

2010 Amendments to the Virginia Stock Corporation Act

Earlier this year, the Virginia General Assembly passed a number of amendments to the Virginia Stock Corporation Act (the “Act”) that will become effective on July 1, 2010. The amendments are enclosed. Many of the changes conform to recent amendments to the Model Business Corporation Act (the “Model Act”). Some changes are technical in nature; others are quite significant. A summary of the principal amendments follows:

1. Proxy Access and Expense Reimbursement. Section 13.1-624 was amended to confirm that Virginia corporations have the authority to adopt bylaws that allow a shareholder to include a director-nominee in the corporation’s proxy materials or require the corporation to reimburse a shareholder for expenses incurred in a proxy contest. In either case, shareholders cannot limit the authority of the board of directors to provide for a reasonable, practicable, and orderly process with respect to a proxy contest. The source of these amendments is a 2010 amendment of the Model Act, though similar amendments were also made to the Delaware General Corporation Law in 2009. These state law changes regarding proxy access have been made in an effort to counter a campaign by activist shareholders to get Congress and the SEC to take control of governance of publicly-owned corporations. The permissive approach on proxy access likely will be trumped by a more draconian approach that the SEC is expected to adopt in the next several months.
2. Separate Record Dates. Sections 13.1-660 and 13.1-661 and certain other provisions of the Act were amended to permit a board of directors to establish dual record dates for shareholders meetings, with one date serving as the date for notice of the meeting and a later date serving as the date for determining shareholders entitled to vote at the meeting. These amendments give corporations the opportunity to set a record date so that the shareholders entitled to vote at a meeting more closely resemble the shareholders on the meeting date. At least one public company merger has taken advantage of similar changes made to the Delaware General Corporation Law last year.
3. Participating Remotely in Shareholders Meetings. New Section 13.1-660.2 was added to permit the board of directors to allow shareholders to participate in shareholders meetings remotely.
4. Disputes Relating to Shareholders Meetings. New Section 13.1-669.1 replaces Section 13.1-681 and addresses in a more comprehensive manner the authority of a court to resolve disputes relating to a vote by shareholders. Among other things, the amendment clarifies that courts have the authority to review contested director elections and other matters voted upon by shareholders. In a related change, Section 13.1-664.1 was amended to provide that there is a rebuttable presumption that the report of the inspectors of election is correct.
5. Size of the Board of Directors. Section 13.1-675B was amended to eliminate the current 30% limitation on the power of the board of directors to increase or decrease the size of the board in between meetings of shareholders. This amendment was made to the Model

Act many years ago and the 30% limitation has sometimes been considered impractical. It bears noting, however, that the Act still provides that the term of any director added by the board only extends to the next meeting of shareholders at which directors are elected.

6. Equity Compensation Awards. Sections 13.1-646 and 13.1-689 were amended to clarify that a board of directors or any board committee may authorize one or more officers to grant equity compensation awards to other employees, subject to such limitations as may be imposed by the board or the committee.
7. Indemnification and Advancement. Two amendments were made to Section 13.1-704 that were intended as clarifications of existing law. The first confirms the authority of the board of directors to commit to provide indemnity that is authorized, but not mandated, by Section 13.1-697 of the Act. The second confirms that a provision requiring the corporation to provide indemnity to the maximum extent permitted by law includes advancement of, and reimbursement of, expenses, unless the applicable document expressly provides otherwise.
8. Class Voting and Appraisal Rights. Prior to the 2010 amendments, Section 13.1-718E generally provided that an affected class of shares in a merger or share exchange was entitled to a class vote. This Section was amended to provide that any such affected class will be entitled to a class vote unless otherwise provided in the articles of incorporation. A related amendment was made to Section 13.1-730 to provide that a shareholder whose shares are affected in a merger or share exchange is entitled to appraisal rights even if the shareholder did not have the right to vote, subject to the other requirements necessary to seek appraisal. Delinking voting rights and appraisal rights provides greater flexibility while guarding against abuse.

In addition to the foregoing, the 2010 amendments made various changes throughout the Act (especially in Section 13.1-610) relating to communications primarily to address the use of electronic communications and to reduce the risk that certain provisions of the Act might be preempted by federal statutes addressing electronic communications. Note that, in order to avoid a more substantial rewrite of many sections in the Act, several definitions in Section 13.1-603 were revised to accommodate electronic communications. Note in particular the new definitions of “document,” “sign” and “writing.”