

Corporate Finance/M&A - USA

Proposed amendments address appraisal arbitration

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On March 6 2015 the Corporation Law Council of the Corporation Law Section of the Delaware State Bar Association released new proposed amendments to the Delaware General Corporation Law that address, among other topics, appraisal arbitration. The proposed amendments have now passed the Delaware legislature and, if signed into law as is expected, will become effective as of August 1 2015.

Appraisal arbitration

As the *Ancestry.com* ruling demonstrated (for further details please see "[Ancestry.com price was fair, despite challenge from appraisal arbitration investors](#)"), appraisal arbitration has become an increasing phenomenon in recent years, with hedge funds in particular purchasing stock in public companies after a merger is announced with the specific intent of pursuing an appraisal claim. One factor contributing to the popularity of appraisal arbitration is that the Delaware General Corporation Law has a high statutory interest rate – the Federal Reserve discount rate plus 5% – that accrues with quarterly compounding from the effective date of the merger through a judgment on the appraisal claim at the conclusion of the litigation years later. To address this particular economic incentive, the proposed amendments would allow corporations to limit the accrual of interest on appraisal awards by paying to appraisal claimants a sum of the corporation's choosing at any time during the appraisal action. Under the proposed amendments, interest would accrue only if the judgment exceeded the amount the corporation elected to pay and only on the difference between the appraisal award and the amount already paid to the stockholder. This proposed amendment would reverse a 2014 Delaware Chancery Court decision recently affirmed by the Delaware Supreme Court which held that the appraisal statute does not authorize the tolling of the statutory interest where a corporation makes a partial payment to the appraisal claimants.⁽²⁾ The proposed amendments also include a *de minimis* exception intended to eliminate so-called 'nuisance' claims by allowing for the dismissal of appraisal petitions if the claimants do not hold at least 1% of the total shares entitled to appraisal rights or the merger consideration applicable to the shares as to which appraisal is being claimed is less than \$1 million.

The council's proposed amendments have been criticised as refraining from making more sweeping changes to render appraisal arbitration less attractive. Some advocate amendments to address the level of the statutory interest rate itself or the standing requirements that currently allow appraisal arbitrageurs to purchase shares after a merger's announcement.

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Endnotes

(1) 91 A 3d 554 (Del 2014).

(2) *Huff Fund Inv P'ship v CKx, Inc*, No 348 (Del February 12 2015); *Huff Fund Inv P'ship v CKx, Inc*, CA No 6844-VCG (Del Ch February 12 2014). For further details please see "[Court relies on deal price to assess fair value in appraisal action](#)".

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