

Alert | Corporate



September 2020

2020 Amendments to the General Corporation Law of the State of Delaware

Delaware House Bill No. 341, amending the General Corporation Law of the State of Delaware (DGCL), was enacted July 16, 2020. The 2020 amendments contain several noteworthy changes, highlighted below, including timely updates responsive to the ongoing Coronavirus Disease 2019 (COVID-19) pandemic. Except as noted otherwise below, the 2020 amendments became effective July 16, 2020.

2020 Amendments to the DGCL

- ***Emergency Bylaws and Other Powers in “Emergency.”***
 - *Emergency Bylaws.* Section 110(a) of the DGCL was amended to expressly include epidemics, pandemics, and declarations of a national emergency by the United States government as conditions constituting an “emergency” during which emergency bylaws may be adopted and operative. The amendments to Section 110(a) also expand the ability of the board of directors to adopt emergency bylaws by (i) eliminating the requirement that emergency bylaws could only be adopted in instances when a quorum of the board of directors could not readily be convened for action, and (ii) permitting a majority of the directors present at a meeting to adopt emergency bylaws even if such number of directors present is less than a quorum if a quorum cannot readily be convened for a meeting.
 - *Meetings of Stockholders.* New Section 110(i) of the DGCL provides that, during any emergency condition, the board of directors may take any action that it determines to be practical and

necessary to address the circumstances of the emergency with respect to a meeting of stockholders notwithstanding anything to contrary in the DGCL or the certificate of incorporation or bylaws of the corporation, including postponing any such meeting to a later time or date and, in the case of a public corporation, giving notice to stockholders of any postponement or change of the place of the meeting solely by a document publicly filed by the corporation with the Securities and Exchange Commission (SEC) pursuant to Sections 13, 14 or 15(d) of the Securities Exchange Act of 1934. Notice of any such change must be given to the stockholders of a corporation as promptly as practicable thereafter.

- *Dividends.* New Section 110(i) of the DGCL further provides that during any emergency condition the board of directors may change the record date and payment date of any dividend that has been declared to a later date or dates (provided the payment date as so changed is within 60 days after the record date so changed), if the record date for such declared dividend has not occurred. Notice of any such change must be given to the stockholders of a corporation as promptly as practicable thereafter.
- The foregoing amendments to Section 110 of the DGCL were made effective retroactively to Jan. 1, 2020, with respect to any emergency condition occurring on or after that date and with respect to any action contemplated by those provisions and taken on or after that date by or on behalf of a corporation with respect to a meeting of stockholders held or a dividend as to which the record date or payment date is anticipated to occur during the pendency of such condition.
- ***Document Form, Signature, and Delivery.*** Sections 116(b), 141(f), 212(c), 228(d) of the DGCL were amended to allow persons to rely on the “safe-harbor” provisions of Section 116(a) of the DGCL as a basis for using an electronic transmission to document director, stockholder, member and incorporator consents and for signing and delivering those documents by electronic means, subject to certain conditions and unless otherwise restricted by a provision in the certificate of incorporation or bylaws of a corporation.
- ***“Holding Company” Mergers.*** Section 251(g)(7) of the DGCL was amended to eliminate the requirement in connection with a “holding company” merger pursuant to such Section, that the organizational documents of the surviving entity contain provisions identical to the certificate of incorporation of the constituent corporation immediately prior to the merger. Note, this amendment does not eliminate the requirement under Section 251(g) of the DGCL that the organizational documents of the surviving entity contain provisions requiring approval of the holding company’s stockholders for any act or transaction by the surviving entity that, if taken by the constituent corporation immediately prior to the merger, would have required stockholder approval. The amendments to Section 251 of the DGCL are applicable to mergers consummated pursuant to an agreement of merger entered into on or after July 16, 2020.
- ***Indemnification of Officers.*** DGCL Section 145(c), which currently requires a corporation to indemnify its present and former officers against expenses actually and reasonably incurred by such officer in defense of any proceeding to the extent that such officer has been successful on the merits or otherwise in defense of any proceeding, was amended to provide that with respect to any act or omission occurring after Dec. 31, 2020, references to “officer” for purposes of Section 145(c) of the DGCL shall be deemed to refer only to a person who at the time of such act or omission has consented to service by the delivery of process to the registered agent of the corporation pursuant to Section 3114(b) of Title 10 of the Delaware Code (i.e., (i) the corporation’s president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer, (ii) an individual identified in a corporation’s public filings with the SEC, if any, because such individual is or was one of the most highly compensated executive officers of the

corporation at any time during the course of conduct alleged in a proceeding to be wrongful, or (iii) an individual who, by written agreement with the corporation, has consented to be identified as an officer for purposes of Section 3114(b)). Section 145(c) of the DGCL was also amended to clarify that a corporation may, but is not required to, indemnify other individuals who are not current or former directors or officers, including officers of a corporation who are not included in the new definition of “officer” in Section 145(c)(1), if such individuals are successful in defense of a proceeding. A corporation’s indemnification regime should be carefully reviewed and analyzed in light of these amendments.

- **Public Benefit Corporations.** Section 363 of the DGCL was amended to lower the stockholder vote required for (i) amendments to a certificate of incorporation to convert a corporation between a conventional corporation and a public benefit corporation, and (ii) mergers that convert shares of conventional corporations into shares of public benefit corporations, from two-thirds ($66\frac{2}{3}$) of the outstanding stock entitled to vote to the majority (>50) of the outstanding stock entitled to vote. Section 363 of the DGCL was also amended to remove statutory appraisal rights for (i) amendments to a certificate of incorporation that convert a conventional corporation to a public benefit corporation, and (ii) mergers that convert shares of conventional corporations into shares of public benefit corporations (note, the determination as to whether appraisal rights will be available in connection with a merger in which a public benefit corporation is a constituent corporation will now be determined in accordance with Section 262 of the DGCL). Section 365 of the DGCL was amended to provide that, as a matter of default, a director’s failure to balance the interests of all stakeholders of a public benefit corporation when making decisions shall not constitute an act or omission in bad faith for purposes of exculpation or indemnification unless otherwise provided in the certificate of incorporation of a corporation.
- **Exculpation of Liability.** Section 102(b)(7) of the DGCL was amended to provide that the amendment, repeal, or elimination of any provision in a corporation’s certificate of incorporation that eliminates or limits the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, shall not retroactively affect the application of such provision to an act or omission by a director occurring before said amendment, repeal, or elimination unless such exculpation provision provided otherwise at the time of such act or omission.

The 2020 amendments contain other technical and clerical modifications to the DGCL. [View the full text of the 2020 amendments and related legislative synopsis.](#)

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