

# LEGAL UPDATE

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By: Michael T. Campoli

## DELAWARE LEGISLATURE ADOPTS AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW REGARDING PROXY ACCESS AND OTHER ISSUES

The Delaware General Assembly recently approved a series of amendments to the Delaware General Corporation Law that address stockholder proxy access and expense reimbursement for director elections, establishment of dual record dates for stockholder meetings, indemnification and expense advancement rights, and the judicial removal of directors. The amendments will become effective on August 1, 2009.

### PROXY ACCESS AND EXPENSE REIMBURSEMENT

New Section 112 of the DGCL provides that a corporation may adopt a bylaw that requires the corporation to include stockholder nominees for director, in addition to individuals nominated by the corporation, in the corporation's proxy solicitation materials. Such bylaws may include conditions that must be satisfied or procedures that must be followed before a corporation will be required to include a stockholder's nominee in the corporation's proxy solicitation materials, including:

- minimum record or beneficial ownership, or duration of ownership, of the corporation's stock by the nominating stockholder;
- submission of certain specified information about the nominating stockholder and its nominees, including information about stock ownership;
- eligibility requirements based upon the number or proportion of directors nominated by stockholders or whether the stockholder previously sought to include nominees in the corporation's proxy solicitation materials;
- precluding nominations by stockholders 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; and

- a requirement that the nominating stockholder indemnify the corporation for any false or misleading statements made in connection with a nomination.

New Section 113 of the DGCL provides that a corporation may adopt bylaws that would require the corporation to reimburse a stockholder's expenses incurred in soliciting proxies in connection with an election of directors. The corporation may provide in such bylaws for conditions that must be satisfied or procedures that must be followed prior to such reimbursement, including:

- conditioning a stockholder's eligibility for reimbursement upon the number or proportion of directors nominated by the stockholder or whether such stockholder previously sought reimbursement from the corporation for similar expenses;
- limiting the amount of reimbursement based upon the proportion of votes cast in favor of one or more of the stockholder's nominees or the amount spent by the corporation in soliciting proxies in connection with the election; and
- imposing limitations for elections involving cumulative voting.

Sections 112 and 113 of the DGCL both leave it in the hands of the corporation as to whether it adopts bylaws providing for proxy access or expense reimbursement. The implications of these new rules and their usefulness to both corporations and shareholders will depend largely on the final "proxy

access” rules to be adopted by the U.S. Securities and Exchange Commission. The SEC published its proposed “proxy access” rules for comment on June 10, 2009. For further information on the SEC’s proposal, please see the Pryor Cashman Legal Update entitled “Proxy Access Proposal” dated May 26, 2009.

#### **SEPARATE RECORD DATES FOR STOCKHOLDER MEETINGS**

The Delaware legislature amended Section 213 of the DGCL to permit corporations to set separate record dates for determining the stockholders entitled to notice of the meeting and stockholders entitled to vote at such meeting. Corporations currently can only set a single record date that applies to both notice and voting, which raises the possibility that certain stockholders who own shares as of the record date will no longer own shares on the meeting date. The record date for notice must be between 10 days and 60 days prior to the meeting; however, the record date for voting may be any date after the notice record date and on or before the meeting date.

#### **INDEMNIFICATION AND ADVANCEMENT RIGHTS**

The amendments to the DGCL revise Section 145 to provide that a director or officer’s right to indemnification or to advancement of expenses pursuant to a corporation’s charter or bylaws cannot be eliminated after the occurrence of an act or omission giving rise to proceedings for which indemnification or advancement is sought, unless the charter or bylaws explicitly authorize such elimination after the occurrence of the act or omission. The legislature adopted this amendment in response to the 2008 Delaware Court of Chancery decision, Schoon v. Troy Corp., which permitted a corporation to amend its charter or bylaws after a director or officer left the corporation, but before the claim is asserted, thereby eliminating the former director’s right to indemnification and advancement.

#### **REMOVAL OF DIRECTORS BY THE COURT OF CHANCERY**

The Delaware legislature added a new subsection (c) of Section 225 of the DGCL to allow a corporation (either directly or pursuant to a derivative suit by a stockholder) to request that the Court of Chancery remove a director if such director is convicted of a felony in connection with

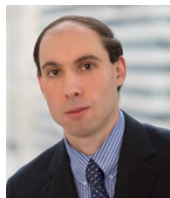
his or her duties to the corporation, or a prior judgment on the merits has been entered against such director for breach of the duty of loyalty. Removal is only allowed if the Court determines that the director did not act in good faith in performing the acts resulting in the conviction or judgment and that removal is necessary to avoid irreparable harm to the corporation.

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*The foregoing is intended to summarize the principal issues relating to recent amendments of the Delaware General Corporation Law. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Michael Campoli at (212) 326-0468.*

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## ABOUT THE AUTHOR



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Mr. Campoli devotes his practice to counseling public and private companies on a broad range of corporate matters, including Securities and Exchange Commission and self-regulatory organization reporting and compliance, corporate formation and governance, mergers and acquisitions, public and private debt and equity financing transactions, and limited liability company and partnership counseling.

Mr. Campoli's work at Pryor Cashman has included:

- Representation of MDRNA, Inc. (NASDAQ: MRNA) as outside general counsel in connection with its equity financings, and SEC and NASDAQ reporting and compliance requirements
- Representation of Javelin Pharmaceuticals, Inc. (NYSE - Amex: JAV) as outside general counsel in connection with its equity financings, and SEC and NYSE - Amex reporting and compliance requirements
- Represented Briad Restaurant Group in its prevailing tender offer for Main Street Restaurant Group, Inc., the largest T.G.I. Friday's franchisee
- Represented Open Range Communications Inc. in connection with a \$380 million financing that consisted of the issuance of a \$270 million promissory note to the U.S. Department of Agriculture and preferred stock to private investors
- Represented The Kushner Companies in connection with its acquisition of the office building located at 666 Fifth Avenue, New York, New York
- Represented Implantable Vision, Inc. (OTCBB: IMVS) as outside general counsel in connection with SEC compliance and reporting matters
- Represented a privately-held alternative media company in connection with general corporate matters and its acquisition of a coffee sleeve advertising business
- Represented a private medical devices manufacturer in connection with equity and debt offerings for aggregate gross proceeds of up to \$4,000,000
- Represented a private life sciences company in connection with the issuance of \$15 million of convertible notes
- Represented a private television production company in connection with the issuance of \$3.5 million of equity securities