

TO: Our Clients and Friends

FROM: McGuireWoods LLP

DATE: June 30, 2010

RE: Virginia Corporate Law Changes

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Amendments to the Virginia Stock Corporation Act (the "Act") passed by the 2010 General Assembly will take effect July 1, 2010. The changes conform provisions of the Act to recently revised provisions of the Model Business Corporation Act relating to technological innovations and shareholder relations and clarify other provisions. In summary, the amendments are as follows:

- Expanded provisions governing the electronic transmission of notices and other communications

The amendments specifically allow the articles of incorporation or bylaws to authorize or require delivery of notices of directors' meetings by electronic transmission, even without the recipient's consent, which was previously required. (§13.1-610(K), (D)) Consent is still required for electronic delivery of notices of shareholders' meetings, except that for public companies, Virginia defers to the protocols prescribed by the Securities and Exchange Commission for the transmittal of notices. The amendments provide that an electronic transmission is deemed to have been received even if no individual is aware of its receipt, so long as it has entered an information processing system that a recipient uses and from which the recipient is able to retrieve the electronic transmission and it is in a form capable of being processed by the system, a change which captures all the previously enumerated accepted modes of electronic transmission. (§13.1-610 (H), (F)) Notably, the definition of signature has also been expanded to expressly include an electronic signature. (§13.1-603)

- Notice in physical form is effective upon receipt

Previously, the Act did not specify an effective date for notice delivered in physical form. The amendments specify that notice in physical form is effective when it is actually received or left at the shareholder's address of record or director's residence or usual place of business, whichever is earlier. (§13.1-610(I))

- Bylaws may cover expanded topics

Under the revised Act, the bylaws of a Virginia corporation may contain any provision that is not inconsistent with the law or the articles of incorporation. (§13.1-624(B)) This change lifts the previous restriction that bylaws pertain to the management of the business or the regulation of corporate affairs.

- Bylaws may require corporations to include shareholders' director nominees in proxies and reimburse shareholders for proxy solicitation expenses in connection with the election of directors

The amendments, aimed at enabling shareholder proxy access, provide that bylaws may require that shareholders' director nominees be included in the corporation's proxy solicitations for director elections and that corporations reimburse shareholders for proxy solicitation expenses incurred in connection with the election of directors. (§13.1-624(C)) Notably, the amendment does not allow any such bylaw to limit the board of directors' ability to amend, repeal, or add any condition or procedure to the bylaws in order to provide for a reasonable, practicable, and orderly process. (§13.1-624(D))

- Boards of directors may authorize corporate officers to make stock-based equity compensation awards

The amendments provide that the board of directors can authorize officers to designate the recipients of rights, options, warrants, or other equity compensation awards involving share issuances subject to limitations established by the board and, if applicable, shareholders. An officer may not designate himself or any other person specified by the board as a recipient. (§13.1-646(C)). Currently, boards may rely on Section 13.1-689(D)(7) to authorize committees and senior executive officers to authorize or approve the sale of shares or enter into contracts for the sale of shares, subject to limitations, if any, imposed by the board. The amendment expands the group of officers to whom authority may be delegated where shares are being sold through an equity compensation program. However, it is more restrictive in that it requires limitations on the authority which Section 13.1-689 does not.

- Boards of directors may establish separate record dates for determining shareholders entitled to notice of meetings and shareholders entitled to vote at meetings

The amendments provide that the record date for a shareholders' meeting fixed by the bylaws or the board of directors shall be the record date for determining shareholders entitled to both notice of and to vote at the shareholders' meeting unless the board, at the time it fixes the record date for determining shareholders entitled to notice of the meeting, fixes a later record date on or before the date of the meeting to determine the shareholders entitled to vote at the meeting. This amendment enables the board to alleviate the so-called "empty voting" problem that occurs when shareholders of record no longer own stock as of the meeting date but are still entitled to vote, by allowing a later date to be fixed for determining shareholders entitled to vote. Notice of the shareholders' meeting shall include the record date for determining the

shareholders entitled to vote at the meeting, if such date is different than the record date for determining shareholders entitled to notice of the meeting. Unless otherwise required by the Code or the articles of incorporation, the corporation is required to give notice only to shareholders entitled to vote at the meeting as of the record date for determining the shareholders entitled to notice of the meeting. (§13.1-658 (A))

- Boards of directors may allow shareholders to participate remotely in shareholders' meetings

The amendments provide that the board of directors can authorize shareholders to participate in shareholder meetings by remote communication. In order for shareholders who are participating remotely to be deemed present and be able to vote, the corporation must have implemented reasonable measures to verify that each remote participant is a shareholder and provide the shareholders an opportunity to participate and vote, including an opportunity to communicate and to concurrently read or hear the proceedings. (§13.1-660.2) Previously, the articles of incorporation or bylaws had to authorize shareholder participation by remote communication and shareholders were required to be able to simultaneously hear each other during the meeting.

- Gives the Circuit Court authority to resolve disputed shareholder votes

With respect to disputed director elections, the amendments allow any shareholder, director, or director nominee to apply to the Circuit Court for relief. The court may determine the persons elected, order a new election, or grant other equitable relief. With respect to disputed outcomes of all other shareholder votes, any shareholder or the corporation may apply to the circuit court for relief. The court may determine the validity of the shareholder vote, order a new vote, or grant other equitable relief. (§13.1-669.1)

- Repeals the existing provision that limits the power of boards of directors to alter the board's size by an amount not greater than 30% of its existing size

The amendment lifts the restriction on the board of directors increasing or decreasing the number of directors by more than 30%. (§13.1-675)

- Confirms that indemnification "to the fullest extent permitted by law" includes mandatory advancement and reimbursement of expenses based on the "willful misconduct or knowing violation of criminal law" standard of conduct

This amendment was adopted to confirm the manner in which the "fullest extent" language will be interpreted under Virginia law. (§13.1-704(B))

- Authorizes a corporation to obligate itself to provide indemnification and advance funds to pay for or reimburse expenses, in advance of the act or omission giving rise to a proceeding

This amendment was adopted to correct a technical issue. (§13.1-704(A))

- Requires class voting by affected classes with respect to mergers, unless otherwise provided in the articles of incorporation

The amendment requires each class or series of shares that will be converted or eliminated as a result of the merger to vote as a group unless the articles of incorporation otherwise provide. Prior to the amendments, group voting was required only for each class or series that was to be converted under the plan of merger, with no carve-out for exceptions in the articles of incorporation. (§13.1-718(E))

- Requires that the articles of merger in a parent-subsiary merger recite the Code section under which the merger is being effected

The amendment provides that in a parent-subsiary merger, the articles of merger shall recite that the merger is being effected pursuant to 13.1-719. (§13.1-720)

- Definition of “affiliated transaction” for purposes of the Virginia affiliated transactions statute amended

The amendment was adopted to correct a technical issue. (§13.1-725)

- Privacy protection provision adopted

Another notable amendment to the Virginia Code to take effect July 1, 2010, pertains to §12.1-19, relating to Uniform Commercial Code and business entity filings. This amendment provides that the person submitting a filing to the State Corporation Commission is responsible for ensuring that it does not contain any personal identifiable information. The provision does not apply if the information is publicly available or is required or authorized by law to be included in the filing. It also authorizes the Commission to remove or delete this information from documents and refuse to accept documents that contain this information.