

MBCA PROPOSED EMERGENCY POWERS AND THEIR EFFECT ON SHAREHOLDERS



By Ryan Downes

A recent bill in the Minnesota Legislature proposes to make various changes, additions, and modifications to the Minnesota Business Corporation Act ("MBCA"). Bill HF747 ("HF747" or the "Bill") aims to modernize the MBCA with alterations that may have wide ranging effects on the operation of corporations and their shareholders in Minnesota. The Bill was crafted largely with the assistance of the Minnesota State Bar Association's Business Law Section.

One of the proposed additions to the MBCA aims to provide additional powers to a corporation's board of directors during "emergencies". These powers include altering the notice requirements and creating an alternative method to achieve a quorum.

Specifically, Minn. Stat. § 302A.011, is amended by adding a subdivision to read:

Subd. 73. Emergency. "Emergency" means a situation during which it is impracticable for the corporation to conduct the corporation's affairs in accordance with this chapter, the articles, the bylaws, or as specified in a notice for the meeting previously given as a result of a catastrophic event or condition, including but not limited to an act of nature, an epidemic or pandemic, a technological failure or malfunction, a terroristic incident or an act of war, a cyber attack, a civil disturbance, or a governmental authority's emergency declaration."

The proposed language is undoubtedly influenced, at least partially, from the inability of Minnesota corporations to effectively conduct business and corporate measures during the Covid-19 pandemic. Indeed, the proposed language in subdivision 73 falls directly in line with the definitions that are generally found in force majeure clauses, many of which were invoked during the pandemic. While the proposed language in the Bill identifies incidents that constitute an "Emergency," it is not restrictive and therefore leaves the door open to corporations to determine the limits of this language. If HF747 becomes law, it will likely lead to litigation in which Minnesota courts must determine how far the definition of "Emergency" can be stretched and how this provision could affect the rights of Minnesota shareholders.

HF747 also provides additional powers to corporations in the event an "Emergency" occurs. Specifically, Minn. Stat. § 302A.161, is amended by adding a subdivision to read:

Subd. 23a.

Emergency powers.

(a) During an emergency, unless emergency bylaws provide otherwise:

(1) notice of a meeting of the board must be given only to the directors that are practicable to reach and may, if ordinary notice is impracticable or inadvisable due to the emergency, be given in any practicable manner; and

(2) the officers designated on a list approved by the board of directors before the emergency, in the priority order and subject to conditions as may be provided in the board resolution approving the list, must, to the extent required to provide a quorum at any meeting of the board, be deemed directors for the meeting.

(b) [omitted]

(c) A corporate action taken in good faith under this subdivision during an emergency to further the business and affairs of the corporation binds the corporation.

Subdivision 23a grants Minnesota corporations two interesting powers. First, during an "Emergency,"

the corporation is only required to give notice of a meeting of the board to the directors that are practicable to reach and may give such notice in any practicable manner. This provision aims to remove the notice requirement called for in the corporation's bylaws and replace such requirements with a practicability requirement. The proposed language introduces a discretionary measure for the corporation to determine which directors are "practicable to reach" and what constitutes notice in a "practicable manner", which are likely corporation specific.

Second, subdivision 23a allows a corporation to designate certain officers to serve as directors for the purpose of establishing a quorum in the event of an Emergency. A plain reading of the proposed language suggests that such a list must be approved by the board prior to the event constituting an "Emergency." The proposed language provides an interesting opportunity in which an officer could be placed in a director role for the sole purpose of achieving a quorum and allowing fewer directors to participate in the decision making of the corporation than is allowed for in the corporation's bylaws. It is likely, if not certain, that such situations may give rise to significant litigation.

While HF747 has yet to be passed into law, the alteration of the notice and quorum requirements due to an "Emergency" could greatly affect the rights of minority shareholders in Minnesota. Minnesota shareholders should be cognizant of their corporation's response in the event of an "Emergency."

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