



SPONSOR: Sen. Townsend & Sen. Henry & Rep. Walker
Sens. Blevins, Lavelle, Simpson; Reps. Hudson, B. Short,
D. Short

DELAWARE STATE SENATE
147th GENERAL ASSEMBLY

SENATE JOINT RESOLUTION NO. 12

CALLING FOR CONTINUED EXAMINATION OF IMPORTANT PROPOSED AMENDMENTS TO THE
DELAWARE GENERAL CORPORATION LAW RELATING TO FEE-SHIFTING BYLAWS AND OTHER ASPECTS
OF CORPORATE LITIGATION.

1 WHEREAS, the legal system and the courts of this State are respected nationally for their efficiency, fairness and
2 predictability and their leadership on issues of corporate law; and

3 WHEREAS, the General Assembly and the courts of this State have developed a balanced corporate law that
4 stakes out a middle ground between the interests of directors, officers, and controlling stockholders, and the interests of
5 other stockholders; and

6 WHEREAS, because its law is balanced and flexible, and protects legitimate interests of all stakeholders, the State
7 of Delaware is the U.S. domicile favored both by most investors in and by most managers of publicly-traded companies;
8 and

9 WHEREAS, Delaware's legal system and its courts have benefited from the continual study of and improvement
10 of the State's business entity laws; and

11 WHEREAS, maintaining balance, efficiency, fairness and predictability requires attention to ensure that statutes,
12 court rules, and judicial doctrine, both within the State of Delaware and in combination with the laws and rules in
13 jurisdictions outside the State of Delaware, do not encourage meritless litigation and impose unnecessary costs, to the
14 detriment of Delaware business entities and, ultimately, their investors; and

15 WHEREAS, members of the Delaware Supreme Court and the Delaware Court of Chancery have commented on
16 the abusive nature of meritless and duplicative litigation brought both within and without the State of Delaware and its
17 imposition of unnecessary costs upon stockholders in Delaware companies and these concerns are shared by the Governor
18 and members of the Delaware General Assembly; and

19 WHEREAS, the Delaware Supreme Court on May 8, 2014 in *ATP Tours, Inc. v. Deutscher Tennis Bund* upheld as
20 facially valid a so-called "fee-shifting" bylaw imposing liability for legal fees on certain members of a non-stock
21 corporation who participated in litigation; and

22 WHEREAS, the members of the Council of the Corporation Law Section of the Delaware State Bar Association
23 expressed concerns regarding the potential unintended consequence of permitting stock corporations to adopt such bylaws
24 and the chilling impact it could have in also deterring meritorious litigation that might be brought by investors in publicly-
25 traded or privately-held corporations; and

26 WHEREAS, the Executive Committee of the Delaware State Bar Association approved a legislative proposal
27 intended to limit the applicability of the *ATP Tours* decision to non-stock corporations and to make clear that liabilities
28 such as a fee-shifting bylaw may not be imposed on holders of stock in stock corporations; and

29 WHEREAS, the Governor and the Delaware General Assembly strongly support a level playing field that provides
30 the ability for stockholders and investors to seek relief on its merits in the Courts of this State and believe that a
31 proliferation of broad fee-shifting bylaws for stock corporations will upset the careful balance that the State has strived to
32 maintain between the interests of directors, officers, and controlling stockholders, and the interests of other stockholders;
33 and

34 WHEREAS, the Governor and the General Assembly recognize the complexity and importance of the issues
35 raised herein and desire to provide all interested parties with adequate time to participate in the development of a
36 comprehensive legislative response to the issues raised in this resolution and the *ATP Tours* decision.

37 NOW THEREFORE:

38 BE IT RESOLVED, by the Senate and the House of Representatives of the 147th General Assembly of Delaware,
39 with the approval of the Governor, that the Delaware State Bar Association, its Corporation Law Section, and the Council
40 of that Section, is called upon to continue its ongoing examination of the State's business entity laws with an eye toward
41 maintaining balance, efficiency, fairness and predictability;

42 BE IT FURTHER RESOLVED, that such examination provide attention to the permissible scope of provisions of
43 the certificate of incorporation, bylaws, or other similar business entity documents affecting the conduct of and the forum
44 for litigation involving claims arising under Delaware's business entity laws; the operation and administration of the
45 statutes and court rules governing the exercise of appraisal rights; and the rate of interest on any fair value determination in
46 an appraisal;

47 BE IT FURTHER RESOLVED, that such examination consider whether legislation similar or in addition to or in
48 modification, limitation or expansion of proposed Senate Bill 236 of the 147th General Assembly would be appropriate,
49 and to submit to the 148th General Assembly for consideration any legislative proposals deemed meritorious in continuing
50 and promoting the adoption and use of the State's business entity laws by corporations and their investors.

SYNOPSIS

This Joint Resolution calls upon the Delaware State Bar Association, its Corporation Law Section, and the Council of that Section, to continue examination of important proposed amendments to the Delaware General Corporation Law relating to fee-shifting bylaws and other aspects of corporate litigation.

Author: Senator Townsend