexibility in structuring the voting powers applicable to those classes, including by setting forth those rights in either the certificate of incorporation or the bylaws. Consistent with that amendment, subsection 215(b) was also amended to specify that, unless otherwise provided in the certificate of incorporation *or bylaws*, members are entitled to one vote on each matter submitted to a vote of members.[145] Subsection 215(b) was further amended to reflect the addition of new subsection 215(f), which provides a method for determining a record date for nonstock corporations.[146] Subsection 215(b), as amended, therefore provides that members' voting rights are subject to the record date for any particular meeting.

Also consistent with the amendments to subsection 102(a)(4), the 2010 amendments added new subsection 215(c)(4), which defines the default quorum and vote necessary to take action for separate votes of classes or groups of members.[147] Subsection 215(c)(4) provides as a default that, where a separate vote by a class or group or classes or groups is required, a *majority* of the members of such class or group or classes or groups is required to establish a quorum, and that, in all matters other than the election of members of the governing body, the affirmative vote of the majority of the members of such class or group or classes or groups present in person or represented by proxy at the meeting shall be the act of such class or group or classes or groups. It should be noted that the default quorum for required class votes is a majority of the class, even though the quorum for member meetings generally is only one-third of the members.[148] The new provision was modeled after subsection 216(4) of the DGCL, which applies a similar default quorum and voting requirement in the case of separate votes by a class or series of stock.[149] The 2010 amendments adopted the majority default quorum, instead of the one-third quorum, for several reasons. First, subsection 215(c)(4) only comes into play if a class vote is *required;* the majority quorum therefore provides the minimum critical mass necessary for a meaningful separate vote. Second, the one-third quorum provided for member meetings generally[150] is not necessarily a persuasive precedent, considering that no annual member meetings are required under the DGCL[151] and considering that the one-third requirement is designed to account for nonprofit nonstock corporations with members who have no economic stake in the enterprise.[152] Third, the 2010 amendments provided sufficient flexibility by allowing the default quorum and voting requirements set forth in subsection 215(c)(4)—as with all the other default quorum and voting

145. *See* Del. Code Ann. tit. 8, § 215(b) (2010).
146. *See id.* § 215(f).
147. *See id.* § 215(c)(4).
148. *Compare id.* § 215(c)(4), *with id.* § 215(c)(1).
149. *Id.* § 216(4).
150. *Id.* § 215(c)(1).
151. *See id.* § 215(a).
152. *Cf. infra* note 171.

requirements in subsection 215(c)—to be altered in the corporation's certificate of incorporation or bylaws.

Further, as indicated above, the 2010 amendments introduced a statutory mechanism for determining a record date for nonstock corporations. New subsection 215(f) provides that—except as otherwise provided in the corporation's certificate of incorporation, in the corporation's bylaws, or by resolution of the corporation's governing body—the record date for meetings of nonstock corporations shall be deemed to be the date of the meeting.[153] If the governing body fixes a record date, however, the record date may not precede the governing body's action fixing that record date.[154] Thus, the formal procedures set forth in Section 213 for stock corporations are unnecessary for nonstock corporations, although nonstock corporations now have the flexibility to provide for such procedures as are necessary and appropriate for their circumstances. Practically speaking, under new subsection 215(f), governing bodies of nonstock corporations need not specifically define a record date if they intend the record date to be the date of the meeting.[155]

No changes were made to Sections 217 or 218, but both sections were made generally applicable to nonstock corporations through Section 114's translator provision. Section 217 does not apply to nonprofit nonstock corporations,[156] however, so only for-profit nonstock corporations may allow fiduciaries to vote on behalf of members. Similarly, subsections 218(a) and 218(b) do not apply to nonprofit nonstock corporations.[157] While members of all nonstock corporations may enter into voting agreements, only members of for-profit nonstock corporations may enter into voting trusts (since members of nonprofit nonstock corporations do not have property interests in their memberships and thus have no property to put into such a trust).

Section 219 was made inapplicable to nonstock corporations, since such corporations are not required to maintain lists of their members.[158] Technical changes were made to Section 220 so that it applies to nonstock corporations properly under Section 114's translator provision.[159]

Section 222, regarding notice of meetings, was made inapplicable to nonstock corporations to avoid imposing notice requirements on nonstock corporations

153. DEL. CODE ANN. tit. 8, § 215(f) (2010). This default record date differs from the default record date for stock corporations. Pursuant to subsection 213(a), if the board of a stock corporation does not set a record date, the record date is the date that notice is given to the stockholders (or, if notice is waived, the day next preceding the day of the meeting). *Id.* § 213(a). Section 213 is expressly made inapplicable to nonstock corporations by Section 215, and nonstock corporations are not required to provide notice under the DGCL. *See id.* § 215(a); text accompanying *infra* notes 160–63.

154. DEL. CODE ANN. tit. 8, § 215(f) (2010).

155. Governing bodies may wish to set a specific record date in certain circumstances, for example, in the payment of a dividend.

156. DEL. CODE ANN. tit. 8, § 114(c)(2) (2010).

157. *Id.*

158. *Id.* § 114(b)(2). It should be noted, however, that if such a corporation *does* maintain a member list, that member list should be made available to the members pursuant to subsection 220(b)(1).

159. *See* 77 Del. Laws ch. 253, §§ 20–23 (2010).

that may not have previously applied.[160] Nonstock corporations are not required to hold annual member meetings,[161] so imposing a notice requirement for such meetings would be somewhat out of place. (Section 231, governing voting procedures and election inspectors, was made inapplicable to nonstock corporations for similar reasons.) Moreover, it is expected that nonstock corporations that require member meetings would already have provisions governing notice in their bylaws or certificates of incorporation,[162] and any inequitable conduct could be invalidated by the Delaware courts.[163] Accordingly, to provide for nonstock corporations with notice provisions in their bylaws or certificates of incorporation, Sections 229, 232, and 233 were made applicable (after technical changes to Sections 232 and 233) to nonstock corporations by translation. Subsection 230(b) already applied to nonstock corporations,[164] but the remainder of Section 230 was made applicable to nonstock corporations by translation as well. Section 228, dealing with member actions by written consent, already applied to nonstock corporations and therefore is not translated by Section 114.[165]

Minor changes were made to other provisions regarding elections and members of nonstock governing bodies. Technical changes were made to Sections 223 (vacancies and newly created memberships on the governing body) and 227 (powers of the Court in elections of the governing body)—with no intent to change the meaning or operation of those sections—so that Section 114's translator provision could apply. Similar technical changes were made to Section 225, with one result that was unclear under the pre-amendment law. Before the 2010 amendments, Section 225 allowed directors of stock corporations—but arguably not members of the governing bodies of nonstock corporations—to bring suit under subsection 225(a) to hear and determine the validity of their elections.[166] The 2010 amendments made clear that members of the governing bodies of nonstock corporations may bring such suits.[167]

Finally, Section 226, governing the appointment of a custodian or receiver for a corporation upon a deadlock or abandonment of the corporation's business, applies to nonstock corporations pursuant to the translator provision in Section 114. A new subsection 226(c) was added, applicable only to charitable

160. *See* text accompanying *supra* note 13.

161. *See* DEL. CODE ANN. tit. 8, § 215(a) (2010).

162. For which Section 222 could likely apply by analogy. *See* Farahpour v. DCX, Inc., 635 A.2d 894, 900 (Del. 1994).

163. *See* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) (stating that "inequitable action does not become permissible simply because it is legally possible").

164. *See* DEL. CODE ANN. tit. 8, § 230(b) (2009); *see also* DEL. CODE ANN. tit. 8, § 114(b)(1) (2010).

165. DEL. CODE ANN. tit. 8, § 114(b)(1) (2010).

166. That is, the pre-amendment subsection 225(a) listed the following persons who could bring such an action: "any stockholder or director, or any officer whose title to office is contested, or any member of a corporation without capital stock." DEL. CODE ANN. tit. 8, § 225(a) (2009). While there was a nonstock equivalent to "stockholder," there was no nonstock equivalent for "director."

167. *See* DEL. CODE ANN. tit. 8, § 225(a) (2010) (referring to "any . . . director"); *id.* § 114(a)(3) (translating references to "directors" to refer to "members of the governing body").

nonstock corporations, requiring a copy of any application to the Delaware Court of Chancery under Section 226 to be provided to the Attorney General of the State of Delaware.[168] New subsection 226(c) does not require the Attorney General to take any action, but the notice requirement was designed to assist the Attorney General in monitoring and policing such corporations.

8. Subchapter VIII—Amendment of Certificate of Incorporation; Changes in Capital and Capital Stock

The DGCL's procedures for amending a nonstock corporation's certificate of incorporation have long differed from those applicable to stock corporations. After a stock corporation has received payment for its capital stock, any amendment to its certificate of incorporation generally must be approved by its board of directors and then adopted by a majority in voting power of its outstanding capital stock (and, depending on the nature of the amendment, also a majority of the holders of one or more class or classes or series of its stock).[169] By contrast, an amendment to the certificate of incorporation of a nonstock corporation must only be approved by a majority of all members of its governing body.[170] That is, no vote of the members of the nonstock corporation is required to effect any such amendment unless the certificate of incorporation expressly requires such a vote.[171]

The 2010 amendments made an important change to Section 241. Pre-amendment, Section 241 addressed a stock corporation's ability to amend its certificate before it received payment for its stock.[172] The 2010 amendments expanded the scope of Section 241 to apply to a nonstock corporation before it has members.[173]

168. *Id.* § 226(c). Similar changes were made to Section 273. *See* text accompanying *infra* note 201.

169. DEL. CODE ANN. tit. 8, § 242(b) (2010).

170. *Id.* § 242(b)(3).

171. *Id.* This fundamental difference in the approach to the different types of corporations is likely a recognition of the basic difference in the nature of the constituency to which each ultimately answers. Stock corporations, of course, are organized for the benefit of their stockholders, who hold property (stock) representing undivided interests in the assets of the corporation and whose rights, powers, and preferences arising from that property are defined by the certificate of incorporation. Not surprisingly, changes to the instrument defining the terms of that property must be authorized by its owners. Although nonstock corporations may be organized such that their members hold membership interests representing undivided interests in the corporation's assets, they need not be—and in many cases are not. A charitable nonstock corporation, for example, may have thousands of members, not one of whom would be entitled to any distribution upon a merger or dissolution. Moreover, while a stock corporation must receive consideration in exchange for its shares (typically in the form of money paid or services rendered by the stockholder), *id.* § 153, and must maintain a list of its registered stockholders, *id.* § 219, a nonstock corporation may define its membership base through the conditions or criteria of membership, *id.* § 102(a)(4), and need not maintain any specific register of the persons or entities included within its membership ranks, *id.* § 114(b)(2) (providing that Section 219 does not apply to nonstock corporations). This flexibility in the nonstock structure allows for membership bases to be composed of broad and fluid groups, such as "all persons having an interest in the beautification of the public parks of the City of Wilmington." A quorum of that particular membership base, let alone the vote of a majority of those members, would likely be unascertainable.

172. DEL. CODE ANN. tit. 8, § 241 (2009).

173. *See* DEL. CODE ANN. tit. 8, 241(c) (2010).

Accordingly, new subsection 241(c) was added to ensure that the procedures in Section 241 would apply (by some translation) to nonstock corporations before such corporations have members.[174] This change ensures that any nonstock corporation whose certificate of incorporation requires a vote of its members for amendments will not be paralyzed if it must make an amendment before its members have been identified.[175]

The 2010 amendments made two changes to Section 242: first, a technical amendment to subsection 242(b)(3)—which sets forth the procedures for amending the certificate of incorporation of a nonstock corporation—to make the terms used therein consistent with the terms used in the Section 114 translator provision; and, second, a substantive change clarifying that subsection 242(b)(4) applies to nonstock corporations.[176] Subsection 242(b)(4) is the DGCL's "anti-sandbagging" provision for amendments to the certificate of incorporation. Before the 2010 amendments, it provided:

> Whenever the certificate of incorporation shall require for action by the board of directors, by the holders of any class or series of shares, or by the holders of any other securities having voting power the vote of a greater number or proportion than is required by any section of this title, the provision of the certificate of incorporation requiring such greater vote shall not be altered, amended or repealed except by such greater vote.[177]

Thus, if the certificate of incorporation contained a provision requiring, for example, that any merger be approved by the vote of two-thirds of the outstanding shares of the corporation's capital stock, any amendment or repeal of that provision would likewise require a two-thirds vote of the outstanding shares. The 2010 amendments added language clarifying that the provision also applies to nonstock corporations.[178]

Sections 243 and 244 are both inapplicable to nonstock corporations[179]—Section 243 because it refers to the retirement of stock, and Section 244 because Section 154 now provides that the capital of nonstock corporations is deemed to be zero.

Finally, the 2010 amendments made technical changes[180] to Section 245 to clarify—with no intent to change the meaning or application of that section—that nonstock corporations may restate their certificates of incorporation.

174. Section 241 is thus accordingly carved out of Section 114's more elaborate translator provision. *See id.* § 114(b)(1).

175. This situation could exist under the post-amendment DGCL, since now conditions or criteria of membership may be put in the bylaws (and even could have existed pre-amendment, since the conditions or criteria could have relied on facts ascertainable outside the certificate). *See id.* § 102(b)(4), (d).

176. *Id.* § 242(b)(3)–(4).

177. Del. Code Ann. tit. 8, § 242(b)(4) (2009), *amended by* 77 Del. Laws ch. 253, § 35 (2010).

178. 77 Del. Laws ch. 253, § 35 (2010).

179. Del. Code Ann. tit. 8, § 114(b)(2) (2010).

180. Those changes included language regarding subsection 242(b)(3), since nonstock corporations do not require (unless so provided in the certificate of incorporation) a member vote to amend their certificates of incorporation. *See* 77 Del. Laws ch. 253, § 37.

9. Subchapter IX—Merger, Consolidation, or Conversion

Before the 2010 amendments, the DGCL contained provisions applicable to mergers and consolidations involving nonstock corporations. The 2010 amendments largely preserved this structure, making many technical and conforming amendments, some procedural improvements, and one empowering change. Many of the provisions in Subchapter IX are carved out of Section 114's translator provision: Sections 251 and 252 because they do not apply to nonstock corporations,[181] and Sections 253 through 258 because they apply to nonstock corporations by their own terms.

Most notable of the amendments to Subchapter IX is new subsection 253(f), which allows nonstock corporations to take advantage of Delaware's "short-form" merger procedure. Before the 2010 amendments, the DGCL allowed a stock corporation to merge with or into a subsidiary corporation (or corporations) of which it owned 90 percent of each class of stock otherwise entitled to vote on a merger, merely by board resolution and by filing a certificate of ownership and merger.[182] The 2010 amendments extended this procedure to nonstock corporations, subject to three key conditions: First, the nonstock corporation must be the parent corporation.[183] Second, the nonstock corporation must be the surviving corporation in the merger.[184] Third, consistent with the DGCL's other provisions governing mergers, no charitable nonstock corporation may effect a short-form merger if its charitable status would thereby be lost or impaired by virtue of the merger.[185] Given the limitations imposed on short-form mergers involving nonstock corporations, new Section 267, which was also added to the DGCL in 2010 to authorize parent non-corporate entities to effect short-form mergers with one or more subsidiary corporations, was made inapplicable to nonstock corporations.[186]

Section 255 underwent several technical changes designed to ensure consistency with the terms used in Section 114[187] as well as amendments designed to clarify procedures regarding the execution, acknowledgment, adoption, and certification of the merger agreement.[188] Subsection 255(c) was amended to clarify that members may vote on a merger if, under the corporation's certificate of incorporation or bylaws, they are entitled to vote on the merger or for the election of the members of the governing body. Previously, members had only been entitled to vote on a merger if they had been entitled to vote for the election of members of

181. It should be noted, however, that certain provisions of Section 251 are made applicable to nonstock corporations through other provisions in Subchapter IX. *See, e.g.*, DEL. CODE ANN. tit. 8, § 255(e)–(f) (2010).

182. DEL. CODE ANN. tit. 8, § 253(a) (2009).

183. DEL. CODE ANN. tit. 8, § 253(f) (2010).

184. *Id.*

185. *Id.* § 253(g).

186. *Id.* § 114(b)(2).

187. For example, the phrases "memberships" and "membership interest" were added throughout as necessary to ensure that for-profit and nonprofit nonstock corporations were both able to use the merger provisions properly. *See id.* § 255.

188. For example, Section 255 now contains this sentence: "The agreement so adopted shall be executed and acknowledged in accordance with § 103 of this title." *Id.* § 255(b).

the governing body.[189] The amendment to subsection 255(c) further clarifies that the decision to include either a copy or a summary of an agreement of merger or consolidation in a notice of a meeting of the members of a constituent nonstock corporation need not be approved by a specific act of the governing body of the nonstock corporation.[190] New subsection 255(e) was also added, to provide that subsection 251(d) (as translated for application to nonstock corporations) applies to mergers under Section 255.

The most notable change to Section 255 involved circumstances in which no members of the corporation are entitled to vote on the merger other than those who are members of the governing body.[191] Before the 2010 amendments, such mergers first had to be authorized by a majority of a quorum of the governing body and then re-approved by two-thirds of the total number of members of the governing body at a second meeting.[192] After the 2010 amendments, the approval of any such merger may be obtained at a single meeting, by the vote of a majority of the total number of members of the governing body.[193]

Technical and conforming amendments were made to Sections 256, 257, 258, 260, 263, and 264. Amendments were made to Sections 256, 257, and 258 to make subsection 251(d) applicable to nonstock corporations—thereby allowing members of the governing bodies of such corporations to make certain amendments to agreements of merger or consolidation after the approval of those agreements by the members.[194] Finally, the prohibition on certain mergers involving charitable nonstock corporations (based on the provision in subsection 258(d)) was added to Sections 256, 263, 264, and 266. This prohibition ensures that no merger is authorized under the DGCL if that merger would cause the charitable status of the charitable nonstock corporation to be lost or impaired.[195]

Section 262 was amended in several technical ways to ensure that Section 114's translator provision would apply properly and to clarify that appraisal is available for nonstock corporation mergers under Sections 255 and 256.[196] Subsection 262(d) was also amended to provide for notice appropriate to nonstock

189. Del. Code Ann. tit. 8, § 255 (2009). Similar changes were made elsewhere, including in Sections 271 and 390.

190. 77 Del. Laws ch. 253, § 41 (2010). That amendment, which was also made to comparable provisions involving stock corporations, was not intended to define or limit any duty of members of the governing body relating to disclosure to members in connection with the transaction.

191. *See* Del. Code Ann. tit. 8, § 255(d) (2010).

192. Del. Code Ann. tit. 8, § 255(d) (2009).

193. Del. Code Ann. tit. 8, § 255(d) (2010). This procedure is now akin to that used in amending the certificate of incorporation of a nonstock corporation in which the certificate of incorporation does not require a member vote on amendments. *See id*. § 242(b)(3).

194. *Cf*. *id*. § 251(d).

195. *See supra* note 35.

196. These amendments were effective only with respect to "transactions consummated pursuant to agreements entered into after August 1, 2010 (or, in the case of mergers pursuant to Section 253, resolutions of the board of directors adopted after August 1, 2010), and appraisal proceedings arising out of such transactions." 77 Del. Laws ch. 253, § 71 (2010).

corporations.[197] It should be noted, however, that Section 262 does not apply to nonprofit nonstock corporations.[198]

10. Subchapter X—Sale of Assets, Dissolution, and Winding Up

Several changes were made to the provisions in Subchapter X of the DGCL, but many of those changes were conforming changes designed to ensure that the translator provision in Section 114 applies correctly.

One change was made to Section 271 to clarify that members of a nonstock corporation may vote on a sale, lease, or exchange of all or substantially all of the corporation's property and assets if, under the corporation's certificate of incorporation or bylaws, the members are entitled to vote on such a transaction or for the election of the members of the governing body.[199] Section 271 was also carved out of Section 114's translator provision[200] because it expressly applies to nonstock corporations already.

Section 273 was amended (along the lines of the changes made to Section 226[201]) to provide that, when a petition for dissolution of a two-member charitable nonstock corporation is filed, the petitioner must provide a copy of the petition to the Attorney General of the State of Delaware within a week of its filing.[202] This amendment does not require the Attorney General to take any action; the notice requirement was merely intended to assist the Attorney General in monitoring and policing charitable nonstock corporations.

Section 276 provides a procedure for dissolving nonstock corporations, adopting in large part the procedures set forth in Section 275. Section 276 received technical amendments in conformance with Section 114 and the other 2010 amendments, but it is not translated by Section 114 because it applies to nonstock corporations by its own terms.[203] It was amended in a few substantive ways as well. First, Section 276 was amended to clarify that members may vote for dissolution if, under the corporation's certificate of incorporation or bylaws, they are entitled to vote on a dissolution.[204] Members entitled to vote for the election of the members of the governing body were already entitled to—and are still entitled to—vote on a dissolution.[205] Second, Section 276 was amended to clarify that a corporation's members may authorize dissolution, without action being taken by

197. That is, along with the copy of Section 262 that must be sent to the members, a copy of Section 114 must also be sent. DEL. CODE ANN. tit. 8, § 262(d)(1)–(2) (2010).

198. *Id.* § 114(c)(2).

199. *Id.* § 271(a). A similar change was also made in Section 255. *See* text accompanying *supra* note 189.

200. DEL. CODE ANN. tit. 8, § 114(b)(1) (2010).

201. *See* text accompanying *supra* note 168.

202. DEL. CODE ANN. tit. 8, § 273(c) (2010).

203. *Id.* § 114(b)(1).

204. Similar changes were made to Sections 255, 271, 312, and 390. *See, e.g.*, *supra* notes 189 and 199.

205. DEL. CODE ANN. tit. 8, § 276 (2010); DEL. CODE ANN. tit. 8, § 276 (2009).

the members of the governing body, if all the corporation's members entitled to vote consent in writing and if a certificate of dissolution is properly filed with the Secretary of State of the State of Delaware.[206]

Pursuant to the 2010 amendments, Sections 280, 281, and 282 apply to nonstock corporations.[207] Nonstock corporations therefore now may take full advantage of the DGCL's provisions regarding notice and distribution to claimants upon dissolution, as well as the accompanying protections[208] for members and members of the governing body. Sections 280 and 281 were amended to provide that, for nonprofit nonstock corporations, the provisions regarding distributions to members will not apply to the extent that those provisions conflict with any other applicable law or with the corporations' certificate of incorporation or bylaws.[209] Many nonprofit or charitable nonstock corporations contain express provisions in their certificates of incorporation requiring them (or they are required by federal law) upon dissolution to distribute their assets to other entities exempted from federal income tax under I.R.C. § 501(c)(3) or to a state or local government. Therefore, Sections 280 and 281 will apply to these corporations, except to the extent that distributions to members are prohibited by any applicable law or by the corporation's certificate of incorporation or bylaws. Section 280 was also amended to provide that notice given by a nonstock corporation under subsection 280(a)(3) must include a copy of Section 114.[210]

11. Subchapter XI—Insolvency; Receivers and Trustees

No changes were made to the provisions in Subchapter XI of the DCGL, and such provisions apply to nonstock corporations pursuant to the translator provision in Section 114.[211]

12. Subchapter XII—Renewal, Revival, Extension, and Restoration of Certificate of Incorporation or Charter

A handful of important changes were made to the provisions of Subchapter XII of the DGCL.

First, new subsection 311(f) was added, to provide that a nonstock corporation can revoke its dissolution.[212] This revocation procedure (which is similar to that of a stock corporation) is expressly analogous to the procedure employed to

206. Del. Code Ann. tit. 8, § 276(a) (2010).

207. *See id.* § 114(b) (not excepting these sections from Section 114's translator provision). The amendments to these sections are "effective only with respect to dissolutions made effective after August 1, 2010, and the filing of claims arising out of such dissolutions." 77 Del. Laws ch. 253, § 71 (2010).

208. *See* Del. Code Ann. tit. 8, §§ 281(c), 282 (2010).

209. *Id.* §§ 280(g), 281(f).

210. *Id.* § 280(g).

211. *See id.* § 114(b) (not excepting these sections from Section 114's translator provision).

212. *Id.* § 311(f).

authorize the corporation's dissolution. That is, the members entitled to vote on dissolution[213] may vote to revoke that dissolution. The nonstock corporation must file a certificate of revocation of dissolution containing information comparable to that described in subsection 311(a)(4) for a stock corporation.[214] Subsection 311(f) also ensures that the provision in Section 311 regarding annual meetings (subsection 311(c)) does not apply to nonstock corporations.[215]

Section 312, governing the renewal and revival of certificates of incorporation, was amended in conformance with the terms used in Section 114. It was also amended to clarify that members may vote for renewal or revival if, under the corporation's certificate of incorporation or bylaws, they are entitled to vote for dissolution or for the election of the members of the governing body.[216] Other changes to Section 312 clarified that subsection 312(j) is subject to the provisions of Section 313 (governing the renewal of certificates of incorporation of certain religious, charitable, or educational corporations) and that subsection 312(i) does not apply to nonstock corporations.[217]

Finally, subsection 313(a) was amended slightly to provide that Section 313 applies to all "exempt corporations" as defined by subsection 501(b).[218]

13. Subchapter XIII—Suits Against Corporations, Directors, Officers, or Stockholders

No changes were made to the provisions in Subchapter XIII of the DGCL, but two notes are in order. First, Section 324 (governing attachment of shares of stock) was made inapplicable to nonstock corporations.[219] Second, although Section 327 applies to all nonstock corporations, the 2010 amendments did not include an affirmative grant to members of nonprofit or charitable nonstock corporations of any right to sue derivatively.[220]

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213. This is as determined by Section 276. *Id.*

214. *Id.*

215. Similarly, subsection 211(c) is expressly inapplicable to nonstock corporations. *Id.* § 215(a).

216. *Id.* § 312(j). Similar changes were made to other sections of the DGCL. *See supra* note 204.

217. DEL. CODE ANN. tit. 8, § 312(j) (2010). Subsection 311(f) contains a similar provision. *See* text accompanying *supra* note 215.

218. Exempt corporations are defined as any corporation organized under the DGCL (including stock corporations and nonstock corporations) that:

(1) Is exempt from taxation under § 501(c) of the United States Internal Revenue Code (26 U.S.C. § 501(c)) or any similar provisions of the Internal Revenue Code, or any successor provisions;
(2) Qualifies as a civic organization under § 8110(a)(1) of Title 9 or § 6840(4) of Title 16;
(3) Qualifies as a charitable/fraternal organization under § 2593(1) of Title 6;
(4) Is listed in § 8106(a) of Title 9;
(5) Is organized primarily or exclusively for religious or charitable purposes; or
(6) a. Is organized not for profit; and b. No part of its net earnings inures to the benefit of any member or individual.

DEL. CODE ANN. tit. 8, § 501(b) (2010).

219. *Id.* § 114(b)(2).

220. *See supra* text accompanying notes 106–07.

14. Subchapter XIV—Close Corporations; Special Provisions

Given the flexiblity granted to nonstock corporations in organizing their management and internal affairs, the 2010 amendments clarified that Subchapter XIV is inapplicable to nonstock corporations.[221]

15. Subchapter XV—Foreign Corporations

Since Subchapter XV governs foreign corporations, and not corporations organized under Delaware law, the 2010 amendments clarified that Subchapter XV does not apply to nonstock corporations.[222]

16. Subchapter XVI—Domestication and Transfer

Using the mechanism set forth in Section 276 as a model, new subsection 390(i) was added to Section 390 to provide that nonstock corporations may transfer to or domesticate or continue in any foreign jurisdiction in a manner analogous to that applicable to a stock corporation.[223] The acts taken by members to authorize a transfer, domestication, or continuance are to be taken by (1) any member entitled to vote thereon pursuant to the corporation's certificate of incorporation or bylaws, as well as (2) any member entitled to vote on "a merger, consolidation, or dissolution of the corporation," and (3) "any other holder of any membership interest in the corporation."[224] This provision was intended to parallel subsection 390(b)'s requirement that "all outstanding shares of stock of [a stock] corporation, whether voting or nonvoting," vote to adopt a resolution for transfer, domestication, or continuance.[225] As with subsection 390(b), the requirement that all "holder[s] of any membership interest" vote in favor of a resolution for transfer, domestication, or continuance of a nonstock corporation was designed to moot the issue of appraisal rights upon transfer or domestication.[226] Finally, in the case of a charitable nonstock corporation, the new subsection requires that the Attorney General of the State of Delaware must be provided with notice of the corporation's intent to effect a transfer, domestication, or continuance ten days before the date of the proposed transfer, domestication, or continuance.[227] The new subsection does not, however, require that any action be taken by the Attorney General.[228]

221. DEL. CODE ANN. tit. 8, § 114(b)(3) (2010).
222. *Id.*
223. *Id.* § 390(i).
224. *Id.*
225. *See id.* § 390(b).
226. *See id.* § 262(a) (allowing appraisal only for members who do not vote in favor of, or consent to in writing, a merger or consolidation).
227. *Id.* § 390(i).
228. *See id.*

17. Subchapter XVII—Miscellaneous Provisions

One minor change was made to Section 391. The definition of "exempt corporation" that used to appear in subsection 391(j) was moved to subsection 501(b), so subsection 391(j) merely refers to that definition in its new location.

18. Chapter 5—Corporation Franchise Tax

A few changes were made to Chapter 5. First, the definition of "exempt corporation" was moved from subsection 391(j) to subsection 501(b) and expanded to include stock corporations.[229] Then, subsection 501(a) was amended to clarify that all exempt corporations are exempt from the corporate franchise tax. Finally, subsection 503(a)(1) was amended to provide that the franchise tax applicable to nonstock corporations (except exempt corporations, which are exempt from the franchise tax) is $75. Since Section 503 calculates franchise tax based on either (a) the number of shares authorized or (b) the "assumed no-par capital" of the corporation,[230] for-profit nonstock corporations had for years been the beneficiaries of a franchise-tax loophole. The 2010 amendments closed that loophole and ensured that for-profit nonstock corporations (but not nonprofit nonstock corporations, which are exempt under Section 501) pay a corporate franchise tax, albeit at the lowest rate.

III. Implications of the Nonstock Amendments for Practitioners

Following the 2010 amendments, Delaware's nonstock corporation law is stronger and more flexible than it ever has been. Nonstock corporations and their advisors now can be more certain of their actions and can take advantage of the express statutory guidance in the DGCL. The 2010 amendments also provided practitioners with additional reasons to consider forming Delaware nonstock corporations.

For-profit nonstock corporations should be poised to take full advantage of the 2010 amendments. The flexibility and ease of use of the revised DGCL redounds particularly to the benefit of for-profit nonstock corporations. For example, such corporations can easily define their own desired ownership and governance structures with express statutory flexibility under subsections 102(a)(4) and 141(j). At the same time, such corporations are not required to follow all stock-corporation formalities, like holding annual stockholder meetings and maintaining stocklists. In particular, small businesses should be perfect candidates for Delaware nonstock corporations—they obtain the benefits of Delaware's excellent court system and developed corporate caselaw, the structural and operating flexibility of a limited liability company (albeit without the statutory freedom to modify fiduciary

229. *See id.* § 501(b). A corresponding change to subsection 505(c) was made to account for the restructuring of Section 501.

230. *See id.* § 503(a)(1)–(2).

duties), the solid foundation of a Delaware corporation, and the freedom from many of the formalities of Delaware stock corporations. Finally, the annual franchise tax for for-profit nonstock corporations is as low as the lowest possible tax rate for stock corporations and is lower than the annual fee for Delaware's limited liability companies.[231]

Nonprofit nonstock corporations and charitable nonstock corporations can also take advantage of the revised DGCL. In effect, the 2010 amendments have created a specific corporation law for nonprofit nonstock corporations. That enhanced statutory guidance, along with the flexibility built into the DGCL, provides certainty and clarity for these nonprofits and their advisors. Delaware's caselaw provides the members of the governing bodies of nonprofit nonstock corporations with the same protection provided to directors of stock corporations,[232] and the post-amendment DGCL contains several safe harbors to protect such corporations from the consequences of "foot-fault" violations of certain statutory requirements.[233] Further, the revised law provides nonprofit corporations with significant flexibility in designing optimal governance structures and in setting forth types and qualifications of members (and allowing members to be the members of the governing body). Finally, all nonprofit nonstock corporations are exempt from Delaware's annual franchise tax.[234]

IV. Conclusion

In all, the 2010 amendments resulted in many changes to the DCGL, but most of those changes were merely confirmatory of Delaware law as most practitioners conceived of it before the amendments. Delaware's nonstock corporations, and particularly its nonprofit and charitable nonstock corporations, now have a solid statutory foundation and clear governing law. It was the intention of the 2010 amendments that such corporations face few (or no) new requirements or obligations but instead reap the benefits of the new clarity, the multiple safe harbors, and the added flexibility in the DGCL. Furthermore, the flexibility of the nonstock-corporation form (in particular, the leeway granted by subsection 141(j), the lack of requirements for annual meetings and various other formalities required for stock corporations, and the ease of conversion to a stock corporation[235]), coupled with the strength and stability of Delaware corporate law, should allow many entrepreneurs and small-business owners to take advantage of nonstock corporations when choosing a corporate form.

231. *See* Del. Code Ann. tit. 6, § 18-1107 (2010). It should be noted, however, that a substantial increase in the adoption of for-profit nonstock corporations might lead to an increase in the annual franchise tax for such corporations.

232. *See* text accompanying *supra* note 108.

233. *See* text accompanying *supra* notes 77–84.

234. Del. Code Ann. tit. 8, § 501 (2010). Such corporations still, however, must pay a reporting fee, but that reporting fee is discounted by half. *Id.* § 391(a)(18).

235. *See, e.g.*, Farahpour v. DCX, Inc., 635 A.2d 894, 899–900 (Del. 1994).