Delaware Corporate Law Amendments Address Emergency Powers, Public Benefit Corporations and Other Matters

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On June 23, 2020, the Delaware General Assembly adopted amendments to the Delaware General Corporation Law (DGCL) proposed by the Delaware State Bar Association, including provisions confirming certain powers that a board of directors may exercise during emergency conditions, and eliminating supermajority voting requirements and appraisal rights in connection with converting to, or merging with, a public benefit corporation. The indemnification and exculpation provisions of the DGCL also will be amended to define categories of officers who will be entitled to mandatory indemnification against expenses if such officers have been successful on the merits, and to restrict any amendment, repeal or elimination of an exculpation clause in a corporation's charter from affecting the exculpation of directors with respect to prior acts or omissions. The amendments also address electronic execution and transmission of documents, among other things.

If signed into law by Gov. John Carney, the amendments will become effective on the date they are so enacted, except as described below with respect to emergency powers, indemnification and holding company mergers.

Emergency Powers

To address certain issues many corporations have encountered during the COVID-19 pandemic, Section 110 will be amended to address emergency bylaws and emergency powers that may be exercised by a board of directors during emergency conditions. The amendments clarify that the types of events that constitute an "emergency" under Section 110 and give rise to emergency powers, include a pandemic, epidemic and declaration of a national emergency by the U.S. government. The amendments further provide that emergency bylaws may be adopted by a corporation's board of directors or, if a quorum cannot be readily convened, by a majority of the directors present. Emergency bylaws may contain any provision "practical and necessary" to address the circumstances of an emergency, notwithstanding any different provisions in the DGCL or the corporation's charter.

The amendments also confirm certain powers that, in the absence of emergency bylaws, may be exercised during emergency conditions by a board of directors (or, if a quorum cannot be readily convened, by a majority of the directors present). The amendments provide that, during emergency conditions, a board may "take any action that it determines to be practical and necessary to address the circumstances of such emergency condition" with respect to a stockholders' meeting, notwithstanding any provision to the contrary in the DGCL or the corporation's charter or bylaws. Such actions may include postponing a stockholders' meeting to a later time or date (while retaining the same record date, notwithstanding the requirements of DGCL Section 213) and, for corporations subject to the reporting requirements of the Securities Exchange Act of 1934 (Exchange Act), notifying stockholders of such postponement or any change to the place of meeting (including a change to hold the meeting solely by means of remote communications) solely by means of a filing with the Securities and Exchange Commission (SEC).

Many companies have faced challenges during the COVID-19 pandemic in making stocklists available for inspection by stockholders in connection with stockholders' meetings, including making stocklists available by means of remote communications. The amendments address this issue by providing that no person shall be liable, and no stockholders' meeting shall be postponed or voided, for any failure to make a stocklist available in accordance with the DGCL if it was not practicable to allow such inspection during an emergency condition.

With respect to the payment of dividends, the amendments to Section 110 clarify that, during any emergency condition, the board of directors may change the record date and payment date of any dividend if the record date has not yet occurred, so long as the new payment date is not more than 60 days after the new record date. A corporation changing the record date or payment date pursuant to this provision will be required to provide stockholders with notice of any such change as promptly as practicable (and, in any event, before the original record date), which notice may be given solely by means of an SEC filing for Exchange Act reporting companies.

The amendments apply retroactively to any emergency conditions existing, and any board actions taken, on or after January 1, 2020. They are not intended, by implication or otherwise, to limit or eliminate the availability of powers or emergency actions not specifically enumerated, or to affect the validity of any action taken during an emergency but not authorized by the amendments, or any actions taken in nonemergency situations.

Exculpation and Indemnification

Also amended will be Section 102(b)(7), which authorizes a corporation to include an exculpation clause in its certificate of incorporation eliminating or limiting the personal liability of directors for monetary damages for certain breaches of fiduciary duty. Section 102(b)(7) will provide that any amendment, repeal or elimination of an exculpation clause will not affect the application of such exculpation clause with respect to any act or omission of a director occurring prior to such amendment, repeal or elimination. This holds true unless the exculpation clause provided, at the time of such act or omission, that it could be amended, repealed or eliminated retroactively. This amendment is consistent with the 2009 amendment to DGCL Section 145 prohibiting retroactive amendments to indemnification clauses in charters or bylaws.

Section 145 is also being amended this year to provide that only certain categories of officers are entitled to mandatory indemnification as a matter of law under Section 145(c) if they are successful on the merits in defense of any action. Such officers would consist of the president, CEO, chief operating officer, chief financial officer, chief legal officer, controller, treasurer and chief accounting officer of a corporation, which are the same categories of officers subject to Delaware's statute regarding consent to service of process on the corporation's registered agent in the state of Delaware. In light of the vast number of officers that many large corporations appoint, and the proliferation of corporate proceedings, this amendment would provide a corporation with increased flexibility to specify in its charter, bylaws or otherwise whether officers, other than those specified in Section 145(c), will have the right to mandatory indemnification under these circumstances. The amendment to Section 145(c) takes effect with respect to actions taken by officers after December 31, 2020.

The amendments further permit (but do not require) a corporation to indemnify any other current or former officers who are successful on the merits in the defense of any proceeding. A corporation may grant rights to such indemnification to other officers mandatory in its certificate of incorporation or bylaws, by way of an agreement or by approval of stockholders or disinterested directors.

Conversions to Public Benefit Corporations

Amendments to Sections 363, 365 and 357 modify or eliminate certain requirements for converting to a public benefit corporation. First, the amendments lower, from two-thirds to a majority of the outstanding shares, the required stockholder vote to (1) amend the certificate of incorporation of a corporation to convert it into a public benefit corporation (or vice versa) and (2) approve any merger in which the outstanding shares of a corporation are converted into shares of a public benefit corporation (or vice versa).

Second, the amendments eliminate statutory appraisal rights in connection with a corporation's conversion to a public benefit corporation, whether by way of a charter amendment and/or a merger in which a corporation's outstanding shares are converted into shares of a public benefit corporation.

The amendments also address the requirement that directors of public benefit corporations balance the public interest with the pecuniary interests of stockholders, by providing that a director's ownership of stock of the corporation does not, alone, create a conflict of interest with respect to such a balancing requirement.

Electronic Consents and Electronic Transmissions

In light of the increasing use and reliance on electronic communications, including electronic signatures and transmission of documents, the amendments expand the 2019 DGCL amendments to further facilitate the electronic execution and transmission of documents in connection with any act or transaction contemplated or governed by the DGCL. The amendments eliminate the carve-out in Section 116(b) for electronic execution of board, stockholder and incorporator consents in lieu of a meeting, and any restrictions thereon are required to be expressly stated in the certificate of incorporation. In addition, any proxy may be executed and transmitted electronically so long as it includes or is delivered with information enabling the corporation to determine the date of delivery and the identity of the stockholder granting such proxy.

In order to lessen the administrative burden for corporations, the amendments also provide that a corporation may deliver any notice to stockholders by email, to each stockholder's email address set forth in the corporation's records, without obtaining the prior consent of any such stockholder.

Holding Company Mergers

The amendments also will facilitate holding company mergers by eliminating the requirement in Section 251(g) that, following consummation of such merger, the organizational documents of the surviving entity (which will be wholly owned by the holding company) must contain provisions identical to the certificate of incorporation of the parent corporation immediately prior to the effectiveness of the merger. Section 251(g)(7) will continue to provide that the organizational documents of such surviving entity must contain provisions requiring approval of the holding company's stockholders for any act or transaction by the surviving entity that, if taken by the parent corporation immediately prior to the merger, would have required approval by the parent corporation's stockholders under the DGCL or under its charter or bylaws.

The amendment to Section 251(g)(7) will apply to merger agreements entered into on or after the date that Gov. Carney signs the bill into law.