

Is Delaware General Corporation Law Really Modern Corporate Law?

Article By:

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I often hear it said that Delaware has a modern corporate law. In reading a recently filed proxy statement, for example, I came across the following assertion:

Our Board of Directors believes Delaware has one of the most modern statutory corporation codes, which is revised regularly in response to changing legal and business needs of corporations.

I grant that Delaware regularly amends the DGCL, but I question whether the DGCL is truly a modern code. After all, is a corporate law that still uses the antiquated concepts of capital and surplus truly modern?

The DGCL, in fact, traces its lineage back to the end of the nineteenth century when the Delaware legislature enacted a “general” corporation law. Act of March 9, 1899, ch. 273, 21 DEL. Laws 445. The act was considered “general” because it departed from the prior practice of incorporation by special act of the legislature. The 1899 Act borrowed heavily from New Jersey’s corporate law, which was then considered to be the most popular. It was only after New Jersey enacted the anti-corporate “Seven Sisters” laws in 1913, that Delaware began its ascent as the leading state for incorporations. In the ensuing years, Delaware has amended its general corporation law many times. In 1953, the Delaware legislature undertook a codification of all of the state’s laws (you will notice that many of the statutory references at the end of sections of the DGCL date to 1953). As a result, the general corporation law was rearranged but not substantively changed. The current arrangement and numbering date from 1953. In 1967, the legislature enacted a bill revising the general corporation law. Thereafter, the Delaware legislature has continued to amend the law. As the foregoing very brief history suggests, the DGCL is actually a nineteenth century law that has been rearranged, revised and amended over more than a century.

Because the DGCL has been the product of continuous evolution, it isn’t as well organized as other state corporation statutes. California’s General Corporation Law, for example, defines terms at the beginning of the law and then uses those terms throughout the law. The DGCL, in contrast, tends to

define terms in specific sections and limit those definitions to those sections (*e.g.*, Section 220).

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