

# Ambiguity in Organizational Documents Paves the Way for Unsolicited Bidder to Gain Faster Control Over Staggered Board

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In a recent decision, the Delaware Court of Chancery held that it was permissible for the stockholders of a company to amend the company's bylaws to schedule the date of the next annual stockholder meeting four months after the prior annual meeting, thereby allowing the stockholders to elect new directors to a class of the company's staggered board within a shorter than usual timeframe.

The decision, *Airgas, Inc. v. Air Products and Chemicals, Inc.*, arises from Air Products' unsolicited attempt to acquire Airgas. At the Airgas 2010 annual stockholder meeting, held on September 15, 2010, Air Products' three nominees were elected to serve on Airgas' nine-member staggered board and 51.9% of the shares present voted in favor of a bylaw amendment proposed by Air Products to hold the annual meetings of stockholders in January even though the company's annual meetings had, since 1986, taken place between July and September, and almost always in the first week of August. The stockholders also approved a bylaw amendment proposed by Air Products requiring stockholder approval for adopting new bylaws or bylaw amendments.

In this case of first impression in Delaware, the key issue was whether the bylaw moving the annual meeting to January violated Airgas' certificate of incorporation and Delaware law.

The Court first noted that certificates of incorporation are to be interpreted as contracts. In addition, if the language is ambiguous (which the Court defined as language reasonably having more than one interpretation), the court will look to the "common or ordinary meaning" of the language. Finally, when interpreting organizational document language that could restrict stockholder electoral rights, the court will resolve the issue in favor of the stockholders in order to protect the "stockholder franchise" and "construe the ambiguous terms against the board".

The specific language under scrutiny in Airgas' certificate of incorporation stated that at the annual meeting "the successors to the class of Directors whose term expires at that meeting shall be elected to hold office for a term expiring at the annual meeting of stockholders held in the third year following the year of their election." The issue here was the interpretation of the words "annual" and "year". The Court, looking at the common dictionary definition of "annual" and interpreting the words in favor of the stockholder franchise, decided that "annual" in this case meant "occurring once a year", as opposed to the alternate definition "covering the period of a year." Following the same approach, the Court construed the meaning of "year" as a "365 day period beginning at any point". Therefore, the Court concluded that there was no requirement that an annual meeting occur one year (12 months) after the previous annual meeting. As such, the period from January 1, 2011 to December 31, 2011 would be the third 365-day period after 2008 and a bylaw amendment setting the annual stockholder meeting in January 2011 would be consistent with Airgas' certificate of incorporation.

The Court also examined whether the proposed bylaw would violate Delaware law. In deciding that Delaware law was not violated, the Court held that the only notable time restriction with respect to holding annual stockholder meetings is that they cannot be separated by more than 13 months. The Court explained that the purpose of this rule was to protect stockholders from insurgent directors attempting to delay meetings for entrenchment, disenfranchisement, or other improper purposes and that Delaware law does not prohibit shortening the amount of time between annual meetings, unless such change is for an inequitable purpose (which, the Court held, was not the case here).

Although it is unclear how the Chancery Court's decision may be applied beyond the facts of this case (Airgas is also appealing the ruling and oral argument is scheduled to occur on November 3, 2010 before the Delaware Supreme Court), this case serves as a reminder of the importance of using unambiguous terms in organizational documents and the Court's leaning to construe ambiguous terms against the board. This decision is of even

greater importance for companies that might become the subject of an unsolicited takeover at which point clarifying such ambiguities may no longer be legally or practically possible.

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M&A Group  
October 2010



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