

Guidelines for Payment of Dividends during the COVID-19 Pandemic

In light of the fact that boards of Delaware corporations may have declared dividends before the current crisis arose, we understand that they may be reassessing whether to proceed with payment. While there are many cases indicating that the declaration of a dividend generally creates a debtor-creditor relationship between the corporation and its stockholders that cannot be revoked, there are a few options that boards have in determining how to proceed, particularly where the long-term health or survival of the corporation relies on cash-conservation under the current conditions:

- If the record date for determining stockholders entitled to receive the dividend has not yet occurred, the board may determine to defer the record date and payment date for the dividend. The DGCL does not prohibit changing a record date or payment date that has not occurred. Accordingly, subject to any requirements under the certificate of incorporation, such as those relating to required quarterly payments of dividends on preferred stock, where the record date has not occurred, a board could change the record date and payment date for a dividend that has already been declared to a future date, so long as the payment date occurs within 60 days after that new record date.
- If the record date has already occurred, but the payment date has not yet arrived, the board should consider whether there are any constraints that would preclude payment of the dividend. In general, under Delaware law, a dividend may only be paid to the extent there are funds lawfully available for the payment. If a board is unable to determine that, at the payment date, the corporation has sufficient “surplus” (as defined in the DGCL) available for the payment of the dividend, or if the board believes payment of the dividend would leave the corporation insolvent, the board is prohibited from paying the dividend until such time as lawful funds become available. The board should inquire of the corporation’s financial officers whether recent developments have raised concerns about any of these matters.

In addition to the state-law issues outlined above, boards of publicly traded Delaware corporations should also consider any issues arising under any applicable federal securities law and national securities exchange rules, particularly where the shares have begun trading “ex-dividend.”

Delaware corporations should consult with legal counsel to obtain advice on their specific circumstances relating to these issues.

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