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Stradley Ronon Stevens & Young, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103-7018
215.564.8000 Telephone
215.564.8120 Facsimile
www.stradley.com

With other offices in:
Washington, D.C.
New York
New Jersey
Illinois
Delaware

DELAWARE CORPORATIONS + BLOCKCHAIN TECHNOLOGY = CORPORATE ADVANCEMENT IN THE CYBER WORLD

by Nicole M. Kalajian and Joelle E. Polesky

Distributed ledger. Blockchain technology. Distributed electronic networks. What do these terms mean? How can they impact entities incorporated under Delaware law?

A distributed ledger is, at its core, a digitized and decentralized ledger of transactions. Blockchain is just one form of distributed ledger. Not all distributed ledgers employ a chain of “blocks” to provide a secure and valid distributed consensus. In a blockchain, the most recent transactions (via completed blocks) are recorded and added to the ledger in chronological order. Before placing a record on the blockchain, the record’s authenticity is verified by participants using the blockchain instead of a single centralized authority. The addition of “blocks” allows all participants on the blockchain to keep track of relevant transactions digitally without having one central recordkeeper. The blocks are then linked to one another and secured using cryptography, which is a method of storing and transmitting data in a particular form so that only those for whom it is intended can read and process it. In a blockchain, each node (which is simply a computer connected to the network) receives a downloadable copy of the entire ledger.

Thus, a blockchain is essentially a continuously growing list of records. Because it operates using an append-only structure, it only allows the addition of data to the database. The ability to alter or delete previously entered data in earlier blocks is virtually impossible. Therefore, blockchain technology is very well-suited for recording transactions and managing records relevant to its participants. From a corporate records perspective, this can include recording and maintaining timely information relating to the number of shares issued, the number of shares outstanding, who holds certain shares of record, shareholder votes, and other relevant corporate transactions.

Recent litigation in the Court of Chancery highlights how unintegrated corporate records can result in substantial harm to shareholders. In the case of *In re Dole Food Co., Inc.*, C.A. No. 8703-VCL (Del. Ch. Feb. 15, 2017 (<https://courts.delaware.gov/Opinions/Download.aspx?id=252690>)), the failure of the record holder’s centralized ledger to account for real-time trades and short sales in the three days prior to a merger resulted in an approximately **10 million-count discrepancy** in the number of facially valid beneficial shareholders claiming entitlement to compensation in a subsequent class action settlement. Recognizing the potential inaccuracies that “depository institutions, jumbo paper certificates, and a centralized ledger” can yield, the court commented that “[d]istributed ledger technology offers a potential technological solution by maintaining multiple, current copies of a single and comprehensive stock ownership ledger.”

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In the wake of the above-described corporate records debacle, as well as other similar cases (see e.g., *In re Appraisal of Dell, Inc.*, C.A. No. 9322-VCL (Del. Ch. July 13, 2015,

revised July 30, 2015 (<https://courts.delaware.gov/Opinions/Download.aspx?id=227490>) and C.A. No. 9322-VCL (Del. Ch. May 11, 2016 (<https://courts.delaware.gov/Opinions/Download.aspx?id=240830>))), the Delaware legislature updated the Delaware General Corporation Law (DGCL) to allow maintenance of corporate records via distributed ledgers. These updates pave the way for a more seamless corporate recordkeeping system. They also reduce the potential for litigation over, among other things, ministerial missteps relating to paper-maintained and/or centralized and untimely records. Given the importance of “status” as a record holder (for both record date purposes and shareholder voting rights), the availability of distributed ledger-based corporate records provides corporations with a more streamlined, real-time method of documenting their stock ledgers and shareholder votes.

With regard to the amendments made to the DGCL, Section 224 (entitled “Form of Records”) was amended to allow maintenance of a distributed ledger of records administered by or on behalf of a corporation, as follows:

Any records administered by or on behalf of the corporation in the regular course of its business, including its stock ledger, books of account, and minute books, may be kept on, or by means of, or be in the form of, any information storage device, method, *or one or more electronic networks or databases (including one or more distributed electronic networks or databases)*, provided that the records so kept can be converted into clearly legible paper form within a reasonable time. . . . When records are kept in such manner, a clearly legible paper form prepared from or by means of the information storage device, method, *or one or more electronic networks or databases (including one or more distributed electronic networks or databases)* shall be valid and admissible in evidence.¹

Note, however, the corporation must still have the ability to convert its records into paper format. Similarly, “stock ledger” in Section 219 is now defined as:

one or more records administered by or on behalf of the corporation in which the names of all of the corporation’s stockholders of record, the address and number of shares registered in the name of each such stockholder, and all issuances and transfers of stock of the corporation are recorded in accordance with § 224.

Finally, the DGCL’s definition of “electronic transmission” in Section 232 was amended to include “any form of communication, not directly involving the physical transmission of paper, *including the use of, or participation in, one or more electronic networks or databases (including one or more distributed electronic networks or databases)*.”

The DGCL welcomes the use of digital ledger and blockchain technology to simplify corporate recordkeeping. Only time will tell, however, whether Delaware corporations will follow suit and jump on the digital ledger and blockchain bandwagon. Are Delaware alternative entities next? Stay tuned.

¹Relevant portions of the amendments to the DGCL are italicized.



Nicole M. Kalajian



Joelle E. Polesky

For more information, contact Nicole M. Kalajian at 312.964.3507 or nkalajian@stradley.com or Joelle E. Polesky at 302.295.4856 or jpolesky@stradley.com.



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