

SPONSOR:

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

[HOUSE/SENATE] BILL NO. ____

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

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

3 § 102 Contents of certificate of incorporation.

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

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

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

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

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

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

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

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

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

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

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

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

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

61 § 115. Forum selection provisions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SYNOPSIS

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

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

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

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

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

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

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

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

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

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

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

SPONSOR:

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

[HOUSE/SENATE] BILL NO. ____

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

1 Section 1. Amend § 262(c), Title 8 of the Delaware Code, by making insertions as shown by underline and
2 deletions as shown by strike through as follows:

3 (c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section
4 shall be available for the shares of any class or series of its stock as a result of an amendment to its certificate of
5 incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or
6 substantially all of the assets of the corporation. If the certificate of incorporation contains such a provision, the
7 ~~procedures~~ provisions of this section, including those set forth in subsections (d), ~~and (e)~~, and (g) of this section,
8 shall apply as nearly as is practicable.

9 Section 2. Amend § 262(g), Title 8 of the Delaware Code, by making insertions as shown by underline and
10 deletions as shown by strike through as follows:

11 (g) At the hearing on such petition, the Court shall determine the stockholders who have complied with
12 this section and who have become entitled to appraisal rights. The Court may require the stockholders who have
13 demanded an appraisal for their shares and who hold stock represented by certificates to submit their certificates of
14 stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any
15 stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder. If
16 immediately before the merger or consolidation the shares of the class or series of stock of the constituent
17 corporation as to which appraisal rights are available were listed on a national securities exchange, the Court shall
18 dismiss the proceedings as to all holders of such shares who are otherwise entitled to appraisal rights unless (1) the
19 total number of shares entitled to appraisal exceeds 1% of the outstanding shares of the class or series entitled to
20 appraisal, (2) the value of the consideration provided in the merger or consolidation for such total number of shares
21 exceeds \$1 million, or (3) the merger was approved pursuant to § 253 or § 267 of this title.

22 Section 3. Amend § 262(h), Title 8 of the Delaware Code, by making insertions as shown by underline and
23 deletions as shown by strike through as follows:

24 (h) After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be
25 conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing
26 appraisal proceedings. Through such proceeding the Court shall determine the fair value of the shares exclusive of
27 any element of value arising from the accomplishment or expectation of the merger or consolidation, together with
28 interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court
29 shall take into account all relevant factors. Unless the Court in its discretion determines otherwise for good cause
30 shown, and except as provided in this subsection, interest from the effective date of the merger through the date of
31 payment of the judgment shall be compounded quarterly and shall accrue at 5% over the Federal Reserve discount
32 rate (including any surcharge) as established from time to time during the period between the effective date of the
33 merger and the date of payment of the judgment. At any time before the entry of judgment in the proceedings, the
34 surviving corporation may pay to each stockholder entitled to appraisal an amount in cash, in which case interest
35 shall accrue thereafter as provided herein only upon the difference, if any, between the amount so paid and the fair
36 value of the shares as determined by the Court. Upon application by the surviving or resulting corporation or by any
37 stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, proceed to trial upon
38 the appraisal prior to the final determination of the stockholders entitled to an appraisal. Any stockholder whose
39 name appears on the list filed by the surviving or resulting corporation pursuant to subsection (f) of this section and
40 who has submitted such stockholder's certificates of stock to the Register in Chancery, if such is required, may
41 participate fully in all proceedings until it is finally determined that such stockholder is not entitled to appraisal
42 rights under this section.

43 Section 4. Sections 1 through 3 shall be effective only with respect to transactions consummated pursuant
44 to agreements entered into on or after August 1, 2015 (or, in the case of mergers pursuant to Section 253, resolutions
45 of the board of directors adopted on or after August 1, 2015 or, in the case of mergers pursuant to Section 267,
46 authorizations provided on or after August 1, 2015 in accordance with an entity's (as defined in Section 267)
47 governing documents (as defined in Section 267) and the laws of the jurisdiction under which such entity is formed
48 or organized), and appraisal proceedings arising out of such transactions.

SYNOPSIS

Section 1. The amendment to Section 262(c) is intended to clarify that where a provision of the certificate of incorporation confers appraisal rights where those rights otherwise do not exist, an appraisal proceeding must be dismissed under the new provisions of subsection (g) of Section 262, if applicable.

Section 2. The amendment to Section 262(g) limits the availability of a judicial determination and award of fair value where the corporation's shares had been traded on a national securities exchange. In that circumstance appraisal rights are essentially precluded unless the dispute with regard to valuation is substantial and involves little risk that the petition for appraisal will be used to achieve a settlement because of the nuisance value of discovery and other burdens of litigation. In a short-form merger under Section 253 or Section 267, however, there is no requirement of approval by the corporation's board of directors and therefore no obligation on the part of directors to approve and recommend the merger, and appraisal may be the only remedy. Accordingly, the limitation in new subsection (g) also is not applicable to mergers accomplished pursuant to Section 253 or Section 267.

Section 3. The amendment to Section 262(h) provides an option to the surviving corporation to pay to the stockholders seeking appraisal a sum of money, the amount of which is to be determined in the sole discretion of the surviving corporation, at any time before judgment is entered in the appraisal proceeding, with the result of avoiding the need to pay subsequently accruing interest on that sum. There is no requirement or inference that the amount so paid by the surviving corporation is equal to, greater than, or less than the fair value of the shares to be appraised. Where one or more stockholders' entitlement to appraisal is contested in good faith, the corporation may elect to pay such amount only to those stockholders whose entitlement to appraisal is uncontested.

Section 4. Section 4 provides that these amendments shall be effective only with respect to transactions consummated pursuant to agreements entered into on or after August 1, 2015 (or, in the case of mergers pursuant to Section 253, resolutions of the board of directors adopted on or after August 1, 2015 or, in the case of mergers pursuant to Section 267, authorizations provided on or after August 1, 2015 in accordance with an entity's (as defined in Section 267) governing documents (as defined in Section 267) and the laws of the jurisdiction under which such entity is formed or organized), and appraisal proceedings arising out of such transactions.