INSIGHTS
The Corporate & Securities Law Advisor

VOLUME 33, NUMBER 4, APRIL 2019

CORPORATION LAW

2019 Proposed Amendments to the General Corporation Law of the State of Delaware

Proposed amendments to the Delaware General Corporation Law would, among other things, add new provisions relating to documentation of transaction by electronic means, revise the default provisions applicable to stockholder notices, including those governing appraisal, clarify the timing of unanimous consents of directors, and make other technical changes.

By John Mark Zeberkiewicz, Brigitte V. Fresco, and Robert B. Greco

Legislation proposing to amend the General Corporation Law of the State of Delaware (General Corporation Law) has been released by the Corporate Council of the Corporation Law Section of the Delaware State Bar Association and, if approved by the Corporation Law Section, is expected to be introduced to the Delaware General Assembly. If enacted, the 2019 amendments to the General Corporation Law (the 2019 Amendments) would, among other things: (1) add new provisions relating to the documentation of transactions and the execution and delivery of documents, including by electronic means, and make conforming changes to existing provisions; (2) significantly revise the default provisions applicable to notices to stockholders under the General Corporation Law, the certificate of incorporation or the bylaws, including by providing that notices may be delivered by electronic mail, except to stockholders who expressly "opt out" of receiving notice by electronic mail; (3) consistent with the foregoing, update the provisions governing notices of appraisal rights and demands for appraisal; (4) update the procedures applicable to stockholder consents delivered by means of electronic transmission; (5) clarify the time at which a unanimous consent of directors in lieu of a meeting becomes effective; and (6) make various other technical changes, including with respect to incorporator consents and the resignation of registered agents.

If enacted, the 2019 Amendments (other than the amendments to Section 262 (appraisal rights)) would be effective on August 1, 2019, and the amendments to Section 262 would be effective with respect to a merger or consolidation consummated pursuant to an agreement of merger or consolidation entered into on or after August 1, 2019.

John Mark Zeberkiewicz *is a director,* **Brigitte V. Fresco** *is counsel, and* **Robert B. Greco** *is an associate, of Richards, Layton & Finger, P.A., in Wilmington, DE. The views expressed herein are the views of the authors and are not necessarily the views of the firm or its clients.*

Document Forms, Including Electronic Signatures and Delivery

Although the General Corporation Law has for years included provisions relating to the execution and delivery of consents, notices and other instruments by means of electronic transmission, it does not currently address in a comprehensive manner the form and effect of electronic signatures or delivery by electronic means. Instead, key provisions of the General Corporation Law governing notices and consents contain individual provisions governing the form and effect of "electronic transmissions," with Delaware's version of the Uniform Electronic Transactions Act expressly providing that it does not apply to a transaction to the extent it is governed by the General Corporation Law.

General Application: The "Safe Harbor" Provision

The 2019 Amendments change numerous sections of the General Corporation Law to address comprehensively the documentation of acts or transactions through electronic means, as well as the execution and delivery of documents through the use of electronic signatures and by electronic transmission. The lynchpin of these changes is new Section 116. Section 116(a) provides that, except as otherwise expressly provided in Section 116(b), any act or transaction contemplated or governed by the General Corporation Law or the certificate of incorporation or bylaws may be provided for in a "document" and an electronic transmission will be deemed the equivalent of a written document. The term "document" is defined in Section 116(a) to mean any tangible medium on which information is inscribed, and includes handwritten, typed, printed, or similar instruments, and copies of those instruments, and an electronic transmission. The term "electronic transmission," which is currently defined in Section 232 of the General Corporation Law, continues to mean any form of communication, not directly involving the physical transmission of paper, including the use of, or participation in, one or more electronic networks or databases, including one or more distributed electronic networks or databases, that creates a record that may be retained, retrieved and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process.

A wide variety of corporate documents may be executed by means of electronic signatures.

Section 116(a) provides that, whenever the General Corporation Law or the certificate of incorporation or bylaws requires or permits a signature, the signature may be a manual, facsimile, conformed or "electronic signature," which is defined to mean an electronic symbol or process that is attached to, or logically associated with, a document and executed or adopted by a person with an intent to authenticate or adopt the document. Thus, a wide variety of corporate documents, including merger agreements, voting agreements and other documents contemplated by the General Corporation Law, may be executed by means of electronic signatures, such as DocuSign®.

Section 116(a) further provides that, unless otherwise agreed between the sender and recipient, an electronic transmission will be deemed delivered to a person for purposes of the General Corporation Law and the certificate of incorporation and bylaws at the time it enters an information-processing system that the person has designated for the purpose of receiving electronic transmissions of the type delivered, so long as the electronic transmission is in a form capable of being processed by that system and the person is able to retrieve the electronic transmission. Section 116(a) provides guidance on the issue of whether a person has so designated such a system, stating that the question will be governed by the certificate of incorporation or bylaws or from the context and surrounding circumstances, including the parties' conduct. Thus, the prior use of electronic

mail between or among specified parties may supply evidence that the parties have made the designation required by Section 116(a).

Section 116(a) sets forth non-exclusive means of reducing specified acts or transactions to a written or electronic document, as well as means of executing and delivering documents manually or electronically. It states that the General Corporation Law shall not prohibit one or more persons from conducting a transaction in accordance with Delaware's Uniform Electronic Transactions Act so long as the part or parts of the transaction that are governed by the General Corporation Law are documented, signed and delivered in accordance with Section 116(a) or the other relevant provisions of the General Corporation Law. Thus, to the extent Delaware's Uniform Electronic Transactions Act does not apply to a transaction because the transaction is governed by the General Corporation Law, the parties to the transaction can satisfy the requirements of the General Corporation Law by complying with Section 116(a).

The "safe harbor" provisions in Section 116(a) apply solely for purposes of determining whether an act or transaction has been documented, and whether a document has been signed and delivered, in accordance with the General Corporation Law and the corporation's certificate of incorporation and bylaws. As its application is limited to the General Corporation Law and the corporation's certificate of incorporation and bylaws, Section 116(a) does not preempt any applicable statute of frauds, nor does it override any other applicable law requiring actions to be documented, or signed and delivered, in a specified manner.

Specific Exclusions from the "Safe Harbor"

Section 116(b) sets forth the actions and documents to which Section 116(a) will not apply. The items excluded from the scope of Section 116(a) consist primarily of those that are governed by other provisions of the General Corporation Law that already address electronic signature or transmission. Thus, Section 116(b) provides that Section 116(a) does not apply to the following:

- Documents filed with or submitted to the Delaware Secretary of State, which continue to be governed by Section 103(h), which will continue to provide that any signature on an instrument authorized to be filed with the Delaware Secretary of State under the General Corporation Law may be a facsimile, a conformed signature or an electronically transmitted signature;
- Documents filed with or submitted to the Register in Chancery, or a court or other judicial or governmental body—all of which must be filed or submitted under the rules or procedures adopted by such courts or other judicial or governmental bodies;
- A document comprising part of the stock ledger;
- Any certificate representing a security;
- Any document expressly referenced as a notice by the General Corporation Law, the certificate of incorporation or the bylaws, which matters are governed by other provisions of the General Corporation Law, including, in the case of notices to stockholders, Section 232, and the certificate of incorporation and bylaws;
- Any document expressly referenced as a waiver of notice by the General Corporation Law, Section 229 of which already permits directors and stockholders to give waivers by electronic transmission;
- Consents by directors in lieu of a meeting, which are governed by Section 141(f), which already provides for consents delivered by electronic transmission;
- Consents of stockholders, which are governed by Section 228, which currently provides for the delivery of consents by electronic transmission and is the subject of amendments summarized below;
- Consents of incorporators, which are governed by Section 108, which is also the subject of amendments summarized below;

© 2019 CCH Incorporated and its affiliates. All rights reserved.

- Ballots to vote on actions at a meeting of stockholders;
- Acts effected pursuant to Section 280 of the General Corporation Law, which sets forth the procedures for giving notice to claimants and other matters in connection with a so-called "long-form" dissolution;
- Any acts or transactions effected pursuant to subchapter III of the General Corporation Law, which contains the provisions addressing the requirement to maintain a registered office in the State of Delaware and includes the principal provisions governing registered agents as well as notices between the corporation and its registered agent;
- Any acts or transactions effected pursuant to subchapter XIII of the General Corporation Law, which deals with suits against corporations, directors, officers or stockholders, including the means of serving process on corporations; and
- Any acts or transactions effected pursuant to subchapter XVI of the General Corporation Law, which deals with foreign corporations, including the requirements of foreign corporations to qualify to do business in the State of Delaware.

Although Section 116(b) excludes the foregoing matters from the automatic operation of Section 116(a), the statute expressly states that the exclusion shall not create any presumption regarding the lawful means of documenting a matter governed by Section 116(b) or the lawful means of signing or delivering a document addressed by Section 116(b). Accordingly, the mere inclusion of any item in Section 116(b)'s "excluded items list" should not, in and of itself, be deemed to create a negative implication that the item may not otherwise be validly executed, delivered or authenticated through electronic means, including DocuSign®. Indeed, many of the instruments in the "excluded items list" are currently executed and delivered, and will continue to be permitted to be executed and delivered, through electronic means.

Section 116(b) also states that no provision of the certificate of incorporation or bylaws shall limit the application of Section 116(a), unless the provision expressly restricts one or more of the means of documenting an act or transaction, or of signing or delivering a document, permitted by that subsection. Thus, a corporation may, through the adoption of an express provision in its certificate of incorporation or bylaws, restrict the application and use of Section 116(a). Any such provision, however, must clearly and expressly restrict the use of electronic signatures and electronic transmissions for documenting an act or transaction or signing and delivering any document. Thus, provisions in certificates of incorporation or bylaws stating that a particular act or transaction must be "signed" or "in writing," as well as provisions stating that documents must be manually delivered, sent or given, will not, in and of themselves, be sufficient to limit the application of Section 116(a). Unless a corporation desires to limit the application of Section 116(a), it will not in most cases be required to amend its certificate of incorporation or bylaws to allow for the documentation by electronic means of acts or transactions covered by that subsection, nor for the signing or delivery of documents falling within its scope.

Interplay with the Federal E-Sign Act

Finally, Section 116(c) addresses the interaction between the provisions of the General Corporation Law and the U.S. federal Electronic Signatures in Global and National Commerce Act (E-Sign Act). In general, the E-Sign Act provides that, with respect to a transaction in or affecting interstate or foreign commerce (and subject to specified exceptions and limitations), a signature, contract, or other record relating to the transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form, and a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation. Section 116(c) states that, if any provision of the General Corporation Law is deemed to modify, limit

or supersede the E-Sign Act, the provisions of the General Corporation Law will control to the fullest extent permitted by Section 7002(a)(2) thereof. Section 7002(a)(2) of the E-Sign Act provides:

> A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 7001 of [the E-sign Act] with respect to State law only if such statute, regulation, or rule of law . . . specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if (A) (i) such alternative procedures or requirements are consistent with [subchapters I and II of the E-Sign Act]; and (ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; and (B) if enacted or adopted after June 30, 2000, makes specific reference to [the E-Sign Act].

Thus, Section 116(c) provides express evidence of the intent to allow the General Corporation Law to govern the documentation of actions, and the signature and delivery of documents, to the fullest extent the General Corporation Law is not preempted by the E-Sign Act.

Ancillary Amendments

The 2019 Amendments also effect changes to Section 212(c) (which deals with the manner in which a stockholder may authorize another person to act as its proxy) and Section 212(d) (which generally provides that copies of proxies may be substituted for an original) to conform to Section 116(a). Specifically, Section 212(c)(1), which currently provides that a stockholder may execute a "writing" authorizing another person or persons to act for such stockholder as proxy and provides that execution of the proxy may be accomplished by the stockholder (or authorized officer, director, employee or agent "signing such writing or causing such person's signature to be affixed to such writing by any reasonable means, including, but not limited to, by facsimile signature"), is being updated to provide simply that a stockholder may execute a "document" granting such authorization, thus confirming that a proxy may be documented, executed and delivered in accordance with Section 116(a).

Section 212(c)(2) also is being updated to eliminate references to the transmission of proxy by "telegram" or "cablegram," opting instead for "electronic transmission," a broader term that would include telegrams and cablegrams in the unlikely event those means of proxy transmission are deployed. Similarly, Section 212(d) is being updated to replace the reference to copies or reproductions of the "writing" granting a proxy with a reference to the "document" and to eliminate the specific references to telegrams and cablegrams, opting again to use the broader concept of "electronic transmission."

In addition, Sections 251(b) (merger or consolidation of Delaware stock corporations) and 255(b) (merger or consolidation of Delaware nonstock corporations) are being amended to permit any authorized person to execute an agreement of merger or consolidation, except that any agreement filed with the Secretary of State must be executed by a person, and in the manner, authorized by Section 103. The changes are unlikely to have significant practical effect, given that certificates of merger or consolidation (as opposed to agreements of merger or consolidation) are frequently filed.

Notices

Along with the amendments dealing with the documentation of transactions and execution and delivery of documents (including through the use of

© 2019 CCH Incorporated and its affiliates. All rights reserved.

electronic signatures and electronic transmissions), the 2019 Amendments include significant revisions to the provisions of the General Corporation Law dealing with the form and manner of notices to stockholders.

Default Delivery of Notices

Section 232, which currently addresses notice by electronic transmission, will be substantially revised to set forth the statutory defaults for notices to stockholders. Section 232(a), as amended, will provide that, without limiting the manner in which they may otherwise be effectively given, notices to stockholders may be given by (1) U.S. mail, postage prepaid, (2) courier service, or (3) electronic mail. Section 232(a) further specifies the time at which notices are given, providing that, if mailed, a notice is given when deposited in the U.S. mail, postage prepaid (thus preserving the concept currently appearing in Section 222(b), which is being updated to eliminate that provision, as it will become redundant); if delivered by courier service, the notice is given at the earlier of the time it is received or left at the stockholder's address; and if given by electronic mail, the notice is given at the time it is directed to the stockholder's electronic mail address.

Additional Provisions Applicable to Notices by Electronic Mail

Since 2000, Section 232(a) has permitted notices to stockholders to be given by means of "electronic transmission," defined broadly to include electronic mail. Section 232(b), however, has since that time provided that notice given by electronic mail will be deemed given only when directed to an electronic mail address at which the stockholder has consented to receive notice. As the initial set of amendments allowing for notices by electronic transmission were adopted in 2000, at a time when electronic mail was not nearly as ubiquitous, the consent requirement was intended as a means of protecting stockholders. The requirement to obtain such consent from stockholders has in many cases limited the usefulness of notice by electronic mail, with corporations effectively being forced to give notices by traditional means, even in cases where they have valid electronic mail addresses for their entire stockholder base. As revised, Section 232(a) will reverse the statutory default as it relates to notices to stockholders by electronic mail.

Notices to stockholders by electronic mail generally will become effective when directed to the stockholder's electronic mail address.

Despite the change in the statutory default, revised Section 232 contains several provisions governing the validity of notice by electronic mail. First, while notices to stockholders by electronic mail generally will become effective when directed to the stockholder's electronic mail address, they will not be effective as to any stockholder that has notified the corporation in writing or by electronic transmission of an objection to receiving notice by electronic mail. Second, any notice given by electronic mail must include a prominent legend that the communication is an important notice regarding the corporation. Third, Section 232(a) will not affect, limit, eliminate or override the application of any other law, rule or regulation applicable to a corporation or by which such corporation or its securities may be bound. Thus, for example, public companies will remain subject to the obligations under Regulation 14A or Regulation 14C promulgated under the Securities Exchange Act of 1934 and accordingly will be unable to send notices thereunder by electronic mail.

Revised Section 232 will expressly define the terms "electronic mail" and "electronic mail address" based on similar terms defined in the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003. As so defined, the term "electronic mail" means an

electronic transmission directed to a unique electronic mail address, and is deemed to include any files attached to it as well as any information hyperlinked to a website, but only if the electronic mail itself includes the contact information of an officer or agent of the corporation who is available to assist with accessing the files and information. Given that many notices to stockholders are likely to include attachments—for example, a consent solicitation statement, form of written consent, or notice of merger and appraisal—corporations will need to ensure that they provide, in the body of the electronic mail, the contact information for the corporate secretary or other officer or agent of the corporation who can assist stockholders with accessing the files. The term "electronic mail address" is defined to mean a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox and a reference to an internet domain, to which electronic mail can be sent or delivered. Finally, revised Section 232 provides that a notice may not be given by an electronic transmission (including any electronic mail) from and after the time that the corporation is unable to deliver by such electronic transmission two consecutive notices and the inability becomes known to the secretary, assistant secretary, transfer agent or other person responsible for giving the notice (although the inadvertent failure to discover the inability will not invalidate any meeting or other action).

Section 232(a), as amended, will set forth the statutorily recognized means of providing notice to stockholders; it will apply not only to meetings of stockholders, but to any notice required to be given to stockholders under the General Corporation Law or the corporation's certificate of incorporation or bylaws. Thus, under revised Section 232(a), a corporation will be able to give all types of notices required under the General Corporation Law or its certificate of incorporation and bylaws, including notices of meetings, notices of actions by written consent of stockholders in lieu of a meeting and notices of appraisal rights, by electronic mail. As noted in the synopsis to the proposed legislation containing the 2019 Amendments, "Section 232(a) applies to any notice that is required to be given under [the General Corporation Law] or under the certificate of incorporation or bylaws" and, accordingly,

> no provision of the certificate of incorporation or bylaws (including any provision requiring notice to be in writing or mailed) may prohibit the corporation from giving notice in the form, or delivering notice in the manner, permitted by Section 232(a).

Thus, while it is often advisable for corporations to review their certificates of incorporation and bylaws periodically to ensure they are current, they will not be precluded from taking advantage of the means of giving notice set forth in Section 232(a). Thus, existing provisions of a corporation's certificate of incorporation or bylaws that require, for example, that notices to stockholders be given in writing or delivered by U.S. mail will not override the statutory provisions allowing for notice to be given by courier or electronic mail in accordance with Section 232.

Other Changes

New Section 232(c) (which substantially incorporates the provisions that are currently set forth in Section 232(b)) provides the three other means of giving notice by electronic transmission: (1) facsimile telecommunication; (2) posting on an electronic network (with separate notice of the posting); and (3) other forms of electronic transmission. In the case of a facsimile notice, the notice is deemed given when directed to a number at which the stockholder has consented to receive notice; in the case of a posting on an electronic network, the notice is given upon the later of the posting and the giving of the separate notice to the stockholder of the posting; and if given by other means of electronic transmission, the notice is deemed given when directed to the stockholder.

Last, Section 232(f) of the General Corporation Law includes provisions (similar to the provisions formerly in Section 222(b) and Section 232(b))

© 2019 CCH Incorporated and its affiliates. All rights reserved.

for transmittal affidavits that serve as prima facie evidence that notice has been given to stockholders. Section 232(g) (formerly designated as Section 232(e)) identifies certain types of notices that must continue to be given in the manner specified by those provisions addressed in Section 232(g).

Ancillary Provisions

Section 160(d), which currently generally provides that shares called for redemption will not be deemed outstanding for purposes of quorum and voting after "written" notice has been sent to stockholders and a sum sufficient to pay the redemption price has been irrevocably deposited or set aside, will be revised to eliminate the requirement of a "written" notice, thus clarifying that such notice may be given in the form and manner provided in revised Section 232. Section 163, which generally requires notices to be given with respect to partly paid shares, is similarly being amended to clarify that such notices may be given in the manner and form provided in revised Section 232.

The 2019 Amendments also amend Section 230 of the General Corporation Law, which sets forth the exceptions to the requirement to provide notice. In general, Section 230(b)(1) of the General Corporation Law eliminates the requirement to give notice to any stockholder to whom notice of two consecutive annual meetings, and all notices of meetings or of the taking of action by written consent without a meeting to such stockholder during the period between such two consecutive meetings, have been returned undeliverable. Section 230(c) currently renders Section 230(b)(1)'s exception to the requirement to give notice inapplicable to any notice if the notice was given by electronic transmission. The 2019 Amendments will add a new sentence to Section 230(c) to provide that Section 230(b)(1)'s exception shall not be applicable to any stockholder whose electronic mail address appears on the records of the corporation and to whom notice is not prohibited by Section 232. Thus, if a corporation has an electronic mail address for a stockholder and notice to such stockholder by electronic mail is not prohibited under Section 232, then the corporation will not be relieved of the obligation to send that stockholder notices pursuant to the "returned mail exception" in Section 230(b)(1).

The 2019 Amendments also would change Sections 251 (merger or consolidation of Delaware stock corporations), 253 (short-form merger of corporations), 255 (merger or consolidation of Delaware nonstock corporations), 266 (conversion of Delaware corporations to other entities), 275 (dissolution) and 390 (transfer, domestication or continuance of Delaware corporations) to provide that the notices required thereunder may be "given," rather than mailed, thereby clarifying that such notices may be provided in the form, and delivered in the manner, permitted by Section 232, as revised.

Appraisal Rights

The 2019 Amendments make several technical changes to Section 262(d), which sets forth the provisions for notices to stockholders in circumstances where they are entitled to appraisal rights, to clarify such notice provisions and conform them to amended Section 232(a). The amendments to Section 262(d) will permit a corporation to deliver a notice of appraisal rights by courier or electronic mail (in addition to by U.S. mail). In addition, Section 262(d) is being amended to permit stockholders to deliver demands for appraisal by electronic transmission. The corporation, however, is only required to receive such demands if it expressly has designated, in the notice of appraisal rights, an information-processing system for receipt of electronic delivery of demands. Thus, a corporation that desires to receive appraisal demands by, for example, electronic mail would need to provide expressly in the appraisal notice that such demands may be delivered to a specified electronic mail address. Similarly, Section 262(e), which requires the provision of specified information regarding the statement of the number of shares and holders entitled to appraisal, is being amended to clarify that the information may be given in any manner permitted by Section 232(a).

As indicated above, the foregoing amendments to Section 262 will be effective with respect to a merger or consolidation consummated pursuant to an agreement of merger or consolidation entered into on or after August 1, 2019.

Stockholder Consents

As part of the overall update to the provisions of the General Corporation Law dealing with electronic signatures and electronic transmissions, the 2019 Amendments effect several changes to Section 228(d), which currently governs the manner and circumstances under which stockholder consents may be delivered through electronic means. In 2000, Section 228(d) was amended to provide that a "telegram, cablegram or other electronic transmission consenting to an action to be taken and transmitted" by a stockholder or proxy holders (or authorized agent) "shall be deemed to be written, signed and dated" for purposes of Section 228, provided that the telegram, cablegram or other electronic transmission sets forth or is delivered with information from which the corporation can determine (x) that it was transmitted by the stockholder, proxyholder or authorized agent, and (y) the date on which the stockholder, proxyholder or agent transmitted it. Nevertheless, while the amendments to Section 228 adopted in 2000 essentially allowed for electronic transmissions to be used in connection with consent solicitations, subject to certain procedural requirements, they also specified that, unless the board of directors otherwise provides, consents delivered by electronic transmission may not be given directly to the corporation or its registered agent. Thus, Section 228(d)(1), as enacted in 2000 and currently in effect, requires that, unless the board otherwise provides, stockholder consents delivered by electronic transmission must first be reduced to paper form and delivered in such paper form to the corporation's registered office in Delaware, to its principal place of business, or to an officer having custody of its books. Thus, current Section 228(d)(1), by default, contemplates a consent solicitation in which stockholders provide consents by electronic transmission to an agent, which agent then reduces the consents to paper form and delivers them to the corporation as required by the statute, with the statutorily specified information.

The 2019 Amendments would overhaul the basic regime governing stockholder consents delivered by electronic transmission.

The 2019 Amendments would overhaul the basic regime governing stockholder consents delivered by electronic transmission. First, as with other provisions of the General Corporation Law, the 2019 Amendments will eliminate references to consents given by telegram and cablegram, using instead only the term "electronic transmission". Next, the 2019 Amendments will replace the provisions of Section 228(d)(1) requiring that, unless otherwise provided by the board, consents given by electronic means be reduced to paper form and delivered through traditional means with provisions that expressly allow for the delivery of consents by electronic transmission. Specifically, the 2019 Amendments will update Section 228(d)(1) to provide that a consent given by electronic transmission is delivered upon the earliest of: (1) the time the consent enters an information-processing system designated by the corporation for receiving consents (so long as the transmission is capable of being processed by the system and the corporation is able to retrieve it); (2) the time at which a paper reproduction of the consent is delivered to the corporation's principal place of business or the appropriate officer or agent; (3) the time at which a paper reproduction is delivered, by hand or certified or registered mail, to the corporation's registered agent in Delaware; or (4) the time at which it is delivered in any other manner authorized by the board.

© 2019 CCH Incorporated and its affiliates. All rights reserved.

As with Section 116, for purposes of determining whether the corporation has "designated" an information-processing system for the receipt of consents, revised Section 228(d)(1) looks to the certificate of incorporation, the bylaws or the context and surrounding circumstances, including the corporation's conduct. In addition, revised Section 228(d)(1) expressly provides that a consent is delivered even if no person is aware of its receipt. Thus, for example, no party will be able to disclaim the validity of a consent validly transmitted to the corporation's information-processing system by electronic transmission on the grounds that the corporation had failed to open the electronic mail or other transmission. Moreover, the receipt of an electronic acknowledgment from an information-processing system will establish that a consent was received, although it would not, in and of itself, establish that the content corresponds to the content received.

Director Consents

The 2019 Amendments will revise Section 141(f) of the General Corporation Law, which deals with director action by consent in lieu of a meeting, to clarify that the filing of the consent (whether in writing or by electronic transmission) to action by the board or any committee is not a condition precedent to the effectiveness of the action. Section 141(f) currently provides that, unless restricted by the certificate of incorporation or bylaws, any action required or permitted to be taken at a meeting of the board or any committee may be taken without a meeting if all members of the board or committee consent thereto in writing, or by electronic transmission, and the writing(s) or electronic transmissions are filed with the minutes of the proceedings of the board or committee. In practice, consents may be obtained from directors—and delivered to the corporation's secretary or outside counsel—and the action may be considered duly authorized before the consents are physically placed with the minute book.

To avoid the implication that an action taken by unanimous consent of directors in lieu of a meeting does not become effective until such time as the relevant instruments are so placed with the minute book, the 2019 Amendments will remove from the first sentence of Section 141(f) the requirement that the consents or electronic transmissions be filed with the minutes of the proceedings of the board or committee. The 2019 Amendments will add to the end of Section 141(f) a requirement that

> [a]fter an action is taken, the consent or consents relating thereto shall be filed with the minutes of the proceedings of the board of directors, or the committee thereof, in the same paper or electronic form as the minutes are maintained.

As the amendments to Section 141(f) are clarifying in nature, they should not, by negative implication or otherwise, give rise to the timing of effectiveness of actions taken by unanimous consent of directors before their adoption.

Incorporator Consents

Section 108(b) of the General Corporation Law, which deals with the principal matters within the power of incorporators (generally, the power to elect the initial board of directors and adopt the initial bylaws), are being amended to clarify that notice of an initial organization meeting may be given in writing or by electronic transmission. The 2019 Amendments also eliminate from Section 108(b) the express requirement that a waiver of that notice be signed. Instead, any such waiver may be given in the manner provided by Section 229, which permits waivers in writing and by electronic transmission. Finally, consistent with the 2014 amendments to Section 141(f) allowing for director consents to become effective at a future date, Section 108(c) is being amended to clarify that a consent of incorporator may become effective in the future in the same manner that a consent of directors may become effective.

Registered Agent Resignation; Revival of Certificate of Incorporation of Exempt Corporations

The 2019 Amendments will amend Section 136(a) to permit the registered agent of a Delaware corporation, including a corporation that has become void pursuant to Section 510 of Title 8 of the Delaware Code, to resign by filing a certificate of resignation. The amendments to Section 136(a) also will require the certificate to include the last known information for a communications contact provided to the resigning registered agent. The communications contact information will not be deemed public, and falls within the exception set forth in Section 10002(l)(6) of Title 29 of the Delaware Code to the definition of "public record" for purposes of the Freedom of Information Act.

In addition, the 2019 Amendments will revise Section 313(a) of the General Corporation Law, which deals with the revival of exempt corporations, to provide that Section 313 applies to an exempt corporation whose certificate of incorporation or charter has become forfeited pursuant to Section 136(b) for failure to obtain a registered agent.

Copyright © 2019 CCH Incorporated. All Rights Reserved.
Reprinted from *Insights*, April 2019, Volume 33, Number 4, pages 12–21,
with permission from Wolters Kluwer, New York, NY,
1-800-638-8437, www.WoltersKluwerLR.com