

DELAWARE COURT OF CHANCERY UPHOLDS AIRGAS BYLAW SHORTENING PERIOD BETWEEN ANNUAL MEETINGS

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To Our Clients and Friends:

The Delaware Court of Chancery, in a case of first impression, has upheld a bylaw that would require a company to hold an annual meeting just four months after the prior annual meeting, markedly compressing the period required to take control of a company with a staggered board.

The case¹ arose as part of Air Products and Chemicals, Inc.'s takeover battle to acquire Airgas, Inc. In September, at Airgas's 2010 annual meeting, Air Products succeeded in electing three insurgent directors. It also received support of a majority of the shares voted for a bylaw that would require Airgas to hold its next annual meeting in January 2011, rather than in August (as was Airgas's recent custom).

Chancellor Chandler characterized the dispute as largely "a semantics war over the meaning of one word": whether "annual" means "separated by approximately twelve months," or, rather, "occurring once a year."

As a threshold matter, he concluded that the bylaw had received the requisite vote for adoption, finding that the supermajority vote required to amend the section of Airgas's bylaws providing for the staggered board was not implicated. According to the Chancellor, the bylaw amendment did not contradict the plain meaning of the staggered board provisions, which provided for directors to have terms expiring at the annual meeting in the third year after their election. For the same reason, he found that the bylaw was not in conflict with Airgas's charter provisions staggering the board.

Chancellor Chandler concluded that the provisions were ambiguous – neither "annual" nor "year" was defined, and both parties' interpretations were plausible. However, he resolved the ambiguity in favor of upholding the exercise of the shareholder franchise, holding that "annual" meant "occurring once a year," and that a "year" meant simply a calendar year, not a fiscal year running between stockholder meetings.

¹ *Airgas, Inc. v. Air Products and Chemicals, Inc.*, C.A. No. 5817-CC (Oct. 8, 2010).

Chancellor Chandler also rejected Airgas's argument that the bylaw amendment conflicted with Delaware's statute, and Airgas's charter, by potentially effecting a removal of directors before the end of their full term without cause, and without the supermajority vote contemplated by the Airgas charter. The Chancellor found no removal problem, since directors' terms are coextensive with annual meetings. He was likewise unpersuaded that Delaware's Section 211, which allows stockholders to compel an annual meeting if more than 13 months has elapsed since the last one, suggests that annual meetings must be held approximately one year apart. The Chancellor noted that while the statute prohibits holding the annual meeting later than 13 months after the last annual meeting, it does not prohibit holding the meeting earlier than a year before the last one.

This decision, if upheld by the Supreme Court, would seriously undermine the effectiveness of Airgas's staggered board in resisting a takeover attempt. However, Chancellor Chandler noted that "corporations are free to draft their governing documents to specify when their annual meetings shall take place" and "can also explicitly define the terms of their staggered boards in their charters or bylaws, should they choose to have a staggered board." Companies should review their charters and bylaws carefully to assess how the current provisions would be interpreted and the possibility of a shareholder-proposed bylaw amendment that would have the effect of truncating the period between annual meetings.

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