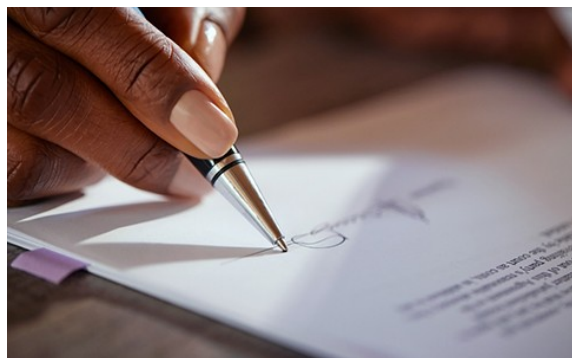


New Legislation to Override Judicial Precedents and Simplify Corporate Governance in M&A

June 20, 2024

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Changes to the Delaware General Corporation Law (“DGCL”) were recently introduced to the Delaware General Assembly in response to several Delaware Chancery Court rulings affecting stockholder agreements, merger agreements and corporate governance requirements applicable to merger transactions. Introduced last month, SB313 imposes a legislative override over recent decisions to implement changes that allow for greater freedom of contract for stockholder and merger agreements and the elimination of technical, seemingly non-material governance requirements applicable to merger transactions.

A new DGCL § 122(18) would permit corporations to convey the rights to consent and approval of corporate action to persons through stockholder agreements unless such conveyance is specifically prohibited by the corporation’s certificate of incorporation. This amendment nullifies the recent decision in *West Palm Beach Firefighters’ Pension Fund v. Moelis & Co.* where the Court found a stockholder agreement requiring the majority stockholder’s approval for certain corporate actions “an impermissible internal governance restriction” in violation of DGCL § 141.

Addressing the Court’s finding of a violation of DGCL § 251(b) when the board approved a draft version of the merger agreement in *Sjunde Ap-Fonden v. Activision Blizzard, Inc.*, a new DGCL § 147, would eliminate the requirement for board approval of the ‘final form’ of agreement if, at the time of approval, all of the material terms are determinable through information and materials presented to or known by the board, and second, a new DGCL § 268(b) would clarify that disclosure schedules and the like are not required to be a part of the merger agreement for board approval pursuant to DGCL § 251(b).

Doubling up on the results of *Activision*, in response to the Court’s finding of a violation of DGCL § 251(c) where the corporation had included a brief summary of the merger agreement in the proxy statement sent with a separate notice to the stockholders that did not include a brief summary of the merger agreement, a proposed DGCL § 232(g) would allow a corporation to satisfy the stockholder notice requirement for a merger agreement when such agreements and brief summaries are “enclosed with the stockholder notice or annexed or appended to the notice.”

A third byproduct of the *Activision* decision, a proposed DGCL § 268(a) allows a board to approve and file a certificate of incorporation of the surviving corporation of a merger following the effectiveness of the merger if the surviving entity will be wholly-owned and controlled by the buyer and all of the shares of capital stock of the constituent corporation issued and outstanding immediately before the effective time of the merger are converted into or exchanged for cash, property, rights or securities (other than stock of the surviving corporation).

In *Crispo v. Musk*, the Court denied a stockholder plaintiff’s claim for lack of standing where the plaintiff sued for ‘lost stockholder premium’ damages despite a provision in the merger agreement that specified that the buyer would be liable for ‘lost stockholder premium’ in the event buyer breached the merger agreement. A newly proposed DGCL § 261(a)(1) would specifically allow parties to a merger agreement to include provisions requiring the payment of penalties and ‘lost stockholder

premiums' in the event the merger is not consummated and allow parties to enforce these payment provisions.

New DGCL § 261(a)(2) confirms that the stockholders of a constituent party to a merger agreement may irrevocably appoint one or more persons to serve as a representative of all stockholders and delegate to such person the exclusive authority to enforce the rights of all stockholders under such agreement, after consummation of the transaction as an agent of the stockholders of the constituent corporation whose shares are canceled and converted in the merger into the right to receive cash or other property, and to enter into a binding settlement on behalf of all shareholders, a principal of corporate law. Seemingly, this amendment codified stockholder representative authority articulated by the Court in *Aveta Inc. v. Cavallieri*, where the Court found that the stockholders were bound to the results of a post-closing adjustment and subsequent arbitration decision when the stockholders appointed a stockholder representative to represent the stockholders and the representative utilized facts ascertainable outside the merger agreement to derive post-closing adjustments on behalf of all stockholders using a calculation method clearly and expressly set forth in the merger agreement and subsequently pursued the final determination through the use of a neutral arbitrator.

This Act requires the affirmative vote of two-thirds of the members elected to each house of the General Assembly. If passed, these changes will become effective on August 1, 2024, and retroactively applied except for any civil action completed or pending on or before such date.