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INTRODUCTION

The 2015 amendments to the Delaware General Corporation Law (the "DGCL") were recently enacted. The amendments address important policy topics (such as prohibiting charter- or bylaw-imposed "loser-pays" fee-shifting provisions for stockholder litigation and expressly permitting charter- or bylaw-imposed exclusive forum selection provisions). The amendments also make certain technical improvements that should interest practitioners (including changes to the board approvals required to issue stock and changes to Delaware's statute on ratification of corporate defects). Except as noted below, all of the amendments became effective on August 1, 2015. All section references are to the DGCL, and the term "charter" is used as a short-hand reference for a certificate of incorporation.

FEE SHIFTING AND FORUM SELECTION

Contents of certificate of incorporation [§ **102]; Bylaws [§ 109]; Application of chapter to nonstock corporations [§ 114]; Forum selection provisions [§ 115].—**The 2015 amendments enact a new Section 102(f) and amended 109(b) to prohibit stock corporations from adopting "loser-pays" fee-shifting charter or bylaw provisions for certain types of stockholder litigation and other intra-corporate disputes. Under these new provisions, neither the charter nor the bylaws can include a provision that would impose liability on a stockholder for attorneys' fees or expenses of the corporation (or any other party) in connection with specifically defined "internal corporate claims." Under new Section 115, an "internal corporate claim" is any claim (including a derivative claim brought in the right of the corporation): (i) that is based on a violation of a duty by any person in his or her capacity as a current or former director, officer or stockholder, or (ii) for which the DGCL vests the Delaware Court of Chancery with the jurisdiction to decide. A related amendment to Section 114(b) provides that these bans on fee-shifting provisions do not apply to non-stock membership corporations.

The new provisions on fee shifting are a response to questions raised by practitioners following the Delaware Supreme Court's decision in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014). In *ATP*, the Delaware Supreme Court upheld, as facially valid, a bylaw imposing liability on members of a non-stock corporation for certain legal fees and other expenses if a member filed a lawsuit against the corporation for certain claims and was not successful in the litigation. The 2015 amendments forbid extending the holding of *ATP* to stock corporations.

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[1] This article supplements prior reports published by Aspen Publishers and its predecessor, Prentice Hall Law & Business, describing amendments to the Delaware General Corporation Law enacted in each of calendar years 1967; 1969-70; 1973-74; 1976; 1981; 1983-1988; and 1990-2014. The authors of one or more of the prior reports are: S. Samuel Arsht; Walter K. Stapleton; Lewis S. Black, Jr.; A. Gilchrist Sparks, III; Frederick H. Alexander; Jeffrey R. Wolters; and James D. Honaker.

The 2015 amendments also create a framework for charter and bylaw provisions that select an exclusive forum for "internal corporate claims."[2] New Section 115 expressly permits a corporation to adopt a provision in its charter or bylaws that requires internal corporate claims to be brought exclusively in "any or all of the courts" in Delaware.[3] New Section 115 also prohibits a corporation from selecting a non-Delaware jurisdiction (or an arbitral forum) as the exclusive forum for deciding internal corporate claims.

The new statutes on fee-shifting and forum selection are intended to serve as a balanced response to concerns about the rise in stockholder litigation, and particularly multi-forum litigation where stockholder plaintiffs "shop" for an advantageous forum to bring a lawsuit challenging an M&A transaction. The drafters determined that fee-shifting provisions could unnecessarily discourage derivative and class action litigation that results in the identification and pursuit of meritorious claims for the benefit of stockholders. But, recognizing that non-meritorious litigation can result in harm to a corporation and its stockholders, the drafters counterbalanced these provisions with the forum selection statute, which can be used by corporations to channel lawsuits to the Delaware forum and thereby enable the Delaware Court of Chancery to continue its trend of curbing abusive litigation by closely reviewing (and in some cases rejecting) class action and derivative settlements or by dismissing non-meritorious claims at an early stage of litigation. These principles are discussed at length in two papers prepared by the Corporation Law Council of the Delaware State Bar Association, which was responsible for drafting the 2015 amendments. *See Explanation of Council Legislative Proposals* (March 2015); *Fee-Shifting FAQs* (March 2015).

Aside from the policy issues, practitioners should also keep in mind a couple of technical considerations. First, the Synopsis accompanying the 2015 amendments specifically notes that the proscriptive features of Sections 102(f), 109(b) and 115 do not apply to private agreements among stockholders and/or the corporation. The 2015 amendments therefore do not interfere with parties who otherwise lawfully contract for fee-shifting, alternative forum selection or arbitration arrangements by contract, outside of the corporation's charter and bylaws. Second, before importing the definition of "internal corporate claims" into a forum selection provision, drafters should be mindful of the scope of that definition, including the second prong that covers any claim with respect to which the Delaware Court of Chancery has jurisdiction. Among other provisions in the DGCL, Section 111 vests the Delaware Court of Chancery with jurisdiction to decide a specific list of claims, including the interpretation of agreements to issue stock, voting agreements, proxies and certain other intra-corporate documents. Practitioners should ensure that they understand the scope of a forum selection charter or bylaw provision that covers all internal corporate claims and consider whether that provision may conflict with any other contracts to which the corporation is a party.

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[2] Section 115 confirms the holding of *Boilermakers Local 154 Retirement Fund v. Chevron Corporation,* 73 A.2d 934 (Del. Ch. 2013), that the charter or bylaws may include such a provision for claims arising under the DGCL or with respect to other "internal affairs" issues.

[3] The Synopsis accompanying Section 115 clarifies that the reference to the courts in Delaware includes any federal court in Delaware.

CORPORATE NAMES; ISSUANCES OF STOCK; RIGHTS AND OPTIONS TO BUY STOCK; RESTATED CERTIFICATE OF INCORPORATION; PUBLIC RECORDS

Contents of certificate of incorporation [§ **102].**—Section 102(a)(1) was amended to enable the Delaware Secretary of State to waive naming requirements in certain limited circumstances. Section 102(a)(1) requires that the name of a corporation be sufficiently different from the names of other entities that are organized or registered in Delaware so that the entities are distinguishable. If a corporation wishes to use a name that is too similar to the name of another entity, the other entity may consent to the corporation's use of the same or similar name. The 2015 amendments have added a new provision permitting the use of the same or similar name, without the consent of the other entity, if the corporation can demonstrate, to the satisfaction of the Delaware Secretary of State, that (i) the corporation or its predecessor entity has made substantial use of the name (or substantially similar name) it is proposing to use, (ii) the corporation has made reasonable efforts to secure the written consent of the other entity with the same or similar name and (iii) the waiver of this name requirement by the Delaware Secretary of State is in the interest of Delaware.

Issuance of stock; lawful consideration; fully paid stock [§ 152].—The 2015 amendments enact new provisions that provide greater flexibility in the approval process for issuing stock. Section 152 requires a corporation's board of directors to determine the form and manner of payment of consideration that the corporation receives in return for issuing stock. In 2014, Section 152 was amended to provide that the board may determine the amount of consideration received for stock by approving a formula by which the amount of consideration can be determined. The 2014 amendment was intended to facilitate "at-the-market" offerings of stock, where a board of a publicly traded corporation authorizes the issuance of stock for consideration determined in reference to the market price of the stock. Certain commentators questioned whether the 2014 amendments went far enough to enable at-the-market offerings. In response, the 2015 amendments provide that the board of directors can satisfy the requirement to determine the amount of consideration to be received for stock by (i) setting a minimum amount of consideration, (ii) approving a formula by which the amount of consideration can be determined or (iii) approving a formula by which the minimum amount of consideration can be determined. Among other things, the new provisions will enable a board to satisfy amended Section 152 by adopting a resolution providing that stock be issued for "not less than $X, with the exact amount of consideration received (in excess of $X) determined by an officer of the corporation." A new sentence has also been added to Section 152 to clarify that a formula used to determine consideration can be made dependent upon "facts ascertainable" outside the resolution approving the issuance. The Synopsis accompanying Section 152 notes that a fact ascertainable can include providing a formula whereby the consideration for stock is determined by reference to market prices, or an average of market prices, of stock on one or more dates. Unlike other provisions of the DGCL that include a "fact ascertainable" concept, the formula for consideration cannot be dependent on a determination of a person or body.[4]

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[4] Compare amended Section 152 ("The formula [by which the amount or minimum amount of consideration is determined] may include or be made dependent upon facts ascertainable outside the formula, provided the manner in which such facts shall operate upon the formula is clearly and expressly set forth in the formula or in the resolution approving the formula.") with Section 102(d) ("[Subject to certain exceptions] . . . any provision of the certificate of incorporation may be made dependent upon facts ascertainable outside such instrument, provided that the manner in which such facts shall operate upon the provision is clearly and explicitly set forth therein. The term 'facts,' as used in this subsection, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.").

Amended Section 152 also permits the board resolution providing for the issuance of stock to provide that the number of shares issued, and the times of issuance, can be determined "by or in the manner set forth in the resolution, which may include a determination or action by any person or body," provided that the resolution (i) fixes the maximum number of shares that may be issued pursuant to the resolution, (ii) provides a time period during which the shares may be issued and (iii) fixes a minimum amount of consideration for which the shares will be issued. Accordingly, amended Section 152 will allow a board of directors effectively to delegate the times for issuance, and the number of shares issued, to officers or other persons, so long as the board has placed a ceiling on the number of shares to be issued, fixes a specific duration for the issuance and fixes the minimum amount of consideration to be received. The amendments to Section 152 effectively allow a board of directors to delegate to officers the authority to issue stock (such as restricted stock) on essentially the same basis that a board may delegate to officers the authority to issue options pursuant to Section 157(c).[5]

Rights and options respecting stock [§ 157].—Section 157(b) was amended to conform to amended Section 152. Section 157(b) provides that the amount of consideration that the corporation receives upon exercise of a right or option to acquire stock may be determined in accordance with a formula. The amendments to Section 157(b) clarify that the formula may be made dependent on the same types of "facts ascertainable" that may be used in a formula to determine the consideration for issuing stock under Section 152. This amendment to Section 157(b) is intended only to conform the language of Section 157 to Section 152. Even under the pre-amendment version of Section 157, the exercise price for a right or option to buy stock could be determined by reference to a formula and extrinsic facts (such as, for employee stock options, the market price of the stock underlying the option as of a date on or before the grant date of the option).

Restated certificate of incorporation [§ 245].—Amended Section 245(c) clarifies what a corporation must certify in a restated charter when the restatement of the charter effects an amendment to the existing charter and the amendment is one of a limited number of amendments that may be effected under the DGCL without stockholder approval.

Amounts payable to Secretary of State upon filing certificate or other paper [§ 391].—Section 391(c) was amended to confirm that the Delaware Secretary of State may issue public records in the form of photocopies or electronic image copies. This amendment also deletes references to microfiche copies and confirms that the Delaware Secretary of State need not provide public records in any form other than photocopies or electronic image copies. This amendment to Section 391 became effective upon its enactment into law.

STATUTORY RATIFICATION OF DEFECTIVE CORPORATE ACTS

Ratification of defective corporate acts and stock [§ 204].—Section 204 provides a statutory means to ratify "defective corporate acts" (i.e., acts that are invalid for purposes of Delaware law for failure to authorize or effect an act in accordance with the DGCL, the certificate of incorporation,

[5] After the baseline terms of an option are fixed by the board of directors (including fixing any terms by reference to a formula), Section 157(c) permits the board to delegate to officers the power to designate the employees who will be recipients of the options and to determine how many options will be granted to each recipient, so long as the board fixes the total number of options that may be granted in the aggregate under the board's resolution providing for the delegation.

the bylaws or any other agreement to which the corporation is a party). The 2015 amendments enact several changes to Section 204, most of which clarify the operation of the statute. There are also a handful of substantive improvements.

A new Section 204(b)(2) was added to provide a means to ratify defects in the election of the initial board of directors. This new provision permits the ratification of any defect in respect of the election of the initial directors by the current de facto directors of the corporation (that is, the persons who are exercising the powers of directors under the claim and color of an election or appointment as directors). New Section 204(b)(2) is intended to provide a useful remedy for early defects in the organization of the corporation that relate to the initial board of directors, like the failure of the incorporator to validly elect directors where the directors are not named in the charter.

The 2015 amendments also enact substantive changes to Section 204(g), which is the provision requiring the corporation to provide notice of ratification to holders of valid stock and "putative stock" (i.e., invalidly issued stock) in certain circumstances. Amended Section 204 permits corporations that have stock listed on a national securities exchange to give notice solely by means of including the contents of the notice in a document publicly filed by the corporation with the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934 and the rules promulgated thereunder. This new provision should facilitate the use of Section 204 by publicly held corporations who wish to ratify defective corporate acts that may be approved unilaterally by the board of directors (such as the ratification of stock options that may be invalid because they were granted in violation of a stock plan).

An amendment to Section 204(d) clarifies that shares constituting putative stock on the record date for purposes of determining the stockholders entitled to vote on a Section 204 ratification of a defective corporate act are not counted for purposes of determining whether the applicable voting and quorum requirements have been satisfied. A related amendment to Section 204(f) clarifies that, when putative stock is ratified, the validity is not given retroactive effect for purposes of the stockholder vote on ratification. The latter amendment is intended to avoid a "recursive loop," where shares of putative stock might be required to be counted in a vote tally because they will be retroactively deemed valid after ratification.

Among the other amendments to Section 204, the 2015 amendments: (i) permit a corporation to select a future effective time for ratifications; (ii) provide that the 120-day period to commence an action to challenge a ratification starts on the later of the effective time of the ratification and the date that the notice of ratification is given; (iii) clarify that multiple defective corporate acts may be ratified in one resolution and that the quorum and voting requirements for ratifying a defective corporate act are determined on an act-by-act basis; (iv) clarify (consistent with practitioners' interpretation of the pre-amendment version of Section 204) that stockholders can approve and adopt ratifications by consent in lieu of a stockholder meeting; (v) permit a corporation to give a combined notice of ratification and action by stockholder consent to satisfy both Sections 204(g) and 228 (the written consent statute) so long as the notice is sent to all of the persons entitled to notice under both statutes; (vi) clarify that a notice of ratification need not be given to a stockholder who has approved the ratification by consent; (vii) clarify the procedures for filing certificates of validation with the Delaware Secretary of State; (viii) clarify that a separate certificate of validation must be filed with the Delaware Secretary of State for each defective corporate act ratified (with exceptions for overissuances of stock or actions that would

have been included in a single filing to validly effect the acts in question) and (ix) clarify that a "failure of authorization" leading to a defective corporate act includes the failure of the board of directors or an authorized officer to approve an act or transaction.

The 2015 amendments to Section 204 are effective only with respect to defective corporate acts and proposed issuances of putative stock ratified or to be ratified pursuant to resolutions adopted by a board of directors on or after August 1, 2015.

Proceedings regarding validity of defective corporate acts and stock [§ 205].—Section 205(f) was amended to conform to Section 204(g) as amended this year. This amendment confirms that the 120-day period during which stockholders may challenge the ratification of a defective corporate act under Section 205 commences from the later of the validation effective time and the time at which the notice required by Section 204(g) is given. This amendment to Section 205 is effective only with respect to defective corporate acts and proposed issuances of putative stock ratified or to be ratified pursuant to resolutions adopted by a board of directors on or after August 1, 2015.

PUBLIC BENEFIT CORPORATIONS

Public benefit corporation defined; contents of certificate of incorporation [§ 362].—Before the 2015 amendments, Section 362 required that a public benefit corporation include in its name an identifier that denoted its status as a public benefit corporation. Amended Section 362 now makes the identifier optional. If the corporate name does not include an identifier, the corporation must, before issuing stock or selling treasury stock, provide prospective purchasers notice of the corporation's public benefit status. This notice requirement does not apply to shares issued or sold in an offering registered under the Securities Act of 1933 or if, at the time of issuance or sale, the corporation has a class of securities that is registered under the Securities Exchange Act of 1934.

Certain amendments and mergers; votes required; appraisal rights [§ 363].—The 2015 amendments make changes to subsections (a), (b) and (c) of Section 363. Section 363(a) specifies the stockholder vote required in order for a Delaware corporation to amend its certificate of incorporation to insert the provisions necessary to become a public benefit corporation or to enter into a merger or consolidation in which shares of stock of the Delaware corporation become, or are converted into or exchanged for, stock of a public benefit corporation. Section 363(a) was amended to change the vote required for these actions from 90% of the shares of each class of stock of the corporation, whether voting or nonvoting, to two-thirds of the outstanding stock entitled to vote thereon.

Section 363(b) confers appraisal rights on holders of stock in connection with the actions specified by Section 363(a). Section 363(b) was amended to provide a "market out" exception to these appraisal rights. Section 363(b), which tracks the market-out exception set forth in Section 262(b), eliminates appraisal rights for shares of stock which, at the record date for notice of the stockholders meeting to act on the agreement of merger or consolidation or certificate of incorporation amendment addressed by Section 363(b), were listed on a national securities exchange or held of record by more than 2,000 holders. Similar to Section 262(b), appraisal rights under Section 363(b) are "given back" to such holders of listed or widely held stock in a merger or consolidation if the terms of the agreement of merger or consolidation provide that the consideration for such stock is

anything except (i) shares of stock (or depository receipts for stock) that will be listed on a national securities exchange or held of record by more than 2,000 holders as of the effective date of the merger or consolidation; (ii) cash in lieu of fractional shares (or depositary receipts) for such listed or widely held stock or (iii) any combination of the foregoing. This amendment to Section 363(b) is effective only with respect to mergers and consolidations consummated pursuant to agreements entered into on or after August 1, 2015, or in the case of amendments to the certificate of incorporation, amendments approved by the board of directors on or after August 1, 2015.

Finally, Section 363(c) specifies the stockholder vote required in order for a public benefit corporation to delete the certificate of incorporation term providing for public benefit status or to enter into a merger or consolidation that will result in the stockholders not owning equity stock in a public benefit corporation (or similar entity). Like the amendments to Section 363(a), the amendments to Section 363(c) changed the vote required for these actions from 90% of the shares of each class of stock of the public benefit corporation, whether voting or nonvoting, to two-thirds of the outstanding stock entitled to vote thereon.

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