

Client Alert

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Chancery Court Provides Guidance Regarding Limits on a Delaware Corporation's Ability to Fix Unauthorized Corporate Acts

The Delaware Court of Chancery recently established new guidelines regarding the ability of a corporation to ratify defective corporate acts due to a failure of authorization pursuant to Sections 204 or 205 of the Delaware General Corporation Law (“DGCL”) in [*Nguyen v. View, Inc.*, C.A. No. 11138-VCS \(Del. Ch. Jun. 6, 2017\)](#). After the enactment of Sections 204 and 205 in 2014, corporations have been able to fix corporate acts that were not validly approved or were inconsistent with the corporation’s certificate of incorporation, or seek relief from the Court of Chancery to validate a corporate act under certain circumstances. *Nguyen* is the latest in a line of cases that attempts to establish the boundaries of the remedial effects of Sections 204 and 205.

On December 18, 2015, an arbitrator’s binding ruling found that because Nguyen, as the majority stockholder of the common stock of View, Inc., had not consented to the Series B financing for View as required by statute, the Series B financing was void and invalid. As subsequent rounds of financings that had closed while the ruling was pending rested on the validity of the Series B financing, the invalidation of the Series B financing also invalidated the Series C through Series F financings, totaling \$500 million. In response to the arbitrator’s ruling, View ratified in early 2016 various charter amendments and other corporate acts in an attempt to correct its capital structure pursuant to Section 204. Nguyen then filed a complaint in the Court of Chancery alleging that View’s attempts to ratify the various rounds of financing pursuant to Section 204 were improper and sought a declaration of invalidity under Section 205.

The Chancery Court denied defendant View’s motion to dismiss and ruled that Nguyen’s deliberate rejection of a corporate proposal to approve the Series B financing as the majority common stockholder was not a “defective” corporate act. A corporation may not ratify an act that stockholders previously and expressly voted against and certify that act as effective as of the date it was rejected by such stockholders. In denying View’s motion for reargument, the Chancery Court struck down View’s

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argument that rejected acts are invalid acts due to a failure of authorization and subject to ratification under Section 204, and made clear that a stockholder's right to vote against a proposal should not be diminished by espousing such argument.

View also argued that the Series B financing could be ratified because the Series A preferred stockholders had the right to convert to common stock prior to the Series B financing. As such, View attempted to convince the Chancery Court that the conversion of the Series A shares into common shares should be viewed as having occurred prior to the Series B financing, resulting in the Series A preferred stockholders gaining majority common stockholder status and voting their common stock to approve the Series B financing. But this "alternative view of history" was rejected by the Chancery Court, which made clear that Section 204 is not a "license to cure any defect" and that it cannot be used "to authorize retroactively an act that was never taken but that the corporation now wishes had occurred, or to 'backdate' an act that did occur but that the corporation wishes had occurred as of an earlier date." The courts must look at the "operative reality" at the time the corporate acts being ratified occurred, and no decision of the courts has applied Section 204 or 205 in a circumstance where a board of directors sought to employ statutory ratification as a means to alter the outcome of a stockholder vote.

Pointing out that View placed itself in this "problematic if not potentially devastating" bind by aggressively pursuing multiple rounds of financing while the outcome of the arbitration remained uncertain, Vice Chancellor Slight made clear that a court of equity may not create new substantive rights under the guise of "doing equity."

Please feel free to contact the Olshan attorney with whom you regularly work or the attorney listed below if you would like to discuss this matter.

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