

Effective Dates of Certificate of Incorporation  
and Certificate of Merger or Consolidation

Amendments to the Business Corporation Law

Chapter 590 of the Laws of 1986, approved July 14, 1986, amended Section 403 of the Business Corporation Law (BCL) to provide that a certificate of incorporation may set forth a date not to exceed 90 days subsequent to filing with the Secretary of State, upon which date corporate existence will begin. This chapter also amended Section 907(g) of the BCL to provide that a certificate of merger or consolidation may similarly set forth a date up to 90 days subsequent to such filing, on which date a merger or consolidation is to be effected.

Effect on Corporate Franchise Taxpayers

Prior to the amendments made by Chapter 590, a certificate of incorporation was automatically effective upon filing. A certificate of merger or consolidation was permitted a post-filing effective date of up to 30 days. Taxpayers are now provided a measure of flexibility in establishing and terminating corporate existence to coincide with tax years and other corporate planning needs.

For example, corporate existence could conveniently be made to commence at the beginning of a calendar or fiscal year and avoid the tax and reporting burdens of premature organization. Similarly, by permitting an effective date of up to 90 days on a certificate of merger or consolidation, corporate taxpayers can plan the merger or consolidation earlier, thus avoiding a possible roll-over into the next taxable period as a result of not being able to assemble all the necessary information to make a timely filing of the certificate of merger or consolidation.

Effect on Subchapter S Taxpayers

Shareholders of a corporation which is an S corporation for federal income tax purposes are permitted to make an election under Section 660(a) of the Tax Law to be taxed under the Personal Income Tax Law (Article 22) and to exempt the corporation from the corporation franchise tax (Article 9-A). The election to treat the corporation as a New York S corporation must be made at any time during a preceding taxable year or on or before the fifteenth day of the third month (75 days) of the taxable year to which the election will apply. Since corporations may now specify an effective date of up to 90 days from the date of the filing of the certificate of incorporation upon which corporate existence may begin, they are provided more time in which to plan, and if desired, to elect S corporation status for New York purposes.

Effective Date

The amendments to the BCL made by Chapter 590 are effective September 1, 1986 and apply to certificates of incorporation or certificates of merger or consolidation filed on or after that date.

Notice to Taxpayers and Practitioners

Where another date has not been provided in the certificate of incorporation, corporate existence will begin upon filing with the Department of State. The election to be treated as a New York S corporation is similarly affected, it should be noted that the new 90 day rule does not apply to certificates of amendment, certificates of reduction in capital, restated certificates of incorporation or any other certificate which may be filed under the BCL. In addition, no similar amendment has been made to any other law under which a corporation may be formed.

The amendments to the BCL made by Chapter 590 of the Laws of 1986 are applicable only to certificates of incorporation filed under Section 403 of the BCL and certificates of merger or consolidation filed under Section 907(g) of the BCL.