



SPONSOR: Rep. M. Marshall & Sen. DeLuca
Rep. J. Johnson, Kovach

HOUSE OF REPRESENTATIVES
145th GENERAL ASSEMBLY

HOUSE BILL NO. 19

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

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

2 “§ 112. Access to proxy solicitation materials.

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

8 (1) A provision requiring a minimum record or beneficial ownership, or duration of ownership, of
9 shares of the corporation’s capital stock, by the nominating stockholder, and defining beneficial
10 ownership to take into account options or other rights in respect of or related to such stock;

11 (2) A provision requiring the nominating stockholder to submit specified information concerning the
12 stockholder and the stockholder’s nominees, including information concerning ownership by such
13 persons of shares of the corporation’s capital stock, or options or other rights in respect of or related
14 to such stock;

15 (3) A provision conditioning eligibility to require inclusion in the corporation’s proxy solicitation
16 materials upon the number or proportion of directors nominated by stockholders or whether the
17 stockholder previously sought to require such inclusion;

18 (4) A provision precluding nominations by any person if such person, any nominee of such person,
19 or any affiliate or associate of such person or nominee, has acquired or publicly proposed to acquire
20 shares constituting a specified percentage of the voting power of the corporation’s outstanding voting
21 stock within a specified period before the election of directors;

- 22 (5) A provision requiring that the nominating stockholder undertake to indemnify the corporation in
23 respect of any loss arising as a result of any false or misleading information or statement submitted
24 by the nominating stockholder in connection with a nomination; and
25 (6) Any other lawful condition.”

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

27 “§ 113. Proxy Expense Reimbursement.

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

31 (1) Conditioning eligibility for reimbursement upon the number or proportion of persons nominated
32 by the stockholder seeking reimbursement or whether such stockholder previously sought
33 reimbursement for similar expenses;

34 (2) Limitations on the amount of reimbursement based upon the proportion of votes cast in favor of
35 one or more of the persons nominated by the stockholder seeking reimbursement, or upon the amount
36 spent by the corporation in soliciting proxies in connection with the election;

37 (3) Limitations concerning elections of directors by cumulative voting pursuant to § 214 of this title;
38 or

39 (4) Any other lawful condition.

40 (b) No bylaw so adopted shall apply to elections for which any record date precedes its adoption.”

41 Section 3. Amend § 145, Title 8, Delaware Code, by adding at the end of subsection (f) thereof the
42 following new sentence:

43 “A right to indemnification or to advancement of expenses arising under a provision of the
44 certificate of incorporation or a bylaw shall not be eliminated or impaired by an amendment to such
45 provision after the occurrence of the act or omission that is the subject of the civil, criminal,
46 administrative or investigative action, suit or proceeding for which indemnification or advancement of
47 expenses is sought, unless the provision in effect at the time of such act or omission explicitly authorizes
48 such elimination or impairment after such action or omission has occurred.”

49 Section 4. Amend § 211(c), Title 8, Delaware Code, by deleting from the final sentence thereof the
50 phrase “the record date for determination of stockholders entitled to vote” and by substituting the phrase “the
51 record date or dates for determination of stockholders entitled to notice of the meeting and to vote thereat” in lieu
52 thereof.

53 Section 5. Amend § 213, Title 8, Delaware Code, by deleting subsection (a) in its entirety and by
54 substituting in lieu thereof the following:

55 “(a) In order that the corporation may determine the stockholders entitled to notice of any
56 meeting of stockholders or any adjournment thereof, the board of directors may fix a record date, which
57 record date shall not precede the date upon which the resolution fixing the record date is adopted by the
58 board of directors, and which record date shall not be more than 60 nor less than 10 days before the date
59 of such meeting. If the board of directors so fixes a date, such date shall also be the record date for
60 determining the stockholders entitled to vote at such meeting unless the board of directors determines, at
61 the time it fixes such record date, that a later date on or before the date of the meeting shall be the date for
62 making such determination. If no record date is fixed by the board of directors, the record date for
63 determining stockholders entitled to notice of and to vote at a meeting of stockholders shall be at the
64 close of business on the day next preceding the day on which notice is given, or, if notice is waived, at the
65 close of business on the day next preceding the day on which the meeting is held. A determination of
66 stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any
67 adjournment of the meeting; provided, however, that the board of directors may fix a new record date for
68 determination of stockholders entitled to vote at the adjourned meeting, and in such case shall also fix as
69 the record date for stockholders entitled to notice of such adjourned meeting the same or an earlier date as
70 that fixed for determination of stockholders entitled to vote in accordance with the foregoing provisions
71 of this Section 213(a) at the adjourned meeting.”

72 Section 6. Amend § 219, Title 8, Delaware Code, by deleting subsection (a) in its entirety and by
73 substituting in lieu thereof the following:

74 “(a) The officer who has charge of the stock ledger of a corporation shall prepare and make, at
75 least 10 days before every meeting of stockholders, a complete list of the stockholders entitled to vote at
76 the meeting; provided, however, if the record date for determining the stockholders entitled to vote is less
77 than 10 days before the meeting date, the list shall reflect the stockholders entitled to vote as of the tenth
78 day before the meeting date, arranged in alphabetical order, and showing the address of each stockholder
79 and the number of shares registered in the name of each stockholder. Nothing contained in this section
80 shall require the corporation to include electronic mail addresses or other electronic contact information
81 on such list. Such list shall be open to the examination of any stockholder for any purpose germane to the
82 meeting for a period of at least 10 days prior to the meeting: (i) on a reasonably accessible electronic
83 network, provided that the information required to gain access to such list is provided with the notice of
84 the meeting, or (ii) during ordinary business hours, at the principal place of business of the corporation. In

85 the event that the corporation determines to make the list available on an electronic network, the
86 corporation may take reasonable steps to ensure that such information is available only to stockholders of
87 the corporation. If the meeting is to be held at a place, then a list of stockholders entitled to vote at the
88 meeting shall be produced and kept at the time and place of the meeting during the whole time thereof
89 and may be examined by any stockholder who is present. If the meeting is to be held solely by means of
90 remote communication, then such list shall also be open to the examination of any stockholder during the
91 whole time of the meeting on a reasonably accessible electronic network, and the information required to
92 access such list shall be provided with the notice of the meeting.”

93 Section 7. Amend § 222, Title 8, Delaware Code, by deleting subsection (a) in its entirety and by
94 substituting in lieu thereof the following:

95 “(a) Whenever stockholders are required or permitted to take any action at a meeting, a written
96 notice of the meeting shall be given which shall state the place, if any, date and hour of the meeting, the
97 means of remote communications, if any, by which stockholders and proxy holders may be deemed to be
98 present in person and vote at such meeting, the record date for determining the stockholders entitled to
99 vote at the meeting, if such date is different from the record date for determining stockholders entitled to
100 notice of the meeting, and, in the case of a special meeting, the purpose or purposes for which the
101 meeting is called.”

102 Section 8. Amend § 222(b), Title 8, Delaware Code, by adding the phrase “as of the record date for
103 determining the stockholders entitled to notice of the meeting” before the period at the end of the first sentence
104 thereof.

105 Section 9. Amend § 222(c), Title 8, Delaware Code, by deleting the text “or if after the adjournment a
106 new record date is fixed for the adjourned meeting,” from the third sentence thereof and by adding the following
107 sentence to the end of that subsection:

108 “If after the adjournment a new record date for stockholders entitled to vote is fixed for the
109 adjourned meeting, the board of directors shall fix a new record date for notice of such adjourned meeting
110 in accordance with Section 213(a) of this title, and shall give notice of the adjourned meeting to each
111 stockholder of record entitled to vote at such adjourned meeting as of the record date fixed for notice of
112 such adjourned meeting.”

113 Section 10. Amend § 225, Title 8, Delaware Code, by adding the following new subsection (c):

114 “(c) If one or more directors has been convicted of a felony in connection with the duties of
115 such director or directors to the corporation, or if there has been a prior judgment on the merits by a court
116 of competent jurisdiction that one or more directors has committed a breach of the duty of loyalty in

117 connection with the duties of such director or directors to that corporation, then, upon application by the
118 corporation, or derivatively in the right of the corporation by any stockholder or any member of a
119 nonstock corporation, in a subsequent action brought for such purpose, the Court of Chancery may
120 remove from office such director or directors if the Court determines that the director or directors did not
121 act in good faith in performing the acts resulting in the prior conviction or judgment and judicial removal
122 is necessary to avoid irreparable harm to the corporation. In connection with such removal, the Court
123 may make such orders as are necessary to effect such removal. In any such application, service of copies
124 of the application upon the registered agent of the corporation shall be deemed to be service upon the
125 corporation and upon the director or directors whose removal is sought; and the registered agent shall
126 forward immediately a copy of the application to the corporation and to such director or directors, in a
127 postpaid, sealed, registered letter addressed to such corporation and such director or directors at their
128 post-office addresses last known to the registered agent or furnished to the registered agent by the
129 applicant. The Court may make such order respecting further or other notice of such application as it
130 deems proper under the circumstances.”

131 Section 11. Amend § 228(e), Title 8, Delaware Code, by deleting from the first sentence thereof the
132 phrase “the record date for such meeting” and by substituting the phrase “the record date for notice of such
133 meeting” in lieu thereof.

134 Section 12. Amend § 262(b), Title 8, Delaware Code, by deleting the phrase “and to vote at” from
135 paragraph (1) thereof.

136 Section 13. Amend § 262(d), Title 8, Delaware Code, by deleting from the first sentence of paragraph (1)
137 thereof the phrase “the record date for such meeting” and by substituting the phrase “the record date for notice of
138 such meeting” in lieu thereof.

139 Section 14. Amend § 275(a), Title 8, Delaware Code, by deleting the phrase “to be mailed to each
140 stockholder entitled to vote thereon” and by adding the phrase “to be mailed to each stockholder entitled to vote
141 thereon as of the record date for determining the stockholders entitled to notice of the meeting” before the period
142 at the end of that subsection.

143 Section 15. Sections 1 through 14 shall be effective on August 1, 2009.

SYNOPSIS

Section 1. New Section 112 clarifies that the bylaws may require that if the corporation solicits proxies with respect to an election of directors, the corporation may be required to include in its proxy materials one or more nominees submitted by stockholders in addition to individuals nominated by the board of directors. Section 112 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. In particular, and in the interest of avoiding election contests instituted by stockholders having little or no economic interest in the corporation, Section 112 authorizes the bylaws to prescribe a minimum level of stock ownership as a prerequisite to requiring inclusion of nominees in the corporation’s proxy materials. In establishing such a minimum level

of stock ownership, the bylaws may define beneficial ownership to take account of ownership of options or other rights in respect of or relating to stock (including rights that derive their value from the market price of the stock). Section 112 also permits the bylaws to limit a right of access according to whether or not a majority of board seats is to be contested, or whether nominations are related to an acquisition of a significant percentage of the corporation's stock. The bylaws may also prescribe any other lawful condition to the exercise of a right of access to the corporation's proxy materials.

Section 2. New Section 113 provides that a bylaw may require the corporation to reimburse proxy solicitation expenses incurred by a stockholder. Section 113 also identifies a non-exclusive list of conditions that the bylaws may impose on such a right to reimbursement.

Section 3. The amendment to Section 145(f) adopts a default rule different than the approach articulated in *Schoon v. Troy Corp.*, 948 A.2d 1157, 1165-1166 (Del. Ch. 2008). Under amended Section 145(f), a right to indemnification or advancement of expenses under a provision of a certificate of incorporation or bylaw cannot be eliminated or impaired by an amendment of the provision after the occurrence of the act or omission to which indemnification or advancement of expenses relates, unless the provision contains, at the time of the act or omission, an explicit authorization of such elimination or limitation.

Section 4. This section amends Section 211(c) to reflect the changes in Section 213(a) providing for separate record dates for determining stockholders entitled to notice of and to vote at a meeting.

Section 5. This amendment to Section 213(a) permits a board of directors to separate the record date for determining the stockholders entitled to vote at a meeting from the record date for determining those stockholders entitled to notice of the meeting. Under amended Section 213(a), the board of directors may choose a date later than the notice record date, on or before the meeting date, for determining those stockholders entitled to vote. This amendment is not intended to affect application of the doctrine expressed in *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971).

Section 6. This section amends Section 219(a) to clarify that, where the record date for determining stockholders entitled to vote is set less than ten days before the date of the meeting as provided for under Section 213(a), the corporation's obligation to provide a list of stockholders prior to the meeting is limited to preparing a list of those holders as of the tenth day before the meeting date. The amendment does not affect the list that must be provided at the meeting.

Sections 7 through 9. These amendments to Section 222 reflect the changes in Section 213(a) permitting separate record dates for determining stockholders entitled to notice of and to vote at a meeting. The amended subsection (a) provides that where the board of directors fixes separate record dates, written notice under that subsection shall include the record date for determining stockholders entitled to vote. In addition, subsection (b) is amended to make clear that the timing requirements for providing written notice remain unchanged in that instance and that the corporation need only provide written notice to those stockholders entitled to vote as of the notice record date. Finally, the new sentence added to subsection (c) provides that where the board of directors sets a new record date for determining stockholders entitled to vote at an adjourned meeting, the board will be required to set a new notice record date in accordance with Section 213(a) and provide written notice to stockholders entitled to vote as of that date.

Section 10. This section, which adds a new subsection (c) to Section 225, changes existing law by granting to the Court of Chancery the power to remove directors under specified limited circumstances. An application for judicial removal of a director must be brought directly by or derivatively in the right of the corporation. Such an application must be preceded by either a felony conviction or a judgment of the sort specified in the new subsection. Removal of a director is permitted only when the Court determines that the director did not act in good faith and that judicial removal is necessary to avoid irreparable harm to the corporation.

Section 11. This section is a technical amendment to Section 228(e) to make it consistent with the revisions to Section 213(a).

Sections 12 and 13. These sections are technical amendments to Section 262 to make it consistent with the revisions to Section 213(a).

Section 14. This section amends Section 275(a) to make it consistent with the revisions to Sections 213(a) and 222 by requiring notice only be mailed to those stockholders entitled to vote as of the notice record date.

Section 15. Section 15 provides for an effective date of August 1, 2009.