

Corporate & Financial Weekly Digest

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Chancery Court Approves Hostile Bidder's Bylaw Amendment Advancing Date of Target's Annual Meeting

In the midst of a takeover battle by defendant Air Products and Chemicals, Inc. for control of Airgas, Inc., the Court of Chancery of Delaware upheld a bylaw amendment sponsored by Air Products that moved up the date of Airgas's upcoming 2011 annual shareholder meeting by approximately nine months, thereby potentially shortening the term to be served by members of Airgas's staggered board.

Air Products launched a proxy contest to acquire control of Airgas's board of directors after Airgas rejected multiple merger proposals. Prior to the start of the proxy contest, Airgas had in place multiple takeover defenses, including a nine-member staggered board of three equal classes, with one class up for reelection each year at the annual shareholder meeting.

At Airgas's September 15 annual shareholder meeting, Air Products' three nominees were elected to the Airgas board of directors, and the Airgas shareholders approved an Air Products sponsored bylaw amendment that moved the date of Airgas's 2011 annual meeting up from August/September (when it traditionally had been held) to January. The effect of the bylaw amendment is that the Airgas directors up for election in 2011 will not necessarily serve full three-year terms.

Airgas argued that the Air Products' bylaw amendment was invalid because: (1) the amendment constituted a change to Airgas's bylaw provisions requiring a staggered board and therefore required a 67% vote to pass; (2) the amendment was inconsistent with the provisions of Airgas's certificate of incorporation providing for a staggered board; and (3) the amendment was contrary to the Delaware General Corporation Law's provisions authorizing corporations to adopt staggered boards.

In a case of first impression, the Delaware's Chancery Court rejected each of these arguments on the ground that, in the court's view, Airgas's bylaws and certificate of incorporation provided only that directors were to stand for reelection at annual meetings held at some point during the third year after their initial election; the bylaws and certificates did not clearly provide that Airgas directors were to serve full three-year terms. To resolve the ambiguity, the court relied on the "rule of construction in favor of franchise rights" and upheld the Air Products sponsored bylaw.

The Chancery Court suggested that this decision will not diminish the effectiveness of staggered boards because drafters remain free to write bylaws and certificates of incorporation that unambiguously set forth the duration of the term to be served by directors on staggered boards. According to the Chancery Court, “This is not the end of the world for staggered boards; it is an easy fix if it needs fixing.” (*Airgas, Inc. v. Air Products and Chemicals, Inc.*, C.A. No. 5817-CC (Del. Ch. Oct. 8, 2010))

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