

2018 Amendments to the Minnesota Business Corporation Act

by Robert A. Rosenbaum and Jonathan A. Van Horn

The Minnesota Legislature has approved, and Governor Mark Dayton has signed, legislation amending the Minnesota Business Corporation Act (MBCA). The amendments go into effect on August 1, 2018 and include authorizations for:

- Minnesota corporations to include **exclusive forum provisions in their articles of incorporation or bylaws**, requiring that “internal corporate claims” be brought exclusively in a court in the State of Minnesota;
- So-called “**medium-form**” **mergers** that do not require shareholder approval when a publicly held Minnesota corporation is being acquired in a two-step transaction (a tender or exchange offer followed by a merger) and the acquirer obtains more than 50% (or such higher percentage as required in the target corporation’s articles of incorporation) of the outstanding shares of the target corporation in the first-step tender or exchange offer; and
- The board of directors to **delegate to another person or persons the authority to issue stock up** to a designated maximum number of shares during a designated period, subject to a designated minimum consideration.

The amendments also contain other, more technical revisions and clarifications of the MBCA.

Exclusive Forum Provisions

In 2015, the Delaware Legislature added Section 115 to the Delaware General Corporation Law (DGCL), giving Delaware corporations explicit authority to adopt exclusive forum provisions in their certificates of incorporation or bylaws. Such provisions make Delaware the exclusive forum for “internal corporate claims,” which are defined as claims, including derivative claims, “(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.” Section 115 legislatively confirmed a previous decision by the Delaware Court of Chancery, *Boilermakers Local 154 Ret. Fund v. Chevron Corporation*, 73 A.3d 934 (Del. Ch. 2013), that held such provisions to be valid under the DGCL. Section 115 prohibits a Delaware

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- Robert A. Rosenbaum
- Jonathan A. Van Horn

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corporation from adopting an exclusive forum provision that would prevent bringing “internal corporate claims” in Delaware, but does not prohibit inclusion of another jurisdiction in such a provision as an alternative forum state.

New Section 302A.191 of the MBCA basically tracks DGCL Section 115, explicitly authorizing a Minnesota corporation to include a provision in its articles of incorporation or bylaws making any or all of the courts in the State of Minnesota (subject to jurisdictional requirements) the exclusive forum for “internal corporate claims.” These claims are defined as “(a) any claim that is based upon a violation of a duty under the laws of this state by a current or former director, officer or shareholder in such capacity; (b) any derivative action or proceeding brought on behalf of the corporation; or (c) any action asserting a claim arising under any provision of [the MBCA] or the corporation’s articles or bylaws.” The new Minnesota provision, like that in Delaware, prohibits a Minnesota corporation from adopting an exclusive forum provision that would prevent bringing “internal corporate claims” in Minnesota, but does not prohibit inclusion of another jurisdiction in such a provision as an alternative forum state.

Since the adoption of DGCL Section 115, many Delaware corporations have adopted exclusive forum bylaws as a means of ensuring that derivative and other corporate claims are adjudicated by courts well-versed in applicable law and of avoiding the costs and other burdens of lawsuits brought in multiple jurisdictions. For the same reasons, Minnesota corporations should carefully consider adopting exclusive forum bylaws under the new explicit authority provided in Section 302A.191.

Medium-Form Mergers

Two-step acquisitions of publicly held corporations, consisting of a first-step tender or exchange offer followed by a second-step merger, are common in the United States. This is because they offer an acquirer the ability to obtain control of the target corporation quickly, through the tender or exchange offer, and then efficiently acquire the remaining untendered shares through the second step, squeeze-out merger. In a one-step acquisition by a normal, long-form merger, the acquirer has to wait until proxies are solicited and stockholders of the target approve the transaction at a special meeting before ownership control is obtained.

If an acquirer obtains 90% or more control in a first-step tender or exchange offer, the second-step merger may be effected without a shareholder vote under the short-form merger provisions in most corporate statutes (including the MBCA). Historically, however, if an acquirer obtained more than 50% ownership but less than the 90% statutory floor for a short-form merger, a vote of target shareholders was required, and the acquirer (unless it had a so-called “top-up option” to buy enough shares from the target itself to get to 90%) had to incur the cost and delays entailed in soliciting proxies and holding a special meeting – even though the vote was a foregone conclusion. In 2013, Delaware adopted DGCL Section 251(h), allowing public corporations to include a provision in a merger agreement that removes the need for a stockholder vote to approve a second-step merger following a public tender or exchange offer if, following the offer, the acquirer owns at least such percentage of stock as would otherwise be

necessary to approve the merger (and meets certain other conditions).

The 2018 MBCA amendments parallel the changes made in Delaware to permit what has become known as a “medium-form” or “intermediate-form” merger. New subdivision 4 to Section 302A.613 permits a second-step merger without a shareholder vote if the plan of merger expressly “(i) permits or requires the merger to be effected in accordance with this subdivision; and (ii) requires that the merger be effected as soon as practicable following the consummation” of the tender or exchange offer in which the acquirer obtains enough shares to ensure approval of the merger if a shareholder vote were required. As in Delaware, the second-step merger must have the same type and amount of merger consideration as was paid in the tender or exchange offer, and the tender or exchange offer (although it may be conditioned on receiving a specified minimum percentage) must be for all outstanding shares of the target (other than shares owned by the acquirer or its affiliates or rollover shares).

The MBCA’s dissenters’ rights provisions are also being amended to provide that a corporation relying on the new medium-form merger provision may, but is not required to, give the statutory notice of dissenters’ rights to all shareholders at the commencement of the first-step tender or exchange offer. In that case, a shareholder who intends to seek dissenters’ rights must not tender his or her shares and must file with the corporation the shareholder’s notice of intent to demand the fair value of his or her shares before the consummation of the offer. The amended MBCA dissenters’ rights provisions exclude medium-form mergers (like short-form mergers) from the “market-out” exception to dissenters’ rights contained in Section 302A.471, subdivision 3(c)(1). Delaware also originally excluded medium-form mergers from its “market-out” exception in DGCL Section 262(b), but amended that provision in 2018 after concluding that it made no sense to differentiate a stock-for-stock, medium-form merger from a stock-for-stock, long-form merger with regard to the “market-out” exception. Minnesota may in the future come to the same conclusion.

Delegation of Authority To Issue Shares

New subdivision 1(b) to MBCA Section 302A.401 provides that the board may pre-authorize a person or persons (whether or not they are directors) to issue stock of the corporation, but only if the resolution granting such delegated authority fixes a maximum number of shares that may be issued pursuant to the resolution, sets a time period during which those shares may be issued and provides for a minimum amount of consideration for which those shares may be issued. The new subdivision will enable boards to authorize a CEO, for example, to make grants of equity awards to employees, within the limits set by the board, without having to obtain further board approval for every such issuance.

Other Amendments

The 2018 MBCA amendments also make a number of technical, clarifying or corrective changes, including:

- Clarifying that the statute authorizes the use of email and other electronic communications to obtain electronic signatures to written actions or consents;
- Clarifying that the ban on amendments to compensatory arrangements during a tender offer under MBCA Section 302A.255, subdivision 3, does not apply to offers that have been approved by a publicly held corporation's board of directors as part of a plan of merger under Section 302A.613 (long-form and medium-form mergers) or Section 302A.621 (short-form mergers);
- Automatic termination of a proxy to vote shares where the shareholder attends and votes at the meeting with respect to which the proxy appointment relates;
- Updates to the names of the exchanges and markets listed in the MBCA Section 302A.471, subdivision 3(c)(1) "market-out" exception to availability of dissenters' rights; and
- Clarification in a new subdivision 3 to MBCA Section 302A.682 that a conversion under the MBCA may include situations where the form of entity remains the same but the jurisdiction of incorporation is changed – what is known as a domestication under the DGCL and some other bodies of corporate statutory law.

Bryn Vaaler, Robert Rosenbaum and Jonathan Van Horn are members of the Minnesota Business Corporation Act Revisions Committee of the Minnesota State Bar Association.

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