

Delaware Liberalizes Procedures for Issuance of Stock

By J. Anthony Terrell and Alexander Tiktin*

On June 24, 2015, the Delaware State Legislature enacted various amendments to the General Corporation Law of the State of Delaware (the “DGCL”), including one providing greater flexibility to the board of directors of Delaware stock corporations in authorizing the issuance of stock and determining the consideration to be received therefore. These amendments will become effective August 1, 2015.

Section 153 of the DGCL provides that shares of stock may be issued for such consideration as is determined from time to time by the board of directors (or by the stockholders if the certificate of incorporation so provides); provided, however, that in the case of stock having a par value, the value of such consideration must not be less than such par value. Section 153 remains unchanged.

Section 152 of the DGCL provides that consideration for the issuance of stock shall be paid in such form and in such manner as the board of directors shall determine; provided, however, that such consideration shall be in the form of cash, any tangible or intangible property or any benefit to the corporation or any combination thereof. Prior to August 1, 2013, Section 152 provided that the consideration for the issuance of stock had to be determined by the board of directors. In order to provide some flexibility to the board of directors, Section 152 was amended, effective August 1, 2013, to provide that “[t]he board of directors may determine the amount of such consideration by approving a formula by which the amount of consideration is determined.” While providing some flexibility, this provision left open the question of what constitutes a “formula” and required that the “formula” be determined only by the board.¹ Furthermore, the authority to issue stock and to determine the consideration therefor could not be delegated to an officer of the corporation or, unless permitted under Section 141 of the DGCL, even to a committee of the board. Thus, “at-the-market” and other periodic offering financing techniques presented legal obstacles unless the board (or committee thereof) approved each issuance or adopted an appropriate “formula.”

¹ Section 141(c)(2) of the DGCL, which applies to corporations incorporated on or after July 1, 1996, permits a committee of the board of directors to authorize the issuance of stock. Section 141(c)(1) of the DGCL, which applies to corporations incorporated prior to July 1, 1996, does not permit a committee of the board to authorize the issuance of stock unless the certificate of incorporation, the bylaws or a resolution of the board expressly so provides; provided, however, that any such corporation, by resolution adopted by a majority of the whole board, may elect to be governed by paragraph (c)(2) rather than paragraph (c)(1).

Section 152 of the DGCL as most recently amended still requires a general authorizing resolution of the board of directors (or, to the extent permitted by Section 141, a committee of the board) for the issuance of stock but provides flexibility in authorizing the issuance of shares in multiple transactions either by delegating the authority to determine the number of shares and timing of issuance to a person or body (with no specific requirement that such person or body be employed by or otherwise associated with the corporation) or by setting forth in the board resolutions the manner in which the same are to be determined; provided, however, that the board resolution must set forth:

- the maximum number of shares that may be issued thereunder;
- the period of time during which such shares may be issued; and
- the minimum amount of consideration for which such shares may be issued (which may be fixed or determined by a formula).

The recent amendments to Section 152 of the DGCL, which are set forth in Exhibit A, also clarify the term “formula” to some extent by providing that “[t]he formula may include or be made dependent upon facts ascertainable outside the formula....” These amendments were accompanied by similar amendments to Section 157(b) relating to the pricing of shares to be issued upon the exercise of stock options or similar rights.

The recent amendments to Section 152 of the DGCL were also accompanied by clarifying amendments to Section 204 of the DGCL which provides the procedures to be followed in order to ratify defective corporate acts, including the defective issuance of shares of stock.

This Client Alert will not compare Section 152 of the DGCL to the corresponding provisions of the corporation laws of other states. However, it is noted that Section 6.21(c) of the Model Business Corporation Act, 4th Edition (the “Model Act”), provides that, before a corporation issues shares, the board of directors must determine that the consideration received or to be received is adequate. However, Section 8.25 of the Model Act, which provides for committees of the board, does not include the approval of stock issuances on the list of acts prohibited for a committee, as in previous editions of the Model Act. The Model Act remains silent as to whether or not mechanisms such as floor prices, capped commissions and/or formulas are acceptable in determining the adequacy of consideration, although, in practice, many corporations incorporated in states whose corporation laws appear to follow the Model Act to some extent have adopted such mechanisms in pricing common stock in at-the-market and other periodic offerings.

** We would like to thank our summer associate Alexander Tiktin for his contribution to this alert.*

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or one of the attorneys below.

J. Anthony Terrell (bio)
New York
+1.212.858.1422
tony.terrell@pillsburylaw.com

David S. Baxter (bio)
New York
+1.212.858.1222
david.baxter@pillsburylaw.com

Todd W. Eckland (bio)
New York
+1.212.858.1440
todd.eckland@pillsburylaw.com

Catherine C. Hood (bio)
New York
+1.212.858.1410
catherine.hood@pillsburylaw.com

Stanton D. Wong (bio)
San Francisco
+1.415.983.1790
stanton.wong@pillsburylaw.com

Jeffrey J. Delaney (bio)
New York
+1.212.858.1292
jeffrey.delaney@pillsburylaw.com

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EXHIBIT A

Section 152 of the General Corporation Law of the State of Delaware, as amended effective August 1, 2015, is set forth below:

§ 152 Issuance of stock; lawful consideration; fully paid stock.

The consideration, as determined pursuant to § 153(a) and (b) of this title, for subscriptions to, or the purchase of, the capital stock to be issued by a corporation shall be paid in such form and in such manner as the board of directors shall determine. The board of directors may authorize capital stock to be issued for consideration consisting of cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof. The resolution authorizing the issuance of capital stock may provide that any stock to be issued pursuant to such resolution may be issued in one or more transactions in such numbers and at such times as are set forth in or determined by or in the manner set forth in the resolution, which may include a determination or action by any person or body, including the corporation, provided the resolution fixes a maximum number of shares that may be issued pursuant to such resolution, a time period during which such shares may be issued and a minimum amount of consideration for which such shares may be issued. The board of directors may determine the amount of ~~such~~ consideration for which shares may be issued by setting a minimum amount of consideration or approving a formula by which the amount or minimum amount of consideration is determined. The formula may include or be made dependent upon facts ascertainable outside the formula, provided the manner in which such facts shall operate upon the formula is clearly and expressly set forth in the formula or in the resolution approving the formula. In the absence of actual fraud in the transaction, the judgment of the directors as to the value of such consideration shall be conclusive. The capital stock so issued shall be deemed to be fully paid and nonassessable stock upon receipt by the corporation of such consideration; provided, however, nothing contained herein shall prevent the board of directors from issuing partly paid shares under § 156 of this title. [Underlining indicates new language; strikeouts indicate deleted language.]

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