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Proposed Amendments to the DGCL Address Issues Raised by Recent Delaware Court Decisions

By **Lauren Russo**
Associate | Corporate

By **Peter Bariso**
Special Counsel | Corporate

On March 28, 2024, the Council of the Corporation Law Section of the Delaware State Bar Association approved legislation proposing to amend the Delaware General Corporation Law ("DGCL") in response to recent Delaware Court of Chancery decisions. The proposed amendments will be introduced to Delaware's General Assembly for consideration and, if enacted, will grant more deference for boards of directors to act consistent with current market practice, after Delaware courts recently held that a strict reading of the DGCL did not permit such behavior in certain contexts. The proposed amendments generally focus on three areas, as summarized below.

Stockholder Agreements

As previously discussed in the Cadwalader Quorum here, in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 2024 WL 747180 (Del. Ch. Feb. 23, 2024), the Court examined whether a stockholder agreement entered into between a corporation and its founding stockholder violated Section 141(a) of the DGCL, which provides generally that the business and affairs of a Delaware corporation "shall be managed by or under the direction of a board of directors." Although the Court acknowledged that it is common for private equity sponsors and other controlling stockholders to enter into agreements allowing holders to retain governance rights and exercise veto rights over certain corporate actions, it read Section 141(a) to require that such arrangements generally be subject to stockholder approval and incorporated into the charter, or risk circumventing the board's authority.

The proposed amendments seek to address the Court's decision in *Moelis* by amending Section 122(18) of the DGCL to expressly permit a corporation to enter into governance agreements with current or prospective stockholders, in exchange for such minimum consideration as determined by the board of directors. The proposed amendments also set forth a non-exhaustive list of the types of provisions that may be incorporated into such agreements, including: (i) veto rights and restrictions on the corporation from taking specified actions; (ii) consent or pre-approval rights in favor of such stockholders; and (iii) covenants that the corporation or certain persons will take, or refrain from taking, specified actions. As noted by the proposed legislation, if adopted, the amendment would include a

"bright-line authorization for these contractual provisions, and therefore would reach a different result from a holding in Moelis."

Merger Agreement Remedies

In *Crispo v. Musk*, C.A. No 2022-0666-KSJM (Del. Ch. Nov. 4, 2023), the Court addressed the validity of a "lost-premium damages" provision. When the plaintiff sued for specific performance and lost-premium damages in connection with Elon Musk's attempts to terminate his agreement to acquire Twitter, the Court dismissed the stockholder's claims. Because the merger was ultimately consummated, the Court reasoned that such lost-premium damages could be obtained by Twitter stockholders only if they had a direct right as a third-party beneficiary, which were not conferred by the merger agreement. In *dicta*, the Court reasoned that the lost premium provision in the merger agreement might have conferred limited third-party beneficiary status on Twitter stockholders had the deal terminated.

The proposed amendments would provide some certainty on this issue by amending Section 261(a) of the DGCL to expressly specify the penalties and consequences of a party's failure to perform and authorize lost-premium damages provisions in merger agreements and the appointment of one or more persons to act as representatives of the target corporation's stockholders, with authority to enforce the rights of such stockholders with respect to the merger. The proposals make clear that the new Section 261(a) does not exclude any remedies otherwise available to any party, nor does it alter the fiduciary duties of directors in connection with determining whether to approve, perform or enforce any such provision.

Merger Agreement Approval and Notification Process

As previously discussed in the Cadwalader Quorum here, in *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, C.A. No. 2022-1001-KSJM (Del. Ch. Feb. 9, 2024), the Court addressed a plaintiff's claims that there were several procedural deficiencies in connection with Microsoft's acquisition of Activision, including, among other items, the board of directors' failure to approve the final merger agreement as required by Section 251 of the DGCL. As with *Moelis*, the Court recognized the market practice that sophisticated parties may continue to negotiate and finalize merger agreements and disclosure schedules "up until the moment a deal closes, if not beyond" but noted that "[w]here market practice exceeds the generous bounds of private ordering afforded by the DGCL, then market practice needs to check itself."

Much like the amendments in response to *Moelis*, the proposed additions to Section 147 of the DGCL would lead to a different result from the holding in *Activision*. The proposed amendments would enable a board of directors to approve any agreement, instrument or document requiring approval under the DGCL that is in final or "substantially final" form. In the published synopsis of the proposal, the Delaware State Bar clarified that an agreement is considered to be in "substantially final" form if all material terms are set forth therein or determinable through other information or materials presented to or known by the board of directors. The new Section 147 of the DGCL would additionally provide that, if the board of directors approves an agreement, instrument or document required to be filed with the Secretary of State in Delaware, or referenced in a certificate to be

filed with the Secretary of State, the board of directors may adopt resolutions ratifying such agreement, instrument or document up until the time of filing. Such ratification can serve as evidence that the agreement, instrument, or document was in substantially final form at the time of its approval.

In direct response to the decision in *Activision*, the proposed amendments would also add a new Section 268(a) to the DGCL to provide that a merger agreement may exclude provisions relating to the certificate of incorporation of the surviving corporation in certain circumstances, and a new Section 268(b) to the DGCL to clarify that the disclosure letter and accompanying schedules would not generally be deemed as part of the merger agreement. To further eliminate an open issue from *Activision*, the proposed amendments would amend Section 232(g) of the DGCL to provide that any document enclosed with or attached to a notice (such as a proxy statement) would be deemed part of the notice for the sole purpose of determining compliance with the DGCL and the corporation's governance documents.

Effective Date of Proposed Amendments

If enacted in their current form, the proposed amendments will be become effective on August 1, 2024, and shall apply to: all contracts made by a corporation; all agreements, instruments or documents approved by a board of directors; and all merger agreements entered into by a corporation, regardless of whether or not they are made, approved or entered into on or before the effective date of the proposed amendments.