

91 A.3d 554

**ATP TOUR, INC., Etienne De Villiers, Charles Pasarell, Graham Pearce, Jacco Eltingh, Perry Rogers, and Iggy Jovanovic, Appellants,**

**v.**

**DEUTSCHER TENNIS BUND (German Tennis Federation), Rothenbaum Sport GmbH, and Qatar Tennis Federation, Appellees.**

**No. 534, 2013.**

**Supreme Court of Delaware.**

**Submitted: Feb. 19, 2014.**

**Decided: May 8, 2014.**

[91 A.3d 555]

Certification of Questions of Law Appellants, from the United States District Court for the District of Delaware, C.A. No. 07-178(GMS).

Upon Certification of Questions of Law from the United States District Court for the District of Delaware. **CERTIFIED QUESTIONS**

**ANSWERED.**

Philip Trainer, Jr., Esquire, Toni-Ann Platia, Esquire, Ashby & Geddes, Wilmington, Delaware; Of Counsel: Bradley I. Ruskin, Esquire (argued), Charles S. Sims, Esquire, Jennifer R. Scullion, Esquire and Jordan B. Leader, Esquire, Proskauer Rose LLP, New York, New York, for Appellants.

David M. Powlen, Esquire and Kevin G. Collins, Esquire, Barnes & Thornburg LLP, Wilmington, Delaware; Of Counsel: Robert D. MacGill, Esquire (argued), Peter J. Rusthoven, Esquire and Hamish S. Cohen, Esquire, Barnes & Thornburg LLP, Indianapolis, Indiana, for Appellees.

**Before STRINE, Chief Justice,\*HOLLAND, BERGER, JACOBS and RIDGELY, Justices, constituting the Court en Banc.**

**BERGER, Justice:**

This Opinion constitutes the Court's response to four certified questions of law concerning the validity of a fee-shifting provision in a Delaware non-stock corporation's bylaws. The provision, which the directors adopted pursuant to their charter-delegated power to unilaterally amend the bylaws, shifts attorneys' fees and costs to unsuccessful plaintiffs in intra-corporate litigation. The United States District Court for the District of Delaware found that the bylaw provision's validity was an open question under Delaware law and certified four questions to

this Court, asking it to decide whether, and under what circumstances, such a provision is valid and enforceable. Although we cannot directly address the bylaw at issue, we hold that fee-shifting provisions in a non-stock corporation's bylaws can be valid and enforceable under Delaware law. In addition, bylaws normally apply to all members of a non-stock corporation regardless of whether the bylaw was adopted before or after the member in question became a member.

**FACTUAL AND PROCEDURAL BACKGROUND**

The following undisputed facts are drawn from the District Court's Certification of Questions of Law.<sup>1</sup> ATP Tour, Inc. (ATP) is a Delaware membership corporation that operates a global professional men's tennis tour (the Tour). Its members include professional men's tennis players and entities that own and operate professional men's tennis tournaments. Two of those entities are Deutscher Tennis Bund (DTB) and Qatar Tennis Federation (QTF, and collectively, the Federations). ATP is governed by a seven-member board of directors, of which three are elected by the tournament owners, three are elected by the player members, and

[91 A.3d 556]

the seventh directorship is held by ATP's chairman and president.

Upon joining ATP in the early 1990s, the Federations "agreed to be bound by ATP's Bylaws, as amended from time to time."<sup>2</sup> In 2006, the board amended ATP's bylaws to add an Article 23, which provides, in relevant part:

(a) In the event that (i) any [current or prior member or Owner or anyone on their behalf ("Claiming Party")] initiates or asserts any [claim or counterclaim ("Claim")] or joins, offers substantial

assistance to or has a direct financial interest in any Claim against the League or any member or Owner (including any Claim purportedly filed on behalf of the League or any member), and (ii) the Claiming Party (or the third party that received substantial assistance from the Claiming Party or in whose Claim the Claiming Party had a direct financial interest) does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought, then each Claiming Party shall be obligated jointly and severally to reimburse the League and any such member or Owners for all fees, costs and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses) (collectively, "Litigation Costs") that the parties may incur in connection with such Claim.<sup>3</sup>

In 2007, ATP's board voted to change the Tour schedule and format. Under the board's "Brave New World" plan, the Hamburg tournament, which the Federations own and operate, was downgraded from the highest tier of tournaments to the second highest tier, and was moved from the spring season to the summer season. Displeased by these changes, the Federations sued ATP and six of its board members in the United States District Court for the District of Delaware, alleging both federal antitrust claims and Delaware fiduciary duty claims.

After a ten-day jury trial, the District Court granted ATP's and the director defendants' motion for judgment as a matter of law on all of the fiduciary duty claims, and also on the antitrust claims brought against the director defendants. The jury then found in favor of ATP on the remaining antitrust claims. Thus, the Federations did not prevail on any claim. ATP then moved to recover its legal fees, costs, and expenses under Rule 54 of the Federal Rules of Civil Procedure. ATP grounded its motion on Article 23.3(a) of ATP's bylaws. The District Court denied ATP's Rule 54 motion because it found Article 23.3(a) to be contrary to the policy underlying the federal antitrust laws.<sup>4</sup> The District Court effectively ruled that "federal law preempts the enforcement of fee-shifting agreements when antitrust claims are involved."<sup>5</sup>

ATP appealed, and the United States Court of Appeals for the Third Circuit vacated the District Court's order. The Third Circuit found that the District Court should have decided whether Article 23.3(a) was enforceable as a matter of Delaware law before reaching the federal

[91 A.3d 557]

preemption question.<sup>6</sup> On remand, the District Court reasoned that the question of Article 23.3(a)'s enforceability was a novel question of Delaware law that should be addressed in the first instance by this Court.<sup>7</sup> The District Court certified the following four questions of law:

1. May the Board of a Delaware non-stock corporation lawfully adopt a bylaw (i) that applies in the event that a member brings a claim against another member, a member sues the corporation, or the corporation sues a member (ii) pursuant to which the claimant is obligated to pay for "all fees, costs, and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses)" of the party against which the claim is made in the event that the claimant "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought"?

2. May such a bylaw be lawfully enforced against a member that obtains no relief at all on its claims against the corporation, even if the bylaw might be unenforceable in a different situation where the member obtains some relief?

3. Is such a bylaw rendered unenforceable as a matter of law if one or more Board members subjectively intended the adoption of the bylaw to deter legal challenges by members to other potential corporate action then under consideration?

4. Is such a bylaw enforceable against a member if it was adopted after the member had joined the corporation, but where the member had agreed to be bound by the corporation's rules "that may be adopted and/or amended from time to time" by the corporation's Board, and where the member was a member at the time that it commenced the lawsuit against the corporation?<sup>8</sup>

We accepted the certified questions based on principles of comity,<sup>9</sup> and will address each question in turn.

**DISCUSSION1. Fee-shifting bylaws are permissible under Delaware Law.**

The first certified question asks whether the board of a Delaware non-stock corporation<sup>10</sup> may lawfully adopt a bylaw that shifts all litigation

expenses to a plaintiff in intra-corporate litigation who “does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought.”<sup>11</sup> Under Delaware law, a corporation's bylaws are “presumed to be valid, and the courts will construe the bylaws in a manner consistent with the law rather than strike down the bylaws.”<sup>12</sup> To be facially valid, a bylaw must be authorized by the Delaware General Corporation Law (DGCL),<sup>13</sup> consistent with the corporation's

[91 A.3d 558]

certificate of incorporation, and its enactment must not be otherwise prohibited.<sup>14</sup> That, under some circumstances, a bylaw might conflict with a statute, or operate unlawfully, is not a ground for finding it facially invalid.

A fee-shifting bylaw, like the one described in the first certified question, is facially valid. Neither the DGCL nor any other Delaware statute forbids the enactment of fee-shifting bylaws. A bylaw that allocates risk among parties in intra-corporate litigation would also appear to satisfy the DGCL's requirement that bylaws must “relat[e] to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.”<sup>15</sup> The corporate charter could permit fee-shifting provisions, either explicitly or implicitly by silence.<sup>16</sup> Moreover, no principle of common law prohibits directors from enacting fee-shifting bylaws.

Delaware follows the American Rule, under which parties to litigation generally must pay their own attorneys' fees and costs.<sup>17</sup> But it is settled that contracting parties may agree to modify the American Rule and obligate the losing party to pay the prevailing party's fees.<sup>18</sup> Because corporate bylaws are “contracts among a corporation's shareholders,”<sup>19</sup> a fee-shifting provision contained in a nonstock corporation's validly-enacted bylaw would fall within the contractual exception to the American Rule. Therefore, a fee-shifting bylaw would not be prohibited under Delaware common law.

Whether the specific ATP fee-shifting bylaw is enforceable, however, depends on the manner in which it was adopted and the circumstances under which it was invoked. Bylaws that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose. In the landmark *Schnell v. Chris-Craft Industries*<sup>20</sup> decision, for example, this Court set aside a board-adopted bylaw amendment

that moved up the date of an annual stockholder meeting to a month earlier than the date originally scheduled.<sup>21</sup> The Court found that the board's purpose in adopting the bylaw and moving the meeting was to “perpetuat[e] itself in office” and to “obstruct [ ] the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management.”<sup>22</sup> The *Schnell* Court famously stated that “inequitable action does not become permissible simply because it is legally possible.”<sup>23</sup>

[91 A.3d 559]

More recently, in *Hollinger International, Inc. v. Black*,<sup>24</sup> the Court of Chancery addressed bylaw amendments, enacted by a controlling shareholder, that prevented the board “from acting on any matter of significance except by unanimous vote” and “set the board's quorum requirement at 80%,” among other changes.<sup>25</sup> The Court of Chancery found, and this Court agreed, that the bylaw amendments were ineffective because they “were clearly adopted for an inequitable purpose and have an inequitable effect.”<sup>26</sup> That finding was based on an extensive review of the facts surrounding the controller's decision to amend the bylaws.<sup>27</sup>

Conversely, this Court has upheld similarly restrictive bylaws that were enacted for proper purposes. In *Frantz Manufacturing Co. v. EAC Industries*,<sup>28</sup> a majority stockholder amended the corporation's bylaws by written consent in order to “limit the [ ] board's anti-takeover maneuvering after [the stockholder] had gained control of the corporation.”<sup>29</sup> The amended bylaws, like those invalidated in *Hollinger*, increased the board quorum requirement and mandated that all board actions be unanimous. The Court found that the bylaw amendments were “a permissible part of [the stockholder's] attempt to avoid its disenfranchisement as a majority shareholder” and, thus, were “not inequitable under the circumstances.”<sup>30</sup>

In sum, the enforceability of a facially valid bylaw may turn on the circumstances surrounding its adoption and use.<sup>31</sup> The Certification does not provide the stipulated facts necessary to determine whether the ATP bylaw was enacted for a proper purpose or properly applied. Moreover, because certifications by their nature only address questions of law,<sup>32</sup> we are able to say only that a bylaw of the type at issue here is facially valid, in the sense that it is permissible under the DGCL, and that it may be enforceable if adopted by the appropriate corporate procedures and for a proper corporate purpose.

**2. The bylaw, if valid and enforceable, could shift fees if a plaintiff obtained no relief in the litigation.**

The second certified question essentially asks whether a more limited version of the ATP bylaw would be valid. Article 23.3(a) states that it can be invoked against any plaintiff who does not obtain a judgment “that substantially achieves, in substance

[91 A.3d 560]

and amount, the full remedy sought.”<sup>33</sup> Since there might be difficulty applying the “substantially achieves” standard, the District Court asks whether the bylaw would be enforceable, at least, where plaintiff obtains “no relief at all against the corporation.”<sup>34</sup> Subject to the limitations set forth in our answer to the first certified question, we answer the second question in the affirmative.

**3. The bylaw would be unenforceable if adopted for an improper purpose.**

The third certified question asks whether the bylaw is “rendered unenforceable as a matter of law if one or more Board members subjectively intended the adoption of the bylaw to deter legal challenges by members to other potential corporate action then under consideration.”<sup>35</sup> Again, we are unable to respond fully. Legally permissible bylaws adopted for an improper purpose are unenforceable in equity. The intent to deter litigation, however, is not invariably an improper purpose. Fee-shifting provisions, by their nature, deter litigation. Because fee-shifting provisions are not *per se* invalid, an intent to deter litigation would not necessarily render the bylaw unenforceable in equity.

**4. Generally, a bylaw amendment is enforceable against members who join the corporation before its enactment.**

The fourth certified question asks whether a fee-shifting bylaw provision is enforceable against members who joined the corporation before the provision's enactment and who agreed to be bound by rules “that may be adopted and/or amended from time to time” by the board.<sup>36</sup> Assuming the provision is otherwise valid and enforceable, as a statutory matter the answer is yes. The DGCL permits a corporation to, “in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors.”<sup>37</sup> If directors are so authorized,

“stockholders will be bound by bylaws adopted unilaterally by their boards.”<sup>38</sup>

**CONCLUSION**

Under Delaware law, a fee-shifting bylaw is not invalid *per se*, and the fact that it was adopted after entities became members will not affect its enforceability. But we cannot say, as a matter of law, that the ATP fee-shifting provision was adopted for a proper purpose or is enforceable in the circumstances presented.

-----

Notes:

<sup>\*</sup> Formerly Chancellor as of the date of this argument and designated pursuant to art. IV, § 12 of the Delaware Constitution and Supreme Court Rules 2 and 4(a) to fill up the quorum as required.

<sup>1</sup> Certification of Questions of Law from the United States District Court for the District of Delaware (Oct. 4, 2013) [hereafter “Certification”].

<sup>2</sup> Certification at 4.

<sup>3</sup>*Id.* at 4–5.

<sup>4</sup>*Deutscher Tennis Bund v. ATP Tour, Inc.*, 2009 WL 3367041, at \*4 (D.Del. Oct. 19, 2009).

<sup>5</sup>*Deutscher Tennis Bund v. ATP Tour Inc.*, 480 Fed.Appx. 124, 126 (3d Cir.2012).

<sup>6</sup>*Id.* at 127–28.

<sup>7</sup> Certification at 7–8.

<sup>8</sup>*Id.* at 9.

<sup>9</sup>*See State Farm Mut. Auto. Ins. Co. v. Dann*, 953 A.2d 127, 128 (Del.2001) (accepting certified questions from the District Court “as a matter of comity”).

<sup>10</sup> Under 8 *Del. C.* § 114, the provisions of the Delaware General Corporation Law, including § 109(b), apply to non-stock corporations and all references to the stockholders of a corporation are deemed to apply to the members of a non-stock corporation.

- <sup>11</sup> Certification at 9.
- <sup>12</sup> See *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del.1985).
- <sup>13</sup> 8 *Del. C. Ch. 1.*
- <sup>14</sup> 8 *Del. C. § 109(b)* (“The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation ....”); see also *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 398 (Del.2010) (“[A] bylaw provision that conflicts with the DGCL is void.”).
- <sup>15</sup> 8 *Del. C. § 109(b).*
- <sup>16</sup> 8 *Del. C. § 102(a)* does not require that fee-shifting provisions be included in the charter.
- <sup>17</sup> *Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 245 (Del.2007) (“Under the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs.”).
- <sup>18</sup> See *Sternberg v. Nanticoke Mem'l Hosp., Inc.*, 62 A.3d 1212, 1218 (Del.2013) (“ ‘An exception to [the American R]ule is found in contract litigation that involves a fee shifting provision.’ ”) (citation omitted).
- <sup>19</sup> *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del.2010).
- <sup>20</sup> 285 A.2d 437 (Del.1971).
- <sup>21</sup> *Id.* at 438–40.
- <sup>22</sup> *Id.* at 439.
- <sup>23</sup> *Ibid.*
- <sup>24</sup> 844 A.2d 1022 (Del.Ch.2004), *aff'd sub. nom.*, *Black v. Hollinger Int'l Inc.*, 872 A.2d 559 (Del.2005).
- <sup>25</sup> *Id.* at 1077.
- <sup>26</sup> *Id.* at 1080.
- <sup>27</sup> See *id.* at 1030–57.
- <sup>28</sup> 501 A.2d 401 (Del.1985).
- <sup>29</sup> *Id.* at 407.
- <sup>30</sup> *Id.* at 407, 409.
- <sup>31</sup> See, e.g., *Stroud v. Grace*, 606 A.2d 75, 83 (Del.1992) (upholding bylaw amendments against claims of entrenchment because “there [was] no evidence that the board adopted the Amendments as defensive measures,” and the “record clearly indicate[d]” that “there was no threat to the board's control”); *Datapoint Corp. v. Plaza Sec. Co.*, 496 A.2d 1031, 1036 (Del.1985) (invalidating board-adopted bylaw amendments because the “underlying intent” behind them was “to give management an opportunity distribute ‘opposing solicitation material’ ” to challenge written stockholder consents); *In re Osteopathic Hosp. Ass'n of Del.*, 191 A.2d 333, 336 (Del.Ch.1963), *aff'd*, 195 A.2d 759 (Del.1963) (invalidating a membership bylaw because a “change of so fundamental a character” to the “structure of this rather unique organization” was improper without the consent of “the group whose interests are adversely affected,” *i.e.*, the association's members).
- <sup>32</sup> Supr. Ct. R. 41(a).
- <sup>33</sup> Certification at 5.
- <sup>34</sup> *Id.* at 9.
- <sup>35</sup> *Ibid.*
- <sup>36</sup> *Ibid.*
- <sup>37</sup> 8 *Del. C. § 109(a).*
- <sup>38</sup> *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 956 (Del.Ch.2013); see also *Kidsco Inc. v. Dinsmore*, 674 A.2d 483, 492–93 (Del.Ch.1995), *aff'd*, 670 A.2d 1338 (Del.1995).



**Delaware Corporate Law Update**  
**The Current State of Fee-Shifting Provisions**

March 17, 2015

**Legislative Developments**

On March 6, 2015, the Council of the Corporation Law Section of the Delaware State Bar Association (the “Council”) released proposed legislation that would amend the Delaware General Corporation Law (the “DGCL”) to invalidate fee-shifting provisions in the certificate of incorporation and bylaws of a stock corporation. Specifically, the legislation would add new Section 102(f), which would provide that a certificate of incorporation may not contain any provision that would impose liability on a stockholder for the attorneys’ fees or expenses of the corporation or any other party in connection with an “intracorporate claim,” as defined in new Section 115 (discussed below). A similar restriction on fee-shifting provisions would be added to Section 109(b) of the DGCL, which deals with the provisions that may be set forth in the bylaws. The proposed legislation would amend Section 114 of the DGCL to provide expressly that such restrictions do not apply to nonstock corporations. In addition, the commentary to the proposed legislation states that the amendments to Sections 102 and 109 are not intended to prevent the application of fee-shifting provisions pursuant to a stockholders’ agreement or other writing signed by the stockholder against whom the provision is to be enforced.

The legislation would also add to the DGCL new Section 115, which would confirm that the certificate of incorporation and bylaws of the corporation may specify that “intracorporate claims” (i.e., claims, including those brought in the right of the corporation, that are based upon a violation of a duty by a current or former director, officer or stockholder in such capacity, or as to which the DGCL confers jurisdiction upon the Court of Chancery) must be brought only in the Delaware courts, including the federal court. New Section 115 would not address the validity of provisions of the certificate of incorporation or bylaws that select a forum other than the Delaware courts as an additional forum in which intracorporate claims may be brought, but it would invalidate any provision selecting the courts outside of Delaware, or any arbitral forum, if it would preclude litigation of the claims in the Delaware courts. The commentary to the proposed legislation states that the addition of Section 115 is not intended to prevent the application of a provision selecting a forum other than the Delaware courts pursuant to a stockholders’ agreement or other writing signed by the stockholder against whom the provision is to be enforced.

If enacted, the amendments would become effective on August 1, 2015. A copy of the proposed legislation is attached [here](#).



## Case Law Developments

### ***Strougo v. Hollander*: Delaware Court of Chancery Addresses Application of Fee-Shifting Bylaws to Former Stockholders**

In *Strougo v. Hollander*, C.A. No. 9770-CB (Del. Ch. Mar. 16, 2015), the first opinion of the Delaware Court of Chancery to address the validity of a fee-shifting bylaw since the Delaware Supreme Court's opinion in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), the Court held that a corporation's fee-shifting bylaw adopted after the consummation of a 10,000-to-1 reverse stock split did not apply to the stockholders whose entire interest was cashed out in the split. Although noting the "serious policy questions implicated by fee-shifting bylaws in general," the Court based its holding on the timing of the bylaw's adoption. The Court held that the bylaw did not apply to the stockholders whose entire interest had been cashed out in the split, because Section 109 of the DGCL does not authorize a bylaw that "regulates the rights or powers of former stockholders who were no longer stockholders when the bylaw was adopted." The Court clarified, however, that its conclusion does not mean that a stockholder whose interest in the corporation is eliminated ceases to be subject to the corporation's bylaws. Instead, the Court held that, "[i]n determining the bylaw provisions that should apply to a lawsuit initiated by a former stockholder challenging the terms of a cash-out transaction, . . . the governing bylaws are those in effect when the former stockholder's interest as a stockholder was eliminated." After that date, a stockholder ceases to be a party to the "corporate contract" and accordingly ceases to be bound by subsequent amendments to that contract. A copy of the opinion is attached [here](#).

SPONSOR:

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

[HOUSE/SENATE] BILL NO. \_\_\_\_

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

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

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

3           § 102 Contents of certificate of incorporation.

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

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



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

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

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

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

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

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

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

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

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

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

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

61 § 115. Forum selection provisions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **SYNOPSIS**

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

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

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

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

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

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

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

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

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

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

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