

July 22, 2020

Amendments to Delaware's General Corporation Law

Affecting Emergency Bylaws, Indemnification and Other Matters

SUMMARY

On July 16, 2020, Delaware's Governor signed House Bill 341 (the "Amendments"),¹ amending key provisions of Delaware's General Corporation Law ("DGCL"). Among other things, the Amendments modify existing statutory provisions governing boards of directors' power to adopt emergency bylaws, address other emergency board powers and effect changes to provisions enabling the indemnification of corporate officers. Except as noted below with respect to emergency powers, holding company mergers, the change to the definition of "officer" in DGCL § 145(c) and appraisal rights, the Amendments became effective on July 16, 2020.

OVERVIEW OF SIGNIFICANT CHANGES

Emergency Bylaws

- **Adoption.** DGCL §110, which had been enacted in the wake of the 1962 Cuban Missile Crisis, empowered a board of directors to adopt bylaws during "any emergency resulting from an attack on, invasion or occupation by foreign military forces of, or disaster, catastrophe, war or other armed conflict, revolution or insurrection, or rioting or civil commotion in, the United States or a locality ... or the immediate threat of any of the foregoing; or any malfunction or outage of the electrical or telephone service to the Secretary of State's office, or weather or other condition in or about a locality in which the Secretary of State conducts its business...." The Amendments expand the circumstances where a board of directors can implement emergency bylaws to include "an epidemic or pandemic, and a declaration of a national emergency by the United States government." The revised statute no longer requires that the catastrophe prevent a quorum of the board from convening a meeting. Emergency bylaws may now be adopted by the normal voting procedures of the board or, if a quorum cannot be readily convened for a meeting, by a majority of the directors present.
- **Virtual Meetings.** Under the emergency conditions described in DGCL §110(a), the Amendments provide a board of directors with discretion to postpone or change the place of a stockholder

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meeting (including to hold the meeting solely by means of remote communication). Public companies may notify stockholders of such a change solely by a document that is publicly filed with the Securities and Exchange Commission.

- **Dividend Payments.** Under the new DGCL §110(i)(2)(ii), a board of directors may also delay the record date and payment date of a dividend payment for which the record date has not yet occurred without incurring liability to stockholders during an emergency, including an epidemic, pandemic or a declaration of a national emergency by the United States government.
- **Effective Date.** In recognition of the impact COVID-19 has had on corporations over the last several months, the amendments to DGCL §110 took effect retroactively as of January 1, 2020.

Stockholder Meetings and Notice

- **Electronic Delivery of Stockholder Consent in Lieu of a Meeting.** DGCL §228(d) has been amended to allow for stockholders to provide consent in lieu of a meeting by electronic means pursuant to amended DGCL §116 (as discussed below), unless an express provision of the corporation's certificate of incorporation or bylaws adopted in accordance with DGCL §116(b) restricts or prohibits a consent from being documented, signed or delivered electronically.
- **Notice.** DGCL §232, which governs the delivery of notice to stockholders, has been amended to clarify that a corporation may give notice to stockholders by electronic mail without obtaining the consent of the stockholder to whom the notice is given.

Liability/Indemnification

- **Limitation of Liability.** DGCL §102(b)(7) permits a corporation to limit the liability of directors for monetary damages for breaches of the duty of loyalty, for acts or omissions committed in good faith or for transactions where the director derived an improper personal benefit. DGCL §102(b)(7) now codifies a provision commonly included in certificates of incorporation that any future amendment, repeal or elimination of an indemnification provision will not revoke the elimination or limitation of liability with respect to actions or omissions occurring while such provision is in effect.
- **Indemnification.**
 - DGCL §145(c) requires a corporation to indemnify current and former directors and officers if they are successful (on the merits or otherwise) in defending claims brought against them by reason of the fact that they are or were directors and/or officers. Prior to the Amendments, the term "officer" as used in DGCL §145(c) was not defined. The Amendments provide that, after December 31, 2020, an "officer" for this purpose is limited to the following persons (although a corporation may choose to indemnify any other person under the same circumstances):
 - the corporation's president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer;
 - an individual identified in public filings as one of the most highly compensated officers of the corporation; and
 - an individual who, by written agreement with the corporation, has consented to be identified as an officer.
 - Similar to the changes to the limitation of liability provisions of DGCL §102(b)(7) described above, DGCL §145(f) now clarifies that the right to indemnification for current and former directors and officers arising under a provision of the corporation's organizational documents cannot be eliminated or restricted by an amendment to the corporation's organizational documents after the occurrence of the applicable act or omission.

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Miscellaneous

- **Electronic Signatures.** Amended DGCL §116 expands the types of documents that may be executed through electronic signatures to include a consent in lieu of a meeting given by a director, stockholder or incorporator.
- **Holding Company Mergers.** DGCL §251(g)(7) has been amended to facilitate holding company mergers by eliminating the requirement that the organizational documents of the surviving entity immediately following the effective time of the holding company merger must contain provisions identical to the certificate of incorporation of the parent corporation immediately prior to the effective time of the merger. The organizational documents of the surviving entity must still contain provisions requiring stockholder approval for any act or transaction by the surviving entity that, if taken by the parent corporation immediately prior to the merger, would have required stockholder approval. Amendments to DGCL §251(g)(7) are effective only with respect to a transaction consummated pursuant to an agreement entered into on or after July 16, 2020.
- **Public Benefit Corporations.** The Amendments include significant changes to DGCL §§363, 365 and 367, which govern public benefit corporations. The Amendments amend the required vote to effect a conversion of a conventional corporation into a public benefit corporation (or vice versa) from a vote of two-thirds to a majority of the outstanding shares. In addition, amended DGCL §363 eliminates the express appraisal rights in connection with a conversion of a conventional corporation into a public benefit corporation. The Amendments also contain several clarifying changes with respect to the duty of directors of a public benefit corporation to balance the public interest with the pecuniary interests of stockholders, including clarifying that a director's ownership interest in the stock of the corporation alone does not create a conflict of interest with respect to a balancing decision, except to the extent that such ownership would create a conflict of interest if the corporation were not a public benefit corporation.

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ENDNOTES

- ¹ The full text of House Bill 341 is *available at* <https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=48122&legislationTypeld=1&docTypeld=2&legislationName=HB341>.

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