WSGR ALERT

# Proposed 2015 Amendments to the Delaware General Corporation Law

**March 16, 2015**

The Delaware Corporation Law Council—composed of members of the Delaware bar charged with proposing annual amendments to the Delaware General Corporation Law (DGCL)—has proposed several potentially significant amendments to the DGCL. Among other things, the amendments would seek to prohibit "fee-shifting" provisions in charters or bylaws. They would authorize forum selection provisions in charters and bylaws if such provisions allow claims to be brought in Delaware courts but prohibit them if they do not. The proposed amendments also would alter various aspects of the appraisal rights available to stockholders upon a merger.[1] The proposed amendments still need to be approved by certain groups within the Delaware State Bar Association (DSBA), the Delaware legislature, and the Delaware governor, and they would not take effect until August 1, 2015. Clients should be aware of these proposed amendments in their corporate planning because of their potential implications and because, historically, amendments recommended by the Council have been regularly adopted.

## The Proposed Fee-Shifting Amendments

The proposed amendments concerning fee-shifting provisions follow nearly a year of controversy. On May 8, 2014, in a then little-watched dispute in *ATP Tours, Inc. v. Deutscher Tennis Bund*, the Delaware Supreme Court answered a certified question from another court regarding the facial validity of a "fee-shifting" bylaw of a Delaware non-stock corporation, a corporate form also governed by the DGCL. The fee-shifting provision in that case provided that if a member participated in bringing an intracorporate claim against the corporation or other members and was not "substantially" successful, that member would have to pay the expenses of the corporation or other members. The Delaware Supreme Court held that a bylaw of that kind was facially valid under the DGCL. The court appeared to broadly premise its ruling on DGCL provisions equally applicable to stock corporations and on Delaware case law from the traditional corporate context.[2]

On May 22, 2014, two weeks after the ruling, the Corporation Law Council proposed DGCL amendments—written to take effect on August 1, 2014—that would have effectively prohibited fee-shifting provisions in the charters and bylaws of stock corporations. In June 2014, the Delaware legislature effectively tabled the amendments, requesting additional examination of the issues by the Council. The currently proposed amendments follow that consideration.

The proposed amendments would broadly provide that charters and bylaws of Delaware corporations may not contain provisions imposing liability on a stockholder for the attorneys' fees or expenses of the corporation or other parties in connection with intracorporate claims. Thus, if the amendments are enacted, they would prohibit fee-shifting provisions in charters and bylaws.

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[1] PDF copies of the proposed amendments are available at: https://www.wsgr.com/PDFs/1182013.pdf and https://www.wsgr.com/PDFs/1182386.pdf.

[2] *See, e.g., ATP*, 91 A.3d 554, 558 (Del. 2014) ("A fee-shifting bylaw, like the one described in the first certified question, is facially valid. Neither the DGCL nor any other Delaware statute forbids the enactment of fee-shifting bylaws. A bylaw that allocates risk among parties in intra-corporate litigation would also appear to satisfy the DGCL's requirement that bylaws must relate to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees. The corporate charter could permit fee-shifting provisions, either explicitly or implicitly by silence. Moreover, no principle of common law prohibits directors from enacting fee-shifting bylaws.") (internal citations and quotations omitted).

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## *Proposed 2015 Amendments to the Delaware General . . .*

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### The Proposed Forum Selection Amendments

Forum selection provisions in charters or bylaws generally require that intracorporate governance claims be brought in the courts of a particular specified state. They have evolved over recent years in response to wasteful multi-forum litigation, which most commonly occurs following the announcement of a deal or news of a corporate trauma. Hundreds of corporations have adopted these provisions, and recent studies suggest that they have had positive impacts.[3] In 2013, in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, the Court of Chancery held that a forum selection bylaw exclusively selecting Delaware courts was facially valid.[4] In September 2014, in *City of Providence v. First Citizens BancShares, Inc.*, the Court of Chancery upheld a bylaw of a Delaware corporation that exclusively selected the courts of the state of the corporation's headquarters (North Carolina).[5] Courts in several, although not all, states have enforced forum selection provisions.

The proposed amendments would in some respects codify and in other respects overturn the Delaware case law. The amendments would codify the *Chevron* decision by authorizing charter and bylaw provisions requiring that intracorporate claims be brought in Delaware courts, subject to jurisdictional requirements. But the amendments would effectively appear to overturn the *City of Providence* ruling by providing that a forum selection provision may not "prohibit bringing such claims" in Delaware courts. In short, if the amendments are enacted, corporations could validly adopt charter or bylaw provisions selecting exclusively the courts of Delaware. But they could not validly select *only* the courts of another state to the exclusion of Delaware.

In materials accompanying the proposed amendments, the Council explained this aspect of the amendments by noting its beliefs "that stockholders of Delaware corporations should not be denied access to the protection of the Delaware courts," that "the value of Delaware as a favored jurisdiction of incorporation is dependent on a consistent development of a balance of corporate law, and that the Delaware courts are best situated to continue to oversee that development," and that "the broadly enabling nature of the DGCL [should] be trimmed back to address this issue."

The practical effect of these proposed amendments is that the only forum a corporation could choose that would eliminate the risk of multi-forum litigation is Delaware. If a corporation sought to have intracorporate claims litigated in the forum of its principal place of business then it would subject itself to the risk of multi-forum litigation, since it must also allow such claims to be brought in Delaware.

### The Appraisal Rights Amendments

In certain circumstances following a merger—including sales of public companies by way of a merger in which target stockholders are cashed out—stockholders have appraisal rights. These are often referred to as "dissenter's rights." Specifically, stockholders can petition the Delaware Court of Chancery to determine the "fair value" of their shares, which can be more or less than the deal price. The acquiror generally pays the difference if the court awards more. In recent years, appraisal arbitrage has materialized, with hedge funds and other investors accumulating shares of a target company after a deal is announced simply to bring an appraisal claim. One economic incentive for such arbitrage is that the DGCL provides for a favorable default interest

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[3] *See, e.g.*, Matthew D. Cain; Steven Davidoff Solomon, "Takeover Litigation in 2014 (Preliminary Figures)" (noting that in 2014 33.8% of transactions involved suits in multiple jurisdictions, compared to 41.8% in 2013 and a high of 53% in 2011); Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Targets: Review of 2014 M&A Litigation* (available here: https://www.cornerstone.com/GetAttachment/897c61ef-bfde-46e6-a2b8-5f94906c6ee2/Shareholder-Litigation-Involving-Acquisitions-2014-Review.pdf) ("Unlike recent years, the majority of litigation for 2014 deals was filed in only one jurisdiction (60 percent). This is likely a result of widespread adoption of forum selection clauses in corporate bylaws. Just 4 percent of the deals were challenged in more than two courts, the lowest number since 2007.").

[4] A prior WSGR Alert detailing *Chevron* is available at: https://www.wsgr.com/WSGR/Display.aspx?SectionName=clients/0613-chevron.htm. Note that Wilson Sonsini Goodrich & Rosati represented Chevron in defending the validity of its forum selection bylaw.

[5] A prior WSGR Alert detailing *City of Providence* is available at: https://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert-providence.htm.

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rate—5 percent over the Federal Reserve discount rate—that accrues and compounds quarterly from the effective time of the merger through a judgment on the appraisal claim, which can take years. That interest runs on whatever amount the stockholder ultimately receives, even if it is just the deal price. Acquiring companies have brought claims challenging the validity of such appraisal actions, but the Delaware courts—including in recent months[6]—have held that their hands were effectively tied in light of how the appraisal rights statute was written. In June 2014, in the same resolution tabling the then-proposed fee-shifting amendments, the Delaware legislature also asked the Council to examine appraisal rights.

The proposed amendments seek to impact appraisal rights in two respects. First, in most public company deals,[7] the proposed amendments would eliminate what the Council has referred to as "nuisance" suits. Specifically, the amendments would provide that in order for an appraisal action to go forward, the stockholders involved in the action must collectively hold at least 1 percent of the total shares entitled to appraisal rights or $1 million worth of the shares as measured in deal value. Second, the amendments would provide that at any time before the court enters judgment in an appraisal action, the company surviving the merger can pay to each stockholder seeking appraisal rights an amount of cash, with interest continuing to accrue only on the amount that is the difference between that cash payment and the court's ultimate award. These amendments appear aimed at the economic incentives underlying appraisal arbitrage but would not change the standing of stockholders to bring appraisal claims even if they buy shares after the announcement of a deal. Thus, the impact of the amendments will remain to be seen.

**Next Steps**

The proposed amendments will now go to the required groups within the DSBA, the Delaware legislature, and the Delaware governor for consideration. Typically the Council's proposals, coming as they do from Delaware corporate law practitioners, are generally adopted as proposed. Wilson Sonsini Goodrich & Rosati will continue to monitor developments.

For more information, please contact William Chandler, Boris Feldman, David Berger, Tamika Montgomery-Reeves, Amy Simmerman, or any member of the corporate law and governance or litigation practices at Wilson Sonsini Goodrich & Rosati.

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[6] *See Merion Capital LP v. BMC Software, Inc.*, C.A. No. 8900-VCG (Del. Ch. Jan. 5, 2015); *In re Appraisal of Ancestry.com, Inc.*, C.A. No. 8173-VCG (Del. Ch. Jan. 5, 2015).
[7] This aspect of the proposed amendments would not apply in public company deals consummated by way of a "short-form" merger or in private company mergers.

Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

This WSGR Alert was sent to our clients and interested parties via email on March 16, 2015.
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