

Corporation Law: Pennsylvania

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A Q&A guide to corporation law in Pennsylvania. This Q&A addresses key areas of corporate law such as formation, foreign qualification, mergers, anti-takeover laws and dissolution. Answers to questions can be compared across a number of jurisdictions (see *Corporation Law: State Q&A Tool* (<http://us.practicallaw.com/5-517-3521>)).

FORMING A CORPORATION AND CORPORATE ACTIONS

1. What is required to form and organize a corporation in your jurisdiction? Please include information on:

- Documents.
- Corporate actions (board versus incorporator actions).
- Name requirements and reservation options.
- Filing requirements (including what needs to be filed and where, timing, electronic versus paper and availability of expedited/rush services)

DOCUMENTS

Articles of Incorporation

The incorporator must file articles of incorporation with the Pennsylvania Department of State's Corporation Bureau (Pennsylvania Corporation Bureau). All entities filing with the Pennsylvania Corporation Bureau must have a Pennsylvania address. A post office box is unacceptable. The articles of incorporation must include:

- A statement that the corporation is incorporated under the Business Corporation Law of 1988 (BCL).
- The name of the corporation.
- The name and address of the incorporator or incorporators.
- The name and address of the registered agent and the address of the registered office in Pennsylvania.

- A statement that the corporation will be organized:
 - on a nonstock basis; or
 - on a stock share basis.

(15 Pa. Cons. Stat. Ann. § 1306(a).)

A statement of duration is only needed if the corporation's existence is not perpetual (15 Pa. Cons. Stat. Ann. § 1306(a)(6)).

If a corporation's articles of incorporation do not state the corporation's purpose, the presumed purpose is to engage in all lawful activity, after first obtaining necessary state agency approval.

By-laws

In Pennsylvania, a corporation need not adopt by-laws at its formation, but by-laws are sometimes adopted by the incorporator or board of directors at formation or a later time. By-laws are only used as regulations among the shareholders, directors and officers of the corporation and do not affect contracts or other dealings with other persons unless those persons have actual knowledge of the by-laws (15 Pa. Cons. Stat. Ann. § 1505). If they conflict with the articles of incorporation, the articles of incorporation control because by-laws are an internal document not filed with the Pennsylvania Corporation Bureau. Therefore, they are not binding on third parties who are not shareholders of the corporation.

Typical areas covered in the by-laws include:

- Procedures for meetings of shareholders and directors (including record date, notice and voting).
- Procedures for the election and removal of directors and officers of the corporation.
- Issuance and transfer of shares of the corporation.

By-laws may be adopted, amended or repealed by:

- The incorporators.
- The initial directors (if named in the articles of incorporation).
- The board of directors (if the corporation has not received payment for any of its stock).

After a corporation receives payment for any of its stock, its shareholders gain the power to adopt, amend and repeal the by-laws. A corporation can also grant its directors the power to adopt, amend and repeal the by-laws by including an express authorization in the articles of incorporation.

CORPORATE ACTIONS

The Pennsylvania Corporation Bureau's acceptance of the articles of incorporation for filing is proof of valid formation of the corporation. At this point, there is a corporation by law. After incorporation, the incorporator (if the articles of incorporation did not name initial directors) holds an organizational meeting to appoint directors, elect officers and conduct other business (*15 Pa. Cons. Stat. Ann. § 1310(a)*).

NAME REQUIREMENTS AND RESERVATION OPTIONS

Naming a Pennsylvania Corporation

Pennsylvania corporation names must include one of the following words or their abbreviations, or equivalent words or their abbreviations in another language:

- Corporation.
- Company.
- Incorporated.
- Limited.
- Association.
- Fund.
- Syndicate.

(*15 Pa. Cons. Stat. Ann. § 203*.)

Any corporation organized under the BCL may not express or imply that the corporation is:

- A governmental agency.
- A bank, bank and trust company, savings bank, private bank or trust company.
- An insurance company, unless it is duly licensed as an insurance company or the Pennsylvania Insurance Department certifies that it does not object to the corporation's use of this designation.
- An electric or gas public utility corporation, unless it has an express corporate purpose of being so (subject to the jurisdiction of the Pennsylvania Public Utility Commission or the Federal Energy Regulatory Commission).
- A credit union.
- An educational institution conforming to the standards and qualifications of the State Board of Education, unless the Department of Education certifies that it can use that designation.
- An architecture, surveying or engineering firm, unless one of the initial incorporators is registered with the appropriate regulatory board.

(*15 Pa. Cons. Stat. Ann. § 202*.)

Name availability may be verified by:

- Calling the Pennsylvania Corporation Bureau at (717) 787-1057.
- Visiting the Bureau's online *search*.
- Submitting a written request, with a list of up to three names, along with a \$15 search fee.

Name Reservations

Corporations can reserve names for 120 days by submitting a written request to the Pennsylvania Corporation Bureau. The fee for reserving a name is \$70. Name reservations can be renewed for an additional 120 days for \$70 based on availability. Reservation requests should be sent by letter because there are no preprinted forms. The address is Department of State Bureau of Corporations and Charitable Organizations, 401 North Street Room 206, Harrisburg, PA 17120. (*15 Pa. Cons. Stat. Ann. § 208*.)

The proposed name of the corporation must be distinguishable from the names:

- Of existing corporations.
- Already reserved.

The Pennsylvania Corporation Bureau may accept names that are not distinguishable from the name of an existing corporation or a name already reserved if the existing corporation consents.

FILING REQUIREMENTS

The articles of incorporation are filed with the Pennsylvania Corporation Bureau. Many law firms and companies use a service company to file the articles of incorporation for a fee. The articles of incorporation typically can be submitted to the service company electronically. If a service company is not used, the articles of incorporation can be filed by mail or fax, as detailed on the Pennsylvania Corporation Bureau's website.

Corporations must comply with the following guidelines for the Pennsylvania Corporation Bureau to properly and efficiently process the corporation's documents:

- Documents must be submitted on Pennsylvania Corporation Bureau forms or on 8 1/2" x 11" paper.
- Documents should be typed or printed in black or blue ink and be legible.
- Legible fax copies or copies of documents are acceptable.
- Pennsylvania Corporation Bureau forms do not require notarization.
- All entities filing with the Pennsylvania Corporation Bureau must have a Pennsylvania address, except for fictitious names and trademarks. A post office box is unacceptable.

The fee for filing articles of incorporation is \$125. Expedited filing services are an additional \$100 for same-day service, \$300 for three-hour service and \$1,000 for one-hour service. After receiving the articles of incorporation and related fees, the Pennsylvania Corporation Bureau:

- Stamps the articles of incorporation with a filing number and the date and time of filing.
- Attaches a certificate from the Pennsylvania Secretary of State approving the articles of incorporation.

Publication of the intent to file or the actual filing of articles of incorporation must be made in two newspapers of general circulation, including a legal journal if possible (*15 Pa. Cons. Stat. Ann. § 1307*). The Pennsylvania Corporation Bureau does not require proof of the advertising, but it should be filed with the corporation's minutes. The advertisements must contain the name of the proposed corporation and a statement that the corporation is to be, or has been, organized under the provisions of the BCL.

2. What are the annual reporting or other filing requirements (including franchise tax amounts) for a corporation in your jurisdiction?

Pennsylvania does not require corporations to file an annual report with the Department of State. Domestic and foreign corporations doing business in Pennsylvania are subject to corporate net income tax and corporate loans tax (see *Foreign Corporations*). In addition, Pennsylvania corporations must pay capital stock tax and foreign corporations must remit foreign franchise tax. The capital stock tax is anticipated to be completely eliminated by 2016.

Corporations subject to the corporate net income tax must file an annual report with the Department of Revenue, which includes:

- The total amount of net income subject to the tax.
- A copy of the corporation's federal tax return.
- The names of its directors and principal officers.
- The address of the corporation's principal office.
- Any other information the department may require.

(72 Pa. Stat. Ann. § 7403(a).)

The Department of Revenue forwards portions of the report to the Department of State for inclusion in its public records (15 Pa. Cons. Stat. Ann. § 1110 and 72 Pa. Stat. Ann. § 7403(a)(3)).

3. What are the requirements for holding an annual meeting of stockholders in your jurisdiction?

PRELIMINARY REQUIREMENTS

Shareholders elect directors annually at either an annual meeting or by unanimous written consent in lieu of a meeting. The annual shareholders meeting must be held to elect directors on the date and time or in the manner described in the by-laws. (15 Pa. Cons. Stat. Ann. § 1755(a).)

Meeting Location

The meeting should be held at a location stated in or fixed in accordance with the corporation's by-laws. If the by-laws do not set a meeting place, the meeting must be held at the corporation's executive office. (15 Pa. Cons. Stat. Ann. § 1704(a).)

Shareholders meetings may also be held by means of the Internet or other electronic communications technology provided the shareholders have the opportunity to:

- Read or hear the proceedings substantially concurrently with their occurrence.
- Vote on matters submitted to the shareholders.
- Pose questions to the directors.
- Make appropriate motions.
- Comment on the business of the meeting.

(15 Pa. Cons. Stat. Ann. § 1704(a).)

Notice to Shareholders

Corporations must notify shareholders of the date, time and place of any meetings no fewer than:

- Ten days prior to a meeting that will consider a transaction under Title 15, Chapter 3 of the Pennsylvania Consolidated Statutes, such as a merger, or a fundamental corporate change under Title 15, Chapter 19 of the Pennsylvania Consolidated Statutes (see *Question 10*).
- Five days prior to a meeting called for any other purpose.

(15 Pa. Cons. Stat. Ann. §§1702 and 1704(b).)

Unless otherwise provided in the by-laws, the board of directors may fix a time prior to the date of any meeting of shareholders as a record date to determine which shareholders are entitled to:

- Notice of a shareholders meeting.
- Vote.

(15 Pa. Cons. Stat. Ann. § 1763(a).)

However, except in the case of adjourned meetings, the record date may not be more than 90 days prior to the date of the meeting (15 Pa. Cons. Stat. Ann. § 1763(a)).

Similarly, unless otherwise provided in the by-laws, the board of directors may fix a record date for the determination of shareholders of record for any other purpose (15 Pa. Cons. Stat. Ann. § 1763(a)).

The record date may not be more than 90 days prior to the date of the meeting (15 Pa. Cons. Stat. Ann. § 1763(a)).

Unless otherwise provided in the bylaws, if a record date is not fixed, the record date for determining shareholders entitled to notice of a meeting or to vote at a meeting is close of business on the day before notice is given to shareholders, or if notice is waived, close of business on the day before the meeting. (15 Pa. Cons. Stat. Ann. § 1763(b).)

Quorum

The presence of shareholders entitled to cast at least a majority of the votes that all shareholders are entitled to cast on a particular matter to be acted upon at the meeting shall constitute a quorum for the purposes of consideration and action on that matter (15 Pa. Cons. Stat. Ann. § 1756(a)).

Unless the by-laws specify otherwise, if a meeting at which directors are to be elected has been previously adjourned for a lack of quorum, the shareholders present at the rescheduled meeting who are entitled to vote constitute a quorum for director elections, even if the requirements for a quorum are not otherwise met (15 Pa. Cons. Stat. Ann. § 1756(b)(1)).

Unless otherwise provided by the by-laws, shareholder action without a quorum may only be taken on other matters if all of the following apply:

- The meeting has previously been adjourned for one or more periods aggregating at least 15 days.
- The original meeting notice specified the nature of the matter for which action by a quorum is to be taken.
- The original meeting notice included a statement that, in the event of an adjournment of the meeting for failure to obtain a quorum, those shareholders who attend the subsequent meeting will constitute a quorum for purposes of taking action on the matters specified.

(15 Pa. Cons. Stat. Ann. § 1756(b)(2).)

Failure to Hold Annual Meeting

If the annual meeting is not held or action by written consent is not taken within six months after the date designated for the annual meeting, any shareholder may call the annual meeting at any time. Failure to hold the annual meeting at the designated time does not trigger a dissolution of the corporation or affect valid corporate acts. (15 Pa. Cons. Stat. Ann. § 1755(a).)

VOTING AND APPROVAL

Directors are elected by cumulative voting unless restricted in the articles of incorporation. A shareholder may multiply the total number of votes cast in a single election by the total number of directors to be elected, provided that the shares are a part of the same voting class. The shareholder may cast all of his entitled votes for a single candidate or distribute the votes among candidates. The director candidates receiving the most votes, up to the number of director slots open, are elected. Shareholders may elect directors of more than one class, but must do so in separate elections. (15 Pa. Cons. Stat. Ann. § 1758(b) and (c).)

Unless otherwise provided in a by-law adopted by the shareholders, the approval of ordinary matters requires a majority of the votes cast by the eligible voting body (15 Pa. Cons. Stat. Ann. § 1757(a)).

An eligible voting shareholder may authorize another person to act in his place by proxy. Actions taken by a designated person are the equivalent of an act taken by the original shareholder. Unless expressly provided, the majority of votes or actions taken by multiple proxies of a shareholder shall be accepted as the vote or action taken by all. If the majority of proxies cannot reach an agreement as to the voting shares or actions delegated to them, then the voting of shares or right to actions are equally divided among the proxies. (15 Pa. Cons. Stat. Ann. § 1759(a).)

OTHER REQUIREMENTS

Shareholders have the right to review the company stockholder list after providing a written demand for the production of records. A shareholder must provide a purpose "reasonably related to the interest of the person as a shareholder" in order to exercise his right of examination. If a third-party in the capacity of an attorney or agent of a shareholder requests review, the demand must also include a written authorization to act on behalf of the shareholder. The demand may be sent to the corporation:

- At its registered office in the Commonwealth.
- At its principal place of business.
- In care of the person in charge of an actual business office of the corporation.

(15 Pa. Cons. Stat. Ann. § 1508(b).)

The corporation's board of directors may appoint judges of election in advance of any meeting of shareholders. If they are not appointed in advance of the meeting, the presiding officer may appoint judges of election at the meeting. Any shareholder may demand that judges of election be appointed. (15 Pa. Cons. Stat. Ann. § 1765(a)(1).)

There may be one or three judges of election. A candidate for an office being filled at the meeting may not act as a judge. (15 Pa. Cons. Stat. Ann. § 1765(a)(1).)

The judges of election shall:

- Determine the number of outstanding shares and the voting power of each.
- Determine the shares represented at the meeting.
- Determine the existence of a quorum.
- Determine the authenticity, validity and effect of proxies.
- Receive votes or ballots.
- Hear and determine all challenges and questions related to the right to vote.
- Count and tabulate all votes.
- Determine the election results.
- Conduct the election or vote with fairness to all shareholders.
- Perform their duties impartially, in good faith, to the best of their ability and as expeditiously as is practical.

(15 Pa. Cons. Stat. Ann. § 1765(a)(3).)

On request of the presiding officer of the meeting or any shareholder, the judges of election must make a report in writing of any challenge or question or matter determined by them, and execute a certificate of any fact found by them. Any report or certificate made by judges of election is prima facie evidence of the facts stated in that report or certificate. (15 Pa. Cons. Stat. Ann. § 1765(a)(4).)

Any by-law modifying the use of judges at election at meetings must be adopted by the shareholders (15 Pa. Cons. Stat. Ann. § 1765(a)).

Unless otherwise restricted in the by-laws, any action required or permitted to be taken at a shareholders meeting may be taken without a meeting on unanimous written consent of shareholders entitled to vote on the action. The action must be evidenced by one or more written consents describing the action taken, signed by all the shareholders entitled to vote on the action and filed with the minutes of the proceedings of the shareholders. (15 Pa. Cons. Stat. Ann. § 1766(a).)

The by-laws may allow action to be taken by the written consent of the minimum number of votes that would be necessary to authorize the action at a meeting at which all shareholders entitled to vote on that action were present and voting (15 Pa. Cons. Stat. Ann. § 1766(b)).

Unless otherwise provided in the by-laws, the presiding officer of a meeting of shareholders shall determine the order of business at the meeting and establish the rules of conduct (15 Pa. Cons. Stat. Ann. §§ 1709(a) and (b)).

Shareholder proposals for publicly traded corporations incorporated in Pennsylvania are also governed by Rule 14a-8 under the Securities Exchange Act 1934, as amended. For more information on the shareholder proposal process, see *Rule 14a-8 Shareholder Proposal Process Flowchart* (<http://us.practicallaw.com/7-508-8268>).

FOREIGN CORPORATIONS

4. When and how does a corporation qualify to do business in your jurisdiction? Please include information on:

- State nexus analysis.
- Filing requirements.
- Fees.
- Name requirements.

STATE NEXUS ANALYSIS

Any corporation organized under a jurisdiction other than Pennsylvania and "doing business" in Pennsylvania must qualify to do business as a foreign business corporation. The Business Corporation Law of 1988 (BCL) does not define "doing business." However, Pennsylvania does not consider the following acts as "doing business":

- Maintaining or defending any action or administrative or arbitration proceeding, or settling claims or disputes.
- Holding meetings of directors or shareholders, or carrying on other internal affairs.
- Maintaining bank accounts.
- Maintaining offices or agencies for the transfer, exchange and registration of its securities.
- Appointing and maintaining trustees or depositaries for its securities.
- Effecting sales through independent contractors.
- Maintaining offices for soliciting or procuring orders, if the orders require acceptance outside of Pennsylvania before becoming binding contracts.
- Creating or acquiring obligations, mortgages or other security interests in real or personal property.
- Securing or collecting debts, or enforcing any rights in property securing them.
- Doing any business in interstate or foreign commerce.
- Conducting an isolated transaction completed within 30 days and not as a part of repeated transactions of a similar nature.
- Inspecting, appraising and acquiring real estate and mortgages (including any liens, personal property and security interests) and holding, leasing, conveying and transferring them.

(15 Pa. Cons. Stat. Ann. § 403.)

Before doing business in Pennsylvania, foreign business corporations must obtain a certificate of authority from the Pennsylvania Department of State (PADOS) (15 Pa. Cons. Stat. Ann. § 411).

FILING REQUIREMENTS

Registration Documents

To qualify to do business in Pennsylvania, a foreign business corporation must file an application for a certificate of authority with the PADOS, setting out:

- The name of the corporation (the name must be available).
- The jurisdiction in which it is incorporated.
- The address, if any, of its principal office under its jurisdiction of incorporation.

- Subject to Title 15, Section 109 of the Pennsylvania Consolidated Statutes (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of its proposed registered office in Pennsylvania.
- A statement that it is a corporation.
- If it may have one or more series, a statement to that effect.

(15 Pa. Cons. Stat. Ann. § 412.)

A foreign business corporation must officially publish notice of its intention to apply its application for a certificate of authority. The notice may appear before or after the day on which the application is made to the PASDOS (15 Pa. Cons. Stat. Ann. § 412).

Annual Reports

Pennsylvania does not require foreign business corporations to file an annual report.

FEES

There is \$250 fee for filing of an application for a certificate of authority. Expedited filing services are available for an additional \$100 for same-day expedited filing services, \$300 for three-hour service and \$1,000 for one-hour service.

NAME REQUIREMENTS

The name of a foreign corporation must be different from either:

- The name of any existing corporation.
- A fictitious name of any other authorized foreign corporation.

(15 Pa. Cons. Stat. Ann. § 206(a).)

If there is an existing Pennsylvania corporation with a similar name, a foreign corporation can register its name with the existing corporation's consent. If the existing corporation will not consent, the foreign corporation may be admitted, if it files a resolution of its board adopting a fictitious name for use in Pennsylvania along with its certificate of authority. (15 Pa. Cons. Stat. Ann. § 206(b).)

Foreign name registrations are registered or reserved for a one-year period for \$70. This filing may be renewed annually between October 1 and December 31 for the following calendar year. This reserves the name but does not qualify the foreign entity. (15 Pa. Cons. Stat. Ann. § 209.)

FIDUCIARY DUTIES

5. Please summarize the fiduciary duties of directors and officers in your jurisdiction.

DIRECTORS AND OFFICERS

Directors and officers of Pennsylvania corporations owe fiduciary duties to the corporation and its shareholders. Directors or officers may be held personally liable for breaching their duties to the corporation. The primary duties are:

- Duty of care.
- Duty of loyalty.

Duty of Care

In fulfilling her responsibilities as a member of the corporation's board of directors, a director must discharge her duties:

- In good faith.
- With the degree of care that an ordinarily prudent person in a like position would use under similar circumstances.

(15 Pa. Cons. Stat. Ann. § 512.)

The fiduciary duty of care obligates directors to act on an informed and reasonably diligent basis when considering material information. A director is not required to consider the interest of any particular group (such as employees or management) as controlling.

Pennsylvania courts review the director's exercise of these duties under the business judgment rule. The courts recognize that directors must sometimes take business risks to promote the best interests of:

- The corporation.
- The shareholders.

The BCL also allows the directors to take into account the effects of any action on groups affected by the action, including the corporation's:

- Shareholders.
- Employees.
- Suppliers.
- Customers.
- Creditors.

(15 Pa. Cons. Stat. Ann. § 515(a).)

Directors may also take into account effects on communities in which offices or other establishments of the corporation are located (15 Pa. Cons. Stat. Ann. § 515(a)).

The business judgment rule was developed under case law and provides that courts will not interfere with the decisions and actions of directors in managing the corporation's affairs, if those decisions and actions are made:

- In good faith.
- On an informed basis.

(*McDonald v. Lake Hauto Club*, 59 Pa. Cmwlth. 36, 38, 428 A.2d 785, 786 (1981).)

The corporation's by-laws can eliminate directors' personal liability to the corporation or its shareholders for breaches of their duty of care. A corporation may not, however, limit directors' liability where the director breaches or fails to perform her duties and there is:

- Self-dealing.
- Willful misconduct.
- Recklessness.

(15 Pa. Cons. Stat. Ann. § 513.)

Duty of Loyalty

The fiduciary duty of loyalty requires directors to act:

- In good faith.

- For the benefit of:
 - the corporation; and
 - shareholders.

Decisions and transactions that involve a conflict between the interests of the corporation and the private interests of the director are not protected by the business judgment rule. Examples include:

- Interested director transactions. Transactions between the corporation and one of its directors.
- Competing ventures. When a director is involved with the corporation's competitor.
- Usurping corporate opportunity. When an opportunity that is necessary to the corporation (in its line of business or in which it has an interest or expectancy) is taken from the corporation for the benefit of one of its directors.
- Self-dealing. When a director takes action that injures the corporation.

However, a transaction involving a conflict of interest is not voidable if either:

- The transaction was fair to the corporation when entered.
- Material facts and the director's interest were known and the deal was approved by a majority of either:
 - the disinterested directors; or
 - shares in good faith.

(*Robinson v. Brier*, 412 Pa. 255, 258, 194 A.2d 204, 207 (1963).)

MERGERS

6. What is required to complete a merger in your jurisdiction? Please include information on:

- Documents.
- Board actions.
- Filing requirements (including timing, electronic versus paper and availability of expedited/rush services).
- Stockholder actions.
- Availability of appraisal rights (including requirements to exercise such rights).

DOCUMENTS

To complete a merger, the participating entities must enter into a merger agreement. Also known as a plan of merger or consolidation, the merger agreement is the main transaction document in a merger. A Pennsylvania corporation may merge with another corporation or other entity whether or not it was organized in Pennsylvania. (15 Pa. Cons. Stat. Ann. § 331.)

A plan of merger or consolidation must set out:

- The name, jurisdiction and entity type of each party to the merger.
- If the surviving entity will be created in the merger, a statement to that effect, the surviving entity's name, jurisdiction and entity type and its proposed organizational documents.
- If the surviving entity exists before the merger, any proposed amendments to its organizational documents.

- The manner of converting some or all of the interests in a merging entity into interests, securities, obligations, money, other property, rights to acquire interests or securities (or any combination of those) or cancelling some or all of the interests in a merging party.
- Any provisions providing special treatment of interests held by any interest holder or group of interest holders under Title 15, Section 329 of the Pennsylvania Consolidated Statutes.
- Any other terms and conditions of the merger.
- Any other provisions required under Pennsylvania law, the laws of the jurisdiction of any foreign merging entity or a merging entity's organizational documents.

(15 Pa. Cons. Stat. Ann. § 332.)

Statement of Merger

After the adoption of the plan of merger or consolidation, each party must sign a statement of merger that sets out:

- Information about the surviving entity and each party that is not the surviving entity, including the:
 - name;
 - jurisdiction of formation;
 - type of entity;
 - address of its registered office in Pennsylvania (if domestic) or other state (if foreign), if any; and
 - address of its principal office (in the case of certain domestic and foreign entities), if any.
- If the statement is not to be effective on filing, the later date or date and time on which it will become effective.
- A statement that the merger was approved in accordance with the laws of each party's jurisdiction of organization.
- If the surviving entity is domestic and created by the merger, its articles of incorporation or similar document.
- If the surviving entity is domestic and existed before the merger, any amendments to its articles of incorporation or similar document.
- If the surviving entity is foreign and not registered to do business in Pennsylvania, either the address of its registered agent and office or its principal office.
- Certain additional required information for domestic partnerships.

The parties must file the statement of merger with the Pennsylvania Department of State (PADOS) to effect the merger. (15 Pa. Cons. Stat. Ann. § 335.)

BOARD ACTIONS

The board of directors of each constituent corporation in a merger must adopt a resolution that approves the merger agreement and declares the merger advisable. If shareholder approval is required (see *Shareholder Actions*), the corporation must give every shareholder notice of the proposed merger, whether or not the shareholder is entitled to vote, and shareholders must approve the agreement by casting a majority of shares in favor of the merger. (15 Pa. Cons. Stat. Ann. § 321.)

The notice must contain:

- A copy or summary of the plan of merger.

- A statement that the organizational documents of the surviving or new entity will be given to any shareholder on request without cost.
- If any shareholders are entitled to assert dissenters rights, the text of the statutes granting them the rights and the text of Chapter 15, Subchapter D of the Pennsylvania Consolidated Statutes.
- If the plan involves any special treatment of interest holders under Title 15, Section 329 of the Consolidated Statutes, a statement that the plan gives certain interest holders special treatment and the names of those interest holders.

(15 Pa. Cons. Stat. Ann. § 321(b).)

FILING REQUIREMENTS

The parties must file:

- The statement of merger with the PASOS's Corporation Bureau.
- Any tax clearance certificates required under Title 15, Section 139 of the Pennsylvania Consolidated Statutes.

The statement of merger can be filed before the effective date of the merger (as long as the articles state the effective date). A merger or consolidation may be terminated under the plan's provisions before it becomes effective. If the corporation has filed the statement of merger or consolidation in the PASOS before the termination, it must also file a statement of termination. (15 Pa. Cons. Stat. Ann. §§ 141 and 334(d).)

If the plan of merger includes all of the information required in the statement of merger and is signed by all of the parties, it may be filed with PASOS instead of the statement of merger (15 Pa. Cons. Stat. Ann. § 335(e)).

The base fee for filing the statement of merger is \$150, which includes a \$40 fee for each of the first two parties to the merger. There are additional fees of:

- \$40 for each additional party to the merger.
- \$100 for same-day expedited filing services, \$300 for three-hour service and \$1,000 for one-hour service.

SHAREHOLDER ACTIONS

Generally, the shareholders of each domestic party to the merger must vote to approve the plan of merger. The plan must be approved by a majority of votes cast by all shareholders and a majority of the votes cast in each class (15 Pa. Cons. Stat. Ann. § 321(c).)

Unless otherwise specified by the corporation's organizational documents, Pennsylvania law does not require shareholder approval if any of the following conditions are met:

- The surviving entity is also a domestic business corporation and:
 - its articles are identical to the original corporation's (except for changes that do not require shareholder approval);
 - the shares of the corporation will continue or be converted into identical shares of the surviving entity; and
 - the plan of merger provides that the corporation's shareholders will hold shares in the surviving entity after the effective time entitled to cast at least a majority of the votes entitled to be cast for the election of directors.

- The merger is between a corporation and an entity that owns at least 80% of each class of that corporation's stock.
- No shares of the corporation had been issued prior to the board of directors adopting the plan of merger.
- The plan of merger provides for the merger of a domestic parent corporation with or into a single indirect wholly-owned subsidiary, if certain additional requirements are satisfied.

(15 Pa. Cons. Stat. Ann. § 321(d)(1).)

APPRAISAL RIGHTS

The Business Corporation Law of 1988 generally provides appraisal rights to dissenting shareholders who wish to request an appraisal of the value of their shares (15 Pa. Cons. Stat. Ann. §§ 333(d) and 1578). In a short-form merger, appraisal rights exist only for the subsidiary corporation's dissenting shareholders.

ASSET SALES

7. What is required for an asset sale in your jurisdiction? Please include any distinctions for a sale of substantially all of the assets. In particular, please include information on:

- Documents.
- Board actions.
- Shareholder actions.
- Bulk sales compliance.
- Successor liability or de facto merger analysis.

DOCUMENTS

Although the Business Corporation Law of 1988 (BCL) does not require any filings to effect an asset sale, generally a corporation enters into an asset purchase agreement with the buyer. The agreement sets out:

- What is being sold.
- Details of the sale process.
- Liabilities and obligations of the parties.

BOARD ACTIONS

A corporation may in the regular course of business sell, lease, exchange or dispose of all or substantially all of its property on the terms and conditions and for the consideration determined by the board of directors (15 Pa. Cons. Stat. Ann. § 1932(a)). If a corporation wishes to sell all or substantially all of its property or assets, other than in the regular course of business, the board of directors must approve the sale and propose the sale to the corporation's shareholders for approval (15 Pa. Cons. Stat. Ann. § 1932(b)).

SHAREHOLDER ACTIONS

Unless the articles of incorporation provide otherwise, a sale of all or substantially all the assets of a corporation, other than in the regular course of business, requires shareholder approval by a majority of votes actually cast on the issue.

In Pennsylvania, the transfer of all or substantially all of the assets not in the ordinary course of business is a fundamental corporate change for the transferring corporation only. It is not a transfer of substantially all assets if the seller retains at least both:

- 25% of its assets.
- 25% of either:
 - income from continuing business operations before taxes; or
 - revenue from continuing operations.

(15 Pa. Cons. Stat. Ann. § 1932(g).)

BULK SALES

In Pennsylvania, a bulk sales transfer occurs when taxpayers transfer more than 51% of assets, including real property and classes of assets including real estate or machinery and equipment. All purchasers must secure Department of Revenue bulk sale clearance certificates from sellers. This law applies to:

- All taxpayers subject to sales and use tax.
- All taxpayers subject to employer withholding tax.
- All corporations subject to any taxes administered and enforced by the Pennsylvania Department of Revenue.

(69 Pa. Stat. Ann. § 529.)

SUCCESSOR LIABILITY OR DE FACTO MERGER ANALYSIS

Under Pennsylvania law, when one company sells or transfers all of its assets to another company, the purchasing or receiving company is not responsible for the debts and liabilities of the selling company simply because it acquired the seller's property (*Cont'l Ins. Co. v. Schneider, Inc.*, 873 A.2d 1286, 1291 (Pa. 2005)). A party can overcome this general rule if it can establish at least one of the following:

- The purchaser expressly or implicitly agreed to assume liability.
- The transaction amounted to a consolidation or merger.
- The purchasing corporation was merely a continuation of the selling corporation.
- The transaction was fraudulently entered into to escape liability.
- The transfer's consideration was inadequate and did not make provisions for the selling corporation's creditors.

(*Cont'l Ins. Co.*, 873 A.2d at 1291.)

ANTI-TAKEOVER LAWS

8. Please describe any state anti-takeover laws. Do corporations have the ability to opt in or out of these laws?

TRANSACTIONS WITH INTERESTED SHAREHOLDERS

The BCL has voting requirements for registered corporations when approving transactions with interested shareholders (shareholders who are parties to the transaction or who are treated differently from other shareholders). Registered corporations include:

- Pennsylvania corporations that have a class or series of shares entitled to vote generally in the election of directors of the corporation registered under the Securities Exchange Act of 1934 (Exchange Act).
- Pennsylvania corporations that are subject to the reporting requirements under Section 15(d) of the Exchange Act.
- Certain registered management companies under the Investment Company Act of 1940 (ICA).

(15 Pa. Cons. Stat. Ann. § 2502.)

Subject to exceptions, the BCL requires the approval of shareholders holding at least a majority of voting shares (excluding the interested shareholders' votes) of a registered corporation for any of the following transactions with an interested shareholder:

- A merger, consolidation, share exchange or asset sale between the registered corporation and a shareholder.
- A division in which the interested shareholder receives a disproportionate amount of shares or other securities of any corporation resulting from the division.
- The voluntary dissolution and winding up of the corporation in which a shareholder is treated differently from other shareholders of the same class (other than dissenting shareholders).
- Any reclassification in which the percentage of voting or economic share interest in the corporation of a shareholder is materially increased relative to substantially all other shareholders.

(15 Pa. Cons. Stat. Ann. § 2538.)

CONTROL TRANSACTIONS

A control transaction is an acquisition by a person or group of the voting power over at least 20% of the voting shares of the corporation. Subject to exceptions, if a Pennsylvania registered corporation is subject to a control transaction:

- The controlling person or group must provide prompt notice of the transaction to the court and each shareholder of record holding voting shares.
- Any holder of voting shares may make a written demand on the controlling person or group for payment in cash of the fair value of each voting share as of the date on which the control transaction occurs.

The fair value of the shares should be based on all relevant factors, including an increment representing a proportion of any value payable for acquisition of control of the corporation (15 Pa. Cons. Stat. Ann. § 2546). The minimum value that a shareholder can receive is the highest price paid per share by the controlling person or group within the 90-day period ending on and including the date of the control transaction (15 Pa. Cons. Stat. Ann. § 2545).

If any shareholder believes the fair value of her shares is higher than the price offered by the controlling person or group, she may file a petition with the court seeking appraisal of the shares. The determination of any court-appointed appraiser is final and binding on both the controlling person or group and all shareholders who surrender their share certificates to the court seeking an appraisal (15 Pa. Cons. Stat. Ann. § 2547).

A registered corporation may opt out of these requirements by including a provision in its original articles of incorporation, or by amending its articles of incorporation before the date of the control transaction. Unless the proposed amendment has been approved by the corporation's board of directors, the affirmative vote of at least 80% of the outstanding shares is also needed (15 Pa. Cons. Stat. Ann. § 2541).

BUSINESS COMBINATIONS AND FAIR PRICE

A registered corporation generally may not engage in any business combination (as defined in Title 15, Section 2554 of the Pennsylvania Consolidated Statutes) with an interested shareholder who either:

- Owns, directly or indirectly, 20% or more of the corporation's voting stock.
- Is an affiliate or associate of the corporation that, at any time within the five year period immediately before the business combination, owned, directly or indirectly, 20% or more of the corporation's voting stock.

A registered corporation may engage in a business combination with any interested shareholders, however, when:

- The corporation's board of directors approved a business combination before the date of the interested shareholder's acquisition of shares.
- The corporation's board of directors approved the purchase of shares by the interested shareholder before that date (15 Pa. Cons. Stat. Ann. § 2555(1)).
- A business combination was approved by the affirmative vote of either:
 - a majority of the shares able to be cast in an election of directors (excluding the interested shareholder's voting shares or their affiliates' or associates') at a meeting at least three months after the interested shareholder became (and at the meeting is) the owner of shares entitling him to cast at least 80% of the votes that all shareholders could cast in to elect directors; or
 - all holders of all of the corporation's outstanding common shares (15 Pa. Cons. Stat. Ann. § 2555(2)).
- The business combination must meet fair price conditions set out in Title 15, Section 2556 of the Pennsylvania Consolidated Statutes.
- Shareholders entitled to cast a majority of the votes able to be cast to elect the corporation's directors (excluding the interested shareholder's voting shares or their affiliates' or associates') voted to approve a business combination at a meeting at least five years after the date of the interested shareholder's acquisition of shares (15 Pa. Cons. Stat. Ann. § 2555(3)).
- A business combination was approved at a shareholders' meeting at least five years after the date of the interested shareholder's acquisition of shares, which meets the minimum conditions set out in Title 15, Section 2556 of the Pennsylvania Consolidated Statutes.

A corporation may opt out of the above requirements by including a provision in the original articles of incorporation or by amending the articles of incorporation:

- According to the procedures applicable to the corporation.
- With the affirmative vote of the holders of a majority of outstanding voting shares (other than shares of interested shareholders) if the amendment will not be effective until 18 months after the shareholders' vote and will not apply to any business combination of the corporation with an interested shareholder whose share acquisition date is on or before the effective date of the amendment.

(15 Pa. Cons. Stat. Ann. § 2551.)

CONTROL-SHARE ACQUISITIONS

A control-share acquisition is an acquisition by any person of voting power that would (but for the restrictions in the BCL) entitle the person to cast, for the first time, a percentage of votes of:

- At least 20% but less than 33.333%.
- At least 33.333% but less than 50%.
- 50% or more.

Under the BCL, subject to exceptions, shares acquired in the control share acquisition do not have any voting rights, unless a resolution approved by a vote of shareholders at an annual or special meeting of shareholders restores the voting rights of the control shares (*15 Pa. Cons. Stat. Ann. § 2564*). The resolution may only be approved by the affirmative vote of the holders of a majority of the voting power entitled to vote in two separate votes as follows:

- All of the disinterested shares of the corporation.
- All voting shares of the corporation.

(*15 Pa. Cons. Stat. Ann. § 2564(a)*.)

These voting rights will be lost if the control-share acquisition is not completed within 90 days after the shareholder approval is obtained (*15 Pa. Cons. Stat. Ann. § 2564(b)*).

Unless prohibited by the terms of the articles of incorporation in effect before a control-share acquisition has occurred, the corporation may redeem all control shares from the acquiring person at the average of the high and low sales price of shares of the same class and series on a national securities exchange or otherwise on the date the corporation provides notice of the call for redemption at any time within 24 months after:

- The date on which the acquiring person consummates a control-share acquisition, if the acquiring person does not, within 30 days after consummation of the control-share acquisition, properly request that the issue of voting rights of the control shares be submitted to a shareholders vote under *Title 15, Section 2565 of the Pennsylvania Consolidated Statutes*.
- The issue of voting rights of the control shares is submitted to the shareholders and the voting rights are either not approved or are approved but lapse.

(*15 Pa. Cons. Stat. Ann. § 2567*.)

A corporation may opt out of these requirements by either:

- Including a provision in the original articles of incorporation.
- Amending the articles of incorporation before it is registered or within 90 days after it is registered.

(*15 Pa. Cons. Stat. Ann. § 2561*.)

DISGORGEMENT

Subchapter H of the BCL protects certain registered corporations and legitimate interests of various groups from manipulative and coercive actions (*15 Pa. Cons. Stat. Ann. § 2572*). Subject to exceptions, a corporation owns and can recover any profit realized by any person or group who is or was a controlling person or group (a person or group who has acquired, offered to acquire or disclosed the intent to acquire at least 20% of the voting power of the corporation, or who

has otherwise publicly disclosed that it may seek to acquire control of a corporation by any means) from the disposition of any of the corporation's equity securities to any person or to another member of the controlling person or group where both:

- The profit is realized from the disposition of the equity security within 18 months after the person or group gained controlling status.
- The controlling person or group acquired the equity security within 24 months before or 18 months after gaining controlling status (*15 Pa. Cons. Stat. Ann. § 2575*).

A corporation may opt out of these requirements by including a provision in the original articles of incorporation or by amending the articles of incorporation before it is a registered corporation or within 90 days after it becomes a registered corporation (*15 Pa. Cons. Stat. Ann. § 2571*).

SEVERANCE COMPENSATION AND CONTROL-SHARE ACQUISITIONS

The BCL provides that any eligible employee whose employment is terminated (other than for willful misconduct) within 90 days before a control-share approval is entitled to receive a lump sum payment, if the termination was connected to an agreement, arrangement or understanding with the acquiring person whose control shares were accorded voting rights in connection with the approval or within 24 months after the control-share approval (see *Control-share Acquisitions*). The lump sum payment from the employer is equal to the difference between:

- The minimum severance amount for the employee.
- Any payments made to the employee by the employer due to termination of employment, whether under any contract, policy, plan or otherwise, but not including any final wage payments to the employee or payments to the employee under pension, savings, retirement or similar plans.

(*15 Pa. Cons. Stat. Ann. § 2582*.)

BUSINESS COMBINATIONS AND LABOR CONTRACTS

The BCL provides that:

- No business combination transaction within five years of a control-share approval will result in the termination or impairment of the provisions of any covered labor contract.
- The contract will remain in effect until it is terminated according to any termination provision or until the parties to the contract or their successors agree otherwise.

(*15 Pa. Cons. Stat. Ann. § 2587*.)

A covered labor contract is any labor contract that:

- Covers persons employed in Pennsylvania.
- A labor organization, collective bargaining agent or other representative negotiated.
- Relates to a business operation that the registered corporation owned at the control-share approval.
- Was in effect and covered the business operation and employees at the control-share approval.

OTHER CONSTITUENCIES

The BCL also grants Pennsylvania corporations' boards of directors wide latitude, in considering the best interests of the corporation. Directors may take into account:

- The effects of any action on groups affected by the action, including shareholders, employees, suppliers, customers and creditors of the corporation and on the communities in which offices or other establishments of the corporation are located.
- The short- and long-term interests of the corporation, including benefits that may accrue to the corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the corporation.
- The resources, intent and conduct (past, stated and potential) of any person seeking to acquire control of the corporation.
- All other pertinent factors.

(15 Pa. Cons. Stat. Ann. § 1715(a).)

In considering the best interests of the corporation or the effects of any action, the board of directors is not required to regard any corporate interest or the interests of any particular group affected as a dominant or controlling factor (15 Pa. Cons. Stat. Ann. § 1715(b)) (see also *Question 5: Fiduciary Duties*).

Absent breach of fiduciary duty, lack of good faith or self-dealing, any act of the board of directors, a board committee or an individual director is presumed to be in the best interests of the corporation. In assessing whether the board of directors, a board committee or an individual director has discharged the applicable fiduciary duties, the court will not apply a higher burden of proof (15 Pa. Cons. Stat. Ann. § 1715(d)).

DISSOLVING A CORPORATION

9. What is required to dissolve a corporation in your jurisdiction? Please include information on:

- Documents.
- Board actions.
- Filing requirements (including timing, electronic versus paper and availability of expedited/rush services).
- Shareholder action.

DOCUMENTS

Generally, a corporation that wishes to dissolve must file articles of dissolution signed by an authorized officer of the corporation with Pennsylvania's Department of State's Corporation Bureau. The corporation must obtain and file clearance certificates from the Pennsylvania Department of Revenue and the Office of Employment Security of the Department of Labor and Industry, showing the payment of all taxes and charges due to Pennsylvania. (15 Pa. Cons. Stat. Ann. § 1977).

The articles of dissolution must include:

- The name of the corporation and the address of its registered office, including street and number, if any.
- The statute under which the corporation was incorporated and the date of incorporation.

- The corporation's directors' and officers' names and addresses, including street and number, if any.
- The manner the corporation adopted the proposal to dissolve voluntarily.
- A statement that the corporation has:
 - discharged or adequately provided for the discharge of all liabilities;
 - fairly and equitably applied all available assets to pay its liabilities, but has insufficient assets to discharge its liabilities in full; or
 - elected to proceed under subchapter H (Post-dissolution Provision for Liabilities) of the Business Corporation Law of 1988 (BCL).
- A statement that the corporation has:
 - distributed all remaining assets, if any, as provided in the BCL; or
 - elected to proceed under subchapter H of the BCL and will distribute any remaining assets under subchapter H.
- If not proceeding under subchapter H of the BCL, a statement that:
 - no actions or proceedings are pending against the corporation in any court; or
 - the corporation has made adequate provision for the satisfaction of any judgments or decrees that may be obtained against it in pending actions or proceedings.
- If not proceeding under subchapter H of the BCL, a statement that notice of the winding up proceedings of the corporation was mailed by certified or registered mail to each known creditor and claimant and to each municipal corporation in which the corporation has a place of business in Pennsylvania.

(15 Pa. Cons. Stat. Ann. § 1977.)

If a corporation has not begun business, the corporation must file articles of dissolution with the Pennsylvania Corporation Bureau stating so. The articles must be executed and acknowledged by a majority of the incorporators or a majority in interest of the shareholders. (15 Pa. Cons. Stat. Ann. § 1971.)

BOARD ACTIONS

The board of directors must adopt a resolution recommending that the corporation be dissolved voluntarily. The resolution must contain a statement that the dissolution will proceed under either:

- Title 15, Section 1975 of the Pennsylvania Consolidated Statutes (Predissolution provision for liabilities).
- Subchapter H of the BCL (15 Pa. Cons. Stat. Ann. §§ 1991 to 1997).

The resolution may provide for the distribution to shareholders of any surplus remaining after providing for all liabilities of the corporation, including provisions for special treatment of shares held by shareholders. The board of directors must submit the resolution to a shareholders' vote at a regular or special meeting (15 Pa. Cons. Stat. Ann. § 1972).

If a corporation has not issued shares or has not commenced business, a majority of the incorporators (or a majority of the shareholders) can agree to dissolve the corporation by filing articles of dissolution with the Pennsylvania Corporation Bureau (15 Pa. Cons. Stat. Ann. § 1971).

FILING REQUIREMENTS

The articles of dissolution must be filed with the Pennsylvania Corporation Bureau, together with clearance certificates from the Pennsylvania Department of Revenue and the Office of Employment Security of the Department of Labor and Industry. The corporation must pay a \$70 filing fee. Expedited filing services are available for an additional \$100 for same-day, \$300 for three-hour service and \$1,000 for one-hour service.

SHAREHOLDER ACTION

Adopting a board of directors' resolution requires a majority of votes cast by all shareholders entitled to vote. If any class of shares is entitled to vote as a class, the resolution must be adopted by the affirmative vote of a majority of the votes cast in each class. A proposal for the voluntary dissolution of a corporation is not adopted by the corporation unless the board of directors has recommended it by resolution, even if the board has directed the submission of the proposal to the shareholders for action. (*15 Pa. Cons. Stat. Ann. § 1974.*)

Immediately after the shareholders approve the resolution, the corporation must officially publish notice of the winding up proceedings and mail the notice by certified or registered mail to each known creditor, claimant and municipal corporation where it does business in Pennsylvania (*15 Pa. Cons. Stat. Ann. § 1975*).

ACTIVITIES REQUIRING SHAREHOLDER CONSENT

10. What activities require shareholder consent in your jurisdiction?

A corporation generally can require shareholder approval for any corporate action by stating so in its articles of incorporation or by-laws. For fundamental corporate changes, the BCL requires a corporation to obtain shareholder approval, subject to exceptions. Changes generally requiring shareholder approval include:

- Amendments to the articles of incorporation (*15 Pa. Cons. Stat. Ann. §§ 1911 to 1916*).
- A merger, share exchange or consolidation (*15 Pa. Cons. Stat. Ann. §§ 331 to 346*).
- The sale of all or substantially all of a corporation's property or assets, other than in the regular course of business (*15 Pa. Cons. Stat. Ann. § 1932*).
- Division of the corporation into two or more corporations (*15 Pa. Cons. Stat. Ann. §§ 361 to 368*).
- Dissolution of the corporation (*15 Pa. Cons. Stat. Ann. §§ 1971 to 1980*).

For these changes, the BCL requires majority stockholder approval. In some cases, the articles of incorporation or by-laws may require approval by a greater percentage vote.

PREEMPTIVE RIGHTS

11. Is there a statutory provision for preemptive rights? Do corporations have the ability to opt in or out of this provision?

A shareholder does not have the preemptive right to subscribe to an additional issuance of stock, option rights or securities having conversion or option rights, or obligations of the corporation unless the articles of incorporation expressly grant it to the shareholder (*15 Pa. Cons. Stat. Ann. § 1530*).

LIMITATIONS ON CLASSES OR SERIES OF STOCK

12. Are there any limits on the classes or series of stock that can be issued in your jurisdiction?

The BCL does not impose limits on the classes or series of capital stock that a corporation can issue. The articles of incorporation must include any limitations or restrictions on any classes or series of capital stock.

LIMITATIONS ON DIVIDENDS

13. Please describe any limitations on the ability of a corporation to pay dividends on capital stock.

Subject to restrictions in the by-laws, the board of directors may authorize, and the corporation may make, distributions on the shares of its capital stock (*15 Pa. Cons. Stat. Ann. § 1551(a)*).

However, no distribution may be made if after giving effect to the distribution, either:

- The corporation would be unable to pay its debts as they become due in the usual course of business.
- The corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation provide otherwise) the amount that would be needed, if the corporation were to be dissolved when the distribution is measured, to satisfy the shareholders whose preferential rights are superior to those receiving the distribution.

(*15 Pa. Cons. Stat. Ann. § 1551(b)*.)

A director may be held personally liable for supporting any improper distribution if it is established that the director breached her fiduciary duties under Title 15, Section 1712 of the Pennsylvania Consolidated Statutes. The board of directors may determine that a distribution is not prohibited based on one or more of the following:

- The book values of the assets and liabilities of the corporation, as reflected on its books and records.
- A valuation that takes into consideration unrealized appreciation and depreciation or other changes in value of the assets and liabilities of the corporation.
- The current value of the assets and liabilities of the corporation, either valued separately or valued in segments or as an entirety as a going concern.
- Any other method that is reasonable in the circumstances.

(*15 Pa. Cons. Stat. Ann. § 1551(c)*.)

The board of directors is not obligated to consider obligations and liabilities, unless they are required to be reflected on a balance sheet prepared on the basis of generally accepted accounting principles, or any other accounting practices and principles that the corporation generally uses in the maintenance of its books and records and that are reasonable in the circumstances (*15 Pa. Cons. Stat. Ann. § 1551(c)*).

A corporation typically does not need shareholder approval to make distributions. A corporation can, however, require shareholder approval of proposed distributions by stating so in its by-laws.

BOARD OF DIRECTORS

14. Please describe any minimum requirements to serve as a corporate director. What are the requirements for or limits on the size of the board of directors?

Each member of the board of directors must be a natural person who is at least 18 years old. They need not be residents of Pennsylvania or a shareholder of the corporation, unless required by the articles of incorporation or by-laws. The by-laws may impose additional qualifications for directors. (15 Pa. Cons. Stat. Ann. § 1722.)

The board of directors must have at least one member. The number of directors must be fixed or specified in accordance with the articles of incorporation or by-laws. If the number is not fixed in accordance with either the by-laws or articles of incorporation, then the board of directors defaults to having three members. (15 Pa. Cons. Stat. Ann. § 1723.)

A decrease in the numbers of directors does not shorten an incumbent director's term (15 Pa. Cons. Stat. Ann. § 1724(a)).

The board of directors may be staggered into classes by the by-laws, provided:

- Each class of directors is as nearly equal in number as possible.
- The term of office of at least one class expires each year.
- The members of a class are not elected for a period longer than four years.

(15 Pa. Cons. Stat. Ann. § 1724(b).)

15. Please summarize the board of directors' ability to designate committees and subcommittees. Are there any limitations on the board of directors' ability to delegate authority to those committees?

Unless otherwise restricted in the by-laws, the by-laws or the board of directors may establish one or more committees to consist of one or more directors of the corporation. Each committee may exercise all of the powers and authority of the board of directors, to the extent provided by resolution or in the by-laws. (15 Pa. Cons. Stat. Ann. §§ 1731(a) and (c).)

However, no committee may have the authority to:

- Submit to shareholders any action requiring approval of shareholders under the BCL.
- Create or fill vacancies on the board of directors.
- Adopt, repeal or amend by-laws.
- Amend or repeal any resolution of the board of directors that by its terms may only be amended or repealed by the board of directors.
- Take action on matters committed exclusively to another committee by the by-laws or a resolution.

(15 Pa. Cons. Stat. Ann. § 1731(a)(2).)

INDEMNIFICATION

16. Please describe the corporation's ability, and any requirements or limits on that ability, to indemnify its directors and officers in your jurisdiction.

Title 15, Chapter 17, Subchapter D of the Pennsylvania Consolidated Statutes sets out the relevant framework for both permissive and mandatory indemnification of corporate agents. These indemnification provisions are not exclusive. A corporation may generally make any other indemnification under any by-law, agreement, vote of shareholders or disinterested directors, or otherwise. (15 Pa. Cons. Stat. Ann. §§ 1741 to 1750).

Unless otherwise restricted in its by-laws, a business corporation shall have the power to indemnify any person who was, or may be made, a party to any proceeding by reason of his association with the corporation as its representative against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with the proceeding if he acted both:

- In good faith.
- In a manner he reasonably believed to be in the best interests of the corporation, or at least not opposed to them.

(15 Pa. Cons. Stat. Ann. §§ 1741 and 1742.)

Additionally, with respect to any criminal proceeding, the agent must not have had reasonable cause to believe his conduct was unlawful (15 Pa. Cons. Stat. Ann. § 1741).

The termination of a non-derivative proceeding by judgment, order, settlement, conviction, or upon a plea of *nolo contendere* or its equivalent *does not, by itself*, create a presumption that the corporate agent did not meet the standard of conduct (15 Pa. Cons. Stat. Ann. § 1741).

A corporation is generally prohibited from indemnifying an officer or director when a final decision in an action by or in the right of the corporation establishes that he is liable to the corporation, unless a court determines that in the view of all of the circumstances of the case, that he is fairly and reasonably entitled to indemnity for certain expenses that the court deems proper (15 Pa. Cons. Stat. Ann. § 1742).

A corporation must indemnify a corporate agent against reasonably incurred expenses if he has been successful on the merits or in defense of any action stemming from his association with the corporation (15 Pa. Cons. Stat. Ann. § 1743).

A corporation may not provide for indemnification in any case where it is determined by a court that the corporate agent's actions constituted willful misconduct or recklessness (15 Pa. Cons. Stat. Ann. § 1746(b)).

Absent an order by the court, a corporation may only authorize indemnification if it finds that the representative has met the requisite standard of conduct (15 Pa. Cons. Stat. Ann. § 1744).

That determination may be made by:

- A majority vote consisting of a quorum of directors who are not parties to either the action or the proceeding.
- The corporation's shareholders.
- Independent legal counsel in a written opinion at the direction of a majority vote of a quorum of disinterested directors.

(15 Pa. Cons. Stat. Ann. § 1744.)

If a quorum of disinterested directors is not obtainable, the determination may be made by independent legal counsel in a written opinion (15 Pa. Cons. Stat. Ann. § 1744).

AMENDMENT OF ORGANIZATIONAL DOCUMENTS

17. What is required to amend the corporation's certificate of incorporation and by-laws? Please include information on:

- Documents.
- Corporate actions (board and stockholder actions).
- Filing requirements.

DOCUMENTS

Upon adopting an amendment to its articles of incorporation, a corporation shall prepare the articles of amendment, which contains:

- The name of the corporation.
- The statute under which the corporation was incorporated and the date of incorporation.
- The complete address of the corporation's registered office, if any.
- The effective date of the amendment.
- The manner in which the amendment was adopted by the corporation.
- The complete text of the amendment.
- If the amendment effects a restatement of the articles of incorporation, a statement that the restated articles supersede the original articles and all amendments made to them.

(15 Pa. Cons. Stat. Ann. § 1915.)

The certificate of amendment may be prepared using:

- A form available from the Pennsylvania Department of State.
- The online filing system on the Department of State's website.
- A self-drafted form.

No specific document needs to be prepared to amend a corporation's by-laws.

CORPORATE ACTIONS

Articles of Incorporation

Unless otherwise prohibited in the bylaws, a corporation may amend its articles of incorporation for any of the following purposes:

- To adopt a new name.
- To modify any provision of the articles relating to its term of existence.
- To change, add to or diminish its purposes or to set forth different or additional purposes.

- To cancel or otherwise affect the right of class shareholders to receive dividends that have accrued but have not been declared, or to reclassify substantial rights of the shareholders, including, without limitation, by providing special treatment of shares held by any shareholder or group of shareholders consistent with the articles.
- To restate the articles in their entirety.
- In any other respects as desired.

(15 Pa. Cons. Stat. Ann. § 1911(a).)

However, no amendment may affect:

- Any existing cause of action in favor of or against the corporation.
- Any pending action or proceeding to which the corporation is a party.
- The existing rights of persons other than shareholders.

(15 Pa. Cons. Stat. Ann. § 1916(b).)

A corporation may not amend its articles of incorporation in such a way that, as amended, they would not be valid as original articles of incorporation (see *Question 1: Articles of Incorporation*), except:

- The amended articles of incorporation do not need to state the names and addresses of the incorporators.
- The amended articles may state the current registered office of the corporation instead of the initial one.
- The corporation is not required to revise any provisions of the articles of incorporation that were valid when they were written and are valid and operative immediately prior to the filing of the amendment.

(15 Pa. Cons. Stat. Ann. § 1911(b).)

Unless otherwise provided in the articles of incorporation, every amendment to the articles of incorporation for a corporation that has already issued shares must be proposed by either:

- The board of directors by adopting a resolution containing the proposed amendment.
- For non-registered corporations, a petition of the shareholders entitled to cast at least 10% of the votes on the matter, stating the proposed amendment, directed to the board of directors and filed with the corporation's secretary.

(15 Pa. Cons. Stat. Ann. § 1912(a).)

The resolution of the board of directors or the petition of the shareholders must contain either:

- The existing text of the articles of incorporation, with brackets around language that is to be deleted and underscoring under language that is to be added.
- The complete text of articles of incorporation as amended or the text of any provisions that are being amended as amended.

(15 Pa. Cons. Stat. Ann. § 1912(b).)

Unless shareholder approval of the amendment is not necessary, once an amendment is proposed by either board or shareholder action, the board of directors shall direct that the amendment be

submitted to a vote by the shareholders. The vote on an amendment proposed by shareholder petition may take place at either a special meeting called for the purpose of voting on the amendment, or the annual meeting, provided that it is more than 120 days after the amendment was proposed. (15 Pa. Cons. Stat. Ann. § 1912(a).)

Each shareholder entitled to vote on the amendment must be provided with notice of the shareholders meeting where action will be taken on the amendment. The notice must include either the text of the proposed amendment or a summary of the changes and, if there are dissenter's rights involved, a copy of Subchapter D of Chapter 15 of the BCL. (15 Pa. Cons. Stat. Ann. § 1913(a).)

Unless a different requirement is set in the articles of incorporation, approval of amendments to the articles of incorporation requires a majority of the votes cast by the eligible voting body. If any class or series of shares is entitled to vote on the amendment as a class, approval requires affirmative votes of the majority of each class voting. (15 Pa. Cons. Stat. Ann. § 1914(a).)

Unless otherwise restricted in the by-laws, an amendment to the articles of incorporation can also be approved by the unanimous written consent of the shareholders entitled to vote (15 Pa. Cons. Stat. Ann. § 1766(a)).

However, unless otherwise restricted in the articles of incorporation, amendments to the articles of incorporation adopted by the board of directors do not require shareholder approval if the corporation has not yet issued shares or if the amendment is restricted to one or more of the following:

- Changing the corporate name.
- Providing for perpetual existence.
- Identifying a reduction of shares, or the deletion of a class or series of shares no longer outstanding, following the corporation's purchase of its own shares.
- Adding or deleting a provision authorizing uncertificated shares (shares for which a stock certificate has not been issued)..
- Adding, changing or removing the par value of any class or series of shares, if the par value does not substantively impact the class or series.
- The amendment is only a restatement without change of the operative provisions of previously amended articles.
- Where the corporation has only one class or series of outstanding voting shares:
 - there are no other outstanding classes or series of shares convertible or junior to those voting shares, or entitled to participate in distributions with those voting shares; and
 - the amendment either results in a stock dividend or stock split increasing the number of authorized voting shares, or a change in the par value of the voting shares.

(15 Pa. Cons. Stat. Ann. § 1914(c)(1) to (4).)

If the amendment has not taken effect, and the resolution or petition provides for termination, a corporation may terminate an amendment (15 Pa. Cons. Stat. Ann. § 1914(d)).

Unless otherwise provided in the articles of incorporation, whenever the articles of incorporation require the taking of a specific number or percentage of votes, the provision of the articles setting forth that requirement may not be amended or repealed by any lesser number or percentage of votes (15 Pa. Cons. Stat. Ann. § 1914(e)).

By-laws

The shareholders entitled to vote may amend or repeal the corporation's by-laws unless otherwise provided by the BCL. The by-laws may vest the exclusive power to amend the by-laws in the board of directors. (15 Pa. Cons. Stat. Ann. § 1504(a).)

However, unless otherwise specified in the articles of incorporation, certain provisions in the by-laws may only be altered by the shareholders, including those dealing with:

- Amendment of voting provisions.
- Personal liability, selection or removal of directors.
- Quorum, voting rights, and definition of minimum vote.
- Share transfer restrictions.

(15 Pa. Cons. Stat. Ann. § 1504(b).)

If amendments to the by-laws are up for consideration at a shareholders meeting, written notice must be given to each shareholder that the purpose or one of the purposes of the meeting is to adopt, amend or repeal by-laws. The notice must include a copy of the proposed amendment or a summary of the changes. (15 Pa. Cons. Stat. Ann. § 1504(a).)

FILING REQUIREMENT

The articles of amendment must get filed with the Pennsylvania Department of State online or by mail. The filing fee is \$70.

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