
Chancery Court Holds that a Board has the Power to “Approve” the Nomination of a Dissident Slate of Director Nominees in Order to Qualify the Dissident Nominees as “Continuing Directors” for Purposes of a Change of Control Put Provision in an Indenture

Date: 05/21/09

On May 12, 2009, the Delaware Chancery Court, in an unpublished opinion by Vice Chancellor Lamb, interpreted a New York law-governed indenture to permit an issuer's board of directors to "approve" the nomination for election as directors members of a slate proposed by dissident stockholders. The purpose of the approval was to enable the issuer to avail itself of a "continuing directors" exception to a change in majority of directors prong of a "Change in Control" covenant and thus avert triggering a put right at par with respect to the notes issued under the indenture. Board approval was given for this purpose even though the board, in the context of a proxy fight, did not recommend that stockholders elect any of the dissidents' proposed nominees, actively and publicly opposed their election and recommended a board-proposed slate of directors.

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