

Client Alert

Corporate Department

May 2009

Delaware Amends Its General Corporation Law

On April 10, 2009, Delaware amended several provisions of its General Corporation Law (the “DGCL”) effective August 1, 2009. Two amendments in particular will have a significant impact on stockholders who are considering soliciting proxies for the election of directors of Delaware corporations. Specifically, new Sections 112 and 113 of the DGCL will expressly allow a corporation to adopt bylaws requiring the corporation to include stockholder nominated directors in its proxy materials and mandate reimbursement of stockholder proxy solicitation expenses, respectively. Below is a summary of each of the amendments.

Access to Proxy Solicitation Materials

New Section 112 of the DGCL will expressly allow a corporation to adopt bylaws that would require the corporation to include stockholder nominated directors in its proxy solicitation materials, subject to any lawful condition that such bylaw may impose.

Section 112 also identifies a non-exclusive list of procedures and conditions that the bylaws may impose on such a right of access, including:

- a minimum level of record or beneficial ownership of the corporation’s stock (and defining beneficial ownership to include derivative holdings) or duration of ownership by the nominating stockholder;
- requiring a submission by the nominating stockholder of specified information concerning the stockholder and the stockholder’s nominees;
- conditioning eligibility upon the number or proportion of directors nominated by stockholders or whether the stockholder submitting the nomination previously sought to require such inclusion;
- precluding nominations by any 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;
- requiring that the nominating stockholder undertake to 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; and

- any other lawful condition.

Proxy Expense Reimbursement

Essentially codifying an important ruling of the Delaware Supreme Court decision in CA, Inc. v. AFSCME Employees Pension Plan, which endorsed the adoption of bylaws mandating stockholder reimbursement of expenses for running a successful “short-slate” proxy solicitation, new Section 113 of the DGCL provides that the bylaws of a corporation may require the corporation to reimburse proxy solicitation expenses incurred by a stockholder, subject to any lawful condition that such bylaw may impose. One noteworthy aspect of Section 113 is that it does not contain a requirement that the bylaw contain a “fiduciary-out” provision, which the Court in CA suggested would be necessary to make a short-slate reimbursement bylaw consistent with Delaware law. Such a provision would have allowed a corporation’s board of directors to refuse reimbursement if reimbursement would violate the directors’ fiduciary duties to the corporation.

Section 113 also identifies a non-exclusive list of procedures and conditions that the bylaws may impose on reimbursement, including:

- conditioning eligibility upon the number or proportion of persons nominated by the stockholder seeking reimbursement (this would allow a corporation to limit reimbursement to “short-slate” contests);
- conditioning eligibility on whether the stockholder seeking reimbursement 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;
- limitations concerning elections of directors by cumulative voting; and
- any other lawful condition.

Any bylaw adopted pursuant to Section 113 after the record date for a stockholder meeting will not apply to elections held at such meeting.

Bifurcation of Record and Notice Dates for Stockholder Meetings

Section 213 of the DGCL has been amended to provide that the board of directors of a corporation may fix one record date for determining which stockholders are entitled to vote at a stockholder meeting and a separate record date for determining which stockholders are entitled to receive notice of the meeting. When the board fixes the notice record date, it may determine that a later date on or before the meeting date shall be the

date for determining stockholders entitled to vote at the meeting. This would allow the board to fix the voting record date much closer to the meeting date in order to help to ensure that, in cases where ownership of shares is likely to significantly change after the notice date, the stockholders voting are more likely to be those stockholders who stand to be affected by the proposals being considered at the meeting.

Removal of Directors by the Court of Chancery

New Section 225(c) of the DGCL grants the Delaware Court of Chancery the power to remove directors upon proper application brought directly by or derivatively in the right of the corporation. Such an application must be preceded by a director's felony conviction in connection with the duties of such director or a prior judgment on the merits by a court of competent jurisdiction that the director committed a breach of the duty of loyalty in connection with the duties of such director to the corporation. The Court of Chancery may remove such director from office if it determines that the director did not act in good faith in performing the acts resulting in the conviction or judgment and removal would be necessary to avoid irreparable harm to the corporation.

Indemnification of Officers, Directors, Employees and Agents

Section 145(f) of the DGCL has been amended to provide that a right of indemnification or advancement of expenses contained in the certificate of incorporation or bylaws cannot be eliminated or impaired by way of an amendment of the applicable provision after the occurrence of the act or omission, unless the provision in effect at the time of the act or omission explicitly authorizes such elimination or impairment after the occurrence of such event.

Please feel free to contact any of the partners listed below or any corporate partner with whom you work if you would like to discuss the amendments to the DGCL and their potential ramifications.

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