

The 2008 Amendments to the Delaware General Corporation Law

The 2008 amendments to the Delaware General Corporation Law will take effect on August 1, 2008. This year's bill contained noticeably fewer amendments than other recent years and largely represents technical refinements to the two affected statutes. The most significant change amends Section 225(b) to authorize the corporation itself to contest the results of a stockholder vote relating to matters other than the election of directors. Section 219 was also amended to allocate the burden of proof and available remedies in an action to address the lack of availability of a list of stockholders prior to and at a meeting of stockholders.

July 2008

Michael B. Tumas and John F. Grossbauer are partners and Ryan J. Frampton is an associate of the Wilmington, Delaware law firm of Potter Anderson & Corroon LLP. The views expressed are solely those of the authors and do not necessarily represent the views of the firm or its clients.

Contested Stockholder Votes (§ 225)

Section 225(a) authorizes the Court of Chancery to determine the entitlement of directors and officers to assume or maintain their positions, and Section 225(b) permits the Court to hear challenges to the results of any vote taken on any matter other than the election of directors. However, because Section 225(b) conferred standing to commence an action under that Section only on stockholders, corporations that of their own accord discovered possible defects in the approval of matters such as amendments to a certificate of incorporation could not initiate a claim to confirm the validity of such matters. The 2008 amendments to Section 225(b) expressly permit a corporation to apply on its own behalf to the Court of Chancery for a hearing determining the validity of the results of any stockholder vote other than those relating to the election of directors.

Examination of the List of Stockholders (§ 219)

Section 219 is a venerable provision of the General Corporation Law that requires a corporation to produce a list of the record holders of stock entitled to vote at a stockholders meeting at least 10 days before the meeting and to make that list available for inspection by record stockholders either electronically or at the corporation's principal place of business. The list also must be available at the meeting to which it relates. Prior to its 2008 amendment, Section 219(b) provided that upon the "willful refusal or neglect" of the directors to produce or make available for review by stockholders the required list of stockholders, the directors who failed to produce the list "shall be ineligible for election to any office at such meeting."

1313 North Market Street

P.O. Box 951

Wilmington, DE 19899-0951

(302) 984-6000

www.potteranderson.com

In light of the harshness of this penalty, which on its face permitted no exceptions, the legislature redrafted Section 219(b) to grant the Court of Chancery broad discretion to fashion an appropriate equitable remedy upon finding that a corporation, or an officer or agent of the corporation, prevented a stockholder from examining the list. This amendment is a complete revision of Section 219(b) and allows a stockholder to seek an order to compel examination of the list in any circumstance where he or she is prevented from examining the list, and eliminates the concept of “willful neglect.”¹ The amendment also specifically allocates the burden of proof to the corporation in any claim under Section 219 such that it must show that the stockholder who was prevented from examining the list sought to do so for a reason that is not germane to the meeting. The broad authority granted to the Court of Chancery in revised Section 219(b) permits the Court to craft appropriate relief, including summarily ordering the examination of the list upon such terms and conditions as may be prescribed by the Court and any other appropriate relief, including postponing the meeting or voiding its results.

Section 219(a) has also been amended, replacing the word “inspected” with the word “examined.” This amendment clarifies the statute to eliminate any argument that “inspected” was intended to have a distinct meaning from the word “examined” as used elsewhere in Section 219(a).

Franchise Tax Charges

In a separate action, the legislature increased the annual report fee for foreign corporations from \$60 to \$100 and increased the rates at which franchise taxes are assessed on domestic corporations. The minimum franchise tax is now \$75 for authorized share capital of 5,000 shares or less and \$150 for authorized capital between 5,001 and 10,000 shares. The rate is now \$75 (increased from \$62.50) for each 10,000 shares block above the first 10,000 shares. Neither the maximum franchise tax amount of \$165,000 nor the annual report fee of \$25 for domestic corporations were changed.

¹ Query what it meant to “willfully neglect” to produce the list.