On May 12 the Delaware Senate passed four amendments to the Delaware General Corporation Law (DGCL). The state’s House will consider the legislation in early June, and if the amendments pass (as is considered likely), they are expected to become effective in August. They would have a significant impact on corporate America, as more than 50 percent of U.S. publicly traded companies and 64 percent of the Fortune 500 companies are incorporated in Delaware, and over one million business entities make Delaware their legal home.

The proposed amendments would change forum selection provisions in the certificates of incorporation or bylaws of Delaware corporations, would invalidate fee-shifting provisions and would make two important changes in the appraisal statute.

**Forum Selection**

Many public companies have adopted “internal affairs” forum selection provisions in their certificates and bylaws in recent years in an attempt to limit duplicative litigation filed in multiple jurisdictions. Multiple forum litigation is expensive, distracting and frequently the result of jockeying among plaintiffs’ lawyers to obtain a “seat at the table” in lawsuits challenging mergers. These forum selection provisions had never been the subject of legislation in Delaware; however, beginning in 2013 the Delaware Court of Chancery upheld several forum selection provisions, including one requiring that litigation involving a Delaware corporation take place in North Carolina.

The proposed amendments would add a new Section 115 to the DGCL, authorizing the certificate of incorporation or bylaws of a Delaware corporation to include forum selection provisions for “internal corporate claims,” including derivative actions. Internal corporate claims are claims based on a violation of a duty by a current or former director or officer or stockholder in such capacity, and other claims as to which the DGCL confers jurisdiction upon the Delaware Court of Chancery. Section 115 would authorize certificate or bylaw provisions requiring that lawsuits asserting internal corporate claims be brought solely and exclusively in the Delaware courts (including the federal court).

Section 115 does not expressly prohibit certificate or bylaw provisions that select a forum other than the Delaware courts as an additional forum in which an internal corporate claim may be brought. But the new Section 115 would invalidate any provision selecting only non-Delaware courts, or any arbitral forum, to the extent the provision would prohibit litigation of internal corporate claims in the Delaware courts. Thus, for example, it would be permissible for a Delaware corporation having its principal place of business or corporate headquarters in Illinois to adopt a charter or bylaw provision making Illinois and Delaware the exclusive fora to bring these claims, but it would be impermissible for the certificate or bylaw provision to prescribe only Illinois as the exclusive forum.

It also is important to keep in mind what this amendment does not do. It does not prohibit a provision selecting a forum other than Delaware as the exclusive forum if placed in a stockholders’ agreement or other writing signed by a stockholder against whom the
Appraisal

In addition, the Senate passed two important amendments to the Delaware appraisal statute—each designed to solve a different problem.

The first, intended to limit de minimis appraisal claims in certain public company transactions, would require the Delaware Court of Chancery to dismiss an appraisal proceeding as to all stockholders otherwise entitled to appraisal if: (i) the total number of shares seeking appraisal is less than 1 percent of the outstanding number of shares of the class or series entitled to appraisal; (ii) the value of the consideration for that total number of shares is $1 million or less; and (iii) the merger took the form of a “short form” merger under Sections 253 or 267 of the DGCL. (“Short form” mergers would not be subject to the “de minimis carve-out” because appraisal may be the only remedy available in such a merger.) Moreover, the carve-out would only apply where the shares were listed on a national securities exchange immediately before the merger or consolidation.

The second proposed amendment is intended to address the “appraisal arbitrage” issue. Many in the corporate legal community advocated a solution whereby the appraisal statute would be amended to require that a stockholder must hold its shares as of the record date for the merger vote. This approach was rejected, however, in favor of a provision that would afford surviving corporations the option of limiting the accrual of statutory interest on appraisal awards. This would allow the company to make an early payment of a sum of money in any amount determined by the company, at any time before entry of judgment in the appraisal proceeding.

When a company makes such a payment, no interest will accrue on that amount from the date of that early payment. Instead, interest will accrue only on the amount by which the ultimately adjudicated appraisal award exceeds the amount that was prepaid. (Under the current law, interest accrues on the entire amount of the appraisal award.) Corporations using this approach must make the payment to all appraisal claimants, except claimants for which the corporation has a good faith basis to contest their entitlement to seek appraisal, and no inference will be drawn from the amount prepaid when determining the fair value of the shares seeking appraisal.

Although this approach will not eliminate altogether the ability of an investor to buy stock of the to-be-merged corporation after the record date and then seek appraisal, it does enable the corporation to eliminate much of the economic incentive to do that, at least in the current (low interest rate) economic environment in which the statutory interest rate is 5 percent over the Federal Reserve rate, compounded quarterly.

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