ARCHER
ATTORNEYS AT LAW

February 2018

Client Advisory

Buzzer-Beater Legislation Brings Changes to New Jersey Corporate Law

As Governor Christie's final term came to a close on January 16th, he signed into law several bills proposed by the state Assembly relating to day-to-day corporate governance. The new laws impact mergers and consolidations and drafting considerations for corporate bylaws and certificates of incorporation, among other things, and amend portions of N.J.S.A. 14A as described in more detail below.

1. Plans of Merger and Consolidation: P.L. 2017, c.355 (N.J. A2161 and S 2237)

P.L. 2017, c.355 amends N.J.S.A. 14A:10-3 to specifically permit corporations to include a "force the vote" provision in any plan of merger or consolidation that it adopts. New section (9) of the law now provides that if a board of directors approves a plan, but determines subsequently that the plan is inadvisable, the corporation may nonetheless submit the plan to a vote of its shareholders if the plan of merger or consolidation requires this.

These types of provisions may deter, in acquisition transactions, potential third party acquirers since the target board cannot approve a third party offer until the target's shareholders have voted on the initial proposed transaction. Accordingly, in determining whether to include a "force the vote" provision, due consideration must be given to balancing the need for deal certainty against the ability of the target's board of directors to properly discharge its fiduciary duties if a superior offer is made prior to a required shareholder vote.

Further, a new section (10) allows a board of directors, in certain cases, to amend the plan after shareholder approval, but prior to the effective date of the merger or consolidation contemplated by the plan. This authority is limited, however, and a board must resubmit the plan for shareholder approval if the plan amendment would:

a. alter or change the amount or kind of consideration to be received by the shareholders of the corporation;
b. alter or change any term of the certificate of incorporation of the surviving corporation; or
c. unless the plan of merger or consolidation expressly provides otherwise, alter or change any of the terms and conditions of the plan, in a manner that would materially and adversely affect the shareholders of either corporation who are or were entitled to vote on the plan.

If a plan of merger or consolidation is amended pursuant to section (10), the revised plan must be submitted to the New Jersey Secretary of State for filing prior to the effective date of the proposed merger or consolidation.

2. Selection of New Jersey as Forum in Bylaws: P.L. 2017, c.356 (N.J. A2162 and S2234)

N.J.S.A. 14A:2-9 was amended to permit corporations to expressly include a forum selection provision in their bylaws. Under this law, bylaws may state that the New Jersey federal and state courts will be the sole and exclusive forum for certain actions, including derivative 2 actions, shareholder suits alleging a breach of a fiduciary duty by an officer or director, shareholder suits alleging a violation of the New Jersey Business Corporation Act by the corporation or its officers or directors, and "any other claim brought by one or more shareholders which is governed by the internal affairs or an analogous doctrine."

In the event that such a suit is brought in contravention to the forum selection provision, the shareholder bringing such a suit may be liable for reasonable costs incurred in enforcing the provision.

3. Applicability of Law to Derivative Proceedings and Shareholder Class Actions: P.L. 2017, c.362 (N.J. A2970 and S2236)

Prior to the passage of this law, the New Jersey Business Corporation Act provisions relating to derivative proceedings and shareholder class actions, located at N.J.S.A. 14A:3-6.1 through 3-6.9, were applicable to a corporation only if the certificate of incorporation provided as such. Now, N.J.S.A. 14A:3-6.1 through 14A:3-6.6 are applicable by default, and these provisions may only be varied by the terms of a corporation's certificate of incorporation.

The provisions, which will be applicable to a corporation now, unless modified in the corporation's certificate of incorporation, relate to the conditions for commencing and maintaining a derivative or shareholder class action proceeding (14A:3-6.2), actions required prior to commencing a proceeding (14A:3-6.3), court stays of proceedings (14A:3-6.4), conditions for dismissal of a proceeding (14A:3-6.5), and the requirement for a court's approval of any discontinuance or settlement of a proceeding (14A:3-6.6). Notably, however, the provisions of 14A:3-6.7 and 3-6.8 relating to the allocation of expenses after termination of derivative or shareholder class action proceedings and the requirement for security for reasonable expenses are still applicable only if contained in the corporation's certificate of incorporation.

It is important to note that these statutory default provisions, unless properly modified in the corporation's certificate of incorporation, will be applicable to any derivative action or shareholder class action brought against a New Jersey corporation whether such action is brought in a state or federal court located within or outside New Jersey. Practitioners, management, and founders of a corporation should carefully consider whether there is a need or desire to deviate from these default positions in the drafting of certificates of incorporation, as well as whether existing certificates of incorporation should be amended in light of such changes.

4. Electronic Transmission of Consents of Boards of Directors: P.L. 2017, c.363 (N.J. A2971 and S2235)

N.J.S.A. 14A:6-7.1 was amended to expressly permit directors to consent to action without a meeting via electronic transmission. This brings New Jersey into line with states like Delaware by expressly recognizing the validity of using technology to facilitate the process for obtaining unanimous board and board committee consents.

5. Permitted Limitations to Shareholder Nominations in Proxy Solicitations: P.L. 2017, c.299 (N.J. A2973 and S2239)

N.J.S.A Title 14A, chapter 5, has been supplemented, and now permits a corporation to impose conditions in its bylaws on the inclusion in the corporation's proxy statements of materials pertaining to shareholder-nominated individuals for election to the corporation's board of directors. The statute provides a non-comprehensive list of examples of such conditions or restrictions. These include:

a. requiring the nominating shareholder to own a minimum level of beneficial ownership of shares in the corporation's voting stock;
b. requiring a minimum duration of ownership of such shares;
c. limiting the nomination of previously-nominated individuals;
d. limiting the number of shareholder-nominated directors for meetings in which directors will be elected; and

e. requiring nominating shareholders to first submit certain specified information about the shareholder and the shareholder nominee.

Notably, for prospective nominating shareholders, corporations may now also include in their bylaws "provisions requiring that the nominating shareholder undertake to indemnify the corporation in respect of any loss arising as a result of any false or misleading information or statement submitted by the nominating shareholder in connection with a nomination."

6. Shareholder Access to Books and Records: P.L. 2017, c.364 (N.J. A2975 and S2238)

Acknowledging that documents may be disseminated more rapidly and easily in the information age, N.J.S.A. 14A:5-28 now allows corporations to "impose reasonable limitations or conditions on the use or distribution of requested materials provided to a demanding shareholder . . . ." It is not clear from the text what constitutes "reasonable limitations or conditions," though a statement accompanying N.J. A2975 advised that the intent is not to deny shareholders access to information, but rather to acknowledge and permit an already-common practice among corporations of requiring shareholders to agree to confidentiality obligations as a condition to access to the materials.

If you have any questions or would like more information on the issues discussed in this Alert, please contact Greg Vogel, Esq. or Deborah A. Hays, Esq., or any other member of Archer's Business Counseling Group in Haddonfield, N.J., at (856) 795-2121, in Princeton, NJ, at (609) 580-3700, in Hackensack, NJ, at (201) 342-6000, in Philadelphia, PA, at (215) 963-3300, or in Wilmington, DE, at (302) 777-4350.