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## A Comparison of the Pennsylvania and Delaware Corporation Statutes

Robert C. Martin

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# A Comparison of the Pennsylvania and Delaware Corporation Statutes

Robert C. Martin\*

## Introduction

In October 1983, the Board of Directors of Gulf Oil Corporation proposed to the corporation's shareholders that Gulf become a wholly owned subsidiary of a holding company Gulf had incorporated in Delaware.<sup>1</sup> The Board explained that it chose Delaware as the state of incorporation for the holding company because "[f]or many years Delaware has followed a policy of encouraging incorporation in that state, and in furtherance of that policy, has adopted comprehensive, modern and flexible corporate laws which are periodically updated and revised to meet changing business needs."<sup>2</sup> The obvious alternative to Delaware was Pennsylvania, the state of incorporation of Gulf Oil Corporation. From the Board's rejection of the latter alternative many inferred that Pennsylvania's Business Corporation Law<sup>3</sup> (referred to herein as the "Pennsylvania statute") was less than "comprehensive, modern and flexible."

To provide an objective basis for evaluating that inference is one purpose of this Article. The comparisons made here show that, in some areas, the Delaware General Corporation Law<sup>4</sup> (referred to herein as the "Delaware statute") is indeed more "comprehensive, modern and flexible" than the Pennsylvania statute.<sup>5</sup> But the com-

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1. Gulf Oil Corporation, *Proxy Statement/Prospectus* (October 26, 1983).

2. *Id.* at 6. The Board of Directors of Atlantic Richfield Company offered the same explanation verbatim in recommending that that company reincorporate from Pennsylvania to Delaware. Atlantic Richfield Company, *Proxy Statement* 21 (March 18, 1985).

3. 15 PA. STAT. ANN. §§ 1001-2203 (Purdon 1967 & Supp. 1984-85) (hereinafter cited as "B.C.L."). In accordance with standard practice, sections of the B.C.L. are identified by the numbers assigned them in the act of May 5, 1933 (P.L. 364, No. 106) adopting the B.C.L. Sections may be located in 15 PA. STAT. ANN. by adding 1,000 to the section numbers given herein.

4. DEL. CODE ANN. tit. 8 §§ 101-398 (1983 & Supp. 1984) (hereinafter cited as "G.C.L.>").

5. See, e.g., *infra* text accompanying notes 60 (no advertisement of incorporations required) & 141 (certificate may authorize quorum of board consisting of less than a majority of

parisons also show that in other areas the reverse is true.<sup>6</sup> In most areas the differences are not great.

Excluded from the scope of this Article are the statutes' provisions relating to foreign corporations,<sup>7</sup> close corporations,<sup>8</sup> litigation procedures,<sup>9</sup> nonstock and nonprofit corporations,<sup>10</sup> and some miscellaneous, general matters.<sup>11</sup> Further, the Article does not discuss statutory counterparts to provisions of one corporation statute that are not contained in the other corporation statute. For example, the takeover disclosure requirements of the Delaware statute<sup>12</sup> are not compared in the Article to the Pennsylvania Takeover Disclosure Law.<sup>13</sup> The Article is based exclusively on the language of the two statutes, without reference to judicial decisions or administrative rules or practices that may bear on the interpretation of that language. These judicial and administrative interpretations may eliminate some of the differences discussed in this Article, as well as create some differences that have not been noted here.

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the directors).

6. See, e.g., *infra* text accompanying notes 31 (no local filing of instruments required) & 83 (sale of assets in ordinary course of business or for relocation does not require shareholder approval).

7. B.C.L. §§ 1001-1016; G.C.L. §§ 371-385.

8. B.C.L. §§ 371-386; G.C.L. §§ 341-356.

9. G.C.L. §§ 321-330.

10. See G.C.L. *passim*.

11. E.g., B.C.L. § 3 (applicability and acceptance of act); G.C.L. § 391 (taxes and fees payable on filing certificate or other paper).

12. G.C.L. § 203.

13. 70 PA. STAT. ANN. §§ 71-85 (Purdon Supp. 1984-85).

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## I. General Provisions

### A. Notices and Meetings

1. *Manner of Giving Notice.*—Under the Pennsylvania statute, whenever the statute or the corporation's articles or by-laws require written notice to be given to a person, the notice may be delivered personally or be sent by mail or telegram to the person's address as shown on the books of the corporation.<sup>14</sup> Notice sent by mail or telegram is deemed to have been given when deposited in the mail or at the telegraph office.<sup>15</sup> A notice relating to a meeting must state the place, date and hour of the meeting, and if the meeting is a special meeting of shareholders, must state the general nature of the business to be transacted.<sup>16</sup> The Delaware statute contains no provision generally applicable to the manner of giving notice, but does contain provisions comparable to the Pennsylvania provisions with respect to the contents of notices of shareholders' meetings and the giving of such notices by mail.<sup>17</sup>

2. *Waiver of Written Notice.*—Both statutes provide that whenever written notice is required by the statute, charter, or by-laws, a waiver of notice in writing, signed by the person entitled to such notice, shall be deemed the equivalent of written notice.<sup>18</sup> Under the Pennsylvania statute a waiver of notice for a special meeting of shareholders must state the purpose of the meeting.<sup>19</sup> Under both statutes, a person's attendance at a meeting constitutes waiver of notice of that meeting, except when the person is attending for the

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14. B.C.L. § 8(A).

15. *Id.*

16. *Id.*

17. G.C.L. § 222.

18. B.C.L. § 8(B); G.C.L. § 229.

19. B.C.L. § 8(B).

purpose of objecting to the transaction of business on the ground that the meeting was not lawfully called or convened.<sup>20</sup>

3. *Modification of Noticed Resolutions.*—Neither statute requires the inclusion of proposed resolutions in notices of shareholders' meetings. However, whenever the language of a proposed resolution has been included in the notice of a shareholders' meeting, the Pennsylvania statute expressly authorizes the shareholders to adopt the resolution at the meeting with such clarifying or other amendments as do not enlarge the resolution's original purpose, without giving further notice to the shareholders not present at the meeting.<sup>21</sup> The Delaware statute does not contain a similar provision.

4. *Attendance by Conference Telephone.*—Under the Pennsylvania statute, if the by-laws so provide, and under the Delaware statute, unless otherwise restricted by the certificate or the by-laws, members of the board of directors or of a committee of the board may attend meetings of the board or committee by conference telephone or similar means of communication by which all the participants in the meeting can hear each other.<sup>22</sup> Only the Pennsylvania statute also authorizes attendance at shareholders meetings by conference telephone.<sup>23</sup>

5. *Notice to Certain Persons Excused.*—The Delaware statute provides that no notice shall be required to be given to a person with whom communication is unlawful or whose address is unknown and that any action taken or meeting held without notice to such persons will be effective as though notice had been given.<sup>24</sup> The Pennsylvania statute does not contain a comparable provision.

## B. *Filing of Instruments*

1. *Execution of Instruments.*—Under the Delaware statute, any instrument required to be filed with the Secretary of State, if filed before the election or appointment of directors, must be signed by the incorporators.<sup>25</sup> If the document is filed after the election or appointment of directors, it must be signed by the chairman or vice-chairman of the board, or by the president or vice-president, and attested by the secretary or an assistant secretary (or by such officers as may be duly authorized to exercise the duties ordinarily exercised

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20. *Id.* § 8(C); G.C.L. § 229.

21. B.C.L. § 8(D).

22. *Id.* § 8(E); G.C.L. § 141(i).

23. B.C.L. § 8(E).

24. G.C.L. § 230. A person's address is considered unknown if notice of two consecutive annual meetings and of all meetings in the interim, or two payments of dividends or interest during a 12-month period, have been returned undeliverable. *Id.*

25. *Id.* § 103(a)(1).

by the president or vice-president and by the secretary or assistant secretary).<sup>26</sup> If it appears from the instrument that there are no such officers, then it must be signed by a majority of the directors or by such directors as may be designated by the board. If it appears from the instrument that there are no officers or directors, the instrument must be signed by all or a majority of the shareholders, or by such shareholders as may be designated by a majority of the shareholders.<sup>27</sup> The Pennsylvania statute contains no execution requirements specifically relating to documents to be filed with the Department of State. The statute does indicate generally, however, that written instruments signed by the president or vice-president and by the secretary, assistant secretary, treasurer, or assistant treasurer are deemed to be properly executed for the corporation, notwithstanding any provision of the by-laws to the contrary.<sup>28</sup>

2. *Acknowledgment of Instruments.*—Whenever under the Delaware statute an instrument must be acknowledged, the requirement is satisfied by a formal acknowledgment of one of the persons signing the instrument stating that the instrument is his or the corporation's act and deed, and that the facts stated in the instrument are true.<sup>29</sup> If an acknowledgment is required and no formal acknowledgment is made, each signature appearing on the instrument is deemed to constitute an acknowledgment under penalty of perjury that the instrument is the signer's or the corporation's act and deed and that the facts stated in the instrument are true.<sup>30</sup> The Pennsylvania statute contains no provision relating to acknowledgments.

3. *Local Filing of Instruments.*—Under the Delaware statute, any instrument required to be filed with the Secretary of State must be filed in duplicate, and after review by the Secretary of State, one copy must be filed in the Recorder's office for the county where the corporation's registered office is located.<sup>31</sup> The Pennsylvania statute does not require the recording of corporate instruments in any county.

4. *Correction of Instruments and Relation Back of Corrections.*—Under the Delaware statute, if a corporation files an instrument which is an inaccurate record of the corporate action referred to in the instrument or which has been defectively or erroneously executed, the corporation may file a corrected instrument.<sup>32</sup> The cor-

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26. *Id.* § 103(a)(2).

27. *Id.*

28. B.C.L. § 305.

29. G.C.L. § 103(b).

30. *Id.*

31. *Id.* § 103(c).

32. *Id.* § 103(f).

rected instrument is effective as of the date of the earlier instrument, except with respect to any person who is substantially and adversely affected by the correction, as to whom the correction is effective only from the date filed.<sup>33</sup> The Pennsylvania statute neither provides for the relation back of corrections nor indicates whether corrections may be made without formal amendment.

5. *Constructive Notice of Filings.*—The Pennsylvania statute indicates that a corporation is required to file documents with the Department of State in order to afford others the opportunity to learn the contents of the documents, but no person dealing with the corporation is deemed to have constructive notice of those contents.<sup>34</sup> The Delaware statute does not contain such a provision.

6. *Filed Instruments as Evidence.*—An instrument filed with the Delaware Secretary of State as required by the statute, when certified by the Secretary of State and accompanied by a certificate of filing from the county of the corporation's registered office, is prima facie evidence of (a) due execution, acknowledgment, filing, and recording of the instrument, (b) the observance of all prerequisites to the instrument's effectiveness, and (c) any other facts permitted by law to be stated in the instrument.<sup>35</sup> A comparable provision once contained in the Pennsylvania statute has been repealed,<sup>36</sup> but the statute still provides that a certificate of incorporation issued by the Department of State is conclusive evidence of incorporation.<sup>37</sup>

### C. *Jurisdiction Over Internal Corporate Matters*

Under the Pennsylvania statute, proceedings involving matters of corporate governance are within the jurisdiction of the Court of Common Pleas for the county where the corporation's registered office is located.<sup>38</sup> Under the Delaware statute, jurisdiction over such proceedings is in the state's Court of Chancery.<sup>39</sup>

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33. *Id.*

34. B.C.L. § 9.

35. G.C.L. § 105.

36. Formerly B.C.L. § 11.

37. B.C.L. § 207.

38. *See, e.g.*, B.C.L. §§ 308(C) (suit to compel inspection of records), 405(C) (removal of director), 513.1 (appointment of custodian), 1107(C) (involuntary dissolution).

39. *See, e.g.*, G.C.L. §§ 168 (suit to compel issuance of share certificate), 211(c) (order of shareholders' meeting), 220 (suit to compel inspection of records), 225 (contested election). Recommending Delaware over Pennsylvania as a state of incorporation, the Boards of Directors of Gulf Oil and Arco both observed, "The Delaware courts have developed considerable expertise in dealing with corporate issues, and a substantial body of case law has developed construing Delaware law and establishing public policies with respect to Delaware corporations, thereby providing greater predictability with respect to corporate legal affairs." Gulf Oil Corporation, *supra* n.1, at 6-7; Atlantic Richfield Company, *supra* n.2, at 21.

## II. Formation of Business Corporations

### A. *The Corporate Name*

1. *Required Designation of Entity.*—A corporation formed under either Pennsylvania or Delaware law must include within its name at least one word or abbreviation designating the corporation's form of association.<sup>40</sup> Both statutes contain a list from which the word (or its abbreviation) must be selected, the Delaware list including all the words in the Pennsylvania list as well as the terms "club," "foundation," "institute," "society," and "union."<sup>41</sup> While both statutes permit the name to be in any language (if written in English letters or characters),<sup>42</sup> only the Delaware statute expressly provides that the required designation of entity may also be expressed by "words or abbreviations of like import in other languages."<sup>43</sup>

2. *Prohibited Terms and Implications.*—The Pennsylvania statute contains restrictions on the use of certain terms in the corporate name, restrictions intended to prevent false implications that the corporation is a government agency or an entity regulated by a government agency.<sup>44</sup> The only comparable provision of the Delaware statute prohibits the use of the word "trust" in the name of a corporation that is not regulated as a trust company.<sup>45</sup> The Pennsylvania statute also prohibits the use of words that constitute "blasphemy, profane cursing or swearing, or that profane the Lord's name,"<sup>46</sup> and contains other name provisions that are not contained in the Delaware statute.<sup>47</sup>

3. *Deceptively Similar Names.*—Both statutes prohibit a corporation's use of a name which is deceptively similar to the name of any other corporation registered in the state.<sup>48</sup> However, Pennsylvania permits a corporation to use a name which is similar to or the same as the name of another corporation if the other corporation consents to the use of the name, has filed with the Department of Revenue a "certificate of out of existence," or has failed for three consecutive years to file with the Department of Revenue or the De-

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40. B.C.L. § 202(A); G.C.L. § 102(a)(1).

41. Compare B.C.L. § 202(A) with G.C.L. § 102(a)(1). The common terms are "corporation," "company," "incorporated," "limited," "association," "fund," and "syndicate."

42. B.C.L. § 202(A); G.C.L. § 102(a)(1).

43. G.C.L. § 102(a)(1).

44. B.C.L. §§ 202(A), 202(F).

45. G.C.L. § 395(c).

46. B.C.L. § 202(A).

47. See *id.* §§ 202(C) (law of trade names and unfair competition preserved), 202(D) (corporate existence not affected by use of prohibited name, but Attorney General may sue for injunction against such use).

48. *Id.* § 202(B) (also prohibiting the use of a name deceptively similar to the name of any state agency); G.C.L. § 102(a)(1).

partment of State a report or return required by law.<sup>49</sup>

4. *Reservation of Corporate Names.*—In Pennsylvania, a corporate name may be reserved with the Department of State prior to incorporation.<sup>50</sup> The Delaware statute has no similar provision.

### B. *The Charter*

The “articles” of incorporation of a Pennsylvania corporation and the “certificate” of incorporation of a Delaware corporation are required and authorized to contain substantially the same disclosures and provisions.<sup>51</sup> However, only the Pennsylvania statute requires the articles to state that the corporation is organized under the state’s corporation law,<sup>52</sup> to indicate the number of shares subscribed for by each incorporator,<sup>53</sup> and to state the term of the corporation’s existence, which may be perpetual.<sup>54</sup> Other differences, each discussed elsewhere in this Article, relate to naming a corporate agent,<sup>55</sup> special insolvency procedures,<sup>56</sup> cumulative voting by shareholders,<sup>57</sup> supermajority vote requirements,<sup>58</sup> and shareholder liability for corporate debts.<sup>59</sup>

### C. *Advertising Requirements*

Under the Pennsylvania statute, the filing of articles of incorporation must be advertised, with minor exceptions, in two newspapers.<sup>60</sup> The Delaware statute contains no advertising requirement.

### D. *Registry Statement*<sup>61</sup>

Under the Pennsylvania statute, a “registry statement” setting forth certain items of information about the corporation must be filed with the articles.<sup>62</sup> If the registry statement discloses that the corporation intends to engage in any state-regulated business, the Department of State must deliver a copy of the statement to the state agency that regulates that kind of business.<sup>63</sup> The Delaware

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49. B.C.L. § 202(B).

50. *Id.* § 203.

51. *Id.* § 204; G.C.L. § 102.

52. B.C.L. § 204(A)(3).

53. *Id.* § 204(A)(8).

54. *Id.* § 204(A)(4). Under the Delaware statute, the term is perpetual unless otherwise stated in certificate. G.C.L. § 102(b)(5).

55. G.C.L. § 102(a)(2). *See infra* p. 826.

56. *Id.* § 102(b)(2). *See infra* text accompanying note 630.

57. B.C.L. § 204(A)(9); G.C.L. § 102(b)(3). *See infra* p. 840.

58. G.C.L. § 102(b)(4). *See infra* p. 838.

59. *Id.* § 102(B)(6). *See infra* p. 827.

60. B.C.L. § 205.

61. General filing procedures are compared *supra* pp. 818-20.

62. B.C.L. § 206(B).

63. *Id.* § 206(C).

statute does not require a registry statement or any similar document to be filed with the certificate of incorporation.

### *E. Powers, Duties, and Rights of Incorporators*

1. *Organization Meeting.*—The powers that may be exercised by the incorporators at the organization meeting, including the power to adopt by-laws and to elect directors, are the same under both statutes.<sup>64</sup> The minimum notice that may be given of the meeting is two days under Delaware law,<sup>65</sup> five days under Pennsylvania law.<sup>66</sup> Only the Delaware statute expressly authorizes the incorporators to take by unanimous written consent any action that may be taken at the organization meeting.<sup>67</sup>

2. *Other Powers of Incorporators.*—The Delaware statute expressly provides that if no directors have been named in the certificate, the incorporators shall manage the affairs of the corporation,<sup>68</sup> may file certificates,<sup>69</sup> and may dissolve the corporation.<sup>70</sup> Even after the organization meeting, the incorporators may adopt, alter, or repeal by-laws until any payment is received for stock of the corporation.<sup>71</sup> The Pennsylvania statute contains no comparable provisions.

## III. Corporate Powers, Duties, and Safeguards

### *A. General Powers*

The Pennsylvania and Delaware statutes are substantially identical with respect to the general authority, capacity, and powers that may be exercised by a corporation.<sup>72</sup>

### *B. By-laws*

1. *Power to Adopt By-laws.*—Under both statutes, the power to adopt, amend, or repeal by-laws may be exercised by the shareholders and, if authorized by the charter, the board of directors.<sup>73</sup> Delaware further provides that, even without charter authorization, “original or other bylaws . . . may be adopted, amended, or repealed

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64. *Id.* § 210; G.C.L. § 108(a).

65. G.C.L. § 108(b).

66. B.C.L. § 210.

67. G.C.L. § 108(c).

68. *Id.* § 107.

69. *Id.* § 103(a)(1).

70. *Id.* § 274 (discussed in text accompanying note 541, *infra*).

71. *Id.* § 109(a) (discussed in text accompanying note 74, *infra*).

72. Minor differences between the statutes are discussed in the Appendices at B.C.L. § 302 and G.C.L. § 122.

73. B.C.L. § 304 (also permitting authorization to be made in by-laws); G.C.L. § 109(a).



by the incorporators, by the initial directors if they were named in the certificate of incorporation, or, *before a corporation has received any payment for any of its stock* by its board of directors.”<sup>74</sup>

2. *Concurrent Powers of Shareholders.*—The Delaware statute makes clear that the stockholders’ power to adopt, amend, or repeal by-laws is not limited by any delegation of that power to the board of directors.<sup>75</sup> The Pennsylvania statute, less clear on this point, provides, “The shareholders shall have power to make, amend and repeal the by-laws . . . , but . . . the authority to make, amend and repeal by-laws may be expressly vested by the articles or the by-laws in the board of directors, subject always to the power of the shareholders to change such action.”<sup>76</sup>

3. *Persons Bound by By-laws.*—The Pennsylvania statute provides that the by-laws operate merely as regulations among the shareholders of the corporation and that no by-law shall affect contracts or dealings of the corporation with any other person unless he or she has actual knowledge of the by-law.<sup>77</sup> The Delaware statute contains no such provision.

### C. *Special And Emergency Powers*

Both statutes authorize the board of directors to adopt emergency by-laws during any emergency resulting from warlike damage, an attack on the United States, or any nuclear or atomic disaster.<sup>78</sup> The Delaware statute also authorizes the adoption of emergency by-laws during any “attack on a locality in which the corporation does business or customarily holds meetings of the board of directors or its shareholders,” and during “the existence of any catastrophe, or similar emergency condition, as a result of which a quorum of the board of directors thereof cannot readily be convened for action.”<sup>79</sup>

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74. G.C.L. § 109(a) (emphasis added). The placement of the emphasized language so as to qualify only the power of the board creates an implication that the incorporators or the initial directors named in the certificate may adopt, amend, or repeal by-laws without charter authorization, whether or not any payment for shares has been received. However, this implication is inconsistent with the balance of the section, which provides that after any payment has been received, the power to adopt, amend, or repeal by-laws shall be in the shareholders and, if authorized in the certificate, the board of directors. *Id.*

75. *Id.*

76. B.C.L. § 304. If “such action” refers to the vesting of authority in the board, the statute could be interpreted to mean that so long as the authority to make by-laws is in the board, the shareholders have no power with respect to the by-laws other than to amend the articles or by-laws to withdraw that authority from the directors. If “such action” refers to the action of the directors in making, amending, or repealing by-laws, the statute could be interpreted to mean that the shareholders may “change” such action, but may not otherwise take the initiative in making by-laws.

77. *Id.* § 305.

78. *Id.* § 321; G.C.L. § 110.

79. G.C.L. § 110.

Both statutes permit corporations to make donations in support of a war involving the United States (the Delaware statute adds “or other national emergency in aid thereof”<sup>80</sup>), and the Pennsylvania statute expressly authorizes corporations to continue paying salaries to employees who have entered military or similar service.<sup>81</sup>

#### D. Sale of Assets

1. *Shareholder Vote*.—Generally, under both statutes, the sale, lease, or exchange of all or substantially all of a corporation’s assets must be approved by the shareholders.<sup>82</sup> The Pennsylvania statute makes an exception for a sale, lease, or exchange made either in the usual and ordinary course of the corporation’s business or for the purpose of relocating the business,<sup>83</sup> and both statutes make an exception for a mortgage or pledge of assets.<sup>84</sup> When approval is required, both statutes require the vote of a majority of the shareholders who are entitled to vote on the sale.<sup>85</sup> The Pennsylvania statute also requires the vote of a majority of each class entitled to vote on the sale as a class<sup>86</sup> and the vote of a majority of the disinterested shareholders who are entitled to vote on the sale.<sup>87</sup>

2. *Notice to Shareholders*.—When a sale, lease, or exchange must be approved by shareholders, the Pennsylvania statute requires that the shareholders be given at least ten days notice of the meeting at which their approval will be sought.<sup>88</sup> The Delaware statute requires at least twenty days notice.<sup>89</sup>

3. *Dissenters’ Appraisal Rights*.—The Pennsylvania statute grants dissenters’ rights, with certain exceptions,<sup>90</sup> if a corporation sells, leases, or exchanges all or substantially all of its assets otherwise than (1) in the usual and regular course of its business, (2) for the purpose of relocating its business, (3) in connection with its dissolution or liquidation, or (4) to a wholly-owned subsidiary in a transaction which does not affect the preferences, qualifications, limitations, restrictions, or special or relative rights granted to or imposed on any class of the parent corporation’s stock.<sup>91</sup> The Delaware

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80. B.C.L. § 314; G.C.L. § 122(9).

81. B.C.L. § 315.

82. B.C.L. § 311(B); G.C.L. § 271(a).

83. B.C.L. § 311(A).

84. *Id.* § 311(E); G.C.L. § 272.

85. B.C.L. § 311(B); G.C.L. § 271(a).

86. B.C.L. § 311(B).

87. *Id.* § 409.1(C) (discussed at pages 838-39, *infra*).

88. *Id.* § 311(B).

89. G.C.L. § 271.

90. Exceptions to the granting of appraisal rights are discussed *infra* at page 848.

91. B.C.L. § 311(D).

statute does not grant dissenters' rights on any sale of assets, although it indicates that the certificate may do so.<sup>92</sup>

4. *Sale of Subsidiary's Assets.*—Under the Pennsylvania statute, a sale, lease, or exchange of assets by a subsidiary is deemed to be a sale, lease, or exchange of the assets of the parent for the purposes of determining whether the approval of the parent's shareholders will be required and whether appraisal rights will be granted.<sup>93</sup> No similar provision is contained in the Delaware statute.

5. *Acquisition of Assets.*—Neither statute requires shareholder approval for a corporation's acquisition of all or substantially all of another corporation's assets. However, under the Pennsylvania statute, if the acquisition is accomplished by the issuance of a number of shares sufficient to elect a majority of the directors of the acquiring corporation, the shareholders of the acquiring corporation are generally entitled to dissenters' rights.<sup>94</sup>

6. *Reorganization upon Forced Sale.*—The Pennsylvania statute permits a purchaser at a judicially forced sale of a corporation's assets to organize a new corporation having the same rights, privileges, and franchises as the selling corporation.<sup>95</sup> The purchaser, at or previous to the sale, may also enter into a plan or agreement for the readjustment of the respective interests of the selling corporation, its creditors, and its shareholders for the representation of such interests in the bonds, shares, or other securities of the new corporation and for the regulation of their voting powers.<sup>96</sup> The Delaware statute contains no such provisions.

## E. Other Provisions

1. *Registered Office and Agent.*—Under both statutes, a corporation must maintain a registered office in the state.<sup>97</sup> The Delaware statute requires a corporation also to have a registered agent in the state.<sup>98</sup>

2. *Location of Books and Records.*—A Pennsylvania corporation must keep originals or copies of its minute book, by-laws, and books of account at its registered office or principal place of business and must keep a share register at its registered office, its principal

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92. G.C.L. § 262(c).

93. B.C.L. § 311(B) (last sentence).

94. *Id.* § 311(F). Exceptions to this rule are discussed *infra* at page 848.

95. *Id.* § 312(A).

96. *Id.* § 312(B).

97. B.C.L. § 306; G.C.L. § 131(a).

98. G.C.L. § 132.

place of business, or the office of its transfer agent.<sup>99</sup> The Delaware statute does not designate a place where records must be kept.

3. *Form of Books and Records.*—The Delaware statute authorizes the keeping of corporate records in any medium (such as magnetic recording or microfiche) that can be converted into clearly legible written form within a reasonable amount of time.<sup>100</sup> The Pennsylvania statute has no comparable provision.<sup>101</sup>

4. *Director's Right to Inspect Books and Records.*—The Delaware statute codifies the director's right to inspect books and records and provides that the Court of Chancery may exercise jurisdiction over a director's suit to enforce that right.<sup>102</sup>

5. *Reports to Shareholders.*—Unless the by-laws provide otherwise, a Pennsylvania corporation must send an annual report, including audited financial statements, to its shareholders.<sup>103</sup> The Delaware statute does not require the sending of reports to shareholders.

6. *Conferral of Voting Powers on Non-Shareholders.*—Both statutes permit a corporation to confer voting and other shareholder rights on the holders of the corporation's debt securities.<sup>104</sup> In addition, the Pennsylvania statute authorizes corporations to confer voting rights on the Commonwealth, any of the Commonwealth's political subdivisions, and any "other entity prohibited by law from becoming a shareholder of a public utility corporation."<sup>105</sup>

7. *Shareholder Liability for Corporate Debts.*—Under the Delaware statute, the certificate of incorporation may include a provision imposing personal liability on the stockholders for the debts of the corporation.<sup>106</sup> The statute provides that absent such a provision in the certificate, the stockholders are not personally liable for the debts of the corporation except as they may be liable by their own conduct or acts.<sup>107</sup> The Pennsylvania statute provides that a shareholder will not be under any liability to the corporation or its creditors with respect to his or her shares, except to comply with the terms of the subscription for those shares.<sup>108</sup>

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99. B.C.L. § 308(A).

100. G.C.L. § 224.

101. However, the B.C.L. does define "written" to include "printed, typewritten, engraved, lithographed, telegraphed, cabled, radiogrammed, photographed, photostated, telephotographed, or other form of recordation." B.C.L. § 2(28).

102. G.C.L. § 220(d).

103. B.C.L. § 318.

104. B.C.L. § 309.1; G.C.L. § 221.

105. B.C.L. § 309.1(2).

106. G.C.L. § 102(b)(6).

107. *Id.*

108. B.C.L. § 609.

## IV. Directors and Officers

### A. Directors

1. *Introductory Note.*—Section 402 of the Pennsylvania statute provides that, subject to the provisions of the statute, the by-laws may prescribe the number, qualifications, terms of office, manner of election, time and place of meeting, compensation, and powers and duties of the directors. The section establishes a minimum number of directors<sup>109</sup> and then sets forth, qualified by the clause, “[e]xcept as otherwise provided in the bylaws,” seven numbered paragraphs of provisions relating to the term of office of directors, the number of directors, the manner of filling vacancies in the board, the place of board meetings, the number of directors required to constitute a quorum and to take action, the creation of committees, and the taking of action by unanimous written consent.

The scope of the “[e]xcept as otherwise provided in the bylaws” clause is unclear. It appears that the provisions of some of the seven numbered paragraphs which follow that clause are intended as statutory minimums which limit what the by-laws may “otherwise provide.”<sup>110</sup> Other provisions appear to be intended as fillers that apply in the event the by-laws fail to make any alternate provision.<sup>111</sup> The difficulty is in identifying which provisions of the seven numbered paragraphs are intended as fillers and which are intended as statutory minimums.<sup>112</sup> In the comments which follow, a question mark (?) indicates those places where it is unclear whether the by-laws may “otherwise provide.”

2. *Management of Corporation.*—A Pennsylvania corporation is managed “by” a board of directors.<sup>113</sup> A Delaware corporation is managed “by or under the direction of” a board of directors, except as may be otherwise provided in the Delaware statute or in the certificate of incorporation.<sup>114</sup>

3. *Number of Directors.*—A Pennsylvania corporation must have at least three directors, unless there are less than three shareholders, in which case the number of directors may be less than

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109. See text accompanying notes 115-19, *infra*.

110. *E.g.*, B.C.L. § 402(6) (“Except as otherwise provided in the bylaws . . . [t]he board of directors may . . . designate one or more committees, *each committee to consist of two or more directors.*” (emphasis added)).

111. *E.g.*, *id.* at § 402(1) (“Except as otherwise provided in the bylaws . . . [a] director shall be elected for a term of at least one year . . .”).

112. For example, the section cited in the preceding footnote as an example of a filler provision has been interpreted by Professor Sell as establishing a statutory minimum. See I W.E. SELL, PENNSYLVANIA BUSINESS CORPORATIONS § 402.2 (Bisel 1969 & Supp. 1984).

113. B.C.L. § 401.

114. G.C.L. § 141(a).

three, but not less than the number of shareholders.<sup>115</sup> One director is sufficient for a Delaware corporation, regardless of the number of shareholders.<sup>116</sup> Under both statutes, the number of directors may be fixed in the charter or the by-laws.<sup>117</sup> The Pennsylvania statute provides that the number of directors shall be the number set in the articles, or, if no number is set in the articles and the by-laws do not provide otherwise, the number shall be three.<sup>118</sup> No provision of the Delaware statute fixes the number of directors if the certificate or by-laws fail to do so. The Delaware statute provides that a failure to elect a sufficient number of directors to conduct the business of the corporation shall not affect otherwise valid corporate acts or work a dissolution or forfeiture of the corporation.<sup>119</sup>

4. *Qualifications of Directors.*—Directors of Pennsylvania corporations must be natural persons of full age,<sup>120</sup> and other qualifications may be prescribed in the by-laws<sup>121</sup> or articles.<sup>122</sup> The Delaware statute prescribes no qualifications for directors, but provides that qualifications may be prescribed in the certificate or by-laws.<sup>123</sup>

5. *Classification of Directors.* (a) *Classification as to representation.*—Under both statutes, the directors of a corporation may be classified with respect to the voting interests they represent.<sup>124</sup> The Pennsylvania statute permits only the articles to provide for such classification.<sup>125</sup> The Delaware statute permits the certificate, the initial by-laws, or a by-law adopted by the shareholders to provide for such classification.<sup>126</sup>

(b) *Staggered board.*—Both statutes permit the board of directors to be divided into classes to serve for staggered terms, with one class up for election in each year.<sup>127</sup> The Pennsylvania statute permits the creation of up to four such classes,<sup>128</sup> while the Delaware statute permits the creation of no more nor less than three such classes.<sup>129</sup> Unique to the Pennsylvania statute is the requirement that the num-

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115. B.C.L. § 402.

116. G.C.L. § 141(b).

117. B.C.L. § 402(2); G.C.L. § 141(b).

118. B.C.L. § 402(2).

119. G.C.L. § 211(c).

120. B.C.L. § 401.

121. *Id.* §§ 401, 402.

122. *Id.* § 401.

123. G.C.L. § 141(b).

124. B.C.L. § 403; G.C.L. § 141(d).

125. B.C.L. § 403.

126. G.C.L. § 141(d).

127. B.C.L. § 403; G.C.L. § 141(d).

128. B.C.L. § 403.

129. G.C.L. § 141(d).

ber of directors in each class be as nearly equal as possible.<sup>130</sup> The Pennsylvania statute allows the articles or any by-law to provide for a staggered board,<sup>131</sup> while the Delaware statute allows only the certificate, an initial by-law, or a by-law adopted by the shareholders to so provide.<sup>132</sup>

6. *Committees of the Board.*—Under both statutes, unless otherwise provided in the by-laws, the board of directors may by resolution designate one or more committees of the board.<sup>133</sup> In a Pennsylvania corporation, unless otherwise provided in the by-laws (?), each such committee must consist of at least two directors and, to the extent provided in the resolution of the board or the by-laws, may exercise all powers and authority of the board.<sup>134</sup> In a Delaware corporation, a committee need consist of only one director.<sup>135</sup> The authority and powers that may be delegated to a committee of the board of a Delaware corporation are limited: a committee may not amend the certificate (with some exceptions), amend the by-laws, adopt an agreement of merger or consolidation, or propose to the shareholders a dissolution of the corporation or a sale of the corporation's assets, and, unless specifically authorized in the certificate of incorporation, the by-laws, or a resolution of the board, may not declare a dividend, authorize the issuance of stock, or adopt a certificate of ownership and merger.<sup>136</sup>

7. *Notice of Directors' Meetings.*<sup>137</sup>—The Pennsylvania statute provides that directors' meetings shall be held on such notice as the by-laws prescribe and that, unless the by-laws prescribe otherwise, five days' notice must be given.<sup>138</sup> The Delaware statute requires notice of the organization meeting,<sup>139</sup> but does not otherwise require notice of directors' meetings.

8. *Quorum of and Action by Board.*—Under both statutes, a majority of the directors is normally required to constitute a quorum.<sup>140</sup> Under the Delaware statute, the certificate or the by-laws may require more than a majority to constitute a quorum, and, unless the certificate provides otherwise, the by-laws may provides that less than a majority (but not less than one-third) may constitute a

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130. B.C.L. § 403.

131. *Id.*

132. G.C.L. § 141(d).

133. B.C.L. § 402(6); G.C.L. § 141(c).

134. B.C.L. § 402(6).

135. G.C.L. § 141(c).

136. *Id.*

137. Notice requirements are discussed further at pages 817-18, *supra*.

138. B.C.L. § 404.

139. G.C.L. § 108(b) (discussed *supra* at page 823).

140. B.C.L. § 402(5); G.C.L. § 141(b).

quorum.<sup>141</sup> A vote of a majority of the directors present at a meeting at which a quorum is present is required for board action, unless the certificate or by-laws require the vote of a greater number.<sup>142</sup> Under the Pennsylvania statute, unless the by-laws otherwise provide (?), a majority of directors is required to constitute a quorum, and the vote of a majority of the quorum is required for board action.<sup>143</sup> No maximum or minimum limits on what the by-laws may otherwise provide with respect to quorum and voting requirements are mentioned.

9. *Board Action Without Meeting.*—Both statutes provide that, unless otherwise provided (unless otherwise “restricted” under the Delaware statute) by the charter or the by-laws, the board or a committee of the board may take action without a meeting if all the members of the board or committee consent to such action in writing.<sup>144</sup> It is unclear under the Pennsylvania statute whether the “[e]xcept as otherwise provided” clause permits the by-laws to provide for written consents that are less than unanimous.<sup>145</sup>

10. *Interested Directors.*—Both statutes provide that a corporate transaction will not be void or voidable solely because an officer or director of the corporation is an officer or director of, or has a financial interest in, the other party to the transaction and participates in the meeting of the board which authorizes the transaction, if (1) the material facts are disclosed to or known by the board and the board authorizes the transaction, (2) the material facts are disclosed to or known by the shareholders and the shareholders approve the specific transaction, or (3) the transaction is fair to the corporation at the time the board authorizes, or the shareholders approve, the transaction.<sup>146</sup> Both statutes permit the interested director or directors to be counted for the purpose of determining the presence of a quorum.<sup>147</sup> The Pennsylvania statute provides that the board authorization referred to in alternative (1) above must be by “a vote sufficient for such purpose without counting the vote of the interested director or directors,”<sup>148</sup> but does not indicate whether a vote, to be “sufficient,” must be of a majority of the whole quorum or of only the disinterested directors. The Delaware statute is more clear: the same authorization must be by “the affirmative votes of a majority of the disinterested directors, even though the disinterested directors

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141. G.C.L. § 141(b).

142. *Id.*

143. B.C.L. § 402(5).

144. *Id.* § 402(7); G.C.L. § 141(f).

145. See B.C.L. § 402(7); *cf. id.* § 513(B) (permitting articles to provide for written shareholder consent which is less than unanimous).

146. B.C.L. § 409.1; G.C.L. § 144.

147. B.C.L. § 409.1(B); G.C.L. § 144(b).

148. B.C.L. § 409.1(A)(1).



be less than a quorum."<sup>149</sup> The Delaware statute expressly provides that the foregoing provisions also apply to committees of the board.<sup>150</sup>

11. *Removal of Directors.*—Both statutes permit, with certain exceptions, the removal, with or without cause, of any or all directors by a majority of the shareholders entitled to vote for them.<sup>151</sup> Under the Delaware statute, unless the certificate provides otherwise, directors who are classified with respect to term or representation may be removed only for cause.<sup>152</sup> Both statutes limit the removal of an individual director where the corporation has cumulative voting and a number of votes sufficient to elect the director is cast against his removal: under the Pennsylvania statute, the director may not be removed unless the entire board or class of which he is a member is removed;<sup>153</sup> under the Delaware statute, the director may not be removed *without cause* unless the entire board is removed.<sup>154</sup> The Pennsylvania statute also provides for judicial removal of a director at the suit of a shareholder or group holding at least ten percent of the outstanding stock, for "fraudulent or dishonest acts, or gross abuse of authority or discretion,"<sup>155</sup> and authorizes the board of directors to declare vacant the office of a director for "any proper cause," which includes but is not limited to the director's being declared of unsound mind by court order, being convicted of a felony, or failing to accept office or to qualify.<sup>156</sup>

12. *Filling Vacancies in Board.*—Both statutes contain provisions that apply, unless otherwise provided in the by-laws (?) or charter, to filling vacancies in the board of directors. Under these provisions, vacancies may ("shall" in Pennsylvania) be filled by the remaining members of the board.<sup>157</sup> The Pennsylvania statute provides that, unless otherwise provided in the by-laws (?), the director selected to fill the vacancy serves until the shareholders elect his successor, which they may do either at the next annual meeting or at an earlier special meeting called for that purpose.<sup>158</sup> The statute does not indicate how these provisions should apply where directors' terms are for longer than one year. The Delaware statute, on the other hand, specifically provides that the director, if he is a member of a

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149. G.C.L. § 144(a)(1).

150. *Id.* § 144.

151. B.C.L. § 405(A); G.C.L. § 141(k).

152. G.C.L. § 141(k).

153. B.C.L. § 405(A).

154. G.C.L. § 141(k).

155. B.C.L. § 405(C).

156. *Id.* § 405(B).

157. B.C.L. § 402(3); G.C.L. § 223(a).

158. B.C.L. § 402(3).

class, serves until the next meeting at which directors of that class are to be elected.<sup>159</sup> The Delaware statute contains a number of other vacancy provisions not found in the Pennsylvania statute, each applicable unless the certificate or by-laws provide otherwise: a vacancy in a directorship which is part of a class must be filled by the remaining directors of that class;<sup>160</sup> a sole remaining director of a class or of an unclassified board is explicitly authorized to fill any vacancies in that class or board;<sup>161</sup> when no directors remain, any interested person may call a special meeting of shareholders for the purpose of electing directors;<sup>162</sup> and a resigning director whose resignation is not yet effective may participate with the board in selecting a director to fill the vacancy his resignation will create.<sup>163</sup> The Delaware statute also provides that if the remaining directors constitute less than a majority of the board, then, without regard to any contrary provision of the certificate or by-laws, a shareholder or group owning at least ten percent of the corporation's stock may request the Court of Chancery to order a special meeting and to set aside any appointments made by the remaining directors.<sup>164</sup>

13. *Reliance on Books and Records.*—The Delaware statute generally provides that a member of the board or of any committee appointed by the board shall, in the performance of his or her duties, be fully protected in relying in good faith on the books and records of the corporation.<sup>165</sup> The Pennsylvania statute makes such a provision only in the context of director liability for unlawful distributions.<sup>166</sup>

## B. Officers

1. *Required Officers.*—A Pennsylvania corporation must have at least a president, a secretary, and a treasurer,<sup>167</sup> while a Delaware corporation must have at least a chairman of the board or president, and a secretary or treasurer.<sup>168</sup> In either corporation, unless the by-laws or the charter provide otherwise, any number of offices may be

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159. G.C.L. § 223(b).

160. *Id.* § 223(a).

161. *Id.*

162. *Id.*

163. *Id.* § 223(d).

164. *Id.* § 223(c); *cf.* B.C.L. § 501(C) (generally permitting ten percent shareholder or group to call a special meeting).

165. G.C.L. § 141(e).

166. B.C.L. § 707(A); *cf.* G.C.L. § 172 (making a similar special provision); *see infra* discussion at page 866.

167. B.C.L. § 406.

168. G.C.L. §§ 142, 158.

held by the same person.<sup>169</sup>

2. *Qualifications of Officers.*—The president and the secretary of a Pennsylvania corporation must be natural persons of full age, and the treasurer may be either a natural person of full age or a corporation.<sup>170</sup> Additional qualifications may be stated in the articles or by-laws.<sup>171</sup> No general qualifications are stated for officers of a Delaware corporation, although qualifications presumably may be stated in the certificate<sup>172</sup> or by-laws.<sup>173</sup>

3. *Loans to Officers.*—The Delaware statute provides that a corporation may loan money to, guaranty the obligation of, or otherwise assist an officer or employee if to do so may be reasonably expected to benefit the corporation.<sup>174</sup> No comparable provision of the Pennsylvania statute authorizes or prohibits such transactions.<sup>175</sup>

### C. *Other Provisions Relating to Directors and Officers*

1. *Fiduciary Relation of Directors and Officers to Corporation.*—The Pennsylvania statute provides that directors and officers shall be deemed to stand in a fiduciary relation to the corporation and that, in discharging their duties, they must act in good faith and with the diligence, care, and skill that ordinarily prudent men would exercise in similar circumstances.<sup>176</sup> In considering the best interests of the corporation, directors and officers may consider the effects of any action on employers, suppliers, and customers of the corporation, communities in which the offices or other “establishments” of the corporation are located, and “all other pertinent factors.”<sup>177</sup> The Delaware statute contains no comparable provisions.

2. *Indemnification of Directors, Officers, and Other Persons.*—The provisions of the Pennsylvania and Delaware statutes are nearly identical with respect to a corporation’s powers to indemnify parties to lawsuits and to provide insurance on such persons’ behalf.<sup>178</sup> However, the Delaware statute does make clarifications not made in the Pennsylvania statute relating to the survival of indemni-

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169. B.C.L. § 406; G.C.L. § 142.

170. B.C.L. § 406.

171. *Id.*

172. G.C.L. § 102(b)(1) (authorizing any lawful provision for the management of the corporation).

173. *Id.* § 109(b) (authorizing any lawful provision relating to the business of the corporation).

174. G.C.L. § 143.

175. *But see* B.C.L. § 408 (directors and officers stand in a fiduciary relationship to the corporation).

176. B.C.L. § 408(A).

177. *Id.* § 408(B).

178. B.C.L. § 410; G.C.L. § 145.

fication rights following a merger or other corporate reorganization<sup>179</sup> and relating to employee benefit plans.<sup>180</sup> The Pennsylvania statute establishes requirements relating to the payment of expenses to officers, directors, employees, or agents in advance of a final determination,<sup>181</sup> while Delaware establishes such requirements only with respect to officers and directors — other employees and agents may be paid upon such terms and conditions as the board deems appropriate.<sup>182</sup>

## V. Shareholders' Meetings, Rights, and Liabilities

### A. Meetings of Shareholders

1. *Call of Annual Meeting.*—Under both statutes, the date and time of the annual meeting of shareholders may be fixed in the by-laws.<sup>183</sup> In lieu of fixing a date and time, the by-laws of a Delaware corporation may designate the manner in which the date and time may be fixed by the directors or anyone else,<sup>184</sup> but the by-laws of a Pennsylvania corporation may grant the authority to fix the date and time only to the directors.<sup>185</sup> Both statutes provide for the call of an annual meeting if no meeting has been held as provided in the by-laws: the Pennsylvania statute provides that if no annual meeting has been held during the calendar year, any shareholder may call the meeting at any time thereafter.<sup>186</sup> The Delaware statute provides that if no annual meeting has been held within thirty days after the date designated in the by-laws, or if no annual meeting has been held for thirteen months, any shareholder or director may petition the Court of Chancery to order a meeting to be held.<sup>187</sup>

2. *Failure to Hold Annual Meeting.*—Both statutes provide that a failure to hold the annual meeting at the designated time shall not work any forfeiture or dissolution of the corporation.<sup>188</sup> The Delaware provision also indicates that such a failure shall not affect otherwise valid corporate acts.<sup>189</sup>

3. *Call of Special Meeting.*—Under the Pennsylvania statute, special meetings may be called at any time by the president, by the board of directors, by a shareholder or group of shareholders entitled

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179. G.C.L. § 145(h).

180. *Id.* § 145(i).

181. B.C.L. § 410(E).

182. G.C.L. § 145(e).

183. B.C.L. § 501(A); G.C.L. § 211(b).

184. G.C.L. § 211(b).

185. B.C.L. § 501(A).

186. *Id.* § 501(B).

187. G.C.L. § 211(c).

188. B.C.L. § 501(B); G.C.L. § 211(c).

189. G.C.L. § 211(c).

to cast one-fifth of the votes which all shareholders may cast at the meeting, or by such other persons as may be designated in the articles or by-laws.<sup>190</sup> Under the Delaware statute, only the board of directors and persons designated in the certificate or by-laws are authorized to call special meetings,<sup>191</sup> except that, when a quorum of directors cannot be formed due to resignations, deaths, or removals, any stockholder or group owning ten percent of the shares entitled to vote for directors may petition the Court of Chancery to order a special election to be held.<sup>192</sup>

4. *Adjournments of Meetings.*—The Pennsylvania statute authorizes the adjournment of special or annual meetings, with the limitation that any meeting at which directors are to be elected may be adjourned only from day to day, or for such longer periods not exceeding fifteen days each, as may be directed by shareholders or their proxies who are present at the meeting and who are entitled to cast a majority of the votes that all shareholders would be entitled to cast at an election of directors.<sup>193</sup> If a meeting is adjourned for want of a quorum, those present may adjourn the meeting, subject to the foregoing limitation if directors are to be elected, to such time and place as those present may determine.<sup>194</sup> The Delaware statute similarly provides for the adjournment of meetings, but expressly limits the business that may be conducted at the adjourned meeting to that which might have been transacted at the original meeting.<sup>195</sup> No limitation on the period of adjournment is stated.

#### B. *Notice of Shareholders' Meetings*<sup>196</sup>

1. *Notice of Annual or Special Meeting.*—Under the Pennsylvania statute, notice of every shareholders' meeting must be given at least five days prior to the meeting, unless earlier notice is required by a specific statutory provision.<sup>197</sup> Under the Delaware statute, notice must be given not less than ten days nor more than sixty days prior to the meeting, unless the statute provides otherwise.<sup>198</sup>

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190. B.C.L. § 501(C).

191. G.C.L. § 211(d).

192. *Id.* § 223(c).

193. B.C.L. § 501(D).

194. *Id.* § 503(A)(3) (discussed further at pages 837-38, *infra*).

195. G.C.L. § 222(c).

196. Notice provisions are discussed generally at pages 817-18, *supra*.

197. B.C.L. § 502. At least 10 days' notice is required for meetings called to approve a merger or consolidation, *id.* § 902(B), a sale of assets, *id.* § 311(B), or an amendment to the articles of incorporation, *id.* § 803.

198. G.C.L. § 222(b). At least 20 days notice is required for meetings called to approve a merger or consolidation, *id.* § 251(c), or sale of assets, *id.* § 271(a).

2. *Notice of Adjourned Meeting.*—Under both statutes, no notice of an adjourned meeting need be given, other than by announcement at the meeting at which the adjournment is taken, unless the by-laws otherwise require or, under the Delaware statute, the adjournment is for more than thirty days.<sup>199</sup>

3. *Affidavit of Notice.*—The Delaware statute provides that an affidavit of the corporation's secretary, assistant secretary, or transfer agent stating that notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein.<sup>200</sup>

### C. *Quorum of and Action by Shareholders*

1. *Quorum of Shareholders.*—Under the Pennsylvania statute, a majority of the shareholders entitled to vote on a matter constitutes a quorum of shareholders with respect to that matter unless otherwise provided in the articles, a by-law adopted by the directors at the organization meeting, or a by-law adopted by the shareholders.<sup>201</sup> The statute does not indicate whether the articles or any by-law may provide for a quorum consisting of less than a majority. The Delaware statute similarly requires a majority to constitute a quorum unless the certificate or any by-law provides otherwise, subject to the limitation that in no event shall a quorum consist of less than one-third of the shareholders entitled to vote.<sup>202</sup>

2. *Withdrawal of Shareholders from Meeting.*—The Pennsylvania statute provides that, unless provided otherwise in the articles, in a by-law adopted by the directors at the organization meeting, or in a by-law adopted by the shareholders, the shareholders present at a duly organized meeting can continue to do business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum.<sup>203</sup> The Delaware statute contains no such provision.

3. *Adjournments Due to Lack of Quorum.*—The Pennsylvania statute provides that, unless otherwise provided in the articles, in a by-law adopted by the directors at the organization meeting, or in a by-law adopted by the shareholders, if a meeting cannot be organized because a quorum has not attended the originally announced meeting or the first adjournment thereof, the shareholders present at the second adjournment thereof shall constitute a quorum, although

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199. B.C.L. § 502; G.C.L. § 222(c).

200. G.C.L. § 222(b).

201. B.C.L. § 503(A)(1).

202. G.C.L. § 216.

203. B.C.L. § 503(A)(2).

less than a quorum as fixed by the statute or the articles.<sup>204</sup> The Delaware statute contains no comparable provision, although it does provide that when the Court of Chancery has ordered a meeting because no annual meeting has been held, the shareholders present at the court-ordered meeting constitute a quorum notwithstanding any contrary provision of the certificate or by-laws.<sup>205</sup>

4. *Majority Vote Requirements.*—Both statutes provide that a simple majority vote of the quorum present at a meeting will constitute action by the shareholders, unless a greater vote is statutorily required in respect of a specific action.<sup>206</sup> Under the Pennsylvania statute, the articles, the initial by-laws, or a by-law adopted by the shareholders may require a greater vote than that required by the statute.<sup>207</sup> Under the Delaware statute, a greater vote than that required by the statute may be required by the certificate<sup>208</sup> and, arguably, by the by-laws.<sup>209</sup>

5. *Vote Required of Disinterested Shareholders.*—Under the Pennsylvania statute, certain transactions require, in addition to any other vote requirement, the vote of a majority of the shareholders entitled to vote on the transaction who are not interested shareholders.<sup>210</sup> “Interested shareholder” is defined as a “shareholder who is a party to the transaction or who is treated differently from other shareholders and any person, or group of persons, that is acting jointly or in concert with the interested shareholder and any person who, directly or indirectly, controls, is controlled by, or is under common control with, the interested shareholder.”<sup>211</sup> The vote of disinterested shareholders is generally required for a sale, lease, or exchange of all or substantially all of the assets of a corporation.<sup>212</sup> A disinterested shareholder vote is also required for a merger or consolidation and a voluntary dissolution of the corporation.<sup>213</sup> However, this additional vote requirement does not apply if the transaction has been approved by majority vote of the directors, without counting

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204. *Id.* § 503(A)(3) (no mention is made of a quorum fixed by the by-laws).

205. G.C.L. § 211(c).

206. B.C.L. § 503(A)(1); G.C.L. § 216.

207. B.C.L. § 503(B); *but see id.* § 805 (An amendment to the articles requires a majority vote, “[u]nless the articles require a greater vote.” This implies that only the articles may require a supermajority vote for an articles amendment).

208. G.C.L. § 102(b)(4).

209. *See id.* § 216 (certificate or by-laws may provide for less than or greater than majority vote, “[s]ubject to this chapter in respect of the vote that shall be required for a specific action”).

210. B.C.L. § 409.1(C).

211. *Id.* § 409.1(C)(1).

212. *Id.* No disinterested or other shareholder vote is required for a sale of assets if the sale is for the purpose of relocation, is made in connection with the liquidation or dissolution of the corporation, or is made in the ordinary course of business. *See id.* §§ 409.1(C)(1), 311(B).

213. *Id.* § 409.1(C)(1).

the vote of directors (a) who are directors or officers of, or have a material equity interest in, the interested shareholder, or (b) who were nominated by the interested shareholder and first elected within two years prior to the vote.<sup>214</sup> Neither will the additional vote requirement apply if the consideration to be received by shareholders of any class of shares held by the interested shareholder equals or exceeds the consideration to be received by the interested shareholder for shares of that class.<sup>215</sup>

#### D. Shareholder Proxies

1. *Formal Requirements for Proxy.*—The Pennsylvania statute expressly requires every proxy to be executed in writing by the shareholder or his attorney-in-fact and to be filed with the corporation.<sup>216</sup> The Delaware statute contains no such requirement.<sup>217</sup>

2. *Term of Proxy.*—Under the Pennsylvania statute, a proxy is not valid for more than eleven months, unless a longer time is stated in the proxy, but in no event can a proxy be valid for more than three years unless coupled with an interest.<sup>218</sup> The Delaware statute provides that a proxy shall not be valid for more than three years, unless a longer time is stated in the proxy.<sup>219</sup>

3. *Revocable Proxies.*—Under the Pennsylvania statute, a proxy not coupled with an interest is revocable at will, notwithstanding any agreement or provision of the proxy to the contrary, but the revocation is not effective until notice of revocation has been given to the secretary of the corporation.<sup>220</sup> Similarly, a proxy is not revoked by the shareholder's death or incapacity, unless notice of the death or incapacity is given to the secretary.<sup>221</sup> The Delaware statute contains no such provisions, although it does state requirements for irrevocable proxies.<sup>222</sup>

4. *Irrevocable Proxies.*—Under both statutes, a proxy must be coupled with an interest in order to be irrevocable.<sup>223</sup> The Delaware statute also requires the proxy to state that it is irrevocable.<sup>224</sup> The Pennsylvania statute provides that a proxy coupled with an interest

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214. *Id.* § 409.1(C)(2)(i).

215. *Id.* § 409.1(C)(2)(ii).

216. *Id.* § 504(A).

217. *But see* G.C.L. § 212 (containing provisions which presuppose a dated, duly executed proxy).

218. B.C.L. § 504(A).

219. G.C.L. § 212(b).

220. B.C.L. § 504(A).

221. *Id.*

222. *See* G.C.L. § 212(c) (discussed next).

223. B.C.L. § 504(A); G.C.L. § 212(c).

224. G.C.L. § 212(c).



shall include an unrevoked proxy in favor of a creditor of the shareholder.<sup>225</sup> The Delaware statute provides that the interest may be in the stock itself or in the corporation generally.<sup>226</sup>

5. *Sale of Proxy.*—The Pennsylvania statute prohibits shareholders from selling their votes or executing proxies in exchange for anything of value.<sup>227</sup> The Delaware statute contains no such prohibition.

### E. Election of Directors

1. *Nomination of Directors.*—The Pennsylvania statute provides that if the articles or a by-law adopted by the shareholders or by the directors at the organization meeting provides a “fair and reasonable” procedure for the nomination of directors, only candidates nominated pursuant to that procedure are eligible for election.<sup>228</sup> The Delaware statute contains no such provision.

2. *Ballot Requirements.*—Under the Pennsylvania statute, unless otherwise provided in the by-laws, elections for directors need not be by ballot, except upon a demand made, prior to the voting, by a shareholder who is present at the election.<sup>229</sup> Under the Delaware statute, all elections of directors must be by written ballot, unless otherwise provided in the certificate.<sup>230</sup>

3. *Cumulative Voting.*—Under the Pennsylvania statute, cumulative voting applies in an election for directors, unless the articles provide otherwise.<sup>231</sup> Under the Delaware statute, cumulative voting applies only if the certificate so provides.<sup>232</sup>

4. *Judges of Election; Contested Elections.*—In Pennsylvania, the board of directors or the chairman of the meeting may appoint judges of election.<sup>233</sup> If a shareholder or shareholder’s proxy so requests, the chairman of the meeting must make this appointment.<sup>234</sup> The judges must pass on all aspects of the shareholder vote for which they have been appointed,<sup>235</sup> and any report or certificates of election prepared by them is prima facie evidence of the facts stated

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225. B.C.L. § 504(A).

226. G.C.L. § 212(c).

227. B.C.L. § 504(A).

228. *Id.* § 505(A).

229. *Id.*

230. G.C.L. § 211(e).

231. B.C.L. § 505.

232. G.C.L. § 214.

233. B.C.L. § 512(A).

234. *Id.*

235. *Id.* § 512(C).

therein.<sup>236</sup> No provision for judges of election is made in the Delaware statute. However, any stockholder or director may petition the Court of Chancery to pass on the validity of the election of a director and, if the election is found invalid, to order a new election.<sup>237</sup>

## F. Special Voting Provisions

1. *Voting by Fiduciaries and Pledges.*—Under both statutes, shares standing on the books of the corporation in the name of a fiduciary or pledgee may be voted by the fiduciary or pledgee.<sup>238</sup> The Delaware statute, however, permits a pledgee to vote pledged shares only if in the transfer by the pledgor on the books of the corporation the pledgor has expressly authorized the pledgee to vote the shares.<sup>239</sup>

2. *Voting by Joint Holders of Shares.*—Both statutes provide for the voting of jointly held shares by one or more joint holders present at a meeting.<sup>240</sup> If more than one joint holder is voting with respect to the jointly held shares, the vote of the majority of the joint holders controls the vote of all the shares.<sup>241</sup> If their vote is equally divided, then the number of shares is divided equally among the joint holders<sup>242</sup> unless, under the Delaware statute, one of the joint holders, or a beneficiary, petitions the Court of Chancery to appoint a person to break the tie, in which case the resulting majority vote controls the vote of all the shares.<sup>243</sup> Alternate voting provisions made in the instrument that creates or governs the joint interests will be given effect if a copy of the instrument is filed with the secretary of the corporation and, under the Pennsylvania statute, an attorney certifies that the copy is correct.<sup>244</sup>

3. *Voting Shares Held by Corporations.*—The Pennsylvania statute provides that a foreign or domestic corporation owning shares of stock in a domestic corporation may vote those shares by any of the owner's officers, by proxy, or by some other person who is appointed to vote the shares in a resolution of the board or a provision of the articles or by-laws.<sup>245</sup> A certified copy of the appointment

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236. *Id.* § 512(D).

237. G.C.L. § 225. This section also authorizes a stockholder, director, or officer whose title to office is contested to petition the Court of Chancery to pass on the election of an officer.  
*Id.*

238. B.C.L. § 506; G.C.L. § 217(a).

239. G.C.L. § 217(a).

240. B.C.L. § 507; G.C.L. § 217(b).

241. B.C.L. § 507; G.C.L. § 217(b).

242. B.C.L. § 507; G.C.L. § 217(b).

243. G.C.L. § 217(b); *but cf. id.* § 218(a) (if trustees of voting trust split evenly, the shares are divided).

244. B.C.L. § 507; G.C.L. §§ 217(b), 218(a) (relating to voting trusts).

245. B.C.L. § 508.

must be filed with the corporation whose shares are so owned.<sup>246</sup> A domestic corporation's shares in a foreign corporation may be voted in the same manner, unless otherwise provided in the law under which the foreign corporation is organized.<sup>247</sup> The Delaware statute contains no comparable provisions. Both statutes prohibit a corporation from voting its own shares held by it, or counting them toward a quorum, unless the shares are held in a fiduciary capacity.<sup>248</sup> In addition, the Delaware statute prohibits the corporation from permitting a majority-owned subsidiary to vote the corporation's shares.<sup>249</sup>

### G. *Determination of Shareholders of Record; Voting Lists*

1. *Record Date Set by Directors.*—Both statutes authorize the board of directors to fix a record date for the determination of shareholders, although in Pennsylvania, the by-laws may restrict this authority.<sup>250</sup> The Pennsylvania statute provides that the record date must be not more than fifty days prior to the meeting or other event for which the determination is to be made.<sup>251</sup> Under the Delaware statute, the record date must be not more than sixty nor less than ten days prior to the meeting or such other event.<sup>252</sup>

2. *Record Date Set by Default.*—Under the Pennsylvania statute, if the by-laws or the directors fail to set a record date for determining who is entitled to notice of, and to vote at, a shareholders' meeting, the record date is statutorily set at ten days prior to the meeting.<sup>253</sup> No provision is made with respect to a record date for other purposes. Under the Delaware statute, if the directors fail to set a record date for a stockholders' meeting, the record date is the close of business on the day before notice is given, or, if notice is waived, the close of business on the day before the meeting.<sup>254</sup> For other purposes, the record date is the close of business on the day the directors adopt the resolution relating thereto.<sup>255</sup>

3. *Record Date for Written Consents.*—Among the events for which a record date may be set under the Delaware statute is the shareholders' giving of written consent to corporate action.<sup>256</sup> When no record date has been set and "no prior action by the board is

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246. *Id.*

247. *Id.*

248. B.C.L. §§ 2(24), 508; G.C.L. § 160(c).

249. G.C.L. § 160(c).

250. B.C.L. § 509; G.C.L. § 213(a).

251. B.C.L. § 509.

252. G.C.L. § 213(a).

253. B.C.L. § 509.

254. G.C.L. § 213(b)(1).

255. *Id.* § 213(b)(3).

256. *Id.* § 213(a).

necessary," the record date is the date on which the first written consent is expressed.<sup>257</sup> The Pennsylvania statute contains no such provisions.

4. *Record Date for Adjourned Meetings.*—The Delaware statute expressly provides that a determination of stockholders entitled to notice of, and to vote at, a stockholders' meeting will apply to any adjournment of that meeting, except that the board of directors may fix a new record date for the adjourned meeting.<sup>258</sup> It is less clear under the Pennsylvania statute whether the directors may set a new record date for an adjourned meeting.<sup>259</sup>

5. *Closing of Stock Books.*—The Pennsylvania statute permits the board of directors to close the books of the corporation against share transfers during all or any portion of the period between the record date and the meeting or other event, provided that at least ten days' prior notice of such closing is given to the shareholders.<sup>260</sup> The Delaware statute contains no provision relating to the closing of stock books.

6. *Voting Lists.*—Both statutes require the corporation to provide the shareholders with a list of shareholders entitled to vote at the meeting.<sup>261</sup> Under the Pennsylvania statute, this list must be available for inspection by the shareholders at the registered office of the corporation, beginning at least five days prior to the meeting, except that a corporation having over 5,000 shareholders may make the same information available by other means.<sup>262</sup> Under the Delaware statute, the list must be available at the place where the meeting is to be held, or at some other designated place within the same city, beginning at least ten days prior to the meeting, without exception.<sup>263</sup> Under both statutes, the stock ledger is evidence as to the identity of the shareholders: it is prima facie evidence under the Pennsylvania statute,<sup>264</sup> and "the only evidence" under the Delaware statute.<sup>265</sup> The Delaware statute disqualifies from election to any office a director who intentionally or by willful neglect fails to make the voting list available at any meeting for the election of directors.<sup>266</sup>

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257. *Id.* § 213(b)(2).

258. G.C.L. § 213(c).

259. See B.C.L. § 509 (directors may set record date for "any meeting of shareholders").

260. B.C.L. § 509.

261. *Id.* § 510; G.C.L. § 219

262. B.C.L. § 510.

263. G.C.L. § 219(a).

264. B.C.L. § 510.

265. G.C.L. § 219(c).

266. *Id.* § 219(b).

## H. Voting Trusts

1. *Number of Shareholders.*—The Pennsylvania statute permits a voting trust to be created by two or more shareholders,<sup>267</sup> while the Delaware statute permits a voting trust to be created by one or more shareholders.<sup>268</sup>

2. *Nature of Trustee.*—Under both statutes, one or more corporations or persons may serve as trustee.<sup>269</sup> The Delaware statute, however, mandates that the corporation must be one authorized to act as a trustee.<sup>270</sup>

3. *Trust Provisions.*—The Pennsylvania statute provides that the trust agreement may vest in the trustee all voting *or other* rights pertaining to the shares, on such terms and conditions as set forth in the trust agreement.<sup>271</sup> The Delaware statute provides that the trust agreement may vest voting rights in the voting trustee, on such terms and conditions as are set forth in the trust agreement, and permits the agreement to contain such additional provisions as are “not inconsistent” with the purpose of vesting voting rights in the trustee.<sup>272</sup>

4. *Filing of Agreement with Corporation.*—Under the Delaware statute, a copy of the voting trust agreement must be filed in the registered office of the corporation, which copy must be available for inspection by any stockholder of the corporation or beneficiary of the trust.<sup>273</sup>

5. *Manner of Voting.*—Under the Pennsylvania statute, unless otherwise provided in the agreement, and under the Delaware statute, the trustee or trustees may vote in person or by proxy.<sup>274</sup>

6. *Voting by Joint Trustees.*—Both statutes treat voting by joint trustees in the same manner as voting by other joint holders, except that the Delaware statute does not authorize petitions to the Court of Chancery to break a tie.<sup>275</sup>

7. *Liability of Trustees.*—Under the Pennsylvania statute, unless the agreement provides otherwise, a trustee incurs “no responsibility as trustee except for his individual neglect or malfeasance.”<sup>276</sup>

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267. B.C.L. § 511(A).

268. G.C.L. § 218(a).

269. B.C.L. § 511(A), G.C.L. § 218(a).

270. G.C.L. § 218(a).

271. B.C.L. § 511(A).

272. G.C.L. § 218(a).

273. *Id.*

274. B.C.L. § 511(C)(1); G.C.L. § 218(a).

275. B.C.L. § 511(C)(2); compare G.C.L. § 218(a) with *id.* § 217(b) (discussed *supra* at page 841).

276. B.C.L. § 511(C)(4).

Under the Delaware statute, a trustee, "in voting the stock, . . . shall incur no responsibility as stockholder, trustee or otherwise, except for his . . . individual malfeasance."<sup>277</sup>

8. *Vacancy Among Trustees.*—The Pennsylvania statute provides that the remaining trustees shall fill any vacancies among the trustees, unless the trust agreement requires otherwise.<sup>278</sup>

9. *Voting Trust Certificates.*—The Pennsylvania statute expressly authorizes the trustee or trustees to issue voting trust certificates to the shareholders participating in the trust.<sup>279</sup> The statute also provides that these voting trust certificates are transferable in the same manner and with the same effect as share certificates.<sup>280</sup>

10. *Term and Renewal of Voting Trust.*—Both statutes limit the term of a voting trust to not more than ten years, but permit the voting trust arrangement to be extended for an additional term not exceeding ten years by agreement entered into prior to the expiration of the original term.<sup>281</sup> Under the Pennsylvania statute, the renewal agreement may be made at any time within one year prior to expiration, and upon such extension, the corporation must issue new share certificates to the trustee or trustees.<sup>282</sup> Under the Delaware statute, the renewal agreement may be made at any time within two years prior to expiration and must be filed with corporation, but no new certificates need issue.<sup>283</sup>

11. *Other Voting Agreement.*—Under a unique provision of the Delaware statute, a signed written agreement between two or more stockholders may provide that their shares shall be voted as provided in the agreement, as the parties may agree, or in accordance with a procedure agreed upon by them.<sup>284</sup> Like a voting trust arrangement, such an agreement may be for a term not longer than ten years and may be renewed at any time within two years prior to expiration.<sup>285</sup>

12. *Validity of Voting Trust or Other Agreement.*—The Delaware statute provides that the validity of a voting trust or other voting agreement shall not be affected during a period of ten years from the date of its creation or last extension by the fact that under its

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277. G.C.L. § 218(a).

278. B.C.L. § 511(C)(3).

279. *Id.* § 511(B).

280. *Id.*

281. *Id.* § 511(D); G.C.L. § 218(b).

282. B.C.L. § 511(D).

283. G.C.L. § 218(b).

284. *Id.* § 218(c).

285. *Id.*

terms it will or may last beyond the ten-year period.<sup>286</sup> The statute also indicates that its provisions relating to voting trusts and voting agreements shall not be deemed to invalidate any voting or other agreement among stockholders, or any irrevocable proxy, which is not otherwise illegal.<sup>287</sup>

### *I. Consent of Shareholders in Lieu of Meeting*

Under the Delaware statute, unless otherwise provided in the certificate of incorporation, any action that may be taken at a stockholders meeting may be taken without a meeting if a written consent to the action is signed by stockholders having sufficient votes to authorize the action at a meeting at which all shares entitled to vote thereon are present and voting.<sup>288</sup> Prompt notice of the taking of action without a meeting must be given to those stockholders who did not sign the consent.<sup>289</sup> Under the Pennsylvania statute, unless either the articles or the by-laws otherwise provide, action without a meeting may be taken by the written consent of the shareholders entitled to vote on such action, but the consent must be unanimous.<sup>290</sup> The statute authorizes the articles to provide for less than unanimous consent, but not with respect to transactions for which dissenters' rights are available, and in no event may the articles permit action to be taken on the written consent of less than two-thirds of the shareholders entitled to vote.<sup>291</sup> Further, a less than unanimous consent is not effective until ten days after written notice has been given to each shareholder entitled to vote on the action.<sup>292</sup>

### *J. Rights of Dissenting Shareholders*

1. *General Availability of Dissenters' Rights. (a) Sale of assets.*—The Pennsylvania statute generally grants dissenters' rights if a corporation sells all or substantially all of its assets other than: (1) in the usual and regular course of its business; (2) for the purpose of relocating its business; (3) in connection with its dissolution or liquidation; or (4) to a wholly-owned subsidiary in a transaction which does not affect the outstanding shares of the parent.<sup>293</sup> The Delaware statute does not grant appraisal rights on a sale of assets, although it

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286. *Id.* § 218(d).

287. *Id.* § 218(e).

288. *Id.* § 228(a).

289. *Id.* § 228(c).

290. B.C.L. § 513(A).

291. *Id.* § 513(B).

292. *Id.*

293. *Id.* § 311(D).

does provide that the certificate may do so.<sup>294</sup>

(b) *Acquisition of assets.*—The Pennsylvania statute generally grants dissenters' rights to shareholders of a corporation that acquires all or substantially all the assets of another corporation in exchange for a number of voting shares sufficient to elect a majority of the directors of the acquiring corporation.<sup>295</sup> The Delaware statute does not grant appraisal rights on any purchase of assets and does not specifically indicate that the certificate may do so.<sup>296</sup>

(c) *Charter amendments.*—The Pennsylvania statute grants dissenters' rights to shareholders affected by any amendment to the articles which eliminates cumulative voting in elections for directors or which abolishes the right to receive accrued but undeclared dividends on shares issued on or before January 1, 1969.<sup>297</sup> The Delaware statute does not grant appraisal rights on certificate amendments, although the statute indicates that the certificate may do so.<sup>298</sup>

(d) *Merger or consolidation.*—The Pennsylvania statute generally grants dissenters' rights to shareholders whose approval of a plan of merger or consolidation is required.<sup>299</sup> Similarly, the Delaware statute generally grants appraisal rights to stockholders whose approval of the agreement of merger or consolidation is required and also to the minority shareholders of a subsidiary in a short form merger, although their approval of the merger is not required.<sup>300</sup> Since, under the Pennsylvania statute, the approval of the subsidiary's shareholders is required for a short form merger,<sup>301</sup> there is no difference between the two statutes in the general scope of the appraisal rights granted in connection with a merger or consolidation. The Delaware statute permits the charter to grant statutory appraisal rights in connection with mergers or consolidations that would not otherwise call for appraisal rights,<sup>302</sup> and the Pennsylvania statute appears to permit the same.<sup>303</sup>

(e) *Exclusiveness of remedy.*—The Pennsylvania statute denies shareholders the right to sue for an injunction against any proposed

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294. G.C.L. § 262(c).

295. B.C.L. § 311(F).

296. See G.C.L. § 262(c).

297. B.C.L. § 810.

298. G.C.L. § 262(c).

299. B.C.L. §§ 515(L)(2), 908.

300. G.C.L. § 262(b).

301. See discussion at page 872, *infra*.

302. G.C.L. § 262(c).

303. See B.C.L. §§ 515(L)(2), 902.1(A) (merger excepted from dissenters' rights provisions if no shareholder vote required; articles may require shareholder vote); *cf. id.* § 515(L) (exceptions to dissenters' rights do not apply if articles provide otherwise).



plan or amendment of articles authorized by the statute unless fraud or fundamental unfairness attends the transaction. Further, only when specific provisions grant appraisal rights may shareholders demand valuation of and payment for their shares, in which case they must conform their demand to the appraisal procedures set forth in the statute.<sup>304</sup> The Delaware statute contains no such provisions.

(f) *Control transactions.*—Rights similar to dissenters' appraisal rights are granted under the Pennsylvania statute when any person or group acting in concert acquires voting power over at least thirty percent of the shares entitled to vote in an election of directors.<sup>305</sup> In such a situation, the other shareholders of the corporation may require the thirty percent shareholder or group to purchase the other shareholders' shares for "fair value."<sup>306</sup> The Delaware statute contains no such provisions.

2. *Exceptions to the General Availability of Dissenters' Rights.* Both statutes contain exceptions to the general availability of dissenters' rights. Unless the corporate charter provides otherwise, these exceptions deny dissenters' rights to the holders of any class of shares that is widely held or listed on a national exchange.<sup>307</sup> Exceptions are also made to these exceptions. In Delaware the general rules governing the availability of dissenters' rights apply if shareholders of the constituent corporation must accept anything for their stock other than shares listed on a national exchange, shares held by more than 2,000 stockholders, shares in the resulting or surviving corporation, cash in lieu of fractional shares, or a combination of such shares and cash in lieu of fractional shares.<sup>308</sup> In Pennsylvania, dissenters' rights are available under the general rules, notwithstanding the exceptions for listed and widely held classes of shares, if the dissenters' shares are being converted into property other than shares of "the acquiring, surviving, new or other corporation or cash in lieu of fractional shares."<sup>309</sup> The Pennsylvania statute also grants dissenters' rights, notwithstanding the exceptions to the general rules, if the directors' resolution proposing the plan calls for dissenters' rights, if the articles are being amended to eliminate cumulative voting or certain dividend rights, or if the dissenters' shares are special or pre-

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304. B.C.L. §§ 5(E), 515(K).

305. *Id.* § 910.

306. *Id.* Control transactions are discussed *infra* at pages 874-75.

307. B.C.L. § 515(L); G.C.L. § 262(b). The B.C.L. excepts any class of stock that is listed on the New York or American Stock Exchanges or which is held by 2,500 or more shareholders. B.C.L. § 515(L). The G.C.L. excepts any class of stock that is listed on *any* national exchange or which is held by 2,000 or more shareholders. G.C.L. § 262(b).

308. G.C.L. § 262(b).

309. B.C.L. § 515(M).

ferred shares not entitled to vote on the plan as a class.<sup>310</sup>

### 3. *Perfection of Dissenters' Rights*

(a) *Notice*.—The Delaware statute requires a corporation to give notice of dissenters' rights at least twenty days prior to the shareholders' meeting.<sup>311</sup> The Pennsylvania statute requires ten days' notice of dissenters' rights with respect to a merger or consolidation,<sup>312</sup> sale of assets,<sup>313</sup> or amendment of articles,<sup>314</sup> but states no notice requirement with respect to an acquisition of assets.<sup>315</sup> The Delaware statute provides that if the plan has been approved by written consent of shareholders,<sup>316</sup> or without the vote of shareholders pursuant to a short-form merger of parent and subsidiary,<sup>317</sup> notice must be given before or within ten days after the effective date of the merger or consolidation.<sup>318</sup>

(b) *Demand*.—Under the Pennsylvania statute, a dissenting shareholder must file with the corporation, prior to the vote, a written objection to the plan and, within twenty days after the vote, also make a written demand for payment of the fair value of his shares, stating the number and the class and series of the shares with respect to which he dissents.<sup>319</sup> Under the Delaware statute, a dissenting shareholder need file only a demand for appraisal, which is sufficient if it reasonably informs the corporation of the shareholder's identity and of his intent to demand appraisal.<sup>320</sup> The demand must be filed prior to the vote or within twenty days after the mailing of notice if there is no vote.<sup>321</sup>

(c) *Offer by corporation*.—The Pennsylvania statute requires the corporation, within thirty days after the plan becomes effective, to make a written offer for the dissenters' shares.<sup>322</sup> The offer must be accompanied by recent financial statements of the corporation.<sup>323</sup> The parties have until sixty days after the effective date to agree on a price, and the corporation has until ninety days after the effective date to pay.<sup>324</sup> No such provisions are contained in the Delaware

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310. *Id.*

311. G.C.L. § 262(d)(1).

312. B.C.L. § 902(B).

313. *Id.* § 311(B).

314. *Id.* §§ 803, 810.

315. *See id.* § 311(F).

316. *See* G.C.L. § 228.

317. *See id.* § 253.

318. G.C.L. § 262(d)(2).

319. B.C.L. § 515(B).

320. G.C.L. § 262(d)(1).

321. *Id.*

322. B.C.L. § 515(D).

323. *Id.*

324. *Id.* § 515(E).

statute, but the statute clearly contemplates settlement by agreement.<sup>325</sup>

(d) *Commencement of judicial appraisal proceedings.*—Under Pennsylvania statute, at any time between sixty and ninety days after the date on which the plan became effective, the shareholder may demand appraisal proceedings.<sup>326</sup> The corporation must then initiate the proceedings within thirty days of receipt of the dissenting shareholder's demand.<sup>327</sup> If the corporation fails to initiate the proceedings, the shareholder may initiate the proceedings.<sup>328</sup> The Delaware statute provides that any party may initiate appraisal proceedings at any time within 120 days after the effective date of the merger or consolidation.<sup>329</sup>

(e) *Tender of certificates; status of shares and shareholder.*—Under both statutes, a shareholder who has demanded payment for his shares has no further rights as a shareholder.<sup>330</sup> Under the Pennsylvania statute, a shareholder who has demanded payment for his shares must, within twenty days after making the demand, submit his share certificates to the corporation for a notation to be placed thereon that a demand has been made.<sup>331</sup> The Delaware statute contains no such requirement. Under both statutes, dissenters' shares acquired by the corporation are deemed authorized but unissued.<sup>332</sup> The Pennsylvania statute also provides that the plan of merger or consolidation may provide for the disposition of such shares.<sup>333</sup>

## K. Other Shareholder Rights

1. *Appointment of Custodian for Corporation on Deadlock or Other Cause.*—Both statutes permit any shareholder of a corporation to petition the appropriate court to appoint a custodian for the corporation when the shareholders or directors are deadlocked or when certain other causes exist.<sup>334</sup> Among the other causes, the Pennsylvania statute specifies two not included in the Delaware statute: (1) illegal, oppressive, or fraudulent conduct of directors; and

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325. Cf. G.C.L. § 262(f) (requiring list of shareholders with whom agreement has not been reached to be filed with petition for adjudication).

326. B.C.L. § 515(F).

327. *Id.*

328. *Id.*

329. G.C.L. § 262(e).

330. B.C.L. § 515(B); G.C.L. § 262(k).

331. B.C.L. § 515(I).

332. B.C.L. § 515(J); G.C.L. § 262(l).

333. B.C.L. § 515(J).

334. B.C.L. § 513.1; G.C.L. § 226.

(2) misapplication of assets.<sup>335</sup>

2. *Derivative Suits*.—Under both statutes, a shareholder who brings suit to enforce a right of the corporation must aver either that he was a stockholder of the corporation at the time of the transaction of which he complains or that his shares devolved upon him from such a stockholder.<sup>336</sup> The Pennsylvania statute also makes clear that a person who has only a beneficial interest may bring suit, and permits an exception to the stock ownership requirement to prevent “serious injustice.”<sup>337</sup> The Pennsylvania statute also permits the corporation to require certain shareholder plaintiffs to give security for any expenses which may be incurred by the corporation in connection with the suit.<sup>338</sup>

## VI. Shares of Capital Stock

### A. *Rights and Preferences*

1. *Generally*.—Both statutes provide that every corporation may issue one or more classes of stock and one or more series of stock within any class.<sup>339</sup> The classes may consist of stock with or without par value, and the classes or series may have such voting powers, designations, preferences, and relative or special rights and restrictions as are set forth either in the charter or in the directors’ resolutions providing for the issuance of the shares pursuant to authority granted in the charter.<sup>340</sup>

2. *Redeemable Shares*.—Under the Delaware statute, only certain categories of stock may be made subject to redemption, and then only within specified limits.<sup>341</sup> Stock having a preference upon any distribution of the corporation’s assets may be made redeemable at the corporation’s or the holder’s option or upon the occurrence of a specified event.<sup>342</sup> Stock of an investment company regulated under the Investment Company Act of 1940 may be made redeemable only at the holder’s option and only so long as the redemption will not impair the corporation’s capital.<sup>343</sup> The stock of any other corporation which is licensed or franchised by a government agency, or which is a member of a national securities exchange, may be made redeemable to the extent required by the license, franchise, or mem-

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335. B.C.L. § 513.1 (incorporating clauses (1) through (3) of *id.* § 1107(A)).

336. B.C.L. § 516(A); G.C.L. § 327.

337. B.C.L. § 516(A).

338. *Id.* § 516(B).

339. B.C.L. § 601; G.C.L. § 151(a).

340. B.C.L. § 601; G.C.L. § 151(a).

341. G.C.L. § 151(b).

342. *Id.*

343. *Id.*

bership.<sup>344</sup> The Pennsylvania statute does not restrict the redemption of any category of shares.

3. *Rights Dependent on Extrinsic Facts.*—The Delaware statute indicates that any of the voting powers, designations, preferences, rights, qualifications, limitations or restrictions pertaining to any class or series of stock may be made dependent upon facts ascertainable outside the certificate of incorporation or outside the directors' resolution providing for the issuance of such stock, so long as the effect of such facts is clearly stated in the certificate of incorporation or in the directors' resolution.<sup>345</sup> The Pennsylvania statute contains no such provision.

## B. Certificates

1. *Uncertificated Shares.*—The Delaware statute authorizes the board of directors to provide by resolution that some or all classes or series of the corporation's stock will be uncertificated shares.<sup>346</sup> However, within a reasonable time after the issuance or transfer of uncertificated shares, the corporation must furnish to the registered owner a written notice containing the statements and descriptions that would have been required to be set forth on a certificate representing those shares.<sup>347</sup> Further, any holder of uncertificated shares may require the corporation to issue a certificate representing his or her shares.<sup>348</sup> The Pennsylvania statute makes no provision for uncertificated shares.

2. *Signature and Seal Requirements.*—The Pennsylvania statute requires each share certificate to be signed by the president or secretary, or by such other officers as the by-laws may provide, and to be sealed with the corporate seal.<sup>349</sup> The Delaware statute requires share certificates to be signed by the president, vice president, or chairman or vice-chairman of the board of directors, and by the treasurer, assistant treasurer, secretary, or assistant secretary, but does not require the certificates to be sealed with the corporate seal.<sup>350</sup> The statute does not indicate that the by-laws may permit

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344. *Id.*

345. *Id.* § 151(a).

346. *Id.* § 158.

347. *Id.* § 151(f). Required statements and descriptions would include a description of relative rights and limitations when the corporation has more than one class or series of stock outstanding, *id.*; a description of any stock transfer restrictions, *id.* § 202(a); and, if the stock is issued pursuant to a voting trust agreement, a statement that it has been so issued, *id.* § 218(a).

348. *Id.* § 151(f).

349. B.C.L. § 607(B).

350. G.C.L. § 158.

other officers to sign.<sup>351</sup>

3. *Delivery of Certificates.*—The Pennsylvania statute prohibits the issuance of a certificate until the shares represented by the certificate have been fully paid for.<sup>352</sup> The Delaware statute contains no such prohibition, but does state requirements that must be met prior to the issuance of certificates for partly paid shares.<sup>353</sup>

4. *Replacement of Lost or Destroyed Certificates.*—The Delaware statute expressly provides that a corporation may issue a new certificate in place of any certificate alleged to have been lost, stolen, or destroyed, and authorizes the corporation to require a bond from the owner of the certificate sufficient to indemnify the corporation against any claim that may arise on account of the issuance of the replacement certificate.<sup>354</sup> If the corporation refuses to issue a new certificate, the owner may institute proceedings in the Court of Chancery to compel issuance.<sup>355</sup> The Pennsylvania statute contains no provisions relating to lost, stolen, or destroyed certificates.<sup>356</sup>

5. *Fractional Shares or Scrip.*—Both statutes authorize a corporation to issue certificates for fractional shares or to issue, in lieu thereof, scrip or warrants.<sup>357</sup> The Delaware statute provides that if the corporation chooses not to issue certificates for fractional shares, it must arrange for the disposition of fractional interests by those entitled to them, must pay in cash the fair value of those fractional interests, or must issue scrip or warrants which entitle the holder to receive a full share upon the surrender of such scrip or warrants aggregating a full share.<sup>358</sup> The Delaware statute also expressly states that a *certificate* for a fractional share shall entitle the holder thereof to vote, to receive dividends, and to participate in the assets of the corporation on liquidation.<sup>359</sup> Both statutes state that such rights are not available to the holder of *scrip* or *warrants* unless otherwise provided in the scrip or warrants.<sup>360</sup>

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351. In fact, a Delaware corporation is required to have such officers as are necessary to enable it to sign stock certificates in accordance with the Delaware statute's stock signature requirements. *Id.* § 142(a).

352. B.C.L. § 607(D).

353. See discussion at page 854, *infra*.

354. G.C.L. § 167.

355. *Id.* § 168.

356. However, provisions relating to lost, stolen and destroyed certificates are made in section 8405 of the Pennsylvania Uniform Commercial Code - Investment Securities. 13 PA. CONS. STAT. ANN. § 8405 (Purdon 1984).

357. B.C.L. § 608; G.C.L. § 155. The B.C.L. also authorizes the issuance of "other evidence of ownership." B.C.L. § 608.

358. G.C.L. § 155.

359. *Id.* It is unclear under the B.C.L. whether a certificate for a fractional share entitles the holder to vote. See B.C.L. § 608.

360. B.C.L. § 608; G.C.L. § 155.

### C. *Quality, Amount, and Payment of Consideration*

1. *Permissible Forms of Consideration.*—The Pennsylvania statute provides that shares may be issued only for “money, labor done, or money or property actually received.”<sup>361</sup> The Delaware constitution provides that stock may be issued only for “money paid, labor done or personal property, or real estate or leases thereof actually acquired by [the] corporation.”<sup>362</sup>

2. *Determination of Price.*—Under the Pennsylvania statute, the amount of consideration to be received for newly issued and treasury shares of the corporation is to be fixed by the directors.<sup>363</sup> Under the Delaware statute, the amount of consideration to be received for such shares is to be determined by the directors, or by the stockholders if the certificate of incorporation so provides.<sup>364</sup>

3. *Fully Paid and Non-assessable Stock.*—Under both statutes, stock is fully paid and non-assessable if the agreed consideration has been delivered to the corporation.<sup>365</sup> However, under the Pennsylvania statute, no note or obligation given by a shareholder, whether secured by pledge or otherwise, constitutes payment.<sup>366</sup> Under the Delaware statute, a binding obligation constitutes payment to the extent it does not exceed the difference between the purchase price and the par or stated value of the stock.<sup>367</sup>

4. *Partly Paid Shares.*—The Delaware statute contains a section which expressly authorizes the issuance of partly paid shares so long as a notation of the total consideration due and of the consideration actually paid is placed either on the certificate representing the shares or, in the case of uncertificated shares, on the books of the corporation.<sup>368</sup> Dividends may be paid on partly paid shares, “but only upon the basis of the percentage of the consideration actually paid thereon.”<sup>369</sup> No restriction on voting is mentioned. The Pennsylvania statute contains no provision authorizing the issuance of partly paid shares, but the drafters obviously contemplated that not all shares would be fully paid.<sup>370</sup> The Pennsylvania statute does not indicate whether the owner of partly paid shares may receive dividends

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361. B.C.L. § 603(A).

362. DEL. CONST. ART. IX, § 3.

363. B.C.L. § 603(A).

364. G.C.L. § 152.

365. B.C.L. § 604; G.C.L. § 152.

366. B.C.L. § 604.

367. G.C.L. § 152.

368. *Id.* § 156.

369. *Id.*

370. *Cf., e.g.,* B.C.L. § 604 (defining “fully paid and nonassessable”); *id.* § 605 (providing for forced sale of unpaid shares).

on or vote the partly paid shares, although it does provide that no share on which an installment is due and unpaid may be voted at any meeting.<sup>371</sup>

5. *Payment of Expenses.*—The Pennsylvania statute provides that the expenses of organizing or reorganizing the corporation, and reasonable compensation for the sale or underwriting of its shares, may be paid by the corporation out of the consideration received for its shares without thereby rendering the shares not fully paid and non-assessable.<sup>372</sup> The Delaware statute does not contain such a provision.

6. *Calls for Payment.*—Both statutes provide that shares shall be paid for in such amounts and at such time as the directors may require.<sup>373</sup> The Pennsylvania statute indicates that any call for payment must be “uniform” as to all shares of the same class or series.<sup>374</sup> It is unclear whether the Delaware statute is also intended to require uniform calls. The statute states that the directors may demand payment “in respect of each share of stock not fully paid.”<sup>375</sup> The statute also limits the amount of any call to such sum of money as the necessities of the business may, in the judgment of the board of directors, require.<sup>376</sup>

7. *Failure to Pay.*—Under both statutes, if a shareholder fails to make timely payment of any proper call upon his shares, the directors may proceed either to collect the amount due in the same manner as they would collect any debt due the corporation or to sell at public sale such part of the shares as will pay the installments due.<sup>377</sup> Notice of the time and place of any sale must be given by advertisement: under the Delaware statute, the advertisement must appear once, at least one week in advance of the sale, in one newspaper;<sup>378</sup> under the Pennsylvania statute, the advertisement must appear once a week for the two consecutive weeks next preceding the sale, in both a legal newspaper and a newspaper of general circulation.<sup>379</sup> Under the Pennsylvania statute, if no bidder can be found to pay the amount due on the shares, *or* if the amount is not collected by an action at law, the shares and any consideration paid by the shareholder are forfeited to the corporation.<sup>380</sup> The Delaware statute

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371. *Id.* § 605.

372. *Id.* § 606.

373. *Id.* § 604 (unless otherwise provided in the subscription agreement); G.C.L. § 163.

374. B.C.L. § 604.

375. G.C.L. § 163.

376. *Id.*

377. B.C.L. § 605; G.C.L. § 164.

378. G.C.L. § 164.

379. B.C.L. § 605.

380. *Id.*



similarly provides for forfeiture, but only if no bidder can be found *and* the amount due has not been collected by an action at law within one year after the bringing of the action.<sup>381</sup> The Pennsylvania statute contains additional provisions granting a lien to the corporation on shares for which subscriptions remain unpaid<sup>382</sup> and prohibiting the voting of shares upon which any installment is due and unpaid.<sup>383</sup> Similar provisions do not appear in the Delaware statute.

8. *Shares Received as Dividend or on Conversion or Exchange.*—The Pennsylvania statute expressly provides that the consideration for shares issued as a stock dividend is the consideration originally received for the shares on which the dividend is paid plus any amount of surplus transferred to stated capital in connection with the dividend.<sup>384</sup> The consideration for shares issued on exchange or conversion is the consideration the corporation originally received for the shares surrendered or converted plus any amount of surplus transferred to stated capital in connection with the transaction, plus any additional consideration paid to the corporation.<sup>385</sup> The Delaware statute contains no such provisions.

#### D. *Rights and Options Authorized*

The Delaware statute expressly authorizes the corporation to issue rights or options to purchase stock of the corporation and details the procedure for issuing such rights or options.<sup>386</sup> Although the Pennsylvania statute contains no such provisions, Pennsylvania corporations may issue rights and options.<sup>387</sup>

#### E. *Stock Transfers*

1. *Transfer Restrictions.*—The sections of the Pennsylvania and Delaware statutes authorizing restrictions on the transfer of stock are substantially identical.<sup>388</sup> The Delaware section makes allowance for uncertificated shares, requiring a notice of any restrictions which normally would have been stated on the stock certificate to be delivered to the owner of such shares.<sup>389</sup> The Delaware section also expressly authorizes restrictions for the purpose of maintaining

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381. G.C.L. § 164.

382. B.C.L. § 604.

383. *Id.* § 605.

384. B.C.L. § 603(B).

385. *Id.* § 603(C).

386. G.C.L. § 157.

387. *Cf.* B.C.L. § 611(A) (rights and options may be issued without first being offered to shareholders); *id.* § 612 (employee stock options authorized).

388. B.C.L. § 613.1; G.C.L. § 202.

389. G.C.L. § 202(a).

any tax advantage,<sup>390</sup> while the Pennsylvania statute refers only to maintaining S corporation status under the United States Internal Revenue Code.<sup>391</sup> However, both statutes allow, in addition to the restrictions they specifically mention, “any other lawful restriction on transfer or registration of transfer.”<sup>392</sup>

2. *Manner of Transfer.*—Transfers of stock issued by Delaware corporations are governed by Article 8 of the Uniform Commercial Code as adopted in Delaware.<sup>393</sup> Transfers of stock issued by Pennsylvania corporations are regulated by the by-laws, provided the by-laws are not inconsistent with law.<sup>394</sup>

3. *Notation of Collateral Assignment.*—Whenever a transfer of shares is made for collateral security, the Delaware statute requires the entry of transfer to reflect that fact if both the transferee and the transferor so request.<sup>395</sup>

#### *F. Other Pennsylvania Provisions Without Counterpart in the Delaware Statute*

1. *Validity of Issuance.*—Shares issued in violation of the Pennsylvania statute, or without full compliance with its requirements, are not rendered invalid by the violation or noncompliance.<sup>396</sup>

2. *Employee Share Purchase Plans and Options.*—The Pennsylvania statute expressly authorizes a corporation to establish an employee stock purchase or stock option plan, provided that if the authorized but unissued shares to be used in the plan are subject to preemptive rights, the plan is approved by a majority of the shareholders entitled to such rights.<sup>397</sup> The statute provides that such shares may be sold as an incentive to service “or for such other consideration or purpose” as the directors deem advantageous to the corporation, that the directors may benefit by their action, and that, in the absence of fraud, the directors’ judgment as to the adequacy of consideration received for rights or options under the plan shall be conclusive.<sup>398</sup>

3. *Failure to Surrender Securities on Conversion.*—The Pennsylvania statute provides that whenever outstanding securities are

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390. *Id.* § 202(d).

391. B.C.L. § 613.1(D).

392. *Id.* § 613.1(E); G.C.L. § 202(e).

393. G.C.L. § 201.

394. B.C.L. § 613(A). Pennsylvania has also adopted Article 8 of the Uniform Commercial Code. 13 PA. CONS. STAT. ANN. §§ 8101-8406 (Purdon 1984).

395. G.C.L. § 159.

396. B.C.L. § 610.

397. *Id.* § 612.

398. *Id.*

converted into other securities or property, the plan or instrument effecting the conversion may fix a period of not less than two years within which holders of the outstanding securities may surrender the outstanding securities for exchange.<sup>399</sup> The plan may also provide that if the outstanding securities are not surrendered for exchange within the period fixed, the corporation may dispose of the securities or property which would have been issued in exchange for the outstanding securities.<sup>400</sup> Thereafter, the holders of the unsurrendered outstanding securities have no right except to receive the proceeds of the disposition.<sup>401</sup>

### *G. Other Delaware Provisions Without Counterpart in the Pennsylvania Statute*

1. *No Taxation of Nonresidents' Securities.*—Delaware does not tax any stock or bond which has been issued by a Delaware corporation and which is owned by a nonresident of Delaware.<sup>402</sup>

2. *Provision Relating to Subscriptions.*—Under the Delaware statute, unless otherwise provided by the terms of the subscription, a preincorporation subscription is irrevocable for six months from its date except with the consent of all the other subscribers.<sup>403</sup> In order to be enforceable, a subscription must be in writing and be signed by the subscriber or his agent.<sup>404</sup>

3. *Situs of Ownership.*—The Delaware statute provides that “[f]or all purposes of title, action, attachment, garnishment and jurisdiction of all [Delaware] courts . . . , but not for the purpose of taxation,” the situs of ownership of the stock of Delaware corporations is in Delaware.<sup>405</sup>

## VII. Dividends, Redemption of Shares, and Reduction of Stated Capital

### *A. Accounting*<sup>406</sup>

1. *Consideration Received for Shares.*—Under the Pennsylvania statute, each corporation must have a “stated capital” which includes the aggregate par value of all its issued shares having a par value, the aggregate value of the total consideration received for no-

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399. *Id.* § 615.

400. *Id.*

401. *Id.*

402. G.C.L. § 159.

403. *Id.* § 165.

404. *Id.* § 166.

405. *Id.* § 169.

406. The table on page 860 shows relationships between Pennsylvania and Delaware net asset accounts.

par stock having a preference on liquidation, and a portion of the consideration received for no-par stock having no liquidation preference, which portion the directors have allocated to stated capital prior to the issuance of the stock.<sup>407</sup> The balance of the consideration received for shares is "capital surplus."<sup>408</sup> Under the Delaware statute, a corporation must include in "capital" the aggregate par value of all its issued shares having a par value, at least a portion of the aggregate consideration received for no-par stock, and any other portion of the consideration received for par or no-par stock which is allocated to capital by the directors at the time of issuance.<sup>409</sup> Consideration allocated to capital in respect of no-par stock is "stated capital."<sup>410</sup> The Delaware statute requires the directors to determine what part of the consideration is capital either prior to issuance (if the shares are issued for cash) or within sixty days after issuance (if the shares are issued for a consideration other than cash).<sup>411</sup> Should the directors fail to make a timely determination, the statute allocates to capital the aggregate par value of shares having a par value and the total consideration received for shares having no par value.<sup>412</sup> Other consideration received for shares is "surplus."<sup>413</sup>

2. *Other Assets.*—Under the Pennsylvania statute, capital surplus includes, in addition to any consideration for shares which is not stated capital, all capital received other than for shares and all amounts of surplus arising from revaluation of or unrealized appreciation in assets.<sup>414</sup> The remainder of the corporation's net assets is "earned surplus."<sup>415</sup> Under the Delaware statute, the excess of the net assets over stated capital is "surplus."<sup>416</sup>

3. *Increasing Capital Accounts.*—Under the Delaware statute, capital can be increased by resolution of the board directing that a portion of surplus be transferred to capital.<sup>417</sup> Similarly, under the Pennsylvania statute, stated capital can be increased by resolution of the board directing that all or a portion of surplus be transferred to stated capital.<sup>418</sup> Under both statutes, the board may direct that the amounts so transferred shall be deemed capital in respect of any

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407. B.C.L. § 614.

408. *Id.*

409. G.C.L. § 154.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. B.C.L. § 2(3).

415. *Id.* § 2(7); cf. *id.* §§ 2(11) (defining "net assets"), 2 (23) (defining "surplus").

416. G.C.L. § 154.

417. *Id.*

418. B.C.L. § 614.

**COMPARISON OF PENNSYLVANIA AND DELAWARE  
NET ASSET ACCOUNTING**

<u>Delaware</u>		<u>Pennsylvania</u>	
<b>CAPITAL</b>	<b>Aggregate Par Value</b>  Total consideration received for no-par stock having a liquidation preference (Pennsylvania only)  Designated consideration received for no-par stock (called "stated capital" in Delaware)	<b>STATED CAPITAL</b>	
	Designated consideration over par (Delaware only)	<b>C A P I T A L</b>	<b>S U R P L U S</b>
<b>SURPLUS</b>	Other consideration received for stock  Other capital contributions  Asset appreciation	<b>S U R P L U S</b>	
	Remainder of net assets	<b>E A R N E D</b>	<b>S U R P L U S</b>

class of shares.<sup>419</sup> Under the Pennsylvania statute, capital surplus may be increased by resolution of the board directing that all or part of earned surplus be transferred to capital surplus.<sup>420</sup>

4. *Reducing Capital Accounts.*—The directors of a Delaware corporation may, by resolution, transfer from capital to surplus (1) some or all of the capital not represented by a particular class of the corporation's capital stock, (2) some or all of the capital represented by its par value stock, which capital is in excess of the aggregate par value of that stock, or (3) some but not all of the capital represented by no-par stock.<sup>421</sup> The Pennsylvania statute provides that stated capital may be reduced only by a majority vote of the shareholders.<sup>422</sup> Capital surplus may be reduced under the Pennsylvania statute (1) by resolution of the board directing that some or all of the portion of capital surplus arising from revaluation of or unrealized appreciation in assets be decreased and that the book value of the assets reflect a corresponding decrease,<sup>423</sup> or (2) upon realization of any appreciation in assets, by resolution of the board transferring the amount realized from capital surplus to earned surplus.<sup>424</sup> Capital surplus may also be transferred to earned surplus to reduce or eliminate any "deficit" in earned surplus, provided that (1) the transfer has been approved within the preceding year by the vote of a majority of each class of shareholders, whether or not the class is otherwise entitled to vote, and (2) earned surplus acquired thereafter is stated for ten years thereafter to be earned surplus.<sup>425</sup>

5. *"Unrestricted" and "Unreserved".*—As discussed in the following paragraphs, the right of a Pennsylvania corporation to acquire its own shares, pay dividends, or otherwise distribute its assets may be limited by the amount of the corporation's surplus which is "unrestricted" and "unreserved." Earned and capital surplus are restricted under the statute to the extent they have been used as a measure of the corporation's right to purchase or redeem its own shares.<sup>426</sup> The restriction cannot be removed until the shares purchased or redeemed are disposed of or canceled.<sup>427</sup> "Unrestricted" surplus is surplus that has not been so restricted.<sup>428</sup> "Unreserved" earned surplus is earned surplus that has not been placed into a re-

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419. *Id.*; G.C.L. § 154.

420. B.C.L. § 704(A).

421. G.C.L. § 244(a)(4).

422. B.C.L. § 706.

423. *Id.* § 704(B).

424. *Id.*

425. *Id.* § 704(C).

426. *Id.* § 701(E).

427. *Id.*

428. *Id.* § 2(27).

serve by the directors pursuant to section 704(E) of the statute.<sup>429</sup>

## *B. Acquisition of the Corporation's Own Shares*

1. *Stock Redemptions Under the Pennsylvania Statute.*—A Pennsylvania corporation may by resolution of its board of directors redeem its redeemable shares to the extent of the aggregate of (1) the stated capital represented by those shares, (2) the corporation's unrestricted capital surplus, and (3) to the extent the foregoing are insufficient, the corporation's unrestricted and unreserved earned surplus.<sup>430</sup> The redemption cannot be made if the corporation is insolvent or would be rendered insolvent by the redemption, if the articles prohibit the redemption, or if the redemption would reduce the net assets of the corporation below the aggregate preferential amount payable upon liquidation to the holders of shares having rights prior to the rights of the shares being redeemed.<sup>431</sup> The Pennsylvania statute provides further that, unless the articles otherwise provide, shares subject to redemption must be redeemed pro rata or by lot or by some other equitable method selected by the board of directors.<sup>432</sup>

2. *Stock Purchases Under the Pennsylvania Statute.*—A Pennsylvania corporation may make purchases of its nonredeemable shares to the extent of the aggregate of the corporation's (1) unrestricted and unreserved earned surplus, (2) unrestricted capital surplus which has been made available by shareholder vote within one year prior to the purchase, and (3), if such surpluses are insufficient, stated capital, but only to the extent necessary to eliminate fractional shares, to collect or compromise debt owing to the corporation, or to pay dissenters.<sup>433</sup>

3. *Purchases and Redemptions Under the Delaware Statute.*—A Delaware corporation may not purchase or redeem its own shares for cash or other property if the corporation's capital is impaired or would be impaired by the purchase or redemption.<sup>434</sup> However, without shareholder vote, the corporation may draw on any capital which is represented by the shares being acquired or which is not represented by any particular class of shares, and may further draw on its capital to purchase or redeem shares having a preference upon any distribution of assets if the corporation retires the shares

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429. *Id.* § 2(26). Section 704(E) is discussed in Appendix A.

430. *Id.* § 701(B)(2).

431. *Id.* §§ 701(B)(3)-701(B)(5).

432. *Id.* § 701(A).

433. *Id.* § 701(B)(1).

434. G.C.L. § 160(a)(1).

and makes a corresponding reduction in capital.<sup>435</sup> The corporation may not purchase shares redeemable at the corporation's option for more than the price at which they may then be redeemed, or redeem shares otherwise than in accordance with the certificate of incorporation.<sup>436</sup> As noted above,<sup>437</sup> only certain shares of a Delaware corporation may be made redeemable.

#### 4. Cancellation of Shares.

(a) *Automatic cancellation.*—When shares of a Pennsylvania corporation are acquired by the corporation on conversion or exchange, the shares are deemed to be canceled,<sup>438</sup> and the corporation's capital accounts must be adjusted as follows: if the aggregate par or stated value of the shares issued in the conversion or exchange is greater than the aggregate stated capital represented by the shares acquired, then an amount equal to the difference must be transferred from earned or capital surplus to stated capital; if the aggregate par or stated value of the shares issued in the conversion or exchange is less than the aggregate stated capital represented by the shares acquired, then an amount equal to the difference must be transferred from stated capital to capital surplus.<sup>439</sup> The Delaware statute provides that shares acquired by purchase, redemption, conversion or exchange are deemed canceled if, by resolution of the directors, capital is applied to the transaction.<sup>440</sup> The directors may apply to a transaction the capital represented by the shares being acquired and any capital not represented by any particular class of shares, provided that, if the transaction is a conversion or exchange, the amount of such capital in the aggregate exceeds the total aggregate par value or stated capital of any previously unissued shares issuable upon the conversion or exchange.<sup>441</sup> The corporation's capital is reduced by the amount so applied.<sup>442</sup>

(b) *Other cancellations.*—Under the Pennsylvania statute, a corporation may by resolution of the board of directors cancel its own shares held by it, although it may not cancel nonredeemable shares without the vote, obtained within a year prior to the cancellation, of a majority of the shareholders of each class.<sup>443</sup> The corporation may reduce its stated capital to the extent represented by the shares be-

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435. *Id.*

436. *Id.* §§ 160(a)(2), 160(a)(3).

437. *See* page 851, *supra*.

438. B.C.L. § 701(C).

439. *Id.*

440. G.C.L. § 243(a).

441. *Id.* § 244(a).

442. *Id.*

443. B.C.L. § 708.



ing canceled, and may reduce its capital surplus to the extent restricted by the purchase or redemption of the shares at the time of cancellation.<sup>444</sup> Under the Delaware statute, the corporation by resolution of its board of directors and without shareholder vote may cancel any of its own shares held by it.<sup>445</sup> The directors may by resolution reduce capital to the extent represented by the canceled shares.<sup>446</sup>

5. *Status of Canceled Shares; Reduction of Authorized Shares.*—Under both statutes, canceled shares resume the status of authorized but unissued shares unless the corporate charter prohibits the reissuance of the shares.<sup>447</sup> If the shares' reissuance is so prohibited, the corporation must file a certificate identifying the shares and stating that the charter prohibits their reissuance, which certificate has the effect of amending the charter so as to reduce the number of authorized shares.<sup>448</sup> The Pennsylvania statute also requires a reduction in the number of authorized shares if shares are redeemed and the articles prohibit their reissuance, or if shares have been acquired on conversion into, or exchange for, other shares of the corporation.<sup>449</sup> Under both statutes the number of authorized shares may also be decreased or increased by an amendment to the corporate charter approved by the shareholders.<sup>450</sup> However, only the Pennsylvania statute permits the directors to reduce the number of authorized shares without shareholder vote by directing in a resolution canceling treasury or other authorized but unissued shares that such a reduction be made.<sup>451</sup>

### C. *Distributions of Assets*

1. *Dividends of Cash or Property Other than Stock.*—A Pennsylvania corporation may declare dividends out of unrestricted and unreserved earned surplus or, if the corporation has no such surplus, out of the net aggregate consolidated unrestricted and unreserved surplus of the corporation and its majority-owned subsidiaries.<sup>452</sup> A Delaware corporation may declare dividends out of its surplus or, if the corporation has no surplus, out of the corporation's net profits for the current fiscal year and the preceding fiscal year.<sup>453</sup>

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444. *Id.*

445. G.C.L. § 243(a).

446. *Id.* § 244(a)(1).

447. B.C.L. § 709; G.C.L. § 243(b).

448. B.C.L. § 709; G.C.L. § 243(b).

449. B.C.L. § 709.

450. *Id.* § 801(A)(4); G.C.L. § 242(a)(3).

451. B.C.L. § 709.

452. *Id.* § 702(A).

453. G.C.L. § 170(a).

Neither corporation may declare a dividend in contravention of the corporate charter.<sup>454</sup> A Pennsylvania corporation may not declare a dividend if the corporation is insolvent or would be rendered insolvent, or if the dividend would reduce the remaining net assets of the corporation below the aggregate preferential amount payable in the event of a voluntary liquidation.<sup>455</sup> A Delaware corporation may not declare a dividend if the capital of the corporation is less than the aggregate amount of capital represented by outstanding stock having a preference on any distribution of assets.<sup>456</sup>

A Pennsylvania corporation may also distribute dividends out of unrestricted capital surplus to holders of shares having a cumulative preferential right to receive dividends, provided that the corporation has no earned surplus, is not insolvent, and would not be rendered insolvent by the dividend.<sup>457</sup> Such a provision is unnecessary under the Delaware statute to the extent that Delaware "surplus," from which any dividend may be paid, includes what would be "capital surplus" under the Pennsylvania statute, and to the extent that Delaware corporations may pay dividends out of net profits for the current fiscal year and the preceding fiscal year.

2. *Stock Dividends.*—Under both statutes, a corporation may pay a dividend in shares of its own stock.<sup>458</sup> The corporation must transfer the aggregate par or stated value of the distributed shares from surplus or current net profits to capital if the corporation is a Delaware corporation,<sup>459</sup> or from earned or capital surplus to stated capital if the corporation is a Pennsylvania corporation.<sup>460</sup> The Pennsylvania statute prohibits the distribution of shares of one class to holders of shares of any other class unless such distributions are authorized by the articles or the distribution has been approved by the shareholders of the class from which the distribution is to be made.<sup>461</sup> Both statutes distinguish certain types of transactions from stock dividends so as to avoid the application of the statutes' stock dividend restrictions: the Delaware statute distinguishes shares distributed pursuant to split-up or division of the corporation's stock,<sup>462</sup> and the Pennsylvania statute distinguishes any reclassification of

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454. B.C.L. § 702(A); G.C.L. § 170(a).

455. B.C.L. § 702(A).

456. G.C.L. § 170(a).

457. B.C.L. § 702(B).

458. *Id.* § 702.1; G.C.L. § 173.

459. G.C.L. § 173.

460. B.C.L. § 702.1(A).

461. *Id.* § 702.1(A)(4).

462. G.C.L. § 173.

shares.<sup>463</sup>

3. *Distributions in Partial Liquidation.*—The Pennsylvania statute authorizes distributions in partial liquidation out of capital surplus provided that any such distribution is approved by a majority of each class of shares.<sup>464</sup> Such a provision is unnecessary under the Delaware statute since the directors may by resolution transfer from capital to surplus any amount that under the Pennsylvania statute would be “capital surplus” and declare a dividend out of that surplus without shareholder approval.

*D. Liability of Directors and Shareholders as to Dividends, Stock Purchases, and Redemptions*

1. *Directors' Liability.*—Under both statutes, if there has been an unlawful distribution of corporate assets, the directors under whose administration the distribution was made and who did not dissent from such action are jointly and severally liable to the corporation for the amount distributed.<sup>465</sup> The Pennsylvania statute makes the directors liable for any unlawful dividend or any unlawful “withdrawal or distribution of the corporate assets.”<sup>466</sup> The Delaware statute makes the directors liable for violations of the statute’s requirements relating to dividends, stock purchases, and stock redemptions, but only if the violation is willful or negligent, and provides that the directors may not be held liable after six years from the date of the violation.<sup>467</sup> The Delaware statute also provides for interest on amounts due and indicates that the directors may be held liable to the corporation’s creditors if the corporation has been dissolved or is insolvent.<sup>468</sup> Under both statutes, directors held liable for unlawful distributions may seek contribution from the other directors.<sup>469</sup>

2. *Reliance on Books, Records and Appraisals.*—Both statutes protect a director from liability for an unlawful distribution if he relies in good faith on financial statements of the corporation.<sup>470</sup> However, the Pennsylvania statute protects the director only if the president or the officer having charge of the corporation’s books of account has represented to the director that the statements are correct or if a certified or independent public accountant has reported that the financial statements reflect fairly the financial condition of

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463. B.C.L. § 702.1(C).

464. *Id.* § 703.

465. *Id.* § 707(A); G.C.L. § 174(a).

466. B.C.L. § 707(A).

467. G.C.L. § 174(a).

468. *Id.*

469. B.C.L. § 707(A); G.C.L. § 174(a).

470. B.C.L. § 707(A); G.C.L. § 172.

the corporation.<sup>471</sup> The Delaware statute authorizes reliance not only on financial statements, but on all books and records of the corporation and on statements prepared by any of the corporation's officers, by independent public accountants, or by appraisers selected with reasonable care by the board.<sup>472</sup>

3. *Shareholder Liability; Subrogation of Directors.*—The Pennsylvania statute provides that a shareholder to whom an unlawful distribution has been made can be held liable to the corporation for the amount he received until two years from the date of the distribution.<sup>473</sup> However, the shareholder is liable only if the corporation is insolvent, if the net assets of the corporation are less than the aggregate preferential amount payable to preferred shareholders in the event of involuntary liquidation, or if the shareholder knew or should have known from facts within his own knowledge that the distribution was unlawful.<sup>474</sup> The Delaware statute contains no provision imposing liability on shareholders for unlawful distributions, although it does permit any director who has been held liable for an unlawful distribution to be subrogated to the rights of the corporation against the shareholders who received that distribution with knowledge of facts indicating that the distribution was unlawful.<sup>475</sup> The statute does not indicate whether such knowledge is a prerequisite to the shareholder's liability to the corporation or is merely a limitation on the director's right to subrogation. The Pennsylvania statute does not provide for such subrogation.

## VIII. Amendment of Charter

### A. *Proposal of Amendments*

Under both statutes, an amendment to the charter may be proposed to the shareholders by the directors' adoption of a resolution which sets forth the proposed amendment and, under the Delaware statute, declares the amendment's advisability.<sup>476</sup> In addition, but only under the Pennsylvania statute, an amendment may be proposed by the petition of a shareholder or group owning ten percent or more of the shares that would be entitled to vote on the amendment.<sup>477</sup> The petition must be directed to and be filed with the board of directors, who then must put the proposed amendment to a vote of

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471. B.C.L. § 707(A).

472. G.C.L. § 172.

473. B.C.L. § 707(B).

474. *Id.*

475. G.C.L. § 174(c).

476. B.C.L. § 802; G.C.L. § 242(b)(1).

477. B.C.L. § 802.

the shareholders.<sup>478</sup>

## B. *Special Voting Rights*

1. *Special Voting Rights Granted*.—Both statutes provide that in addition to the shareholders who normally would be entitled to vote on charter amendments, the shareholders of any class which is affected by certain amendments may vote on those amendments as a class, notwithstanding any provision of the charter to the contrary.<sup>479</sup> Under both statutes, the holders of the outstanding shares of a class are entitled to vote as a class on any amendment which would (1) change the powers, preferences, or special rights of that class so as to affect it adversely, (2) increase or decrease the par value of the shares of that class, or (3) increase the authorized number of shares in that class.<sup>480</sup> Consistent with the foregoing, the Pennsylvania statute adds that the shareholders of a class may vote as a class on any amendment which would (1) limit or deny the existing preemptive rights of the shares of that class, (2) authorize a new class senior or superior in any respect to the shares of that class, or (3) increase the authorized number of shares in a class senior or superior in any respect to the shares of that class.<sup>481</sup>

2. *Exceptions to Special Voting Rights*.—Both statutes provide that no special voting rights will be granted in connection with a proposed amendment which would increase the authorized number of shares in a class if such voting rights are denied in the original charter, in the amendment to the charter which created the class, in any charter amendment adopted by a majority of the shareholders of that class, or, under the Delaware statute only, in any charter amendment adopted prior to the issuance of any shares in that class.<sup>482</sup> The Delaware statute also provides that no special voting rights will be granted in connection with a proposed amendment which would *decrease* the number of shares in a class, but not below the number of shares outstanding, if such voting rights are denied in the original certificate or in an amendment as described above.<sup>483</sup> Since the Pennsylvania statute grants no special voting rights in connection with a decrease in the authorized number of shares, no such exception is necessary under the Pennsylvania statute.

3. *Special Voting Rights When Amendment Affects Series*.—With respect to series within classes, the Delaware statute

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478. *Id.*

479. *Id.* § 804; G.C.L. § 242(b)(2).

480. B.C.L. § 804; G.C.L. § 242(b)(2).

481. B.C.L. § 804.

482. *Id.* § 804; G.C.L. § 242(b)(2).

483. G.C.L. § 242(b)(2).

provides that when less than all the series of a class are affected by a charter amendment which would call for special voting rights as described above, only the series affected is entitled to such voting rights.<sup>484</sup> Under the Pennsylvania statute, if a proposed amendment would authorize the board of directors to determine relative rights and preferences as between series within a special or preferred class, or would revoke such an authorization, then all the holders of shares in that class may vote on the amendment, apparently even if not all the series are affected.<sup>485</sup>

### C. *Advertisement of Amendments*

Under the Pennsylvania statute, the filing of articles of amendment must be advertised in a manner similar to that prescribed for the advertisement of the filing of the original articles.<sup>486</sup> No advertisement is required under the Delaware statute.

### D. *Dissenters' Rights*

Under the Pennsylvania statute, appraisal rights are granted to shareholders who object to an amendment which either (1) affects the shareholders' right to receive accrued but undeclared dividends on stock outstanding on or before January 1, 1969, or (2) eliminates their right to cumulate votes in an election for directors.<sup>487</sup> No appraisal rights are available under the Delaware statute in connection with any amendment. The Pennsylvania statute also provides that a shareholder shall not have any right to obtain in the absence of fraud or fundamental unfairness an injunction against any proposed amendment, or, in situations where the statute grants appraisal rights, to claim payment for his shares other than in accordance with the appraisal procedures set forth in the statute.<sup>488</sup>

### E. *Amendments Without Shareholder Vote*

1. *Prior to Payment for Stock.*—The Delaware statute authorizes the incorporators or the directors to amend the certificate if the corporation has received no payment for any of its stock.<sup>489</sup> Any such amendment is deemed effective as of the date of incorporation, except with respect to persons substantially and adversely affected by the amendment, as to whom the amendment is effective from the

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484. *Id.*

485. B.C.L. § 804.

486. *Id.* § 807.

487. *Id.* § 810.

488. *Id.* § 5(E).

489. G.C.L. § 241.

filing date.<sup>490</sup>

2. *Restated Certificate*.—The Delaware statute authorizes the directors to restate the certificate without shareholder vote if in restating the certificate they do not otherwise amend it.<sup>491</sup> A restatement of the articles under the Pennsylvania statute requires a shareholder vote.<sup>492</sup>

## IX. Merger, Consolidation and Certain Other Fundamental Transactions

### A. *Merger of Domestic Corporations*

1. *Agreement or Plan of Merger*.—When a Pennsylvania corporation is to be merged or consolidated with another corporation, the board of directors of the Pennsylvania corporation must adopt by resolution a “plan” of merger or consolidation.<sup>493</sup> When a Delaware corporation is to be merged or consolidated, the board of directors must adopt by resolution, execute and acknowledge an “agreement” of merger or consolidation.<sup>494</sup> Both statutes require the plan or agreement to set forth certain terms and conditions of the merger or consolidation, the items required by each statute being substantially identical.<sup>495</sup> The Delaware statute provides that the agreement may refer to facts ascertainable outside of the agreement.<sup>496</sup>

2. *Merger or Consolidation Without Shareholder Vote*.—Generally, a plan or agreement of merger or consolidation must be approved by the shareholders.<sup>497</sup> However, unless the corporation’s charter provides otherwise, certain mergers may proceed without shareholder approval.<sup>498</sup> Under the Delaware statute, a merger does not need approval by the shareholders of a constituent corporation if (1) no change is made to the corporation’s certificate, (2) each share of the corporation’s stock outstanding immediately prior to the merger is to be an identical outstanding or treasury share immediately after the merger, and (3) the corporation does not issue in connection with the merger securities representing or convertible into an amount of common stock which exceeds twenty percent of the common stock outstanding immediately prior to the

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490. *Id.*

491. *Id.* § 245.

492. B.C.L. § 801(A)(6).

493. B.C.L. § 902(A).

494. G.C.L. § 251(b).

495. B.C.L. § 902(A); G.C.L. § 251(b).

496. G.C.L. § 251(b).

497. B.C.L. § 902(B); G.C.L. § 251(c).

498. B.C.L. § 902.1; G.C.L. § 251(f).

merger.<sup>499</sup> The Pennsylvania rule is similar, except that the corporation's name may be changed and the percentage of securities which may be issued is only fifteen percent.<sup>500</sup> The Delaware statute provides a further exception to the requirement of shareholder approval when no shares of the constituent corporation have been issued.<sup>501</sup>

3. *Notice to Shareholders.*—When the plan or agreement must be approved by shareholders, the Pennsylvania statute requires that the shareholders be given at least ten days' notice of the meeting at which such approval will be sought,<sup>502</sup> while the Delaware statute requires at least twenty days' notice.<sup>503</sup> Both statutes require the corporation to give shareholders notice of any appraisal rights that may be available to them.<sup>504</sup>

4. *Dissenters' Appraisal Rights.*—Both statutes generally grant appraisal rights to shareholders who object to a plan or agreement of merger or consolidation which requires shareholder approval.<sup>505</sup>

5. *Director Termination or Amendment of Plan or Agreement.*—Under both statutes, the plan or agreement may provide that at any time prior to filing the plan or agreement the board of directors of any constituent corporation may terminate the plan or agreement notwithstanding shareholder approval of the plan or agreement.<sup>506</sup> The Delaware statute expressly permits the plan or agreement to provide that the board of a constituent corporation may amend the plan so long as the amendment does not (1) alter the consideration to be received for shares of the constituent corporation, (2) alter the certificate of the surviving corporation, or (3) alter the agreement so as to adversely affect the shareholders of the constituent corporation.<sup>507</sup>

6. *Filing of Agreement or Plan.*—Both statutes require the plan or agreement to be filed with the appropriate government agencies,<sup>508</sup> but the Delaware statute also permits the surviving corporation to file on behalf of all the constituent corporations a certificate in lieu of the agreement, the certificate indicating among other

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499. G.C.L. § 251(f).

500. B.C.L. § 902.1(A).

501. G.C.L. § 251(f).

502. B.C.L. § 902(B).

503. G.C.L. § 251(c).

504. B.C.L. § 902(B); G.C.L. § 262(d)(1).

505. B.C.L. §§ 908(A), 515(L)(2); G.C.L. § 262(b). Exceptions to this rule are discussed *supra* at page 848.

506. B.C.L. § 902(C); G.C.L. § 251(d).

507. G.C.L. § 251(d).

508. B.C.L. § 905; G.C.L. § 251(c).



things that the agreement is on file at the surviving corporation's principal place of business and that copies of the agreement are available to stockholders on request.<sup>509</sup>

## *B. Merger of Domestic with Foreign Corporations*

1. *Merger with Non-U.S. Corporation.*—A Delaware corporation may merge with a corporation incorporated outside of the United States only if the surviving corporation is a Delaware corporation.<sup>510</sup> The Pennsylvania statute imposes no such limitation.

2. *Consent to Service.*—If the surviving corporation is a foreign corporation organized under the laws of another state of the United States, the Delaware statute requires the surviving corporation to consent to service of process in Delaware in connection with claims against any Delaware corporation participating in the merger, including claims to enforce appraisal rights.<sup>511</sup> The Pennsylvania statute does not require such a consent.

3. *Other Points of Comparison.*—The observations made above under *Merger of Domestic Corporations*<sup>512</sup> apply also to mergers and consolidations of domestic and foreign corporations.<sup>513</sup>

## *C. Parent and Subsidiary Mergers Without Shareholder Vote*

1. *“Short Form” Mergers Permitted Without Shareholder or Director Vote.*—When required conditions are met, both statutes permit a domestic parent to merge with its ninety percent-owned domestic or foreign subsidiary without a vote of the parent's shareholders.<sup>514</sup> However, the Delaware statute also eliminates the need for a vote of the directors or shareholders of the subsidiary, thus permitting a ninety percent-owned Delaware subsidiary to be merged with its domestic or foreign parent by the unilateral act of the parent.<sup>515</sup> These “short form” merger procedures are available to a parent and ninety percent-owned subsidiary merely as an alternative — parent and subsidiary corporations may also merge under the regular merger provisions, including other provisions for mergers without shareholder vote.<sup>516</sup>

2. *Requirement of Agreement or Plan.*—The Pennsylvania

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509. G.C.L. § 251(c).

510. *Id.* § 252(a).

511. *Id.* § 252(d).

512. Pages 870-71, *supra*.

513. See B.C.L. art. IX; G.C.L. § 252.

514. B.C.L. § 902.1(A)(1); G.C.L. § 253(a).

515. G.C.L. § 253(a).

516. See text accompanying notes 497-501, *supra*.

statute requires the same type of plan for a short form merger that it requires for a regular merger;<sup>517</sup> the Delaware statute requires only a resolution of the parent's directors, but if the parent corporation owns less than all of the subsidiary's stock, the resolution must set forth the terms and conditions of the merger, including what the minority shareholders of the subsidiary are to receive for their stock.<sup>518</sup>

3. *Parent or Subsidiary as Surviving Corporation.*—Short form merger is available under the Pennsylvania statute only when the parent is to survive unchanged: the parent's outstanding shares may not be "affected," it must remain a Pennsylvania corporation, and no change other than a name change is permitted in its articles.<sup>519</sup> Under the Delaware statute, either the parent or the subsidiary may be the survivor.<sup>520</sup> However, if the parent is not the survivor, the vote of the parent's shareholders is required.<sup>521</sup> No change is permitted in the charter of the surviving corporation other than a name change or other change authorized by the short form merger section.<sup>522</sup>

4. *Dissenters' Appraisal Rights.*—Under both statutes, minority shareholders of the subsidiary are generally entitled to appraisal rights.<sup>523</sup> Neither statute grants appraisal rights to shareholders of the parent corporation.<sup>524</sup> This appears to be the case under the Delaware statute even when the vote of the parent's shareholders is required.<sup>525</sup>

5. *Other Points of Comparison.*—The observations made above under *Merger of Domestic Corporations* in the paragraph labeled, "Director Termination or Amendment of Plan or Agreement,"<sup>526</sup> and under *Merger of Domestic with Foreign Corporations* in the paragraphs labeled, "Merger with Non-U.S. Corporation,"<sup>527</sup> and "Consent to Service,"<sup>528</sup> also apply to short form mergers.<sup>529</sup>

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517. B.C.L. §§ 902, 902.1(A).

518. G.C.L. § 253(a).

519. B.C.L. § 902.1(A).

520. G.C.L. § 253(a).

521. *Id.*

522. *Id.* §§ 253(b), 253(c).

523. B.C.L. § 908(A); G.C.L. §§ 253(d), 262(b)(3). Exceptions to this rule are discussed *supra* at page 848.

524. B.C.L. §§ 908(A), 515(L)(2); G.C.L. § 262(b).

525. This is so since the vote is required by section 253 of the G.C.L., a section not listed in section 262(b) as incorporating appraisal rights, and the rule stated in section 262(b)(3), granting appraisal rights to the *subsidiary's* minority shareholders, does not apply.

526. Page 871, *supra*.

527. Page 871, *supra*.

528. Pages 871-72, *supra*.

529. See B.C.L. art. IX; G.C.L. §§ 253(a), 253(c), 253(e).

#### D. Other Provisions Relating to Mergers

1. *Vote Required of Disinterested Shareholders.*—The Pennsylvania statute provides that in addition to any other vote requirements, a merger or consolidation of a corporation or its subsidiary with a shareholder of the corporation must be approved by a majority of the disinterested shareholders.<sup>530</sup> The Delaware statute makes no such requirement.

2. *Effect of Merger.*—The Pennsylvania and Delaware statutes contain similar provisions relating to the effect of a merger on the surviving corporation's powers, rights, and liabilities.<sup>531</sup> Each statute is more explicit than the other in some areas,<sup>532</sup> but no significant substantive differences appear.

3. *Domestication of Foreign Corporations.*—The Pennsylvania statute provides for the domestication of any foreign corporation authorized to do business in Pennsylvania.<sup>533</sup> The Delaware statute contains such a provision only with respect to non-United States corporations.<sup>534</sup> Thus, a corporation of another state of the United States which wishes to become a Delaware corporation must do so by merger. The Delaware statute also contains a provision permitting a non-United States corporation to move its domicile to Delaware on a temporary basis in the event of an insurrection or other emergency.<sup>535</sup>

#### E. Control Transactions

Under the Pennsylvania statute, unless otherwise provided in either a by-law adopted prior to March 23, 1984 or the articles, when a person or group of persons acting in concert acquires voting power over thirty percent or more of the stock of a corporation that has a class of voting securities registered under the Securities Exchange Act of 1934, the other shareholders of the corporation may require the thirty percent shareholder or group to purchase the other shareholders' stock in the corporation.<sup>536</sup> The rule does not apply to the acquisition of such voting control, in good faith and not for the pur-

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530. B.C.L. § 409.1(C). See discussion at pages 838-39, *supra*.

531. B.C.L. §§ 14, 907; G.C.L. §§ 251(e), 259, 260, 261.

532. For example, the Pennsylvania statute provides that a domestic survivor may not acquire any powers by the merger that a corporation may not be formed to exercise under the statute, B.C.L. § 907; the Delaware statute contains provisions relating to the surviving corporation's powers to issue and secure debt instruments and to issue stock in connection with the merger, G.C.L. § 260.

533. B.C.L. § 909.

534. G.C.L. § 388. Unlike the Pennsylvania provision, the Delaware provision applies whether or not the foreign corporation was previously authorized to do business in the state.

535. *Id.* § 389.

536. B.C.L. § 910.

pose of circumventing the rule, by an agent, bank, broker, nominee or trustee for one or more beneficial owners who do not individually or as a group acting in concert have voting power over thirty percent or more of the corporation's stock.<sup>537</sup> Upon the acquisition of such voting control, the thirty percent shareholder or group must give notice to the other shareholders,<sup>538</sup> each of whom may, either prior to or within a reasonable time after receiving notice, make written demand upon the thirty percent shareholder or group to purchase his or her shares.<sup>539</sup> The price to be paid for such shares is the "fair value" of the shares on the day prior to the date on which the thirty percent shareholder or group acquired voting control over thirty percent or more of the corporation's stock.<sup>540</sup> The Delaware statute contains no similar provision.

## X. Dissolution and Winding Up

### A. *Voluntary Dissolution Before Beginning Business*

Under the Delaware statute, a corporation which has not begun business may be voluntarily dissolved by a majority of the incorporators or directors.<sup>541</sup> Under the Pennsylvania statute, such a corporation may be voluntarily dissolved only by unanimous shareholder action.<sup>542</sup>

### B. *Voluntary Dissolution After Beginning Business*

1. *Election to Dissolve.*—Under both statutes, a corporation which has commenced business may elect to dissolve by unanimous written action of the shareholders.<sup>543</sup> Alternatively, the board of directors may adopt a resolution recommending dissolution and directing that the question be put to a vote of the shareholders.<sup>544</sup> Under the Delaware statute, the dissolution must then be approved by a majority of the outstanding stock entitled to vote thereon;<sup>545</sup> under the Pennsylvania statute, the dissolution must be approved by a majority of the stock entitled to vote thereon, by a majority of any class entitled to vote on the dissolution as a class,<sup>546</sup> and by a major-

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537. *Id.* § 910(B)(3).

538. *Id.* § 910(C).

539. *Id.* § 910(D).

540. *Id.* § 910(E).

541. G.C.L. § 274.

542. B.C.L. § 1101.

543. B.C.L. § 1102; G.C.L. § 275(c).

544. B.C.L. § 1102; G.C.L. § 275(a) (requiring the resolution to be adopted by a majority of the "whole" board at a meeting called for that purpose).

545. G.C.L. § 275(b).

546. B.C.L. § 1102.

ity of the disinterested shareholders.<sup>547</sup>

2. *When Dissolution Effective; Certificate of Election to Dissolve.*—Both statutes require the filing of a certificate indicating that the dissolution has been authorized by the shareholders in accordance with the required procedures.<sup>548</sup> Under the Delaware statute, the corporation is “dissolved” upon the filing of the certificate.<sup>549</sup> Under the Pennsylvania statute, upon the filing of the certificate, the corporation must cease to carry on its business, except as may be necessary for the proper winding up of its affairs, but the corporation is not “dissolved” until articles of dissolution have been filed by the Department of State, or until a decree dissolving the corporation has been entered by a court of common pleas.<sup>550</sup> Articles of dissolution, for which there is no counterpart in the Delaware statute, are prepared by the corporation and must state, among other things: (1) that the debts of the corporation have been paid or provided for, or that the assets of the corporation are insufficient to pay its debts and have been fairly applied to the payment of the corporation’s debts; (2) that all remaining property of the corporation has been distributed to shareholders; (3) that no actions are pending against the corporation, or that adequate provision has been made for any action pending against the corporation; and (4) that notice of the winding-up of the corporation has been mailed to each Pennsylvania municipality in which the corporation does business.<sup>551</sup> Included with the articles of dissolution must be certificates from “the proper departments of the Commonwealth” evidencing the payment of all taxes and charges.<sup>552</sup> Upon the filing of the articles by the Department of State, the corporate existence ceases.<sup>553</sup>

3. *Winding Up.*—Under the Pennsylvania statute, a corporation must wind up its affairs *prior to* dissolution.<sup>554</sup> Under the Delaware statute, a corporation winds up its affairs *after* dissolution: the corporation is “dissolved” upon the filing of a certificate of election to dissolve, but the corporation’s existence continues for three years thereafter for the purpose of suit and winding up the corporation’s affairs.<sup>555</sup> Of the two statutes, the Pennsylvania statute is more ex-

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547. *Id.* § 409.1(C) (discussed *supra* in text accompanying notes 210-15).

548. *Id.* § 1103; G.C.L. § 275(b).

549. G.C.L. § 275(b); *but cf. id.* § 277 (no corporation shall be dissolved until all Delaware franchise taxes have been paid), *id.* § 278 (continuance of corporate existence after dissolution).

550. B.C.L. § 1103.

551. B.C.L. § 1105.

552. *Id.*

553. *Id.*

554. *Cf. id.* § 1105 (discussed in the preceding paragraph).

555. G.C.L. § 278.

plicit as to the procedures to be followed by the directors in winding up the corporation's business.<sup>556</sup> The Pennsylvania statute also permits the directors to petition the court of common pleas to supervise the winding up of the corporation.<sup>557</sup>

4. *Rescinding Election to Dissolve.*—Both statutes permit a corporation which has elected to dissolve and has filed a certificate to that effect to elect to rescind that action in substantially the same manner required for an election dissolve.<sup>558</sup> Under the Pennsylvania statute, the election to rescind apparently must occur prior to the filing of the articles of dissolution by the Department of State.<sup>559</sup> Under the Delaware statute, the election to rescind must occur prior to the expiration of the post-dissolution winding up period described in the preceding paragraph.<sup>560</sup>

### C. *Dissolution and Winding Up Following Expiration of Charter*

Under the Pennsylvania statute, a corporation is dissolved upon the expiration of its charter,<sup>561</sup> but nevertheless continues to exist for the purpose of winding up its affairs.<sup>562</sup> No provision is made for the termination of this continuance; apparently the corporate existence continues until it is determined that the corporation's affairs are wound up. Under the Delaware statute, a corporation whose charter has expired, like a corporation that has filed a certificate of election to dissolve, continues in existence for three years for the purpose of winding up.<sup>563</sup>

### D. *Involuntary Dissolution*

1. *Grounds for Involuntary Dissolution.*—Under the Pennsylvania statute, a court of common pleas may upon petition of a shareholder entertain proceedings for the involuntary winding up and dissolution of the corporation if: (1) the objects of the corporation are wholly failed or abandoned or their accomplishment is impracticable; (2) the acts of those controlling the corporation are illegal, oppressive, or fraudulent, and dissolution would be beneficial to the interests of the shareholders; (3) the corporation's assets are being misapplied or wasted, and dissolution would be beneficial to the interests of the shareholders; or (4) the directors are deadlocked, and the

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556. Compare B.C.L. § 1104 with G.C.L. § 278.

557. B.C.L. § 1104(D).

558. *Id.* § 1103.1; G.C.L. § 311.

559. See B.C.L. § 1103.1.

560. G.C.L. § 311.

561. See B.C.L. § 1106.

562. *Id.*

563. G.C.L. § 278.

deadlock is causing or threatens to cause irreparable injury to the corporation.<sup>564</sup> The court may also entertain proceedings for the involuntary winding up and dissolution of a corporation upon petition filed by a creditor of the corporation whose claim has been either admitted by the corporation or reduced to judgment and returned unsatisfied because the corporation is unable to make timely payment of its debts in the regular course of business or to afford reasonable security to those who deal with it.<sup>565</sup> No provision is made in the Delaware statute for involuntary dissolution of a corporation upon the petition of a shareholder or creditor other than the provision for the dissolution of a joint venture described below.

2. *Dissolution of Joint Venture.*—The Delaware statute provides for the dissolution of a joint venture between two fifty-percent shareholders who are unable to agree on the desirability of continuing the joint venture; either shareholder may apply to the Court of Chancery to commence dissolution proceedings.<sup>566</sup> The Pennsylvania statute does not contain such a provision.

#### *E. Winding Up of Corporation by Trustee or Receiver*

1. *Appointment of Trustee or Receiver.*—Under the Pennsylvania statute, upon the petition of the board of directors<sup>567</sup> or upon the petition of a shareholder or creditor seeking involuntary dissolution of the corporation,<sup>568</sup> the court of common pleas may appoint a receiver pendente lite and, after hearing, may appoint a liquidating receiver for the corporation.<sup>569</sup> The receiver must be either a resident of Pennsylvania or a corporation authorized both to transact business in Pennsylvania and to act as a receiver.<sup>570</sup> Under the Delaware statute, when a corporation has been dissolved in any manner whatsoever, the Court of Chancery, upon the application of a shareholder, a creditor, or any other person who shows good cause therefor, may either appoint one or more of the directors of the corporation as trustees for the corporation or appoint one or more other persons as receivers for the corporation.<sup>571</sup> No qualifications for trustees or re-

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564. B.C.L. § 1107(A).

565. *Id.* § 1107(B); *see also id.* § 1109 (discontinuance of involuntary dissolution proceedings), *id.* § 1110 (decree of involuntary dissolution).

566. G.C.L. § 273.

567. *See* B.C.L. § 1104(D). Although the provision authorizing the board to petition for court supervision is contained in a section relating generally to voluntary dissolutions, nothing in the provision indicates that it may not apply to involuntary dissolutions. *See id.*

568. *See id.* § 1107.

569. *Id.* § 1108.

570. *Id.* § 1108(C).

571. G.C.L. § 279.

ceivers are mentioned.

2. *Powers, Rights and Duties of Trustee or Receiver.*—Under both statutes, trustees or receivers generally have authority to take charge of the corporation's assets, prosecute and defend suits in the name of the corporation, wind up the corporation's affairs, pay creditors, and distribute the remaining assets to the shareholders.<sup>572</sup> The Pennsylvania statute is more express with respect to the receiver's authority to collect unpaid consideration for shares from shareholders and to dispose of property at public or private sale.<sup>573</sup> It provides that the order appointing the receiver shall state his or her powers and duties and that such powers and duties may be increased or diminished at any time by the court.<sup>574</sup> The Delaware statute expressly authorizes the trustee or receiver to appoint agents and to do all acts which might be done by the corporation that may be necessary for the winding up of its affairs.<sup>575</sup> It directs further that the debts of the corporation be paid in the order of their lawful priority and that unsecured debts, if the assets are insufficient to pay them all, be paid as directed by the court.<sup>576</sup> The statute also contains other sections, without counterpart in the Pennsylvania statute, relating to trustees and receivers: title to the corporation's assets vests by operation of law in the trustee or receiver;<sup>577</sup> the trustee or receiver must prepare an itemized inventory of the corporation's assets and debts;<sup>578</sup> the trustee or receiver may dispose of perishable or deteriorating property, clear of encumbrances, prior to a determination of the priority of any liens on that property;<sup>579</sup> before any distribution of the corporation's assets is made, the trustee or receiver is to be paid a reasonable compensation plus reimbursement of costs and expenses,<sup>580</sup> and the receiver may, upon application, be substituted for the corporation as a party in any suit involving the corporation, and the suit will not abate by reason of his death, but will continue against his successor.<sup>581</sup>

3. *Proof of Claims.*—Both statutes authorize the court to require creditors to supply proofs of their claims against the corporation.<sup>582</sup> Under the Pennsylvania statute, the court must fix a deadline

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572. B.C.L. § 1108(B); G.C.L. §§ 279, 281.

573. B.C.L. § 1108(B).

574. *Id.*

575. G.C.L. § 279.

576. *Id.* § 281.

577. *Id.* § 292.

578. *Id.* § 294.

579. *Id.* § 297.

580. *Id.* § 298.

581. *Id.* § 299.

582. B.C.L. § 1108(D); G.C.L. § 281.



for filing claims (which cannot be less than four months from the date of the order requiring the proofs) and must prescribe the notice to be given to creditors of the date so fixed.<sup>583</sup> The Delaware statute provides simply that creditors shall prove their debts in the manner directed by the court.<sup>584</sup>

#### *F. Survival of Remedies*

1. *Pending Litigation.*—The Delaware statute provides that any suit pending or commenced against the corporation in any Delaware court does not abate by reason of the corporation's subsequent dissolution, but shall continue against the trustee or the receiver of the corporation.<sup>585</sup> Under the Pennsylvania statute, a corporation before dissolving must make adequate provision for the satisfaction of any judgment or decree which may be obtained against the corporation in any pending proceeding without regard to the state in which the suit is pending or was commenced.<sup>586</sup>

2. *Litigation Commenced After Dissolution.*—The corporate existence of a Delaware corporation continues for three years after dissolution, or for such longer period as the Court of Chancery may direct, for the purpose of prosecuting or defending suits.<sup>587</sup> Further, with respect to any suit begun by or against the corporation prior to or within the three-year period, the corporation continues for the purpose of such suit beyond the three-year period until any judgment, order, or decree obtained in the suit is fully executed.<sup>588</sup> Under the Pennsylvania statute, a remedy may be granted against the corporation, its directors, or its shareholders in any suit brought prior to or within two years after dissolution for any liability incurred prior to dissolution, unless the dissolution was by the decree of a court of common pleas and the court liquidated the assets and property of the corporation.<sup>589</sup> The statute provides further that the dissolution of a corporation does not take away or impair any property right or right of action of the corporation; if any such right is discovered after dissolution, a representative of the corporation may enforce that right.<sup>590</sup>

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583. B.C.L. § 1108(D).

584. G.C.L. § 281.

585. *Id.* § 282; *cf.* text accompanying notes 554-55, *supra*.

586. B.C.L. § 1105(5).

587. G.C.L. § 278.

588. *Id.*

589. B.C.L. § 1111(A).

590. *Id.* § 1111(B).

## G. *Revocation of Charter*

Under the Delaware statute, the Attorney General on his own motion or on the relation of a proper party may seek, and the Court of Chancery may grant, the revocation or forfeiture of a corporation's charter for "abuse, or non-use of its corporate powers, privileges or franchises,"<sup>591</sup> but no proceeding for non-use may be brought until two years after incorporation.<sup>592</sup> The Court has the power by the appointment of receivers or otherwise to wind up the affairs of the corporation and to make such orders in connection with the winding up as it deems just and equitable.<sup>593</sup> The Pennsylvania statute provides merely that the Attorney General may seek to "annul, vacate or forfeit the articles and the franchise of a business corporation, upon such grounds and in such manner as is now provided by law."<sup>594</sup> The court in which the proceeding is brought has power to wind up the affairs of the corporation the same as in any other court-supervised liquidation.<sup>595</sup>

## H. *Renewal or Revival of Charter*

The Delaware statute contains unique provisions permitting a corporation whose charter has expired, been forfeited, or become inoperative for nonpayment of taxes to renew or revive its charter by filing a certificate.<sup>596</sup> A corporation whose charter has been so renewed or revived continues, having the same rights and duties as provided in the original charter and enjoying all the benefits of the Delaware statute.<sup>597</sup>

## XI. *Insolvency and Receivership*

### A. *Arrangement and Reorganization Under Federal Law*

The provisions of the Delaware and Pennsylvania statutes authorizing the reorganization of a corporation under federal law are substantially identical.<sup>598</sup> The Delaware statute applies to any reorganization under any applicable federal law relating to the reorganization of corporations.<sup>599</sup> The Pennsylvania statute applies to any reorganization, and any arrangement confirmed by court order, pursuant to a national bankruptcy law.<sup>600</sup> Both statutes grant the

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591. G.C.L. § 283(a).

592. *Id.* § 283(c).

593. *Id.* § 283(b).

594. B.C.L. § 1112.

595. *Id.*

596. G.C.L. § 312.

597. *Id.* §§ 312, 314.

598. B.C.L. § 320; G.C.L. § 303.

599. G.C.L. § 303(a).

600. B.C.L. § 320(1).

trustee or designated officers of the corporation the power to carry out the plan or decree of reorganization without further action by the directors or shareholders, which power includes, without limitation, the power to amend the charter and by-laws, to reconstitute and reclassify the board, to dissolve, transfer assets, merge or consolidate without granting appraisal rights, and to make any change in the corporation's capital stock.<sup>601</sup> The Delaware provisions expressly state that they shall cease to apply upon the entry of a final decree closing the case and discharging the trustee, if any.<sup>602</sup>

## B. Other Provisions of the Pennsylvania Statute

1. *Board Action Authorized.*—The Pennsylvania statute provides that whenever a corporation is insolvent or in financial difficulty, the board of directors may without shareholder consent direct the officers of the corporation to make an assignment for the benefit of creditors, to file a voluntary petition in bankruptcy, to file an answer consenting to the appointment of a receiver in a suit by a shareholder or creditor, or, if the corporation is insolvent, to file an answer to an involuntary petition in bankruptcy admitting the corporation's insolvency and its willingness to be adjudged a bankrupt on that ground.<sup>603</sup>

2. *Involuntary Dissolution.*<sup>604</sup>—If it appears that the corporation is unable to make timely payment of its debts or to afford reasonable security to those who may deal with it, a Court of Common Pleas may entertain proceedings for the winding up and involuntary dissolution of a corporation upon petition filed by a creditor whose claim has been either admitted by the corporation or reduced to judgment and returned unsatisfied.<sup>605</sup> The court may appoint a receiver for the corporation and require proof of claims from creditors.<sup>606</sup> The court has the discretion to discontinue the liquidation proceedings if it appears that the debts of the corporation have been paid or provided for and there remain sufficient assets for the corporation to resume its business, or if a "majority in number, representing three-fourths in value of the creditors" approve a compromise or plan of organization.<sup>607</sup> Otherwise, after distribution of the corporation's assets to its creditors and shareholders, the court must decree

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601. *Id.* § 320(2); G.C.L. § 303(b).

602. G.C.L. § 303(d).

603. B.C.L. § 319.

604. Involuntary dissolution is discussed further in text accompanying notes 565-66, *supra*.

605. B.C.L. § 1107(B).

606. *Id.* § 1108.

607. *Id.* § 1109.

the corporation dissolved.<sup>608</sup>

### C. *Receivership Under the Delaware Statute*

When a Delaware corporation is insolvent, any creditor or stockholder may apply to the Court of Chancery for the appointment of a receiver to manage the affairs of the corporation for so long a period as the Court deems necessary.<sup>609</sup> Title to the property of the corporation vests by operation of law in the receiver upon his or her appointment; if not merely a receiver pendente lite, the receiver must file notice of his or her appointment in the Recorder's Office of each Delaware county where the corporation has property.<sup>610</sup> All notices required to be given in the proceeding, unless otherwise directed by the Court, must be given by the Register in Chancery.<sup>611</sup> The receiver is to prepare and file in the Register an itemized inventory of assets.<sup>612</sup> Creditors must file proof of claims in accordance with the rules of the Court of Chancery or be barred in the Court's discretion from participation in the distribution.<sup>613</sup> The receiver then allows or disallows the claims, and creditors whose claims are disallowed may appeal to the Court within thirty days after receiving notice of the disallowance.<sup>614</sup> Where property is subject to a disputed lien and is of a character that its value may deteriorate during litigation, the Court may order its sale with the proceeds being paid into Court.<sup>615</sup> The receiver is to be paid a reasonable compensation plus expenses out of the assets of the corporation.<sup>616</sup> The receiver may, upon his or her application, be substituted for the corporation in any suit to which the corporation is a party.<sup>617</sup> Employees other than officers obtain a first lien position for up to two months unpaid wages.<sup>618</sup> When "cause for liquidation no longer exists," the Court, in its discretion and subject to conditions it deems appropriate, may dismiss the proceedings and direct the receiver to return the corporation's assets to the corporation.<sup>619</sup>

### D. *Receivership and Involuntary Dissolution Compared*

The receivership procedure of the Delaware statute does not

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608. *Id.* § 1110.  
609. G.C.L. § 291.  
610. *Id.* § 292.  
611. *Id.*  
612. *Id.* § 294.  
613. *Id.* § 295.  
614. *Id.* § 296.  
615. *Id.* § 297.  
616. *Id.* § 298.  
617. *Id.* § 299.  
618. *Id.* § 300.  
619. *Id.* § 301.

provide for the involuntary dissolution of a corporation in receivership, and no other provision is made in the statute for the involuntary dissolution of a corporation. The Pennsylvania statute, on the other hand, does not provide for the appointment of a receiver except in the context of a proceeding for the involuntary dissolution of the corporation.<sup>620</sup> However, since receivership under the Delaware statute and involuntary dissolution under the Pennsylvania statute serve similar purposes, some aspects of these procedures are compared here.

1. *Commencement of Proceedings.*—Under the Delaware statute, any shareholder or creditor of the corporation may seek the appointment of a receiver if the corporation is insolvent.<sup>621</sup> Under the Pennsylvania statute, a creditor whose claim against the corporation has been either admitted by the corporation or reduced to judgment and returned unsatisfied may seek involuntary winding up and dissolution of the corporation if the corporation is unable to make timely payment of its debts or to afford reasonable security to those who may deal with it.<sup>622</sup>

2. *Title to Corporate Assets.*—The Delaware statute vests title to the corporate assets in the receiver.<sup>623</sup> Similarly, the Pennsylvania statute grants authority to the receiver to collect and dispose of the assets.<sup>624</sup>

3. *Creditors' Proofs of Claims.*—Under the Pennsylvania statute, the court may require creditors to file proofs of their claims by fixing a date, not less than four months from the date of the order requiring the proofs, before which proofs must be filed.<sup>625</sup> Under the Delaware statute, all creditors must submit proof of their claims "within the time fixed by and in accordance with the Rules of the Court of Chancery."<sup>626</sup> Both statutes allow the court to prescribe the notice to be given to creditors, and creditors failing to file their claims before the deadline may by order of the court be barred from participating in the distribution of the corporation's assets.<sup>627</sup>

4. *Discontinuance of Proceedings.*—Under the Pennsylvania statute, the liquidation of the corporation's assets may be discontinued if the debts of the corporation have been paid or provided for

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620. B.C.L. § 1108.

621. G.C.L. § 291 ("insolvency" is not defined).

622. B.C.L. § 1107(B).

623. G.C.L. § 292.

624. B.C.L. § 1108(B).

625. B.C.L. § 1108(D).

626. G.C.L. § 295.

627. B.C.L. § 1108(D); G.C.L. § 295.

and there remain sufficient assets for the corporation to continue its business, or if a compromise or reorganization has been approved by a "majority in number, representing three-fourths in value" of the creditors or by a similar majority of a class of creditors.<sup>628</sup> Under the Delaware statute, the liquidation of the corporation's assets may be discontinued at any time subject to such conditions as the Court deems appropriate when the cause for liquidation no longer exists.<sup>629</sup> The Delaware statute also provides for discontinuance upon the approval of a compromise or reorganization by three-fourths in value of the creditors or of a class of creditors, but only if a clause has been included in the certificate of incorporation expressly authorizing such a procedure.<sup>630</sup>

5. *Delaware Provisions Without Counterpart.*—The following receivership provisions of the Delaware statute have no counterpart in the Pennsylvania statute: all notices are to be given by the Register in Chancery unless the Court directs otherwise;<sup>631</sup> the receiver is to prepare an itemized inventory of the corporation's assets and debts;<sup>632</sup> the receiver may dispose of perishable or deteriorating property clear of any encumbrances, prior to a determination of the priority of any liens on that property;<sup>633</sup> before any distribution of the assets of the corporation, the receiver is to be paid a reasonable compensation plus reimbursement of cost and expenses;<sup>634</sup> the receiver may upon application be substituted for the corporation as a party in any suit involving the corporation, and the suit will not abate by reason of his death but will continue against his successor;<sup>635</sup> and employees, other than officers, have a lien on the assets of an insolvent corporation for up to two months' wages, to be paid before any other debt of the corporation.<sup>636</sup>

### Note on Use of Appendices

Appendix A provides cross references from the Pennsylvania statute to the Delaware statute, and Appendix B provides cross references from the Delaware statute to the Pennsylvania statute. The appendices also serve as an index to the Article and include comparisons in addition to those discussed in this Article. These additional comparisons are set forth in Appendix A to the extent possible. Ap-

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628. B.C.L. § 1109.

629. G.C.L. § 301.

630. G.C.L. § 302 (referring to the clause set forth in *id.* § 102(b)(2)).

631. G.C.L. § 293.

632. *Id.* § 294.

633. *Id.* § 297.

634. *Id.* § 298.

635. *Id.* § 299.

636. *Id.* § 300.

pendix B contains comments only on those sections or provisions of the Delaware statute that do not have counterparts in the Pennsylvania statute and that have not been discussed in the Article.

## APPENDIX A

### B.C.L. Section Cross Reference Chart and Index

<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
1	398	Short Title.
2	—	Definitions.
2(1)	104	Delaware defines “certificate of incorporation” to include the original certificate and all documents filed pursuant to the G.C.L. which have the effect of amending or supplementing the original certificate. The Pennsylvania definition of “articles of incorporation” is similar, but the definition excludes documents filed prior to a complete restatement of the articles.
3	—	Applicability and Acceptance of Act.
4	—	Scope of Act.
5	—	304, 488. Saving Clause; Limited Uniform Application of Act.
6	—	Interpretation of Act.
7	—	Fees.
8(A)	222	14-17.
8(B)	229	18-19.
8(C)	229	20.
8(D)	—	21.
8(E)	141(i)	22-23.
9	—	34.

## APPENDIX A

<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
10	103	Both statutes allow for delayed effectiveness of filed instruments, B.C.L. § 10(B); G.C.L. § 103(d), but the G.C.L. limits the permissible delay to 90 days, G.C.L. § 103(d).
11	—	36. Repealed.
12	—	Validation of Certain Defective Corporations.
13	—	Validation of Certain Defective Corporate Acts.
14	—	531. Scope and Duration of Certain Franchises.
15	—	Applicability of Sections 12 through 14.
16	—	Transfers of Certain Rights, Powers and Privileges (relating to public utility corporations).
201	101	Delaware explicitly authorizes formation of a corporation by a partnership or association.
202	102(a)(1) 395	40-49.
203	—	50.
204(A)	102	51-59.
204(B)	—	Pennsylvania provides that the naming of directors in the articles constitutes an affirmation that they have consented in writing to serve as such.
205	—	60.
206	103	62-63.
207	105 106	35-37.
208-209.2	—	Repealed.



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<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
210	108 109(a)	64-67.
211	394	The Delaware legislature expressly reserves the right to amend or repeal the G.C.L., but no such amendment or repeal shall affect any remedy under the G.C.L. against a corporation or its officers for any liability previously incurred. The G.C.L. is made part of the charter of every Delaware corporation to the extent applicable and appropriate to the corporation's purposes. The Pennsylvania legislature expressly reserves the right to revoke, amend, or repeal the articles of any Pennsylvania business corporation.
301	121	
302(1)	122(1)	
302(2)	122(2)	
302(3)	122(3)	
302(4)	122(4) 123	
302(5)	122(4)	
302(6)	122(13)	Delaware expressly authorizes a corporation to make contracts of guaranty and suretyship which are necessary or convenient to the business of a parent, subsidiary, or sister corporation, provided that all ownership relations are 100% ownership.
302(7)	—	Omitted.
302(8)	122(13)	

## APPENDIX A

<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
302(9)	122(14)	
302(10)	122(8)	
302(11)	122(6)	
302(12)	122(5)	
302(13)	122(13)	
302(14)	—	
302(15)	122(7)	
302(16)	122(9) 122(12)	
302(17)	—	Pennsylvania expressly authorizes the use of “abbreviations, words or symbols” on and in connection with the corporation’s share certificates.
302(18)	122(10) 122(11)	
303	124	When a court sets aside a contract because it is ultra vires, under the B.C.L. the court “shall” allow compensation to the injured parties, B.C.L. § 303(A)(1); under the G.C.L. the court “may” allow compensation, G.C.L. § 124(1). The B.C.L. permits officers or directors to raise the defense of ultra vires in certain circumstances, B.C.L. § 303(A)(1); the G.C.L.’s similar provision applies to “incumbent or former” officers or directors, G.C.L. § 124(2).
304	109	73-76.
305	103(a)(2)	25-28, 77.
306	131(a)	97.
307	133	

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<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
308(A)	—	99.
308(B)	220(b)	
308(C)	220(c)	38.
309	—	Repealed.
309.1	221	104-05.
310	—	Repealed.
311(A)	—	83.
311(B)	271	88-89, 313.
311(C)	—	The B.C.L. explicitly states that its section governing sales of assets does not authorize conveyances in fraud of creditors or shareholders.
311(D)	—	91, 293-94.
311(E)	272	84.
311(F)	—	94, 295-96, 315.
312	—	95-96.
313	330	
314	—	80.
315	—	81.
316	122(15)	Pennsylvania expressly allows payment of pensions or allowances to dependents or beneficiaries of directors, officers, and employees, even if no such grant was made during the lifetime of the director, officer, or employee.
317	—	Repealed.
318	—	103.
319	—	603.
320	303	598-602.

## APPENDIX A

<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
321	110	78-79. Delaware makes clear that its section governing emergency powers is not exclusive of other provisions for emergency powers which may be adopted by the corporation.
322	—	Relating to public utility companies.
371-386		8. Relating to closely held corporations.
401	141(a) 141(b) 141(h)	103-14, 120-23. Pennsylvania explicitly provides that a director may also be an officer of the corporation and that the articles or by-laws may require a director to be a Pennsylvania resident. Delaware indicates that a director's resignation must be in writing.
402	141(b)	109-12, 115-16, 120-23.
402(1)	—	111.
402(2)	141(b)	117-18.
402(3)	223	157-64.
402(4)	141(g)	Delaware expressly provides that directors may have offices outside the state.
402(5)	141(b)	140-43.
402(6)	141(c)	133-36.
402(7)	141(f)	144-45.
403	141(d)	124-32.
404	—	138.
405(A)	141(k)	151-54.
405(B)	—	156.
405(C)	—	155.

## APPENDIX A

<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
406	142	167-73. Delaware provides, "A failure to elect officers shall not dissolve or otherwise affect the corporation." G.C.L. § 142(d).
407	142(b)	The B.C.L. permits the removal of officers by the board of directors "whenever . . . the best interests of the corporation will be served thereby."
408	—	176-77.
409	—	Repealed.
409.1(A), (B)	144	146-50. Delaware substitutes "relationship or interest" for "interest" in paragraphs (1) and (2), and "Common or interested" for "Interested" in paragraph (b).
409.1(C)	—	210-15, 530.
410	145	178-82.
501	211 222(c)	164, 183-95.
502	222	197-200.
503(A)	216	194, 201-209.
503(B)	102(b)(4)	207-09.
504(A)	212	216-27. Delaware explicitly provides that if the certificate provides for more or less than one vote per share, references in the statute to a majority or other proportion of stock will refer to such majority or other proportion of the votes of such stock. G.C.L. § 212(a).

## APPENDIX A

<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
504(B)	160(d)	Under both the B.C.L. (unless otherwise provided in the articles) and the G.C.L., shares called for redemption are not entitled to vote and are deemed not to be outstanding. Under the Delaware statute, however, the shares are deemed not to be outstanding “for the purpose of voting.” The Delaware statute explicitly provides that such shares shall not be counted when determining the total number of shares entitled to vote. The Pennsylvania statute requires the redemption notice to specify the bank or trust company that will pay for the shares surrendered.
505	211(e) 214	228-32. The Pennsylvania statute contains a grandfather clause denying cumulative voting in certain circumstances unless the articles provide otherwise.
506	217(a)	238-39. Both statutes permit voting of shares held by fiduciaries, but Pennsylvania’s statute is more express as to voting by receivers and assignees for the benefit of creditors.
507	217(b)	240-44. Both statutes permit voting of jointly owned shares, but the Delaware statute is more express as to forms of joint ownership, including joint ownership by fiduciaries.
508	160(c)	245-49.
509	213	250-60.

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<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
510	219	261-66.
511	218	267-87.
512	—	233-37.
513	228	288-92.
513.1	226	38, 334-35.
514	—	Repealed.
515	262	299-333.
516	327	336-38.
601	151(a) 159 161	339-40. The B.C.L. expressly provides that, unless otherwise provided in the articles, each share is equal to every other share and that series of the same class are not to be construed as different classes for the purpose of class voting.
602	151(g)	While both statutes allow the directors to reduce (by resolution filed with the state) the number of shares in a class, only the G.C.L. expressly provides that the number may be reduced to zero.
603(A)	152 153(a) 160(a)	361-62. The B.C.L. expressly states that subscriptions made prior to incorporation shall be made payable with consideration of the character and value determined by the incorporators.

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<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
		Both statutes provide that the directors' valuation of the consideration is conclusive, but the G.C.L. expressly qualifies its provision, "[i]n the absence of actual fraud in the transaction." G.C.L. § 153(a). The B.C.L. provision also applies to valuations by the incorporators and also makes clear that the value to be determined is the value to the corporation.
603(B)	—	384.
603(C)	—	385.
604	152 163 164	365-67, 373-76.
605	162 164	371, 377-83.
606	—	372.
607	151(f) 158	349-51. The B.C.L. provides that certificates representing shares without par value shall not state a par or other value, nor state a dividend right in terms of a percentage of any value, but may state rights and restrictions in terms of dollars and cents per share.
608	155	357-60.



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<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
609	162	108. Both statutes protect the transferee of shares which have not been fully paid if the transferee takes the shares in good faith and without knowledge of the defect. The G.C.L. adds, "but the transferor shall remain liable." G.C.L. § 162(c).
610	—	396.
611	102(b)(3)	387. Under both statutes, there are generally no preemptive rights unless the charter provides otherwise. Both statutes contain grandfather clauses, with some differences. The B.C.L. contains a unique provision which governs the scope of preemptive rights if the articles do not otherwise provide.
612	—	387, 397-98.
613(A)	201	393-94.
613(B)	—	The B.C.L. authorizes the opening of a share register, and the employment of a transfer agent, in any state of the United States. <i>Cf.</i> B.C.L. § 308(A) (excepting the share register from the general B.C.L. requirement that books and records shall be maintained at the registered office of the corporation). Delaware does not designate a place where books or records must be maintained and therefore need not specially authorize the keeping of any book or record outside the state.
613.1	202	388-92.
614	154	407-13.

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<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
615	—	399-401.
701(A)	160(a)	430-37. Both statutes permit a corporation to acquire and dispose of its own shares; the Delaware statute contains a more detailed list of the ways corporations may acquire and dispose of shares. <i>Cf.</i> B.C.L. § 603(A) (disposal of treasury shares).
701(B)	160(a)	430-37. The G.C.L. specifically provides that, although the corporation may not purchase or redeem its own shares when the capital of the corporation is impaired or would be impaired by the purchase or redemption, a note or other obligation of the corporation given as consideration for such shares when the capital has not been and is not being impaired remains valid, even if capital is subsequently impaired.
701(C)	243(a) 243(a)(3)	430-42.
701(D)	—	This subsection authorizes open-end investment companies to apply stated capital and capital surplus to the acquisition of their own shares without shareholder vote. Such a provision is unnecessary under the Delaware statute since generally no shareholder vote is required to apply capital to the acquisition of a corporation's own shares.
701(E)	—	426-27.
702(A)(1)	170(a)	452-56.

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<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
702(A)(2)	170(a)	452-56.
702(A)(3)	170(b)	Special provisions for the declaration of dividends by corporations exploiting wasting assets.
702(A)(4)	—	452-56.
702(B)	—	457.
702.1(A)	173	458-63. The B.C.L. expressly requires shares distributed as a dividend to be distributed pro rata, and requires the corporation to disclose to those receiving the dividend the amount of surplus that was transferred to stated capital in connection with the distribution.
702.1(B)	—	The B.C.L. expressly authorizes the payment of cash in lieu of the issuance of fractional shares in a stock dividend.
702.1(C)	—	462-63.
703	—	464.
704(A)	—	420.
704(B)	—	423-24.
704(C)	—	425.
704(D)	—	
704(E)	171	429. The G.C.L. permits the creation of reserves out of funds that would be available for dividends; the B.C.L. permits the creation of reserves out of earned surplus (which is generally the source of dividends).

## APPENDIX A

<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
704(F)	—	The B.C.L. provides for carry forward of earned surplus on merger, consolidation, etc.
705	—	Repealed.
706	244(a)(4)	422.
707	172 174	165-66, 465-75.
708	243(a) 244(a)	443-46.
709	243(b)	447-51.
801	242(a)	450, 491-92. The G.C.L. requires to be included in any amendment providing for a change in stock or stockholders' rights, or for an exchange, reclassification, or cancellation of stock or stockholders' rights, such provisions as may be necessary to effect the change, exchange, reclassification, or cancellation.
802	242(b)(1)	476-78.
803	242(b)(1) 222	314. Under both statutes, notice of a meeting at which a proposed charter amendment will be put to shareholder vote must be given not less than ten days prior to the meeting. The G.C.L. also provides that the notice may not be given more than sixty days prior to the meeting.

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<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
804	242(b)(2)	479-85. Explicit in the B.C.L. is the rule that, except as otherwise provided in the statute, only shareholders entitled under the charter to vote on charter amendments shall be entitled to vote thereon.
805(A)	242(b)(1)	The B.C.L. explicitly provides that any number of charter amendments may be voted on by the shareholders at one meeting. It also provides that a proposed amendment may contain a provision that at any time prior to filing the amendment with the Department of State, the proposal may be terminated by the directors, notwithstanding shareholder approval.
805(B)	242(b)(4)	207. Both statutes provide that any provision of the charter calling for a supermajority vote may be amended only by a similar supermajority vote. While the B.C.L. refers to charter provisions requiring a supermajority of the directors, <i>of any class of directors, of the shareholders</i> , or of any class or series of shareholders, and the G.C.L. refers to charter provisions requiring a supermajority of the directors, of any class or series of shareholders, or <i>of any other security holders</i> , the statutes are probably of equivalent scope.
806-809	242(b)(1)	486. Filing procedures.
810	—	297, 314, 487.

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<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
901	251(a) 252(a)	
902(A)	251(b) 252(b) 252(c)	493-96.
902(B)	251(b) 251(c) 252(c)	312, 497, 502-04.
902(C)	251(c) 251(d) 252(c) 252(e)	506-07.
902(D)	252(c)	
902.1(A)	251(f) 252(e) 253	303, 498-501, 517-19.
902.1(B)	253(a)	
903	251(c) 252(c)	
904	—	Repealed.
905	103 251(c)	508-09.
906	103	
907	251(e) 259 260 261	531-32.
908(A)	262	299, 505, 523-25.
908(B)	—	<i>See entry at B.C.L. § 311(F).</i>
909	388 389	532-35.
910	—	305-06, 536-40.
1001-1016	—	7. Relating to foreign corporations.
1101	274	541-42.

## APPENDIX A

<u>B.C.L. §</u>	<u>G.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
1102	275	543-47.
1103	275	548-50. The G.C.L. requires that if a unanimous written shareholder consent to dissolution is signed by an attorney, the original or a photocopy of the power of attorney must be attached to and filed with the consent; in addition, the consent filed with the Secretary of State must have attached to it both an affidavit of a corporate officer stating that the consent has been signed by or on behalf of all the shareholders and a certificate of a corporate officer setting forth the names and addresses of the directors of the corporation.
1103.1	311	558-60.
1104	278 279	556-57, 567.
1105	275 277	551-53, 586. The G.C.L. requires the payment of franchise taxes prior to dissolution; the B.C.L. requires the payment of all state taxes.
1106	278	561-63.
1107	283	564-65, 568, 605, 622.
1108	279 280	569-584, 606, 623-27.
1109	—	565, 607, 628.
1110	—	565, 608.
1111(A)	282	589.
1111(B)	278	590.
1112	283(a)	591-595.

## APPENDIX B

### B.C.L. Section Cross Reference Chart and Index

<u>G.C.L. §</u>	<u>B.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
101	201*	
101(c)	4(B)(2)	
102	202 204	40-43, 48-49, 51-59, 106-07, 172, 208.
102(b)(3)	611*	
103	10* 204(A) 207	25-33, 69.
104	2(1)*	
105	207	35-37.
106	207	
107	210	68.
108(a)	210	64-67.
108(b)	8(B) 8(C) 210	64-67, 139.
108(c)	210 402(7)	64-67.
109	210 304	71, 73-76, 173.
110	321*	78-79.
121	301 302	
122(1)	302(1)	
122(2)	302(2)	
122(3)	302(3)	
122(4)	302(4) 302(5)	
122(5)	302(12)	
122(6)	302(11)	

\* Comments are made in Appendix A at this section number.



**APPENDIX B**

<u>G.C.L. §</u>	<u>B.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
122(7)	302(15)	
122(8)	302(10)	
122(9)	302(16) 314	80.
122(10)	302(18) 201	
122(11)	302(18)	
122(12)	302(16)	
122(13)	302(6)* 302(8)	
122(14)	302(9)	
122(15)	316*	
122(16)	—	Delaware expressly authorizes corporations to maintain life insurance on directors and officers, and on stockholders for the purpose of repurchasing the stockholders' shares.
123	302(4)	
124	303*	
125	202(A)	
126	202(A)	
127	—	Relating to powers and duties of private foundations.
131(a)	306	97.
131(b)	—	Delaware provides that "principal place of business" and terms of like import in the certificate, any other document, and in any statute shall be deemed to refer to the corporation's registered office, unless the context indicates otherwise.

\* Comments are made in Appendix A at this section number.

## APPENDIX B

<u>G.C.L. §</u>	<u>B.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
132	—	98.
133	307	
134-136	—	Relating to registered agent.
141(a)	401*	114.
141(b)	401 402	116-17, 123, 140-43.
141(c)	402(6)	133-36.
141(d)	403	124-32.
141(e)	707(A)	165.
141(f)	402(7)	144.
141(g)	402(4)*	
141(h)	401	
141(i)	8(E)	22-23.
141(j)	—	Relating to nonstock companies.
141(k)	405	151-56.
142	406*	167-69, 351.
143	—	174.
144	409.1*	146-50.
145	410	178-82.
151(a)	601*	339-40, 345.
151(b)	—	341-44.
151(c)	—	This subsection indicates that the dividend rights of special and preferred stock are governed by the certificate of incorporation or the directors' resolutions providing for the issuance of such stock.

\* Comments are made in Appendix A at this section number.

## APPENDIX B

<u>G.C.L. §</u>	<u>B.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
151(d)	—	This subsection indicates that the liquidation rights of special and preferred stock are governed by the certificate of incorporation or the directors' resolutions providing for the issuance of such stock.
151(e)	601	
151(f)	607(A)	347-48.
151(g)	602*	
152	603* 604	363-67.
153	603*	
154	2(11) 2(23) 614	409-13, 416-19.
155	608	357-60.
156	—	368-69.
157	—	386.
158	607	168, 346, 349-51.
159	—	395, 402. <i>Cf.</i> B.C.L. § 601 (shares are personal property)
160(a)	603(A) 701*	434-36.
160(b)	603(A)	
160(c)	508	248-49.
160(d)	504(B)*	
161	601	
162(a)	609	
162(b)	—	<i>Cf.</i> G.C.L. § 325 (litigation procedure).
162(c)	609*	
162(d)	609	

\* Comments are made in Appendix A at this section number.

## APPENDIX B

<u>G.C.L. §</u>	<u>B.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
162(e)	—	The G.C.L. imposes a six-year statute of limitations on shareholders' liability for stock not paid in full.
162(f)	—	The G.C.L. grants shareholders of an insolvent corporation the right to appear and contest the claims of a person trying to enforce an assessment against shareholders.
163	604	373-76.
164	605	377-83.
165	—	403.
166	—	404.
167	—	354.
168	—	39, 355.
169	—	405.
170	702*	453-56.
171	704(E)*	
172	707(A)	166, 470-72.
173	702.1(A)*	458-63.
174	707	465-69, 475.
201	613	393-94.
202	613.1	347, 388-92.

\* Comments are made in Appendix A at this section number.

## APPENDIX B

<u>G.C.L. §</u>	<u>B.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
203	—	12. A disclosure-type antitakeover statute, requiring 20 to 60 days notice to a Delaware corporation of any intent to make a tender offer, providing for a 20-day stockholder withdrawal period (with 10 day extensions following revisions of the offer), permitting no payment until the expiration of the withdrawal period, and allowing a second bidder to enter with no waiting period.
211	501	39, 119, 183-92, 205.
211(e)	505	230.
212	504(A)*	217-27.
213	509	250-59.
214	505(A)*	232.
215	—	Nonstock Corporations.
216	503	202, 206-09.
217(a)	506*	238-39.
217(b)	507*	240-44, 275.
218	511	243-44, 267-87, 347.
219	510	261-66.
220	2(18)	39, 102.
221	309.1	104. <i>Cf.</i> B.C.L. §§ 504, 601 (articles may deny voting rights).
222	8(A) 502	14-17, 195, 198-200.
223	402(3)	157-64, 192.
224	—	100.
225	512	39, 237.
226	513.1	334.

\* Comments are made in Appendix A at this section number.

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<u>G.C.L. §</u>	<u>B.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
227	—	The Court of Chancery, in any proceeding under sections 211 (failure to hold a meeting), 215 (relating to nonstock corporations), or 225 (contested election of directors), may determine the right and power of persons claiming to own stock (or to be members of a nonstock corporation), may appoint a master to conduct an election, may punish any officer or director for contempt, and may punish the corporation for disobedience of an order with a penalty not to exceed \$5,000.
228	513	288-92, 316.
229	8	18-20.
230	—	24.
241	—	489-90.
242(a)	801*	450.
242(b)(1)	802 803* 805(A)* 806 808 809	476.
242(b)(2)	804*	479-85.
242(b)(3)	—	Applies to nonstock corporations.
242(b)(4)	805(B)*	
243(a)	701(C) 708	440, 445.
243(b)	709	447-48.
243(c)	—	See G.C.L. § 244.
244(a)(1)	708	441-42, 446.

\* Comments are made in Appendix A at this section number.

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<u>G.C.L. §</u>	<u>B.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
244(a)(2)	701(B)	441-42.
244(a)(3)	701(C)	441-42.
244(a)(4)	704(B) 706	421.
244(b)	—	This subsection sets forth limitations on the reduction of capital by the board of directors. Comparable limitations are scattered throughout the B.C.L., e.g., B.C.L. § 701(B)(1) (reduction of capital surplus on purchase of shares not subject to redemption); <i>id.</i> § 701(C) (adjustment on exchange or conversion); <i>id.</i> § 701(D) (open-end investment companies); <i>id.</i> § 702(A)(4) (dividends from consolidated earned surplus); <i>id.</i> § 702(B) (dividends from capital surplus to pay cumulative dividends); <i>id.</i> § 704(B) (appreciation in assets); <i>id.</i> § 706 (reduction of stated capital); <i>id.</i> § 708 (cancellation of treasury shares).
245	—	491-92.
246	—	The G.C.L. requires the Secretary of State to furnish on request a “composite certificate of incorporation” containing only those certificate provisions then in effect.
251	901 902 903	198, 493-509.
251(d)	—	506-07.

\* Comments are made in Appendix A at this section number.

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<u>G.C.L. §</u>	<u>B.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
251(e)	907	531.
251(f)	902.1(A)(2)	498-501.
252	901 902 903	510-13.
252(d)	—	511.
252(e)	—	<i>See</i> G.C.L. §§ 251(e), 251(f).
253	902.1(A)(1)	317, 514-29.
254-258	—	Relating to mergers with joint-stock, nonstock, and nonprofit corporations.
259(a)	907	531.
259(b)	—	Relating to mergers involving banks or trust companies.
260	—	531-32.
261	907	531.
262	908	92, 294-333, 504-05. <i>Cf.</i> B.C.L. §§ 311(D), 311(F), 515, 908.
262(d)	515	311-21.
271	311	82-89, 198.
272	311(E)	84.
273	—	566.
274	1101	70, 541.
275	1102 1103* 1105	543-49.
276	—	Dissolution of Nonprofit, Nonstock Corporation.
277	1105*	549.
278	1105 1106	549, 555-56, 563, 587-88.

\* Comments are made in Appendix A at this section number.



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<u>G.C.L. §</u>	<u>B.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
279	1108	571-72, 575.
280	1108	
281	1108(B)	572, 576, 582-84.
282	1105(A)(6) 1111(A)	585.
283	1107 1112	591-93.
284	—	
291	—	609, 621. <i>Cf.</i> B.C.L. § 1107(B).
292	—	577, 610-11, 623. <i>Cf.</i> B.C.L. § 1108(B).
293	—	631.
294	—	578, 612, 632.
295	—	613, 626-27. <i>Cf.</i> B.C.L. § 1108(D).
296	—	614. <i>Cf.</i> B.C.L. § 1108(B).
297	—	579, 615, 633.
298	—	580, 616, 634.
299	—	581, 617, 635.
300	—	618, 636.
301	—	619, 629. <i>Cf.</i> B.C.L. §§ 1109(2), 1109(3).
302	—	630. <i>Cf.</i> B.C.L. § 1109(3).
303	320	598-02.
311	1103.1	558-60.
312	—	596-97.
313	—	Renewal of Charter of Religious, Educational or Charitable Institutions.
314	—	597.

\* Comments are made in Appendix A at this section number.

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<u>G.C.L. §</u>	<u>B.C.L. §</u>	<u>See Text Accompanying Notes Indicated; Further Comments</u>
321-326	—	9. Suits Against Corporations, Directors, Officers or Stockholders.
327	516(A)	9, 336.
328	—	9.
329	—	9.
330	313	9.
341-356	—	8. Close Corporations.
371-385	—	7. Foreign Corporations.
388	909	534.
389	—	535.
391	—	11. Taxes and Fees Payable on Filing Certificate or Other Paper.
392	—	The G.C.L. provides that if a document required to be filed in the office of a county recorder is filed in the wrong county, the subsequent filing of the document in the proper county will be effective as of the date of the incorrect filing. The B.C.L. does not require local recording. <i>See</i> text at page 819.
393	—	Rights, Liabilities, and Duties Under Prior Statutes.
394	211*	
395	202(A)	45.
396	—	Publication of G.C.L. by Secretary of State.
397	—	Penalty for Unauthorized Publication.
398	1	Short Title.

\* Comments are made in Appendix A at this section number.

