

# **Securities Regulation Daily Wrap Up, TOP STORY—**

## **Delaware legislature passes bill addressing fee-shifting and forum selection bylaws,(Jun. 12, 2015)**

By John M. Jascob, J.D.

The Delaware House of Representatives has unanimously approved a bill prohibiting stock corporations from adopting governance provisions that would impose liability on shareholders for the corporation's attorney fees or expenses in connection with litigating an internal corporate claim. The bill also allows corporations to attempt limit duplicative litigation filed in multiple jurisdictions by adopting provisions requiring that any internal corporate claims be brought exclusively in the Delaware courts.

The Delaware House approved [S.B. 75](#) in a session late yesterday by a vote of 40-0, after the bill had previously been approved by the state Senate on May 12. The legislation now heads to Gov. Jack Markell for his signature.

**Ban on fee-shifting provisions.** The ban on fee-shifting provisions by stock corporations comes in response to the Delaware Supreme Court's decision last year in [\*ATP Tour, Inc. v. Deutscher Tennis Bund\*](#), where the court held that fee-shifting provisions in a non-stock corporation's bylaws generally can be valid and enforceable under Delaware law. Although S.B. 75 does not disturb that ruling in relation to non-stock corporations, the bill seeks to preserve effective enforcement of fiduciary duties in stock corporations by adding new Section 102(f) to the Delaware General Corporation Law (DGCL). Section 102(f) provides that the certificate of incorporation of a stock corporation may not contain any provision that would impose liability on a shareholder for the attorney fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in new Section 115. The bill also amends Section 109(b) by prohibiting a stock corporation's bylaws from including such provisions.

The synopsis to S.B. 75 further states that new Section 102(f) and the amendments to Section 109(b) are not intended to prevent the application of the ban on fee-shifting provisions to any provision in a stockholder's agreement or other writing signed by the stockholder against whom

the provision is to be enforced. Amendments to Section 114 explicitly avoid application of the fee-shifting ban to non-stock corporations.

In a [speech](#) in March of this year, SEC Chair Mary Jo White noted that more than 40 companies had already adopted bylaws shifting legal fees to losing shareholders in derivative actions since the Delaware Supreme Court's ruling in *ATP Tour*. Although declining to comment on the merits of the arguments in favor and against fee-shifting bylaws, White expressed concern that such bylaw provisions that are legal under state law could inappropriately stifle shareholders' ability to seek redress under the federal securities laws.

**Forum selection provisions.** New Section 115 of the DGCL defines "internal corporate claims" to mean claims arising under the DGCL, including derivative claims of a breach of fiduciary duty by current or former directors or officers or stockholders of the corporation. Section 115 further provides that a corporation's certificate of incorporation or bylaws may require any internal corporate claims to be brought exclusively in the state or federal courts in Delaware. Moreover, no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in Delaware. Section 115 thus confirms the Chancery Court's ruling in [\*Boilermakers Local 154 Retirement Fund v. Chevron Corp.\*](#), where the court upheld bylaws requiring that matters regarding internal corporate affairs be litigated in Delaware. Section 115 does not address, however, the validity of forum selection provisions that designate a forum other than the Delaware courts as an additional forum in which internal corporate claims may be brought.

As with the amendments relating to fee-shifting provisions, the synopsis of the bill states that Section 115 is not intended to prevent the application of any forum selection provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced. Section 115 also is not intended to foreclose evaluation of whether the specific terms and manner of adoption of a particular forum selection provision comport with relevant fiduciary obligations or operate reasonably under the circumstances.

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