

New Delaware Law Regarding Proxy Solicitations Involving Contested Director Elections

On April 10, 2009, Delaware Governor Jack Markell signed into law House Bill 19 containing important amendments to the Delaware General Corporation Law (“DGCL”). The amendments, among other things, expressly permit Delaware corporations to adopt bylaws giving stockholders access to a corporation’s proxy statement to nominate directors and permitting the reimbursement of stockholder proxy solicitation expenses in connection with the election of directors. These amendments will become effective on August 1, 2009.

I. Access to Proxy Materials

New Section 112 of the DGCL permits a corporation to enact bylaws that provide that if the corporation solicits proxies with respect to the election of directors, the corporation may be required to include in such proxy materials one or more nominees submitted by stockholders. The new provision also identifies a non-exclusive list of conditions that the bylaws may impose on such a right of access to the corporation’s proxy materials. Specifically, the bylaws may:

- Prescribe a minimum level of stock ownership and/or duration of ownership of the nominating stockholder;
- Require the nominating stockholder to submit specified information concerning the stockholder and the stockholder’s nominee;
- Limit a right of access according to the number or proportion of seats to be contested;
- Preclude access if the nominating stockholder or the stockholder’s nominee has acquired or proposes to acquire a specific percentage of the corporation’s outstanding shares;
- Require the nominating stockholder to indemnify the corporation with respect to any loss arising as a result of any false or misleading information submitted in connection with the nomination; and/or
- Include any other lawful condition.

II. Proxy Expense Reimbursement

New Section 113 of the DGCL permits a corporation to enact bylaws that require the corporation to reimburse proxy solicitation expenses incurred by stockholders in connection with the election of directors. As with Section 112, this provision identifies a non-exclusive list of conditions the bylaws may impose on stockholders seeking reimbursement. Specifically, the bylaws may:

- Limit eligibility for reimbursement according to the number or proportion of seats to be contested;
- Limit 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;
- Provide for limitations concerning elections of directors by cumulative voting pursuant to Section 214 of the DGCL; and/or
- Include any other lawful condition.

CAHILL

Bylaws contemplated by new Section 113 may not apply to elections for which any record date precedes their adoption.

New Sections 112 and 113 of the DGCL remove doubt regarding the validity of bylaws that have been proposed to be adopted by stockholders that would require inclusion of information regarding stockholder nominated candidates for directorships and/or reimbursement of stockholder solicitation expenses in connection with contested director elections.¹

It should be noted that the SEC's current interpretation of Rule 14a-8(i)(8) under the Securities Exchange Act of 1934 would permit a company to exclude from its proxy materials a stockholder proposal to adopt a bylaw permitted by new Sections 112 and 113 of the DGCL. However, SEC Chairman Mary Shapiro has recently indicated that the SEC may change this interpretation by stating, in reference to the then-proposed Sections 112 and 113, that the SEC "will consider a proposal to ensure that a company's owners have a meaningful opportunity to nominate directors."²

New Sections 112 and 113 of the DGCL are attached as Annex A.³

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Richard E. Farley at 212.701.3434 or rfarley@cahill.com.

¹ See *C.A. Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008), holding that a stockholder-proposed bylaw providing for reimbursement of solicitation expenses would violate the prohibition of contracts that would preclude a board of directors from discharging its fiduciary duties.

² See "*Speech by SEC Chairman: Address to the Council of Institutional Investors*," April 6, 2009, available on the SEC's website: <http://www.sec.gov/news/speech/2009/spch040609mls.htm>.

³ Sections 1 and 2 of Chapter 14 of the 145th General Assembly, formerly House Bill No. 19.

Sections 1 and 2 of Chapter 14 of the 145th General Assembly

Section 1. Amend Title 8, Delaware Code, by adding the following new Section 112:

“§ 112. Access to proxy solicitation materials.

The bylaws may provide that if the corporation solicits proxies with respect to an election of directors, it may be required, to the extent and subject to such procedures or conditions as may be provided in the bylaws, to include in its proxy solicitation materials (including any form of proxy it distributes), in addition to individuals nominated by the board of directors, one or more individuals nominated by a stockholder. Such procedures or conditions may include any of the following:

- (1) A provision requiring a minimum record or beneficial ownership, or duration of ownership, of shares of the corporation’s capital stock, by the nominating stockholder, and defining beneficial ownership to take into account options or other rights in respect of or related to such stock;
- (2) A provision requiring the nominating stockholder to submit specified information concerning the stockholder and the stockholder’s nominees, including information concerning ownership by such persons of shares of the corporation’s capital stock, or options or other rights in respect of or related to such stock;
- (3) A provision 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;
- (4) A provision 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;
- (5) A provision 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
- (6) Any other lawful condition.”

Section 2. Amend Title 8, Delaware Code, by adding the following new Section 113:

“§ 113. Proxy Expense Reimbursement.

- (a) The bylaws may provide for the reimbursement by the corporation of expenses incurred by a stockholder in soliciting proxies in connection with an election of directors, subject to such procedures or conditions as the bylaws may prescribe, including:

CAHILL

- (1) 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;
 - (2) 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;
 - (3) Limitations concerning elections of directors by cumulative voting pursuant to § 214 of this title; or
 - (4) Any other lawful condition.
- (b) No bylaw so adopted shall apply to elections for which any record date precedes its adoption.”