

**DELAWARE LEGISLATURE APPROVES IMPORTANT AMENDMENTS  
 TO THE DELAWARE GENERAL CORPORATION LAW**

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The Delaware legislature approved several amendments to the Delaware General Corporation Law (the “DGCL”) that are responsive to ongoing corporate governance concerns but that do not sacrifice the touchstone of Delaware corporate law – private ordering. The 2009 amendments touch on five primary areas of law: (1) stockholder proxy access; (2) stockholder proxy expense reimbursement; (3) record dates for those entitled to vote at stockholder meetings; (4) director removal by the Court of Chancery; and (5) indemnification and advancement rights. These amendments, each discussed in turn below, will become effective on August 1, 2009.

**Stockholder Proxy Access**

The 2009 DGCL amendments added a new Section 112 that expressly allows a corporation to adopt a proxy access bylaw, i.e., a bylaw requiring the corporation to include stockholder nominees for director in the corporation’s proxy solicitation materials.<sup>1</sup> Section 112 also sets forth a non-exclusive list of conditions that a proxy access bylaw may impose on such a right of access to the corporation’s proxy materials. Specifically, such a bylaw may require satisfaction of any or all of the following conditions or procedures (or any other lawful condition) before the corporation will be required to include a stockholder’s nominees in the corporation’s proxy solicitation materials:

- a condition requiring minimum record or beneficial ownership or duration of ownership by a nominating stockholder;
- a condition requiring a nominating stockholder to submit specified information concerning

the stockholder and his or her nominee, including information concerning such person’s ownership of the corporation’s stock, options or other rights related to such stock;

- a condition limiting the number of directors nominated by stockholders;
- a condition precluding a nomination by a stockholder who recently acquired or publicly proposed to acquire a specified percentage of voting power of the corporation’s stock within a specified period before the election of directors; or
- a condition requiring a stockholder to indemnify the corporation for any loss arising as a result of false or misleading information submitted by the nominating stockholder in connection with a nomination.

By its terms, Section 112 is an enabling provision that permits, but does not require, a corporation to give proxy access to its stockholders. A corporation can require proxy access through a bylaw adopted by its stockholders or by the board (if the charter authorizes the board to amend the bylaws). In the absence of such a bylaw provision, however, a corporation may choose not to provide proxy access to its stockholders for nominations.

**Stockholder Proxy Expense Reimbursement**

The 2009 DGCL amendments also added a new Section 113, which permits a corporation to adopt bylaws that would require the corporation to reimburse a stockholder’s expenses incurred in soliciting proxies in connection with an election of directors. Section 113 expressly allows such a bylaw to impose the following conditions on a stockholder seeking reimbursement:

- a condition basing eligibility for reimbursement upon the number of persons nominated or whether such stockholder previously sought reimbursement from the corporation for similar expenses;

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<sup>1</sup> Shortly after the Delaware legislature adopted the amendments discussed herein, the Securities and Exchange Commission approved for public comment proposed Exchange Act Rule 14a-11, which, if adopted, would allow stockholders to include their nominees for director in the corporation’s proxy solicitation materials after meeting certain eligibility requirements. The possible implications of this proposed Rule, and the interplay between the federal securities laws generally and the amendments discussed herein, are beyond the scope of this article.

- a limitation on the amount of reimbursement based upon (a) the proportion of votes cast in favor of the person(s) nominated by the stockholder or (b) the amount spent by the corporation in soliciting proxies in connection with the election;
- a limitation concerning elections by cumulative voting; or
- any other lawful condition.

As with Section 112, Section 113 is an enabling provision that permits, but does not require, a corporation to adopt bylaws providing for expense reimbursement.

### **Record Dates For Stockholder Meetings**

The legislature revamped Section 213 to empower, but not require, a board to set separate record dates for determining (1) the stockholders entitled to notice of a stockholder meeting and (2) the stockholders entitled to vote at such meeting. Currently, a corporation can only set a single record date that applies both to notice and voting, which can result in a “stale” record date for determining the stockholders entitled to vote. A “stale” record date occurs when a large number of shares change hands after a record date has been set but before the meeting date, so that many persons entitled to vote based on the record date do not own shares of the corporation when the vote occurs. The ability to fix a second record date for voting increases the probability that the shares of stock at the meeting are in the hands of the persons entitled to vote. To fully effect this amendment, certain other conforming changes were made to other sections of the DGCL with record date language. As a practical matter, it is unclear whether public companies will be able to immediately avail themselves of this new DGCL provision in light of logistical concerns and certain issues under the federal securities laws.

### **Director Removal By The Delaware Court Of Chancery**

The 2009 DGCL amendments also added Section 225(c). This section permits a corporation (or stockholders who bring a derivative action on behalf of the corporation) to seek an order from the Delaware Court of Chancery to remove one or more directors from the board if (a) such director or directors are convicted of a felony in connection with their duties to the corporation or (b) a prior judgment on the merits has been entered against them for breach of the duty of loyalty. In such an action, the Court has the discretion to decide whether or not to remove a director from office, and removal is only allowed if the Court determines that the director did not act in good faith in performing the acts resulting in the conviction or judgment and that judicial removal is necessary to avoid irreparable harm to the corporation.

### **Indemnification And Advancement Rights**

The 2009 DGCL amendments made an important change to Section 145—the section governing the payment of indemnification and advancement of expenses for directors and officers. The amendment establishes a default rule that if an indemnitee takes action, or fails to take action, at a time when a corporation’s charter or bylaws provide such person with indemnification or advancement, subsequent amendments to such provision will not divest that person of those indemnity and advancement rights. This amendment is in response to a 2008 decision from the Delaware Court of Chancery, *Schoon v. Troy Corp.*, 948 A.2d 1157, 1165–66 (Del. Ch. 2008), which suggested that the right to indemnity or advancement does not “vest,” and therefore can be taken away from an indemnitee, prior to the time a lawsuit is filed against the indemnitee. In contrast, the new default rule provides for “vesting” at the time of the alleged act or omission that later leads to an action against the indemnitee.

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