

2009 Amendments to the Delaware General Corporation Law

Recent amendments to the Delaware General Corporation Law (the “Amendments”), which go into effect on August 1, 2009, cover a number of topics relating to corporate governance. These topics include proxy contests, record dates for stockholder meetings, indemnification of directors and officers, and judicial removal of directors.

Access to Proxy Solicitation Materials (new Section 112). The Amendments permit a Delaware corporation to adopt a bylaw giving stockholders direct access to the corporation’s proxy machinery. The bylaw may require that, if the corporation solicits proxies with respect to an election of directors, it include in its proxy statement and proxy card nominees submitted by stockholders in addition to the nominees of the board of directors, subject to the procedures or conditions imposed by the bylaws. The Amendments provide a non-exclusive list of permitted procedures or conditions that the bylaws may impose on this right of access to the proxy statement and proxy card, including:

- Requiring minimum record or beneficial stock ownership, or duration of stock ownership, by the nominating stockholder;
- Requiring that the nominating stockholder submit specified information about the stockholder and the stockholder’s nominees, including information concerning stock ownership by such persons;
- Conditioning eligibility to require inclusion in the corporation’s proxy solicitation materials upon the number or proportion of directors nominated by stockholders or whether the stockholder previously sought to require such inclusion;
- Precluding nominations by a person if such person, any nominee of such person, or any affiliate or associate of such person or nominee, has acquired or publicly proposed to acquire shares constituting a specified percentage of the voting power of the corporation’s outstanding voting stock within a specified period before the election of directors; and
- Requiring that the nominating stockholder indemnify the corporation in respect of any loss arising as a result of any false or misleading information or statement submitted by the nominating stockholder in connection with a nomination.

The Amendments are the latest development in the continuing controversy regarding the inclusion of stockholder nominees in company proxy materials. Longstanding SEC proposals would allow a stockholder who satisfies a minimum ownership test for a minimum period to include nominees in the company’s proxy materials. On May 20, 2009, the SEC proposed for public comment a new stockholder access rule, which if adopted will impose mandatory requirements on public companies as opposed to the permissive approach taken by the Amendments.

Reimbursement of Proxy Solicitation Expenses (new Section 113). The Amendments permit a Delaware corporation to adopt a bylaw providing for the reimbursement by the corporation of expenses incurred by a stockholder in soliciting proxies in connection with an election of directors, subject to the procedures or conditions imposed by the bylaws. The Amendments provide a non-exclusive list of permitted procedures or conditions that the bylaws may impose, including:

- Conditioning eligibility for reimbursement upon the number or proportion of persons nominated by the stockholder seeking reimbursement or whether such stockholder previously sought reimbursement for similar expenses;

- Limitations on the amount of reimbursement based upon the proportion of votes cast in favor of one or more of the persons nominated by the stockholder seeking reimbursement, or upon the amount spent by the corporation in soliciting proxies in connection with the election; and
- Limitations concerning elections of directors by cumulative voting.

The Amendments codify in part the Delaware Supreme Court's decision last year in *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008), which held as proper a stockholder-proposed bylaw requiring reimbursement of proxy solicitation expenses for a partial nominee slate (while invalidating the proposal because it did not allow for fiduciary considerations). The Amendments now permit reimbursement for non-majority nominees, subject to achievement of specified success.

Record Date (Section 213). Delaware law formerly required the board of directors of a Delaware corporation to fix a single date as the record date for determining both (1) stockholders entitled to notice of a stockholder meeting and (2) stockholders entitled to vote at the meeting. The Amendments allow the board of directors to fix a record date for voting at a stockholder meeting that is separate from, and later than, the record date for notice of the meeting. (As is currently the case, the record date for notice of the meeting must not be more than 60 or less than 10 days before the meeting date.) The record date for voting may even be as late as the meeting date, although this would presumably be impractical in most circumstances for public companies.

As a result, a board may fix a later record date for determining stockholders entitled to vote at a meeting that reduces the potential for voting by persons who sell their shares or their economic interest therein in the days or weeks preceding the meeting – and increases the potential for voting by the new stockholders. It will be interesting to see if the SEC provides any interpretative guidance as to the interplay between the Amendments and the federal proxy rules, although the availability of electronic proxy materials would facilitate dual record dates.

Indemnification and Advancement of Expenses (Section 145). The Amendments provide that a right to indemnification or to advancement of expenses arising under a provision of a Delaware corporation's certificate of incorporation or bylaws cannot be eliminated or impaired by an amendment to such provision after the occurrence of the act or omission that is the subject of the action for which indemnification or advancement of expenses is sought, unless the provision in the certificate of incorporation or bylaws, at the time of the act or omission, explicitly authorizes such elimination or impairment after such action or omission has occurred.

This Amendment effectively rejects the Court of Chancery decision in *Schoon v. Troy Corp.*, 948 A.2d 1157 (Del. Ch. 2008), which (under the particular facts of that case) upheld a board-adopted bylaw amendment that eliminated advancement rights in favor of a former director after the occurrence of the underlying act or omission.

Judicial Removal of Directors (new Section 225(c)). The Amendments grant the Delaware Court of Chancery the power to remove directors of a Delaware corporation in certain limited circumstances, such as conviction of a felony in connection with a director's duties as a director or a prior judgment on the merits that one or more directors has committed a breach of the duty of loyalty in connection with the duties of such director(s). An application for judicial removal can be made by the corporation (or on its behalf in a derivative lawsuit) and will be approved only if the Court determines that the director did not act in good faith and that judicial removal is necessary to avoid irreparable harm to the corporation.

For more information on this subject or Hughes Hubbard's Corporate Governance practice, please feel free to contact us.

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