

Alert

Pro-Shareholder Amendments to Delaware General Corporation Law Proposed

February 24, 2009

Summary of Amendments

Legislation proposing amendments to the Delaware General Corporation Law (the “DGCL”) has been submitted to the Delaware State Bar Association for approval and, if granted, the amendments would be sent to the Delaware General Assembly for approval and then to the Delaware State Governor for signature into law, and would become effective August 1, 2009. The proposed amendments include the creation of two new DGCL sections, Sections 112 and 113, which would permit Delaware corporations to adopt bylaws that would give shareholders access to a company’s proxy statement for purposes of nominating directors as well as requiring the reimbursement of stockholder proxy expenses in certain situations. Along with these new sections, the proposed amendments included changes to Section 213, which would permit Delaware corporations to provide different record dates for stockholders entitled to notice of the annual meeting and stockholders entitled to vote at the meeting.

Section 112: Proxy Access Bylaws

This new section authorizes Delaware corporations to adopt bylaws granting stockholders “proxy access” for the purpose of nominating directors, subject to any lawful conditions imposed by the bylaws. This addition clarifies and confirms the ability of Delaware corporations to effect proxy access in their bylaws. The new section also contains a nonexclusive list of reasonable restrictions on the right to proxy access that a corporation may impose. Examples of permissible restrictions include those based on ownership thresholds of corporation securities and limitations on the number of seats for which nominations could be made. The proposed section states that the authorizing bylaw may impose disclosure and/or undertaking requirements on a nominating shareholder.

Section 113: Reimbursement Bylaws

Proposed Section 113 would permit a company to adopt bylaws providing for the reimbursement of shareholders who solicited proxies for the election of directors. This new section essentially gives a Delaware corporation the power to adopt in its bylaws a provision for the reimbursement of a shareholder’s expenses in running a slate for election, subject to any conditions that the bylaws may impose. Some of the conditions identified in this section’s nonexclusive list include the right to condition reimbursement to slates with no more than a certain number of directors, limiting the amount of reimbursement available and any other lawful condition. This new section would also state that no bylaw adopted pursuant to this provision could apply to elections where the record date precedes the adoption of the bylaw, thus making it impossible for a shareholder to propose such a bylaw amendment and seek the reimbursement contemplated by it simultaneously.

Section 213(a): Record Date Separation

The proposed amendment to Section 213(a) attempts to provide some relief to the problem that occurs when transactions in a security are entered into after the record date, which is often many weeks prior to the taking of an actual vote, by permitting two separate record dates for Delaware corporations—one for the giving of notice of

an annual meeting and another for entitlement to vote at such meeting. The proposed amendment applies this separation to adjourned meetings as well. The proximity of the voting record date to the meeting is not specifically limited by the terms of the proposed amendment, but as a practical matter, would still be subject to certain external timing factors related to the voting of securities.

Significance

Proposed Sections 112 and 113 would be potentially significant for activist investors in that they could greatly increase access to a corporation's proxy statement and the right to reimbursement for nominating directors to the corporation's board. While this could result in economic savings for activists, a corporation adopting such provisions in its bylaws has significant discretion in controlling the grant of proxy access and reimbursement by imposing various conditions. Shareholders themselves could propose such bylaws for adoption, without conditions, but it would no doubt require a proxy contest to get these provisions adopted. The proposed revisions to Section 213(a) would likely be utilized by companies only where they believe that ownership changes subsequent to the notice record date favor the corporate position.

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