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Examining the 2015 Amendments to Delaware's General Corporation Law and Alternative Entity Statutes



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In its last session, the Delaware legislature passed a number of amendments to the Delaware General Corporation Law ("***DGCL***") and to three of Delaware's four "alternative entity" statutes—the Delaware Limited Liability Company Act ("***DLLCA***"), the Delaware Revised Uniform Limited Partnership Act ("***DRULPA***") and the Delaware Revised Uniform Partnership Act ("***DRUPA***").[1] Gov. Jack Markell signed the bill into law June 24, 2015. Except as otherwise noted below, all of the amendments are effective as of Aug. 1, 2015.

The amendments to the DGCL effect a broad array of substantive, technical, and clarifying changes. Among other changes discussed in greater depth below, the amendments (1) prohibit "fee shifting" provisions in the certificate of incorporation or bylaws of Delaware stock corporations, (2) authorize forum selection provisions in the certificate of incorporation and bylaws, (3) clarify the power of the board to issue stock within prescribed parameters, (4) clarify and refine the procedures for statutory ratification under Section 204, and (5) remove obstacles to the adoption of "public benefit" status.

The amendments to the alternative entity statutes include several important changes. They eliminate, generally on a prospective basis, the class or group default voting in the DLLCA and DRULPA, which had applied to mergers, conversions, domestications, dissolutions and a number of other significant actions. They also confirm that the same rules governing irrevocability apply to a proxy as apply to a power of attorney and confirm that a delegation by a general partner or a manager is irrevocable if it states that it is irrevocable.

This article will discuss the amendments to the DGCL and the amendments to the alternative entity statutes, each in turn.

[1] No amendments were enacted to the Delaware Statutory Trust Act in this legislative session.

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Amendments to the DGCL

Technical Change Regarding Distinctiveness of Corporate Name. [DGCL § 102(a)] Section 102(a)(1)(ii) requires a corporation's name to be distinguishable from the names of all other registered Delaware business entities as well as from all other duly reserved names. The 2015

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amendments add an exception allowing the Division of Corporations to waive this requirement if the corporation demonstrates that it or a predecessor entity has made substantial use of the name or a substantially similar name, that it has made reasonable efforts to secure the consent of the other entity or reserved name holder to use the name, and that ''such waiver is in the interest of the State.'' The amendment also expressly provides that such waiver will not prejudice the rights of the other entity or reserved name holder.

Fee Shifting Provisions. [DGCL § § 102(f), 109(b), 114(b), 115] In *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), the Delaware Supreme Court upheld the facial validity of a bylaw adopted by a nonstock corporation imposing liability in certain circumstances on the corporation's members for the corporation's legal fees in litigation brought by the members. In response to *ATP*, a number of Delaware corporations adopted fee shifting bylaws, but it was not clear whether such provisions would be enforceable under Delaware law. After much deliberation and debate in and outside of Delaware on the issue, the legislature enacted amendments to Sections 102, 109, and 114, and a new Section 115, to limit the *ATP* decision to its facts by prohibiting Delaware stock corporations from including fee shifting provisions in the certificate of incorporation or bylaws.

New Subsection 102(f) provides, ''The certificate of incorporation may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim.'' Section 115 defines ''internal corporate claim,'' discussed in greater detail below, to cover claims traditionally falling within the internal affairs doctrine. Similar language has been added to the end of Section 109(b) to prohibit fee shifting provisions in bylaws. Lastly, Section 114(b)—the ''translator provision'' for applying the DGCL's default provisions to nonstock corporations—now includes cross-references to Section 102(f) and the last sentence of Section 109(b) to make clear that the provisions prohibiting fee-shifting do not apply to nonstock corporations.

Finally, the synopsis notes explicitly that the amendments do not prohibit the inclusion of fee shifting provisions in other instruments, such as a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.

Forum Selection Provisions. [DGCL § 115] New Section 115 codifies the holding of *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013), by providing that the ''certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts of this State.'' According to the synopsis, ''courts of this State'' include the U.S. District Court for the District of Delaware.

The key term ''internal corporate claims'' is defined explicitly 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.'' Thus, this definition includes all claims traditionally falling within the internal affairs doctrine, including all direct and derivative claims against directors, officers and controlling stockholders for breaches of fiduciary duty, as well as claims as to which the Court of Chancery has jurisdiction.

In addition to codifying the *Boilermakers* holding, new Section 115 further provides that ''no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State,'' such as by purporting to designate the courts in a different State, ''or an arbitral forum,'' according to the synopsis, as the *exclusive* forum for internal corporate claims. Consequently, new Section 115 permits the certificate of incorporation or bylaws (1) to be silent regarding the forum in which internal corporate claims may be brought, (2) to select any or all of the Delaware courts as the exclusive forum in which to litigate such claims, or (3) to select the Delaware courts and one or more additional forums as the exclusive forums for such claims.

As with the fee shifting amendments, new Section 115 does not address (and is not intended to prevent) the application of forum selection provisions in other instruments, such as a stockholders agreement signed by the stockholder against whom the provision is to be enforced. Finally, Section 115 does not foreclose judicial review of the manner of adoption or as-applied enforcement of a facially valid forum selection provision to determine if the provision comports with fiduciary duties or is reasonable in the circumstances. In that regard, the statutory requirement of consistency with ''applicable jurisdictional requirements'' is intended to clarify that, although Section 115 authorizes the selection of ''any'' Delaware court as the exclusive forum for internal corporate claims, Section 115 is not intended to allow a corporate charter or bylaw to foreclose suit in a federal court based on federal jurisdiction, or to limit or expand the jurisdiction of the Court of Chancery or the Superior Court.

Clarifying Changes Regarding Stock Issuances. [DGCL § § 152, 157(b)] Section 152 requires directors to determine the consideration for the issuance of stock. The statute already provides the board wide discretion in this regard, and amendments enacted in 2013 expressly permit a board to ''determine the amount of such consideration by approving a formula by which the amount of consideration is determined.'' The 2015 amendments provide further clarity regarding this board power by, first, permitting the board resolution authorizing the issuance to provide for the stock to be issued in one or more transactions, in such numbers, and at such times as is determined by a person or body specified in the authorizing resolution (which need not be the board of directors or a board committee), so long as the resolution fixes a maximum number of shares to be issued, a time period over which the shares may be issued, and a minimum amount of consideration for their issuance. Second, the amendment clarifies that a formula for determining the minimum amount of consideration may reference or depend on facts ascertainable outside the formula, such as a market price on the date of issuance or an average market price over a particular period, among other possibilities. These clarifications to the process for issuing stock are designed to facilitate corporations' participation in ''at the market'' programs without the need for separate board authorization for each issuance under the program.

A conforming change has been made to Section 157(b) regarding the issuance of shares upon the exer-

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cise of rights or options. The statute already permits the exercise price to be set by formula. The 2015 amendments add a new sentence clarifying that such a formula may refer to or depend on facts ascertainable outside the formula.

Refinements to Procedures to Ratifying Defective Corporate Acts. [DGCL § 204] Section 204 provides a comprehensive statutory procedure for ratifying stock issuances or corporate acts that would be void or voidable under common law due to a ''failure of authorization.'' Section 204 first took effect on April 1, 2014, and the 2015 amendments are the first revisions to that procedure. In general, the amendments address seven different issues:

1. *Multiple defective corporate acts may be remedied concurrently*. Amendments to Section 204(b)(1) confirm that multiple defective corporate acts may be remedied in a single ratification process. Thus, the statute now provides, ''to ratify *one or more* defective corporate *acts*,'' the board of directors must adopt resolutions setting forth ''the defective corporate act *or acts*'' to be ratified. Conforming changes throughout Section 204 also were made to clarify the procedures for ratifying several defective corporate acts. For example, Section 204(b)(1) now provides that, notwithstanding stockholder approval for the ratification, the board may abandon the ratification of any defective act, as opposed to the entire resolution. Section 204(b)(1) (with respect to board approval) and Sections 204(c) and (d) (with respect to stockholder approval) state explicitly that the voting and quorum requirements for approving the ratification of several defective corporate acts must be viewed on an act-by-act basis. For example, if one defective corporate act would have required the approval of the majority of stockholders and another would have required approval by a two-thirds supermajority, ratification of the first act must be approved by a majority while ratification of the second act requires approval by the supermajority. As the statutory synopsis makes clear, however, nothing in the amendments prohibits the corporation from cross-conditioning board or stockholder approval of one defective corporate act on obtaining board or stockholder approval of one or more other defective corporate acts.

2. *New provision for ratifying the election of the initial board of directors*. A new Section 204(b)(2) has been added for the specific purpose of ratifying the election of an initial board of directors if directors were not named in the certificate of incorporation and the incorporator failed to appoint them. Section 204(b)(2) permits those persons who have been acting as the corporation's directors under claim and color of an election or appointment to adopt resolutions ratifying the election of those persons who first took action on behalf of the corporation as the board of directors and that ratification is given retroactive effect. The bill's synopsis also makes clear that Section 204(b)(2) is not intended to foreclose the use of Section 103(f) to the extent its correction procedures otherwise are available.

3. *Clarification regarding voting rights of putative stock*. ''Putative stock'' is defined by the statute to refer generally to shares of stock issued pursuant to a defective corporate act or that cannot be determined to have been validly issued. Until ratified, putative stock cannot validly vote but, once ratified, the validity of putative stock is given retroactive effect as of its issuance date. To avoid any confusion regarding whether the participation of putative stock is required to ratify the putative stock itself, the changes to Sections 204(d) and (f) clarify that the only stockholders entitled to vote on the ratification of a defective corporate act, or to be counted for quorum purposes with respect to such a vote, are the holders of record of valid stock and that the retroactive validity of putative stock does not undermine the effectiveness of any ratification of a defective corporate act or acts previously submitted to stockholders.

4. *Changes to the required contents of certificates of validation.* Amendments to Section 204(e) clarify and refine the requirements for filing a certificate of validation, which is required if the defective corporate act being ratified would have required the filing of any other certificate under another provision of the DGCL. Section 204(e) clarifies that a separate certificate of validation must be filed for each defective corporate act requiring a filing that has been ratified, subject to two exceptions. The first exception is that two or more defective corporate acts may be included in a single certificate of validation if the other DGCL provision or provisions requiring the filing of the other type of certificate would have permitted both acts to be included in a single certificate. An example of this would be if two subsidiaries were merged, albeit defectively, into a parent corporation by the filing of a single certificate of ownership and merger. In that case, the ratification of both defective mergers could be included in the same certificate of validation. The second exception is where two or more overissues of stock have been ratified, in which case a single certificate of validation can evidence the ratification of all of the overissues, provided that the increase in the corporation's number of authorized shares set forth in the certificate of validation shall be effective as of the first overissue. There also are refinements specifying the information that must be included in a certificate of validation. Section 204(e) prescribes information regarding the defective corporate act that must be included depending on whether the corporation (a) previously filed a certificate under the DGCL regarding the defective corporate act that, upon ratification, requires no further changes, (b) previously filed a certificate under the DGCL that requires further changes, or (c) never filed a certificate under the DGCL. An example of the first case, clause (a), would be if the corporation defectively amended its charter pursuant to board resolutions adopted by majority written consent instead of unanimous written consent. In this instance, the certificate of validation must identify the previous filing by name, title, and date and also attach a copy of it as an exhibit. An example of the second case, clause (b), would be if the amendment to the charter was to approve a forward stock split, but the certificate of amendment failed to include the language required by Section 242(b) effecting the split. In that case, the certificate of validation must (x) identify the previous filing by name, title, and date, (y) include as an exhibit a certificate of amendment containing all of the information required under Section 242 for the split, and (z) specify the date and time when such certificate of amendment shall be deemed to have become retroactively effective. An example of the third case, clause (c), would be if the board purported to effect a reverse stock split unilaterally without filing any certificate of amendment. In that case, the certificate of validation must include as an exhibit a certificate of amendment containing all of the information required under Section 242 and must specify

the date and time when the attached certificate will be deemed to have become effective.

5. *Clarifications regarding notice procedures.* In addition to general conforming changes, new language has been added to Section 204(g) regarding the statutory notice provisions. Amended Section 204(g) permits public companies to give notice of the ratification of a defective corporate act by means of a public filing pursuant to the Exchange Act of 1934. Section 204(g) also clarifies the notice requirements when the ratification of a defective corporate act has been approved by stockholders acting by written consent under Section 228. In that case, the notice required by Section 204(g) may be included in the notice required by Section 228(e), but the notice must be sent to the broad group of recipients entitled to receive it under Section 204(g) (except that, consistent with Section 228(e), no notice must be given to the stockholders who acted by written consent to approve the ratification).

6. *Clarifications to two key definitions.* Amendments to Section 204(h) also modify the definitions of ''failure of authorization'' and ''validation effective time'' under the statute. The original definition of ''failure of authorization'' covered the failure to authorize any act or transaction in compliance with the DGCL, the corporation's certificate of incorporation or bylaws, or any plan or agreement to which the corporation is a party. While preserving that existing definition, the definition has been expanded to include the failure of the board or any officer to authorize or approve any act or transaction that would have required for its authorization the approval of the board or such officer. The synopsis makes clear that this amendment is intended solely to confirm the broad scope of acts that may be ratified under Section 204 and is not intended to imply that any such failures of authorization could not also be cured under principles of common law ratification. The definition of ''validation effective time'' also has been amended, first, to conform to the changes made to Section 204(b) and, second, to clarify that the board of directors may fix a future validation effective time for any defective corporate act that is not required to be submitted to a vote of stockholders and that does not require the filing of a certificate of validation. Because the 120-day period during which stockholders may challenge the ratification of a defective corporate act begins to run from the later of the validation effective time and the sending of any required notice under Section 204(g), these amendments obviate logistical issues that may arise in connection with the delivery of notices where multiple defective corporate acts are being ratified at the same time by enabling the board to set one date on which the ratification of all defective corporate acts approved by the board will be effective.

7. *Confirmation of the continued validity of the ''pre-incorporation doctrine.''* Section 204(i) provides that Section 204 is not the exclusive means of ratifying corporate acts that might be ''voidable'' and thus susceptible to cure by ratification under the common law. The amendments to Section 204(i) clarify the preservation of the common law ''pre-incorporation doctrine,'' which generally provides that a corporation can adopt and ratify agreements made in contemplation of its organization.

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

Conforming Changes Regarding Judicial Proceedings to Validate Defective Corporate Acts and Putative Stock. [DGCL § 205(f)] Among other things, Section 205 provides a judicial process for stockholder challenges to ratifications effected under Section 204. Generally, such challenges must be brought within 120 days of the ratification. Amendments to Section 205(f) make changes to conform to the revisions under Section 204(g) and (h)(6), clarifying that the 120-day period commences from the later of the validation effective time and the giving of the Section 204(g) notice. As with the amendments under Section 204, these amendments are effective only with respect to defective corporate acts and issuances of putative stock ratified or to be ratified pursuant to board resolutions adopted after August 1, 2015.

Technical Change Regarding Restated Certificates of Incorporation. [DGCL § 245(c)] The 2014 DGCL amendments added language to Section 242 allowing a corporation to file an amendment to its certificate of incorporation to change the corporation's name without stockholder approval. The 2015 amendment to Section 245(c) clarifies that a restated certificate of incorporation filed under Section 245 shall state that it does not further amend the charter ''except, if applicable, as permitted under § 242(a)(1) and § 242(b)(1)'' of the DGCL.

Removal of Obstacles to Adopting ''Public Benefit'' Status. [DGCL § § 362, 363] The 2015 DGCL amendments make several changes designed to facilitate corporations becoming public benefit corporations (''***PBCs***''). The first is to Section 362, regarding naming requirements. As originally enacted, the statute required the corporate name to include either ''PBC'' or ''public benefit corporation'' to alert investors to the corporation's public benefit status. Some jurisdictions outside of Delaware, however, consider ''PBC'' insufficient to signal corporate identity or already have ascribed an alternative meaning to the phrase ''public benefit corporation,'' which raised problems for Delaware PBCs registering to do business as a foreign corporation in other jurisdictions. The 2015 amendments to Section 362 now allow, but no longer require, PBCs to use the ''PBC'' or ''public benefit corporation'' identifiers. If they choose not to use those identifiers, however, there is a new requirement that PBCs provide notice to anyone to whom stock is issued or who acquires treasury stock that they are acquiring stock in a PBC. This requirement does not apply to publicly traded PBCs.

There also are three amendments to Section 363. The first, in Section 363(a), is to the voting threshold required for a traditional Delaware corporation to adopt a charter amendment to become a PBC or to approve a merger in which such corporation's stock is converted into shares of a PBC. In either case, the original legislation required 90 percent approval by the holders of each class of outstanding stock, whether voting or nonvoting. The 90 percent threshold limited the ability of PBCs (whether incorporated in Delaware or in other jurisdictions) to use their own stock to acquire other Delaware corporations. The 2015 amendments reduce the required stockholder vote to two-thirds of the outstanding *voting* shares. A similar change also was made to Section 363(c) regarding voting thresholds for PBCs to amend their certificates of incorporation or to approve mergers or consolidations. The current version of Sec-

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tion 363(c) requires two-thirds approval of the outstanding stock, whether voting or nonvoting. The 2015 amendment changes the required vote to two-thirds of the outstanding voting shares and, like 363(a), excludes the nonvoting shares.

The final change is to Section 363(b) concerning appraisal rights. The current version of Section 363 grants stockholders of traditional Delaware corporations appraisal rights if the corporation adopts PBC status or is a party to a merger or consolidation resulting in the stockholder's shares being converted into shares of a PBC. The new amendments create a ''market out'' exception as exists under Section 262, providing that appraisal rights are not available if the corporation's stock was publicly traded before and after the charter amendment or merger. This amendment is effective only with respect to mergers or consolidations consummated pursuant to merger agreements entered into on or after Aug. 1, 2015 or, in the case of charter amendments, amendments approved by the board of directors on or after Aug. 1, 2015.

Technical Change Regarding Provision of Public Records. [DGCL § 391(c)] The final 2015 amendment to the DGCL confirms that the Secretary of State may issue public records in the form of photocopies or electronic image copies, and need not provide public records in any other form, in exchange for the statutorily prescribed fees. Unlike the other 2015 DGCL amendments, this change took effect immediately upon enactment into law.

Amendments to the Alternative Entity Statutes

Elimination of Default Class or Group Votes. [DLLCA § § 18-209(b), 18-213(b), 18-215(k), 18-215(l), 18-216(b), 18-801(a), 18-803(a); DRULPA § § 17-204(a)(3), 17-211(b), 17-214(a), 17-216(b), 17-218(k), 17-218(l), 17-219(b), 17-801, 17-803(a), 17-806] The enumerated sections currently require a class or group vote for the actions taken thereunder, which include mergers and consolidations, transfers or continuances, termination and winding up of series, conversions and dissolution, if there is more than one class or group of members or limited partners, as applicable (unless otherwise provided in the limited liability company agreement or limited partnership agreement). Both the DLLCA and DRULPA permit the establishment of classes or groups **[see § 18-302 of the DLLCA and § 17-302 of DRULPA]**. However, neither the DLLCA nor DRULPA defines what a class or a group is. This has led to much uncertainty as to what constituted a ''class or group'' for purposes of the default voting provisions when a limited liability company agreement or limited partnership agreement gives certain members or partners different rights without designating those members or partners as a separate class or group. This uncertainty, in turn, has made numerous transactions difficult because it has been unclear what vote was required to approve them. The amendments eliminate these default rules throughout the DLLCA and DRULPA, although drafters may still put class or group votes in a limited liability company agreement or a limited partnership agreement if desired. For the most part, the changes are prospective only because the class or group voting requirements have been part of the statutes for so long that parties to limited liability company agreements and limited partnership agreements may have relied on them rather than putting class or group voting in their agreements. The exceptions are all in DRULPA and apply to Section 17-806 relating to revocation of dissolution because that section was just added last year so there would be no history of reliance on a default class or group vote and to Section 17-204(a)(3) relating to execution of a certificate of cancellation and Section 17-214(a) relating to election to be a limited liability limited partnership where, presumably, there would be little or no reliance on these provisions.

Proxies. [DLLCA § 18-204(c); DRULPA § 17-204(c); DRUPA § 15-123] Section 18-204(c) of the DLLCA, Section 17-204(c) of DRULPA and Section 15-123 of DRUPA currently address powers of attorney given with respect to limited liability companies, limited partnerships and general partnerships, respectively, and the circumstances under which they can be irrevocable. The amendments to these sections make clear that these provisions apply to proxies as well as powers of attorney. They also make clear that drafters can otherwise provide with respect to the provisions of an irrevocable power of attorney or irrevocable proxy in a limited liability company agreement or limited partnership agreement and that these subsections will not be construed to limit the enforceability of those powers of attorney or proxies. Thus, drafters should be able to expand or limit the circumstances under which a power of attorney or proxy will be deemed irrevocable in a limited partnership agreement or limited liability company agreement as well as in a general partnership agreement (although a similar change was not made to DRUPA because of its different structure relating to default rules).

Irrevocable Delegation. [DLLCA § 18-407; DRULPA § 17-403(c)] Section 18-407 of the DLLCA currently provides that a member or manager of a limited liability company can delegate to one or more persons the member's or manager's rights and powers to manage and control the business and affairs of the limited liability company. Section 17-403(c) of DRULPA is to the same effect with regard to delegation by a general partner of a limited partnership of its rights and powers to manage and control the business of the limited partnership. The amendments confirm that any delegation by a member or manager or general partner will be irrevocable if it states that it is irrevocable, unless otherwise provided in the limited liability company agreement or the limited partnership agreement, as applicable, thus eliminating any question as to whether a delegation must be coupled with an interest or satisfy any additional requirements in order to be irrevocable.

Technical Change Regarding the Provision of Public Records. [DLLCA § 18-1105(a)(5); DRULPA § 17-1107(a)(5); DRUPA § 15-1207(a)(5)] The final 2015 amendment to each of the DLLCA, DRULPA and DRUPA confirms that the Secretary of State may issue public records in the form of photocopies or electronic image copies and need not provide public records in any other form, in exchange for the statutorily prescribed fees. Unlike the other 2015 alternative entity amendments, these amendments took effect immediately upon enactment into law.