

When You Say "Get It In Writing", What Do You Mean?

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Several provisions of the Delaware General Corporation Law authorize or require that a notice or communication be in "writing" or "written". For example, Section 142(b) provides "Any officer may resign at any time upon written notice to the corporation". But what exactly constitutes "written notice"?

One might define a written notice by the manner in which it is perceived - a notice or communication is in writing if it can be seen (as opposed to heard). Under this interpretation, the writing's medium is irrelevant. It could be paper, stone tablets or a computer screen. However, a problem with focusing on visual perception is that it arguably excludes Braille which visually impaired people "read" by touch rather than sight. Moreover, the a requirement of written notice does not expressly address the manner in which the notice or communication must be transmitted.

Historically, all writing involved some form of tangible medium. Thus, a requirement that a communication be given in writing was tantamount to requiring some form of physical transmission such as personal delivery or mail. Technology now allows for the delivery of documents through electronic transmission which the recipient can perceive visually. Consequently, some have questioned whether email notice constitutes written notice. In 2000, the Delaware legislature amended Section 141(b) of the DGCL to provide that a director may resign by "notice given in writing or by electronic transmission". 72 Del. Laws 343 (SB 363). Previously, the statute had authorized director resignations upon "written notice". Section 232(c) defines "electronic transmission" to mean any form of communication not involving the physical transmission of paper that creates a record that may be retained, retrieved and reviewed by the recipient and that may be directly reproduced in paper form by the recipient through an automated process. It is unclear why the Delaware legislature decided to authorize directors but not officers to resign by electronic transmission.

Delaware is now on the verge of introducing a new concept. SB 88 will add a new Section 116 that will muddy the waters even more by providing that any act or transaction contemplated or governed by the DGCL, the certificate of incorporation or bylaws may be provided in a "document" and that an electronic transmission is deemed the equivalent of a "written document". The statute then confusingly defines a "document" to mean a tangible medium on which information is inscribed and an electronic transmission. If a document is defined to include an electronic transmission, why is it necessary to state that an electronic transmission is deemed the equivalent of a "written document" and how is a "written document" distinguished from a "document"? Perhaps even more confusingly, these definitions will not apply to a wide range of communications under the

DGCL, including "any document expressly referenced as a notice (or waiver of notice) by the DGCL, the certificate of incorporation or bylaws.

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