

Corporate Alert

July 29, 2015

2015 Changes to Delaware Law Go into Effect

Amendments to the DGCL

Several significant amendments to the Delaware General Corporation Law (DGCL) were signed into law on June 24, 2015, and will go into effect on August 1, 2015. Most significantly, these amendments:

- *Prohibit fee-shifting* – After the revised Sections 102 and 109 take effect, any provisions in the certificates of incorporation or bylaws of Delaware corporations that would seek to “fee shift,” or impose liability on a stockholder for attorneys’ fees or expenses of the corporation (or anyone else) in connection with “internal corporate claims” (e.g., breaches of fiduciary duties) will be prohibited.¹
- *Authorize Delaware forum selection clauses* – In the new Section 115, the DGCL (1) expressly authorizes the inclusion of Delaware exclusive forum provisions for internal corporate claims in the certificates of incorporation or bylaws of Delaware corporations and (2) prohibits provisions in such certificates of incorporation or bylaws that would disallow bringing internal corporate claims in Delaware.²

Fee-Shifting Provisions – Sections 102 and 109

“Fee-shifting” provisions in a corporation’s certificate of incorporation or bylaws generally provide that, in litigation brought by stockholders against the corporation or its directors or officers, including actions for breach of fiduciary duty and derivative suits, the plaintiff stockholder is required to pay the legal fees of the defendant corporation, officer or stockholder if the lawsuit is unsuccessful.

The revisions to Sections 102 (relating to the certificate of incorporation) and 109 (relating to the bylaws) will prohibit the certificate of incorporation and bylaws from imposing any liability on a stockholder for the attorneys’ fees or expenses of the corporation or any other party in connection with “internal corporate claims.”³

The new Section 115 defines “internal corporate claims” 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 [the DGCL] confers jurisdiction upon the Court of Chancery.”⁴ Essentially, “internal corporate claims” are any claims arising under the DGCL.⁵

¹ S. 75, 148 Gen. Assemb., Reg. Sess. (Del. 2015).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *See id.*

These amendments come in response to a recent debate over fee-shifting provisions as a result of the Delaware Supreme Court's decision in *ATP Tour, Inc. v. Deutscher Tennis Bund*,⁶ which upheld the validity of a bylaw provision adopted by a nonstock membership corporation shifting attorneys' fees and expenses to unsuccessful plaintiffs in intracorporate litigation. Notably, the amendments to Sections 102 and 109 do not affect nonstock corporations (Section 114 of the DGCL was amended to make this explicitly clear) —they simply make clear that the ATP Tour decision is not applicable to stock corporations.⁷

It is also important to note that the amendments to Sections 102 and 109 do not prohibit the inclusion of fee-shifting provisions in a stockholders' agreement or other writing signed by the stockholder against whom the provision is to be enforced (e.g., stock purchase agreements).⁸

Forum Selection Provision – Section 115

The new Section 115 expressly authorizes Delaware corporations to include exclusive forum provisions for internal corporate claims in their respective certificates of incorporation or bylaws and also prohibits provisions that exclude Delaware as a forum for internal corporate claims in such organizational documents.⁹

As a result, Section 115 permits the selection of Delaware as the exclusive forum while disallowing the selection of another state as the exclusive forum for internal corporate claims, though it remains to be seen whether other states may be selected as acceptable forums **in addition to** Delaware.¹⁰

This new Section 115 comes in response to the growing popularity of forum selection provisions, and effectively overrules the Court of Chancery's decision in *City of Providence v. First Citizens BancShares, Inc.*,¹¹ which upheld a forum selection provision designating North Carolina as the exclusive forum for intracorporate disputes.

Similar to the amendments relating to fee-shifting provisions, Section 115 does not prevent the application of any forum selection provision (even those selecting a state other than Delaware as the exclusive forum) in a stockholders' agreement or other writing signed by the stockholder against whom the provision is to be enforced.¹²

Other DGCL Amendments

The DGCL amendments also, among other things:

⁶ 91 A.3d 554 (Del. 2014).

⁷ See S. 75, 148 Gen. Assemb., Reg. Sess. (Del. 2015).

⁸ See *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 99 A.3d 229 (Del. Ch. 2014).

¹² See S. 75, 148 Gen. Assemb., Reg. Sess. (Del. 2015).

- *Provide flexibility in stock and option issuances* – Amendments to Section 152 clarify the requirements for board approval of stock to be issued in one or more future transactions and expressly provide that boards may authorize stock to be issued in “at-the-market” programs without having to separately authorize each individual stock issuance.¹³ Corresponding amendments to Section 157 were also made with respect to authorization of rights and options to purchase stock.¹⁴
- *Clarify procedures for rectifying defective corporate acts and stock issuances* – Amendments to Sections 204 and 205 clarify and streamline the procedures for ratifying defective corporate acts and stock issuances that would be void or voidable due to a “failure of authorization.”¹⁵

Amendments to the LLC and Partnership Acts

Recent amendments to the Delaware Limited Liability Company Act (the “LLC Act”), the Delaware Revised Uniform Limited Partnership Act (the “LP Act”) and the Delaware Revised Uniform Partnership Act (the “GP Act” and, collectively with the LLC Act and the LP Act, the “LLC and Partnership Acts”) were also signed into law on June 24, 2015, and will generally go into effect on August 1, 2015. The most significant of these amendments:

- *Eliminate default class or group voting requirements:*
 - The LLC Act and the LP Act were amended to eliminate the default class or group voting requirements in connection with (1) the merger or consolidation, transfer or continuance, conversion, dissolution or winding up of a Delaware limited liability company or Delaware limited partnership; and (2) the termination and winding up of a series of a Delaware limited liability company or Delaware limited partnership; however, these amendments also provide that the default voting requirements as in effect on July 31, 2015, will continue to apply to entities whose original certificate of formation or certificate of limited partnership was filed on or before July 31, 2015, unless otherwise provided in such entity’s limited liability company agreement or partnership agreement.¹⁶
 - Additionally, the LP Act has been amended (1) to eliminate the default class or group voting requirements in connection with the revocation of dissolution of a Delaware limited partnership or the conversion of a Delaware limited partnership to a Delaware limited liability limited partnership and (2) to eliminate the default class or group requirement for executing a certificate of cancellation for a Delaware limited partnership being wound up by its limited partners. Unlike the eliminated default class or group voting requirements discussed above, these requirements were eliminated regardless of when an original certificate of limited partnership was filed and effective, unless otherwise provided in a partnership agreement.¹⁷

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See S. 76, 77 and 78, 148 Gen. Assemb., Reg. Sess. (Del. 2015).

¹⁷ *Id.*

- It is important to note that, even though default class or group voting requirements have been eliminated with respect to certain corporate actions by these amendments, the LLC Act and the LP Act will continue to have default voting requirements in connection with such actions —such default voting requirements will apply to all members or limited partners generally, however, instead of to classes or groups.
- *Clarify that irrevocable power-of-attorney provisions also apply to irrevocable proxies* – The LLC and Partnership Acts were amended in 2010 to clarify when a power of attorney would be irrevocable and to explain the effects of such irrevocability.¹⁸ The 2015 amendments to the LLC and Partnership Acts provide that the provisions of the LLC and Partnership Acts relating to irrevocable powers of attorney also apply to proxies, and, similarly to the 2010 amendments, they clarify when a proxy will be irrevocable and explain the effects of such irrevocability.¹⁹ It is important to note that these amendments do not limit the enforceability of a power of attorney or proxy that is part of a limited liability company agreement or partnership agreement; rather, they simply operate as a default to the extent that the matter is not addressed in the limited liability company agreement or partnership agreement.²⁰
- *Provide for the irrevocable delegation of rights and powers* – The LLC and Partnership Acts were amended to provide that, unless otherwise provided in a limited liability company agreement or partnership agreement, a delegation of the rights and powers to manage and control the business and affairs of a Delaware limited liability company, Delaware limited partnership or Delaware general partnership by a member or manager of a Delaware limited liability company, a general partner of a Delaware limited partnership or a partner of a Delaware general partnership shall be irrevocable if such delegation states that it is irrevocable.²¹

¹⁸ See H. 372, 373 and 374, 145 Gen. Assemb., Reg. Sess. (Del. 2010).

¹⁹ See S. 76, 77 and 78, 148 Gen. Assemb., Reg. Sess. (Del. 2015).

²⁰ See *id.*

²¹ *Id.*

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