

Client Alert

April 2020

Proposed Amendments to Delaware Law That Would Allow Corporations to Postpone Annual Meetings in Light of COVID-19 Pandemic May Undermine Stockholder Democracy

Certain factions within the Delaware State Bar Association ("DSBA") are attempting to fast track legislation that would allow corporations incorporated in Delaware to postpone their annual meetings of stockholders in light of the COVID-19 public health threat. While these groups' actions appear well intentioned, we have significant concerns that the proposed amendment to the statute, as currently drafted, could be abused by corporations looking to postpone their annual meetings and avoid being held accountable to stockholders under the pretense that such a delay is required due to COVID-19.

Section 110 of the Delaware General Corporation Law ("DGCL") requires Delaware corporations to hold annual meetings of stockholders. Many publicly traded Delaware corporations provided notice of their annual meetings to stockholders prior to the escalation of the COVID-19 pandemic or may be required to hold their annual meetings at a future date when the dangers imposed by COVID-19 will have not yet subsided. Due to the possibility that Delaware corporations may need emergency relief from their obligations to hold annual meetings under the DGCL in order to promote the safety of meeting participants, we understand that the DSBA Executive Committee has been asked to adopt a resolution in the coming days that will advocate to the Delaware General Assembly for immediate consideration of certain emergency amendments to Section 110 related to the authority of boards of directors of Delaware corporations to adopt emergency bylaws and to take certain actions relating to annual meetings during emergency conditions such as those created by the COVID-19 pandemic.

Under Section 110(a), the board of any Delaware corporation may adopt emergency bylaws which, notwithstanding any different provision that may be present elsewhere in the DGCL or in the charter or bylaws of the corporation, *will be operative during any emergency resulting from an attack on the United States, during any nuclear or atomic disaster or*

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during the existence of any catastrophe or similar emergency, “as a result of which” a quorum of the board cannot readily be convened for action. Under the draft legislation most recently circulated by DSBA leadership, Section 110(a) would be amended to, among other things, clarify that the types of events that give rise to the availability of these emergency powers could include “an epidemic or pandemic, and a declaration of a national emergency by the United States government.”

Of greater concern, under the draft legislation, Section 110(a) would be amended to strike the language “as a result of which” within the provision italicized above and to replace it with “irrespective of whether.” This would eliminate the requirement for a causal link between the emergency and an inability to convene a quorum for board action, thus potentially empowering a board minority with the power of the full board without suitable justification.

In addition, Section 110 of the DGCL would be amended by adding a new subsection (i) specifically providing that during any emergency condition contemplated by Section 110(a), the board (or, if a quorum cannot be readily convened for a meeting, a majority of the directors present) may:

- take any action that it determines to be practical and necessary to address the circumstances of such emergency condition with respect to a meeting of stockholders notwithstanding anything to the contrary in the DGCL or in the charter or bylaws, including, but not limited to,
 - to postpone any such meeting to a later time or date (with the record date for such meeting applying to the postponed meeting irrespective of Section 213 of the DGCL), and
 - with respect to a corporation subject to the SEC reporting requirements under the Securities Exchange Act of 1934, as amended (“Exchange Act”), to notify stockholders of any postponement or a 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 SEC pursuant to the applicable Exchange Act rules.

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New Section 110(i) would also provide that no person will be liable, and no meeting of stockholders will be postponed or voided, for the failure to make a stockholder list available pursuant to Section 219 of the DGCL if it was not practicable to allow inspection during any such emergency condition.

The DSBA Executive Committee's resolution would also approve the submission to Governor Carney's counsel a draft executive order that the Governor could, if he so chooses, execute to temporarily accomplish some of the same results contemplated by the proposed amendments to Section 110 of the DGCL.

While these are unprecedented times and ensuring the health and safety of all meeting participants should be the highest priority, the proposed amendments have far-reaching implications for stockholders and their ability to exercise their ultimate form of corporate democracy that we believe require more careful consideration by DSBA leadership. In order to reduce the likelihood of unscrupulous boards invoking these rules for entrenchment purposes, any amendment to Section 110 should preserve the language requiring a causal link between the emergency and an inability to convene a quorum for board action and contain other features that protect the interests of stockholders.

For example, if an emergency is declared, corporations should not have the ability to postpone their annual meetings indefinitely. Any amendment should explicitly require the corporation to reschedule its meeting to be held within a set number of days (e.g., 30 days) following the official cessation of the emergency. Any amendment should also require that the corporation hold a virtual meeting rather than hold out for an in-person meeting if the emergency persists for an extended period of time specified in the statute. In addition, it may be appropriate for any amendment to require the corporation to set a new record date in the event of an extended postponement.

We are hopeful that DSBA leadership will resist the urge to rush this proposed legislation and bypass the formalities normally associated with carefully formulating and recommending these types of statutory amendments given the concerns discussed above.

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Please contact the Olshan attorney with whom you regularly work or one of the attorneys listed below if you would like to discuss further or have questions.

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