BCLP. Client Intelligent

BCLPSecCorpGov.com

EMERGENCY BYLAWS - CONSIDERATIONS IN LIGHT OF THE COVID-19 PANDEMIC AND BEYOND

Jun 15, 2020

Among the many previously hypothetical concerns for companies that became actualized, or threatened to become actualized, during the height of the COVID-19 pandemic was the prospect of multiple members of the board or senior management becoming incapacitated due to serious illness.

With an average age of S&P 500 directors hovering around 63 according to recent surveys, many public company directors fall within the higher risk age ranges for more severe COVID-19 complications. This heightens the concern that the board and/or its committees may not be able to comply with, among other things, the quorum requirements in the company's bylaws or pursue action by unanimous written consent due to sustained periods where multiple directors are incapacitated.

Emergency Bylaws as Potential Remedy:

One potential way to address this concern is through the adoption of so-called "emergency bylaw" provisions. State law will, of course, govern whether and what types of emergency bylaw provisions may be available. Based on a recent review of S&P 500 company filings, approximately 22% of such companies have adopted emergency bylaw provisions in some form, and approximately 1% have adopted specific emergency bylaw provisions in the last 120 days, presumably in the context of the COVID-19 pandemic.

Delaware law, specifically Section 110 of the Delaware General Corporation Law (the "DGCL"), allows for such emergency-related bylaw provisions. Section 110(a) of the DGCL has a distinct Cold War flavor, appropriate to the time it was adopted. It provides that the board may adopt emergency bylaws, subject to repeal or change by action of the stockholders, during an emergency that prevents a quorum of the board or a committee from being readily achieved, which would be "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."

Delaware emergency bylaws or other applicable state law may provide for flexibility on, among other matters:

- who may call board and committee meetings (including any officer or director) and the manner of notice;
- modified quorum requirements (e.g., any director or directors in attendance constituting a quorum);
- establishing before the emergency certain officers attending meetings being deemed directors for purposes of constituting a quorum, subject to such conditions or limitations as provided in such bylaws or resolution;
- establishing lines of succession among officers; and
- changing the headquarters or providing for one or more alternative headquarters.

Regardless of whether emergency bylaws are expressly adopted, the DGCL provides as a default (unless otherwise set forth in the emergency bylaws) that (a) notice of any board meeting during 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, and (b) to the extent necessary to achieve a quorum during an emergency, the company's officers, in the order of rank, who are present shall be deemed directors for the meeting.

Importantly, Section 110 of the DGCL protects officers, directors and/or employees acting in accordance with any emergency bylaws by limiting any liability for such act except for willful misconduct.

Although sustained periods where multiple directors are incapacitated would limit the ability of a board to pursue action by unanimous written consent, Section 110 does not contemplate that the authority under that section to "make any provision that may be practical and necessary for the circumstances of the emergency" would include the ability to override the requirement under Section 141(f) that action by written consent be taken by "all members of the board or committee, as the case may be."

Practical Next Steps:

Unless a company has already adopted more tailored emergency bylaws, whether default emergency bylaw provisions apply to the company will depend on the law of the state of incorporation.

Companies should consider having their legal departments and/or outside counsel:

- review applicable state law and charter documents to determine the availability of emergency bylaw relief and the ability of the board to amend the bylaws without prior stockholder approval;
- determine whether emergency bylaws are already in place and what default statutory emergency provisions apply;
- consider whether to adopt tailored emergency bylaws or rely on any existing default statutory emergency provisions;
- assist in defining what emergency scenarios would trigger such tailored emergency provisions (e.g., tiered or lowered quorum requirements or lowered notice requirements);
- evaluate whether to identify specified officers to fill board seats; and
- review committee charters for corresponding revisions to ensure consistency across the governing documents.

Also note that changes to the bylaws will trigger disclosure requirements and other considerations for publicly traded companies. Specifically, a Form 8-K must be filed within four business days of adopting the bylaw changes. Furthermore, the governance requirements of the applicable stock exchange should be reviewed to determine whether any actions taken under such emergency bylaw provisions would trigger a compliance issue with the exchange's listing rules (e.g., non-independent directors or officers substituting as directors for board or committee action under emergency scenarios that result in the action being taken by a majority of non-independent directors).

RELATED CAPABILITIES

- Securities & Corporate Governance

MEET THE TEAM

Tyler Mark

Boulder / Denver

tyler.mark@bclplaw.com
+1 303 866 0238
