SPONSOR: Sen. Sharp & Rep. Wagner

DELAWARE STATE SENATE

140th GENERAL ASSEMBLY

SENATE BILL NO. 363

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE: (two-thirds of all members elected to each house thereof concurring therein)

Section 1. Amend Section 102(a)(1), Title 8, Delaware Code, by deleting clause (ii) thereof in its entirety and inserting in lieu thereof the following:

"(ii) shall be such as to distinguish it upon the records in the office of the Division of Corporations in the Department of State from the names of other corporations, limited partnerships, limited liability companies or business trusts organized, reserved or registered as a foreign corporation, limited partnership, limited liability company or business trust under the laws of this State, except with the written consent of such other foreign corporation or domestic or foreign limited partnership, limited liability company or business trust, executed, acknowledged and filed with the Secretary of State in accordance with § 103 of this title and".

Section 2. Amend Section 103(a)(1), Title 8, Delaware Code, by adding the words "(or, in the case of any such other instrument, such incorporator's or incorporators' successors and assigns)" at the end of the first sentence thereof, and by adding the following sentence at the end of such paragraph:

"If any incorporator is not available by reason of death, incapacity, unknown address, or refusal or neglect to act, then any such other instrument may be signed, with the same effect as if such incorporator had signed it, by any person for whom or on whose behalf such incorporator, in executing the certificate of incorporation, was acting directly or indirectly as employee or agent, provided

that such other instrument shall state that such incorporator is not available and the reason therefor, that such incorporator in executing the certificate of incorporation was acting directly or indirectly as employee or agent for or on behalf of such person, and that such person's signature on such instrument is otherwise authorized and not wrongful."

Section 3. Amend Section 122, Title 8 Delaware Code, to add a new paragraph 17 as follows:

"(17). Renounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or stockholders."

Section 4. Amend Section 141(b), Title 8, Delaware Code, by deleting in the sixth sentence thereof the words "written notice" and inserting in lieu thereof the words "notice given in writing or by electronic transmission".

Section 5. Amend Section 141(f), Title 8, Delaware Code, by adding after the words "consent thereto in writing" the words "or by electronic transmission", by inserting after the words "the writing or writings" the words "or electronic transmission or transmissions" and by adding at the end a new sentence reading as follows: "Such filing shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form.".

Section 6. Amend Section 141(i), Title 8, Delaware Code, by deleting the word "similar" and substituting in lieu thereof the word "other".

Section 7. Amend Section 211(a), Title 8, Delaware Code, by deleting the existing text in its entirety and substituting in lieu thereof the following:

"(a)(1) Meetings of stockholders may be held at such place, either within or without this State, as may be designated by or in the manner provided in the certificate of incorporation or bylaws or, if not so designated, as determined by the board of directors. If, pursuant to this paragraph (a)(1) or the certificate of incorporation or the bylaws of the corporation, the board of directors is authorized to determine the place of a meeting of stockholders, the board of directors may, in its

sole discretion, determine that the meeting shall not be held at any place, but may instead be held solely by means of remote communication as authorized by paragraph (a)(2) of this Section 211.

(2) If authorized by the board of directors in its sole discretion, and subject to such guidelines and procedures as the board of directors may adopt, stockholders and proxyholders not physically present at a meeting of stockholders may, by means of remote communication:

(A) participate in a meeting of stockholders; and

(B) be deemed present in person and vote at a meeting of stockholders whether such meeting is to be held at a designated place or solely by means of remote communication, provided that (i) the corporation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a stockholder or proxyholder, (ii) the corporation shall implement reasonable measures to provide such stockholders and proxyholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings, and (iii) if any stockholder or proxyholder votes or takes other action at the meeting by means of remote communication, a record of such vote or other action shall be maintained by the corporation."

Section 8. Amend Section 211(e), Title 8, Delaware Code, by deleting the existing text in its entirety and substituting in lieu thereof the following:

"(e) All elections of directors shall be by written ballot, unless otherwise provided in the certificate of incorporation; if authorized by the board of directors, such requirement of a written ballot shall be satisfied by a ballot submitted by electronic transmission, provided that any such electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the stockholder or proxy holder."

Section 9. Amend Section 219(a), Title 8, Delaware Code, by deleting after the first sentence thereof the remaining text in its entirety and substituting in lieu thereof the following:

"Nothing contained in this Section shall require the corporation to include electronic mail addresses or other electronic contact information on such list. Such list shall be open to the

examination of any stockholder, for any purpose germane to the meeting for a period of at least 10 days prior to the meeting: (i) on a reasonably accessible electronic network, provided that the information required to gain access to such list is provided with the notice of the meeting, or (ii) during ordinary business hours, at the principal place of business of the corporation. In the event that the corporation determines to make the list available on an electronic network, the corporation may take reasonable steps to ensure that such information is available only to stockholders of the corporation. If the meeting is to be held at a place, then the list shall be produced and kept at the time and place of the meeting during the whole time thereof, and may be inspected by any stockholder who is present. If the meeting is to be held solely by means of remote communication, then the list shall also be open to the examination of any stockholder during the whole time of the meeting on a reasonably accessible electronic network, and the information required to access such list shall be provided with the notice of the meeting."

Section 10. Amend Section 219(b), Title 8, Delaware Code, by adding after the words "election of directors" and before the comma the following words: "held at a place, or to open such a list to examination on a reasonably accessible electronic network during any meeting for the election of directors held solely by means of remote communication".

Section 11. Amend Section 222(a), Title 8, Delaware Code, by adding after the words "the place," and before the word "date" the words "if any,", by adding after the words "hour of the meeting," and before the word "and" the words "the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such meeting,".

Section 12. Amend Section 222(b), Title 8, Delaware Code, by adding in the third sentence thereof after the words "transfer agent" the words "or other agent".

Section 13. Amend Section 222(c), Title 8, Delaware Code, by deleting in the first sentence thereof the words "and place thereof" and adding in lieu thereof the following words: ", place, if any, thereof, and the means of remote communications, if any, by which stockholders and proxy holders may be deemed to be present in person and vote at such adjourned meeting".

Section 14. Amend Section 224, Title 8, Delaware Code, by adding in the first sentence after the words "may be kept on," the words "or by means of," by deleting in the first sentence the words "punch cards, magnetic tape, photographs, microphotographs or", by deleting in the first sentence the word "other" where

it appears between the words “any” and “information”, by adding in the first sentence after the words “storage device” the words “or method”, by deleting in the first sentence the word “written” and substituting in lieu thereof the word “paper”, by deleting at the end of the second sentence the words “the same” and substituting in lieu thereof the words “such records pursuant to any provision of this chapter”, by replacing in the third sentence the word “written” in each of the three places it appears with the word “paper”, by adding in the third sentence after the words “produced from” the words “or by means of”, by deleting in the third sentence the words “cards, tapes, photographs, microphotographs or other”, and by adding to the third sentence after the words “storage device” the words “or method”.

Section 15. Amend Section 228, Title 8, Delaware Code, by re-lettering existing subsection (d) as subsection (e) and adding a new subsection (d) reading in its entirety as follows:

“(d)(1) A telegram, cablegram or other electronic transmission consenting to an action to be taken and transmitted by a stockholder or proxyholder, or by a person or persons authorized to act for a stockholder or proxyholder, shall be deemed to be written, signed and dated for the purposes of this section, provided that any such telegram, cablegram or other electronic transmission sets forth or is delivered with information from which the corporation can determine (A) that the telegram, cablegram or other electronic transmission was transmitted by the stockholder or proxyholder or by a person or persons authorized to act for the stockholder or proxyholder and (B) the date on which such stockholder or proxyholder or authorized person or persons transmitted such telegram, cablegram or electronic transmission. The date on which such telegram, cablegram or electronic transmission is transmitted shall be deemed to be the date on which such consent was signed. No consent given by telegram, cablegram or other electronic transmission shall be deemed to have been delivered until such consent is reproduced in paper form and until such paper form shall be delivered to the corporation by delivery to its registered office in this State, its principal place of business or an officer or agent of the corporation having custody of the book in which proceedings of meetings of stockholders are recorded. Delivery made to a corporation's registered office shall be made by hand or by certified or registered mail, return receipt requested. Notwithstanding the foregoing limitations on delivery, consents given by telegram, cablegram or other electronic transmission may be otherwise delivered to the principal place of business of the corporation or to an officer or agent of the corporation having custody of the book in which proceedings of meetings of stockholders are recorded if, to the extent and in the manner provided by resolution of the board of directors of the corporation.

(d)(2) Any copy, facsimile or other reliable reproduction of a consent in writing may be substituted or used in lieu of the original writing for any and all purposes for which the original writing could be used, provided that such copy, facsimile or other reproduction shall be a complete reproduction of the entire original writing.**"**

Section 16. Amend Section 229, Title 8, Delaware Code, by adding in the first sentence after the words "entitled to notice," the words "or a waiver by electronic transmission by the person entitled to notice," and by adding in the third sentence after the words "waiver of notice" the words "or any waiver by electronic transmission".

Section 17. Amend Section 230, Title 8, Delaware Code, by adding a new subsection (c) reading in its entirety as follows:

"(c) The exception in Section 230(b)(1) to the requirement that notice be given shall not be applicable to any notice returned as undeliverable if the notice was given by electronic transmission."

Section 18. Amend Section 231(d), Title 8, Delaware Code, by deleting in the first sentence the words "§ 212(c)(2)" and inserting in lieu thereof the words "Section 211(e) or Section 212(c)(2) of this title, or any information provided pursuant to Section 211(a)(2)(B)(i) or (iii)".

Section 19. Amend Title 8, Delaware Code, by adding thereto a new section 232 reading in its entirety as follows:

"(a) Without limiting the manner by which notice otherwise may be given effectively to stockholders, any notice to stockholders given by the corporation under any provision of this chapter, the certificate of incorporation, or the bylaws shall be effective if given by a form of electronic transmission consented to by the stockholder to whom the notice is given. Any such consent shall be revocable by the stockholder by written notice to the corporation. Any such consent shall be deemed revoked if (1) the corporation is unable to deliver by electronic transmission two consecutive notices given by the corporation in accordance with such consent and (2) such inability becomes known to the secretary or an assistant secretary of the corporation or to the transfer agent, or other person responsible for the giving of notice; provided, however, the inadvertent failure to treat such inability as a revocation shall not invalidate any meeting or other action.

(b) Notice given pursuant to subsection (a) of this section shall be deemed given: (1) if by facsimile telecommunication, when directed to a number at which the stockholder has consented to receive notice; (2) if by electronic mail, when directed to an electronic mail address at which the stockholder has consented to receive notice; (3) if by a posting on an electronic network together with separate notice to the stockholder of such specific posting, upon the later of (A) such posting and (B) the giving of such separate notice; and (4) if by any other form of electronic transmission, when directed to the stockholder. An affidavit of the secretary or an assistant secretary or of the transfer agent or other agent of the corporation that the notice has been given by a form of electronic transmission shall, in the absence of fraud, be prima facie evidence of the facts stated therein.

(c) For purposes of this chapter, "electronic transmission" means any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved, and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process.

(d) This section shall apply to a corporation organized under this chapter that is not authorized to issue capital stock, and when so applied, all references to stockholders shall be deemed to refer to members of such a corporation.

(e) This section shall not apply to §§ 164, 296, 311, 312, or 324 of this chapter."

Section 20. This Act shall become effective July 1, 2000.

SYNOPSIS

Section 1. The amendment to Section 102(a)(1) adds the names of limited liability companies and business trusts to the names of business entities that may not, without consent, conflict with the name of a Delaware corporation.

Section 2. The amendment to Section 103(a)(1) clarifies that an instrument (other than the certificate of incorporation) to be filed before the election of the initial board of directors (if the initial directors were not named in the certificate of incorporation) may be signed by the incorporator's or incorporators' successors and assigns, and also provides that if any incorporator is not available by reason of death, unknown address, or refusal or neglect to act, any such instrument may be signed by any person for whom or on whose behalf such incorporator in executing the certificate of incorporation was acting as employee or agent, with the same effect as if such incorporator had signed it.

Section 3. New subsection 122(17) clarifies that a corporation has the power to renounce in advance, in its certificate of incorporation or by action of its board of directors (including action approving an agreement to which the corporation is a party), the corporation's interest or expectancy in specified business opportunities or specified classes or categories of business opportunities. By way of example, the classes or categories of business

opportunities may be specified by any manner of defining or delineating business opportunities or the corporation's or any other party's entitlement thereto or interest therein, including, without limitation, by line or type of business, identity of the originator of the business opportunity, identity of the party or parties to or having an interest in the business opportunity, identity of the recipient of the business opportunity, periods of time or geographical location. The subsection is intended to eliminate uncertainty regarding the power of a corporation to renounce corporate opportunities in advance raised in Siegman v. Tri-Star Pictures, Inc., C. A. No. 9477 (Del. Ch. May 5, 1989, revised May 30, 1989). It permits the corporation to determine in advance whether a specified business opportunity or class or category of business opportunities is a corporate opportunity of the corporation rather than to address such opportunities as they arise. The subsection does not change the level of judicial scrutiny that will apply to the renunciation of an interest or expectancy of the corporation in a business opportunity, which will be determined based on the common law of fiduciary duty, including the duty of loyalty.

Sections 4, 5 and 6. The amendments to subsections (b), (f) and (i) of Section 141(b) permit a corporation's directors to make use of available communication technologies. As amended, subsections 141(b) and (f) permit director resignations and actions by consent to be submitted or taken by electronic transmission, as defined in new Section 232(c).

Section 7. The amendment to Subsection (a) expands the use companies may make of new technologies in the conduct of stockholder meetings. Paragraph (1) allows stockholder meetings to be held entirely by remote communication, without a venue for physical attendance, if so determined by the board of directors in its sole discretion. In addition, paragraph (a)(1) eliminates the former default provision that provided, absent a bylaw identifying the location, that stockholder meetings be held at the corporation's registered office in Delaware. Paragraph (2) of subsection (a) authorizes stockholder participation by remote communication, as well as presence and voting by remote communication, if so determined by the board of directors in its sole discretion. Such presence and voting is permitted only if the corporation implements (i) verification procedures, (ii) measures to ensure such stockholders have an opportunity to participate in the meeting and vote, and (iii) means to record the votes of such stockholders.

Section 8. The amendment to Subsection (e) defines written ballot to include ballots submitted by electronic transmission, as defined by Section 232.

Sections 9 and 10. The amendments to Section 219 delete from the existing statute provisions requiring that the list of stockholders be available either at a place within the city where the meeting is to be held or at the place of the meeting for 10 days prior to the meeting, and substitute in lieu thereof a requirement that the list either be made available on an electronic network or at the corporation's principal place of business. The amendments also provide that, in the case of a meeting of stockholders held without a physical location, the list shall be made available during the meeting on an electronic network.

Sections 11, 12 and 13. The amendment to subsection (b) of Section 222 conforms to the corresponding provision in new Section 232. The amendments to subsections (a) and (c) conform the statutory notice requirements to the changes to Section 211, which permit stockholder meetings to be held by means of remote communication, if so determined by the board of directors in its sole discretion.

Section 14. The Amendments to Section 224 are intended to modernize and simplify the technical terminology describing non-paper forms of record storage that may be utilized by corporations. The amendments also relax existing requirements that the corporation must convert such records to clearly legible written form upon the request of any person entitled to inspection. As amended, the statute requires conversion only in respect to inspection rights arising under this chapter. The amendments are not intended to effect any changes of substance with respect to conversion requirements or inspection rights arising from other sources, including other statutes, regulations, and rules of procedure.

Section 15. The amendments to Section 228 generally permit the use of electronically transmitted consents, and align Section 228 with Section 212(c), governing electronic proxies. The proposed amendments also address the circumstances in which an electronically transmitted consent is deemed to be in writing, dated, and signed by the stockholder, as well as delivery of such a consent.

Section 16. The amendment to Section 229 provides that a waiver of notice may be given by electronic transmission (as defined in Section 232 of Title 8), and that neither the business to be transacted at, nor the purpose

of, a meeting need be specified in a waiver by electronic transmission, unless the certificate of incorporation or bylaws so require.

Section 17. New subsection (c) of Section 230 provides that the exception to requirements of notice under subsection 230(b)(1) does not apply to a notice that has been given by electronic transmission.

Section 18. The amendment to subsection (d) of Section 231 of Title 8 expands the types of material that inspectors of election may rely on to include any verification information required of stockholders voting electronically, whether by electronic transmission in lieu of a written ballot or otherwise.

Section 19. Section 232 is new. Subsection (a) provides that any notice by the corporation to a stockholder by a form of electronic transmission is effective if the stockholder has consented to the corporation giving notice by that particular form of electronic transmission. It also provides that a stockholder may revoke such consent by written notice to the corporation. Subsection (a) is not intended to suggest that a notice given by a form of electronic transmission and actually received is ineffective solely because the recipient has not consented to the giving of notice by such form of electronic transmission. Subsection (a) further provides that a stockholder's consent to notice by electronic transmission is revoked if the corporation is unable to deliver two consecutive electronic transmission notices, and such inability becomes known to the secretary, assistant secretary, the transfer agent, or other person responsible for giving notice. Subsection (a) also makes clear, however, that the inadvertent failure to treat such inability as a revocation of consent shall not invalidate any meeting or other action. Subsection (b) of Section 232 specifies when notice by a form of electronic transmission is deemed to have been given. Subsection (c) provides a definition of the term "electronic transmission." Subsection (e) specifies that Section 232 does not apply to certain enumerated Sections of the DGCL.

Section 20. Section 20 provides for an effective date of July 1, 2000.

Author: Delaware Bar Association