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Recent Amendments to the Delaware LLC and LP Acts: Permitting Revocation of Dissolution Without a Unanimous Vote, Confirming Permissibility of Future-Effective Written Consents, and Other Changes

By Norman M. Powell and John J. Paschetto

Recent amendments to the Delaware Limited Liability Company Act (the "DLLCA") and the Delaware Revised Uniform Limited Partnership Act (the "DRULPA") have, among other changes, replaced with less-burdensome alternatives the unanimous-vote requirements for revoking the dissolution of a limited liability company (an "LLC") or a limited partnership (an "LP"), and confirmed that action can be taken by members or managers of an LLC, or limited or general partners of an LP, by means of written consent even if the consent was signed at a time when such persons were not yet members, managers, or partners. These amendments went into effect on August 1, 2014.

Revocation of Dissolution of LLCs and LPs Without Unanimous Votes

Under the DLLCA and DRULPA, the dissolution of an LLC or LP is separate from, and precedes, the termination of the LLC's or LP's existence.[1] Dissolution, by itself, commences a period of indefinite length during which the LLC or LP is to wind up its affairs in preparation for its death as a juridical person. 6 *Del. C.* §§ 18-803(b) (winding-up of LLC), 17-803(b) (winding-up of LP). The LLC or LP finally ceases to exist upon the effectiveness of a certificate of cancellation filed with the Delaware Secretary of State. 6 *Del. C.* §§ 18-203(a) (LLC certificate of cancellation), 17-203(a) (LP certificate of cancellation).

During the period between an LLC's or LP's dissolution and death, it is not uncommon for those who own or control the entity to wish to revoke the dissolution. This may happen if the dissolution was inadvertent (e.g., by the triggering of a provision in an LLC or LP agreement providing for automatic dissolution), or if an unanticipated beneficial transaction did not surface until after dissolution.

Before the 2014 amendments, the DLLCA and DRULPA required the unanimous vote of the remaining members or the remaining general and limited partners, respectively, for dissolution to be revoked. Moreover, if the entity had been dissolved pursuant to a vote of the members or partners, dissolution could not be revoked unless every person who voted for dissolution also voted to revoke it. Thus, the mere unavailability or indifference of a single person could prevent a value-creating transaction involving the dissolved entity.

Almost entirely rewriting § 18-806 of the DLLCA and § 17-806 of the DRULPA, the 2014 amendments have made revocation of dissolution considerably easier to accomplish. The amendments have done away with the blanket requirement of a unanimous vote by remaining

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[1] The same is true for Delaware corporations. *See* 8 *Del. C.* § 278.

members or partners, and the requirement of a unanimous vote of all persons who voted in favor of dissolution if the LLC or LP was dissolved pursuant to a vote. Those requirements have been replaced with a series of alternative revocation methods whose availability depends in part on how dissolution was effected.

First, if the entity was dissolved pursuant to a vote, then its dissolution may be revoked by such vote. 6 *Del. C.* §§ 18-806(i), 17-806(i). Thus, where dissolution was effected by vote under the default provisions of the DLLCA or DRULPA, the dissolution may now be revoked by the same vote—i.e., the vote of members owning more than two thirds of all the members' interests in profits, in the case of an LLC (6 *Del. C.* § 18-801(a)(3)), and the vote of all general partners plus the vote of limited partners owning more than two thirds of all the limited partners' interests in profits, in the case of an LP (6 *Del. C.* § 17-801(2)). Similarly, if dissolution was effected pursuant to the vote of some different proportion as set forth in the LLC or LP agreement, that proportion would govern a vote to revoke dissolution. There is now no requirement that the revocation be approved by the same persons who voted for the dissolution.

Second, if dissolution resulted from the expiration of a time period or the occurrence of an event as set forth in the LLC or LP agreement, that dissolution can be revoked by whatever vote is required to amend the provision in the LLC or LP agreement that caused it. 6 *Del. C.* §§ 18-806(ii), 17-806(ii). Note, however, that this alternative does not apply if the "event" causing dissolution was a vote to dissolve, the withdrawal of a general partner (in the case of an LP), or an event that caused the last remaining member or limited partner to cease to be a member or limited partner. *Id.* The revocation of a dissolution resulting from those "events" is covered by other subsections of §§ 18-806 and 17-806, as discussed above and in the next paragraph.

Third, in the case of an LLC, if dissolution resulted from an event that caused the last remaining member to cease to be a member, revocation can be achieved by the vote of the personal representative of the last remaining member or the vote of "the assignee of all of the [LLC] interests in the [LLC.]" 6 *Del. C.* § 18-806(iii). In the case of an LP, if dissolution resulted from the withdrawal of a general partner or an event that caused the last remaining limited partner to cease to be a limited partner, revocation can be achieved by the vote of all remaining general partners and, where any limited partners remain, the vote of the limited partners owning more than two thirds of all the limited partners' interests in profits. If no limited partners remain, the requirement of their vote can be satisfied by the vote of the personal representative of the last remaining limited partner or the vote of "the assignee of all of the limited partners' partnership interests in the limited partnership[.]" 6 *Del. C.* § 17-806(iii).

The amendments also confirm that an LLC or LP agreement may specify "the manner in which a dissolution may be revoked" or may prohibit revocation of dissolution altogether. They further provide that §§ 18-806 and 17-806 "shall not be construed to limit the accomplishment of a revocation of dissolution by other means permitted by law"—a recognition that under certain circumstances, it may be possible to revoke dissolution by, for example, merging a dissolved LLC or LP into an entity that has not been dissolved.

As they did prior to the 2014 amendments, §§ 18-806 and 17-806 continue to provide that dissolution may not be revoked once a certificate of cancellation has been filed for the dissolved entity. They also continue to require the admission of a member when the dissolution of an LLC with no remaining members is revoked, and the appointment of a general partner or a limited partner when the dissolution of an LP with no remaining general or limited partners is revoked (with new text that specifically address-

es when an LP has no remaining partners at all, whether general or limited).

Future-Effective Consents by Members, Managers, and Partners

As discussed in the accompanying article (beginning on the next page), the General Corporation Law of the State of Delaware (the "DGCL") has been amended effective August 1, 2014, to expressly permit the use of future-effective written consents by directors and stockholders of Delaware corporations. To confirm that future-effective consents are permitted also with respect to Delaware LLCs and LPs, similar amendments have also been made to the DLLCA and DRULPA. These amendments provide that any consent given by a person "as a member" or a manager of an LLC, or as a limited or general partner of an LP, whether or not such person is "then a member" (or manager or partner), may be made effective as of a future time, and "such person shall be deemed to have consented" in such capacity as of such future time if such person is a member (or manager or partner) as of such future time. 6 *Del. C.* §§ 18-302(d) (member consent), 18-404(d) (manager consent), 17-302(e) (limited partner consent), 17-405(d) (general partner consent).

In several respects, the future-effective consent amendments to the DLLCA and the DRULPA permit greater flexibility than those made to the DGCL. First, future-effective consents in the LLC or LP context, unlike future-effective director and stockholder consents, may be made more than 60 days before their future effectiveness. Second, unlike a stockholder, a member or partner need not provide to the entity evidence of an instruction or provision regarding a consent's future effectiveness for the consent to be deemed given at the future time. Third, the DLLCA and DRULPA amendments are silent regarding what steps a person must take to provide for future effectiveness, whereas the DGCL amendments refer to "instruction to an agent or otherwise[.]" 8 *Del. C.* §§ 141(f), 228(c). Fourth, the DLLCA and DRULPA amendments expressly recognize (as is common in those Acts) that an LLC or LP agreement may opt out of the statutory future-effectiveness rules.[2]

Records Identifying Members, Managers, and Partners

The 2014 amendments have added provisions to the DLLCA and DRULPA that expand the role of the "communications contact" that every LLC and LP has been required to have since 2006. 6 *Del. C.* §§ 18-104(g) (for LLCs), 17-104(g) (for LPs).[3] A communications contact is a natural person whose name, business address, and business phone number are provided to the entity's registered agent in Delaware, and who is authorized by the entity to receive communications from the registered agent.

Provisions added by the 2014 amendments require that every LLC and LP, when requested by its communications contact, "shall provide the communications contact with the name, business address and business telephone number of a natural person who has access to the record required to be maintained pursuant to § 18-305(h) of this title [or, in the case of an LP, § 17-305(g)]." *Id.* Sections 18-305(h) and 17-305(g) of Title 6, which are new, in turn provide that every LLC or LP "shall maintain a current record that identifies the name and last known business, residence or mailing address" of each member and manager (in the case of an LLC) and each general and limited partner (in the case

[2] Presumably, a corporation may also opt out, by means of a provision in its certificate of incorporation in the case of stockholder consents, and by means of a provision in its certificate of incorporation or bylaws in the case of director consents. 8 *Del. C.* §§ 141(f) (director consent), 228(a) (stockholder consent).

[3] Delaware corporations are also required to have communications contacts. 8 *Del. C.* § 132(d).

of an LP). Thus, an LLC or LP is now required to maintain a record similar to the list of stockholders that a corporation must periodically prepare, and make available for inspection by stockholders, pursuant to § 219 of the DGCL. 8 *Del. C.* § 219. Moreover, the DLLCA and DRULPA amendments have, in effect, established a chain of communication through which an LLC's or LP's registered agent in Delaware (whose identity and address are a matter of public record) can convey to the entity's communications contact (whose contact information the registered agent must have) a request for the record of members, managers, or partners that the entity is now required to maintain. The circumstances under which the possessor of that record may be compelled to provide it are beyond the scope of the amendments.

Exercise of Informational Rights Through an Agent

Lastly, the 2014 amendments have increased the similarity of the informational rights of members and limited partners to those of stockholders. The DLLCA and DRULPA provisions dealing with the rights of members (of an LLC) and limited partners (of an LP) to obtain information about the entity have been amended to provide that members and limited partners may assert such rights not only "in person" but also "by attorney or other agent[.]" 6 *Del. C.* §§ 18-305(a) (for LLCs), 17-305(a) (for LPs). If the member or limited partner acts through an attorney or other agent, the demand for information must be accompanied by "a power of attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the member [or limited partner]." §§ 18-305(e), 17-305(d). This language tracks that of § 220 of the DGCL, which sets forth a stockholder's right to inspect books and records of a corporation. 8 *Del. C.* § 220.

Delaware's General Corporation Law Is Amended Regarding Future-Effective Written Consents, Unavailable Incorporators, and Two-Step Acquisitions, Among Other Changes

By Norman M. Powell and John J. Paschetto

The Delaware legislature recently adopted amendments to the State's General Corporation Law (the "DGCL") that should, among other things, simplify a variety of common transactions. The amendments, which went into effect on August 1, 2014, include (i) confirming that individuals can effectively provide written consents as directors even if they are not directors when they actually sign the consents; (ii) streamlining the means by which the organization of a corporation can be completed when the incorporator is unavailable or uncooperative; and (iii) refining the new short-form merger procedure in two-step acquisitions that was introduced last year. Of perhaps equal importance, however, is a widely anticipated amendment that was *not* made.

Possible Legislation on Fee-Shifting Bylaws

On May 8, 2014, the Delaware Supreme Court issued an opinion in which it held, among other things, that the board of a Delaware nonstock corporation could validly adopt a bylaw under which any member that unsuccessfully sues the corporation or another member would be required to bear the litigation expenses of the corporation or defendant member. *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 557-58 (Del. 2014). This ruling, in response to one of four questions certified by the United States District Court for the District of Delaware, dealt only with the challenged bylaw's facial validity, and spoke only in the context of a nonstock corporation. Many practitioners, however, have viewed the court's reasoning in *ATP Tour* as equally valid in the case of stock corporations.

It was therefore expected that boards of Delaware stock corporations would adopt fee-shifting bylaws, as has since occurred to an apparently limited extent.[4]

The committee of the Delaware State Bar Association responsible for proposing amendments to the DGCL drafted amendments that would have prevented application of *ATP Tour* to stock corporations. But on June 18, 2014, the Delaware Senate adopted a joint resolution requesting Delaware's corporate bar to "continue its ongoing examination" and consider what legislation, if any, may be appropriate on this issue. Del. S. J. Res. 12, 147th Gen. Assem. (2014). Legislative consideration of any amendments on the subject of fee-shifting bylaws has thus been effectively postponed until 2015.

Future-Effective Consents by Directors and Stockholders

Among the default rules of corporate governance under the DGCL is that a board of directors may take action without a meeting if the directors unanimously consent in writing to the action. 8 *Del. C.* § 141(f). Like telephonic meetings, unanimous consents have become one of the indispensable features of modern board procedure. And on occasion, in the interests of efficiency and certainty, signatures to a board consent are collected from individuals who are not yet, but soon will be, directors. This strategy is particularly valuable in the context of a corporate acquisition, in order that certain actions (such as replacing senior officers) can be effected immediately after the new board is seated, without requiring the incoming directors to hold themselves in readiness to act as soon as they get word of their election. Typically, when a board consent is signed before the signers become directors, the signature pages are held by counsel until the consent's intended time of effectiveness.

While this practice was generally viewed as permissible under the DGCL, an unreported United States District Court opinion, applying Delaware law, cast doubt on its effectiveness. *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, No. 3:10-CV-1842-G (N.D. Tex. Aug. 8, 2012). On its motion for partial summary judgment, the plaintiff argued that a purportedly unanimous written consent by one defendant's board of directors was invalid because two individuals had signed it the day before they became directors. In response, the defendants maintained that the signatures of those individuals were properly "held" by counsel until the individuals were duly seated on the board. *Id.* at 6-7. The court, however, after noting the weak evidentiary support for this factual contention, appeared to hold that even if the challenged signature pages had been held in escrow, they were invalid because action taken by individuals when they are not directors cannot "be carried forward" to a time when they are. *Id.* at 7 (relying in part on *AGR Halifax Fund, Inc. v. Fiscina*, 743 A.2d 1188 (Del. Ch. 1999)).[5]

The 2014 amendments to the DGCL have now settled this issue under Delaware law, confirming that a board consent is not necessarily invalid if some or all of the directors were not yet directors when they actually signed it. The amendments also make clear that such consents need not be subject to a formal escrow arrange-

[4] *See, e.g.*, Tom Hals, *U.S. companies adopt bylaws that could quash some investor lawsuits*, REUTERS, July 7, 2014, *available at* http://www.reuters.com/article/2014/07/07/us-usa-litigation-companies-idUSKBN0FC26O20140707.

[5] In *AGR Halifax Fund*, the Delaware Court of Chancery invalidated action taken pursuant to a board consent signed by several individuals before they became directors. 743 A.2d at 1194-95. However, it does not appear from the opinion that the consent was to be escrowed, or that if so, the possible effect of escrow was presented to the court.

ment to be effective. As amended, § 141(f) of the DGCL provides that any director consent (including one signed by a person who is "not then a director") may be made effective as of a future time, including the happening of a future event, "whether through instruction to an agent or otherwise[.]" The consent will be deemed to have been given at the future effective time if (a) that time is no more than 60 days "after such instruction is given or such provision is made" regarding future effectiveness, (b) the person who signed the consent is a director when the consent is to become effective, and (c) the consent has not previously been revoked. Every such consent "shall be revocable prior to its becoming effective." 8 *Del. C.* § 141(f).

A similar amendment has been made to the DGCL provisions dealing with written consents by stockholders. 8 *Del. C.* § 228. Language added to § 228(c) provides that, "whether through instruction to an agent or otherwise," a stockholder consent may be made effective as of a time up to 60 days in the future. If "evidence" of the instruction or provision regarding future effectiveness is furnished to the corporation, "such later effective time shall serve as the date of signature." Unlike future-effective consents given by directors, such a stockholder consent may provide that it is irrevocable. *Id.*

The legislative synopsis pertaining to the 2014 DGCL amendments makes the important point that the amendment to § 228(c) "does not affect the requirement that the consent bear the actual date of signature." In addition, the synopsis explains that the amendment to § 228(c) does not "expressly state [that] the signatory need not be a stockholder when the consent is signed[,]" because "under current law" the person signing the consent must be a stockholder "only on the relevant record date." Del. H.B. 329 syn. § 5, 147th Gen. Assem. (2014).

Perfecting Corporate Organization in the Absence of the Incorporator

Under Delaware law, a corporation's initial certificate of incorporation must be signed by one or more "incorporators." 8 *Del. C.* § 103(a)(1). In addition, an initial certificate of incorporation may, but need not, state the names and addresses of the corporation's initial directors. 8 *Del. C.* § 102(a)(6). When the initial directors are named in the certificate of incorporation, any authority of the incorporator terminates upon the filing and effectiveness of the certificate of incorporation, and the initial directors then have exclusive authority to perfect the corporation's organization. *Id.*; *see also* 8 *Del. C.* § 108(a). More commonly, however, certificates of incorporation do not name the initial directors, sometimes in the interest of privacy, and sometimes simply because the selection of the initial directors has not yet been finalized when the certificate of incorporation is filed.

When the initial directors have not been named in the certificate of incorporation, the incorporator has the exclusive authority to elect them. Until the incorporator does so, the corporation is effectively paralyzed. Without a board of directors, it has no power to issue stock, with the result that the ability to elect directors to manage the business and affairs of the corporation cannot be shifted from the incorporator to stockholders.

Not infrequently, once a certificate of incorporation is filed, the interested parties fail to see that the incorporator finishes the job by electing the initial directors. Years sometimes pass before this oversight is detected, and in such situations, the incorporator may be impossible to locate or, if located, unwilling to cooperate. A somewhat cumbersome remedy for the missing or inert incorporator was possible before the 2014 amendments, by means of DGCL § 103(a)(1) (which has also been amended this year, as discussed below). Under that section, if one of several specified circumstances caused an incor-

porator to be unavailable (and the initial directors were not named in the certificate of incorporation), any person for whom the incorporator had acted in signing the certificate of incorporation could sign any other filing with the Delaware Secretary of State until the initial board was elected. Relying on this provision, the principal for whom the incorporator had acted could sign and file a certificate of amendment that would add to the certificate of incorporation a provision naming a cooperative individual as the initial director. Then, as the initial director, that individual would proceed to complete the corporation's organization (adopting bylaws, electing officers, authorizing the initial issuances of stock, etc.).

The 2014 amendments have made the unavailability of an incorporator much easier to overcome. Under new § 108(d), "[i]f any incorporator is not available to act, then any person for whom or on whose behalf the incorporator was acting directly or indirectly as employee or agent, may take any action that such incorporator would have been authorized to take" pursuant to the DGCL. Thus, no filing must now be made with the Delaware Secretary of State to enable the principal of an unavailable incorporator to step into the incorporator's shoes. The only associated formality is that any instrument signed by the principal in place of the incorporator (and the minutes of any meeting where the principal acts in concert with multiple incorporators) must state that the incorporator is unavailable, "the reason therefor," that the incorporator was acting "directly or indirectly as employee or agent" for the principal, and that the principal's signature (or participation in an incorporators' meeting) "is otherwise authorized and not wrongful." 8 *Del. C.* § 108(d).

An amendment regarding incorporator unavailability has also been made to § 103(a)(1) of the DGCL. Previously, § 103(a)(1) stated that the principal for whom an incorporator acted could sign filings with the Secretary of State if the incorporator was "not available *by reason of death, incapacity, unknown address, or refusal or neglect to act"* (emphasis added). The emphasized language has now been removed by the amendment. However, that language should remain significant insofar as it aids interpretation of "not available"—a phrase that most readers would not normally take to encompass a refusal or neglect to act by someone who physically is available. Importantly, the legislative synopsis indicates that this amendment is not intended to narrow the meaning of "not available"; rather, its purpose is just the opposite, i.e., "to remove any limitation on the reason for the incorporator's unavailability." Del. H.B. 329 syn. § 1, 147th Gen. Assem. (2014).

Refinement of the Second-Step Merger Provisions Added to the DGCL in 2013

Last year, the Delaware legislature amended the DGCL's basic merger statute, 8 *Del. C.* § 251, to simplify the consummation of a merger when it forms the second step of a standard two-step acquisition of a public corporation (in which a merger follows a successful tender offer for the target corporation's shares). Under then-new § 251(h), if various requirements were met, the acquiring corporation would be spared the necessity of obtaining approval of the merger from the target corporation's stockholders if, following the tender offer, the acquiring corporation owned enough shares to determine the outcome of any stockholder vote on the merger (typically, anything over 50% of the shares entitled to vote). This was a significant innovation because, under prior law, approval by the target's stockholders could be avoided only if the acquirer held at least 90% of the target's voting shares after the tender offer and any subsequent "top-up" purchases.[6]

[6] For a fuller discussion of the original version of § 251(h), see the summer 2013 issue of the *Update*, which is available at http://www.youngconaway.com//files//upload/DETransUpdateSummer2013.pdf.

The streamlined transaction structure offered by § 251(h) was quickly put to use by M&A practitioners. Their experience in crafting merger agreements so as to come within the new provisions led to a number of amendments that have made § 251(h) clearer and more practical.[7]

First, the agreement of merger need no longer provide that the merger "shall" be governed by § 251(h) and "shall" be effectuated as soon as possible after the tender offer. Instead, the agreement need only "permit[]" the merger to be effectuated under § 251(h) and provide that its effectuation will follow the tender offer as soon as possible *if* the merger is under § 251(h). Second, the amendments have made clear that the tender offer, which must be for "any and all" of the target's outstanding voting shares, nevertheless need not include target shares already held by the acquirer, by any person that directly or indirectly owns all of the stock in the acquirer, or by any direct or indirect wholly owned subsidiary of such person, of the target, or of the acquirer.

Third, following the tender offer, the acquirer need no longer "own[]" sufficient target shares to control the outcome of a merger vote. Instead, the acquirer can reach the required threshold by including shares "irrevocably accepted" in the offer and "received" by the target's depository before the offer expired. Fourth, the amendments have removed the former requirement that no party to the agreement of merger be an "interested stockholder" under Delaware's anti-takeover statute (8 *Del. C.* § 203). Finally, the amendments have added definitions that helpfully specify what § 251(h) means by "consummation" of a tender offer and stock "received" by a "depository."

[7] The 2014 amendments to § 251(h) apply only to agreements of merger entered into on or after August 1, 2014.

Changing Corporation's Name Without Stockholder Vote; Other Amendments

The 2014 amendments to the DGCL have also made it possible for a corporation to change its name without stockholder approval. Changing a corporation's name requires an amendment to its certificate of incorporation. Previously, the approvals needed for such an amendment (as set forth in § 242) were the same as for any other amendment to a certificate of incorporation: if the corporation had received payment for stock, the amendment had to be approved by the board and by holders of a majority of the outstanding shares entitled to vote. As a result of the 2014 amendments, however, stockholder approval is no longer needed to amend a certificate of incorporation to change the corporation's name.

In addition, § 242 has been amended to permit the removal of obsolete provisions from a certificate of incorporation without a stockholder vote and without restating the entire certificate. Since 1967, § 245 of the DGCL has set forth a procedure by which a certificate of incorporation can be "restated"—i.e., "integrat[ing] into a single instrument all of the provisions . . . which are then in effect and operative" as a result of earlier certificates of amendment or other filings with the Delaware Secretary of State. 8 *Del. C.* § 245(a). If the corporation merely restates its certificate without simultaneously further amending it, no stockholder approval has been required. 8 *Del. C.* § 245(b). Moreover, no stockholder approval has been required if the restated certificate also "omit[s]" certain obsolete provisions, including provisions naming the incorporator and provisions effectuating a recapitalization that has since taken place. 8 *Del. C.* § 245(c). Not until now, however, could such obsolete provisions be removed, without a stockholder vote, by means of a certificate of amendment. The 2014 amendments to § 242 now permit a certificate of incorporation to be amended, without a stockholder vote, to remove the types of obsolete provisions described in § 245.

A third amendment this year to § 242 involves the notice that must be given to stockholders when an amendment to the certificate of incorporation requires their approval. Under § 242, the notice to stockholders must set forth in full or summarize the proposed amendment. 8 *Del. C.* § 242(b)(1). The 2014 amendments have inserted a qualification to this notice requirement, under which the notice need not set forth or summarize the proposed amendment if "such notice constitutes a notice of internet availability of proxy materials under the rules promulgated under the Securities Exchange Act of 1934." *Id.*

Finally, the provisions of the DGCL regarding stockholder voting trusts have been amended to provide an additional means by which the settlors of a voting trust can cause the corporation to issue stock to the voting trustee. Previously, the voting trust agreement had to be "filed" in the corporation's registered office in Delaware. Now it will be sufficient if the agreement is "delivered" to either the corporation's registered office in Delaware or its principal place of business. 8 *Del. C.* § 218.

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