



Client Alert

This alert discusses a recent Delaware decision that highlights a potential weakness in the typical staggered board takeover defense adopted by many companies.

See [December 2010 update](#).

Delaware Chancery Court Ruling Exposes Possible Weakness in Staggered Board Takeover Defense

A recent ruling in the contested hostile takeover bid by Air Products & Chemicals, Inc. for Airgas, Inc. has important implications for companies that have implemented a staggered board of directors.

On October 8, 2010, the Delaware Chancery Court upheld the adoption of an amendment to the Airgas bylaws to accelerate the Airgas 2011 annual stockholders meeting to January 2011, only four months after the 2010 annual meeting in September 2010. The amendment had been proposed by Air Products and approved by the stockholders of Airgas at the Airgas 2010 annual meeting, along with a slate of directors proposed by Air Products for election to the class of Airgas directors elected at the 2010 annual meeting.

Staggered board provisions are a common form of takeover defense at many companies. By dividing the board of directors into three classes, with each class to be elected every three years, staggered board provisions are designed to make it necessary for insurgents to elect their own slate of directors at at least two annual stockholders meetings in order to install a majority of the board members. In our experience, the bylaws of most companies do not



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specify a particular date or month for holding annual meetings, and annual meetings usually are established approximately one year apart by action of the board of directors.

The staggered board provisions in Airgas' charter and bylaws were typical of these types of provisions. They provided that directors were to be elected "for a term expiring at the annual meeting of stockholders held in the third year following the year of their election." Airgas argued that, in order for Airgas directors to serve their full term in accordance with the staggered board provisions, the annual stockholders meetings must be separated by twelve months. Air Products, on the other hand, maintained that the Airgas staggered board provisions should be interpreted to require only that an annual meeting occur once per year and not at twelve-month intervals.

In ruling for Air Products, the Chancery Court determined that the term "annual" as used in the Airgas staggered board provisions was open to interpretation, but in the absence of explicit language to the contrary, means once per year as opposed to once every twelve months. As a result, the full term of the members of a class of directors on the Airgas staggered board did not extend for a full three years from the time of their election, but only until the third annual stockholders meeting following their election. The Chancery Court noted that Airgas could have specified in its charter or bylaws a minimum interval between annual meetings, or simply provided that the directors serve three-year terms, but it not do so.

In the Chancery Court's view, the annual meeting provisions of Section 211 of the Delaware General Corporation Law permit a corporation to specifically define when its annual meetings will take place. If a corporation does not do so, however, the "default rules" in Delaware require only that the meetings occur once every calendar year.

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If you would like to know more about staggered board provisions, generally, or this recent decision, please contact [Dale Short](#), chairman of the firm's Corporate Department, or the TroyGould attorney with whom you regularly work.

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