WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

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FILE NO. S-1287

**BUSINESS ORGANIZATIONS:
Manner in Which a Foreign
Corporation May Reduce Its
Paid-In Surplus**

Honorable Alan J. Dixon
Secretary of State
State of Illinois
Springfield, Illinois 62706

Dear Mr. Dixon:

I have your letter wherein you inquire whether the Secretary of State should accept and file a report under section 119 of The Business Corporation Act (Ill. Rev. Stat. 1975, ch. 32, par. 157.119) showing a reduction of paid-in surplus when such surplus has not been reduced in accordance with section 60a of the same Act. (Ill. Rev. Stat. 1975, ch. 32, par. 157.60a.) For the reasons hereinafter stated, it is my opinion that a foreign corporation is not required

to comply with section 60a in order to effect a reduction of its paid-in surplus and a corresponding reduction in its franchise taxes. It is also my opinion that a report submitted under section 119 should be accepted and filed if a change in the corporation's paid-in surplus is made in a manner permitted by the laws of the State or country under which it is organized.

The basis for computation of the franchise tax for a foreign corporation is the sum of such corporation's stated capital and paid-in surplus. (Ill. Rev. Stat. 1975, ch. 32, par. 157.139.) The sum of the stated capital and paid-in surplus is ascertained from the annual report which is filed under section 115 of the Act (Ill. Rev. Stat. 1975, ch. 32, par. 157.115), and a reduction in stated capital and paid-in surplus is reported by an additional filing under section 119 of the Act which provides in pertinent part as follows:

> "Whenever a foreign corporation authorized to transact business in this State (1) shall be a party to a statutory merger and shall be the surviving corporation, or (2) shall effect a reduction in the amount of its stated capital or paid-in surplus, or both, by the redemption and cancellation of its shares, or (3) shall effect any formal change in the sum of its stated capital and paid-in surplus, by amendment to its

articles of incorporation or in any other manner permitted by the laws of the state or country under which it is organized, and such change is not reported to the Secretary of State by any other report required by this Act to be filed, it shall, within sixty days after the effective date of such change, execute and file, in the manner herein provided, a report setting forth:

(a) The name of the corporation.
(b) A statement of the nature of the change effected.

* * *

(e) A statement, expressed in dollars, of the amount of stated capital and the amount of paid-in surplus of the corporation as last reported to the Secretary of State in any document required to be filed by this Act, other than an annual report.
(f) A statement, expressed in dollars, of the amount of stated capital, and the amount of paid-in surplus of the corporation after giving effect to such change.

* * *

Such report shall be made on forms prescribed and furnished by the Secretary of State and shall be executed by the corporation by its president or a vice-president, and verified by him, and the corporate seal shall be thereunto affixed, attested by its secretary or an assistant secretary, and delivered to the Secretary of State. Upon receipt thereof he shall examine the same, and if he finds that it conforms to the provisions of this Act, he shall, when all franchise taxes, fees, and charges have been paid as in this Act prescribed, endorse thereon the word 'Filed,' and the month, day, and year of the filing thereof, and thereupon file the same in his office." (Emphasis added.)

Statutory language should be given its plain and

commonly accepted meaning. (People v. McCoy (1976), 63 Ill. 2d 40, 45.) Applying the plain meaning of the words contained therein to the underscored portion of section 119, one can see clearly that changes in stated capital or paid-in surplus may be effected in any way permitted by the State or country of incorporation and that Illinois procedures need not be followed. Therefore, a report reflecting a reduction in paid-in surplus properly accomplished in a manner permitted by the State or country of incorporation should be accepted and filed by the Secretary of State, and the franchise taxes should be computed on the reduced figure.

You mention in your letter the definition of paid-in surplus contained in section 2-12 of the Act (Ill. Rev. Stat. 1975, ch. 32, par. 157.2-12) and inquire whether that language constitutes a basis for requiring foreign corporations to comply with section 60a. The language of section 2-12 to which you direct my attention is the following:

> " * * * Irrespective of the manner of designation thereof by the laws under which a foreign corporation is or may be organized, the paid-in surplus of a foreign corporation shall be determined on the same basis and in the same manner as paid-in surplus of a domestic corporation, for the purpose of computing fees, franchise taxes and other charges imposed by this Act."

The above language is directed to assets still held by the corporation which might in some manner be disguised under the laws of the State or country of incorporation but would be considered paid-in surplus under Illinois law. This language does not control the manner in which the paid-in surplus of a foreign corporation can be reduced, and therefore, section 60a does not apply.

Since the General Assembly is presumed not to have intended an absurdity or injustice, the construction of the pertinent provisions contained herein is mandated. (Halberstadt v. Harris Trust & Savings Bank (1973), 55 Ill. 2d 121, 128. In the situation which you have presented, corporation A, a Delaware corporation having a certificate of authority to transact business in Illinois, had a paid-in surplus of approximately $200,000,000. In December of 1975, corporation B, a subsidiary of corporation A, was formed in Delaware and granted a certificate of authority to transact business in Illinois. Approximately $84,000,000 out of the paid-in surplus of corporation A was "spun-off" to corporation B. The aforementioned "spin-off" was permissible under Delaware

law and resulted in the reduction of the paid-in surplus of corporation A to approximately $116,000,000. Corporation B paid franchise taxes based upon its $84,000,000 paid-in surplus. A refusal to accept a section 119 report from corporation A and a requirement that said corporation pay franchise taxes on its former paid-in surplus figure of $200,000,000 because it did not reduce its paid-in surplus in accordance with section 60a would result in double taxation on $84,000,000 in paid-in surplus. The result would be unjust and, therefore, a construction which produces this result cannot be presumed to be the one intended by the General Assembly.

Very truly yours,

ATTORNEY GENERAL