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Delaware Legislature Prohibits Fee Shifting and Authorizes Exclusive Forum Selection

Matthew M. Greenberg | greenbergmm@pepperlaw.com
James H. S. Levine | levinejh@pepperlaw.com
Christopher B. Chuff | chuffc@pepperlaw.com
Ashleigh K. Reibach | reibacha@pepperlaw.com

DELAWARE CORPORATIONS SHOULD EVALUATE THEIR CERTIFICATES OF INCORPORATION OR BYLAWS IN LIGHT OF NEW AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW.

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On June 24, Delaware Governor Jack Markell signed Senate Bill 75 (the Amendment), S.B. 75, 148th Gen. Assemb., 1st Reg. Sess. (Del. 2015) (SB 75), which amended several provisions of the Delaware General Corporation Law (DGCL). In addition to other changes to the DGCL, the Amendment prohibits stock corporations from enacting fee-shifting provisions in their certificates of incorporation or bylaws and endorses the adoption of forum selection clauses that designate Delaware as the exclusive forum in which certain litigation may be initiated. The Amendment will become effective on August 1, 2015.

Prohibition on Fee-Shifting Provisions

The Amendment comes in the midst of a vigorous debate in the corporate legal community regarding the propriety of fee-shifting provisions. Pursuant to the Amendment, which revises sections 102 and 109(b) of the DGCL, the certificate of incorporation or bylaws of a Delaware stock corporation “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.” New section 115 defines “internal corporate claims” as those claims based on violations of current or former officers’ or directors’ duties and violations that fall under the jurisdiction of the Delaware Court of Chancery. Internal corporate claims do not include federal securities class actions or claims brought by individuals who are not stockholders.

The fee-shifting prohibition was proposed in response to the Delaware Supreme Court’s ruling in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014). In *ATP*, the court upheld the validity of a fee-shifting bylaw that made members of a nonstock corporation potentially liable for the corporation’s litigation expenses in connection with certain intracorporate litigation where the member did not obtain “a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought.” The Amendment limits the application of the *ATP* ruling to nonstock corporations, only prohibiting the inclusion of fee-shifting provisions in the certificates of incorporation or bylaws of Delaware stock corporations. Notably, the Amendment also does not prohibit fee-shifting provisions in stockholder agreements or other private agreements between stockholders and corporations that may be enforced against stockholders who are parties to the agreement.

Authorization of Exclusive Forum Selection Provisions

New section 115 of the DGCL provides that the certificate of incorporation or bylaws of a Delaware corporation may provide that “internal corporate claims” — claims that are brought in the right of the corporation (1) that are based on a violation of duty by a current or former director or officer or stockholder in such capacity or (2) as to which the DGCL confers jurisdiction upon the Court of Chancery — must be brought in Delaware courts, including the U.S. District Court for the District of Delaware.

Section 115 codifies the Delaware Court of Chancery’s holding in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013), that the bylaws of a Delaware corporation may provide that certain claims, including claims for breach of fiduciary duty, must be brought in a court in Delaware. Section 115 further provides that “no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of [Delaware],” such as provisions in the certificate of incorporation or bylaws of a Delaware corporation selecting a non-Delaware forum as the sole and exclusive forum in which internal corporate claims may be brought. The Amendment neither authorizes nor prohibits provisions in a Delaware corporation’s certificate of incorporation or bylaws that specify a forum other than Delaware as an additional, nonexclusive forum.

Similar to the fee-shifting amendments, the revisions affecting forum selection do not impact provisions of stockholder agreements or other private agreements between stockholders and corporations that may be enforced against the stockholders who are parties to the agreement.

Other Changes to the DGCL

The Amendment also clarifies that the board of directors of a Delaware corporation may authorize stock pursuant to “at the market” programs without authorizing each stock issuance pursuant to such programs. Revised section 152 provides that a formula to determine the price at which shares of stock may be issued can depend on extrinsic facts, for example, market prices on a given date.

Amendments to section 204 clarify provisions relating to the ratification of defective corporate acts that would otherwise be void or voidable. Among other changes, revised section 204 clarifies the quorum and voting requirements for ratification of defective corporate acts, addresses the process by which stockholders may approve defective corporate acts (that require stockholder assent), and provides requirements for delivering notice of defective corporate acts. Revised section 204 also dictates a process for appointing initial directors when none are named in the corporation’s initial certificate of incorporation.

Potential Impact

In light of the Amendment, Delaware corporations that enacted fee-shifting provisions in their certificates of incorporation or bylaws should remove them prior to August 1, 2015.

Delaware corporations should also consider adopting forum selection provisions requiring that internal corporate claims be filed in Delaware to ensure that such claims will be adjudicated with the benefit of the experience and expediency of the Delaware courts and judges, and should remain aware of the added flexibility the Amendment affords

Delaware corporations in several ways.