Simpson Thacher

# Memorandum

## Delaware Governor Signs Corporate Law Amendments Into Law

July 18, 2024

Yesterday, July 17, 2024, Delaware Governor John Carney signed into law Senate Bill 313, which amended Title 8 of the Delaware General Corporation Law ("DGCL") to, among other things: (i) allow boards of directors to enter into stockholders agreements providing for consent over certain corporate governance matters, rather than including such provisions in the corporation's certificate of incorporation; (ii) clarify standards for board approval of agreements; and (iii) permit merger agreements to specify penalties for failure to perform.

The legislation, introduced on May 23, 2024, was passed by the Delaware Senate without dissent on June 13, 2024 and passed the Delaware House of Representatives on June 20, 2024 by a vote of 34-7. As with past amendments to the DGCL, Senate Bill 313 started from a recommendation by the Corporation Law Section of the Delaware State Bar Association. Senate Bill 313 has been colloquially referred to as the "market practice amendments" as it was developed in response to several recent Delaware Court of Chancery rulings which proponents believed were inconsistent with existing corporate and mergers and acquisitions practices. The bill sparked controversy and was met with opposition throughout the process, with certain modifications being made before the proposed amendments were approved by the Executive Committee of the Delaware Bar Association and then introduced in the legislature. Although Governor Carney's signature yesterday brings this chapter to a close, commentary on the Bill and its implications will likely continue for some time.

The Act's effective date is August 1, 2024, and it retroactively applies to all contracts made by a corporation, all agreements, instruments or documents approved by a board and all agreements of merger and consolidation entered into by a corporation. However, the Act does not apply to or affect any civil action or proceeding completed or pending on or before August 1, 2024.

### Corporations May Enter Into Governance Arrangements With Stockholders

The Act amends Section 122, which states that corporations have the power to undertake certain actions, by adding paragraph (18)[1]. New Section 122(18) identifies certain types of provisions that may be included in contracts between a corporation and its current or prospective stockholders or beneficial owners of its stock and

[1] Discussing new Section 122(18), the Synopsis for Senate Bill 313 states that in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 2024 WL 747180 (Del. Ch. Feb. 23, 2024), the Court "found that provisions in a stockholder agreement that required a stockholder's approval before the corporation could take a number of actions constituted, in the aggregate, impermissible internal governance restrictions in violation of § 141(a), and therefore those approval rights should have been included in the certificate of incorporation to be valid." The Synopsis states that "[n]ew § 122(18) provides bright-line authorization for contractual provisions addressing the matters listed above, and therefore would provide for a different rule than the portion of the *Moelis* decision in which the Court held that contract provisions of this nature must be included in the certificate of incorporation to be valid."

need not be included in the corporation's certificate of incorporation. New Section 122(18) specifically authorizes a corporation to enter into contracts with one or more stockholders or beneficial owners of its stock, for such minimum consideration as approved by its board, and provides a non-exclusive list of contract provisions by which a corporation may agree to:

- Restrict or prohibit future corporate actions;
- Require the approval or consent of one or more persons or bodies[2] before the corporation may take actions; and
- Covenant that the corporation or one or more persons or bodies will take, or refrain from taking, future actions.

Under new Section 122(18), no provision of a contract shall be enforceable against a corporation to the extent such contract provision is contrary to the certificate of incorporation or would be contrary to Delaware laws (other than Section 115[3]) if included in the certificate of incorporation. The Synopsis for Senate Bill 313 explains that a general recitation in the certificate of incorporation of the default provisions of Section 141(a)[4] would not be sufficient to render new Section 122(18) inoperable. The Synopsis notes that to render new Section 122(18) inoperable, a certificate of incorporation "could state that the corporation lacks the power and authority to authorize specific contracts, or types of contracts, that would otherwise be authorized by § 122(18)."

## Boards May Approve Agreements in Substantially Final Form

New Section 147 under the Act provides that whenever Chapter 1 of Title 8 expressly requires a board to approve or take other action with respect to an agreement, instrument or document, it may be approved by the board in final form or substantially final form.[5]

## Stockholder Notices Are Deemed to Include Enclosed Documents

The Act also amends Section 232 of Title 8, which concerns how corporations may make effective delivery of notice to stockholders. New Section 232(g) provides that a notice given to stockholders is deemed to include any document enclosed with, or appended or annexed to it. For example, a notice of a stockholder meeting to approve a merger agreement would be deemed to include a proxy statement provided with it. The Synopsis notes that

[2] Under new Section 122(18), the phrase "persons or bodies" may include the board or one or more current or future directors, stockholders or beneficial owners of stock of the corporation.

[3] *See* Del. Code Ann. tit. 8, § 115, which provides that the certificate of incorporation or the bylaws may require that any or all internal corporate claims shall be brought solely and exclusively in Delaware state courts, and that no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in Delaware state courts.

[4] *See* Del. Code Ann. tit. 8, § 141(a), which provides generally that the business and affairs of every Delaware corporation shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.

[5] Noting that the "Delaware Court of Chancery recently considered competing interpretations of § 251 of Title 8 as to whether a board of directors must approve an agreement of merger on final or essentially final terms" in *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, 2024 WL 863290 (Del. Ch. Feb. 29, 2024), the Synopsis states that "[n]ew § 147 is intended to enable a board of directors to approve an agreement, instrument or document if, at the time of board approval, all of the material terms are either set forth in the agreement, instrument or document or are determinable through other information or materials presented to or known by the board."

under amended Section 232, information in a document that is incorporated into a notice (by dint of being enclosed with, or appended or annexed to the notice) is not intended to be deemed "per se" material to stockholders.

## Boards Do Not Need to Approve a Surviving Corporation's Certificate of Incorporation in a Merger

New Section 268(a) provides that if a merger agreement[6] entered into pursuant to Subchapter IX of Chapter 1 of Title 8 provides that all of the shares of capital stock of the constituent corporation are converted into or exchanged for cash, property, rights or securities (other than stock of the surviving corporation), then: (i) the merger agreement approved by the board need not include any provision relating to the certificate of incorporation of the surviving corporation; (ii) the board (or any person acting at its direction) may approve any amendment or amendment and restatement of the certificate of the surviving corporation; and (iii) no alteration or change to the certificate of incorporation of the surviving corporation will be deemed to constitute an amendment to the merger agreement. The Synopsis explains that new Section 268(a) is being adopted to address a Chancery Court decision involving a merger where the board did not approve the certificate of incorporation for the surviving corporation. The Synopsis notes that the amendment will provide flexibility to a buyer in a typical "reverse triangular merger" to adopt the terms of the certificate of incorporation of the corporation that, after the merger, will be wholly owned and controlled by the buyer.

## Disclosure Schedules Do Not Need To Be Approved by a Board or Stockholders

New Section 268(b) provides that a disclosure letter or disclosure schedules (or any similar documents or instruments) that are delivered in connection with an agreement of merger or consolidation that modify, supplement, qualify, or make exceptions to representations, warranties, covenants or conditions in the agreement will not, unless otherwise expressly provided by the agreement, be deemed part of the agreement for purposes of the provisions of Title 8. The Synopsis explains that purpose of new Section 268(b) is to avoid any implication that, for such an agreement to have been duly authorized, a board must have approved final or substantially final disclosure schedules (or similar documents), or that the disclosure schedules (or similar documents) must be submitted to or adopted by the stockholders.

## Merger Agreements Can Include Penalties (*e.g.*, '*ConEd*' Damages) for Failure to Perform and Appoint a Representative to Enforce Them on Behalf of All Stockholders

New Section 261(a)(1) clarifies that parties to an agreement of merger or consolidation may specify the penalties or consequences of a party's failure to perform its obligations under, or comply with the terms and conditions of,

[6] Other than a holding company reorganization under Section 251(g).

their agreement before the effective time of the merger, or to consummate the merger or consolidation.[7] The penalties or consequences may include an obligation to make payments to the other party if the merger or consolidation is not consummated, including damages based on the lost premium that stockholders of a constituent corporation would be entitled to receive if the merger closed and reverse termination fees. New Section 261(a) provides that if a corporation is entitled such payment, the corporation may enforce the payment obligation and is entitled to retain the payment.

New Section 261(a)(2) states that an agreement of merger or consolidation may provide for the appointment of a representative of stockholders of any constituent corporation, including those whose shares of capital stock shall be cancelled, converted or exchanged in the merger or consolidation and for the delegation to such representative of the sole and exclusive authority to take action on behalf of such stockholders pursuant to such agreement, including enforcing such stockholders' rights. New Section 261(a)(2) is intended to confirm that a stockholders' representative may be delegated powers, exercisable after the effectiveness of the merger, in addition to the power to make adjustments in respect of the nature or amount of merger consideration. The amendments to Section 261(a)(2) do not allow for a provision empowering a stockholders' representative to exercise powers beyond those related to the enforcement of stockholders' rights under the agreement. The Synopsis explains that the amendments would not empower a stockholders' representative, under new Section 261(a)(2), to waive, compromise or settle, in the name of any stockholder, any rights to appraisal under Section 262 or any direct claim for breach of fiduciary duty that such stockholder is entitled to assert following a merger or consolidation, or to consent, in the name of a stockholder, to restrictive covenants. However, the amendments do not restrict any individual stockholder or stockholder group from granting a stockholders' representative or other agent any such power or any other delegable power, whether through execution of a joinder to the agreement of merger or consolidation, consent or support agreement or other instrument evidencing assent to the grant of such power.

If you have any questions, please reach out to your regular Simpson Thacher contact.



[7] The Synopsis states that "[n]ew § 261(a)(1) is being adopted in light of the Court of Chancery's decision in *Crispo v. Musk*, 304 A.3d 567 (Del. Ch. 2023), to clarify the authority under Title 8 to include in an agreement of merger or consolidation provisions for penalties or consequences (including a requirement to pay lost premium damages) upon a party's failure to perform or consummate the merger or consolidation, regardless of any otherwise applicable provisions of contract law, such as those addressing liquidated damages and unenforceable penalties."