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Delaware Court Refuses to Require Disclosure of Internal Projections

The Delaware Chancery Court has forcefully rejected an attempt to enjoin a merger vote on the basis of allegedly insufficient disclosure in the proxy statement. In re CheckFree Corporation Shareholders Lit., (Nov. 1, 2007) (Chandler, C.). The Court cited long-established standards of Delaware law regarding materiality and disclosure. Importantly, the Court emphasized that recent decisions (such as Netsmart) do not signal a sea change in these established precepts.

The case arose out of the proposed $4.4 billion business combination of CheckFree and Fiserv. Shareholder plaintiffs sought to enjoin the merger, claiming that CheckFree improperly failed to disclose internal financial projections used by CheckFree's financial advisor in preparing its fairness opinion. The plaintiffs argued that under the Chancery Court's Netsmart decision, management projections are always material and must be disclosed. The Court rejected the claim, holding that there is no *per se* rule in Delaware that management projections are required to be disclosed in a merger proxy. The Court noted that in Netsmart the proxy disclosed some preliminary internal financial projections, while omitting others. In contrast, the CheckFree proxy "never purports to disclose these projections" and makes clear that the financial advisors "had to interview members of senior management to ascertain the risks that threatened the accuracy of those projections." The Court then concluded: "These raw, admittedly incomplete projections are not material and may, in fact, be misleading."

The Court also rejected other allegations of disclosure deficiencies, including a claim of insufficient detail in the proxy statement's background description. Dismissing the plaintiffs' argument that the background section ran less than two full pages, the Court stated that it "does not evaluate the adequacy of disclosure by counting words," and that "[p]laintiffs cannot simply allege that the background section is lacking; they must explain *what* is lacking."

The CheckFree opinion is an important reminder that sometimes less may be more when it comes to proxy statements, which should be prepared carefully with an eye to clearly presenting the information that is material to the decision the shareholders are being asked to make and necessary and appropriate to comply with the securities laws. The opinion also shows the Delaware courts understand that financial projections are different from financial statements — projections are used for different purposes, are subject to frequent change and revision, have numerous assumptions and contingencies embedded in them and are not necessarily prepared with the same level of rigor as historical financial statements — and that the disclosure of projections can have the potential to mislead investors who attach undue emphasis to them. Moreover, the contrasting results in the CheckFree and Netsmart cases demonstrate that the inclusion of extraneous detail in a proxy statement, even if well-intentioned, can actually increase the legal risk of a disclosure violation.

Edward D. Herlihy
Marc Wolinsky
Lawrence S. Makow
Matthew M. Guest