

June 25, 2024

Delaware General Assembly Approves 2024 Amendments to General Corporation Law

On Thursday, June 20, the Delaware General Assembly passed legislation to amend provisions of the Delaware General Corporation Law (“DGCL”). Assuming they are signed by Governor John C. Carney, which is likely, the amendments will take effect on August 1, 2024 and will apply retroactively, but will not apply to or affect any completed or pending civil actions on or before the amendments’ effective date. The amendments abrogate various recent Court of Chancery decisions that many practitioners had considered inconsistent with market practice. In particular, key changes effected by the amendments include: (i) expressly permitting stockholders agreements relating to corporate governance, such as consent rights over corporate actions; (ii) authorizing boards to approve agreements, instruments and other documents that require board approval under the DGCL, such as merger agreements, in final or “substantially final” form; (iii) clarifying that customary disclosure schedules delivered in connection with merger agreements are not part of the “agreement” that must be approved by the board and adopted by stockholders, and that the merger agreement need not include any provision relating to the survivor’s charter in certain circumstances; and (iv) expressly permitting merger agreements to include “*Con-Ed*” provisions addressing “penalties and consequences” for non-performance, including reverse termination fees representing stockholders’ lost transaction premium, as opposed to the target *entity’s* expectation or reliance damages. The full text of the amendments can be found [here](#).

Authorization of Stockholders Agreements

In [West Palm Beach Firefighters’ Pension Fund v. Moelis & Co.](#), the Delaware Court of Chancery held that certain consent and other provisions in a stockholders agreement were facially invalid under the DGCL because they substantially restricted the ability of the board to manage the business and affairs of the corporation. The amendments enact a new subsection (18) of DGCL Section 122 (relating to a corporation’s specific powers and permitted actions) that expressly authorizes corporations to contract with stockholders or beneficial owners of its stock on governance matters for such minimum consideration approved by the board, thus abrogating that portion of *Moelis*. In particular, new Section 122(18) expressly permits corporations to agree to take (or not to take) actions identified in a stockholders agreement, including to provide stockholders or directors with veto or consent rights over such actions, so long as they do not override any requirements for corporate action enumerated in the DGCL or the corporation’s charter. For example, Section 242(b)(1) of the DGCL generally requires approval by the board and the stockholders (in that order) for a corporation to amend its charter. So while a stockholders agreement cannot eliminate that requirement, it may, pursuant to Section 122(18), contain a covenant prohibiting the corporation from amending the charter without first obtaining a particular stockholder’s consent. Importantly, Section 122(18) addresses only the statutory validity of such provisions; it does not affect a board’s or controlling stockholder’s fiduciary duties in entering into, performing or exercising its rights under such agreements in any particular case, nor does it abrogate other principles articulated in existing case law.

Approval of Agreements

The amendments address the Court of Chancery’s decision in [Sjunde Ap-Fonden v. Activision Blizzard, Inc.](#) (discussed [here](#)) in which the court considered (but did not conclusively decide) whether Section 251(b) of the DGCL requires boards to approve the

final execution version of a merger agreement. The *Activision* court held that at a minimum the board must approve an “essentially complete” version of the merger agreement, which the court held the board in that case failed to do, as the approved version was missing disclosure schedules, the surviving company’s charter, the consideration amount and the amount of dividends that the company could pay in the period between sign and close. In response to this holding, the amendments enact a new Section 147 of the DGCL, which provides that whenever the DGCL requires board approval of any “agreement, instrument or document,” such document may be approved in “final form or in substantially final form.” According to the legislative synopsis, a document is substantially final when all its material terms are either set out in the document or known to the board through other materials presented to it. For example, new Section 147 will permit a board to approve a merger agreement or a charter that does not specify a particular material term (such as the merger consideration or reverse stock split ratio in a charter amendment) if the board was otherwise aware of that term when it gave its approval (such as through a presentation identifying the final amount of consideration or split ratio). However, new Section 147 only addresses board approval of agreements, instruments and other documents; it does not authorize submitting such documents in substantially final form to stockholders. Nor does it affect fiduciary duties or equitable remedies in connection with the board’s approval or taking of other actions in respect of the agreement, instrument or document so approved.

The amendments also enact a new Section 268 of the DGCL that addresses the *Activision* court’s concerns that the board did not approve a final form of the surviving company’s charter amendments or disclosure schedules related to a merger. Specifically, new Section 268 provides that disclosure letters, disclosure schedules or similar documents will not be deemed to be part of a merger agreement that must be approved by the board unless otherwise provided in the agreement. In addition, if a merger agreement (other than for a “holding company” merger under Section 251(g)) provides that all of the stock of a constituent will be converted into or exchanged for cash, property or securities (other than shares of the surviving corporation), then (i) the merger agreement required to be approved by the board need not include any provision relating to the survivor’s charter to be considered in final or substantially final form, (ii) the board or any person acting at its direction may approve any amendment to the survivor’s charter and (iii) no alteration or change to the survivor’s charter will constitute an amendment to the merger agreement. According to the legislative synopsis, “[a]mong other things, this amendment will provide flexibility to a buyer in a typical ‘reverse triangular merger’ to adopt the terms of the [survivor’s charter] that, following the effectiveness of the merger, will be wholly owned and controlled by the buyer.” The synopsis also notes, however, that a target may still insist that the merger agreement provide for the survivor’s charter in a particular form or that it contain specified provisions, such as those relating to indemnification and advancement of the corporation’s directors and officers.

Authorization of Lost Premium Damages Provisions

The amendments modify Section 261 of the DGCL to clarify that a merger agreement may specify “penalties or consequences” for noncompliance prior to the effective time of the merger, including a “reverse termination fee” requiring a would-be acquiror in a failed transaction to pay the target an amount based on the stockholders’ loss of the transaction premium. The amendments also expressly authorize, if specified in the merger agreement, the target itself to retain such stockholders’ lost premium payments without any obligation to distribute them to the stockholders. Merger agreements commonly include such provisions, but the Court of Chancery recently suggested in *Crispo v. Musk* (discussed [here](#)) that they may be inconsistent with Delaware law. This amendment would reinstate the validity of such “*Con-Ed*” provisions in Delaware.

Conclusion

The amendments reflect the Delaware legislature’s willingness and ability to address dislocations between the state’s jurisprudence and market practice quickly and efficiently. As already mentioned, while the amendments make facially valid certain actions that the courts had found to violate the DGCL, directors, officers and stockholders remain bound by longstanding fiduciary duties, and also equitable principles developed by Delaware case law and policed by the Delaware courts on an as-applied basis.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Andre G. Bouchard
+1-302-655-4413
abouchard@paulweiss.com

Geoffrey R. Chepiga
+1-212-373-3421
gchepiga@paulweiss.com

Andrew G. Gordon
+1-212-373-3543
agordon@paulweiss.com

Jaren Janghorbani
+1-212-373-3211
jjanghorbani@paulweiss.com

Robert A. Kindler
+1-212-373-3199
rkindler@paulweiss.com

Andrew D. Krause
+1-212-373-3161
akrause@paulweiss.com

Kyle T. Seifried
+1-212-373-3220
kseifried@paulweiss.com

Laura C. Turano
+1-212-373-3659
lturano@paulweiss.com

Counsel Frances F. Mi and Jason S. Tyler, legal consultant Cara G. Fay and associate Matt Clarida contributed to this memorandum.

Our M&A Group

The Paul, Weiss M&A Group consists of approximately 40 partners and 125 counsel and associates based in New York, Washington, D.C., Wilmington, London, San Francisco, Los Angeles, Toronto, Tokyo, Hong Kong, Beijing and Brussels. The firm's Corporate Department consists of more than 75 partners and roughly 300 counsel and associates.

Our M&A Partners

[Matthew W. Abbott](#)

[Benjamin Goodchild](#)

[Judie Ng Shortell](#)

[Sarah Stasny](#)

[Edward T. Ackerman](#)

[Ian M. Hazlett](#)

[Maria-Leticia Ossa Daza](#)

[Christopher Sullivan](#)

[William Aitken-Davies](#)

[Roger Johnson](#)

[Andreas Philipson](#)

[Laura C. Turano](#)

[Scott A. Barshay](#)

[Robert A. Kindler](#)

[Austin S. Pollet](#)

[Krishna Veeraraghavan](#)

[Angelo Bonvino](#)

[James King](#)

[Ravi Purohit](#)

[Jeremy M. Veit](#)

[Ellen N. Ching](#)

[Andrew D. Krause](#)

[Kenneth M. Schneider](#)

[Michael Vogel](#)

[Chelsea N. Darnell](#)

[David K. Lakhdir](#)

[Robert B. Schumer](#)

[Samuel J. Welt](#)

[Ross A. Fieldston](#)

[James E. Langston](#)

[John M. Scott](#)

[Steven J. Williams](#)

[Brian P. Finnegan](#)

[Brian C. Lavin](#)

[Kyle T. Seifried](#)

[Bosco Yiu](#)

[Adam M. Givertz](#)

[Xiaoyu Greg Liu](#)

[Cullen L. Sinclair](#)

[Tong Yu](#)

[Neil Goldman](#)

[Jeffrey D. Marell](#)

[Megan Spelman](#)