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Overview Of The 2009 Amendments To The Delaware General Corporation Law

The Delaware General Assembly enacted several important amendments to the Delaware General Corporation Law (the "DGCL") in 2009. Consistent with Delaware's flexible, enabling approach to corporation law, the most widely recognized amendments added new DGCL sections expressly authorizing Delaware corporations to adopt and tailor proxy access and proxy expense reimbursement bylaws. The amendments also added two new provisions of particular significance to directors. These amendments provide a default rule governing the vesting of advancement and indemnification rights granted by the corporation's governing documents and give the Delaware Court of Chancery power to remove directors in certain limited circumstances. Finally, a series of amendments permit boards to fix separate record dates for determining stockholders entitled to notice of, and to vote at, stockholder meetings.

Proxy Access [§ 112]

The 2009 amendments added a new Section 112 relating to proxy access bylaws. Section 112 expressly authorizes a Delaware corporation to adopt a bylaw that would require the corporation to include stockholder nominees for director in the corporation's proxy solicitation materials (including any proxy card). Section 112 also provides that any such proxy access bylaw may include procedures or conditions that must be satisfied before the corporation is required to include stockholder nominees on the corporation's proxy solicitation materials. Section 112 permits a proxy access bylaw to contain any lawful condition and provides the following nonexclusive list of permitted procedures and conditions:

- Requiring minimum record or beneficial stock ownership or minimum duration of stock ownership by the nominating stockholder;
- Requiring the nominating stockholder to submit specified information regarding the stockholder and the stockholder's nominees, including stock ownership by such persons;
- Conditioning eligibility upon the number or proportion of directors nominated by stockholders or whether the stockholder 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; and

- 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.

After Section 112 was adopted in March 2009 but before it went into effect in August 2009, the U.S. Securities and Exchange Commission (the “SEC”) issued a proposed rule that, if adopted, would mandate proxy access if a stockholder meets certain criteria.¹ The mandatory federal proxy access proposal differs materially from the enabling approach embodied in Section 112, and would preclude a corporation and its stockholders from opting out of the proposed mandatory regime. The SEC has received a significant number of comments on the proxy access proposal, including a number of comments favoring the enabling approach generally embodied in Section 112.² The SEC opened a second comment period and has delayed final consideration of the proposed rule on proxy access until early 2010, which means that a federal proxy access regime will not be in place for the 2010 proxy season. As a practical matter, Delaware corporations must consider the advisability of adopting a proxy access bylaw pursuant to Section 112 with the possibility of federal proxy access requirements on the horizon.³

Proxy Expense Reimbursement [§ 113]

The 2009 amendments created a new Section 113 relating to proxy expense reimbursement bylaws. Section 113 authorizes a Delaware corporation to adopt a bylaw that provides for the reimbursement by the corporation of expenses incurred by a stockholder in soliciting proxies in connection with an election of directors. Similar to Section 112 on proxy access bylaws, Section 113 permits a proxy expense reimbursement bylaw to condition reimbursement on any lawful condition and contains the following nonexclusive list of permitted procedures and conditions:

- 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

¹ See Facilitating Shareholder Director Nominations, Securities Act Release No. 9046, Exchange Act Release No. 60,089, Investment Company Act Release No. 28,765, 74 Fed. Reg. 29,024 (proposed June 10, 2009); see also Facilitating Shareholder Director Nominations, Securities Act Release No. 9086, Exchange Act Release No. 61,161, Investment Company Act Release No. 29,069, 74 Fed. Reg. 67,144 (proposed Dec. 14, 2009). For our memo on this proposal, see SEC Publishes Proxy Access Proposal (June 19, 2009), <http://www.paulweiss.com/resources/pubs/detail.aspx?publication=2399>.

² See, e.g., Letter from the Delaware State Bar Association (July 24, 2009), <http://www.sec.gov/comments/s7-10-09/s71009-65.pdf> (“the thrust of our comment is that a single rule would unnecessarily deprive Delaware corporations of the flexibility state law confers to deal effectively with myriad different circumstances that legislators and rulemakers cannot anticipate”).

³ See generally Task Force on Shareholder Proposals of the Committee on Federal Regulation of Securities of the American Bar Association, Exposure Draft of Illustrative Access Bylaw With Commentary (June 15, 2009), available at http://meetings.abanet.org/webupload/commupload/CL410000/sitesofinterest_files/illustrative_access_bylaw.pdf.

- Limitations concerning elections of directors by cumulative voting.

Section 113 provides that a proxy expense reimbursement bylaw applies only to elections for which the record date precedes its adoption. This prospective only application prevents a stockholder from running a proxy solicitation in favor of its director nominees and the adoption of a proxy expense reimbursement bylaw, and subsequently seeking reimbursement for that proxy solicitation under the newly adopted bylaw.

The adoption of Section 113 followed the *CA, Inc. v. AFSCME Employees Pension Plan* decision in which the Delaware Supreme Court addressed a short slate proxy expense reimbursement bylaw in the context of two questions certified to it by the SEC.⁴ The *CA* decision resolved an ongoing debate whether stockholders could supplant the board of directors' statutory authority to manage the business and affairs of the company through stockholder adopted bylaws. The court held that the statutory authority of stockholders to adopt bylaws could not supplant the board of directors' authority to manage the corporation. Thus, a stockholder adopted bylaw that mandates a particular board decision is invalid, whereas a bylaw that regulates a process for substantive decision-making could be appropriate. Following its demarcation of authority between stockholders and directors, the *CA* court concluded that "the process for electing directors" was a "subject in which shareholders of a Delaware corporation have a legitimate and protected interest" and that a proxy expense reimbursement bylaw could fit comfortably with the scope of permissible stockholder adopted bylaws so long as the board of directors retained the authority to deny reimbursement if meeting their fiduciary duties so required.

Indemnification and Advancement [§ 145]

The 2009 amendments made an important addition to Section 145 relating to the vesting of advancement and indemnification rights granted by the corporation's certificate of incorporation or bylaws. The amendment sets a default rule that a right to advancement or indemnification arising under a provision in the certificate of incorporation or bylaws shall not be eliminated or impaired by an amendment to such provision after the occurrence of the act or omission to which the indemnification or advancement of expenses relates. This default rule may be varied by a provision in the certificate of incorporation or bylaws in effect at the time of the act or omission relating to the advancement or indemnification of expenses that expressly authorizes the elimination or impairment advancement or indemnification rights by amendment. The new default rule differs from the approach articulated in *Schoon v. Troy Corp.*, 948 A.2d 1157, 1165-66 (Del. Ch. 2008), which suggested that the right to advancement or indemnification under a corporation's governing documents can be eliminated or impaired by amendment at any time prior to the instigation or threat of litigation against an indemnitee.

Judicial Removal of Directors [§ 225]

The 2009 amendments added a new subsection (c) to Section 225 relating to judicial removal of directors in certain limited circumstances. Section 225(c) permits the corporation (or a stockholder who brings a derivative action on the corporation's behalf) to apply for the Court of Chancery to remove one or more directors. Such an application may only be made with respect to directors that have been, in connection with their duties to that corporation, either convicted of a felony or subject to a prior judgment on the merits of a breach of the duty of loyalty to the corporation. In those narrow circumstances, the Court of Chancery may remove such directors if the court determines that the directors did not act in good faith in performing the acts resulting in

⁴ 953 A.2d 227 (Del. 2008).

the prior conviction or judgment and judicial removal is necessary to avoid irreparable harm to the corporation.

Dual Record Dates [§§ 213 & 211, 219, 222, 228, 262, 275]

The 2009 amendments amended Section 213 to permit a board of directors to fix dual record dates. The prior version of Section 213 allowed directors to determine only one record date for determining stockholders entitled to notice of and to vote at a meeting of stockholders. New Section 213 permits the board of directors to fix two separate record dates for stockholders meetings—one date to determine stockholders who are entitled to notice of the meeting and a later date to determine stockholders who are entitled to vote at the meeting. The notice record date may not be more than 60 nor less than 10 days before the date of the meeting whereas, if the board adopts a separate voting record date, that date may be any later date on or before the date of the meeting. The ability to set a voting record date closer to the date of the meeting may reduce the potential for voting by stockholders who no longer hold the shares at the time of the meeting. The concern about the separation of voting rights from the economic interest in shares was echoed in a recent Delaware Court of Chancery case that suggested voting manipulation techniques leading to such a separation may be subject to equitable review under the concept of vote buying.⁵

The amendment to Section 213 required a series of conforming amendments to several other DGCL Sections, including: Section 211 relating to meetings of stockholders; Section 219 relating to the list of stockholders; Section 222 relating to notice of meetings and adjourned meetings; Section 228 relating to written consent of stockholders; Section 262 relating to appraisal rights; and Section 275 relating to dissolution.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. If you have any questions or wish to discuss your particular situation, please call Stephen P. Lamb (302-655-4411), Frances Mi (212-373-3185), John P. DiTomo (302-655-4412) or Jeffrey M. Gorris (302-655-4413).

⁵ *Kurz v. Holbrook*, C.A. No. 5019-VCL (Del. Ch. Feb. 9, 2010). For our alert on this decision, see Corporate Alert: Delaware Decision Signals a New Focus on Vote Buying Claims and Redefines Law on Record Holders (Feb. 11, 2010), <http://www.paulweiss.com/resources/pubs/detail.aspx?publication=2601>.