

[Domestication に関する解説文献 訳文]

第 16.1 項 非合衆国会社 (Non-United States Corporation) のデラウェア州への州内会社化 (Domestication)

会社法第 388 条は、合衆国（又はその領土若しくは領域）以外の法域の法律に基づいて設立された会社が、州内会社化の証明書 (Certificate of Domestication) 及び設立証明書 (Certificate of Incorporation) を州務長官に提出することにより、デラウェア州において会社化することを認めている¹。第 388 条が導入される前は、デラウェア州において再設立しようとする非合衆国会社は、そのために吸収合併を行う必要があった²。第 253 条第(e)項³によりこれまでに課されていた制限のために、かかる吸収合併は限定された状況下でのみ許容されていた。第 388 条は、非合衆国会社がこうした途中経過を経ることなく、デラウェア州において直接に州内会社化するための規定を定めることにより、会社の法人格の存続を許容している。

第 388 条に基づきデラウェア州への州内会社化を実施するためには、非合衆国会社は、州務長官に対し、(1)作成され⁴、かつ、会社法第 103 条に従って提出されかつ記録された⁵州内会社化の証明書、及び、(2)（会社法第 102 条を遵守しなければならず）会社法第 103 条にも従って作成され、確認されかつ提出されなければならない設立証明書⁶を提出しなければならない。州内会社化の証明書は、その非合衆国会社が設立された日及び法域⁷、デラウェア州において州内会社化の証明書を提出する直前のその会社の名称及びデラウェア州における設立証明書に記載されるその会社の名称⁸、並びに、州内会社化の証明書を提出する直前にその会社の所在地又は主たる営業の

¹ デラウェア法典第 8 法律デラウェア会社法第 388 条第(b)項。

² 会社法第 251 条はデラウェア州の会社と非合衆国会社との吸収合併を規定していないが、他方、第 252 条第(a)項は、非合衆国の法域の法律がかかる吸収合併の実施を認める場合には、かかる吸収合併を許容している。州内会社化の代替手段として、デラウェア州法及び他法域の法律に従いながら「二重に設立」（つまり、二つ以上の法域の法律に基づいて設立）された法人がいくつかある。

³ デラウェア法典第 8 法律デラウェア会社法第 253 条第(e)項。

⁴ デラウェア法典第 8 法律デラウェア会社法第 388 条第(b)項(1)。デラウェア法典第 8 法律デラウェア会社法第 388 条第(g)項も参照のこと。

⁵ デラウェア法典第 8 法律デラウェア会社法第 103 条。第 19 条を参照のこと。

⁶ デラウェア法典第 8 法律デラウェア会社法第 388 条第(b)項(2)。書式 16.1 を参照のこと。

⁷ デラウェア法典第 8 法律デラウェア会社法第 388 条第(c)項(1)。

⁸ デラウェア法典第 8 法律デラウェア会社法第 388 条第(c)項(2)。1985 年に第 388 条が改正され、会社は州内会社化に関連してその名称を変更できることが明らかとなった。1985 年第 388 条

場所を成した法域⁹を証明しなければならない。州内会社化の証明書及び設立証明書を提出したときに、その会社はデラウェア州において州内会社化され、かつ、デラウェア州法に服することになったものとみなされる¹⁰。但し、会社法第 106 条の規定と異なり¹¹、その会社は、非合衆国の法域におけるその当初の設立日に存在を開始したものとみなされる¹²。州内会社化の証明書には、役員、取締役、受託者、支配人、パートナー、又は、その会社のためにこれらに相当する権限を有する者が署名しなければならない¹³。

デラウェア州における州内会社化は、それ自体、州内会社化された会社の（他法域における）存続に影響を及ぼすものではなく、また、州内会社化の日の前に負担した会社法人のいかなる義務又は責任にも影響を及ぼすものではない¹⁴。同様に、州内会社化の証明書の提出は、その会社に関する事項に適用のある法律の選択に影響を及ぼさない。但し、州内会社化の効力が生じた後、デラウェア州法は、その会社が州内会社化の日に設立された場合と同様にその会社に適用される¹⁵。

第 388 条は、デラウェア州における州内会社化に先立って、非合衆国会社が株主の承認又は何らの必要な政府承認を取得することを要求していない。その結果として、吸収合併に関する会社法第 252 条及び第 253 条と異なり、第 388 条は他法域の法律がその会社のデラウェア州への州内会社化を許容することを要求していない。しかしながら、他法域では、これらの要求及びその他の要求をその法域の会社に課することがあり、従って、このような要素について検討がなされる必要がある。最後に、デラウェア州における州内会社化は、デラウェア州法に基づき、他法域の法律に基づく会社の存在を消滅させるものではなく、また、州内会社化された会社が他法域におけるその存在を消滅させるための何かの措置を取らない限り、州内会社化された会社は二つの法域の会社法及びその他の法律に服し得る、つまり、「二重に設立」され得るのである。

改正及びその注釈を参照のこと。

⁹ デラウェア法典第 8 法律デラウェア会社法第 388 条第(c)項(4)。

¹⁰ デラウェア法典第 8 法律デラウェア会社法第 388 条第(d)項。

¹¹ デラウェア法典第 8 法律デラウェア会社法第 106 条。

¹² デラウェア法典第 8 法律デラウェア会社法第 388 条第(d)項。

¹³ デラウェア法典第 8 法律デラウェア会社法第 388 条第(g)項。

¹⁴ デラウェア法典第 8 法律デラウェア会社法第 388 条第(e)項。

¹⁵ デラウェア法典第 8 法律デラウェア会社法第 388 条第(f)項。

THE
DELAWARE
LAW OF CORPORATIONS
&
BUSINESS ORGANIZATIONS

THIRD EDITION

VOLUME 1
TEXT

R. FRANKLIN BALOTTI
JESSE A. FINKELSTEIN

ASPEN
PUBLISHERS

111 Eighth Avenue, New York, NY 10011
www.aspenpublishers.com

2005 SUPPLEMENT

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other professional assistance is required, the services of a competent professional person should be sought.

—From a *Declaration of Principles* jointly adopted by a
Committee of the American Bar Association and a Com-
mittee of Publishers and Associations

© 2005, 2004, 2003, 2002, 2001, 2000, 1999, 1998, 1997, 1996 Aspen Publishers, Inc.
A Wolters Kluwer Company
www.aspenpublishers.com

© 1994, 1993, 1992, 1991, 1990, 1989, 1988, 1987, 1986 by Prentice Hall Law & Business.
All rights reserved. No part of this publication may be reproduced or transmitted in any form
or by any means, electronic or mechanical, including photocopy, recording, or any informa-
tion storage and retrieval system, without permission in writing from the publisher. Requests
for permission to reproduce content should be directed to the Aspen Publishers website at
www.aspenpublishers.com, or call the permissions department for more information at
(212) 771-0619.

Cite this book as:
Balotti and Finkelstein, Del. Law of Corps. &
Bus. Orgs., 3d Ed. § _____ (1998)

Library of Congress Cataloging-in-Publication Data

Balotti, R. Franklin.

The Delaware law of corporations and business organizations / R.
Franklin Balotti, Jesse A. Finkelstein.—3rd ed.

p. cm.

Includes index.

ISBN 1-56706-669-0 (set).—ISBN 1-56706-670-4 (v. 1).—ISBN
1-56706-671-2 (v. 2).—ISBN 1-56706-672-0 (v. 3).

1. Corporation law—Delaware. 2. Corporation Law—Delaware—
Forms. 3. Limited partnership—Delaware. 4. Limited partnership—
Delaware—Forms. I. Finkelstein, Jesse A. II. Title.

KFD213.B35 1997

346.751'066—dc21

97-37284
CIP

1 2 3 4 5 6 7 8 9 0

2005 SUPPLEMENT

CHAPTER 16

DOMESTICATION, CONTINUANCE, AND TRANSFER

by Mark J. Gentile

§ 16.1 Domestication into Delaware of Non-United States Corporations

§ 16.2 Temporary Transfer of Domicile into Delaware

§ 16.3 Transfer to or Domestication or Continuance in Foreign Jurisdictions by Delaware Corporations

Relevant Statutes:

8 *Del. C.* § 388

8 *Del. C.* § 389

8 *Del. C.* § 390

Relevant Forms:

Form 16.1

Form 16.2

Form 16.3

Form 16.4

Form 16.5

§ 16.1 DOMESTICATION INTO DELAWARE OF NON-UNITED STATES CORPORATIONS

Section 388 of the General Corporation Law allows any corporation organized under the laws of a jurisdiction other than one of the United States (or of its territories or possessions) to become incorporated in Delaware by filing a certificate of domestication and a certificate of incorporation with the Secretary of State.¹ Before the adoption of Section 388, a non-United States corporation

¹ 8 *Del. C.* § 388(b).

§ 16.1 DELAWARE CORPORATIONS/BUSINESS ORGANIZATIONS

seeking to reincorporate in Delaware was required to do so by merger.² The restrictions formerly imposed by Section 253(e)³ permitted such mergers only under limited circumstances. Section 388 permits a continuation of a corporation's corporate existence by providing for direct domestication of non-United States corporations in Delaware without such intermediate steps.

In order to effectuate domestication into Delaware under Section 388, the non-United States corporation must file with the Secretary of State (1) a certificate of domestication executed⁴ and filed and recorded in accordance with Section 103 of the General Corporation Law⁵ and (2) a certificate of incorporation (which must comply with Section 102 of the General Corporation Law), that also must be executed, acknowledged, and filed in accordance with Section 103.⁶ The certificate of domestication must certify the date and the jurisdiction in which the non-United States corporation was incorporated,⁷ the name of the corporation immediately prior to the filing of the certificate of domestication in Delaware and its name in its Delaware certificate of incorporation,⁸ and the jurisdiction constituting the situs or principal place of business of the corporation prior to the filing of the certificate of domestication.⁹ Upon filing the certificate of domestication and the certificate of incorporation, the corporation is deemed to have become domesticated in Delaware and to have become subject to Delaware law.¹⁰ However, unlike the provisions of Section 106 of the General Corporation Law,¹¹ the corporation is deemed to have commenced upon the date of its original formation in a non-United States jurisdiction.¹² The certificate of domestication must be signed by an officer, director, trustee, manager, partner, or person with equivalent authority on behalf of the corporation.¹³

² While Section 251 of the General Corporation Law does not provide for mergers of Delaware and non-United States corporations, Section 252(a) does permit such mergers where the laws of the non-United States jurisdiction allow such a merger to occur. As an alternative to domestication, some entities have become "dually incorporated" (or incorporated under the laws of two or more jurisdictions) complying with the laws of Delaware and with the laws of a foreign jurisdiction.

³ 8 Del. C. § 253(e).

⁴ 8 Del. C. § 388(b)(1). See also 8 Del. C. § 388(g).

⁵ 8 Del. C. § 103. See § 1.9.

⁶ 8 Del. C. § 388(b)(2). See Form 16.1.

⁷ 8 Del. C. § 388(c)(1).

⁸ 8 Del. C. § 388(c)(2). In 1985, Section 388 was amended to make clear that a corporation may change its name in connection with a domestication. See the 1985 Amendment to Section 388 and the Commentary thereto.

⁹ 8 Del. C. § 388(c)(4).

¹⁰ 8 Del. C. § 388(d).

¹¹ 8 Del. C. § 106.

¹² 8 Del. C. § 388(d).

¹³ 8 Del. C. § 388(g).

Domestication in Delaware, in and of itself, does not affect the continued existence (in its foreign jurisdiction) of a domesticated corporation or any of the obligations or liabilities of the corporate entity incurred prior to the date of domestication.¹⁴ Similarly, the filing of the certificate of domestication does not affect the choice of law that applies to matters concerning the corporation except that, following the effectiveness of domestication, Delaware law applies to the corporation as if it had been incorporated on the date of domestication.¹⁵

Section 388 does not require a non-United States corporation to obtain stockholder approval or any necessary governmental approvals prior to domestication in Delaware. Consequently, unlike Sections 252 and 253 of the General Corporation Law in respect of mergers, Section 388 does not require the laws of the foreign jurisdiction to permit a domestication of the corporation into Delaware. A foreign jurisdiction may, however, impose these and other requirements upon its corporations, and consideration must accordingly be given to such factors. Lastly, domestication in Delaware does not under Delaware law extinguish a corporation's existence under the laws of a foreign jurisdiction, and unless a domesticated corporation takes some action to extinguish its existence in the foreign jurisdiction, a domesticated corporation may be subject to the corporation and other laws of the two jurisdictions, or be "dually incorporated."

§ 16.2 TEMPORARY TRANSFER OF DOMICILE INTO DELAWARE

Section 389 of the General Corporation Law permits a non-United States corporation to use Delaware as a form of protective jurisdiction in the event of an emergency by providing a temporary domicile. The "emergency condition" in the non-United States jurisdiction that could give rise to such a transfer of domicile has been broadly defined to include, but is not limited to, war or armed conflict, revolution or insurrection, invasion or occupation by foreign military forces, rioting or extended civil commotion, domination by a foreign power, expropriation, nationalization, any action under United States law that might subject the non-United States entity to restrictions under United States laws relating to trading with enemies of the United States, or similar exigent situations.¹⁶ Domicile may be temporarily transferred by a non-United States corporation only where the laws governing the internal affairs of such corporation do not expressly prohibit such a transfer.¹⁷

The provisions of the statute reflect the recognition that corporations seeking to arrange for a possible future transfer of domicile may have a strong inter-

¹⁴ 8 Del. C. § 388(e).

¹⁵ 8 Del. C. § 388(f).

¹⁶ 8 Del. C. § 390(a)(3).

¹⁷ 8 Del. C. § 390(b).

§ 16.2 DELAWARE CORPORATIONS/BUSINESS ORGANIZATIONS

est in keeping such arrangements confidential. Nevertheless, Section 389 requires that certain fundamental information concerning the corporation must be available in Delaware should the need to transfer domicile temporarily arise in an emergency situation.

In order to prepare for a possible transfer of domicile, the Secretary of State must be provided with the following documents at least thirty days prior to any proposed transfer:

1. A certified copy of the corporation's existing certificate of incorporation and by-laws (or their equivalents under the laws of the non-United States jurisdiction);¹⁸
2. An authorized certificate confirming the existence of the non-United States corporate identity;¹⁹
3. A list enumerating the individuals who will become the authorized directors and officers of the corporation upon the transfer during an emergency, accompanied by evidence of their authority and executed agreements consenting to the service of process in Delaware;²⁰
4. A certificate setting forth the identity and address of the corporation's registered agent in Delaware, a description of the business of the corporation, a statement that the filing of the certificate is duly authorized and does not violate the certificate of incorporation, by-laws, or other organic documents of the corporation, a list setting forth the individual(s) authorized to sign written communications required by Section 389 of the General Corporation Law, an affirmation that the transfer is not expressly prohibited by the laws of the jurisdiction governing the internal affairs of the non-United States corporation and an undertaking that any transfer of domicile will occur only in the event of an emergency and will continue only so long as such emergency situation continues;²¹ and
5. The appropriate examination fee (currently \$10,000).²²

In the event that any documents required to be submitted to the Secretary of State are not in English, a translation under oath of the translator must accompany them.²³

Assuming that the documents submitted to the Secretary of State comply with Section 389 and that the name of the corporation satisfies the requirements of Section 102(a)(1),²⁴ the Secretary of State will notify the corporation that the

¹⁸ 8 Del. C. § 389(c)(1).

¹⁹ 8 Del. C. § 389(c)(2).

²⁰ 8 Del. C. § 389(c)(3).

²¹ 8 Del. C. § 389(c)(4)(a)-(f). See Form 16.2.

²² 8 Del. C. § 389(c)(5), 8 Del. C. § 391(a).

²³ 8 Del. C. § 389(c).

²⁴ 8 Del. C. § 102(a)(1).

documents have been accepted for filing. The name of the corporation is then entered on the reserved list of the Secretary of State to be preserved as long as the corporation continues to comply with the requirements of Section 389.²⁵ In order to preserve the confidentiality of the arrangements for the potential emergency transfer, none of the documents submitted to the Secretary of State is available for public inspection unless the corporation invokes the right to transfer its domicile in the event of an emergency.²⁶

In order to maintain the ability to transfer domicile in the event of an emergency, a corporation seeking to comply with Section 389 must file a certificate on or before March 1 of each year certifying that the documents submitted pursuant to Section 389 remain in full force and effect.²⁷ In the event that any change in the documents has occurred, amendments or supplements must be submitted with this certificate together with the appropriate filing fee.²⁸ Failure of a corporation to comply with the annual confirmation requirement renders all certificates and filings void and requires requalification under the statute.²⁹

The emergency transfer of domicile may be effected by any corporation that has otherwise complied with Section 389 by transmitting to the Secretary of State³⁰ a written communication signed by one of the individuals identified as authorized to issue such a communication. Upon the receipt by the Secretary of State of such a communication and payment of the appropriate fee, the Secretary of State will certify the effectiveness of the transfer of domicile.³¹

Following the effectiveness of a transfer of domicile in an emergency situation, the corporation may continue to conduct its affairs under the laws of its non-United States domicile.³² The transfer of domicile does not affect any obligations or liabilities of the corporation incurred prior to transfer,³³ nor does the transfer of domicile automatically remove assets from the original corporate domicile. Upon effectiveness of the transfer of domicile, the corporation and its directors become amenable (pursuant to their prior consent) to service of process in Delaware as if the corporation were a domestic corporation.³⁴

When the emergency situation providing the impetus for the transfer of domicile has abated, the corporation may apply to the Secretary of State to withdraw from domicile in Delaware. An application for withdrawal must be accompanied by a resolution from the directors authorizing withdrawal and a cer-

²⁵ 8 Del. C. § 389(c).

²⁶ *Id.*

²⁷ 8 Del. C. § 389(d).

²⁸ *Id.*

²⁹ *Id.*

³⁰ 8 Del. C. § 389(e).

³¹ *Id.*

³² 8 Del. C. § 389(f).

³³ 8 Del. C. § 389(h).

³⁴ 8 Del. C. § 389(j).

§ 16.3 DELAWARE CORPORATIONS/BUSINESS ORGANIZATIONS

tificate of the diplomatic or consular officer of the non-United States jurisdiction accredited to the United States consenting to the withdrawal.³⁵ In order to withdraw, the corporation must also agree to be served with process in Delaware for the enforcement of any obligation arising prior to its withdrawal and agree to appoint the Secretary of State as its agent for the acceptance of service of process.³⁶ The temporary transfer of domicile terminates upon the payment of fees and taxes owed to the State of Delaware for the period of the transfer of domicile.³⁷

§ 16.3 TRANSFER TO OR DOMESTICATION OR CONTINUANCE IN FOREIGN JURISDICTIONS BY DELAWARE CORPORATIONS

Section 390 of the General Corporation Law permits a Delaware corporation, under certain circumstances, to transfer to (thereby ceasing its existence as a Delaware corporation) or domesticate or continue in (without ceasing its existence as a Delaware corporation) a foreign jurisdiction (i.e., a jurisdiction other than the United States, or any state, territory, or possession thereof) that permits the transfer to or domestication or continuance in such jurisdiction of a Delaware corporation.

The 1997 amendments to Section 390 authorize a Delaware corporation to domesticate or continue into a foreign jurisdiction without having to cease its existence as a Delaware corporation. Prior to the amendment, Section 390 provided for the transfer of a Delaware corporation to a jurisdiction outside the United States and required that, upon such transfer, the corporation cease its existence as a corporation of the State of Delaware. That procedure remains available under Section 390. Section 390 also authorizes a corporation to domesticate or continue in a jurisdiction outside the United States without terminating its Delaware existence by filing with the Secretary of State a certificate of continuance indicating the jurisdiction in which the corporation will be domesticated or continued and also that the corporation will thereafter continue to exist as a Delaware corporation. A corporation filing a certificate of continuance will remain subject to Delaware law to the same extent as before the continuance.

A significant aspect in utilizing Section 390 to transfer or domesticate or continue a Delaware corporation is the requirement that the holders of all outstanding shares of stock of the corporation (both voting and nonvoting) be voted in favor of the proposed action. The inclusion of Section 390 in the General Corporation Law thereby establishes a mechanism whereby a corporation can domesticate into Delaware from a foreign jurisdiction pursuant to Section 388 and, without regard to the duration of its existence as a Delaware corporation,

³⁵ 8 Del. C. § 389(k).

³⁶ *Id.* See Form 16.3.

³⁷ *Id.*

immediately transfer from Delaware to, or domesticate or continue into, a non-United States jurisdiction pursuant to Section 390 of the General Corporation Law.

In order to effect a transfer, domestication, or continuance of a Delaware corporation pursuant to Section 390, the board of directors of the Delaware corporation must adopt a resolution approving such transfer, domestication, or continuance specifying the jurisdiction to which the corporation will be transferred or in which the corporation is to be domesticated or continued, and recommending the approval of such action to the stockholders of the corporation. The resolution then must be submitted to a vote of all stockholders of the corporation at an annual or special meeting upon notice of at least twenty days (or through action by written consent in lieu thereof in accordance with Section 228 of the General Corporation Law). If all outstanding shares of stock of the corporation (both voting and nonvoting) vote in favor of adoption of the resolution, the corporation must file a certificate of transfer³⁸ (if the corporation is to be transferred to another jurisdiction) or a certificate of continuance³⁹ (if the corporation is to be domesticated or continued in another jurisdiction) with the Secretary of State of the State of Delaware that certifies (1) the name of the corporation (including the name of the corporation under which it was originally incorporated, if changed), (2) the date of filing of the original certificate of incorporation with the Secretary of State, (3) the jurisdiction to which the corporation shall be transferred or in which it will be domesticated or continued, and (4) the approval of the transfer or domestication or continuance of the corporation in accordance with the provisions of Section 390. The certificate of transfer must also specify that the corporation's existence shall cease when the transfer becomes effective and contain an agreement of the corporation that it may be served with process in Delaware in any proceeding for enforcement of any obligation of the corporation arising while it was a Delaware corporation and specify the Secretary of State as its agent to accept service of process in connection with such proceeding. Upon payment of all requisite fees and filing of the certificate of transfer, the Secretary of State shall issue a certificate noting that the corporation has filed all documents and paid all fees required by Section 390 and that the transfer has become effective, upon which the corporation will cease to be a corporation incorporated under the laws of the State of Delaware. Accordingly, upon the issuance of such certification by the Secretary of State in connection with a certificate of transfer, the corporation is no longer incorporated under the laws of the State of Delaware. A certificate of continuance must certify that the corporation will continue to exist as a Delaware corporation after the certificate of continuance is filed with the Secretary of State.

³⁸ See Form 16.4.

³⁹ See Form 16.5.

§ 16.3 DELAWARE CORPORATIONS/BUSINESS ORGANIZATIONS

Similar to Section 388, the transfer of a corporation out of Delaware pursuant to Section 390 shall not be deemed to affect any obligations or liabilities of the corporation that are incurred prior to such transfer, nor shall such a transfer be deemed to affect the choice of law applicable to the corporation with respect to matters arising prior to such transfer.