

SECURITIES AND EXCHANGE COMMISSION

FORM 8-K

Current report filing

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FILER

BUCYRUS INTERNATIONAL INC

CIK: **740761** | IRS No.: **390188050** | State of Incorpor.: **DE** | Fiscal Year End: **1231**

Type: **8-K** | Act: **34** | File No.: **001-00871** | Film No.: **11964110**

SIC: **3532** Mining machinery & equip (no oil & gas field mach & equip)

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**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**
Washington, D.C. 20549

Form 8-K

Current Report

**Pursuant to Section 13 or 15(d) of the
Securities Exchange Act of 1934**

Date of Report (Date of earliest event reported): July 8, 2011

Bucyrus International, Inc.

(Exact name of registrant as specified in its charter)

001-00871

(Commission File Number)

Delaware

(State or other jurisdiction
of incorporation)

39-0188050

(I.R.S. Employer
Identification No.)

**P.O. Box 500, 1100 Milwaukee Avenue,
South Milwaukee, Wisconsin 53172**

(Address of principal executive offices, with zip code)

(414) 768-4000

(Registrant's telephone number, including area code)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (*see* General Instruction A.2. below):

- ☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
 - ☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
 - ☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
 - ☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))
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On July 8, 2011, Bucyrus International, Inc. (the “Company”) and Caterpillar Inc., a Delaware corporation (“Caterpillar”), completed the previously announced merger of a wholly owned subsidiary of Caterpillar with and into the Company in accordance with the Agreement and Plan of Merger, dated as of November 14, 2010, by and among Caterpillar, Badger Merger Sub, Inc., a Delaware corporation and a wholly owned subsidiary of Caterpillar (“Merger Sub”) and the Company (the “Merger Agreement”). Pursuant to the terms of the Merger Agreement, Merger Sub merged with and into the Company (the “Merger”), with the Company continuing as the surviving entity and a wholly owned subsidiary of Caterpillar. The Merger became effective on July 8, 2011 at 8:48 a.m., Central Daylight Time (the “Effective Time”).

Item 1.02 Termination of a Material Definitive Agreement.

As of July 8, 2011, in connection with the closing of the Merger, the Company terminated that certain Amended and Restated Credit Agreement, dated as of May 25, 2007 (as amended, the “Credit Agreement”), among the Company, the Foreign Subsidiaries of the Company from time to time party thereto, the lenders party thereto and JPMorgan Chase Bank, N.A., as administrative agent, and repaid all amounts (including principal, interest and fees) accrued and outstanding thereunder. Letters of credit issued for the account of the Company pursuant to the Credit Agreement having a face value of approximately \$263 million remain outstanding following termination of the Credit Agreement, and Caterpillar has provided a guaranty of the Company’s obligations with respect thereto.

Item 2.01 Completion of Acquisition or Disposition of Assets.

At the Effective Time, each outstanding share of common stock, par value \$0.01 per share, of the Company (the “Company Common Stock”), other than those held by the Company, Caterpillar or Merger Sub or any other direct or indirect wholly owned subsidiary of Caterpillar, was converted into the right to receive \$92.00 in cash, without interest (the “Merger Consideration”). At the Effective Time, holders of shares of Company Common Stock ceased to have any rights as stockholders in the Company, other than the right to receive the Merger Consideration in accordance with the Merger Agreement. Immediately prior to the Effective Time, each outstanding share of Company restricted stock became fully vested and, in connection with the Merger, was converted into the right to receive \$92.00 per share in cash, without interest and less any applicable withholding taxes. At the Effective Time, (i) each outstanding Company restricted stock unit, vested or unvested, was cancelled and converted into the right to receive a cash payment equal to \$92.00 in cash for each share of Company Common Stock subject to the restricted stock unit award, without interest and less any applicable withholding taxes and (ii) each outstanding Company stock appreciation right, vested or unvested, was cancelled and converted into the right to receive a cash payment equal to \$92.00 for each share of Company Common Stock subject to the stock appreciation right, less the applicable exercise price per share, without interest and less any applicable withholding taxes.

The aggregate value of consideration paid to former holders of the Company Common Stock in connection with the Merger was approximately \$7.6 billion.

The foregoing summary of the Merger Agreement and the transactions contemplated thereby does not purport to be complete and is qualified in its entirety by reference to the full text of the Merger Agreement, which was attached as Exhibit 2.1 to the Company’s Current Report on Form 8-K filed with the Securities and Exchange Commission (the “SEC”) on November 17, 2010, and is incorporated herein by reference.

Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing.

In connection with the closing of the Merger, the Company requested that the NASDAQ Stock Market (“NASDAQ”) suspend trading in Company Common Stock, effective as of July 8, 2011, and file with the SEC an application on Form 25 in accordance with Rule 12d2-2 promulgated under the Securities Exchange Act of 1934, as amended, to delist the Company Common Stock as soon as practicable.

Item 3.03 Material Modification to Rights of Security Holders.

The information under Item 2.01 is incorporated herein by reference.

Item 5.01 Changes in Control of Registrant.

Upon the Effective Time, a change in control of the Company occurred, and the Company became a wholly owned subsidiary of Caterpillar. Caterpillar funded its payment of the Merger Consideration using a combination of the net proceeds from its May 2011 underwritten public offering of senior notes and cash on hand.

The information under Item 2.01 is incorporated herein by reference.

Item 5.02 Departure of Directors or Principal Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

Immediately prior to the Effective Time, the following directors of the Company resigned from the Company's Board of Directors (the "Board of Directors") and any committees of the Board of Directors, as provided in the Merger Agreement:

Theodore C. Rogers
Michelle L. Collins
Paul W. Jones
Deepak T. Kapur
Gene E. Little
Robert K. Ortberg
Robert L. Purdum
Robert C. Scharp

Following such resignations, Timothy W. Sullivan, as the Company's only remaining director, appointed Christopher Curfman to the Board of Directors, effective as of the Effective Time. Effective as of the Effective Time and following such appointment, Timothy W. Sullivan resigned from the Board of Directors.

Immediately following the Effective Time, each of the Company's officers was removed pursuant to action by the Company's Board of Directors. As a result, immediately following the Effective Time, each of Timothy W. Sullivan, Craig R. Mackus, William S. Tate, Luis de Leon, John F. Bosbous and Mark J. Knapp ceased to be an officer of the Company.

Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.

Immediately following the Effective Time on July 8, 2011, the Company filed with the Secretary of State of the State of Delaware an amended and restated certificate of incorporation, which became effective on such date. In addition, pursuant to the terms of the Merger Agreement, at the Effective Time, the bylaws of Merger Sub as in effect immediately prior to the Effective Time became the bylaws of the Company. Copies of the amended and restated certificate of incorporation and the bylaws are filed as Exhibits 3.1 and 3.2, respectively, to this Current Report on Form 8-K.

Item 9.01 Financial Statements and Exhibits.

(d) *Exhibits.*

<u>Exhibit Number</u>	<u>Description</u>
2.1	Agreement and Plan of Merger, by and among Caterpillar, Merger Sub and the Company (incorporated by reference to Exhibit 2.1 to the Company's Current Report on Form 8-K filed with the SEC on November 17, 2010).
3.1	Amended and Restated Certificate of Incorporation of the Company.
3.2	Bylaws of the Company.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Date: July 12, 2011

BUCYRUS INTERNATIONAL, INC.

By: /s/ Julie A. Lagacy

Julie A. Lagacy

Chief Financial Officer

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EXHIBIT INDEX

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3.1	Amended and Restated Certificate of Incorporation of the Company
3.2	Bylaws of the Company.

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF
BUCYRUS INTERNATIONAL, INC.

Bucyrus International, Inc., a corporation organized and existing under the laws of the State of Delaware, hereby certifies as follows:

1. The name of the corporation is Bucyrus International, Inc. The corporation was originally incorporated under the name Bucyrus-Erie Company. The date of filing of the corporation's original certificate of incorporation with the Secretary of State was November 3, 1927.
2. This Amended and Restated Certificate of Incorporation has been duly adopted in accordance with the provisions of Sections 242 and 245 of the General Corporation Law of Delaware.
3. The text of the Certificate of Incorporation of the corporation is amended and restated to read as herein set forth in full as follows:

AMENDED AND RESTATED CERTIFICATE OF INCORPORATION
OF
BUCYRUS INTERNATIONAL, INC.

FIRST: The name of the corporation is Bucyrus International, Inc. (the "Corporation").

SECOND: The registered office of the Corporation in the State of Delaware shall be located at the Corporation Trust Center, 1209 Orange Street, Wilmington, New Castle County, Delaware 19801. The name of the registered agent at such address shall be The Corporation Trust Company.

THIRD: The purposes of the Corporation are to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware. The Corporation shall be authorized to conduct its business or hold property in any part of the United States and its possessions and foreign countries.

FOURTH: The total number of shares of all classes of stock which the Corporation shall have authority to issue is 1,000 shares of Common Stock, no par value per share.

FIFTH: The Corporation is to have perpetual existence.

SIXTH: The Corporation shall indemnify its directors and officers to the fullest extent authorized or permitted by law, as now or hereafter in effect, and such right to indemnification shall continue as to a person who has ceased to be a director or officer of the Corporation and shall inure to the benefit of his or her heirs, executors and personal and legal representatives; provided, however, that, except for proceedings to enforce rights to indemnification, the Corporation shall not be obligated to indemnify any director or officer (or his or her heirs, executors or personal or legal representatives) in connection with a proceeding (or part thereof) initiated by such person unless such proceeding (or part thereof) was authorized or consented to by the Board of Directors. The right to indemnification conferred by this Section 6 shall include the right to be paid by the Corporation the expenses incurred in defending or otherwise participating in any proceeding in advance of its final disposition.

The Corporation may, to the extent authorized from time to time by the Board of Directors, provide rights to indemnification and to the advancement of expenses to employees and agents of the Corporation similar to those conferred in this Section 6 to directors and officers of the Corporation.

The rights to indemnification and to the advance of expenses conferred in this Section 6 shall not be exclusive of any other right which any person may have or hereafter acquire under this Amended and Restated Certificate of Incorporation, the Bylaws of the Corporation, any statute, agreement, vote of stockholders or disinterested directors or otherwise.

Any repeal or modification of this Section 6 shall not adversely affect any rights to indemnification and to the advancement of expenses of a director or officer (or, if applicable, employee or agent) of the Corporation existing at the time of such repeal or modification with respect to any acts or omissions occurring prior to such repeal or modification.

IN WITNESS WHEREOF, Bucyrus International, Inc. has caused this Amended and Restated Certificate of Incorporation to be signed as of this 8th day of July, 2011.

BUCYRUS INTERNATIONAL, INC.

By: /s/ Christopher C. Curfman

Name: Christopher C. Curfman

Title: President

AMENDED AND RESTATED BYLAWS
OF
BUCYRUS INTERNATIONAL, INC.

ARTICLE I

OFFICES

Section 1. The registered office shall be located at the Corporation Trust Center, 1209 Orange Street, Wilmington, New Castle County, Delaware 19801.

Section 2. The corporation may also have offices at such other places both within and without the State of Delaware as the board of directors may from time to time determine or the business of the corporation may require.

ARTICLE II

MEETINGS OF STOCKHOLDERS

Section 1. All meetings of the stockholders for any purpose may be held at such place, within or without the State of Delaware, as shall be stated in the notice of the meeting or in a duly executed waiver of notice thereof.

Section 2. Annual meetings of stockholders shall be held on the last Wednesday in April in each year starting in 2011 (or if that date is a legal holiday, then on the first succeeding business day) at such time and place as may be designated by the board of directors, or at such date, time or place as shall be stated in the notice of the meeting or in a duly executed waiver of notice thereof. At each meeting the stockholders shall elect by a plurality vote a board of directors and may transact any other proper business.

Section 3. Written notice of the annual meeting stating the place, date and time of the meeting shall be given to each stockholder entitled to vote at such meeting at least ten days prior to the meeting.

Section 4. Special meetings of the stockholders, for any purpose or purposes, unless otherwise prescribed by statute or by the certificate of incorporation, may be called either by any member of the board of directors or by any stockholder. Such call shall state the purpose or purposes of the proposed meeting.

Section 5. Written notice of a special meeting stating the place, date, and time of the meeting and the purpose or purposes for which the meeting is called, shall be given not less than ten days before the date of the meeting to each stockholder entitled to vote at such meeting.

Section 6. Business transacted at any special meeting of stockholders shall be limited to the purposes stated in the notice.

Section 7. The holders of one third of the stock issued and outstanding and entitled to vote thereat, present in person or represented by proxy, shall constitute a quorum at all meetings of stockholders for the transaction of business except as otherwise provided by statute, by the certificate of incorporation or by these bylaws. If, however, such quorum shall not be present or represented at any meeting of the stockholders, the stockholders entitled to vote thereat, present in person or

represented by proxy shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present or represented. At such adjourned meeting at which a quorum shall be present or represented any business may be transacted which might have been transacted at the meeting as originally notified. If the adjournment is for more than thirty days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting.

Section 8. When a quorum is present at any meeting, the vote of the holders of a majority of the stock having voting power present in person or represented by proxy shall decide any question brought before such meeting, unless the question is one upon which by express provision of the statutes or of the certificate of incorporation or of these bylaws a different vote is required in which case such express provision shall govern and control the decision of such question.

Section 9. Each stockholder shall at every meeting of the stockholders be entitled to one vote in person or by proxy for each share of the capital stock having voting power held by such stockholder, but no proxy shall be voted after three years from its date unless the proxy provides for a longer period.

Section 10. Whenever the vote of stockholders at a meeting thereof is required or permitted to be taken for or in connection with any corporate action, such action may be taken by the written consent of stockholders owning stock having not less than the minimum number of votes which is required to authorize such action at a meeting, provided that prompt notice of the taking of such action must be given to those stockholders who have not consented in writing.

ARTICLE III

DIRECTORS

Section 1. The number of directors which shall constitute the whole board shall be such number not less than one (1) nor more than ten (10) as the board of directors shall from time to time determine. Except as provided in Section 2 of this Article, directors shall be elected at the annual meeting of the stockholders and each director shall hold office until his successor is elected and qualified. Directors need not be stockholders.

Section 2. Vacancies and newly created directorships resulting from any increase in the authorized number of directors may be filled by a majority of the directors then in office, though less than a quorum, or by a sole remaining director, and the directors so chosen shall hold office until the next annual election and until their successors are duly elected and shall qualify, unless sooner displaced. If there are no directors in office, then an election of directors may be held in the manner provided by statute.

Section 3. The business and property of the corporation shall be managed by its board of directors which may exercise all such powers of the corporation and do all such lawful acts and things as are not by statute or by the certificate of incorporation or by these bylaws directed or required to be exercised or done by the stockholders.

Section 4. The board of directors may hold meetings, both regular and special, either within or without the State of Delaware.

Section 5. The first meeting of each newly elected board of directors shall be held at the same place as, and immediately following, each annual meeting of stockholders and no notice of such meeting shall be necessary to the newly elected directors in order legally to constitute the meeting, provided a quorum shall be present, or they may meet at such time and place as shall be fixed by the consent in writing of all of the directors.

Section 6. Regular meetings of the board of directors may be held without notice on such date and at such time and place as shall from time to time be determined by the board.

Section 7. Special meetings of the board may be called by any director on one (1) days' notice to each director, either delivered personally, by facsimile, by telegram or by other written or electronic means, or on three (3) days' notice if sent by mail. If the secretary or an assistant secretary shall fail or refuse to give such notice, then the notice may be given by the director making the call. Any such meeting may be held at such place as the board may fix from time to time or as may be specified or fixed in such notice or waiver thereof. Any meeting of the board of directors shall be a legal meeting without any notice thereof having been given, if all the directors shall be present thereat, and no notice of a meeting shall be required to be given to any director who shall attend such meeting.

Section 8. At all meetings of the board a majority of the total number of directors shall constitute a quorum for the transaction of business and the act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the board of directors, except as may be otherwise specifically provided by statute or by the certificate of incorporation. If a quorum shall not be present at any meeting of the board of directors, the directors present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present.

Section 9. Unless otherwise restricted by the certificate of incorporation or these bylaws, any action required or permitted to be taken at a meeting of the board of directors or of any committee thereof may be taken without a meeting, if all members of the board or committee, as the case may be, consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the board or committee.

Section 10. Members of the board, or any committee thereof, may participate in a meeting of the board or such committee by means of conference telephone or similar communications equipment, by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute presence in person at such meeting.

Section 11. Directors, as such, shall not receive any stated salary for their services, but, by resolution of the board, a fixed sum and expenses of attendance, if any, may be allowed for attendance at each regular or special meeting. No such payment shall preclude any director from serving the corporation in any other capacity and receiving compensation therefor.

ARTICLE IV

NOTICES

Section 1. Whenever, under the provisions of the statutes or of the certificate of incorporation or of these bylaws, notice is required to be given to any director or stockholder, it shall not be construed to require personal notice, but such notice may be given in writing, by mail, by facsimile, by telegram, or by other written or electronic means, addressed to such director or stockholder, at his address as it appears on the records of the corporation, with postage thereon prepaid, and such notice shall be deemed to be given at the time when the same shall be sent.

Section 2. Whenever any notice is required to be given under the provisions of the statutes or of the certificate of incorporation or of these bylaws, a waiver thereof in writing, signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent thereto. Except as otherwise provided by statute, notice of any meeting shall be deemed waived by any director present at such meeting or by any stockholder present in person or represented by proxy at such meeting.

ARTICLE V

OFFICERS

Section 1. The officers of the corporation shall be chosen by the board of directors and shall be a president, a secretary, and a treasurer. The board may also choose one or more vice presidents and one or more assistant secretaries and assistant treasurers. Any number of offices may be held by the same person, unless the certificate of incorporation or these bylaws otherwise provide.

Section 2. At the first meeting of the board of directors after incorporation, and thereafter at the first meeting of the board of directors elected at each annual meeting of stockholders, the board of directors shall choose a president, a secretary and a treasurer, none of whom need be a member of the board.

Section 3. The board of directors may choose such other officers and agents as it shall deem desirable who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time by the board. The directors may require any such officers and other employees of the corporation to be bonded as they deem necessary for the protection of the corporation.

Section 4. The officers of the corporation shall hold office until their successors are chosen and qualify. Any officer chosen by the board of directors may be removed at any time by the affirmative vote of a majority of the board of directors, either with or without cause. Any vacancy occurring in any office of the corporation shall be filled by the board of directors.

Section 5. The president shall be the chief executive officer of the corporation, shall have general and active management of the business of the corporation and shall see that all orders and resolutions of the board of directors are carried into effect. In the absence of the president, or in the event of his inability to act, the vice president (or if there is no vice president able to act, the treasurer) shall perform the duties and exercise the powers of the president.

Section 6. The vice-president shall perform such duties and have such powers as the board of directors may prescribe.

Section 7. The secretary shall attend all meetings of the board of directors and of the stockholders and record the proceedings thereof in a book kept for that purpose; shall give, or cause to be given, notice of meetings of stockholders and special meetings of the board of directors; and shall perform such other duties and have such other powers as may be prescribed by the board of directors or the president. He shall have custody of the corporate seal of the corporation and shall have authority to affix the same to any instrument requiring it and, when so affixed, to attest it by his signature. Each other officer shall also have authority to affix the seal of the corporation and to attest the affixing by his signature.

Section 8. Each assistant secretary may, in the absence of the secretary or in the event of his inability to act, perform the duties and exercise the powers of the secretary, and shall perform such other duties and have such other powers as the board of directors, the president or the secretary may prescribe.

Section 9. The treasurer shall have custody of the corporate funds and securities; shall keep full and accurate accounts of receipts and disbursements; and shall perform such other duties and have such other powers as may be prescribed by the board of directors or the president.

Section 10. Each assistant treasurer may, in the absence of the treasurer or in the event of his inability to act, perform the duties and exercise the powers of the treasurer, and shall perform such other duties and have such other powers as the board of directors, the president or the treasurer may prescribe.

ARTICLE VI

INDEMNIFICATION OF OFFICERS AND DIRECTORS

Section 1. The corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he is or was a director or officer of the corporation, or is or was serving at the request of the corporation as a director or officer of another corporation, partnership, joint venture, trust or other enterprise (and the corporation, in the discretion of the board of directors, may so indemnify a person by reason of the fact that he is or was an employee or agent of the corporation or is or was serving at the request of the corporation in any other capacity for or on behalf of the corporation or was serving at the request of the corporation as an employee or agent of another corporation, partnership, joint venture, trust or other enterprise), against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction or upon a plea of *nolo contendere* or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

Section 2. The corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director or officer of the corporation, or is or was serving at the request of the corporation as a director or officer of another corporation, partnership, joint venture, trust or other enterprise (and the corporation, in the discretion of the board of directors, may so indemnify a person by reason of the fact that he is or was an employee or agent of the corporation or is or was serving at the request of the corporation in any other capacity for or on behalf of the corporation or was serving at the request of the corporation as an employee or agent of another corporation, partnership, joint venture, trust or other enterprise) against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

Section 3. To the extent that a present or former director or officer of the corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in Sections 1 and 2 of this Article VI, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

Section 4. Any indemnification under Sections 1 and 2 of this Article VI (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the present or former director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in Sections 1 and 2 of this Article VI. Such determination shall be made, with respect to a person who is a director or officer at the time of determination, (1) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding, even though less than a quorum, or (2) by a committee of such directors designated by majority vote of such directors, even though less than a quorum, or (3) if there are no such directors, or if such directors so direct, by independent legal counsel in a written opinion, or (4) by the stockholders.

Section 5. Expenses (including attorneys' fees) by an officer or director incurred in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors upon receipt of an undertaking by or on behalf of such director or officer to repay such amount unless it shall ultimately be determined that such person is not entitled to be indemnified by the corporation under this Article VI. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.

Section 6. The corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, (i) arising under the Employee Retirement Income Security Act of 1974 or regulations promulgated thereunder, or under any other law or regulation of the United States or any agency or instrumentality thereof or law or regulation of any state or political subdivision or any agency or instrumentality of either, or under the common law of any of the foregoing, against expenses (including attorneys' fees), judgments, fines, penalties, taxes and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding by reason of the fact that he is or was a fiduciary, disqualified person or party in interest with respect to an employee benefit plan covering employees of the corporation or of a subsidiary corporation, or is or was serving in any other capacity with respect to such plan, or has or had any obligations or duties with respect to such plan by reason of such laws or regulations, provided that such person was or is a director, officer, employee or agent of the corporation, or (ii) in connection with any matter arising under federal, state or local revenue or taxation laws or regulations, against expenses (including attorneys' fees), judgments, fines, penalties, taxes, amounts paid in settlement and amounts paid as penalties or fines necessary to contest the imposition of such penalties or fines, actually and reasonably incurred by him in connection with such action, suit or proceeding by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise and had responsibility for or participated in activities relating to compliance with such revenue or taxation laws and regulations; provided, however, that such person did not act dishonestly or in willful or reckless violation of the provisions of the law or regulation under which such suit or proceeding arises. Unless the board of directors determines that under the circumstances then existing, it is probable that such director, officer, employee or agent will not be entitled to be indemnified by the corporation under this Section 6, expenses incurred in defending such suit or proceeding, including the amount of any penalties or fines necessary to be paid to contest the imposition of such penalties or fines, shall be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors in the manner provided in Section 4 of this Article VI upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the corporation under this Section 6.

Section 7. The indemnification provided by this Article VI shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

Section 8. The corporation may purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not he would be entitled to indemnity against such liability under the provisions of this Article VI.

Section 9. For purposes of this Article VI, references to “the corporation” shall include, in addition to the resulting corporation, any constituent corporation (including any constituent of a constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors, officers, and employees or agents, so that any person who is or was a director, officer, employee or agent of such constituent corporation, or is or was serving at the request of such constituent corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, shall stand in the same position under this section with respect to the resulting or surviving corporation as such person would have with respect to such constituent corporation if its separate existence had continued.

Section 10. For purposes of this Article VI, references to “other enterprises” shall include employee benefit plans; references to “fines” shall include any excise taxes assessed on a person with respect to any employee benefit plan; and references to “serving at the request of the corporation” shall include any service as a director, officer, employee or agent of the corporation which imposes duties on, or involves services by, such director, officer, employee, or agent with respect to an employee benefit plan, its participants or beneficiaries; and a person who acted in good faith and in a manner such person reasonable believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a matter “not opposed to the best interests of the corporation” as referred to in this Article VI.

Section 11. The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

ARTICLE VII

GENERAL PROVISIONS

Section 1. The fiscal year of the corporation shall end on the December 31 of each year.

Section 2. The bylaws of the corporation may be adopted, amended, or repealed by the board of directors at any regular or special meeting without prior notice of intent to take such action.