

Memorandum

Keeping the Machine Running Part Two: Emergency Bylaw Provisions Under Delaware Law

March 30, 2020

With the coronavirus disease 2019 (“COVID-19”) pandemic and the recent widespread transition to remote work arrangements, many public companies are facing novel questions on how to properly conduct common corporate activities remotely, including board actions, SEC filings and contracts. Our previous [memorandum](#) provided a brief summary of key considerations as to how companies may be able to continue to function in an era where in-person interaction is not possible. However, telephonic board meetings and electronic written consents are only useful when a quorum of or all directors, respectively, are available. What can a company do when a board or board committee cannot achieve a quorum or act by written consent because one or more directors are unreachable during the existence of a catastrophe or other similar emergency condition such as the COVID-19 pandemic?

Emergency Bylaws

- Under Section 110 of the Delaware General Corporation Law (“Section 110”), the board of directors of a Delaware corporation may adopt emergency bylaws, subject to repeal or change by action of the stockholders, 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 customarily holds meetings of its board of directors or its stockholders, or during any nuclear or atomic disaster, or during the existence of any catastrophe, or other similar emergency condition, as a result of which a quorum of the board of directors or a standing committee thereof cannot readily be convened for action.
- The emergency bylaws are permitted to include any provision that may be practical and necessary for the circumstances of the emergency, including provisions that:
 - A meeting of the board of directors or a committee thereof may be called by any officer or director in such manner and under such conditions as shall be prescribed in the emergency bylaws;
 - The director or directors in attendance at the meeting, or any greater number fixed by the emergency bylaws, shall constitute a quorum; and
 - The officers or other persons designated on a list approved by the board of directors before the emergency, all in such order of priority and subject to such conditions and for such period of time (not longer than reasonably necessary after the termination of the emergency) as may be provided in the

emergency bylaws or in the resolution approving the list, will, to the extent required to provide a quorum at any meeting of the board of directors, be deemed directors for such meeting.

- Section 110 also provides that:
 - Unless otherwise provided in emergency bylaws, notice of any meeting of the board of directors during such an emergency may be given only to such of the directors as it may be feasible to reach at the time and by such means as may be feasible at the time;
 - The board of directors, either before or during any such emergency, may provide, and from time to time modify, lines of succession in the event that during such emergency any or all officers or agents of the corporation shall for any reason be rendered incapable of discharging their duties; and
 - No officer, director or employee that acts in accordance with any emergency bylaws will be subject to liability, except for willful misconduct.

Action Items

- In light of the current COVID-19 pandemic, Delaware corporations that are concerned that director unavailability may impede their ability to act by written consent or obtain a quorum for board and committee meetings may wish to consider adopting emergency bylaws.
- Since the certificate of incorporation of most Delaware corporations provides that the corporation's board of directors can amend its bylaws without prior stockholder approval, emergency bylaws can generally be adopted swiftly.
- A Form 8-K describing the emergency bylaws would need to be filed within four business days of adoption.

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