

Delaware Corporate Update

Monday, February 23, 2009

Important Proposed Amendments to the General Corporation Law of the State of Delaware Relating to Proxy Access, Proxy Expense Reimbursement, Record Date Bifurcation and Other Matters

Legislation proposing to amend the General Corporation Law of the State of Delaware (the "DGCL") and Section 3114(c) of Title 10 of the Delaware Code has been submitted to the Corporation Law Section of the Delaware State Bar Association (the "DSBA") for approval. Upon approval by the Corporation Law Section and by the Executive Committee of the DSBA, the proposed legislation will be submitted to the Delaware General Assembly and, subject to the approval of the Delaware General Assembly, to the Governor of the State of Delaware for signature. If the proposed legislation is enacted, the amendments to the DGCL and to Section 3114(c) of Title 10 of the Delaware Code would become effective August 1, 2009.

Amendments to the DGCL

Access to Proxy Solicitation Materials [§ 112]. The proposed amendments to the DGCL would add a new Section 112 relating to access to a corporation's proxy solicitation materials. New Section 112 would provide that the bylaws of a Delaware corporation may provide that, if the corporation solicits proxies with respect to an election of directors, the corporation may be required to include in its solicitation materials (including any form of proxy it distributes) one or more individuals nominated by a stockholder in addition to the individuals nominated by the board of directors. The obligation of the corporation to include such stockholder nominees would be subject to the procedures and conditions set forth in the bylaw adopted pursuant to new Section 112. New Section 112 would also provide a nonexclusive list of permitted procedures and conditions, including:

- requiring a minimum record or beneficial stock ownership or minimum duration of stock ownership by the nominating stockholder;
- requiring that the nominating stockholder provide specified information about the stockholder and the nominee, 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 of such person or nominee has acquired or publicly proposed to acquire shares



constituting a specified percentage of the voting power of the corporation within a specified period before the election of directors; and

- requiring that the nominating stockholder indemnify the corporation in respect of any loss arising from any false or misleading information or statement submitted by the nominating stockholder in connection with the nomination.

Proxy Expense Reimbursement [§ 113]. The proposed amendments to the DGCL would also add a new Section 113 relating to reimbursement of expenses incurred by a stockholder in soliciting proxies in connection with an election of directors. New Section 113 would allow the bylaws of a Delaware corporation to include a provision that the corporation would reimburse a stockholder for the expenses such stockholder incurred in soliciting proxies in connection with an election of directors, subject to the conditions and procedures prescribed by the bylaws. New Section 113 also would provide a nonexclusive list of permitted procedures and conditions, including:

- conditioning eligibility for reimbursement upon the number or proportion of persons nominated by the stockholder or whether such stockholder previously sought reimbursement for similar expenses;
- limiting the amount of reimbursement based upon the proportion of votes cast in favor of the persons nominated by the stockholder or based upon the amount spent by the corporation soliciting proxies in connection with the election; and
- imposing limits concerning elections of directors by cumulative voting.

New Section 113 would also provide that no bylaw adopted pursuant to Section 113 would apply to elections for which any record date precedes its adoption.

Indemnification and Advancement [§ 145]. Section 145 of the DGCL governs the ability of a Delaware corporation to grant rights to indemnification and advancement of expenses. Section 145(f) of the DGCL provides that the indemnification and advancement rights granted pursuant to Section 145 are not exclusive of other rights to which those seeking indemnification and advancement may be entitled. The proposed amendment to Section 145(f) would add a new sentence to the end of Section 145(f) to provide that a right to indemnification or advancement under a provision of a corporation's certificate of incorporation or bylaws could 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 relates, unless the provision in the certificate of incorporation or bylaws contains, at the time of the act or omission, an express authorization of such elimination or impairment. The proposed amendment to Section 145(f) is in response to the Court of Chancery decision in Schoon v. Troy Corp., 948 A.2d 1157, 1165-66 (Del. Ch. 2008), which held that, based on the facts and circumstances of that case, indemnification and advancement rights could be eliminated or impaired after the occurrence of the underlying act or omission.

Judicial Removal of Directors [§ 225]. Section 225 of the DGCL governs contested elections of directors. The proposed amendment to Section 225 would add a new subsection (c) which would grant the Court of Chancery the power to remove directors of a Delaware corporation

under certain limited circumstances. The new Section 225(c) would provide that if one or more directors has been convicted of a felony in connection with his duties to the corporation, or if there has been a judgment on the merits by a court of competent jurisdiction that one or more directors has committed a breach of the duty of loyalty in connection with his duties to the corporation, then, upon an application by the corporation, or derivatively in the right of the corporation by any stockholder or member of a nonstock corporation, in a subsequent action brought for such purpose, the Court of Chancery may determine to remove such director or directors if the Court determines such director or directors did not act in good faith in performing the acts resulting in the conviction or judgment and the removal is necessary to avoid irreparable harm to the corporation.

Record Date [§ 213] and Related Amendments. Section 213 of the DGCL relates to the setting of record dates. Section 213(a), as currently drafted, provides that the record date to determine the stockholders entitled to notice of a stockholder meeting and the record date to determine the stockholders entitled to vote at a stockholder meeting are the same. The proposed amendment to Section 213(a) would allow the board of directors of a Delaware corporation to fix one date as the record date to determine the stockholders entitled to receive notice of a stockholder meeting (which date must be not more than 60 nor less than 10 days before the date of the meeting) and to fix another later date on or before the date of the meeting as the record date to determine the stockholders entitled to vote at the meeting. By allowing the board of directors to fix a record date to determine stockholders entitled to vote at the meeting closer to the meeting date, a board of directors can reduce the potential for voting by persons who no longer have an economic interest in the stock.

The proposed amendment to Section 213(a) would also necessitate corresponding amendments to a number of other provisions of the DGCL, as set forth below.

Meeting of Stockholders [§ 211]. Section 211(c) of the DGCL governs the situation where a Delaware corporation fails to hold an annual meeting of stockholders and grants the Court of Chancery the power to call a meeting of stockholders. The proposed amendment to Section 211(c) of the DGCL would amend the last sentence thereof to reflect the amendment to Section 213(a) allowing for separate record dates for determining stockholders entitled to notice of meetings and stockholders entitled to vote at meetings.

List of Stockholders [§ 219]. Section 219 of the DGCL requires that a Delaware corporation prepare a list of stockholders entitled to vote at a meeting of stockholders. In light of the proposed amendment to Section 213(a), Section 219 would be amended to provide that if the record date for determining stockholders entitled to vote at a meeting is less than 10 days before the meeting, then the list required by Section 219 would reflect the stockholders entitled to vote as of the tenth day before the meeting date.

Notice of Meetings and Adjourned Meetings [§ 222]. Section 222 of the DGCL sets forth the notice requirements for stockholder meetings and adjourned stockholder meetings. The proposed amendment to Section 222(a) would require that a notice of meeting specify the record date for determining stockholders entitled to vote at the meeting, if such record date is different from the record date for determining stockholders entitled to notice of the meeting. Section 222(b) would be amended to clarify that the timing requirements for providing notice of the meeting would

remain unchanged so that a Delaware corporation would need only send notice to the stockholders entitled to vote as of the notice record date. Finally, Section 222(c) would be amended to provide that if a board of directors sets a new record date for determining stockholders entitled to vote at an adjourned meeting, the board would be required to set a new record date for notice thereof and provide notice to stockholders entitled to vote as of that date.

Consent of Stockholders [§ 228]. Section 228 governs action by written consent of stockholders or members of a Delaware corporation. The proposed amendment to Section 228(e) would specify that the notice of stockholder action by consent would need to be sent to nonconsenting stockholders as of the record date for determining stockholders entitled to notice of a meeting of stockholders if such record date was the date of the delivery of the requisite number of consents. The amendment would make Section 228 consistent with the proposed amendment to Section 213(a).

Appraisal Rights [§ 262]. Section 262 of the DGCL governs appraisal rights of stockholders in connection with certain mergers. The proposed amendments to Section 262 would clarify that the record date referenced therein is the record date to determine stockholders entitled to receive notice of the meeting. These amendments are technical changes to make Section 262 consistent with Section 213(a) as it is proposed to be amended.

Dissolution [§ 275]. Section 275 of the DGCL governs the procedure to dissolve a Delaware corporation. The proposed amendment to Section 275(c) would clarify that the notice of the board's adoption of resolutions to dissolve the corporation should be mailed to the stockholders entitled to vote thereon as of the record date for determining stockholders entitled to notice of the meeting. Again, this is a technical amendment to make Section 275 consistent with Section 213(a) as it is proposed to be amended.

Amendment to Section 3114(c)

Section 3114 of Title 10 of the Delaware Code governs service of process on nonresident directors, trustees, members of the governing body or officers of Delaware corporations. Section 3114(c) would be amended to eliminate the need for duplicative mailings of process where the residence or last known address of the director, trustee, member or officer is the same as the corporation's principal place of business.