

2009 Updates to Delaware General Corporation Law - Part 2: Elimination of "Empty Voting"

April 29, 2009

By an amendment effective August 1, 2009 to section 213(a) of its General Corporation Law, Delaware has provided a way for corporate boards to avoid a problem sometimes referred to as "empty voting." The purpose of the change is to better align shareholders' voting rights with their actual economic interests.

Under the old statute, the record date for (a) notice of a shareholder meeting and (b) entitlement to vote at that shareholder meeting are one and the same, and must be no more than 60 days and no fewer than 10 days prior to the shareholder meeting. However, in some circumstances, such as following the announcement of a public company merger requiring shareholder approval, a long period between the record date and the meeting date may result in a significant proportion of shareholders of record selling their stock to capture the gain of the merger. Those sellers thus have no economic interest in the corporation at the time of the vote. This can make majority and supermajority voting requirements difficult for the merging corporation to achieve.

As amended, section 213(a) allows the board to fix a separate and subsequent "voting record date" for determining voting eligibility. There is no statutory limit on how late the voting record date can be, so that, at least theoretically, the board could set the record date for voting as late as the day of the meeting. (As a practical matter, companies will not be able to have such a late record date because of the need to ensure that proxies are distributed and votes can be tabulated in a timely fashion.) Setting the record date for voting much closer to the meeting increases the likelihood that the shareholder of record actually owns the stock and therefore has an economic interest in the corporation.

The default rule is the old rule: if the board does not establish separate record dates for notice and voting, then the single record date establishes both the right to notice and the right to vote.

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