

ANALYSIS OF 2009 AMENDMENTS TO THE GENERAL CORPORATION LAW OF THE STATE OF DELAWARE

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The General Corporation Law of the State of Delaware, 8 *Del. C.* § 101 *et seq.* (the “DGCL”), has been amended in 2009, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. Certain amendments to the DGCL were contained in Delaware State House Bill No. 19 and became effective on August 1, 2009. 77 *Del. Laws*, c. 14. Other amendments to the DGCL, and to the chapter of the Delaware Code regarding the corporation franchise tax, were included in Delaware State House Substitute No. 1 for House Bill No. 267 as amended by House Amendment No. 2. 77 *Del. Laws*, c. 78, §§ 38-58, 69-70. Perhaps foremost among these 2009 statutory revisions are those dealing with proxy access and reimbursement of proxy expenses. Other amendments address indemnification and advancement rights, record dates, judicial removal of directors, and amounts payable to the Delaware Secretary of State.

Proxy access and reimbursement of proxy expenses [§§ 112 and 113]. New sections added to the DGCL in 2009 address proxy access as well as reimbursement of proxy expenses. These new provisions, DGCL Sections 112 and 113, constitute “enabling” rather than “mandatory” legislation: they expressly authorize, but do not require, the adoption of certain bylaw provisions. Pursuant to Section 112 of the DGCL, the bylaws may grant a right of “proxy access;” specifically, the bylaws may provide that, if the corporation solicits proxies in regard to an election of directors, then the corporation must include in its proxy materials nominees identified by stockholders in addition to individuals nominated by the board. Section 112 makes clear that the bylaws may establish any lawful condition to such a proxy access right, and identifies a non-exclusive array of conditions that the bylaws may impose, such as a minimum level of stock ownership necessary for requiring inclusion of a stockholder’s nominees in the corporation’s proxy materials. Under DGCL Section 113, a bylaw may be adopted requiring that the corporation reimburse proxy solicitation expenses incurred by a stockholder. Section 113 provides an illustrative list of conditions that the bylaws may impose on such a reimbursement right.

Indemnification and advancement rights [§ 145]. Language has been added to Section 145(f) of the DGCL, adopting a default rule as to the vesting of certain rights to indemnification and advancement of expenses. This rule differs from the approach articulated in *Schoon v. Troy Corporation*, 948 A.2d 1157, 1165-1166 (Del. Ch. 2008). Under Section 145(f) as amended, a right to indemnification or advancement of expenses under a charter or bylaw provision generally cannot be eliminated or impaired by an amendment of that provision effected after the occurrence of the act or omission to which indemnification or advancement relates. An exception to this rule applies, however, if the operative charter or bylaw provision contains, at the time of

the act or omission, an explicit authorization for such elimination or limitation; in that case, elimination or impairment of rights is permitted.

Record dates [§§ 211, 213, 219, 222, 228, 262, and 275]. Section 213(a) of the DGCL has been amended to permit the board of directors to establish one record date for determining the stockholders entitled to notice of a meeting and another later record date for determining the stockholders entitled to vote at the meeting. (This amendment, in keeping with the doctrine expressed in *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971), is not intended to exempt from judicial review a board decision to separate the notice and voting record dates.) Conforming changes have been made to DGCL Sections 211(c), 219(a), 222, 228(e), 262, and 275(a), to account for the potential divergence between the notice and voting record dates.

Judicial removal of directors [§ 225]. House Bill No. 19 added a new subsection (c) to DGCL Section 225. This provision changes existing law by granting to the Delaware Court of Chancery the power to remove one or more directors under specified limited circumstances. Judicial removal of a director pursuant to this provision is allowed only when the court determines that the director did not act in good faith and that such removal is necessary to avoid irreparable harm to the corporation. An application for judicial removal of a director under DGCL Section 225(c) must be brought directly by the corporation or derivatively in the right of the corporation.

Amounts payable to Secretary of State [§§ 372, 391, 502, and 503]. Delaware State House Substitute No. 1 for House Bill No. 267 as amended by House Amendment No. 2 altered various fees and taxes assessed by the Delaware Secretary of State. Among the changes were amendments to DGCL Section 391 modifying a number of different fees payable to the Secretary of State, such as the charge for a certified copy of a filed document. Pursuant to new language in 391(h)(1), 30-minute expedited service is now available from the Secretary of State, for a substantial fee. This legislation also effected revisions to Chapter 5 of Title 8 of the Delaware Code, which deals with the corporate franchise tax. Among the amendments to this chapter was an increase in the maximum annual franchise tax, from \$165,000 to \$180,000. Most of the changes included in this legislation took effect on August 1, 2009, but there were a few exceptions. Increases to the maximum franchise tax, and to the “assumed par value multiplier” for calculation of franchise tax, took effect for the tax year beginning January 1, 2009. Further, increases to the minimum franchise tax applicable under the “assumed par value” test, and to the penalty for late filing of an annual franchise tax report, become effective for the tax year beginning January 1, 2010.