



Delaware Chancery Court Clarifies Effectiveness of Share Transfer Restrictions

Corporate and Securities Alert | July 17, 2017

By: Marc Casarino, Lori Smith and Joshua Galante

Section 202 of the Delaware General Corporation Law allows for certain restrictions on the transfer of shares. Recently, the Delaware Chancery Court clarified the extent to which such restrictions may be imposed upon subsequent acquirers of the shares. In *Henry v. Phixios Holdings, Inc.*[1], a stockholder agreement containing statutorily-allowed share transfer restrictions was adopted prior to the plaintiff acquiring his shares. The plaintiff's share certificates did not reference the transfer restrictions. Although the plaintiff received by email attachment a copy of the stockholder agreement after acquiring his shares, the Court credited his testimony that he never read the email attachment.

The Court outlined the mechanisms by which share transfer restrictions may be imposed. Section 202(a) provides that share transfer restrictions are enforceable against a particular stockholder if: (1) conspicuously noted on the share certificate; or (2) the stockholder had actual knowledge of the restriction. Section 202(b) provides that share transfer restrictions are binding upon existing shares if: (1) included in the certificate of incorporation; (2) included in the bylaws; or (3) by agreement among the stockholders or among stockholders and the corporation. In any event, a share transfer restriction cannot be imposed on a current stockholder without his express consent.

The statutory purpose of Section 202 is to protect a stockholder's investment from diminishment through post-purchase transfer restrictions imposed unilaterally by the company or other stockholders. Thus, if not conspicuously noted on the share certificate, a share transfer restriction is only binding upon a subsequent acquirer if he has actual knowledge of the restriction *at the time of acquiring the share* or he later consents by vote or other affirmative agreement to be bound by the restriction, according to the Court.

Since the share certificates did not contain the restrictions and the plaintiff did not have knowledge of the restrictions at the time he acquired the shares, the Court confronted whether the plaintiff's acknowledging receipt of the email transmitting the stockholder agreement constituted "express consent" to the restrictions. The Court held that because the plaintiff never read the stockholder agreement attached to the email, his merely acknowledging receipt of the email was not express consent to the share transfer restrictions.

This decision informs company management and their counsel that, when share transfer restrictions are not conspicuously noted on a share certificate, care must be taken to confirm that subsequent acquirers of shares are informed of and acknowledge express consent to the restrictions. Merely delivering documentation containing the restrictions may not be sufficient in light of the *Henry* decision.

If you have any questions or would like additional information, please contact Marc Casarino (casarinom@whiteandwilliams.com; 302.467.4520), Lori Smith (smithl@whiteandwilliams.com; 212.714.3075) or Josh



Galante (galantej@whiteandwilliams.com; 212.868.4836).

[1] C.A. No. 12504-VCMR (July 10, 2017).

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult a lawyer concerning your own situation and legal questions.