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Market Practice" 2024 DGCL Amendments Become Effective

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The amendments to the Delaware General Corporation Law (DGCL) are effective today, August 1, and will apply retroactively to agreements and contracts that a Delaware corporation entered into, or that a Delaware corporation's board approved, on or before August 1, 2024. However, the amendments will not apply to or affect civil actions or proceedings completed or pending on or before August 1.

In response to a series of recent Delaware Court of Chancery opinions that have had important implications for corporate practitioners and Delaware corporations, the amendments will, among other things: (i) authorize a board to agree to stockholder agreements that grant certain governance rights to stockholders, (ii) permit a board to approve a merger agreement in "substantially final form," and (iii) allow contracting parties to agree to penalties or consequences (including lost premiums) for a party's failure to comply with, or perform its obligations under, a merger agreement.

Stockholder Rights

In *West Palm Beach Firefighters' Pension Fund v. Moelis & Company*, the Delaware Court of Chancery held that certain approval rights granted to the founder of a corporation in a stockholder agreement were invalid because those rights constituted part of the corporation's internal governance arrangements, removed from the directors in a very substantial way their duty to use their own best judgment on management matters, and were not contained in the certificate of incorporation. These approval rights required the board to get approval from the founder before taking certain actions, including incurring certain debts, declaring and paying dividends, and changing the taxable or fiscal year.

As part of the amendments, new Section 122(18) would authorize a corporation's board to enter into agreements with one or more current or prospective stockholders (even outside of the certificate of incorporation), for minimum consideration as approved by the board, whereby the corporation may, among other things, agree to:

- Restrict or prohibit itself from taking future corporate actions specified in the contract;
- Require the approval or consent of one or more persons before the corporation may take actions specified in the contract (which may include the board or stockholders); and
- Covenant that the corporation or one or more persons or bodies (which may include the board or stockholders) will take, or refrain from taking, future actions specified in the contract.

New Section 122(18) does not permit a corporation to enter into a contract with a stockholder that imposes remedies on directors. Rather, any remedies will run against the corporation. In addition, if an action specified in a contract also requires director or stockholder approval under the DGCL, that approval must still be obtained. Finally, New Section 122(18) does not relieve any party of its fiduciary duties to the corporation or its stockholders.

New Section 261(a)(2) allows for parties to a merger agreement to expressly appoint one or more persons to serve as the representative for the target's stockholders. This representative may serve as a representative for all stockholders, including those whose shares will be canceled, converted, or exchanged in the merger or consolidation agreement. This section does not allow for provisions that would empower the representative to exercise powers beyond those related to the enforcement of the rights of the stockholders under the relevant agreement. For example, no representative could waive appraisal rights on behalf of stockholders or bind stockholders to restrictive covenants.

Transaction Approval

In *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, the Court of Chancery held that it was reasonably conceivable that the Activision board failed to approve a merger in compliance with DGCL Section 251(b), because the merger agreement as approved did not contain certain key terms, such as the consideration to be paid by the acquiror, the disclosure letter, and a dividend restriction provision that was agreed upon following board approval. The court did not rule on whether the board needed to approve an "execution version" of the agreement but held that even if assuming only an "essentially complete" version was required, the agreement as approved was not "essentially complete."

Under new Section 147, a board could approve an agreement if all of the material terms are included in the agreement, are determinable through other information or materials presented to the board, or known by the board at the time of approval. New Section 147 also provides the board with a nonexclusive means to ratify merger agreements that have already been approved by the board or the stockholders so long as no filing has been made with the Delaware Secretary of State.

The court in *Activision Blizzard* also held that it was reasonably conceivable that the Activision board did not comply with Section 251(c)'s notice requirements by omitting the surviving corporation's charter when submitting the merger agreement to stockholders for approval. Under new Section 268(a), a merger agreement approved by the board (other than in a holding company reorganization) does not need to include any provision relating to the survivor's certificate of incorporation when a merger agreement provides that all shares of capital stock the constituent corporation issued and outstanding immediately before the effective time of the merger will be converted into or exchanged for cash, property, rights, or securities (other than stock of the surviving corporation).

Additionally, the *Activision Blizzard* court held that the summary of the agreement provided to stockholders in the proxy statement did not comply with the DGCL because the DGCL required the summary to be included in the notice itself. Under new Section 232(g), any document enclosed with, appended to, or annexed to the notice (including a proxy statement provided to stockholders with the notice) will be deemed part of the notice itself.

New Section 268(b) also provides that the disclosure letter, disclosure schedules, or any other similar documents or instruments that modify, supplement, qualify, or make exceptions to representations, warranties, and other provisions in a merger agreement that are delivered in connection with a merger agreement will not be deemed part of the merger agreement. The adoption of this section is intended to confirm that these types of documents do not have to be approved the board as part of its approval of a merger agreement or submitted to the stockholders. This amendment reflects the “market-practice” argument from *Activision Blizzard* and recognizes that these types of documents are often being revised up until closing, and after the merger agreement has already been approved by the board. Practitioners should be aware that “boilerplate” language in merger agreements purporting to incorporate the disclosure schedules as part of the merger agreement will override this new statutory default.

Lost Premium Damages

Crispo v. Musk revolved around the feud between Twitter and Elon Musk in which Musk and his affiliates attempted to terminate the merger agreement whereby they would acquire Twitter. A Twitter stockholder then filed suit against Musk seeking specific performance of the merger agreement. After Musk and his affiliates later decided to perform under the merger agreement, the Twitter stockholder claimed partial credit for the closing of the transaction and petitioned the Court of Chancery for mootness fees. As part of its ruling rejecting the petition, the court stated that because stockholders can only expect to receive a premium if the merger closes, a stockholder would be entitled to lost premium damages only if the provision granted third-party beneficiary status to the stockholder.

Adopted in response to this decision, new Section 261(a)(1) allows for parties to a merger agreement to expressly provide for penalties or consequences for a party’s failure to: (i) perform its obligations under the agreement prior to the effective date of the merger, (ii) comply with the terms of such agreement prior to the effective date, and (iii) consummate the transaction contemplated by the agreement. The penalties for failure to consummate the transaction may include payments to the other party, which may include lost premium damages to which stockholders of a corporation would be entitled if the transaction is ultimately consummated in accordance with the terms of the agreement.

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