

## **Amendments to Delaware Corporate Statute May be Helpful to Companies Coping With COVID-19**

The COVID-19 pandemic has given rise to a wide variety of issues for companies dealing with the impact of the resulting lockdowns, layoffs, deteriorating economic conditions, and other consequences. In July 2020, the Delaware legislature passed certain amendments (the “2020 Amendments”) to the Delaware General Corporations Law (the “DGCL”) that may help both public and private Delaware corporations cope with the pandemic.<sup>1</sup> These amendments expand the availability of emergency bylaws and permit more flexibility in postponing stockholders’ meetings and moving dividend record and payment dates.

### **I. Emergency Bylaws**

Before the 2020 Amendments, Section 110(a) of the DGCL permitted boards of directors of Delaware corporations to adopt emergency bylaws during the “existence of any catastrophe or other similar emergency condition” but only if a quorum of the full board could not be convened. Emergency bylaws could be adopted to address matters that may be “practical and necessary for the circumstances of the emergency.”

The 2020 Amendments amend Section 110(a) in three respects:

- to clarify that the circumstances in which the emergency bylaw provisions apply (an “Emergency Condition”) include (without limitation) an “epidemic or pandemic, and a declaration of national emergency” by the federal government;
- to eliminate the requirement that a quorum of the board be unable to convene for the provisions to be applicable; and
- to specify that an emergency bylaw can be adopted by the full board or, if a quorum cannot be convened, a majority of the directors present (the “Minimum Required Vote”).

### **II. Meetings of Stockholders**

Many companies, particularly publicly-traded ones, faced enormous challenges relating to the convening, postponing, and ultimately holding meetings of stockholders during the most recent annual stockholders meeting season. A variety of remedial efforts were made by government agencies (such as the Securities and Exchange Commission (the “SEC”)),<sup>2</sup> governors (including Governor Carney of Delaware),<sup>3</sup> and others, but these efforts fell short in certain ways now addressed in the 2020 Amendments by the addition of new Section 110(i) of the DGCL.

New Section 110(i) provides, in the event of an Emergency Condition, the board of a Delaware corporation may, by Minimum Required Vote, take “any action that it determines to be practical and necessary” to address how such Emergency Condition is impacting a meeting of the corporation’s stockholders, notwithstanding any otherwise then applicable provisions or the DGCL or the corporation’s charter or bylaws, including (without limitation):

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<sup>1</sup> House Bill No. 341, embodying these amendments, can be found [here](#). Unless otherwise specified, all quotations in this memorandum are taken from the House Bill.

<sup>2</sup> Our previous memorandum regarding the SEC’s efforts in this regard, entitled “*SEC Staff Provides Guidance For Conducting Annual Meetings in Light of COVID-19*,” can be found [here](#).

<sup>3</sup> See the “*Tenth Modification of the Declaration of the State of Emergency for the State of Delaware Due to a Public Health Threat*,” which can be found [here](#).

- postponing the meeting to a later date (while maintaining the record date for such meeting); and
- for public companies, notifying the corporation’s stockholders of any such postponement, any change of venue, or any change to make such a meeting “virtual only,” exclusively by means of a document publicly filed with the SEC.

### III. Dividends

The pandemic also has created challenges for companies paying or considering paying dividends, only to have their financial results dramatically and negatively impacted by the pandemic.<sup>4</sup> New Section 110(i), included in the 2020 Amendments, addresses one of these issues by allowing a board, during an Emergency Condition and by Minimum Required Vote, to move either or both the record and payment date of a dividend that has been declared, provided the record date has not yet occurred (while maintaining the requirement that the payment date not be over 60 days after the record date). If any such change in dates occurs, the corporation must notify its stockholders of the change “as promptly as practicable thereafter” and, in any event, before the original record date. As with Section 110(i)’s provisions regarding meetings of stockholders described above, for public companies, the notice of any such change in record or payment dates may be given exclusively by means of a document publicly filed with the SEC.

### IV. Conclusion

In considering the 2020 Amendments and evaluating their applicability to a given corporation or situation, here are three additional points to bear in mind:

- The 2020 Amendments are, both by their terms and as made clear in the Synopsis accompanying them, to be thought of as safe harbors and are not intended “by implication or otherwise, to limit or eliminate the availability of any powers or emergency actions that are not specifically enumerated.”
- The provision of Section 110 giving it effect “notwithstanding any different provision elsewhere” in the DGCL, a corporation’s charter or its bylaws (which predates the 2020 Amendments and is repeated in new Section 110(i)) remains unchanged.
- The 2020 Amendments are effective retroactively to January 1, 2020 with respect to any actions of the type addressed in the Amendments taken with respect to a then pending or subsequently occurring Emergency Condition.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Geoffrey E. Liebmann at 212.701.3313 or [gliebmann@cahill.com](mailto:gliebmann@cahill.com); or Eboney J. Hutt at 212.701.3259 or [ehutt@cahill.com](mailto:ehutt@cahill.com); or email [publications@cahill.com](mailto:publications@cahill.com).

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<sup>4</sup> Our previous memorandum regarding certain of the issues arising from the payment of dividends during the pandemic, entitled “*Suspension of Dividend Payments and COVID-19*,” can be found [here](#).