

THE REVIEW OF SECURITIES & COMMODITIES REGULATION

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 40 No. 10 May 16, 2007

DELAWARE LAW DEVELOPMENTS: STOCK OPTION BACKDATING AND SPRING-LOADING

In Recent Opinions, the Delaware Court of Chancery Has Denied Motions to Dismiss Stockholder Complaints that Directors Who Approved Backdated or Spring-Loaded Options Had Breached Their Fiduciary Duties to their Corporations and Stockholders. The Authors Discuss These Cases and Review Other Possible Challenges to Option Grants under Delaware Law.

By C. Stephen Bigler & Pamela H. Sudell *

The practice of stock option backdating has been subject to intense scrutiny, investigation and litigation over the past few months. The practice raises numerous legal questions relating to the duties of directors in disclosing and reporting stock option grants. In January, the Delaware Court of Chancery addressed the application of fiduciary duties under Delaware common law in the stock option backdating context. The following article discusses a board of directors' authority to grant stock options, problems that may arise in the granting of such options, and the application of fiduciary duties under Delaware law to the practice of stock option backdating and spring-loading.

THE AUTHORITY TO GRANT STOCK OPTIONS

Section 157 of the General Corporation Law of the State of Delaware authorizes the board of directors of a corporation to create and issue options entitling the holders thereof to purchase from the corporation shares

of its capital stock.¹ The terms of such stock options must be set out in either the corporation's certificate of incorporation or in a resolution adopted by the directors.²

Delegation to a Committee

The board of directors may delegate the authority given to it under Section 157 to a committee of the board, consisting of one or more directors of the corporation, in accordance with Section 141(c) of the General Corporation Law. Section 141(c) allows a board to delegate its powers and authority to a committee, either through the corporation's bylaws or a resolution of the board of directors. The Delaware Court

* C. STEPHEN BIGLER is a director of, and PAMELA H. SUDELL is an associate at, the law firm of Richards, Layton & Finger, P.A. in Wilmington, Delaware. Their e-mail addresses are, respectively, Bigler@RLF.com and Sudell@RLF.com. Richards, Layton & Finger has participated as counsel in some cases discussed in this article. The views expressed in this article are solely those of the authors, and do not necessarily represent the views of Richards, Layton & Finger, P.A. or its clients.

¹ 8 Del. C. § 157(a).

² *Michelson v. Duncan*, 386 A.2d 1144 (Del. Ch. 1978), *aff'd in part and rev'd in part*, 407 A.2d 211 (Del. 1979).

IN THIS ISSUE

- DELAWARE LAW DEVELOPMENTS:
STOCK OPTION BACKDATING AND SPRING-LOADING
- MARKET TIMING IN VARIABLE ANNUITIES:
TRENDS IN REGULATORY ENFORCEMENT

of Chancery has made clear that directors do not breach their fiduciary duties simply by delegating to a compensation committee their authority to grant stock options.³ Corporations formed prior to June 1, 1996 that have not adopted a resolution electing treatment under Section 141(c)(2) are governed by Section 141(c)(1). Where Section 141(c)(1) applies, only a majority of the full board may adopt a resolution designating a committee. Section 141(c)(2) applies to all other corporations. Where Section 141(c)(2) applies, a committee, if granted the full power of the board, has the power to form another committee. For example, a properly empowered compensation committee could establish an equity awards committee.

Delegation to Officers

Prior to July 1, 2001, only a board of directors, or a duly empowered committee, had the authority to grant stock options. Effective July 1, 2001, Section 157 of the General Corporation Law was amended to add subsection (c), which authorizes a board of directors or a committee, by the adoption of resolutions, to delegate to officers the authority to identify the recipients of stock options and the number of options received thereby, provided that the board or committee establishes the maximum number of shares the officers may award and fixes the basic terms of the awards.

In delegating authority, a board of directors should be aware of issues that arise as to whether authority to issue stock options was properly delegated to a committee or an officer. It is important to consider the following when addressing whether authority was properly delegated: First, what is the precise scope of authority granted to the committee/officer pursuant to the resolutions or bylaws, and did the committee/officer act outside the scope of that authority? Second, does the relevant stock option plan, if any, permit delegation to a committee or an officer? Finally, do the corporation's disclosure documents, such as the corporation's proxy

statements, disclose that authority has been or may be delegated?⁴

Approval of Stock Option Grants

Under the General Corporation Law, a board of directors or a duly empowered committee may take action through one of two means. First, action can be taken by the vote of a majority of the directors present at a meeting of the board or committee, as applicable, at which a quorum is present.⁵ Alternatively, action may be taken by the unanimous written consent of the members of the board or by a duly empowered committee, as applicable.⁶ Virtually all of the issues arising in the stock option backdating context stem from the practice of a board, or a committee, making grants by unanimous written consent dated "as of" a date prior to the date on which the consent is actually signed by all of the members of the board or committee. Therefore, a question is raised with respect to the relationship between the time at which the written consent becomes effective under Delaware law and the stated effective date as specified in the grant and/or provided in the relevant stock option plan.

Section 141(f) generally provides that an action may be taken "if all members of the board of directors or committee, as the case may be, consent thereto in writing, or by electronic transmission and the writing or writings are filed with the minutes of proceedings of the board of directors, or committee." Thus, for purposes of Delaware law, an action taken by written consent is not taken until the written consent has been executed by all of the members of the board or committee and has been

⁴ In addition it is important to note that Section 157(c) applies only to options. Many stock option plans permit grants not only of options, but also of restricted stock and restricted stock units. If the relevant stock option plan permits grants of restricted stock and restricted stock units, it is important that the board make clear that any authority delegated to an officer to identify the recipients of option grants and the number of options to be received thereby is limited to grants of options.

⁵ 8 *Del. C.* § 141(b).

⁶ 8 *Del. C.* § 141(f).

³ *Michelson*, 386 A.2d at 1151.

filed with the minutes. It is important to consider the interplay of Section 141(f) and the terms of the relevant stock option plan construing the "date of grant." For example, certain stock option plans define "date of grant" as the date on which the committee makes a "determination" to grant the options. The Delaware courts have not addressed when a "determination" is made where the action is taken by written consent rather than at a meeting. It could be argued that, under the General Corporation Law, since the written consent is not legally effective unless it is placed in the minute book, the action taken thereby likewise cannot be legally effective — and thus no "determination" could have occurred — until the consent is placed in the minute book. On the other hand, since the directors have no control over when the consents are filed in the minute book, it would be logical to conclude that the "determination" was made at the time the consents were actually signed by all of the directors. This argument is also supported by the fact that when directors act at a meeting rather than by written consent, the action is effective on the date of the meeting, not the date when the minutes of the meeting are filed in the minute book.

Ultimately, the date on which the written consent was signed by all the directors or committee and filed with the minutes is a factual question that must be determined from the company's records, the recollections of the relevant directors or committee members, and the officers responsible for preparing, disseminating, retrieving and filing the signed written consents. Copies of transmittal letters, fax tag lines on the signature pages of the written consent, etc., will all be relevant. In the absence of conclusive documentary evidence, if these individuals are willing to provide an affidavit to the effect that the written consents were virtually always executed and filed within several days of the "as of" date on the written consent, such an affidavit could be evidence of the approximate date the written consents were so executed and filed. Acting at an in-person or a telephonic meeting would help avoid potential issues resulting from the uncertainty surrounding when actions are legally effective when the directors act by written consent.

DEFECTS IN AUTHORIZATION AND OTHER ISSUES

Under Delaware law, stock options issued in contravention of a duly adopted stock option plan could be found to be invalid. In *Sanders v. Wang*,⁷ the Delaware Court of Chancery found that the board of directors' grant of shares of common stock to certain key

executives of the company under its stockholder-approved key employee stock ownership plan violated the plan's cap on the number of shares authorized thereunder.⁸ Thus, the court found such grant, to the extent the shares were issued in excess of the stated cap, to be invalid.⁹

The Delaware Court of Chancery recently suggested, in *Ryan v. Gifford*,¹⁰ that a committee of the board of directors may have exceeded the scope of its authority under a stockholder-approved stock option plan by backdating stock options. In that case, the plaintiff, a stockholder of Maxim Integrated Products, Inc., alleged that certain directors and members of the compensation committee breached their fiduciary duties by approving or accepting nine backdated stock option grants to the founder, chairman, and chief executive officer of the company.¹¹ The stockholder-approved stock incentive plans, one approved in 1983 and one in 1999, required that the board of directors (or compensation committee) set the exercise price of all stock option grants to be no less than the fair market value of the company's common stock on the date of grant.¹² According to the plaintiff, the board of directors or committee dated the grants when the market price was at its lowest rather than on the date when they were actually granted.¹³ In addressing plaintiff's claims, the court addressed for the first time whether stock option backdating violated one or more fiduciary duties under Delaware law. The court was "convinced that the intentional violation of a stockholder-approved stock option plan, coupled with fraudulent disclosures regarding the directors' purported compliance with that plan, constituted conduct that is disloyal to the corporation and is therefore an act in bad faith."¹⁴ The court focused on the intentional violation of the stockholder-approved plans and the board of directors' practice of falsely representing the date on which options were granted in public disclosures in finding that there was sufficient evidence of a breach of the duties of loyalty and good faith to survive a motion to dismiss.¹⁵

⁸ *Id.* at *25.

⁹ *Id.* at *39.

¹⁰ C.A. No. 2213-N, 2007 Del. Ch. LEXIS 22 (Del. Ch. Feb. 6, 2007).

¹¹ *Id.* at *3-5.

¹² *Id.* at *8-9.

¹³ *Id.* at *4-5.

¹⁴ *Id.* at *38.

¹⁵ *Id.* at *40.

⁷ C.A. No. 16640, 1999 Del. Ch. LEXIS 203 (Del. Ch. Nov. 8, 1999).

Similarly, in another recent case, *In re Tyson Foods, Inc. Consol. S'holder Litig.*,¹⁶ issued the same day as *Ryan v. Gifford*, the Court of Chancery considered a motion to dismiss a stockholder complaint for “spring-loading” options, *i.e.*, granting options just before the release of material information reasonably expected to drive up the price of the underlying stock. In first finding that there were sufficient allegations to justify equitable tolling of the statute of limitations because of defendants’ fraudulent concealment, the court observed that “It is difficult to conceive of an instance, consistent with the concept of loyalty and good faith, in which a fiduciary [the director] may declare that an option is granted at ‘market rate’ and simultaneously withhold that both the fiduciary and the recipient *knew* at the time that those options would quickly be worth much more.”¹⁷

The court then turned to whether the compensation committee, in granting the options, was protected by the business judgment rule. The court observed that whether a board of directors may in good faith grant spring-loaded options is a more difficult question than that posed by options backdating. While all backdated options involve “a fundamental, incontrovertible lie ... [a]llegations of spring-loading implicate a much more subtle deception.”¹⁸ The court noted that there could be a situation where the board of directors, within the rational exercise of business judgment, could make a decision to grant spring-loaded options as a form of compensation if it were made honestly and disclosed in good faith.¹⁹ But the facts of this case, in the court’s view, were different. A director’s duty of loyalty includes a duty to deal fairly and honestly with the stockholders for whom he is a fiduciary and “it is inconsistent with such a duty for a board of directors to ask for shareholder approval of an incentive stock option plan and then later to distribute shares to managers in such a way as to undermine the very objectives approved by shareholders.” And this remains true “even if the board complies with the strict letter of a shareholder-approved plan as it relates to strike prices or issue dates.”²⁰ The court concluded that “A director who intentionally uses inside knowledge not available to shareholders in order to enrich employees while avoiding shareholder-imposed requirements cannot, in

my opinion, be said to be acting loyally and in good faith as a fiduciary.”²¹

The court summed up its opinion by stating that plaintiffs must allege, first, that options were issued pursuant to a stockholder-approved plan; and, second, that the directors approving the options (i) were possessed of material nonpublic information and (ii) issued those options with the intent to circumvent stockholder-approved restrictions upon their exercise price.²² Since plaintiff had made such allegations in this case, the motion to dismiss was denied.

Additional Situations Regarding the Validity of Stock Option Grants

Approval Precedes Establishment of Exercise Price. Issues surrounding the validity of a stock option grant can occur when the board of directors or a committee approves the grant as of a specific date, the approval contemplates an exercise price based on the average closing price over a specified period (*e.g.*, the following 10 trading days), and such period has not commenced as of the date of approval.

Depending on the specific terms of the relevant plan, the “date of grant” for purposes of Delaware law would be the date of the action of the committee or board approving the grant, regardless of whether the exercise price was fixed based on an average of past or future stock prices. Therefore, an inquiry should be made into whether the formula results in the grant being effected in violation of the plan.

Conditional Awards to Employees. In some situations, a board of directors or committee may make an award to an incoming employee that is conditioned on the employee commencing employment on a future date. The employee then starts on a date thereafter and is granted the option on such date. In determining the “date of grant” for such awards, it is important to look to the terms of the relevant plan, since the provisions of many plans could be read as indicating that the effective date of a grant to a prospective employee is the date the written consent approving the grant is executed or the date of the meeting at which the grant is made. However, such a reading could be inconsistent with other provisions of the plan, such as those requiring that a grant to a future employee “vest” on or after the date employment commences.

¹⁶ C.A. No. 1106-N, 2007 Del. Ch. LEXIS 19 (Del. Ch. Feb. 6, 2007).

¹⁷ *Id.* at *62.

¹⁸ *Id.* at *67.

¹⁹ *Id.* at *68 n. 75.

²⁰ *Id.* at *69.

²¹ *Id.* at *70.

²² *Id.* at *71.

Awards to Future Employees. A board of directors or committee may make an award to an incoming employee on the date that the employee is hired. The award may not be expressly conditioned on the employee commencing employment at a future date. However, the employee may in fact start on a date after the date on which the option is granted. Depending on the specific terms of the relevant plan, a Delaware court would likely analyze these grants in accordance with the analysis for conditional awards to employees. The question often turns on whether the employee provided services to the company prior to commencing employment. If the individual provided no services prior to commencing employment, options dated prior to the commencement date could be subject to challenge.

Scope of Authority. If a relevant stock option plan provides that a specified party, such as the compensation committee, shall act as the "administrator" of such plan and make all grants thereunder, but instead the grant is made by a committee acting in excess of its delegated authority or by an officer that was not specifically authorized to make the grant, the options so granted would not be duly authorized and thus could be subject to challenge. As a general matter, a board of directors may ratify prior corporate actions, and such ratification will relate back to the date on which the action was taken, provided that the action being ratified is "voidable" rather than void.²³ In explaining the distinction between voidable and void acts, the Delaware Supreme Court has stated that "the former are those which may be found to have been performed in the interest of the corporation but beyond the authority of management, as distinguished from acts which are *ultra vires*, fraudulent or gifts or waste of corporate assets."²⁴ The Delaware Chancery Court has expressed the distinction as follows: "Void acts are those acts that the board of directors, or more generally the corporation, has no implicit or explicit authority to undertake or those acts that are fundamentally contrary to public policy."²⁵

²³ See *Kalageorgi v. Victor Kamkin, Inc.*, 750 A.2d 531 (Del. Ch. 1999), *aff'd*, 748 A.2d 913 (Del. 2000) (TABLE) (holding that the board of directors could cure a technically defective stock issuance retroactively by ratifying the issuance); *Hannigan v. Italo Petroleum Corp. of Am.*, 47 A.2d 169 (Del. Ch. 1945) ("Ratification of the action of corporate officers for which there may have been no adequate antecedent authority may be express or implied."); *Michelson*, 407 A.2d at 218-19; *Blish v. Thompson Automatic Arms Corp.*, 64 A.2d 581, 604 (Del. 1948).

²⁴ *Michelson*, 407 A.2d at 219.

²⁵ *Solomon v. Armstrong*, 747 A.2d 1098, 1114 (Del. Ch. 1999) (footnote omitted), *aff'd*, 746 A.2d 277 (Del. 2000) (TABLE). See also *MBKS Co. v. Reddy*, C.A. No. 1853-VCL (Del. Ch.

In *Liberis v. Europa Cruises Corp.*,²⁶ the Delaware Court of Chancery examined whether the issuance and repricing of stock options pursuant to a transaction that was not expressly authorized by the board of directors was void. The court found that the directors, acting at a meeting that was not duly called and at which a quorum was not present, did not comply with the requirements of Section 157 of the General Corporation Law when it purportedly issued and repriced certain previously granted stock options.²⁷ The court stated that "the complete absence of board of directors' action is not an irregularity correctable by routine ratification. In other words, the purported authorization was void, not voidable."²⁸ The court thus confirmed that a ratification will not be effective unless there is an antecedent act capable of being ratified.

In addition to the legal question of whether an action is capable of ratification, there is a practical question as to whether a company's current board of directors would be willing to ratify the actions of prior boards of directors or committees whose members may no longer be affiliated with the company. Given the level of scrutiny that questionable stock option practices are now receiving from regulators, stockholders and the press, it is not clear that a company's present directors would be willing to ratify any prior option grants, questionable or otherwise.

If a grant is not capable of ratification (or if the board of directors declines to ratify any grant that is otherwise capable of ratification), it may be necessary to determine whether the grant could nonetheless be viewed as a binding obligation of the company under equitable principles. The Delaware courts have applied theories of apparent authority and estoppel to protect those who have relied on corporate officials later found to have lacked actual authority. Even if the relevant officer or stock option committee lacked the actual authority to make a particular grant, such grant may nevertheless be binding on the company if the officer or committee had the apparent authority to make it. The Delaware courts have defined apparent authority as "that authority which, though not actually granted, the principal knowingly or

footnote continued from previous column...

Apr. 30, 2007) ("If the stock is voidable, the corporation normally has the right to void and cancel the shares. If the stock is void, that action is not necessary as the stock is usually considered void *ab initio*.").

²⁶ C.A. No. 13103, 1996 WL 73567, at *6 (Del. Ch. Feb. 8, 1996), *aff'd*, 702 A.2d 926 (Del. 1997) (TABLE).

²⁷ *Id.* at *8.

²⁸ *Id.*

negligently permits the agent to exercise or which it holds him out as possessing."²⁹ Describing the effect of apparent authority, the Court in *Mulco* stated: "When an agent of a corporation possesses such authority, the corporation is bound by the act of the agent within the scope of his apparent authority as to any person who believes and has reasonable ground to believe that the agent has such authority and in good faith deals with him."³⁰ Consequently, if an optionee had no reason to believe that the committee or officer making the grant lacked the actual authority to do so, the options so granted could be binding obligations of the company vis-à-vis such optionee under the doctrine of apparent authority.

In the alternative, stock options so granted could be viewed as binding obligations of the company under the theories of equitable or promissory estoppel. To prevail under the theory of equitable estoppel, a plaintiff must show that he or she: (i) lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (ii) reasonably relied on the conduct of the party against whom estoppel is claimed; and (iii) suffered a prejudicial change of position as a result of reliance.³¹ To establish promissory estoppel, the plaintiff must show: (i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) injustice can be avoided only by enforcement of the promise.³² To the extent that equitable estoppel and promissory estoppel are two distinct claims, the former applies to past or present facts, while the latter extends to future facts.³³ Neither

theory, however, applies "when the corporate contract or action approved by the directors ... is illegal or void."³⁴

Grants Made by an Inappropriate Party. Some stock option plans provide that a specified party, such as the compensation committee, shall act as the "administrator" of the plan and make all grants thereunder. However, such grants may be made by a committee that, although authorized by the board of directors to make stock option grants, is not identified in the plan as the "administrator." Because such grants could be viewed as in violation of the terms of the plan, they could be viewed as not having been duly authorized and thus could be subject to challenge.

Grants Made to Ineligible Participants. Some stock option plans may specify certain employees or classifications of employees as "eligible participants" to receive the grants. A problem arises when the board of directors or committee then makes a grant to a party that is not identified as an "eligible participant" under the plan. Because these grants would be made in violation of the plan, they would not be duly authorized and thus would be subject to challenge.

Missing Consents. In some cases, a grant may be made as of a specific date, but there is no evidence of the grant in the company's books, either because the grant did not occur when it was intended to occur or because the minutes or unanimous written consents have been lost. Because a board of directors or committee cannot lawfully act except at a meeting or by written consent, the absence of evidence for the authorization of the grant would call its validity into question. It will thus be necessary to gather any available extrinsic evidence regarding the authorization of the grant and the implementation thereof. It would, however, likely be difficult to prove the authorization and date of the grant solely through extrinsic evidence.

Annotated Consents. In cases where the documentation of the written consent can be located, the written consent appearing in the company's records may contain handwritten notations modifying the terms of the grants. It may not be clear that the written consent, as annotated, was approved by each member of the board of directors or committee. In the event all members of

²⁹ See, e.g., *In re Mulco Prods., Inc.*, 123 A.2d 95, 103 (Del. 1956), *aff'd sub nom. Mulco Prods., Inc. v. Black*, 127 A.2d 851 (Del. 1956).

³⁰ *Id.* at 104.

³¹ *Nevins v. Bryan*, 885 A.2d 233, 249 (Del. Ch. 2005), *aff'd*, 884 A.2d 512 (Del. 2005) (TABLE).

³² *Collins v. Am. Int'l Group, Inc.*, C.A. No. 14365, 1998 WL 227889, at *5 (Del. Ch. Apr. 29, 1998) (applying the theory of promissory estoppel to enforce a promise made by a corporate executive to an employee that the employee could exercise his stock options as they matured in normal course), *aff'd*, 719 A.2d 947 (Del. 1998) (TABLE); *Keene Corp. v. Hoofe*, 267 A.2d 618, 624 (Del. Ch. 1970) (finding that although the employee relied to his detriment on terms in his stock option plan, his reliance was unreasonable), *aff'd*, 276 A.2d 269 (Del. 1971).

³³ *Genecor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 12 n.7 (Del. 2000); *Haveg Corp. v. Guyer*, 226 A.2d 231 (Del. 1967).

³⁴ *Nevins*, 885 A.2d at 250. See also *Waggoner v. Laster*, 581 A.2d 1127 (Del. 1990); *Elster v. Am. Airlines, Inc.*, 148 A.2d 343 (Del. Ch. 1959), *rev'd on other grounds*, 160 A.2d 731 (Del. 1960) (refusing to apply theory of promissory estoppel where the corporation issued stock as a result of the exercise of an employee's stock options that constituted an improper gift of corporate assets).

the committee have not approved the written consent containing the notations, such consents will not have validly authorized the options purportedly granted pursuant to the annotations. Accordingly, any such grants may be subject to challenge.

Unlisted Optionees. Similar to the problem of grants made to ineligible plan participants, individuals who are not listed, either by name or by category, as option recipients in the written consents executed by the board or committee may have received options pursuant to grants made on specified dates. In those cases, the written consents are not effective with respect to the unlisted optionees. Accordingly, any such grants may be subject to challenge.

Officer Action under Routine Grants. Officers of the company may at times act without express authority from the board of directors or committee but with the understanding that they have the authority to make option grants and distribute letters or other materials to optionees informing them of the grants and the relevant details thereof. At the end of each month, a list of all the grants made during the month is then compiled and attached as a schedule to the form of written consent of the relevant committee approving grants. To the extent the officers exceed the scope of their prescribed authority, the grants could be viewed as invalid and thus subject to challenge.

Officers Exclude Specific Recipients. A board of directors or committee may approve specific guidelines identifying the classes of officers, directors and employees that are entitled to receive option grants and the specific circumstances under which the grants are to be made (*e.g.*, upon hiring, promotion, annually, etc.). Then an officer of the company makes a grant to some, but not all, of the intended recipients.

As a result of the 2001 amendments to the General Corporation Law, officers who have been duly authorized under Section 157(c) are entitled to identify the recipients of option grants. Thus, the selection by any such officer of the specific optionees should not result in a statutory violation. Prior to the 2001 amendments, however, officers were not entitled to identify option recipients and any such grants made thereby could be viewed as invalid and subject to challenge.

Automatic Grants. A board of directors or committee may adopt a resolution providing for routine grants of options to certain classes of employees to occur automatically on the last trading day of each calendar month upon specified events — *e.g.*, the hiring or promotion of individual employees into the designated

classes. The automatic grant resolutions provide for the grants to become effective without the need of the relevant committee taking repetitive formal action with respect to them. The grants are implemented by officers and are, in some cases, confirmed by a written consent of the board of directors or relevant committee.

Since any grants made pursuant to automatic grant resolutions could be viewed as being previously authorized by the board of directors or relevant committee, any subsequent written consents relating to such grants, because they are not needed to authorize the grants, could be considered confirmations of previously authorized grants. Moreover, it could be argued that the officers effecting the automatic grants are acting solely in an administrative role and are not making the grants. As a result, they should not be viewed as exceeding the scope of their statutory authority and the grants should be valid.

FIDUCIARY DUTIES OF DIRECTORS

Under Delaware law, directors owe to the company and its stockholders the fiduciary duties of loyalty, care and good faith. In most cases, directors are entitled to judicial deference for their business decisions and also are shielded from personal liability by the business judgment rule. The business judgment rule is a series of judicially created presumptions in favor of the nonconflicted (*i.e.*, disinterested) corporate director that “in making a business decision [he/she] ... acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”³⁵ The business judgment rule can be rebutted by a showing of a breach of the duty of care, loyalty or good faith.³⁶ Once the business judgment rule is rebutted, the burden shifts to the directors to prove the transaction was entirely fair to the corporation.³⁷

The practice of backdating stock options can raise issues that defeat the presumption of the business judgment rule. “Backdating options qualifies as one of those rare cases in which a transaction may be so egregious on its facts that board of directors’ approval

³⁵ *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *accord Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182-84 (Del. 1985).

³⁶ *See, e.g., Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993).

³⁷ *See, e.g., Kahn v. Lynch Commc’n Sys., Inc.*, 638 A.2d 1110, 1116 (Del. 1994), *aff’d*, 669 A.2d 79 (Del. 1995); *Cede*, 634 A.2d at 361; *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257 (Del. Ch. 1989).

cannot meet the test of business judgment, and a substantial likelihood of director liability therefore exists."³⁸

Duty of Care

Under the duty of care, prior to making a business decision, directors must call forth and consider all material information reasonably available to them.³⁹ When considering any proposed award of stock options, directors should apprise themselves of all relevant terms of the plans, if any, under which the options will be granted (including the way in which those terms relate to the proposed awards) and the material terms of the proposed award, including the price, number of option shares to be granted and the dilutive effect of the proposed award. Directors who are negligent in reviewing the terms of the relevant stock option plans and the terms of the proposed awards, although not intentionally violating such terms, could be found to be breaching their duty of care. Thus, their conduct would not be afforded the protections of the business judgment rule.

Duty of Loyalty

In addition to the duty of care, directors of Delaware corporations have a duty of loyalty to the corporation and its stockholders. The duty of loyalty prohibits a corporate director from engaging in self-dealing or usurping corporate opportunities in the performance of his or her duties as a director.⁴⁰ Delaware courts have long held that "[c]orporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. . . . [A]n undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest."⁴¹

In order to fulfill the fiduciary duties of care and loyalty, a fiduciary "must in good faith act to make

informed decisions on behalf of the shareholders"⁴² Some decisions suggest that the duty to act in good faith is lacking where there is evidence of a disloyal "motive," such as self-dealing or other self-interested behavior.⁴³ Other decisions suggest that a decision would be lacking in good faith if it were "indifferent" to or in "reckless disregard" of the interests of a corporation and its stockholders.⁴⁴ More recently, in *In re The Walt Disney Co. Deriv. Litig.*,⁴⁵ the court, in addressing the plaintiffs' challenge to the hiring and compensation package of Michael Ovitz, held that the complaint alleged more than merely negligent or grossly negligent conduct; it alleged facts to "suggest that the Disney directors failed to exercise any business judgment and failed to make any good faith attempt to fulfill their fiduciary duties to Disney or its stockholders."⁴⁶

As evidenced in the recent cases *Ryan v. Gifford* and *In re Tyson Foods*, questions regarding the duty of loyalty and good faith are implicated in the stock option backdating and spring-loading contexts, particularly in instances of intentional violations of stockholder-approved plans, intentional backdating of stock options (without contemporaneous or subsequent disclosure as to the manner in which the options were dated and priced), and the use of inside information to enrich certain insiders through spring-loading or other devices.

CONCLUSION

The opinions recently issued by the Delaware Court of Chancery indicate that the practices of stock option backdating and spring-loading will be closely scrutinized by Delaware courts for potential breaches of directors' fiduciary duties. Intentional violations of stockholder-approved stock option plans and concealment of such violations from stockholders are factors that would likely lead a Delaware court to find a breach of a director's fiduciary duties. Given these recent decisions, a board of directors should, in addition to other precautionary measures, ensure that their stock option grants are properly authorized, comply with stockholder-approved stock option plans, are properly accounted for, and are fully disclosed to stockholders. ■

³⁸ *Ryan*, 2007 Del. Ch. LEXIS 22, at *34.

³⁹ See, e.g., *Aronson*, 473 A.2d at 812; *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985); *Saito v. McCall*, C.A. No. 17132-NC, 2004 WL 3029876 (Del. Ch. Dec. 20, 2004); *In re Caremark Int'l, Inc. Deriv. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

⁴⁰ See, e.g., *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (finding that corporate directors' fiduciary duty "requires an undivided and unselfish loyalty to the corporation [and] demands that there be no conflict between duty and self-interest").

⁴¹ *Guth*, 5 A.2d at 510.

⁴² *In re Walt Disney Company Derivative Litig.*, 2005 WL 2056651, at *2 (Del. Ch. Aug. 9, 2005).

⁴³ See *In re Fort Howard Corp. S'holders Litig.*, C.A. No. 9991, 1988 WL 83147, at *14 (Del. Ch. Aug. 8, 1988).

⁴⁴ See *Crescent/Mach I Partners, L.P v. Turner*, 846 A.2d 963, 981-82 (Del. Ch. 2000).

⁴⁵ 825 A.2d 275 (Del. Ch. 2003).

⁴⁶ *Id.* at 278.