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## Emergency Bylaws: An Underutilized Tool for Corporate Operation During an Emergency

Grace Myers

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# EMERGENCY BYLAWS: AN UNDERUTILIZED TOOL FOR CORPORATE OPERATION DURING AN EMERGENCY

GRACE MYERS\*

## ABSTRACT

*Emergency bylaws are an underutilized tool for corporate governance whose importance has been highlighted by COVID-19. Emergency bylaws can be included within corporations' bylaws and only operate during an "emergency" as defined by state statutes. These provisions usually give boards more agency to act during an emergency through mechanisms such as looser quorum and notice requirements. These provisions will be increasingly important during future pandemics, wars, and global warming. However, few corporations have these bylaws, and the current hodgepodge of state statutes hinders their adoption. The current state of emergency bylaws regulation and implementation raises some questions about shareholder rights and disclosure requirements. States should look to the newly updated Delaware Corporate Code provisions for a better model of regulation, and corporations should adopt provisions tailored to their needs.*

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## INTRODUCTION

The COVID-19 pandemic has shaken corporate governance and exposed weaknesses in how companies operate during an emergency,<sup>1</sup> and yet one of the most powerful tools for governance during an emergency—emergency bylaws—receives little attention.<sup>2</sup> Emergency bylaws are provisions that companies can incorporate into their bylaws to supersede certain normal bylaw provisions in the event of an emergency.<sup>3</sup> These bylaws trigger (become operational) only during an emergency and cease to become operational once the emergency has ended.<sup>4</sup> State law governs how emergency bylaws work and sets the definition of an emergency.<sup>5</sup> Many states also have emergency powers statutes,<sup>6</sup> which give boards special powers automatically during an emergency.<sup>7</sup>

Emergency bylaw provisions adopted by individual corporations give companies wider agency to act as needed to ensure continuity of management during an emergency situation.<sup>8</sup> In fact, several states have special emergency bylaw statutes that apply only to domestic insurers and give “default” emergency bylaws if insurance companies choose not to adopt their own, ensuring that insurance companies in particular operate during an emergency.<sup>9</sup>

The importance of emergency bylaws was brought into sharp relief during the COVID-19 pandemic, and as a result, law firms and corporations have finally given more attention to this underappreciated mechanism of corporate governance.<sup>10</sup> COVID-19

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<sup>1</sup> See Michael Peregrine et al., *The Long-Term Impact of the Pandemic on Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 16, 2020), <https://corpgov.law.harvard.edu/2020/07/16/the-long-term-impact-of-the-pandemic-on-corporate-governance> [<https://perma.cc/89G4-PQZY>].

<sup>2</sup> See Keith Bishop et al., *Should Your Corporation Have Emergency Bylaws?*, JD SUPRA (Apr. 23, 2020), <https://www.jdsupra.com/legalnews/should-your-corporation-have-emergency-47585> [<https://perma.cc/EMT3-KV4N>].

<sup>3</sup> MODEL BUS. CORP. ACT § 2.07 (AM. BAR ASS’N, amended 2016).

<sup>4</sup> *Id.*

<sup>5</sup> Holly Gregory et al., *Leadership Resiliency in an Emergency*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 22, 2020), <https://corpgov.law.harvard.edu/2020/04/22/leadership-resiliency-in-an-emergency> [<https://perma.cc/A5GY-RZ6U>].

<sup>6</sup> *Id.*

<sup>7</sup> MODEL BUS. CORP. ACT § 3.03.

<sup>8</sup> See Gregory et al., *supra* note 5.

<sup>9</sup> See *infra* Parts II, III.

<sup>10</sup> See Bishop et al., *supra* note 2 (“The current COVID-19 pandemic has highlighted the importance of emergency planning for businesses. For example,

is but one unprecedented emergency that has forced companies to consider their emergency provisions; global diseases, conflicts and war, and the increasing rate of natural disasters as a result of climate change will necessitate that companies take emergency bylaws seriously.<sup>11</sup>

In this Note, Parts I and II will examine model and state statutes regarding emergency bylaws and powers.<sup>12</sup> Part III will then examine the need for better emergency bylaw statutes and adoption rates given the acceleration of global crises.<sup>13</sup> Part IV will highlight current issues with emergency bylaw statutes and regulation, and Part V will give several recommendations to state lawmakers and regulatory agencies that will facilitate the effectiveness of emergency bylaw statutes and their impacts on corporate governance.<sup>14</sup>

## I. THE MBCA APPROACH TO EMERGENCY BYLAWS AND POWERS

### A. *The Model Business Corporation Act*

The American Bar Association's (ABA) Model Business Corporation Act (MBCA) is a model code for state corporate codes;<sup>15</sup> thirty-three states have implemented either the 1984 or 2016 iteration of the MBCA as of July 2019.<sup>16</sup> Additionally, the MBCA is influential beyond the thirty-three states that have adopted it; many other states pull language directly from the MBCA's provisions for their own corporate codes.<sup>17</sup> Since its inception in 1950,

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physical limitations or governmental action may prevent directors from meeting or attaining a quorum or may cause key members of management to be unreachable or unable to act on behalf the corporation.”).

<sup>11</sup> See Henry Fountain, *Climate Change Is Accelerating, Bringing World 'Dangerously Close' to Irreversible Change*, N.Y. TIMES (Dec. 4, 2019), <https://www.nytimes.com/2019/12/04/climate/climate-change-acceleration.html> [https://perma.cc/6WZK-8N4Z].

<sup>12</sup> See *infra* Parts I, II.

<sup>13</sup> See *infra* Part III.

<sup>14</sup> See *infra* Parts IV, V.

<sup>15</sup> See *Model Business Corporation Act (2016 Revision) Launches*, BUS. L. TODAY (Jan. 19, 2017), <https://businesslawtoday.org/2017/01/model-business-corporation-act-2016-revision-launches> [https://perma.cc/9LA4-WU9S].

<sup>16</sup> *Corporate Laws Committee*, AM. BAR ASS'N, [https://www.americanbar.org/groups/business\\_law/committees/corplaws](https://www.americanbar.org/groups/business_law/committees/corplaws) [https://perma.cc/7FY4-W73W].

<sup>17</sup> See *infra* Part III.

the ABA has issued fully revised versions of the MBCA three times: in 1969, 1984, and 2016.<sup>18</sup> The MBCA first featured emergency bylaws and emergency powers clauses as separate concepts in its 1984 revision, and each edition since has featured some version of these two provisions.<sup>19</sup>

### *B. Emergency Bylaws in the MBCA*

The emergency bylaws section of the MBCA, section 2.07, allows companies to adopt emergency bylaws, which “may make all provisions necessary for managing the corporation during an emergency.”<sup>20</sup> Though the MBCA section gives a nonexhaustive list of possible provisions that boards can adopt, companies can also create and tailor specific emergency bylaws for their needs.<sup>21</sup> Any emergency bylaws that companies choose to adopt preempt that company’s standard bylaws only when they directly contradict; all unaffected bylaws remain operational during an emergency.<sup>22</sup>

Emergency bylaws are subject to repeal by the shareholders.<sup>23</sup> They trigger when the emergency begins and end when the emergency ends.<sup>24</sup> The MBCA section further imposes a good faith standard on corporate action taken within the scope of emergency bylaws.<sup>25</sup> The comment to the MBCA explains that this provision is intended “[t]o encourage corporations to adopt emergency bylaws.”<sup>26</sup>

Importantly, the MBCA defines an emergency as a situation in which “a quorum of the board of directors cannot readily be assembled because of some catastrophic event.”<sup>27</sup> There is no

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<sup>18</sup> See *Model Business Corporation Act (2016 Revision) Launches*, *supra* note 15.

<sup>19</sup> STATE BAR OF CAL., CORP. COMM., BUS. L. SEC., PROPOSAL TO AMEND SECTIONS 207 AND 212 OF CALIFORNIA CORPORATIONS CODE 2 (2012).

<sup>20</sup> MODEL BUS. CORP. ACT § 2.07(a) (AM. BAR ASS’N, amended 2016).

<sup>21</sup> *Id.* These possible provisions include changing procedures for calling board meetings, adjusting quorum requirements, and designating “additional or substitute directors.” *Id.*

<sup>22</sup> § 2.07(b).

<sup>23</sup> § 2.07(a).

<sup>24</sup> § 2.07(a)–(b).

<sup>25</sup> § 2.07(c).

<sup>26</sup> § 2.07 cmt.

<sup>27</sup> § 2.07(d).

guidance as to how this applies to remote meetings, and “catastrophic event” intentionally covers a wide range of events.<sup>28</sup> This definition also means that one corporation could experience an emergency while another in the same state would not: a corporate jet crash in Georgia that killed most of a company’s board, for example, was a “catastrophic event” and therefore an emergency for that company alone.<sup>29</sup>

### C. *Emergency Powers in the MBCA*

The comments to section 2.07 explain that even if a corporation chooses not to adopt emergency bylaws, the board of the corporation “may nevertheless exercise the powers described in section 3.03 [emergency powers] in the event of an emergency.”<sup>30</sup> The emergency powers section, section 3.03, unlike section 2.07, gives boards power to do certain things during *and* “[i]n anticipation of ... an emergency.”<sup>31</sup> In the MBCA context, this stands in contrast to emergency bylaws, which are only applicable *during* an emergency.<sup>32</sup>

The MBCA’s emergency powers provision allows boards to change lines of succession or relocate offices before or during an emergency.<sup>33</sup> Companies do not need to have adopted emergency bylaw provisions to use these powers.<sup>34</sup> Additionally, as long as a company’s emergency bylaws do not say otherwise, *during* an emergency a board can give notice of a meeting, in any practicable manner, to only the board members whom it is practicable to reach.<sup>35</sup> Moreover, a board can deem any present officers to be directors in order to achieve a quorum.<sup>36</sup> Section 3.03 contains the same good faith protection and emergency definition as section 2.07.<sup>37</sup>

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<sup>28</sup> § 2.07 cmt.

<sup>29</sup> *Id.*; see *infra* notes 101–04 and accompanying text.

<sup>30</sup> § 2.07 cmt.

<sup>31</sup> § 3.03(a).

<sup>32</sup> § 2.07(a)–(b).

<sup>33</sup> § 3.03(a).

<sup>34</sup> § 3.03 cmt.

<sup>35</sup> § 3.03(b).

<sup>36</sup> *Id.*

<sup>37</sup> See § 3.03(c)–(d); § 2.07(c)–(d).

## II. STATE APPROACHES TO EMERGENCY BYLAWS AND POWERS

Though all states borrow some language and ideas from the MBCA, some states have unique emergency bylaw and powers statutes,<sup>38</sup> some states have no statutes at all,<sup>39</sup> and others have emergency bylaw statutes *only* for domestic insurers and no provisions for corporations in general.<sup>40</sup> Additionally, several notable states have unique emergency bylaw statutes.<sup>41</sup>

## A. Delaware

Delaware's emergency bylaw and powers provisions are rolled into section 110 of the state's corporate code.<sup>42</sup> Delaware has very similar emergency power provisions to the MBCA,<sup>43</sup> as well as very similar good faith standards<sup>44</sup> and timing provisions.<sup>45</sup> Delaware, however, made several changes to emergency bylaws in direct response to the COVID-19 pandemic of 2020.<sup>46</sup> Before the changes, which were enacted on July 16, 2020 and applied retroactively to January 1, 2020, the definition of "emergency" was:

[A]ny emergency resulting from an attack on the United States or on a locality in which the corporation conducts its business ... or during any nuclear or atomic disaster, or during the existence of any catastrophe, or other similar emergency condition, as a result of which a quorum of the board of directors ... cannot readily be convened.<sup>47</sup>

This definition, slightly broader than the MBCA, was changed substantially to adjust to COVID-19.<sup>48</sup> The current, updated code defines "emergency" as:

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<sup>38</sup> See, e.g., *infra* Part II.

<sup>39</sup> See, e.g., VT. STAT. ANN. tit. 11A (2020).

<sup>40</sup> See, e.g., ALASKA STAT. ANN. § 21.69.660 (West 2020).

<sup>41</sup> See *infra* Sections II.A–II.C.

<sup>42</sup> DEL. CODE ANN. tit. 8, § 110 (West 2020).

<sup>43</sup> *Id.* § 110(b)–(c), (f)–(g); MODEL BUS. CORP. ACT § 3.03(a)–(b) (AM. BAR ASS'N, amended 2016).

<sup>44</sup> DEL. CODE ANN. tit. 8, § 110(d); MODEL BUS. CORP. ACT § 3.03(c).

<sup>45</sup> DEL. CODE ANN. tit. 8, § 110(e); MODEL BUS. CORP. ACT § 3.03.

<sup>46</sup> See H.B. 341, 150th Gen. Assemb., 2d Reg. Sess. (Del. 2019).

<sup>47</sup> *Id.* (emphasis added).

<sup>48</sup> See *id.*



[A]ny emergency resulting from an attack on the United States or on a locality in which the corporation conducts its business ... or during any nuclear or atomic disaster, or during the existence of any catastrophe, *including, but not limited to, an epidemic or pandemic, and a declaration of a national emergency by the United States government*, or other similar emergency condition, *irrespective of whether a quorum of the board of directors ... can readily be convened.*<sup>49</sup>

Though this change explicitly mentions an “epidemic or pandemic,”<sup>50</sup> the most notable change by far is Delaware’s disposal of the language: “as a result of which a quorum of the board of directors ... cannot readily be convened,”<sup>51</sup> which is present in nearly every other states’ emergency bylaws statutes.<sup>52</sup> This gives companies extremely wide authority to use emergency bylaws, as it eliminates the confusing and vague element of whether a board can be “readily convened.”<sup>53</sup>

The Delaware legislature also added a lengthy subsection to section 110 in the same round of changes, mainly to give corporations more agency in dealing with shareholder obligations.<sup>54</sup> On March 17, 2020 (and as edited on April 7, 2020), the Securities and Exchange Commission (SEC) Division of Corporation Finance released staff guidance regarding notice for remote shareholder meetings.<sup>55</sup> Given the challenges of COVID-19, many corporations needed to change their annual shareholder meetings to a virtual or remote format, often with little time to make such a change.<sup>56</sup> To facilitate this change, the SEC gave a set of rules relaxing how companies had to send proxy cards and other materials to change to a remote meeting.<sup>57</sup>

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<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; DEL. CODE ANN. tit. 8, § 110(a) (West 2020).

<sup>52</sup> *See infra* Section IV.A.

<sup>53</sup> *See infra* Section IV.A.

<sup>54</sup> *See* H.B. 341, 150th Gen. Assemb., 2d Reg. Sess. (Del. 2019).

<sup>55</sup> *See Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns*, SEC ANNOUNCEMENT (Mar. 17, 2020), <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns> [<https://perma.cc/464A-ZW2E>].

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (In light of [the difficulties of changing meeting format], the staff will take the position that an issuer that has already mailed and filed its definitive proxy materials can notify shareholders of a change in the date, time, or

Section 110 was amended to account for this change during an emergency.<sup>58</sup> Mainly, the change to the Delaware Code allowed the board to change the location of a shareholder meeting during an emergency (presumably to a remote format) solely by filing relevant documents with the SEC.<sup>59</sup> The code dictates that a corporation then must give stockholders further notice “as promptly as practicable thereafter.”<sup>60</sup>

The amendment also allows corporations to change the record and payment dates of dividends during an emergency, provided that shareholders are notified “as promptly as practicable thereafter” and that such a change is allowable by the SEC.<sup>61</sup> The amendment also clarifies that no shareholder meeting could be changed or cancelled simply because a stock list was not available in time due to the emergency.<sup>62</sup> These changes give companies more flexibility in an emergency as well as the authority to postpone or alter corporate obligations to shareholders during an emergency.<sup>63</sup>

### *B. California*

California’s emergency bylaws and powers statutes mostly track the MBCA’s provisions but differ markedly in several significant ways.<sup>64</sup> California’s statutes use a long and specific definition of an emergency, which defines an emergency as a natural disaster (of which a nonexhaustive list of examples is included); an actual or imminent attack; a state of emergency; or any manmade

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location of its shareholder meeting without mailing additional soliciting materials or amending its proxy materials if it: issues a press release announcing such change; files the announcement as definitive additional soliciting material on EDGAR; and takes all reasonable steps necessary to inform other intermediaries in the proxy process ... and other relevant market participants ... of such change.)

<sup>58</sup> DEL. CODE ANN. tit. 8, § 110(i) (West 2020).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See* CAL. CORP. CODE §§ 212(c)(1), (3)–(4), 207(i)(1)–(4) (West 2020); MODEL BUS. CORP. ACT §§ 2.07(a)–(c), 3.03(a)–(c) (AM. BAR ASS’N, amended 2016).

disaster that results in mass casualties, damage, or destruction.<sup>65</sup> Like Delaware, California's definition does not include the MBCA requirement that a quorum not be readily convenable, and California's categories, though specific, are wide enough to conceivably catch most emergency situations.<sup>66</sup>

California's emergency bylaws statute includes one very limiting clause that is not present in any other state's statute: "[d]uring an emergency, the board may not take any action that requires the vote of the shareholders or is not in the corporation's ordinary course of business, unless the required vote of the shareholders was obtained prior to the emergency."<sup>67</sup> This limitation severely hamstrings corporate action by acting contrary to the point of emergency bylaws: to facilitate corporate action in an emergency situation.<sup>68</sup> The "ordinary course of business" restriction is equally confounding; as one firm aptly puts it, "[t]he ... restriction is inexplicable because an emergency might be just the very time when a board should take action outside of the corporation's ordinary course of business."<sup>69</sup>

The convoluted emergency bylaw statute aside, California also provides an emergency bylaw statute for domestic insurers.<sup>70</sup> Domestic insurers face neither of the unique restrictions noted above in the corporate code; their actions do not need shareholder approval, and the bylaws can contain "any provision ... reasonably necessary for the operation" of the insurance company.<sup>71</sup> Insurance companies therefore have much wider agency to create emergency

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<sup>65</sup> CAL. CORP. CODE § 207(i)(5).

<sup>66</sup> *See id.*; DEL. CODE ANN. tit. 8, § 110(a); MODEL BUS. CORP. ACT § 2.07(d).

<sup>67</sup> CAL. CORP. CODE § 207(i)(3).

<sup>68</sup> *See, e.g.*, William Ross, *Corporate Governance in California During the COVID-19 Pandemic*, HIRSCHFIELD KRAMER (Mar. 30, 2020), <https://www.hkemploymentlaw.com/blog/corporate-governance-in-california-during-the-covid-19-pandemic> [<https://perma.cc/7NGT-6SU3>] ("Since it is likely that an emergency would give rise to circumstances that are highly unusual, the limitation as to the corporation's ordinary course of business is unfortunate."); Keith Bishop et al., *Does This California Statute Arbitrarily Shackle Corporate Boards In Times of Emergency?*, JD SUPRA (Mar. 22, 2020), <https://www.jdsupra.com/legalnews/does-this-california-statute-16582> [<https://perma.cc/B39K-S33L>].

<sup>69</sup> CAL. CORP. CODE § 207(i)(3); *see* Bishop et al., *supra* note 68.

<sup>70</sup> CAL. INS. CODE § 688.1 (West 2020).

<sup>71</sup> *Id.*

bylaws, though this standard is simply more aligned with that of the MBCA.<sup>72</sup>

California's insurance code also gives a set of emergency bylaws that apply during an emergency to all domestic insurers that have not adopted their own emergency bylaws.<sup>73</sup> These default provisions set the number of directors that can constitute a quorum (three), describe how to fill board vacancies, and give a succession plan in the event that there are no surviving directors.<sup>74</sup> Insurance companies can override these default provisions by adopting their own emergency bylaws.<sup>75</sup> These default provisions are the same ones generally adopted by other states that have default emergency bylaws for domestic insurers.<sup>76</sup>

### C. New York

New York's emergency bylaw statute is disorganized at best.<sup>77</sup> New York's corporate code mentions emergency bylaws briefly, giving corporations the power "[t]o adopt, amend or repeal by-laws, including emergency by-laws made pursuant to ... the state defense emergency act, relating to the business of the corporation, the conduct of its affairs, its rights or powers or the rights or powers of its shareholders, directors or officers."<sup>78</sup> The section referred to by the corporate code, strangely situated in New York's Defense Emergency Act, gives corporations generally the same powers as the MBCA, except that there is no good faith protection.<sup>79</sup>

The Defense Emergency Act, still in operation, was established in 1951 to prepare for the threat of attack on the United States by a Communist nation and was in response to President Truman's state of emergency declaration during the Korean War.<sup>80</sup>

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<sup>72</sup> See *id.*; MODEL BUS. CORP. ACT § 2.07 (AM. BAR ASS'N, amended 2016).

<sup>73</sup> CAL. INS. CODE § 688.2.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., ALASKA STAT. ANN. § 21.69.660 (West 2020).

<sup>77</sup> See N.Y. UNCONSOL. LAW § 9112(17) (McKinney 2020).

<sup>78</sup> N.Y. BUS. CORP. LAW § 202(11) (McKinney 2020).

<sup>79</sup> N.Y. UNCONSOL. LAW § 9112(17); MODEL BUS. CORP. ACT § 2.07 (AM. BAR ASS'N, amended 2016).

<sup>80</sup> N.Y. UNCONSOL. LAW § 9102 ("In view of the professed determination of the government of the United States to resist further communist aggression,

The Act's express purpose is "to minimize the hardship resulting from these dislocations, and to permit the fullest participation by the people of this state in the defense effort .... It is the purpose of this legislation to meet these dangers and problems with the least possible interference ...."<sup>81</sup> The Act seems to still operate even though the need for the Act probably ended after the partial disarmament at the end of the Cold War, given its stated purpose.<sup>82</sup>

Given the provision's location in the Emergency Defense Act, it is unsurprising that New York's emergency bylaws are only applicable during an attack.<sup>83</sup> An attack is defined as "[a]ny attack, actual or imminent, or series of attacks by an enemy or a foreign nation upon the United States causing, or which may cause, substantial damage or injury to civilian property or persons in the United States."<sup>84</sup> This makes sense, as this statute is in New York's Defense Emergency Act.<sup>85</sup>

New York's Defense Emergency Act also contains an emergency bylaw provision for domestic insurers, which is mostly similar to the statute for corporations, except that domestic insurers have a different emergency definition, and insurer emergency bylaws require superintendent approval.<sup>86</sup> All emergency bylaws must be approved by the Superintendent of Financial Services.<sup>87</sup> They apply in an "acute emergency," which is a much wider definition than for corporations.<sup>88</sup> An acute emergency is:

[A] period in which, by reason of loss of life, epidemic disease, destruction or damage of property, contamination of property by radiological, chemical or bacteriological means, or disruption of the means of transportation and communication, resulting from an attack ... it is impossible or impracticable for the business

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and because of the likelihood of resort to atomic and radiological weapons in the event of further conflict between this nation and communist aggressors, the peril to the people of this state is sufficiently great that the precautions embodied in this act must be taken.").

<sup>81</sup> *Id.*

<sup>82</sup> See *The End of the Cold War*, NEB. STUDS., <https://www.nebraskastudies.org/en/1975-1999/the-end-of-the-cold-war> [<https://perma.cc/D8UE-TN56>].

<sup>83</sup> N.Y. UNCONSOL. LAW § 9129.

<sup>84</sup> § 9103.

<sup>85</sup> *Id.*

<sup>86</sup> §§ 9112(17), 9177(1).

<sup>87</sup> § 9177(1).

<sup>88</sup> § 9176(1)(d).

of insurance in this state to be conducted in strict accord with the provisions of law or “charters” applicable thereto.<sup>89</sup>

#### *D. Other States*

Some states have adopted the MBCA but with their own modifications.<sup>90</sup> Florida, for example, uses the MBCA provisions nearly verbatim, with a few additions.<sup>91</sup> The most notable change is the addition of a subsection stating that “[n]o officer, director, or employee acting in accordance with any emergency bylaws shall be liable except for willful or intentional misconduct.”<sup>92</sup> This expands the MBCA’s good faith protections for company officers during an emergency to cover all behavior other than willful misconduct.<sup>93</sup>

Illinois, a state with unique emergency bylaw provisions, has the same general emergency bylaw provisions as the MBCA.<sup>94</sup> Its emergency definition for all corporations (presumably including insurance companies), however, limits the use of emergency bylaws to a state or national declaration of civil defense emergency due to an impending attack.<sup>95</sup> Illinois has a separate definition for just insurance companies, allowing insurance companies to adopt emergency bylaws that would be operational during an emergency resulting from an attack on the United States, no official declaration necessary.<sup>96</sup> It is unclear if this difference is intentional or not, but the interpretation could give insurance companies wider latitude in using emergency bylaws than other types of corporations.<sup>97</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 10-207 (2020); FLA. STAT. ANN. § 607.0303 (West 2020).

<sup>91</sup> *See* FLA. STAT. ANN. §§ 607.0207, 607.0303; MODEL BUS. CORP. ACT §§ 2.07, 3.03 (AM. BAR ASS’N, amended 2016).

<sup>92</sup> FLA. STAT. ANN. § 607.0303(4).

<sup>93</sup> *See id.*

<sup>94</sup> *See* 805 ILL. COMP. STAT. ANN. 5/2.30 (West 2020); MODEL BUS. CORP. ACT § 2.07.

<sup>95</sup> 805 ILL. COMP. STAT. ANN. 5/2.30.

<sup>96</sup> 215 ILL. COMP. STAT. ANN. 5/155.06.

<sup>97</sup> *See id.*

*E. Timing of Emergency Bylaw Statute Adoption*

There does not seem to be any evidence that states adopted their emergency bylaw or powers statutes in response to any particular emergency.<sup>98</sup> However, states have *changed* their emergency bylaw statutes to reflect emergency situations.<sup>99</sup> Delaware is by far the most notable example,<sup>100</sup> but Georgia also adapted its emergency bylaw statute in response to a corporate plane crash in 1991.<sup>101</sup> Previously, Georgia's definition of an emergency was limited to nuclear attack or another similar emergency.<sup>102</sup> After a plane crash killed five top executives of an Alabama corporation,<sup>103</sup> Georgia changed its definition of an emergency to match the MBCA, specifically noting that this change "could cover a crash of a corporate jet."<sup>104</sup>

## III. THE INCREASING NEED FOR EMERGENCY BYLAWS

Emergency bylaws are by nature only useful during an emergency, and the recent COVID-19 pandemic was such a situation for many companies.<sup>105</sup> Though pandemics are formidable emergencies for companies,<sup>106</sup> other crises, such as war<sup>107</sup> and climate change,<sup>108</sup> can also prompt situations during which emergency bylaws would be a key tool for corporations.

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<sup>98</sup> See *supra* Part II.

<sup>99</sup> See, e.g., *infra* notes 101–04 and accompanying text.

<sup>100</sup> See *supra* notes 46–49 and accompanying text.

<sup>101</sup> GA. CODE ANN. § 14-2-207 cmt. (2020).

<sup>102</sup> *Id.*

<sup>103</sup> Ronald Smothers, *Crash of Private Plane in Georgia Kills 9*, N.Y. TIMES (Dec. 12, 1991), <https://www.nytimes.com/1991/12/12/us/crash-of-private-plane-in-georgia-kills-9.html> [<https://perma.cc/7Q7B-RQM4>].

<sup>104</sup> GA. CODE ANN. § 14-2-207 cmt.; see MODEL BUS. CORP. ACT § 2.07(d) (AM. BAR ASS'N, amended 2016).

<sup>105</sup> See Bishop et al., *supra* note 2.

<sup>106</sup> See *infra* Section IV.A.

<sup>107</sup> See *infra* Section III.B.

<sup>108</sup> See *infra* Section III.C.

*A. Global Diseases*

Despite the popular concept that a global pandemic is a once-in-a-lifetime event, this may no longer be true.<sup>109</sup> For a variety of reasons, including urbanization, climate change, global travel, and increased human-animal contact, global diseases and pandemics are likely to become more prevalent.<sup>110</sup> As humans push further into natural areas, habitat loss forces animals closer to human settlements.<sup>111</sup> This increases the likelihood of disease outbreaks:

“There is no great mystery about the cause of ... any modern pandemic,” said Dr. Peter Daszak, President of EcoHealth Alliance ... “The same human activities that drive climate change and biodiversity loss also drive pandemic risk through their impacts on our environment. Changes in the way we use land; the expansion and intensification of agriculture; and unsustainable trade, production and consumption disrupt nature and increase contact between wildlife, livestock, pathogens and people. This is the path to pandemics.”<sup>112</sup>

There are currently about 1.7 million unidentified viruses in mammals and birds, about half of which could impact humans.<sup>113</sup> Especially in the crowded, quickly growing cities of Asia and Africa, pandemics will spread more quickly and kill more people.<sup>114</sup> Financially, global diseases post-COVID-19 will cost the

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<sup>109</sup> See Victoria Gill, *Coronavirus: This Is Not the Last Pandemic*, BBC (June 6, 2020), <https://www.bbc.com/news/science-environment-52775386> [<https://perma.cc/NM2C-3VXT>].

<sup>110</sup> *5 Reasons Why Pandemics Like COVID-19 Are Becoming More Likely*, GAVI (June 10, 2020), <https://www.gavi.org/vaccineswork/5-reasons-why-pandemics-like-covid-19-are-becoming-more-likely> [<https://perma.cc/M2SJ-Q23Y>].

<sup>111</sup> Josef Settele et al., *COVID-19 Stimulus Measures Must Save Lives, Protect Livelihoods, and Safeguard Nature to Reduce the Risk of Future Pandemics*, INTERGOVERNMENTAL SCI.-POL'Y PLATFORM ON BIODIVERSITY & ECOSYSTEM SERVS. (Oct. 29, 2020), <https://ipbes.net/covid19stimulus> [<https://perma.cc/YYQ3-2Z38>].

<sup>112</sup> *Escaping the 'Era of Pandemics': Experts Warn Worse Crises to Come*, INTERGOVERNMENTAL SCI.-POL'Y PLATFORM ON BIODIVERSITY & ECOSYSTEM SERVS., <https://ipbes.net/pandemics> [<https://perma.cc/7GQG-FUMD>].

<sup>113</sup> INTERGOVERNMENTAL PLATFORM ON BIODIVERSITY & ECOSYSTEM SERVS., IPBES WORKSHOP ON BIODIVERSITY AND PANDEMICS: EXECUTIVE SUMMARY 5 (2020) [hereinafter IPBES WORKSHOP].

<sup>114</sup> *Id.* at 6.



global economy an estimated trillion dollars a year in economic damages.<sup>115</sup> In the United States alone, COVID-19 will have cost the economy an estimated \$16 trillion by the end of 2021.<sup>116</sup> Given the huge human capital and financial costs of global diseases, pandemics provide ample reason for corporations to adopt emergency bylaws now.<sup>117</sup>

### *B. Terrorist Attacks, Wars, and Global Conflict*

Terrorist attacks, wars, and global conflict can all destabilize companies' normal operations to the extent to which emergency bylaws could be useful.<sup>118</sup>

For example, the terrorist attacks of September 11, 2001, showcased the need for emergency bylaws.<sup>119</sup> Joan MacLeod Heminway, Professor of Law at the University of Tennessee, highlighted the September 11 attacks as a catalyst for her recommendation that companies have emergency bylaws.<sup>120</sup> The attacks showed how unprepared corporations were for such a large scale disruption: "it was clear that business continuity planning had not fully taken into account the potential for wide-area disasters and for major loss or inaccessibility of critical staff."<sup>121</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *See id.*

<sup>118</sup> *See* Tyler Mark, *Emergency Bylaws—Considerations in Light of the COVID-19 Pandemic and Beyond*, LEXOLOGY LLP (June 15, 2020), <https://www.lexology.com/library/detail.aspx?g=bd9e7304-ff60-409e-a0f9-522674b7d63d> [<https://perma.cc/EXE3-4Q4Z>].

<sup>119</sup> *Summary of "Lessons Learned" from Events of September 11 and Implications for Business Continuity*, SEC (Feb. 13, 2002) [hereinafter *Lessons Learned*], <https://www.sec.gov/divisions/marketreg/lessonslearned.htm> [<https://perma.cc/MZU4-HNMS>].

<sup>120</sup> Jennifer Williams-Alvarez, *Boards Adopt Emergency Bylaws for Critical Flexibility*, AGENDA (Apr. 22, 2020), <https://3epjwm3sm3iv250i67219jhowpengine.netdna-ssl.com/wp-content/uploads/2020/04/Bylaws.pdf> [<https://perma.cc/FK2G-4NHJ>]. This article, though helpful, is not updated to account for Delaware's July 16, 2020, changes. *See id.*

<sup>121</sup> *See Lessons Learned*, *supra* note 119. This effect was compounded by the concentration of businesses in the World Trade Center and the relative novelty of such a large attack. *Id.*

More specifically, terrorist attacks like those on September 11 can disrupt communication, strand or isolate key employees, destroy essential physical capital and databases, and otherwise impede the regular course of a business.<sup>122</sup> Emergency bylaws could ensure that corporations can maintain communications and operations during a terrorist attack of any scale.<sup>123</sup> The same need for emergency bylaws also applies to attacks as a part of more formal warfare against the United States.<sup>124</sup>

Global conflicts, whether or not the United States is directly affected, can also impact corporate operations.<sup>125</sup> Though most states' statutes account for the event of an attack on the United States, the Delaware statute, for example, also triggers emergency bylaws after an attack "on a locality in which the corporation conducts its business ... or during any nuclear or atomic disaster."<sup>126</sup> This means that companies in some states could theoretically use their emergency bylaws to respond to emergencies in other countries in which the company operates.<sup>127</sup>

### C. Global Warming

Global warming has a variety of long-term consequences for human rights, the environment, and human infrastructure.<sup>128</sup> Economically, scientists predict that global warming will increasingly and negatively impact supply chains, availability of goods, and market stability due to extreme climate related events.<sup>129</sup> Though these long-term economic effects are important considerations for

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<sup>122</sup> Paul A. Argenti, *Crisis Communication: Lessons from 9/11*, HARV. BUS. REV. (Dec. 2002), <https://hbr.org/2002/12/crisis-communication-lessons-from-911> [<https://perma.cc/BB6R-4X2Z>].

<sup>123</sup> *Id.*

<sup>124</sup> *See id.*

<sup>125</sup> *See, e.g.*, Kislaya Prasad, *The Fight Over Kashmir Has Business Consequences*, U.S. NEWS (Mar. 28, 2019, 5:42 PM), <https://www.usnews.com/news/best-countries/articles/2019-03-28/commentary-how-business-thrive-in-times-of-international-conflict> [<https://perma.cc/3UYB-5RQU>].

<sup>126</sup> DEL. CODE ANN. tit. 8, § 110(a) (West 2020).

<sup>127</sup> *See id.*

<sup>128</sup> *See* Fountain, *supra* note 11.

<sup>129</sup> U.S. GLOBAL CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT: IMPACT, RISKS, AND ADAPTATION IN THE UNITED STATES: REPORT-IN-BRIEF 107 (2018) [hereinafter CLIMATE ASSESSMENT].

businesses, the relevant effect of global warming for emergency bylaws is the growth of climate change related disasters.<sup>130</sup>

Global warming is the phenomenon of rising average temperatures worldwide as a result of human activities, mostly fossil fuel burning.<sup>131</sup> Human activities are estimated to have increased the global average temperature by about 1.8 degrees Fahrenheit since about 1850.<sup>132</sup> The majority of this change occurred within the last seventy years, and the Intergovernmental Panel on Climate Change (IPCC) predicts that over the next 100 years, the average annual temperature could increase anywhere between 2.5 and 10 degrees Fahrenheit.<sup>133</sup>

Global warming provides a host of logistical problems for countries and individuals, but for businesses considering emergency bylaws, the increased risk of disastrous events is the most important problem.<sup>134</sup> Global warming can make wildfires worse, create more intense hurricanes and storms, and exacerbate droughts.<sup>135</sup> All of these events could cause board members to become unavailable, prompting an “emergency” under the MBCA definition.<sup>136</sup> These are also emergencies within Delaware’s new definition, and so companies could want wider latitude in continuing operations during such events.<sup>137</sup>

These events are also exacerbated by other factors and vary from region to region.<sup>138</sup> In the Northeast, aging infrastructure is likely to be more vulnerable to storms and their resulting storm surges, high winds, and precipitation.<sup>139</sup> Importantly, “[l]oss of public services affects the capacity of communities to function as administrative and economic centers and triggers disruptions of interconnected supply chains.”<sup>140</sup> The risk of incapacity in the

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<sup>130</sup> See *infra* Section III.C.

<sup>131</sup> *Overview: Weather, Global Warming, and Climate Change*, NAT’L AERONAUTICS & SPACE ADMIN. (Dec. 16, 2020), <https://climate.nasa.gov/resources/global-warming-vs-climate-change> [<https://perma.cc/X234-KDCJ>].

<sup>132</sup> *Id.*

<sup>133</sup> *The Effects of Climate Change*, NAT’L AERONAUTICS & SPACE ADMIN. (Dec. 16, 2020), <https://climate.nasa.gov/effects> [<https://perma.cc/TP7H-DC2M>].

<sup>134</sup> See CLIMATE ASSESSMENT, *supra* note 129, at 12.

<sup>135</sup> Fountain, *supra* note 11.

<sup>136</sup> See REVISED MODEL BUS. CORP. ACT § 2.07(d) (AM. BAR ASS’N 2016).

<sup>137</sup> See DEL. CODE ANN. tit. 8, § 110(a) (West 2020).

<sup>138</sup> See CLIMATE ASSESSMENT, *supra* note 129, at 5.

<sup>139</sup> *Id.* at 118.

<sup>140</sup> *Id.*

major northeastern cities of Boston, Philadelphia, New York City, and Washington, D.C. could be disastrous for companies.<sup>141</sup>

The Southeast and U.S. Caribbean are particularly vulnerable to heat waves, coastal flooding, and violent storms.<sup>142</sup> The Midwest and Great Plains' roles as major suppliers of foodstuffs in the United States could be threatened by droughts and storms alike: By 2100, adapting storm water systems in the Midwest to accommodate the increasingly severe storms will cost an estimated \$500 million annually.<sup>143</sup>

The Pacific Coast is already facing the impacts of global warming, with increasingly disastrous wildfires, landslides, droughts, heatwaves, and flooding.<sup>144</sup> The impacts of these are felt by companies, especially insurers: wildfires in 2018 cost insurers an estimated \$20 billion in claims.<sup>145</sup>

The winter storm in Texas and Oklahoma in February 2021 highlighted the vulnerabilities of infrastructure to extreme weather events.<sup>146</sup> The winter storm, uncommon in Texas, paralyzed the power grid and ground the economy to a stand-still.<sup>147</sup> For example, the storm halted one-third of American oil production.<sup>148</sup> The experience of Texas is a warning sign for other states as to the consequences of infrastructure that is ill-adapted to extreme weather.<sup>149</sup>

These emergency risks do not exist in isolation; all three are interconnected.<sup>150</sup> Global warming can not only cripple economies but also exacerbate conflict; it also creates climate refugees who flee newly uninhabitable land<sup>151</sup> and increases prices and competition

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<sup>141</sup> *See id.*

<sup>142</sup> *Id.* at 121, 127.

<sup>143</sup> *Id.* at 132, 137.

<sup>144</sup> *Id.* at 145, 150.

<sup>145</sup> Timothy Rooks, *West Coast Fires Will Cost US Economy Dearly*, DEUTSCHE WELLE (Sept. 17, 2020), <https://www.dw.com/en/economic-impact-california-wild-fires-us-west-coast/a-54956210> [<https://perma.cc/7PAC-F39P>].

<sup>146</sup> Christopher Flavelle et al., *Texas Blackouts Point to Coast-to-Coast Crises Waiting to Happen*, N.Y. TIMES (Feb. 20, 2021), <https://www.nytimes.com/2021/02/20/climate/united-states-infrastructure-storms.html> [<https://perma.cc/4ZX8-Z8M2>].

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See* CLIMATE ASSESSMENT, *supra* note 129, at 12.

<sup>151</sup> *Climate change and disaster displacement*, U.N. HIGH COMM'N FOR REFUGEES (Dec. 21, 2020), <https://www.unhcr.org/en-us/climate-change-and-disasters.html> [<https://perma.cc/JMT9-Q5KU>].

for resources, both of which increase the likelihood of conflict.<sup>152</sup> Climate change and its biological and human effects accelerate both the risk and spread of pandemics.<sup>153</sup> Though research is limited by past pandemics, COVID-19 has also made peacekeeping efforts less likely to succeed and given governments an opportunity to tighten control, further aggravating global conflict.<sup>154</sup>

#### IV. CONCERNS ABOUT EMERGENCY BYLAW STATUTES

Given the increasing need for emergency bylaw provisions, the MBCA and many states' statutes are inefficient at giving corporations much needed flexibility during an emergency.<sup>155</sup>

##### A. *The Definition of "Emergency"*

The definition of an emergency which the MBCA (and most states) uses includes the requirement that a quorum of a board is not readily convenable.<sup>156</sup> This requirement is vague at best and has the potential to be unclear given that remote board

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<sup>152</sup> CLIMATE ASSESSMENT, *supra* note 129, at 108 (“[C]limate variability has been shown to affect conflict through intermediate processes, including resource competition, commodity price shocks, and food insecurity.”).

<sup>153</sup> IPBES WORKSHOP, *supra* note 113, at 6 (“Climate change has been implicated in disease emergence (e.g., tick-borne encephalitis in Scandinavia) and will likely cause substantial future pandemic risk by driving movement of people, wildlife, reservoirs, and vectors, and spread of their pathogens, in ways that lead to new contact among species.”).

<sup>154</sup> Katariina Mustasilta, *The Effects of the Global COVID-19 Pandemic on Peace and Conflict*, INT’L PEACE INST. GLOB. OBSERVATORY (Oct. 23, 2020), <https://theglobalobservatory.org/2020/10/effects-of-covid-19-pandemic-on-peace-conflict/> [<https://perma.cc/7D5Z-PSDG>] (“As global attention remains caught up in fighting the pandemic and the policy measures restricting the movement of people continue, both local and international peace efforts suffer .... Second, policy responses to the pandemic give opportunities to state and non-state actors alike to tighten or advance their power and undermine their opponents while leaving civilians more exposed and vulnerable to violence .... In multiple relatively peaceful countries as well, state actors have taken concerning steps that undermine human rights and threaten democratic institutions, using COVID-19 responses as a pretext.”); *see also* Katariina Mustasilta, *From Bad to Worse? The Impact(s) of COVID-19 on Conflict Dynamics*, EUR. UNION INST. FOR SEC. STUD. (June 11, 2020), <https://www.iss.europa.eu/content/bad-worse-impacts-covid-19-conflict-dynamics> [<https://perma.cc/Y827-2ZJ6>].

<sup>155</sup> *See supra* Section V.B.

<sup>156</sup> REVISED MODEL BUS. CORP. ACT § 2.07(d) (AM. BAR ASS’N 2016).

meetings are now not uncommon.<sup>157</sup> Nearly every state allows remote corporate board meetings (or at least is silent on the issue), ensuring that boards are ostensibly “convenable” in most situations.<sup>158</sup>

The current MBCA definition seems to suggest that an emergency only exists if a quorum cannot be easily convened either because not enough directors are alive or because not enough are reachable by telephone or internet.<sup>159</sup> While the inclusion of the adverb “readily” might water down the limiting nature of the statute, it still seems counterintuitive that the emergency definition would be so limiting in light of the rise of remote meetings, given the MBCA’s intent that companies adopt emergency bylaws.<sup>160</sup>

### *B. Shareholders’ Rights*

The risk of danger to shareholders’ rights posed by emergency bylaws is out of the scope of this Note, but is important to mention. Emergency bylaws allow corporate officers to act with some impunity: those acting within emergency bylaws are shielded from liability so long as they act in good faith.<sup>161</sup> Florida, for example, additionally says that no employee, director, or officer acting within the emergency bylaws can be liable for anything other than willful or intentional misconduct.<sup>162</sup> Also important, emergency powers statutes, given by state law, are *not* subject to shareholder repeal or amendment, and so boards automatically

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<sup>157</sup> See *COVID-19 Has Moved You to Virtual Board Meetings—Is That Even Legal?*, ONBOARD (Mar. 17, 2020), <https://www.passageways.com/blog/covid-19-has-moved-you-to-virtual-board-meetings-is-that-even-legal> [<https://perma.cc/UKB5-GTNQ>].

<sup>158</sup> *Are Virtual Board and Committee Meetings Legal?*, ONBOARD, [https://www.passageways.com/board-portal/virtual-board-meetings-law?utm\\_medium=Website&utm\\_source=Social&utm\\_campaign=Blog&utm\\_term=blog&utm\\_content=virtualmeetings1-blog-03172020](https://www.passageways.com/board-portal/virtual-board-meetings-law?utm_medium=Website&utm_source=Social&utm_campaign=Blog&utm_term=blog&utm_content=virtualmeetings1-blog-03172020) [<https://perma.cc/G5FV-RTW3>]. Though this source uses the title “virtual,” it is important to note that board meetings by phone, for example, would suffice for a valid board meeting, as most states require simply that all participants can hear one another simultaneously. *Id.* “Remote” is therefore a more accurate term than “virtual,” which implies the use of the Internet. *See id.*

<sup>159</sup> See REVISED MODEL BUS. CORP. ACT § 2.07(d).

<sup>160</sup> *Id.* § 2.07 cmt.

<sup>161</sup> *Id.* § 2.07(c).

<sup>162</sup> FLA. STAT. ANN. § 607.0303 (West 2020).

have several delegated powers during an emergency with limited shareholder interference.<sup>163</sup>

Additionally, shareholders can repeal or amend emergency bylaw provisions.<sup>164</sup> However, shareholders may not understand the full power granted to the board during an emergency until an emergency has occurred, and at that point it may be difficult for shareholders to vote to repeal or amend the emergency bylaws.<sup>165</sup> This is due both to shareholders individually dealing with the ramifications of an emergency, as well as limits imposed by a remote shareholder meeting format.<sup>166</sup>

Changed shareholder meetings, which may have to be held remotely due to an emergency situation, may limit shareholders' ability to directly confront the board about these emergency bylaw provisions, further hindering shareholders' rights.<sup>167</sup> In 2020, more than 1,000 American companies conducted remote shareholder meetings, as compared to fewer than 300 in 2019.<sup>168</sup> This explosion was presumably due to COVID-19.<sup>169</sup> The limitation of shareholder ability to address emergency bylaw provisions may be both because of a lack of face-to-face confrontation with the board, as well as the risk of the company potentially filtering presubmitted shareholder complaints.<sup>170</sup> Also, Delaware's new requirement that companies need only file applicable change-of-location documents with the SEC to change to a remote meeting, then give notice

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<sup>163</sup> REVISED MODEL BUS. CORP. ACT § 3.03.

<sup>164</sup> *Id.* § 2.07(a).

<sup>165</sup> Note that methods for shareholder voting vary from company to company.

<sup>166</sup> See Nathan Sisodia, *Virtual Shareholder Meetings: Advantages, Disadvantages and Practical Considerations*, FED. SEC. L. SOURCE (Apr. 11, 2018), <https://www.fedseclaw.com/2018/04/articles/general-business-news/virtual-shareholder-meetings-advantages-disadvantages-and-practical-considerations> [https://perma.cc/XW7C-SZUE].

<sup>167</sup> See *id.*; Charles H. Friedrich, *Has Your Business Considered Holding a Virtual Remote Shareholder Meeting?*, SCARINCI HOLLENBECK (May 3, 2017), <https://scarincihollenbeck.com/law-firm-insights/business-law/pros-cons-virtual-shareholder-meeting> [https://perma.cc/3SZT-33EC].

<sup>168</sup> Peter Rasmussen, *Analysis: In-Person Annual Meetings 'Virtually' Vanish for 2020*, BLOOMBERG (May 11, 2020), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-in-person-annual-meetings-virtually-vanish-for-2020> [https://perma.cc/XPV5-QF4J].

<sup>169</sup> *Id.*

<sup>170</sup> See Sisodia, *supra* note 166.

“as soon as practicable thereafter” may cause very short notice of a remote meeting for shareholders.<sup>171</sup>

Finally, once the board has acted in accordance with the bylaws, the good faith protections may make lawsuits regarding corporate action difficult.<sup>172</sup>

### *C. Disclosure of Emergency Bylaw Operation*

Shareholders’ rights are also at risk given that regulation does not yet seem to contemplate emergency bylaws.<sup>173</sup> Though shareholder rights can be drastically altered by the triggering of emergency bylaw statutes,<sup>174</sup> there is no specified disclosure required by the SEC for the *operation* of emergency bylaws, only for *adoption* of them.<sup>175</sup> Some events as a result of the emergency or the triggering of the emergency bylaws may qualify under certain events in Form 8-K.<sup>176</sup> This might include departure or appointment of certain offices (Item 5.02) for example, but there is no specific item which would necessitate that a company alert shareholders as to the operation of the emergency bylaws.<sup>177</sup> Item 5.03 (“Amendments to Articles of Incorporation or Bylaws”) almost seems to be the right fit, but the triggering of emergency bylaws is not an amendment, only the original adoption of the provisions is.<sup>178</sup> The best shareholders could hope for is that companies elect to alert them to the usage of emergency bylaws using Item 8.01 (Other Events).<sup>179</sup> However, disclosure under Item 8.01 is entirely at a corporation’s discretion.<sup>180</sup> As it stands, it does not seem like emergency bylaw usage has raised any flags among shareholder advocates, but it is an important consideration moving forward.

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<sup>171</sup> DEL. CODE ANN. tit. 8, § 110(i) (West 2020).

<sup>172</sup> See REVISED MODEL BUS. CORP. ACT § 2.07 (AM. BAR ASS’N 2016).

<sup>173</sup> See SEC, Form 8-K, Information to Be Included in the Report 17 [hereinafter SEC, Form 8-K].

<sup>174</sup> See, e.g., Del. Code Ann. tit. 8, 110.

<sup>175</sup> See SEC, Form 8-K, *supra* note 173, at 17.

<sup>176</sup> *Id.* at 15.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 17.

<sup>179</sup> *Id.* at 21.

<sup>180</sup> *Id.*



## V. RECOMMENDATIONS FOR EMERGENCY BYLAW STATUTES

State statutes should align more with Delaware's statute to allow for more corporate flexibility during emergencies.<sup>181</sup> Companies simply should have emergency bylaws, and tailor them specifically to the company's needs and their geographic area's challenges.

A. *Recommendations for States*

State statutes must be clarified to help corporations adopt and use effective emergency bylaws.<sup>182</sup> Delaware's newly edited statute provides a model for other states: the elimination of the "readily convened for action" requirement allows for more flexibility in what counts as an emergency.<sup>183</sup> However, this broader definition of an emergency may come at the cost of shareholder rights, a discussion outside the scope of this Note.<sup>184</sup> It also may allow corporations to trigger their emergency bylaws for any emergency in a locale where the business operates, a broad range of locations for many corporations.<sup>185</sup>

With the definition of an emergency expanding, the MBCA 128 provision that emergency bylaws are subject to repeal by shareholders becomes an even more important check on corporate power.<sup>186</sup>

States may have some incentive to adapt their corporate codes to more closely resemble Delaware's.<sup>187</sup> In fact, there is an established history of other states adopting Delaware's corporate

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<sup>181</sup> See DEL. CODE ANN. tit. 8, § 110(a) (West 2020).

<sup>182</sup> See Anne Anderson et al., *How State Competition for Corporate Charters Has Changed the Delaware Effect*, COLUM. L. SCH. BLOG ON CORPS. & THE CAP. MKT. (Oct. 16, 2017), <https://clsbluesky.law.columbia.edu/2017/10/16/how-state-competition-for-corporate-charters-has-changed-the-delaware-effect/> [<https://perma.cc/Z5K4-F6T8>].

<sup>183</sup> See *supra* notes 46–54 and accompanying text.

<sup>184</sup> See *supra* Section IV.B.

<sup>185</sup> See *supra* notes 126–28 and accompanying text.

<sup>186</sup> See REVISED MODEL BUS. CORP. ACT § 2.07(a) (AM. BAR ASS'N 2016).

<sup>187</sup> See Anderson et al., *supra* note 182.

code changes.<sup>188</sup> Even minute changes in corporate power can be important as states attempt to lure company incorporation away from Delaware with corporation friendly policies.<sup>189</sup>

### *B. Recommendations for Corporations*

Corporations' best course of action regarding emergency bylaws is to have them. A majority of corporations do not have emergency bylaws.<sup>190</sup> While emergency bylaw provisions may be more common in the financial services industry, every industry could benefit from their inclusion.<sup>191</sup> Only about one-fifth of S&P 500 corporations have emergency bylaw provisions, though this number is not current given the challenge of COVID-19.<sup>192</sup> Given the advantage that emergency bylaws give to boards during emergencies, the companies with these provisions have an advantage over companies who do not.<sup>193</sup> To stay competitive in an emergency and to ensure continuing of operations, more companies should adopt these provisions.<sup>194</sup>

MasterCard, for example, adopted emergency bylaws in response to COVID-19.<sup>195</sup> The changes allowed board members to call meetings "by any feasible means" and to invite only whoever can be reasonably reached, as well as allowing any present director to constitute a quorum.<sup>196</sup>

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<sup>188</sup> See Brian Buckley, *So You Think Washington Is A Delaware State? Debunking the Myth that Washington Follows Delaware on Issues of Corporate Law*, CORP. AND SEC NEWSL. 1; William E. Foster, *The (Limited) Allure of Delaware*, ARK. L. NOTES (Aug. 13, 2013), <http://media.law.uark.edu/arklaw/notes/2013/08/13/the-limited-allure-of-delaware> [<https://perma.cc/J9YQ-732W>]. Many other states also use Delaware's Court of Chancery opinions as persuasive authority in their own corporate cases. Buckley, *supra* note 188, at 1.

<sup>189</sup> See Anderson et al., *supra* note 182.

<sup>190</sup> Mark, *supra* note 118.

<sup>191</sup> *Leadership Resiliency in an Emergency*, SIDLEY (Apr. 8, 2020), <https://www.sidley.com/en/insights/newsupdates/2020/04/leadership-resiliency-in-an-emergency> [<https://perma.cc/WA5C-GJ9M>]. Note that this law firm memo, though helpful, is not updated with the Delaware Corporate Code's July 16, 2020, changes.

<sup>192</sup> Mark, *supra* note 118.

<sup>193</sup> See *supra* Part I.

<sup>194</sup> See *supra* Part I.

<sup>195</sup> See Williams-Alvarez, *supra* note 120.

<sup>196</sup> See *id.*

Companies should be careful with their provisions, especially ones beyond those enumerated in state statutes.<sup>197</sup> Companies should tailor them to their regional and corporate needs.<sup>198</sup> “For boards, there’s risk when adopting these provisions in not thinking through the process carefully enough ... care should be devoted to looking at how [emergency bylaws] will play out in an emergency.”<sup>199</sup> Though the risks of poorly drafted emergency bylaws are not clear, as there is so little precedent, Joan MacLeod Heminway, Professor of Law at the University of Tennessee, puts it most succinctly: “In not adopting [emergency bylaws], the risks are pretty obvious.”<sup>200</sup>

#### CONCLUSION

Emergency bylaws are a powerful tool for boards to continue operations during an emergency. The MBCA provides one guide for how states can write their emergency bylaws and powers statutes, and many states use the MBCA.<sup>201</sup> However, the MBCA’s definition of “emergency” is limited to catastrophes during which a quorum of the board cannot be readily assembled, a potentially confusing definition especially given the rise of remote board meetings.<sup>202</sup>

Some states have adopted their own emergency bylaws and powers statutes,<sup>203</sup> with Delaware notably changing its statute to account for challenges posed by COVID-19 and eliminating the “cannot be readily assembled” language of the MBCA’s emergency definition.<sup>204</sup> Delaware’s change should be a model for other states to follow and can clarify the definition of “emergency.”<sup>205</sup>

While COVID-19 has shown the need for emergency bylaw adoption, it is by no means the only emergency which has arisen or will arise necessitating emergency bylaws.<sup>206</sup> Future

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<sup>197</sup> *See id.*

<sup>198</sup> *See id.*

<sup>199</sup> *See id.*

<sup>200</sup> *Id.*

<sup>201</sup> *See supra* Part I.

<sup>202</sup> *See supra* Section IV.A.

<sup>203</sup> *See supra* Section II.A.

<sup>204</sup> *See supra* Section II.A.

<sup>205</sup> *See supra* Section II.A.

<sup>206</sup> *See supra* Part III.

pandemics, domestic and global conflict, and global warming all will increase the need for emergency bylaws.<sup>207</sup> The interconnectedness of these issues will only exacerbate them, leading to more disasters which will push companies' abilities to govern during catastrophes.<sup>208</sup>

Companies underutilize emergency bylaws and should adopt them.<sup>209</sup> Companies should also consider how to tailor these bylaws to best suit their needs and the potential disasters the company will face.<sup>210</sup> States should move toward Delaware's model of an emergency bylaw statute, as the MBCA's emergency definition has not yet adapted to the possibility of remote meetings and is vague and unhelpful.<sup>211</sup>

Though emergency bylaws are helpful, it is important to note that their use could threaten shareholders' rights, and that the operation of emergency bylaw provisions does not yet have a mandatory disclosure requirement with the SEC.<sup>212</sup> As more companies adopt emergency bylaws and an evaluation of their efficacy is possible after the COVID-19 emergency in the United States (hopefully) ends, companies will be able to gain a more thorough understanding of how emergency bylaws operate and how they can be most useful.

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<sup>207</sup> *See supra* Part III.

<sup>208</sup> *See supra* notes 147–51 and accompanying text.

<sup>209</sup> *See supra* Section V.B.

<sup>210</sup> *See supra* Section V.B.

<sup>211</sup> *See supra* Section IV.A.

<sup>212</sup> *See supra* Sections IV.B, IV.C.