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CORPORATE LAW

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

The 2020 amendments to the Delaware General Corporation Law make several important changes, including clarifying the circumstances under which emergency bylaws may be invoked, providing safe harbors for specified corporate actions taken during an emergency condition, reducing the statutory hurdles to become a public benefit corporation, providing further definition around mandatory indemnification for officers and effecting other technical changes.

By John Mark Zeberkiewicz

On June 23, 2020, the Delaware General Assembly passed House Bill 341, an act to amend the General Corporation Law of the State of Delaware (DGCL). The legislation was signed by the Governor on July 16 2020. The amendments make several important changes to the DGCL, including clarifying the circumstances under which emergency bylaws may be invoked, providing safe harbors for specified corporate actions taken during the pendency of an emergency condition, reducing the statutory hurdles for a conventional corporation to become a public benefit corporation (and vice versa), eliminating some of the existing governance restrictions imposed on operating companies resulting from a statutory holding company reorganization, providing further definition around statutory-based mandatory indemnification for officers, clarifying the application of the safe harbor provisions for documents executed by electronic means, and effecting other technical changes. Except as specifically noted below, the 2020 amendments to the DGCL become effective when enacted into law.

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Emergency Bylaws

The COVID-19 pandemic precipitated a renewed focus on Section 110 of the DGCL, which currently authorizes the adoption of bylaws that become operative during any emergency resulting from an attack on the United States or on a locality in which the corporation conducts its business or holds meetings, or during any nuclear or atomic disaster, or during the existence of any catastrophe, or other similar emergency condition, that prevents a quorum of the

board from convening, and provides for the exercise of other emergency powers.[1] Section 110 was adopted in 1963, in the wake of the Cuban Missile Crisis, which likely accounts for the specific references to nuclear and atomic disasters.[2] The language of Section 110, however, is not expressly limited to such disasters, and emergency bylaws may become operative while other catastrophic or emergency conditions persist.

The 2020 amendments to the DGCL clarify the application, and expand the scope, of Section 110 in several key respects. First, the amendments clarify that "an epidemic or pandemic, and a declaration of a national emergency by the United States government," are among the catastrophes that may result in emergency bylaws becoming operative and allow for the exercise of emergency powers under Section 110. Second, the amendments dispense with the requirement that the specific catastrophe or emergency be one that prevents a quorum of the board from convening a meeting. Third, the amendments provide that emergency bylaws may be adopted by the board of directors or, if a quorum cannot be readily convened for a meeting, by a majority of the directors present.

The 2020 amendments make two significant changes to Section 110—one dealing with meetings of stockholders and the other dealing with dividends—that are directly attributable to fallout from the COVID-19 pandemic. As a result of government-ordered lockdowns and in view of public health and safety, many corporations determined it was necessary or advisable to switch from holding an annual meeting of stockholders at a physical location to a virtual meeting format, or to adjourn or postpone a previously called meeting. In many cases, the decision to change the format of the annual meeting, or to adjourn or postpone the meeting, gave rise to questions regarding whether the corporation would be required to mail a new notice of the meeting.

On April 6, 2020, the Governor of the State of Delaware issued the Tenth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat (Order) that sought to relax some of the notice requirements for public corporations that, before the date of the Order, had called a physical meeting and were seeking to switch to a virtual meeting format. The Order, however, was limited in scope and included a so-called savings clause that called into question its enforceability, and it did not address the multitude of issues that corporations were facing as they navigated calling and convening an annual meeting in the midst of a public health crisis.

Separately, many corporations that had declared dividends in the pre-pandemic era were seeking to conserve cash once it became clear that the pandemic was likely to have a severe economic toll on various industries and sectors. Those corporations, however, were forced to contend with case law indicating that the declaration of a dividend creates a debtor-creditor relationship between the corporation and the stockholders entitled to receive it. New Section 110(i) of the DGCL addresses both of these issues and provides safe harbor protection for specified actions taken under emergency conditions.

Section 110(i) provides that, during any emergency condition, the board may change the record date and payment date of any dividend that has been declared.

First, new Section 110(i) provides that, during any emergency condition, the board (or, if a quorum cannot be readily convened, a majority of the directors present) may take any action that it determines to be practical and necessary to address the circumstances of the emergency as it relates to a meeting of stockholders, regardless of any contrary provisions of the DGCL, the certificate of incorporation or bylaws. This includes postponing any such meeting to a later time or date (with the record date for determining

the stockholders entitled to notice of, and to vote at, such meeting applying to the postponed meeting) and, in the case of a public corporation, giving notice to stockholders of any postponement or change of the place of the meeting (or a change to hold the meeting solely by means of remote communication) 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 and the rules and regulations thereunder (Exchange Act). In addition to providing safe harbor protection with respect to notices, adjournments and postponements of stockholders' meetings, new Section 110(i) provides that no person shall be liable for, and no meeting of stockholders shall be postponed or voided due to, the corporation's failure to make a stocklist available pursuant to Section 219 of the DGCL if it was not practicable to allow inspection during any such emergency condition.

Second, Section 110(i) provides that, during any emergency condition, the board (or, if a quorum cannot be readily convened, a majority of the directors present) may change the record date and payment date of any dividend that has been declared, but whose record date has not yet occurred, to a later date or dates. In delaying the record date and payment date, the board (or majority of the directors) must ensure, consistent with Section 213(c), that the new payment date is within 60 days of the new record date. In all cases, the corporation must give notice of any change to the record date or payment date of a dividend to stockholders as promptly as practicable thereafter (and in any event before the applicable record date). In the case of a public corporation, the notice may be given solely by a document publicly filed under Sections 13, 14 or 15(d) of the Exchange Act.

It is important to recognize that Section 110(i) operates as a safe harbor provision for purposes of Delaware corporate law. Indeed, the synopsis to House Bill 341 makes clear that the amendments to Section 110 are

> not intended, by implication or otherwise, to limit or eliminate the availability of any powers or emergency actions that are not specifically enumerated with respect to stockholders' meetings, dividends, or other matters that are practical and necessary in connection with the particular emergency, or to affect the validity of any action taken in an emergency situation but not authorized by the amendments or taken in a non-emergency situation.

To this point, it should be noted that Section 110(i) does not address other issues that might arise as a result of a previously declared dividend, including the potential consequences that might arise if a board seeks to delay a record date or payment date after the shares have begun trading "ex-dividend." In addition, Section 110(i) does not alter or change any existing law that would preclude the payment of dividends under specified circumstances, including situations in which the corporation does not have sufficient "surplus" to make the payment.

In recognition of the disruption to ordinary corporate processes wrought by the COVID-19 pandemic, House Bill 341 provides that the amendments to Section 110 shall be effective retroactively as of January 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 the 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.

Public Benefit Corporations

The 2020 amendments to the DGCL make several significant changes to the statutory regime governing public benefit corporations. A public benefit corporation is a for-profit corporation that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable

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manner.[3] In furtherance of that purpose, public benefit corporations are to be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or benefits identified in the corporation's certificate of incorporation.[4]

When the concept of the public benefit corporation was first introduced to the DGCL, significant hurdles, largely in the form of super-majority stockholder votes and appraisal rights, were placed on any conventional corporation seeking to convert to a public benefit corporation, and vice-versa.[5] These statutory hurdles were considered to be important protections to stockholders due in large part to the differences between conventional corporations, the directors of which are charged with a duty to maximize value for the benefit of stockholders, and public benefit corporations, the directors of which are obligated to engage in a balancing of interests.

After a few years of experience with public benefit corporations, and with interest in sustainability and corporate environmental and social responsibility on the rise, questions arose as to the need for those statutory hurdles, particularly given that the DGCL is a flexible, enabling statute that is designed to allow corporations to implement the governance regime that best suits their particular needs. To that end, the 2015 amendments to the DGCL reduced the vote required to convert a conventional corporation to a public benefit corporation (and vice versa) and limited the circumstances in which appraisal rights would be available upon conversion to or from a public benefit corporation. The 2020 amendments continue this trend, further relaxing some of the barriers to converting to or from a public benefit corporation.

Elimination of Super-Majority Voting Rights

Section 363(a) of the DGCL currently provides that a corporation that is not a public benefit corporation may not, without the approval of two-thirds of the outstanding stock entitled to vote thereon, (1) amend its certificate of incorporation to include provisions resulting in its becoming a public benefit corporation, or (2) merge or consolidate with or into another entity if, as a result of the merger or consolidation, the shares of the corporation would become (or would be converted into or exchanged for the right to receive) shares or equity interests in a domestic or foreign public benefit corporation or similar entity.[6] In addition, Section 363(c) of the DGCL currently provides that a public benefit corporation may not, without the approval of two-thirds of its outstanding stock entitled to vote thereon, amend its certificate of incorporation to delete the provisions relating to its status as a public benefit corporation or merge or consolidate with another entity if, as a result, the shares of the public benefit corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in an entity that is not a public benefit entity.[7]

The 2020 amendments to the DGCL eliminate current Sections 363(a) and 363(c). As a result, the vote of stockholders required to amend the certificate of incorporation of a conventional corporation to become a public benefit corporation, as well as the vote required to amend the certificate of incorporation of a public benefit corporation to become a conventional corporation, will be the default vote required under Section 242(b) of the DGCL—that is, a majority of the outstanding stock entitled to vote thereon (along with any greater or additional vote of stockholders required under the certificate of incorporation). Likewise, the vote of stockholders required to approve a merger in which shares of capital stock of a conventional corporation are converted into shares of a public benefit corporation, as well as the vote required to approve a merger in which shares of a public benefit corporation are converted into shares of a conventional corporation, will be the default vote required under Section 251 or other applicable provision governing mergers—that is, a majority of the outstanding stock entitled to vote thereon (along with any greater or additional vote of stockholders required under the certificate of incorporation).

Appraisal Rights

Section 363(b) of the DGCL currently provides that any stockholder of a conventional corporation that holds shares of stock of the corporation immediately prior to the effective time of (1) an amendment to the corporation's certificate of incorporation that causes it to become a public benefit corporation, or (2) a merger or consolidation that would result in the conversion of the corporation's stock into or exchange of the corporation's stock for the right to receive shares in a public benefit corporation and who has not voted for such amendment or merger will be entitled to appraisal rights, subject to the "market out" exception.[8] In the case of private corporations, the existing provisions of Section 363(b) have the practical effect of severely restricting conversions to a public benefit corporation model, as few private corporations are willing to risk being subject to a liquidity event requiring an outlay of cash.

The 2020 amendments to the DGCL eliminate Section 363(b) in its entirety. (The 2020 amendments make conforming changes to Section 262, which governs the procedures for demanding and perfecting appraisal rights.) Following the amendment to Section 363(b), appraisal rights will no longer be automatically provided by statute as a result of an amendment of a certificate of incorporation that effectively converts a conventional corporation to a public benefit corporation. Nevertheless, 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 be determined in accordance with Section 262 of the DGCL; in many cases, appraisal rights will be triggered in such mergers.

Director Interest

The 2020 amendments to the DGCL make several changes in respect of the governance of public benefit corporations. To explain these changes, it is important to recite the existing statutory framework. Section 365(a) of the DGCL sets forth the duties of directors of a public benefit corporation, providing that the board shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation. Section 365(b) then provides that, for any decision implicating the "balancing requirement," a director will be deemed to have satisfied such director's fiduciary duties if such director's decision is informed and disinterested and not such that no person of ordinary, sound judgment would approve. Section 365(c), in turn, authorizes the certificate of incorporation of a public benefit corporation to include a provision that any disinterested failure to satisfy the provisions of Section 365 shall not, for purposes of Section 102(b)(7) of the DGCL (which generally exculpates directors against liability for monetary damages for breaches of the duty of care) or Section 145 (which governs rights to indemnification, subject, in specified cases, to the indemnitee having met specified standards of conduct), constitute an act or omission not in good faith or a breach of the duty of loyalty.

The 2020 amendments revise Section 365(c) in two key respects. First, the amendment clarifies that a director's ownership of or other interest in the stock of the public benefit corporation will not, of itself, create a conflict of interest on the part of the director with respect to any decision implicating the director's balancing requirements, except to the extent such ownership or other interest would create a conflict of interest if the corporation were a conventional corporation. Put differently, a stockholder generally will not be able to attack a director's balancing decision solely on the basis that the director owned stock in the public benefit corporation (and therefore presumably could be alleged to favor the pecuniary side of the balancing test). Second, the amendment revises Section 365(c) to provide that, absent a conflict of interest, no failure to satisfy the balancing requirement shall, for purposes of Section 102(b)(7) or

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Section 145 of the DGCL, constitute an act or omission not in good faith, or a breach of the duty of loyalty, *unless* the certificate of incorporation so provides. In other words, this latter revision to Section 365(c) provides, by statutory default, the protection available to directors of public benefit corporations that previously could be obtained only through a provision of the certificate of incorporation. Following the 2020 amendments, public benefit corporations seeking to divest directors of the protection afforded to their satisfaction of the balancing requirement must do so through the certificate of incorporation.

Suits to Enforce the Balancing Requirement

Section 367 currently governs the rights of stockholders to maintain derivative suits to enforce the statutory balancing requirements, setting forth minimum stock ownership thresholds for the plaintiffs, individually or collectively (currently fixed at 2 percent of the outstanding stock or, in the case of certain listed corporations, the lesser of 2 percent of such shares or shares with a market value of $2,000,000).[9] The 2020 amendments revise Section 367 to clarify that any action to enforce the balancing requirement (including any individual, derivative or other type of action) to which a public benefit corporation is subject must be brought by one or more plaintiffs owning individually or collectively at least 2 percent of the corporation's outstanding shares or, in the case of certain listed corporations, the lesser of 2 percent of the corporation's shares or shares with a value of at least $2,000,000.

Effective Time of Amendments

The amendments effecting the repeal of Section 363(b)(2), and the corresponding amendments to Section 262 described above, are effective only with respect to a merger or consolidation consummated pursuant to an agreement entered into, or, with respect to a merger consummated pursuant to Section 253, resolutions of the board of directors adopted, on or after their enactment. Because Section 262 of the DGCL requires that a current copy of that section be included with a notice of appraisal rights, corporations and practitioners preparing disclosure documents for a merger or consolidation are reminded to confirm the enactment date of House Bill 341 to ensure that they include in such notices the correct version of Section 262.

Holding Company Reorganization Mergers

Section 251(g) of the DGCL allows a corporation to effect a so-called holding company reorganization merger without the need to obtain a vote of its stockholders, subject to compliance with specified conditions and procedures.[10] In general, to effect a holding company reorganization under Section 251(g), an existing operating corporation first establishes a wholly-owned subsidiary corporation, which eventually will become the new holding company. That first subsidiary corporation then establishes a wholly-owned merger subsidiary, which may either be a Delaware corporation or Delaware limited liability company. The merger subsidiary is then merged with or into the original operating corporation. In the merger, all of the shares or equity interests in the merger subsidiary outstanding prior to the merger are converted into all of the shares or equity interests of the surviving entity, and all of the shares of the original operating corporation outstanding prior to the merger are converted into shares of the new holding company. The end result is that the stockholders of the original operating company become stockholders of the new holding company, which owns all of the equity of the operating company.

Section 251(g) currently provides that the provisions of the organizational documents of the surviving entity in a merger under that subsection must be identical to the provisions of the certificate of incorporation of the original operating corporation immediately prior to the merger, subject to limited exceptions. In many cases, the provisions of the certificate of incorporation of the original operating corporation, which is often a public

corporation with widely-held stock, make little sense in the context of corporation that will be managed as a wholly-owned subsidiary in a holding company structure. Moreover, in cases where the operating company that emerges from the reorganization is to be a limited liability company, it often is difficult to recreate the provisions of the original operating corporation's certificate of incorporation in the form of a limited liability company agreement.

The 2020 amendments to Section 251(g) eliminate the requirement that the provisions of the organizational documents of the surviving entity in a reorganization merger under that subsection be identical to those of the original operating company as of immediately prior to the merger. The amendments to Section 251(g), however, do not disturb the existing requirement 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 original operating company immediately prior to the merger, would have required stockholder approval. In addition, Section 251(g) will continue to provide, following the 2020 amendments, that the business and affairs of a surviving entity that is not a corporation must be managed by or under the direction of a board of directors, board of managers or other governing body consisting of individuals who are subject to the same fiduciary duties applicable to, and who are liable for breach of such duties to the same extent as, directors of a Delaware corporation.

The 2020 amendments to Section 251(g) are effective with respect to agreements of merger consummated pursuant to an agreement entered into on or after their enactment into law.

Indemnification

The 2020 amendments make certain changes to the provisions of the DGCL governing rights to indemnification.

Mandatory Indemnification by Statute

Section 145(a) of the DGCL generally provides that a corporation may indemnify its directors, officers, employees, agents and other persons against expenses, judgments, fines and amounts paid in settlement arising out of specified actions, suits or proceedings (other than those brought by or in the right of the corporation).[11] Section 145(b) generally permits a corporation to indemnify those parties against expenses they incur in connection with actions brought by or in the right of the corporation.[12] Those permissive rights to indemnification under subsections (a) and (b) of Section 145 may be made mandatory by a provision of the certificate of incorporation, the bylaws, agreement or through other means. In either case, however, a person asserting a claim to indemnification under subsection (a) or (b) of Section 145 generally must establish that such person has met the so-called "standard of conduct"—that he or she acted in good faith and in a manner in or not opposed to the best interests of the corporation and, with respect to any criminal action or proceeding, had no reason to believe that his or her conduct was unlawful.[13] Section 145(d) then specifies the manner in which such standard of conduct determination must be made with respect to persons who are directors or officers of the corporation at the time of the determination.[14]

Section 145(c) of the DGCL, however, currently requires the corporation to indemnify its present and former directors and officers against expenses they incur in connection with any action, suit or proceeding if they are successful (on the merits or otherwise) in defending any action, suit or proceeding for which the corporation may indemnify them under subsections (a) or (b) of Section 145, regardless of whether such rights have been granted under the certificate of incorporation or bylaws, any agreement or through other means and without any need for a determination as to whether the officer or director has met the standard of conduct.[15] Currently, Section 145(c) does not define

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the "officers" to whom such mandatory rights to indemnification must be provided.

The 2020 amendments revise Section 145(c) to add a new clause (1), which preserves the existing text of Section 145(c) and adds a new sentence providing that, for indemnification with respect to any act or omission occurring after December 31, 2020, references to "officer" for purposes of Section 145(c), shall mean only a person who at the time of such act or omission is deemed to have 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.[16] Thus, by reference to Section 3114(b), the "officers" entitled by statutory default to mandatory indemnification under Section 145(c) are: (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 public filings as one of the most highly compensated officers of the corporation; 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) (all such officers, "3114 Officers").[17]

The 2020 amendments then add a new clause (2) to Section 145(c), which provides that the corporation *may* indemnify any other person who is not a present or former director or officer against expenses (including attorney fees) actually and reasonably incurred by such person to the extent he or she has been successful on the merits or otherwise in defense of any action, suit or proceeding identified in subsections (a) or (b) of Section 145. Following the effectiveness of the amendments to Section 145(c), if a corporation has officers that, although appointed pursuant to the bylaws, do not qualify as 3114 Officers (Non-3114 Officers), those Non-3114 Officers will not be entitled, by statutory default, to mandatory indemnification under Section 145(c) with respect to acts or omissions occurring after December 31, 2020. (The Non-3114 Officers should, however, remain entitled to the statutory protection under Section 145(c) with respect to acts or omissions occurring before December 31, 2020.) Although new Section 145(c)(1) narrows the scope of covered persons, new Section 145(c)(2) makes clear that corporations may provide Non-3114 Officers (along with other indemnifiable persons) the same basic protection that is granted to directors and 3114 Officers under new Section 145(c)(1).

In light of these changes, corporations should review the provisions of their certificates of incorporation and bylaws dealing with indemnification and advancement to ensure that they meet the corporation's objectives. In this regard, it is important to consider the amendments to Section 145(c) in light of the opinion of the Court of Chancery in *Zaman v. Amedeo Holdings*.[18] In *Zaman*, the Court was called on to construe a bylaw providing that the corporation

> shall indemnify and hold harmless, to the fullest extent permitted by applicable law . . . any person who was or is made or is threatened to be made a party or is otherwise involved in any threatened, pending, or completed action, suit, or proceeding . . . by reason of the fact that he, or a person for whom he is the legal representative, is or was a director or officer of the corporation or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation or of a partnership . . . against all liability and loss suffered and expenses (including attorneys' fees) reasonably incurred by such indemnitee,

to determine whether agents serving at the corporation's request were entitled to mandatory indemnification under Section 145(c) by virtue of that bylaw. The Court stated:

> Under § 145(c), mandatory indemnification for success is not required as to an agent, only as to "a present or former director or officer of a corporation." But, § 6.1 [of the bylaws] contractually obligates the defendants to

> indemnify an agent serving at their request at another corporation to the full extent permitted by Delaware law. Therefore, as a contractual matter, if the [agent-indemnitees] acted in an indemnifiable capacity, the defendants must indemnify if § 145(c) would authorize them to do so if the [agent-indemnitees] were directors or officers. The reason why is simple: if Delaware law mandates indemnity for success by a director or officer, a corporation is not prohibited by Delaware law from providing indemnity to an agent who was successful. Having promised to indemnify persons they ask to serve as agents of other corporations to the fullest extent permitted by Delaware law, the defendants are bound if a person is sued in an indemnifiable capacity and is successful.[19]

Thus, in cases where the corporation has bound itself, through its certificate of incorporation or bylaws, to provide mandatory indemnification, to the fullest extent permitted by law, to its "officers," without further qualification or conditions, the corporation likely would be required to extend such protection to all those persons who serve as officers pursuant to its bylaws, including any Non-3114 Officers. The changes to Section 145(c), however, would be expected to affect the protections of Non-3114 Officers not party to separate indemnification contracts in cases where: (i) the corporation's certificate of incorporation and bylaws contain no provisions extending rights to indemnification (or contain provisions that are entirely permissive); (ii) the corporation's certificate of incorporation or bylaws contain provisions that extend mandatory rights to indemnification to "officers" but clearly subject to the officers' entitlement to indemnification to a standard of conduct determination; or (iii) the corporation's certificate of incorporation or bylaws narrowly define the class of officers entitled to mandatory indemnification such that it includes only 3114 Officers.

The language in new Section 145(c)(1) does not define who qualifies as an "officer" for purposes of the provisions outside of subsection (c), and new subsection 145(c)(2) allows for the extension of mandatory indemnification of expenses under Section 145(c) to persons other than "officers" (as that term is used and defined in Section 141(c)(1) (*i.e.*, 3114 Officers)). Thus, corporations that want to specify the universe of "officers" to whom they wish to provide mandatory rights to advancement of expenses or to provide mandatory rights to indemnification under subsections (a) or (b) of Section 145 may wish to consider adopting express provisions clarifying which parties constitute officers for those purposes. In considering these matters, corporations also may want to consider whether to make clear that employees bearing officer-like titles (*e.g.*, Vice President) but who are not "officers" appointed pursuant to the bylaws should be excluded expressly from any structural mandatory indemnification and advancement rights provided to "officers."[20]

Corporations may wish to consider adopting express provisions clarifying which parties constitute officers.

Continued Application of Indemnification and Advancement Provisions

Section 145(f) prohibits the elimination or impairment of a right to indemnification or to advancement by an *amendment* to the certificate of incorporation or the bylaws after the occurrence of the act or omission that is the subject of the civil, criminal, administrative or investigative action, suit or proceeding for which indemnification is sought, unless the provision in effect at the time of the act or omission expressly authorizes such elimination or impairment after such act or omission has occurred. The 2020 amendments to the DGCL clarify that the prohibition against divesting such rights applies to an amendment to or

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repeal or elimination of the certificate of incorporation and bylaws.

Exculpatory Clauses

Section 102(b)(7) of the DGCL provides that a corporation may, through the adoption of a provision of its certificate of incorporation, limit or eliminate the liability of a director for monetary damages to the corporation or its stockholders for breach of fiduciary duty, other than liability stemming from any breach of the duty of loyalty, acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, illegal dividends or share repurchases or redemptions, and any transaction from which the director receives an improper personal benefit.[21] In many cases, corporations that adopt so-called "102(b)(7) provisions" expressly state in their certificate of incorporation that, if the provision is later modified or amended to reduce or eliminate the protection afformed to directors, the modification or amendment will not apply to acts or omissions that occurred prior to that modification or amendment.

The 2020 amendments to the DGCL codify this not uncommon practice, unless the corporation elects otherwise in its 102(b)(7) provision. The amendments to Section 102(b)(7) thus clarify that an exculpatory provision has the effect of eliminating or limiting a director's liability for monetary damages with respect to any acts or omissions occurring while the exculpatory provision is in effect. Unless the corporation's 102(b)(7) provision provides otherwise at the time of such act or omission, any future amendment, repeal or elimination of the 102(b)(7) provision will not revoke the elimination or limitation of liability with respect to acts or omissions occurring while it is in effect.

Electronic Transmissions and Notices

Electronic Signatures, etc.

In 2019, Section 116 was added to the DGCL to provide, among other things, a non-exclusive safe harbor for the execution and delivery of documents contemplated by the DGCL.[22] In general, Section 116(a) broadly enabled the use of electronic signatures and electronic transmissions for the execution and delivery of documents, while Section 116(b) carved out various classes and categories of documents and instruments that would not be covered by the safe harbor provisions of Section 116(a).[23] In some cases, specific classes of documents and instruments, such as board and stockholder consents, were carved out of the safe harbor provision of Section 116(a) on the basis that separate statutes (*e.g.*, Section 141(f), in the case of board consents, and Section 228, in the case of stockholder consents) already addressed the manner in which those documents and instruments could be executed and delivered through electronic means. Nevertheless, to provide additional clarity, the 2020 amendments to the DGCL revise Section 116 in a few technical respects to confirm the validity of the use of electronic signatures and transmissions for the execution and delivery of various documents and instruments.

First, the amendments to Section 116(a)(2) clarify that a person may "execute" a document (such as agreements of merger and other documents that require execution under the DGCL) by using any type of signature contemplated by Section 116(a)(2), which includes both "wet ink" signatures and electronic signatures. Second, the amendments to Section 116(b) clarify that the Section 116(a) safe harbor may be relied upon 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.

In connection with the amendments to Section 116, conforming changes are being made to several other provisions of the DGCL. Section 108(c) of the DGCL is being revised to permit an incorporator or initial director to rely on Section 116 as a basis to document, sign and deliver a consent by electronic means, unless the use of Section 116 is expressly restricted or prohibited by the certificate of incorporation. Section 141(f) of the DGCL is being

amended to reflect that directors may rely on Section 116 as a basis to document, sign and deliver a consent by electronic means, unless expressly restricted or prohibited by the certificate of incorporation or bylaws. The 2020 amendments add a new subsection (c) to Section 212, which deals with proxies, to clarify that a stockholder may rely on Section 116 as a basis to document a proxy and to sign and deliver a document evidencing the proxy, unless restricted or prohibited by the certificate of incorporation or bylaws.

Directors may rely on Section 116 as a basis to document, sign and deliver a consent by electronic means.

Finally, Section 228 of the DGCL, which governs stockholder action by consent in lieu of a meeting, is being revised in several respects to reflect that consents may be executed and delivered in accordance with Section 116, unless the certificate of incorporation or bylaws expressly restrict or prohibit consents from being so documented, signed or delivered, and to harmonize the provisions dealing with the execution and delivery of consents in writing or by electronic transmission. Notably, these conforming amendments are designed to confirm the application of the safe harbor provisions of Section 116 to consents and instruments that were previously capable of being executed and delivered through electronic means by reference to other statutory provisions; the amendments should not be used as a basis to call into question the validity of board or stockholder consents otherwise given in conformity with the DGCL prior to the enactment of Section 116(a) or the 2020 amendments.

Notices to Stockholders

When Section 116 was added to the DGCL in 2019, corresponding amendments to Section 232 of the DGCL were made to address the manner in which notices could be given to stockholders.[24] Before the 2019 amendments, Section 232 provided that notices would be deemed given by various means of electronic transmission so long as the stockholder had consented to receive notice through such means. A key objective of the 2019 amendments was to dispense with the need for the corporation to receive consent from stockholders to deliver notice to them by electronic mail. Thus, in 2019, Section 232(a) was amended to specify that the corporation could give notice in writing and that such notices "shall be given" when given by mail, courier service or electronic mail in the manner provided in that subsection. Section 232(b), as amended in 2019, continued to provide that, without limiting the manner in which notice could otherwise be given, notice could be given by "a form of electronic transmission consented to by the stockholder to whom the notice is given."[25] Although the consent requirement for notices by electronic transmission in Section 232(b) was never intended to override the specific authority to give notice by electronic mail pursuant to Section 232(a),[26] the continuing reference to a notice by "electronic transmission"—which includes electronic mail—in Section 232(b) arguably created some ambiguity. To eliminate any doubt as to whether notices to stockholders may be given by electronic mail without the need for their consent, the 2020 amendments revise Section 232(a) so that it states expressly that a corporation may give a notice by electronic mail in accordance with Section 232(a) without obtaining the consent required by Section 232(b).

Other Amendments

Corporate Name

In 2019, the Delaware Limited Liability Company Act was amended to introduce the concept of "registered series" of a limited liability company. Different from a "protected series," a registered series is intended to qualify as a registered organization under the Uniform Commercial Code (UCC) and, accordingly, its formation requires the filing of

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a certificate of registered series with the Delaware Secretary of State. At that time, Section 102(a) of the DGCL was amended to provide that the name of a corporation must be distinguishable from the name of a registered series of a limited liability company on file with the Delaware Secretary of State. As corresponding amendments to the Delaware Revised Uniform Partnership Act are scheduled to become effective in 2020, Section 102(a) is likewise being amended to provide that the name of a corporation must be sufficiently distinguishable from the name of a registered series of a limited partnership on file with the Delaware Secretary of State.

Provisions Relating to the Delaware Secretary of State

Section 135 of the DGCL, which deals with the resignation of a registered agent and the appointment of a successor registered agent, is being amended to eliminate the requirement that the Secretary of State issue specified certificates upon such an appointment, consistent with its current practices. Section 266 of the DGCL, which deals with a conversion of a corporation to another entity, is also being amended to reflect the current practice of the Secretary of State relating to the issuance of a certified copy of a certificate of conversion to a non-Delaware entity. Section 377(b) of the DGCL is being amended to conform the process relating to the resignation of a registered agent of a foreign corporation to the process applicable to the resignation of a registered agent of a corporation under Section 136. Finally, Section 391(a)(16) of the DGCL is being amended to include the maximum fee payable to the Secretary of State for a written report of a record search.

Conclusion

The 2020 amendments to the DGCL make several important changes, continuing Delaware's commitment to updating its corporate law annually to address issues affecting corporations and practitioners.

Notes

1. 8 *Del. C.* § 110.
2. *See* 1 David A. Drexler et al., *Delaware Corporate Law and Practice* § 9.07, at 9-21 (2019 Supp.).
3. 8 *Del. C.* § 362(a).
4. *Id.*
5. *See* William J. Haubert, John Mark Zeberkiewcz & Brigitte Fresco, "Significant Proposed Amendments to the General Corporation Law of the State of Delaware," *Insights*, June 2013, at 7.
6. 8 *Del. C.* § 363(a).
7. *Id.* § 363(c).
8. *Id.* § 363(b). The "market out" exception generally provides that appraisal rights are not available for holders of shares listed on a national securities exchange or held of record by more than 2,000 holders, unless, in the case of a merger, the holders are required to accept anything other than shares listed on a national securities exchange or held of record by more than 2,000 holders. *Id.*
9. *Id.* § 367.
10. *Id.* § 251(g).
11. *Id.* § 145(a).
12. *Id.* § 145(b).
13. *Id.* §§ 145(a), 145(b).
14. *Id.* § 145(d).
15. *Id.* § 145(c).
16. 10 *Del. C.* § 3114(b). Although Section 3114(b) does not apply to residents of Delaware, given that they are already subject to personal jurisdiction, new Section 145(c)(1), as amended, treats Delaware residents as if they were non-residents to ensure that persons who hold the officer positions identified in Section 3114(b) are entitled to indemnification, whether or not they are Delaware residents.
17. *Id.*
18. Zaman v. Amedeo Holdings, 2008 WL 2168397 (Del. Ch. May 23, 2008).
19. *Id.* at *16.
20. *See generally* Aleynikov v. The Goldman Sachs Group, Inc., C.A. No. 10636-VCL (Del. Ch. July 13, 2016) (observing, in *dicta*, that the doctrine of *contra proferentem* could be used to construe the provisions of the corporation's

bylaws granting mandatory rights of indemnification and advancement to "officers" for purposes of determining whether a non-employee with the title "Vice President" may be entitled to such rights as an officer).

21. 8 *Del. C.* § 102(b)(7).
22. John Mark Zeberkiewicz, Brigitte Fresco, and Robert G. Greco, "2019 Proposed Amendments to the General Corporation Law of the State of Delaware," *Insights*, April 2019, at 2–5.
23. 8 *Del. C.* § 116.
24. *See* Zeberkiewicz, et al. at *supra* n. 22 at 6.
25. *Id.*
26. *Id.* ("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.").

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