

## **RULING SUGGESTS DELAWARE CORPORATIONS WITH STAGGERED BOARDS REVIEW ANNUAL MEETING TERMS**

**October 18, 2010**

Earlier this month, the Delaware Court of Chancery decided that a bylaw amendment proposed by Air Products and Chemicals, Inc. (“Air Products”) that would result in the annual stockholder meetings of Airgas, Inc. (“Airgas”) being held seven months in advance of their historical dates was valid under Airgas’s governing documents and Delaware law. The Court’s decision<sup>1</sup>, which is currently being appealed to the Delaware Supreme Court, highlights the importance of precise and unambiguous language in bylaw and charter provisions regarding staggered boards. Delaware corporations should consider whether amendments to their bylaws or charter are necessary to avoid unintended consequences.

At Airgas’s 2010 annual meeting last month, Air Products, as part of its heated takeover battle for control of Airgas, proposed a bylaw amendment to move Airgas’s annual stockholder meetings, which were historically held in August, up to January, which would result in the 2011 annual stockholder meeting being held barely four months after the 2010 annual meeting. At the 2010 annual meeting, Air Products obtained all three board seats up for election on Airgas’ nine-member board, and holding the 2011 annual meeting earlier could potentially enable Air Products to obtain control of the Airgas board more quickly.

Airgas first contended that the bylaw amendment was not validly adopted. Airgas argued that the bylaw amendment, which received the approval of 51% of the votes cast, did not meet the supermajority vote required for amendments inconsistent with Airgas’s bylaw provisions addressing director elections. However, the Court concluded that the bylaw amendment only amended the section of Airgas’s bylaws addressing the annual stockholder meeting, and, given the ambiguities discussed below, required only a majority vote for stockholder approval and thus was validly adopted.

The Court then addressed the more significant issue of whether the bylaw itself was valid. The crux of the suit focused on the meaning of the Airgas bylaw provision that required each new class of directors to be elected “for a term expiring *at the annual meeting of stockholders held in the third year following the year of their election.*” (Emphasis added.) Airgas contended that under Delaware law and Airgas’s governing documents, the full term of the class of directors elected at the August 2008 annual meeting would end at Airgas’s annual meeting to be held a full three years after the August 2008 meeting -- August 2011. Air Products, on the other hand, maintained that if the annual meeting was held in January 2011, such date would be in the “*third year following the year of their election* (emphasis added),” and the directors elected in 2008 would thus have served their full term. In upholding the bylaw amendment, the Court noted that Airgas’s governing documents did not define “years” as being calendar years or fiscal years, nor did they define “annual meeting” as requiring a minimum duration between meetings, and Airgas could have included such definitions if its intent was to create such requirements. Furthermore, the Court noted that while Delaware law prescribes the maximum amount of time that may elapse between annual stockholder meetings (13 months), it does not prescribe a minimum amount of time that must elapse between such meetings. Thus, the Court interpreted the

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<sup>1</sup> *Airgas, Inc. v. Air Products and Chemicals, Inc.* (Del. Ch. Oct. 8, 2010), available at <http://www.wcsr.com/resources/pdfs/AirgasvAirProducts.pdf>.

ambiguous terms in favor of the shareholder franchise and said that “annual” means “once every year,” not every 12 months.

Given the Court’s interpretation of Airgas’s existing bylaws, Delaware corporations with staggered boards should consider whether the director election and annual meeting provisions of their bylaws and/or charter should be revised to avoid ambiguities. Specifically, these corporations should assess whether the language of their bylaws and charter is clear and precise with respect to the length of directors’ terms, the minimum duration between annual meetings and the scope of supermajority vote provisions for bylaw amendments.

### **Contact Information**

If you have any questions regarding the recent Delaware Court of Chancery case, please contact Sudhir N. Shenoy (<http://www.wcsr.com/SudhirShenoy>), the principal drafter of this client alert, or you may contact the Womble Carlyle attorney with whom you usually work or one of our Corporate and Securities attorneys at the following link: <http://www.wcsr.com/profSearch?team=corporateandsecurities>.

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