

Proposed DGCL Amendments to Address Fee Shifting, Forum Selection and Appraisal Proceedings

03 / 09 / 15

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

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On March 6, 2015, the Corporation Law Council of the Delaware State Bar Association announced proposed amendments to the Delaware General Corporation Law (DGCL) intended to address fee shifting, forum selection and appraisal proceedings, among other things. The proposed legislation arises in response to Senate Joint Resolution No. 12, adopted by the Delaware General Assembly, which called upon the Corporation Law Council to continue its ongoing examination of the permissible scope of provisions of the certificate of incorporation, bylaws and other organizational documents affecting the conduct of (and forum for) litigation involving claims arising under the DGCL, Delaware's other business entity laws as well as the laws involving appraisal rights.

Fee Shifting

The proposed amendments, if adopted, would prohibit a provision in the certificate of incorporation or bylaws that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with "intracorporate claims."¹ The synopsis to the proposed legislation states that the amendment is intended to address the uncertainty following the Delaware Supreme Court's decision in *ATP Tour Inc. v. Deutscher Tennis Bund, et al.*, in which the Supreme Court held that fee shifting bylaws are facially valid in the context of nonstock corporations. The proposed amendments do not disturb that decision in relation to such corporations. Accordingly, the proposed legislation would not apply to nonstock corporations, nor would it invalidate any provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is sought to be enforced.

Forum Selection

With respect to forum selection, the proposed amendments provide that the certificate of incorporation or bylaws, consistent with applicable jurisdictional requirements, (i) may contain a provision requiring that any or all intracorporate claims be brought exclusively in any or all courts of the state of Delaware and (ii) may not contain a provision prohibiting such claims from being brought in Delaware courts. The proposed amendments do not address the validity of a provision in the certificate of incorporation or bylaws selecting a forum other than Delaware (as an additional forum to Delaware) in which intracorporate claims may be brought. However, the amendments would not prevent application of such a provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is sought to be enforced.

Appraisal Proceedings

Regarding appraisal proceedings, the proposed amendments limit the right to bring an appraisal proceeding with respect to publicly traded companies if the claim is *de minimis*. Accordingly, the proposed amendments authorize dismissal of appraisal proceedings unless: (i) the total number of shares entitled to appraisal exceeds 1 percent of the outstanding

¹ "Intracorporate claims" is defined in the proposed legislation to mean claims, including derivative claims, based on a violation of duty by current or former directors, officers or stockholders, or any other claim as to which the DGCL confers jurisdiction on the Delaware Court of Chancery.

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shares that could have sought appraisal, (ii) the value of the merger consideration for the total number of shares entitled to appraisal exceeds \$1 million, or (iii) the merger is a parent/subsidiary merger effected under Section 253 or 267 of the DGCL. The proposed amendments also address the concern over “appraisal arbitrage,” or the acquisition of shares with attendant appraisal rights purchased after a merger announcement in anticipation of a favorable appraisal award, including interest. The proposed amendments permit a corporation to cut off the accrual of interest by paying stockholders pursuing an appraisal claim an amount chosen by the corporation. Interest would only accrue on any excess of the appraisal award over the amount so paid.

Copies of the proposed legislation are **attached** for your review, along with “frequently asked questions” and explanatory notes providing additional background information. If approved by the Corporation Law Section and Executive Committee of the Delaware State Bar Association, the proposed amendments will be introduced in the General Assembly for consideration and, if adopted, would become effective August 1, 2015.