

1967 O. A. G.

OFFICIAL OPINION NO. 37

November 3, 1967

**CORPORATIONS—SECRETARY OF STATE—
Filing Fees to Be Charged.**

Opinion Requested by Hon. Edgar D. Whitcomb, Secretary of State.

You have informed me that you are presently engaged in the preparation of new forms and an instruction guide for corporations for profit, which will incorporate changes made by the 1967 General Assembly in The Indiana General Corporation Fee Act of 1957. You and the Corporation Advisory Committee seek my advice concerning the answers to the following questions which have arisen concerning the proper interpretation of that Act. For my convenience in answering, I have rephrased and renumbered your questions.

- (1) What is the proper charge for issuing a certificate of good standing impressed with the Great Seal of the State of Indiana?
- (2) In determining the proper charge for filing a certificate of increase of capital stock, shall your office take into account the number of shares previously authorized, or shall you charge solely on the basis of the number of shares by which the authorized stock is increased?
- (3) What is the proper charge for filing a certificate of increase of capital stock of seven hundred and fifty-one (751) to one thousand (1,000) shares?
- (4) Shall a minimum fee of twenty dollars (\$20.00) be charged for each filing of articles of agreement of merger, consolidation or union pursuant to § 2 (e) (1) and (2), Burns § 25-602(e) (1) and (2) ?

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(1) The answer to your first question is clear. Acts 1895, ch. 145, § 3, Burns § 49-1201, did authorize the Secretary of State to charge fifty cents (\$.50) for each attestation and seal not exempted therein, and also provided charges for filing and recording articles of incorporation. However, Acts 1957, ch. 230, Burns §§ 25-601—25-606, The Indiana General Corporation Fee Act of 1957, specifically provides a different and higher mandatory charge to be made by the Secretary of State for the issuance of certificates and for affixing the great seal of the State:

“In addition to any and other fees herein prescribed the secretary of state shall charge and collect two dollars for each certificate issued by him, and one dollar for each impression of the great seal of the State of Indiana affixed by him on said certificate, all of which shall be covered in by him into the general fund of the State of Indiana.” Section 3, Burns § 25-603.

To the extent to which there is a conflict between the 1895 statute and the 1957 statute as to the charges which must be made by your office, the 1957 statute must prevail. The Supreme Court stated in *Fort Wayne Community Schools v. State ex rel. New Haven Public Schools*, 240 Ind. 57, 64-65, 159 N.E. 2d 708 (1959):

“. . . of course the rule is well settled that in case of conflict between statutes upon a particular subject matter, it is the later expression of the legislature which controls.”

Therefore, in my opinion, you should charge three dollars (\$3.00) for the preparation of a Certificate of Good Standing, based upon a two dollar (\$2.00) charge for the issuance of the certificate, and a one dollar (\$1.00) charge for the impression of the Great Seal of the State of Indiana.

(2) Your second question concerns the fees to be charged for filing a certificate of increase of capital stock pursuant to § 2 (b) of The Indiana General Corporation Fee Act of 1957, as last amended by Acts 1967, ch. 159, § 1, Burns § 25-602 (b). That subsection reads as follows:

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“(b) For filing with the secretary of state a certificate of increase of capital stock, whether par value or no par value, of a domestic corporation for profit, two cents per share on the first two hundred thousand (200,000) shares, one cent per share on the next eight hundred thousand (800,000) shares, and two-tenths (0.2) of one cent per share on all additional shares; and where the increase, whether par value or no par value, is one thousand shares or less, fifteen dollars minimum fee.”

Prior to the 1967 amendment, this subsection required the charging of a flat two cents (\$0.02) per share for each certificate of increase of more than one thousand (1,000) shares. Apparently, some of the corporations filing certificates of increase have contended that the number of shares which determines the applicable rate under the amended section is the total number of shares authorized after the certificate of increase has been filed. Under this theory, for example, a two thousand (2,000) share increase of a corporation with at least one million (1,000,000) shares previously authorized would be charged at the rate of two-tenths of one cent (\$0.002) per share, rather than two cents (\$0.02) per share. In my opinion, that contention is unsound.

This subsection is clear and unambiguous. The last clause resolves any possible question concerning the interpretation of the preceding clauses in the section: “and where the *increase . . . is one thousand shares or less*, fifteen dollars minimum fee.” (Emphasis added.) The fees set out herein are to be charged for the number of shares by which the previously authorized number of shares is increased. The same conclusion under a prior statute was reached in 1944 O.A.G., p. 249.

(3) Your third question also concerns the interpretation of section 2 (b) of the 1957 Act, as amended in 1967, Burns § 25-602 (b). The pertinent portion reads as follows:

“For filing with the secretary of state a certificate of increase of capital stock . . . of a domestic corporation for profit, two cents per share on the first two

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hundred thousand (200,000) shares . . . and where the increase . . . is one thousand shares or less, fifteen dollars *minimum* fee.” (Emphasis added.)

As you stated, a simple mathematical computation will show that a charge of two cents (\$0.02) per share on one thousand (1,000) shares will amount to twenty dollars (\$20.00), five dollars (\$5.00) above the stated minimum. The legal minimum is reached, when charging two cents (\$0.02) per share, at seven hundred and fifty (750) shares. This subsection as originally enacted, and as reenacted in the amendment of 1959, ch. 159, § 1, of the 1959 Acts, read as follows:

“For filing with the secretary of state a certificate of increase of capital stock, whether par value or no par value, of a domestic corporation for profit, two cents per share on the first twenty thousand (20,000) shares and two cents per share on all additional shares *where the increase is more than one thousand shares, and where the increase, whether par value or no par value, is one thousand shares or less, fifteen dollars minimum fee.*” (Emphasis added.)

The section then specifically provided that the charge of two cents (\$0.02) per share should be made “where the increase is *more than one thousand shares.*” (Emphasis added.) Therefore, under that statute, the proper charge was fifteen dollars (\$15.00) for an increase of one thousand shares or less. The fact that the quoted language was omitted from the subsection, as it was amended in 1967, indicates that the Legislature intended to make a change in the effect of the subsection. *Dailey v. Pugh*, 83 Ind. App. 431, 131 N.E. 836 (1921).

Under this section before the 1967 amendment, a smaller amount per share was charged for increases of seven hundred and fifty (750) shares to one thousand (1,000) shares than was charged for increases of one (1) to seven hundred and fifty (750) shares, or increases of one thousand and one (1,001) to two hundred thousand (200,000) shares. Such a

system of fees or taxation does not make sense, and the change in language must have been intended to remedy the previous inequity. The retention of the word "minimum" to describe the fifteen dollar (\$15.00) fee also indicates that (a) no less than fifteen dollars (\$15.00) must be charged for a certificate of increase of capital stock of less than one thousand (1,000) shares, and (b) the regular two cents (\$0.02) per share on the first two hundred thousand (200,000) shares must be charged unless the amount resulting from that computation is less than fifteen dollars (\$15.00).

In answer to your third question, therefore, it is my opinion that you should charge, under section 2 (b), as amended, Burns § 25-602 (b), for the first seven hundred and fifty (750) shares or less increase, the minimum fee of fifteen dollars (\$15.00), and for all increases over seven hundred and fifty (750) shares up to and including one thousand (1,000) shares, two cents (\$0.02) per share should be charged.

(4) Your fourth question relates to the fees to be charged for the filing of corporate articles of agreement to consolidate, merge or unite. Subsection 2 (e) of the Act, as last amended by Acts 1967, ch. 159, § 1, Burns § 25-602 (e), governs such charges. Paragraphs (1) and (2) are identical except that the first applies to a resulting or remaining corporation which becomes an Indiana corporation, while the second applies to a resulting or remaining foreign corporation admitted or seeking to be admitted to do business in Indiana. Therefore, both paragraphs (1) and (2) will be treated as identical for the purposes of your question.

The question arises from the following language:

"(e) For filing with the secretary of state the articles of agreement . . . of any consolidation, merger, or union of corporations . . .

"(1) . . . the secretary of state shall charge the same fees in each case for filing such articles of agreement . . . as is hereinabove set forth for filing articles of incorporation . . . of a . . . corporation for profit, having the same amount of capital stock as the result-

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ing or remaining corporation . . . but shall deduct therefrom and allow full credit for the fee on the number of shares, authorized prior thereto for any domestic corporation and represented in this state prior thereto for any foreign corporation admitted to do business in this state, included in such consolidation, merger, or union and for which a fee has been paid."

You ask whether any fee shall be charged when the resulting or remaining corporation has the same or a lower number of shares than the consolidated, merged or united corporation (or corporations) for which a fee has previously been paid. No charge at all would be made, unless it is necessary to charge for each filing of articles of agreement, regardless of previous fees paid, the fee of twenty dollars (\$20.00) provided in subsection (a) for filing articles of incorporation for a domestic corporation having one thousand (1,000) or less shares of stock. (Subsection (a) is identical to subsection (c), which applies to foreign corporations, insofar as the amount of fees is concerned.) In my opinion, the twenty dollar (\$20.00) fee must be charged in each case.

Paragraph (3) of subsection 2 (e), as amended, of The Indiana General Corporation Fee Act of 1957, Burns § 25-602 (e) (3), requires that you charge a ten dollar (\$10.00) fee for the filing of articles of agreement when the resulting or remaining corporation is neither admitted nor seeking admission to do business in this State, regardless of the number of shares for which fees have previously been paid. Paragraph 4 of subsection (e) further provides that the subsection shall apply to an existing corporation continued after a merger, consolidation or union, as well as to a new corporation. Thus, subsection (e), when its provisions are read together, shows an intention on the part of the Legislature to charge a fee for each filing of articles of agreement, regardless of any credits given in that subsection. The charge of twenty dollars (\$20.00) in subsections (a) and (c) amounts to a minimum fee. It, therefore, appears to me that the language in subsections (1) and (2) of subsection (e) which requires you to charge the same fee as that charged for filing articles of incorporation (or application for admission in the

case of a foreign corporation), with credit for the number of shares for which fees have previously been paid, must be interpreted to incorporate the minimum fee requirements for filing articles of incorporation or application for admission. In my opinion, a minimum fee of twenty dollars (\$20.00) should be charged for each filing of articles of agreement of consolidation, merger or union of corporations itemized in paragraphs (1) and (2) of subsection (e).

In summary, your questions have been answered as follows:

(1) Your charge for the preparation and issuance of a Certificate of Good Standing impressed with the Great Seal of the State of Indiana is three dollars (\$3.00).

(2) The rate to be charged for the filing of a certificate of increase of capital stock must be determined from the number of shares by which the capital stock is increased, without regard to the number of shares previously authorized.

(3) The minimum fee of fifteen dollars (\$15.00) for filing a certificate of increase of capital stock should be charged for all increases of seven hundred and fifty (750) or less shares. A fee of two cents (\$0.02) per share should be charged on all increases of seven hundred and fifty-one (751) through two hundred thousand (200,000) shares.

(4) No less than a minimum fee of twenty dollars (\$20.00) should be charged for each filing of articles of agreement of merger, consolidation or union under Burns § 25-602 (e) (1) and (2).