COVID-19: DELAWARE'S 2020 AMENDMENTS TO ITS GENERAL CORPORATION LAW RESPOND TO COVID-19 AND MORE

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On 16 July 2020, the General Corporation Law of the State of Delaware (the DGCL) was amended (the 2020 Amendments) to assist Delaware corporations in responding to challenges arising from the novel coronavirus (COVID-19) pandemic. The 2020 Amendments also make a number of important changes to the DGCL that are unrelated to the challenges presented by COVID-19, including by facilitating a corporation's ability to convert to a public benefit corporation and effect a holding company merger. Finally, the 2020 Amendments limit the persons who constitute “officers” of a corporation for purposes of determining the officers entitled to mandatory indemnification from the corporation in cases where the officer is successful on the merits or otherwise in defending a proceeding brought by reason of such officer's corporate status. A summary of the 2020 Amendments is provided below.

RESPONDING TO AN EMERGENCY CONDITION SUCH AS COVID-19

Section 110 of the DGCL previously allowed the board of directors of a corporation to adopt emergency bylaws to be operative during any emergency, such as an attack, nuclear or atomic disaster, catastrophe, or other similar emergency condition, as a result of which a quorum of the board of directors or a committee thereof could not easily be convened for action.

However, COVID-19 presented new challenges that Section 110 of the DGCL did not expressly cover. Some of these challenges were addressed on an emergency basis on 6 April 2020 when the governor of the State of Delaware issued an order (the Order) allowing public corporations subject to the reporting requirements of §13(a) or §15(d) of the Securities Exchange Act of 1934 (the Exchange Act) to change the format of a meeting previously noticed for a physical location to a virtual meeting solely by the filing of a document with the Securities and Exchange Commission (the SEC) pursuant to Sections 13, 14, or 15(d) of the Exchange Act and issuing a press release.

While the Order provided interim authority for many Delaware corporations to change the format of a stockholders' meeting, the 2020 Amendments to Section 110, which are effective retroactively as of 1 January 2020, provide a more permanent solution. The 2020 Amendments expand the definition of an emergency to include an epidemic, a pandemic, and declaration of national emergency by the United States government and include additional flexibility for a board of directors with respect to stockholders' meetings, dividends, or other matters, which are discussed below.

Board Meetings

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If a quorum of the board cannot readily be convened during an emergency condition, the board may adopt emergency bylaws or take other practical and necessary actions by a majority of the directors present at a meeting.

Stockholder Meetings

During any emergency condition, the board of directors may take any action it determines to be practical and necessary to address such emergency condition as it relates to a meeting of stockholders, including: (i) postponing a stockholder meeting, while maintaining the original record date of such meeting irrespective of the number of days by which such meeting is postponed, and (ii) if a corporation is subject to the reporting requirements of Section 13(a) or Section 15(d) of the Exchange Act, notifying stockholders of a postponement or change in the location or format of a meeting solely by filing a document with the SEC pursuant to the Exchange Act. Further, if it is not practicable to allow inspection of a list of stockholders entitled to vote before or during a stockholders' meeting, the failure of a corporation to make the stockholders list available will not result in any personal liability for directors or a meeting of stockholders being postponed or voided.

Dividends

The 2020 Amendments allow for a change in the record date and payment date of a dividend declared by a Delaware corporation during an emergency condition if the record date has not yet occurred so longs as the new payment date is within 60 days of the new record date. A Delaware corporation that is subject to the reporting requirements of Section 13(a) or Section 15(d) of the Exchange Act may give notice of such change to stockholders solely by a filing with the SEC pursuant to the Exchange Act. In all cases, notice must be given as promptly as practicable after the change in record date and payment date.

BENEFIT CORPORATIONS

The 2020 Amendments make it easier for a Delaware corporation to become a public benefit corporation and vice versa by lowering the stockholder voting threshold from two-thirds to a majority of the outstanding voting power for a conventional corporation to (i) amend a certificate of incorporation that converts a conventional corporation into a public benefit corporation or vice versa, and (ii) enact a merger whereby shares of a conventional corporation are converted into shares of a public benefit corporation, or vice versa. The 2020 Amendments also eliminate appraisal rights in connection with the conversion or merger of a conventional corporation to, or into, a benefit corporation effective on 16 July 2020. Further, the 2020 Amendments reduce the risks for persons serving as directors of a public benefit corporation in several key ways.

Section 365 of the DGCL provides that directors, in managing the business and affairs of a public benefit corporation, shall balance the pecuniary interests of the stockholders, the interests of those materially affected by the corporation's conduct, and the public benefits identified in the corporation's certificate of incorporation.The 2020 Amendments provide that a director of a public benefit corporation will not be considered interested in such balancing decisions due to having an ownership interest in the public benefit corporation, unless such ownership would be considered a conflict of interest for a traditional corporation.

In addition, provided a director does not have a conflict of interest, a director's failure to balance the interests of all stakeholders when making decisions on behalf of the corporation will not constitute an act or omission in bad faith for purposes of exculpation or indemnification, unless the corporation's certificate of incorporation otherwise

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provides. Finally, the 2020 Amendments provide a higher standard for stockholders to bring an action to enforce the balancing requirements for directors of public benefit corporations. In order to bring an action or a breach of the duty of loyalty to enforce the statutory requirement that the directors of public benefit corporations balance the pecuniary interests of the stockholders with the public benefit identified in the corporation's certificate of incorporation, the stockholder must own at least two percent of the corporation's outstanding shares, or, in the case of certain public companies, the lower of two percent of the corporation's outstanding shares or shares with a value of at least $2,000,000.

HOLDING COMPANY MERGERS

Prior to the 2020 Amendments, Section 251(g) of the DGCL allowed corporations to effect holding company reorganization mergers, without a stockholder vote, only if the entity surviving the merger and the existing operating company generally had identical organizational documents. This requirement will be eliminated with respect to holding company mergers consummated pursuant to an agreement entered into after 16 July 2020. The amendments do not change the requirement that the stockholders of the holding company must approve any action at the operating company level that would have required their approval if they were still stockholders of the operating company. In addition, the 2020 Amendments require that a non-Delaware holding company must be managed by persons who have the same fiduciary duties as directors of a Delaware corporation.

INDEMNIFICATION AND EXCULPATION

The 2020 Amendments amend certain provisions of the DGCL governing indemnification, advancement, and exculpation. First, with respect to any act or omission occurring after 31 December 2020, Section 145(c) of the DGCL will only require mandatory indemnification for a present or former officer of a corporation that has been successful on the merits or otherwise in a proceeding brought by reason of his or her corporate status if the officer at the time of such act or omission (i) is the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer, or chief accounting officer of the corporation, (ii) is or was identified in the corporation's public filings with the SEC as one of the most highly compensated executive officers of the corporation, and (iii) has consented to service of process in Delaware by written agreement.

Second, the 2020 Amendments specifically provide that a corporation may choose to indemnify any other person who has been successful in a covered proceeding, who is not a present or former director or officer of the corporation. Next, the 2020 Amendments protect indemnification and advancement rights contained in a corporation's certificate of incorporation or bylaws by providing that such rights cannot be removed and retroactively alter a covered person's indemnification or advancement rights with respect to acts or omission that occurred prior to the elimination of such provision unless authorized by such provision as in effect at the time of removal or alteration. Similarly, a corporation's deletion or amendment of an exculpation provision from its certificate of incorporation will not affect acts that occurred prior to such deletion or amendment.

ELECTRONIC TRANSMISSION AND COMMUNICATION

The 2020 Amendments further streamline the manner in which corporations and their stockholders may electronically execute or transmit director, incorporator, and stockholder consents and clarify that while a

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corporation may restrict its stockholders' ability to sign or deliver documents electronically, a Delaware corporation may not limit other permitted means of signing or delivery. Additionally, stockholder consents or documents evidencing a proxy that are delivered electronically must be accompanied by information needed to determine the date of delivery and identify the person delivering such document.

The 2020 Amendments clarify the manner in which a corporation may provide notice to its stockholders. A corporation may provide notice to stockholders by mail, courier service, or electronic mail without stockholder consent. However, notice sent to stockholders by other means of electronic transmission, such as by facsimile telecommunication, posting on an electric network, or any other form of electronic transmission, requires prior consent by the stockholder to whom the notice is given.

RECORD DATE

The 2020 Amendments provide that if a record date has not been set with respect to an action by written consent of stockholders, the default record date will be the date in which consents are received by the corporation.

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