On July 16, Delaware Governor John Carney signed into law the 2020 amendments to the General Corporation Law of the State of Delaware (the “DGCL”), the Delaware Limited Liability Company Act (the “LLC Act”), the Delaware Revised Uniform Partnership Act (the “Partnership Act”), and the Delaware Revised Uniform Limited Partnership Act (the “LP Act”).

The amendments will be effective on varying dates as provided in the signed legislation. Set forth below is a brief summary of the most important of these amendments.

**General Corporation Law**

**Emergency Bylaws**

Overall, the amendments to Section 110 clarify the types of events that give rise to the availability of a board of directors’ emergency powers and confirm certain specific powers relating to stockholders’ meetings and dividends that may be exercised during the duration of an emergency condition.

The legislation amends Section 110(a), which governs a board's authority to adopt emergency bylaws, to make express that it includes epidemics, pandemics, and declarations of a national emergency by the US government as events that give rise to the availability of emergency powers. The list of triggering events remains non-exclusive. Under the amendment, the emergency bylaws can be adopted by the board or by a majority of the directors present if a quorum cannot be achieved.

The legislation also amends the DGCL by adding Section 110(i) to confirm certain powers relating to stockholders’ meetings and dividends that may be exercised during an emergency condition. Section 110(i) effectively codifies a prior order by the Governor permitting the postponement of annual meetings or the transition of annual meetings to remote means and permitting corporations who had declared a dividend but had not yet had a record date occur to push off the dividend to a later date under certain circumstances.[1]

Notably, in recognition of COVID-19’s impact, the legislation provides that the amendments to Section 110 are effective retroactively as of January 1.
Public Benefit Corporations

The amendments also make a number of significant changes to public benefit corporations ("PBCs"). PBCs are for-profit corporations that are intended to produce public benefits and to operate in a responsible and sustainable manner. PBCs are managed to balance stockholders’ financial interests, the best interests of those impacted by the corporation's conduct, and the public benefit or benefits identified in the public benefit corporation's charter. Despite these laudable purposes, their utilization as an entity structure has not taken off as some had expected. On the whole, the 2020 amendments relax or remove some of the barriers or risks to converting to a PBC.

First, the amendments greatly reduce appraisal rights in connection with a conversion to a PBC. Previously, Section 363(b) generally provided appraisal rights to any stockholder that held stock immediately prior to the effective time of (a) an amendment to the corporation's certificate of incorporation that caused it to become a PBC, or (b) a merger or consolidation that would result in the conversion of the corporation into a PBC (subject to standard Section 262 appraisal requirements). It appears these appraisal rights may have deterred some conversions to PBC, particularly for corporations whose conversion could potentially trigger an obligation to make cash payments to challenging stockholders. The amendments eliminate Section 363(b) in its entirety and thus greatly reduce the availability of appraisal rights.

In addition, the amendments remove certain super-majority voting provisions that previously applied to PBCs. Previously, Section 363(a) provided that a corporation that was not a PBC needed approval of two-thirds of the outstanding stock entitled to vote to (a) amend its certificate of incorporation to include provisions resulting in its becoming a public benefit corporation, or (b) merge or consolidate with or into another entity if, as a result of the merger or consolidation, the shares of the corporation would become shares or equity interests in a public benefit corporation or similar entity. Section 363(c) provided the same two-thirds vote requirements in the opposite direction (i.e. converting from a PBC to a standard corporation via charter amendment or merger). The amendments eliminate Sections 363(a) and 363(c) thus lowering the thresholds to become, or transition away from being, a PBC to the statutory defaults of majority approval (unless otherwise stated in a corporation's certificate of incorporation).

Finally, the amendments clarify some lingering concerns regarding director liability in a PBC. As a reminder, a PBC's structure requires that it “balance” the interests of certain constituencies in its governance. Section 365(a) sets forth the duties of a PBC's directors and previously provided in full that “[t]he board of directors 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(a) was amended to make clear that a director's ownership of stock of a PBC (i.e. her personal financial interest) does not, alone, create a conflict of interest with respect to the statute's balancing requirements. Pursuant to the amendment to Section 365(c), failing to satisfy the balancing requirement will not constitute an act or omission not in good faith under Sections 102(b)(7) or 145, unless the certificate of incorporation provides otherwise. This has important practical implications for directorial exculpation from liability and indemnification.
Indemnification and Exculpation

The 2020 amendments make clear that certain categories of officers are entitled to mandatory indemnification as a matter of law under Section 145(c) if they are successful on the merits in defense of an action. The covered officers are defined by reference to Delaware’s implied consent to jurisdiction statute, 10 Del. C. § 3114(b) and would include at least the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer and chief accounting officer of a corporation. With respect to officers not covered by 10 Del. C. § 3114(b), the corporation maintains flexibility to specify in its charter, bylaws or agreements if other such officers will have the right to mandatory indemnification under the same circumstances. The amendment to Section 145(c) takes effect with respect to actions taken by officers after December 31, 2020.

The 2020 amendments further alter Section 145(c)(2) to permit, but not require a corporation to indemnify any other current or former officers who are successful on the merits in the defense of any proceeding. These changes are intended to incorporate Delaware case law into the DGCL.

Additionally, Section 145(f) was amended to clarify that a right to indemnification or advancement cannot be eliminated or impaired by the repeal or elimination of the certificate of incorporation or the bylaws after the occurrence of the act or omission giving rise to that right to indemnification or advancement. Section 145(f) already prohibited the elimination or impairment of those rights by an amendment to the certificate of incorporation or the bylaws.

Further, the 2020 amendments alter Section 102(b)(7), which already authorizes a corporation to include an exculpatory provision in its certificate of incorporation eliminating or limiting the personal liability of directors for monetary damages for certain breaches of fiduciary duty, namely the duty of care. The amendment alters 102(b)(7) to make clear that any amendment, repeal or elimination of an exculpation clause will not affect the application of such exculpation clause with respect to any act or omission of a director occurring prior to such amendment, repeal or elimination. This amendment is consistent with the framework of Section 145 prohibiting retroactive amendments to indemnification clauses in charters or bylaws.

Holding Company Reorganization Mergers

The 2020 amendments make changes to facilitate holding company mergers. Prior to this year’s amendments, Section 251(g)(7) required that, following consummation of a reorganization merger, the organizational documents of the surviving entity must contain provisions identical to the certificate of incorporation of the parent corporation immediately prior to the effectiveness of the merger. The 2020 amendments eliminate the requirement in Section 251(g)(7) that the organizational documents of a surviving entity contain provisions identical to the certificate of incorporation of the constituent corporation immediately before the merger.

Electronic Consents and Electronic Transmissions

In light of the prevalence and reliance on electronic communications such as electronic signatures and transmission of documents, the 2020 amendments build upon the 2019 amendments to facilitate the electronic execution and transmission of documents in connection with any act or transaction contemplated or governed by the DGCL via clarifying language added to Section 116(a)(2). In addition, pursuant to new Section 212(c)(3), any proxy may be executed and transmitted electronically so long as it includes or is delivered with information enabling the corporation to determine the date of delivery and the identity of the stockholder granting such proxy.
Additionally, in order to streamline and simplify the administrative burden for corporations, the 2020 DGCL amendments revise Section 232(a) so that it now states expressly that a corporation may give a notice by electronic mail to each stockholder's email address set forth in the corporation's records, without obtaining the prior consent of any such stockholder.

**Alternative Entity Statutes**

### Appraisal Rights

The amended Alternative Entity Statutes clarify that appraisal rights are not available to partnership or LLC interests (or any other interest in a partnership or LLC), unless otherwise provided in a partnership or LLC agreement, an agreement of merger or consolidation, a plan of merger or a plan of division (for LPs and LLCs).

### Books and Records

The 2020 amendments provide that the books, records, and other information of a Delaware LLC, partnership, or LP may now be in a form other than paper (including electronic form) as long as the form can be converted into paper form within a reasonable time.

### Certificates

The 2020 amendments contain a few changes regarding certificates filed with the Delaware Secretary of State.

First, certified certificates of transfer, certificates of transfer and domestic continuance, certificates of conversion to a non-Delaware entity, and certificates of conversion of registered series to protected series are now *prima facie* evidence of a transfer, transfer and continuance, or conversion.

Second, the 2020 amendments allow LLCs and LPs to include information not enumerated by statute in certificates of division.

Finally, the LLC Act and the LP Act each require that an LP's or LLC's certificate of registered series be promptly amended if the certificate of registered series no longer complies with the requirements of 6 Del. C. § 17-221(d)(4) or 6 Del. C. § 18-218(e)(1).

### Registered Agents

Under the amended Alternative Entity Statutes, the Delaware Secretary of State is no longer required to issue:

- a certified copy of any certificate filed by the registered agent changing the address of the registered office or the name of the registered agent (under the amended Acts, a name change would include conversion of the registered agent (or a division) in which a resulting person succeeds to all of the registered agent's business); and

- a certificate in connection with the resignation of the registered agent of a partnership, a domestic or foreign limited partnership, or a domestic or foreign limited liability company, or the appointment of a successor registered agent.

The Alternative Entity Statutes were also amended to specify that a foreign general partnership can no longer be a registered agent of a partnership, LP, or LLC.
Finally, the LLC Act and the LP Act now permit a registered agent to resign without appointing a successor registered agent if a foreign LP or LLC ceases to be registered under 6 Del. C. § 17-1109(g) or 6 Del. C. § 18-1107(h). However, the amendments require:

- the entity to use the form of the certificate of resignation provided by the Delaware Secretary of State; and
- the entity to include in the certificate the name, business address, and business telephone number of a natural person who is a member, manager, officer, employee, or designated agent of the domestic or foreign LP or LLC (the communications contact) last provided to the registered agent. The information regarding the communications contact included in the certificate would not be deemed public.

Document Form, Signature, and Delivery


Admission of Limited Partners or Members

The LP Act now confirms that a limited partnership agreement may provide for the admission of a limited partner in connection with formation. The amendments also eliminate any statutory requirement that a limited partner’s admission after formation must be reflected in the records of the LP. Finally, the amendments clarify that an assignee of a partnership interest is admitted as a limited partner under 6 Del. C. § 17-704(a).

Similarly, the LLC Act now confirms that an LLC agreement may provide for the admission of members in connection with formation. The amendments also eliminate any statutory requirement that a member’s admission after formation must be reflected in the records of the LLC. Finally, the amendments clarify that an assignee of an LLC interest is admitted as a member under 6 Del. C. § 18-704(a).

For more information about Delaware's corporation and alternative entity laws, please contact the authors or the attorneys at the Firm with whom you are regularly in contact.

1. For a discussion of Governor Carney’s prior emergency order regarding postponing meetings and adjourning meetings, see https://www.saul.com/publications/alerts/delaware-modifies-stockholder-meeting-requirements-publicly-traded-corporations.