INSIGHTS

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2015 Amendments to the Delaware General Corporation Law

The 2015 amendments to the Delaware General Corporation Law make important changes, including the addition of a prohibition on "fee-shifting" charter and bylaw provisions for stock corporations, express authorization of exclusive forum provisions, amendments confirming that the DGCL provides the flexibility to effect "at the market" stock offerings, significant revisions to the Delaware ratification statute and important amendments to the DGCL provisions governing public benefit corporations.

By Jeffrey R. Wolters and Daniel D. Matthews

On June 24, 2015, Governor Markell of Delaware signed into law amendments to the Delaware General Corporation law (DGCL).[1] Except as otherwise noted, these amendments become effective on August 1, 2015.[2] The amendments address several important topics, including (1) a prohibition on "fee-shifting" provisions that would require a stockholder plaintiff to pay a corporation's litigation expenses, (2) adding a new Section 115 that expressly authorizes exclusive forum provisions in a corporation's charter or bylaws, (3) amendments that confirm the ability of corporation to effect "at the market" stock offerings, (4) significant revisions to the recently enacted Delaware ratification statute, Section 204, and (5) amendments to Subchapter XV regarding public benefit corporations.[3]

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Prohibition on "Fee-Shifting" Charter and Bylaw Provisions

In 2014, on a certified question of law from a Federal District Court, the Delaware Supreme Court upheld as facially valid a "fee-shifting" bylaw that imposed liability on a member of a *nonstock* corporation (*i.e.,* a "membership" corporation, rather than a traditional "stock" corporation) for the corporation's attorneys' fees and other litigation expenses in connection with certain intracorporate claims if the member was not successful in those claims.[4] Following this decision, at least 33 public *stock* corporations adopted "fee-shifting" bylaws and at least 6 *stock* corporations adopted "fee-shifting" provisions in their pre-IPO charter or bylaws.[5] In 2014, amendments that would have prohibited such fee-shifting provisions were proposed, but ultimately not adopted pending "further consideration" of

such provisions and related aspects of corporate litigation.[6]

The amendments adopted on June 24, 2015, would effectively prohibit *stock* corporations from adopting fee-shifting provisions with respect to a defined category of "intracorporate claims." The amendments add a new Section 102(f) to the DGCL (which governs the contents of a certificate of incorporation) and a new sentence to Section 109(b) of the DGCL (which governs the contents of bylaws) that will prohibit on the inclusion of fee-shifting provisions in connection with intracorporate claims in a charter or bylaws.[7] The key term "intracorporate claims" is defined in a new Section 115, which will expressly authorize exclusive forum provisions and is discussed below.[8] The synopsis to the amendments notes that the amendments do not "disturb [the] ruling [in *ATP*] in relation to *nonstock* corporations."[9] The synopsis further clarifies that these amendments are "not intended … to prevent the application of such provisions pursuant to a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced."[10]

Exclusive Forum Provisions

In 2013, the Court of Chancery of the State of Delaware held, in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, an opinion issued by then-Chancellor, now Chief Justice Strine, that an exclusive forum bylaw—*i.e.,* a bylaw specifying that intracorporate claims were required to be brought in the Court of Chancery—was "statutorily valid" under the DGCL.[11] Following this decision, many Delaware corporations adopted exclusive forum bylaws.[12] New Section 115 of the DGCL codifies the Court of Chancery's decision in *Boilermakers* and expressly authorizes a charter provision or a bylaw to select either the Delaware courts, or the Delaware courts and one or more other forums, as the exclusive jurisdiction(s) for "intracorporate claims."[13] Section 115 defines "intracorporate claims" as:

> claims, including claims in the right of the corporation (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.[14]

In addition to codifying the result of *Boilermakers*, new Section 115 prohibits a corporation from adopting a charter or bylaw provision selecting the courts in a different state (or an arbitral forum) as the exclusive forum for intracorporate claims, if that provision would also preclude litigating those claims in the Delaware courts.[15] Accordingly, under Section 115, Delaware corporations have essentially three options regarding how to address the forum for intracorporate claims: a Delaware corporation could (1) not include any provision in its charter or bylaws regarding the forum for litigating intracorporate claims, (2) include a provision selecting the Delaware courts (and no other) as the exclusive forum for litigating intracorporate claims, or (3) include a provision selecting the Delaware courts and one or more other forums as the exclusive forums for litigating intracorporate claims.

Section 115 is not intended to preclude private agreements that include a non-Delaware exclusive forum provision.

Like the prohibition on "fee-shifting" provisions, the synopsis to the amendments notes that Section 115 is not intended to preclude private agreements that include a non-Delaware exclusive forum provision, such as in a stockholders agreement or other writing signed by the stockholder against whom the exclusive forum provision will be enforced.[16] Further, the synopsis also notes that Section 115 is not "intended to foreclose evaluation of whether the specific terms and manner of adoption of a particular provision authorized by Section 115 comport with any relevant fiduciary

obligation or operate reasonably in the circumstances presented."[17]

"At the Market" Stock Issuances

Under Section 152 of the DGCL, the form and manner of payment of the consideration paid for a stock issuance is required to be determined by a corporation's board of directors (or a committee thereof).[18] Historically, this provision has limited the ability of a board of directors to delegate to an agent or officer the authority to fix the terms of a stock issuance.[19] This limitation has been particularly problematic for corporations seeking to effect "at the market" offerings. In 2013, Section 152 was amended to permit a board of directors to determine the amount of consideration for a stock issuance by approving a formula by which the amount of consideration is determined.[20] However, certain commentators suggested that Section 152 should be expanded to provide additional flexibility and certainty that "at the market" offerings are permitted. The 2015 amendments are designed to clarify and confirm that such offerings are permitted by the DGCL.

The amendments provide additional flexibility regarding the determination of the number of shares to be issued and the times of such issuances.

Under the amendments, a board of directors is able to satisfy the requirement to determine the amount of consideration that the corporation will receive in exchange for issuing stock by (1) setting a minimum amount of consideration, (2) approving a formula for determining the amount of consideration, or (3) approving a formula for determining the minimum amount of consideration.[21] The amendments also make clear that the amount of consideration may be made dependent on facts outside of the formula, such as, *e.g.,* market prices of the corporation's stock on one or more dates or an average of such market prices on one or more dates.[22]

The amendments to Section 152 provide additional flexibility regarding the determination of the number of shares to be issued and the times of such issuances. The amendments provide that the number of shares to be issued, and the times of the stock issuances, may either be "set forth in" or "determined in the manner set forth in" the resolutions of the board of directors.[23] The resolutions of the board of directors can provide that the determination as to the number of shares to be issued and the times of the stock issuances may be made by any person or body (including the corporation), so long as the resolutions fix (1) a maximum number of shares that may be issued, (2) a time period during which the shares may be issued and (3) the minimum amount of consideration for which the shares may be issued.[24]

In connection with the amendments to Section 152, the amendments also make conforming changes to Section 157 of the DGCL (which governs the issuance of options and other rights to acquire stock).[25] Section 157 generally requires the terms of an option to be set forth in a board resolution, or set forth in the corporation's certificate of incorporation.[26] Section 157 already allowed the terms of an option to provide that the consideration to be paid upon exercise of an option could be determined based upon a formula.[27] The amendments to Section 157 add a new sentence to Section 157(b) that parallels the amendments to Section 152 and clarifies that the amount of consideration to be paid upon exercise of an option may be made dependent on facts outside of the formula, such as market prices on one or more dates, or an average market price on one or more dates.[28]

Ratification of "Defective Corporate Acts"

On April 1, 2014, Section 204 of the DGCL became effective. Section 204 generally provides

a mechanism to ratify defective (or potentially defective) corporate acts that were beyond the authority conferred by, or not authorized or effected in accordance with, the DGCL or the corporation's certificate of incorporation or bylaws. Under the common law, such acts could not be ratified if they were deemed "void" (in comparison to "voidable").[29] Typical examples of such defective corporate acts include overissuances of stock (*i.e.,* issuances of stock in excess of a corporation's authorized shares),[30] stock splits that are not properly effected,[31] charter amendments[32] or merger agreements[33] that were not approved in the order specified by the DGCL and actions approved by undated stockholder consents (or stockholder consents bearing a single, usually pre-printed, "as of" date for multiple signatories).[34]

Section 204 provides corporations with a "self-help" mechanism to ratify otherwise void or voidable corporate acts. The amendments to Section 204, which apply to defective corporate acts ratified after August 1, 2015, contain extensive revisions to many of the section's provision, though the synopsis makes clear that many of the revisions are intended to be "clarifying" changes.[35] Key aspects of the 2015 amendments to Section 204 include[36]:

Ratification of initial election of directors. New subsection 204(b)(2) permits a "de facto" board, *i.e.,* directors exercising the powers of directors under claim and color of an election or appointment as directors, to ratify the initial election of a board of directors. A valid ratification under Section 204, like any other board action, is dependent on having a valid board of directors in place. This new provision is intended to allow corporations to avoid the situation of being unable to adopt ratifying resolutions under Section 204 because the incorporator of the corporation failed to properly elect the initial board of directors, with the result that all subsequent corporate acts are invalid.

Multiple acts ratified in one resolution. The amendments to Section 204(b)(1) confirm that multiple defective corporate acts may be ratified in a single set of board resolutions. The amendments also make clear that the determination of the applicable voting and quorum requirements is made on an "act by act" basis.

Determination of shares entitled to vote on a ratification. The amendments to Section 204 also clarify, in circumstances in which a stockholder vote is required, only *valid* shares as of the applicable record date are entitled to vote on a ratification. The amendments expressly provide that "putative" (*i.e.,* invalid or potentially invalid) shares are not entitled to vote on such a ratification. Importantly, for these purposes, the characterization of shares as "valid" vs. "putative" is made *without regard to the "relation back" effect of any ratification that becomes effective after such record date*.

Form of certificate of validation filings. The amendments clarify the form that a certificate of validation must take and specify alternative forms for three different circumstances. Namely, where (1) a prior filing was made in respect of the defective corporate act and changes to that filing are not required, (2) a prior filing was made in respect of the defective corporate act and changes to that filing are required, and (3) a prior filing was not made in respect of the defective corporate act.

Notices.

- *Interaction of Sections 204(g) and 228(e).* Section 204(g) was amended to expressly provide, and clarify, that a notice of ratification required by Section 204(g) may be contained in the same document as a notice of stockholder action by written consent required by Section 228(e) relating to such ratification. Note that such a "dual" Sections 204(g) and 228(e) notice must be given to any person entitled to notice under either statute.
- *Elimination of duplicate notice to consenting stockholders.* The amendments to Section 204(g) eliminate the requirement that notice of the ratification be given to stockholders

who have consented to the ratification pursuant to Section 228.

- *Public company exception.* Section 204(g) also now provides that the notice required by Section 204(g) will be deemed given, with respect to a corporation that has a class of stock listed on a national securities exchange, if such a notice is disclosed in a document publicly filed by the corporation under Sections 13, 14 or 15(d) of the Exchange Act. This amendment eliminates the need for public companies that wish to use Section 204 to send a hard copy of the Section 204(g) notice to current stockholders and former stockholders.
- *Effective time of ratification.* The amendments to Section 204 also provide greater flexibility to determine the "validation effective time" for a ratification under Section 204, *i.e.,* the time at which the ratification is complete and becomes effective. Under the current version of Section 204, certain ratifications—specifically, where a ratification does not require the filing of a certificate of validation or a stockholder vote—are effective upon the giving of a notice of ratification under Section 204(g). Under the amendments, a board of directors can specify a future validation effective time, including based on a future event, in the resolutions approving the ratification.
- Even though the validation effective time may be determined by reference to a future event, it will still be important for a corporation to make sure that the Section 204(g) notice of ratification is promptly given, because Section 205 requires that certain claims relating to a ratification under Section 204 must be brought within a 120-day period. Under the amendments (to both Section 204 and Section 205) that 120-day period will begin on the *later* of the validation effective time and the giving of the Section 204(g) notice.

The amendments to Section 204 are extensive and should be reviewed carefully before analyzing whether (and how) to use Section 204 to ratify defective corporate acts.

Public Benefit Corporations

The 2015 amendments to the DGCL also implement important changes to Subchapter XV of the DGCL. Subchapter XV was added in 2013 to authorize the formation of so-called "public benefit" corporations—*i.e.,* a for-profit corporation that binds itself to promote specific public benefit(s) and whose directors are required to balance (1) those specific public benefits, (2) the pecuniary interests of the stockholders, and (3) the best interests of those materially affected by the corporation's conduct.[37]

The amendments change the vote requirements applicable when an existing corporation wishes to convert to a public benefit corporation.

The 2015 amendments make three key changes to the public benefit corporation provisions. First, Section 362(c) is amended to delete the requirement in the current statute that the name of a public benefit corporation include the identifier "public benefit corporation" or the abbreviation "P.B.C." or "PBC." Some public benefit corporations had encountered administrative issues when attempting to register to do business in a state other than Delaware as a foreign corporation because some states did not recognize the "public benefit corporation" identifiers listed above. When a public benefit corporation does not include an express identifier in its name, Section 362(c) as amended requires that upon issuance of stock, the corporation give notice to purchasers that the corporation is a public benefit corporation.[38]

Second, the amendments change the vote requirements applicable when an existing corporation wishes to convert to a public benefit corporation. Under the current version of the statute, an existing corporation can become a

public benefit corporation through a charter amendment or by means of a merger or consolidation, but only with the approval of 90 percent of the outstanding shares of each class of stock of the corporation (including any class of otherwise nonvoting stock).[39] Under the amendments, an existing corporation is able to "opt-in" to public benefit corporation status with approval from holders of shares constituting two-thirds of the voting power of the outstanding capital stock of the corporation entitled to vote on the matter. These amendments (1) reduce the vote threshold from 90 percent to two-thirds, (2) eliminate the separate class votes and (3) eliminate the right of otherwise nonvoting stock to vote on the matter.[40] A corresponding amendment imposes the same vote for a public benefit corporation to eliminate (or amend) the public benefit corporation provisions in its charter (whether by means of charter amendment or a merger or consolidation).[41]

Third, the amendments add a "market out" exception to the appraisal rights that Section 363(b) otherwise provides in connection with a conversion of an existing corporation to a public benefit corporation. Under the current statute, when an existing corporation converts to a public benefit corporation (whether by means of a charter amendment or a merger or consolidation) its stockholders always have appraisal rights.[42] The amendments add a "market out" exception—paralleling the "market out" exception contained in the Delaware appraisal statute, Section 262—that eliminates such appraisal rights if the shares of the public benefit corporation were publicly listed prior to the amendment, merger or consolidation and, in the case of a merger or consolidation, publicly listed following the merger or consolidation.[43] The amendments relating to the addition of this "market out" exception are effective only with respect to mergers and consolidations consummated pursuant to agreements entered into on or after August 1, 2015 or charter amendments approved by a board of directors on or after August 1, 2015.[44]

Notes

1. 80 Del. Laws ch. 40 (2015) (formerly Senate Bill No. 75) (2015 Amendments).

2. 2015 Amendments, § 16.

3. On March 6, 2015, the Council of the Corporation Law Section of the Delaware State Bar Association also published proposed amendments relating to appraisal rights under Section 262 of the DGCL. As of the writing of this article, such amendments have not been submitted to the Delaware General Assembly. For a discussion of those formerly proposed amendments *see* Eric S. Klinger-Wilensky & Daniel D. Matthews, *Proposed Amendments to the Delaware General Corporation Law*, 29 Insights 4 (Apr. 2015).

In addition to the amendments discussed in this article, the 2015 Amendments include the following minor changes to the DGCL: (1) an amendment to Section 102 of the DGCL authorizing the Secretary of State of the State of Delaware to grant exceptions to the normal "distinguishability" requirement for corporate names in certain circumstances, (2) a conforming amendment to Section 245 relating to the form of a restated certificate of incorporation that "restates and integrates" and includes a board-only approved corporate name change (under a 2014 amendment to the DGCL, a corporation is permitted to amend its charter to change its name solely with board approval, instead of the "dual" approval of the board of directors and stockholders normally required for charter amendments) and (3) an amendment to Section 391 to provide that the Secretary of State of the State of Delaware is only required to provide copies of public records in the form of photocopies or electronic images. 2015 Amendments, §§ 1, 10, 15.

4. *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014).

5. Claudia H. Allen, *Fee-Shifting Bylaws: Where Are We Now?* 13 Corporate Accountability Report 03 (The Bureau of National Affairs, Inc. 2015).

6. Delaware State Senate 147th General Assembly, Senate Joint Resolution No. 12 (June 18, 2014), available at *http://legis.delaware.gov/LIS/lis147.nsf/?vwLegislation/?SJR+12/?$file/??legis.html*.

7. 2015 Amendments, §§ 2, 3.

8. 2015 Amendments, § 5.

9. 2015 Amendments, §§ 2, 4 (Synopsis). The 2015 Amendments amend Section 114 of the DGCL (a "translator" provision that controls which provisions of the DGCL apply to nonstock corporation) to make the prohibition on fee-shifting charter provisions and bylaws inapplicable to nonstock corporations. 2015 Amendments, § 4.

10. 2015 Amendments, §§ 2, 3 (Synopsis).

11. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013). In an earlier case, *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 961 & n.8 (Del.Ch. 2010), Vice Chancellor Laster had

suggested that corporations might adopt exclusive forum provisions in their certificates of incorporation.

12. According to one study, by the end of 2013, 155 Delaware corporations had adopted or announced plans to adopt such an exclusive forum bylaw. Claudia H. Allen, *Trends in Exclusive Forum Bylaws* at 3 n.15, Director Notes (Jan. 2014).

13. 2015 Amendments, § 5.

14. *Id.*

15. In substance, this aspect of Section 115 will overturn the result of *City of Providence v. First Citizens BancShares, Inc*., 99 A.3d 229 (Del. Ch. 2014), in which Chancellor Bouchard of the Court of Chancery upheld a forum selection bylaw that chose a non-Delaware forum as the exclusive jurisdiction for intra-corporate claims. *But cf. Revlon*, 990 A.2d at 961 n.8 ("I can envision that the Delaware courts would retain some measure of inherent residual authority so that entities created under the authority of Delaware law could not wholly exempt themselves from Delaware oversight.").

16. 2015 Amendments, § 5 (Synopsis).

17. *Id.* As an example, the Synopsis notes that an exclusive forum provision "may not be enforceable if the Delaware courts lack jurisdiction over indispensable parties or core elements of the subject matter of the litigation. *Id.* The Synopsis also states: "Section 115 is also not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction, nor is Section 115 intended to limit or expand the jurisdiction of the Court of Chancery [of the State of Delaware] or the Superior Court [of the State of Delaware]." *Id.*

18. 8 *Del. C.* § 152.

19. *See, e.g.*, *Field v. Carlisle Corp.*, 68 A.2d 817 (Del. Ch. 1949).

20. 8 *Del. C.* § 152.

21. 2015 Amendments, § 6.

22. *Id.*; *see also* 2015 Amendments, § 6 (Synopsis).

23. 2015 Amendments, § 6.

24. *Id.*

25. 2015 Amendments, § 7.

26. 8 *Del. C.* § 157.

27. 8 *Del. C.* § 157(b).

28. 2015 Amendments, § 7.

29. *Starr Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991); *Blades v. Wisehart*, 2010 WL 4638603 (Del. Ch. Nov. 17, 2010).

30. *See* 8 *Del. C.*§ 161 ("The directors may, at any time and from time to time, if all of the shares of capital stock which the corporation is authorized by its certificate of incorporation to issue have not been issued, subscribed for, or otherwise committed to be issued, issue or take subscriptions for additional shares of its capital stock up to the amount authorized in its certificate of incorporation.").

31. 8 *Del. C.* § 242(a) (authoring a corporation to effect a subdivision of stock, i.e., a "stock split," by means of an amendment to its certificate of incorporation). The effect of a stock split may also be accomplished through the mechanism of the declaration and payment of a stock dividend to the corporation's existing stockholders.

32. 8 *Del. C.* § 242(b) (requiring that an amendment to a corporation's certificate of incorporation be approved *first* by the board of directors and *second* by the stockholders).

33. 8 *Del. C.* § 251(b), (c) (requiring that a merger agreement: *first* be approved by the board of directors, *second* be executed by an officer of the corporation and *third* be approved by the stockholders).

34. 8 *Del. C.* § 228 (stating that "[e]very written consent shall bear the date of signature of each stockholder … who signs the consent").

35. 2015 Amendments, § 8 (Synopsis).

36. 2015 Amendments, § 8.

37. 8 *Del. C.* § 362.

38. 2015 Amendments, § 11.

39. 8 *Del. C.* § 363(a).

40. 2015 Amendments, § 12.

41. 2015 Amendments, § 14.

42. 8 *Del. C.* § 363(b).

43. 2015 Amendments, § 13.

44. 2015 Amendments, § 16.