Delaware Corporate Law Update

Thursday, March 28, 2024

2024 Proposed Amendments to the General Corporation Law of the State of Delaware

Legislation proposing to amend the General Corporation Law of the State of Delaware (the "DGCL") has been approved by the Council of the Corporation Law Section of the Delaware State Bar Association and is expected to be introduced to the Delaware General Assembly for consideration during its 2024 regular session. If enacted, the 2024 amendments will, among other things, make the following changes:

- Section 122, which enumerates express powers that a corporation may exercise, is being amended in response to the Delaware Court of Chancery's opinion in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, — A.3d —, 2024 WL 747180 (Del. Ch. Feb. 23, 2024), to provide that a corporation may enter into governance agreements with stockholders and beneficial owners where the corporation agrees, among other things, to restrict itself from taking action under circumstances specified in the contract, to require contractually specified approvals before taking corporation action, and to covenant that it or one or more persons or bodies (which persons or bodies may include the board or one or more current or future directors, stockholders or beneficial owners of stock) will take, or refrain from taking, contractually specified actions.

- New Section 147 is being added in light of the Delaware Court of Chancery's opinion in *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, 2024 WL 863290 (Del. Ch. Feb. 29, 2024), to provide that, where the DGCL requires the board of directors to approve an agreement, document or other instrument, the board may approve the document in final form or substantially final form. The new section will also provide that, where the board has previously taken action to approve an agreement, document or other instrument that is required to be filed with the Delaware Secretary of State (or required to be referenced in a certificate so filed (*e.g.*, a certificate of merger or certificate of amendment)), the board may ratify the agreement, document or other instrument before the instrument effecting the act becomes effective.

- Section 232, which deals with notices to stockholders, is also being amended in light of the opinion in *Activision*. The amendments provide that any materials included with, or appended or attached to, a notice to stockholders are deemed to be part of the notice for purposes of compliance with the DGCL's notice procedures.

- New Section 261(a)(1) is being added in light of *Crispo v. Musk*, 304 A.3d 567 (Del. Ch. 2023), to provide, among other things, that a target company may include in a merger agreement a provision that allows the target to seek damages, including

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damages attributable to the stockholders' loss of a premium, against a buyer that has failed to perform its obligations under the merger agreement, including any failure to cause the merger to be consummated.

- New Section 261(a)(2) is being added to provide that stockholders may, through the adoption of a merger agreement, appoint a person to act as stockholders' representative to enforce the rights of stockholders in connection with a merger, including rights to payment of merger consideration or in respect of escrow or indemnification arrangements and settlements.

- New Section 268 is being added in light of *Activision* to address ministerial matters relating to the adoption of a merger agreement. Section 268(a) sets forth limited circumstances under which the certificate of incorporation of the surviving corporation need not be attached to the merger agreement or approved by stockholders—principally in a typical reverse triangular merger where all of the target's stockholders are cashed out in the merger. Section 268(b) provides that, unless otherwise expressly provided in the merger agreement, disclosure letters, disclosure schedules and similar documents are not deemed part of the merger agreement (and thus need not be submitted to or approved by the board or stockholders as a statutory matter) but have the effects provided in the agreement.

If enacted, the amendments will become effective on August 1, 2024 and will apply to all contracts made by a corporation, all agreements, instruments or documents approved by the board, and all agreements of merger or consolidation entered into by a corporation, in each case whether made or approved before or after August 1, 2024. The proposed legislation, however, states that the amendments will not apply to or affect any civil action or proceeding completed or pending before August 1, 2024.

Section 122: Agreements with Stockholders and Beneficial Owners

The amendments to Section 122 are being proposed in response to the opinion of the Delaware Court of Chancery in *Moelis*. In that case, the plaintiff, a stockholder of Moelis & Company, challenged the facial validity of various provisions in a stockholders' agreement between the company and its founder, Ken Moelis. The stockholders' agreement was adopted before the company's initial public offering, at which time Mr. Moelis owned more than 90% of the company's outstanding stock. While it undoubtedly was envisioned that Mr. Moelis would gradually reduce his position in the company's stock over time, it was apparently deemed important that he nevertheless retain some control over the company—which bore his name and presumably owed a substantial measure of its success to his involvement and efforts. Accordingly, the stockholders' agreement provided Mr. Moelis veto rights with respect to various corporate actions as well as rights in respect of the composition of the company's board of directors and board committees.

The Court agreed with the plaintiff's argument that most of the provisions in the stockholders' agreement violated Section 141(a) of the DGCL, which provides that the business and affairs of the corporation shall be managed by or under the direction of the board of directors, except as otherwise provided in the DGCL or the certificate of incorporation. In reaching this conclusion, the Court distinguished between "internal governance arrangements" and third-party agreements, finding that corporations have a greater degree of latitude in imposing restrictions on the board's managerial authority in third-party agreements than they do in the context of internal governance arrangements. In the case of the stockholders' agreement between the company and Mr. Moelis, the Court held that the veto rights—which covered 18 different categories of actions, including the hiring and firing of the chief executive officer, mergers and acquisitions and financings—were overbroad in combination, having the "effect of removing from the directors in a very substantial way their duty to use their own best judgment on management matters." The Court likewise invalidated the provisions of the stockholders' agreement obligating the board to recommend to stockholders that they vote to elect Mr. Moelis' nominees as well as the provisions providing Mr. Moelis rights to fix the size of the board, to dictate the composition of board committees and to fill board vacancies.

The Court observed that certain provisions of the stockholders' agreement could have been validly implemented by alternative means, including through the adoption of provisions of the certificate of incorporation providing for charter-based veto rights or an affirmative delegation of the powers otherwise reserved by default to the board. Thus, the Court's holding should be read to mean that there is no public policy prohibiting the types of governance arrangements set forth in the stockholders' agreement. Rather, the Court's opinion should be read to mean that the provisions were invalid solely because they had not been implemented in one of the manners that the statute expressly permits.

Anticipating the effect its opinion would have on commercial practice, the Court opened its opinion with the following: "What happens when the seemingly irresistible force of market practice meets the traditionally immovable object of statutory law? A court must uphold the law, so the statute prevails." In recognition of the effect on market practice, the Court seemed to invite a legislative change, stating that the "expansive use of stockholder agreements suggests that greater statutory guidance may be beneficial" and that it "would welcome additional statutory guidance."

The amendments to Section 122 of the DGCL attempt to provide such additional statutory guidance. Section 122 is the provision of the DGCL that enumerates specific powers that are conferred upon a corporation, largely to negate any implication that the enumerated powers are not otherwise available to the corporation. To this end, the amendments add new Section 122(18), which expressly authorizes a corporation to enter into contracts with its stockholders and beneficial owners of its stock in exchange for minimum consideration determined by the board of directors. The statutory requirement for "minimum consideration" need not be expressly fixed by the board; rather, based on the language of the statute, the board's approval of an agreement from which it is clear that some form of consideration is flowing to the corporation will satisfy the statutory requirement that the board make a determination as to the minimum consideration. The "minimum consideration" requirement is designed principally to distinguish between contracts, such as the stockholders' agreement at issue in *Moelis*, involving bargained for rights and benefits, on the one hand, and governance arrangements, such as rights plans, where the counterparty is a rights agent (rather than one or more stockholders, despite the fact that they may be the ultimate beneficiaries of the plan) or stockholder-adopted bylaws. Nothing in new Section 122(18), however, should disturb the well-settled law surrounding stockholder-adopted bylaws or the adoption and maintenance of rights plans, or otherwise cast doubt on the sufficiency of the consideration supporting the validity of rights plans at common law.

Section 122(18) includes a non-exclusive list of the types of contracts that may be made with stockholders and beneficial owners, including agreements (a) pursuant to which the corporation agrees to restrict or prohibit itself from taking actions specified in the contract, whether or not the taking of such action would require approval of the board of directors under the DGCL, (b) pursuant to which the approval or consent of one or more persons or bodies is required before the corporation may take actions specified in the contract, and (c) in which the corporation covenants that it or one or more persons or bodies will take, or refrain from taking, actions specified in the contract. The amendments recognize that, unlike a charter-based provision adopted pursuant to Section 141(a), an agreement-based provision under Section 122(18) may not have the effect of ensuring that a stockholder or beneficial owner, in and of itself and without further corporate action on the part of the board or one or more other parties, can implement corporate action. But such an agreement-based provision may give rise to a remedy for breach of contract or attempted breach of contract. Broadly speaking, the amendments to Section 122(18) would insulate an agreement pursuant to which a corporation provides one or more of its stockholders or beneficial owners broad-based veto rights against a finding of statutory invalidity. It would similarly insulate against a finding of statutory invalidity contract-based provisions that, for example, require the board (or some future board) to appoint specified directors to committees of the board, authorize corporate actions (including stock issuances), or take or refrain from taking any number of other corporate actions.

While the plain language of the new subsection would appear to give the board the power to bind the corporation to take fundamental action, such as approving a merger, at the direction of a stockholder, the real-world operation of any provision included in a stockholders' agreement will be much more limited. Although an agreement adopted pursuant to new Section 122(18) may require a corporation to cause fundamental action to be taken, nothing in the statute expressly provides that individual directors may be parties to the agreement and expressly bound thereto in their directorial capacities. Moreover, nothing in Section 122(18) enables a corporation to deliver any vote or consent of stockholders required by the DGCL or the certificate of incorporation. While new Section 122(18) recognizes that a stockholder may receive damages if the corporation fails to cause a contractually specified event to occur, the amount of any such damages will be constrained, in most cases involving fundamental corporate actions, by equitable principles. For example, fashioning a remedy for a corporation's failure to cause a merger to occur as required by a stockholders' agreement due to the failure of stockholders to adopt the merger agreement likely would involve consideration of the principles of preclusion and coercion applicable to termination fees.

In connection with the addition of Section 122(18), Section 122(5), which relates to the corporation's power to appoint officers and agents and provide them suitable compensation, is being amended to clarify that any contract delegating power to an officer or agent is subject to Section 141(a), to the extent applicable. Thus, the amendments make clear that a board may not, for example, delegate fundamental board-level functions to officers and agents, absent a charter provision allowing such a delegation of power.

Section 147: Approval of Agreements, Documents and Instruments

New Section 147 is being added in response to the Delaware Court of Chancery's opinion in *Activision*, in which the Court declined to grant a motion to dismiss plaintiff's claims that a board failed to adequately authorize a merger agreement in accordance with Section 251. Among other things, the *Activision* Court observed that there are competing views under Delaware law as to whether the board must approve the final merger agreement or an "essentially complete" form of the merger agreement. The Court seemed to suggest that it would be sufficient for a board to approve an "essentially complete" form of agreement. Nevertheless, the Court found, based on the allegations in the plaintiff's complaint, that the merger agreement as approved by the target company's board was not in essentially final form due to the omission of several terms that it regarded as essential.

New Section 147 enables a board of directors to approve, in either final form or "substantially final" form, any agreement, instrument or document that requires board approval under the DGCL. Although new Section 147 does not expressly define what constitutes "substantially final," the synopsis to the proposed legislation makes clear that an agreement, document or other instrument should be deemed to be in substantially final form 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. Thus, a form of merger agreement that contains, for example, a bracketed bullet for the merger consideration may be in substantially final form if the board, at the time it approved the agreement, was in possession of other materials (*e.g.*, a board deck or resolutions) setting forth the merger consideration, or if it may be demonstrated that the directors otherwise knew the amount of the merger consideration, as would be the case if statements in the minutes of the meeting at which the approval was given showed the directors' knowledge of and consideration of the matter.

Although new Section 147 is being adopted in response to *Activision,* which related to the authorization of a merger agreement, it applies more broadly to other types of agreements, documents or instruments requiring board approval under the DGCL, such as amendments to the certificate of incorporation, including certificates of designation. The new section applies to all relevant provisions of the DGCL, not just those relating to mergers; it thereby avoids creating a trap for the unwary by prescribing a more restrictive regime for one class of agreements, documents and instruments than another. Section 147 should not be used to create an implication that any such agreement, document or instrument requiring board approval may only be approved in final form or substantially final form; whether any such agreement is duly authorized is a function of the corporation's certificate of incorporation and bylaws and common law principles governing corporate authorization. For example, the board's authorization of a term sheet summarizing the key terms, including the principal amount, interest rate, and maturity date, of a short-term note may serve as sufficient authorization of the note, even if the form of note was not presented to or reviewed by the board. Notably, since Section 271 of the DGCL, which requires a vote of stockholders to authorize a sale, lease or exchange of all or substantially all of a corporation's assets, does not expressly require approval of an agreement, the new statute should not be viewed as creating an implication that a board must approve, pursuant to Section 271, an agreement in final form or substantially final form, nor should it create an implication that a board may not seek authorization for a sale, lease or exchange of assets in the absence of a specific agreement.

New Section 147 also provides that if the board of directors has acted to approve or take other action with respect to an agreement, instrument or document that is required to be filed with the Secretary of State or referenced in a certificate so filed (*e.g.*, a certificate of merger), the board may, after providing such approval or taking such action and before the effectiveness of such filing, ratify the agreement, instrument or document at any time before such filing becomes effective, and such ratification will satisfy any requirement under the statute relating to the board's authorization, whether in terms of the manner or sequence in which it is provided. The ratification provision is available as an option to provide greater certainty in circumstances where there may be a question as to whether the agreement, document or instrument as initially approved was in substantially final form at the time of its approval. Although a board may elect to use Section 147's procedure to ratify an agreement, document or instrument that it had previously approved in substantially final form, no such ratification is required for the valid authorization of any such agreement, document or instrument. The fact that the statute offers a ratification as a failsafe should not be viewed as undermining the prior due authorization of any agreement, document or other instrument subject to the statute if it was in fact approved in final form or substantially final form. Ratification under Section 147's procedure, where available, is an alternative to ratification under Section 204 of the DGCL, which provides corporations with a "self-help" procedure for ratifying defective acts, and Section 205 of the DGCL, which gives corporations and others the right to seek an order of the Court of Chancery validating a corporate act. Ratification under Section 147 dispenses with the formalities applicable to a ratification under Section 204 and, more important, dispenses with any need for a determination that the underlying act is or may be defective due to some failure in its authorization. As with ratification under Sections 204 and 205, however, the board's ratification of its original approval of an agreement, document or other instrument under Section 147 relates back to the time of the original board approval. Moreover, ratification under Section 147 operates solely to eliminate doubt as to whether an agreement, document or instrument subject to the statute was duly authorized; it does not, of itself, render moot any otherwise viable equitable challenge to the underlying business decision.

New Section 147 does not undercut any public policy in favor of ensuring that the terms expressly required by statute to be included in a merger agreement have largely come to rest by the time the board takes action to approve the merger agreement. By statute, the only matters required to be included in a merger agreement are the terms and conditions of the merger, the mode of carrying it into effect, the amendments or changes of the certificate of incorporation of the surviving corporation to be effected by the merger, and the manner of converting shares into merger consideration or cancelling some or all of the shares. Any of the terms of the merger agreement, including those required by statute to be set forth therein, can be made dependent upon the operation of extrinsic facts. Moreover, before 1983, when the statute was amended to provide express authority for amendments to a merger agreement to be made, it was customary to negotiate the material terms of a transaction in a reorganization agreement, which had attached to it as an exhibit a bare-bones, short-form merger agreement that formally implemented the merger. These features of the statute and historical practice may provide some gloss on which terms of a merger agreement will be most critical in connection with any assessment as to whether the board had approved a "substantially final" form of the agreement.

Section 261: Remedies for Breach of a Merger Agreement; Stockholders' Representatives

Remedies for Breach of a Merger Agreement

The amendments to Section 261(a)(1) are being proposed principally to address the Delaware Court of Chancery's opinion in *Crispo*, in which a former Twitter stockholder, Luigi Crispo, brought suit against Elon Musk and his affiliates seeking specific performance and damages after they attempted to terminate a merger agreement with Twitter. After Musk and his affiliates dropped their suit against Twitter and closed the acquisition, Crispo sought a fee award based on the assertion that his claims contributed to the buyer group's decision to change course and close the deal. The *Crispo* Court ruled that the plaintiff was not entitled to a mootness fee, finding that his claims were not meritorious since he either lacked status as a third-party beneficiary to bring the claims or, to the extent he was a third-party beneficiary, his ability to exercise his rights as such had not vested.

In reaching this conclusion, however, the Court followed the reasoning in the Second Circuit Court of Appeals' decision in *Consolidated Edison, Inc. v. Northeast Utilities*, 426 F.3d 524 (2d Cir. 2005), to the effect that a target corporation in a proposed merger could not seek on behalf of its stockholders the loss of any premium the stockholders would have enjoyed had the buyer not breached the merger agreement beyond the damages incurred by the target itself. In the nearly two decades between *ConEd* and *Crispo*, many practitioners believed that the Delaware courts would not follow the reasoning in *ConEd*, and Delaware M&A practice evolved around that basic premise, with many public company M&A agreements either including provisions stating expressly that the target corporation would be entitled to seek from the buyer damages in the form of the stockholders' lost premium if the buyer's breach caused a closing failure, or remaining entirely silent on the question with the expectation that Delaware was an "anti-*ConEd*" state.

While the *Crispo* Court recognized that M&A agreements may confer third-party beneficiary status on stockholders allowing them to seek damages for any lost premium, it suggested, contrary to the expectations of many practitioners, that Delaware law aligns with *ConEd*. The opinion thus called into question the enforceability of provisions in M&A agreements purporting to vest in the target company the exclusive right to recover damages for the stockholders' lost premium. The *Crispo* Court noted that, if the acquiror performed its obligations under the merger agreement, payment of the premium would flow to the stockholders, not the target company. On that basis, the Court suggested that a damages award of the stockholders' lost premium, if recovered by the corporation itself, would function as an unlawful penalty. Despite recognizing the efficiency of allowing the target corporation to recover the stockholders' lost premium, the Court indicated that a corporation could not appoint itself as the stockholders' agent for that purpose. (In a footnote, the Court did raise the question as to whether a charter provision could be used to appoint the corporation as agent on behalf of the stockholders to seek damages based on the stockholders' lost premium.) The Court's opinion appeared to provide stockholders greater protection in the form of a direct right to pursue claims for damages against buyers if the target failed to seek or obtain an award of specific performance. In practice, though, it significantly diminished the negotiating leverage of target corporations and decreased the overall protection available to their stockholders in that it supplied buyers with a strong rationale for resisting any effort to name the target company's stockholders as third-party beneficiaries or to include a lost damages premium as a potential measure of damages (*i.e.*, that the buyer refused to expose itself to damages claims from a gaggle of disaggregated plaintiffs).

The amendments to Section 261(a)(1) allow commercial parties to contract for an outcome different from that contemplated by *ConEd*. The new subsection provides that parties to a merger agreement may include provisions for penalties or consequences (including a requirement to pay lost premium damages) upon a party's failure to perform or consummate the merger, regardless of any otherwise applicable provisions of contract law, such as those addressing liquidated damages and unenforceable penalties. Consistent with the DGCL's role as an enabling statute, the new subsection provides that constituent corporations may, through express provision in the merger agreement, allocate the risk of non-performance. Thus, a target corporation may, acting on behalf of the stockholders generally, seek a damages award from a buyer in the form of the stockholders' lost premium. Moreover, the target corporation may retain any such damages award it collects—and need not distribute the proceeds to stockholders or to any group of stockholders.

The new subsection, in and of itself, does not exclude remedies that might otherwise be available to a party at law or in equity, nor does it alter the fiduciary duties of directors in determining whether to approve or enforce any provision of a merger agreement. Thus, the new subsection will not displace the well-developed common law governing the circumstances under which a target's termination fee may operate lawfully, or when it may be struck down as preclusive of other bids or coercive of a stockholder vote.

Appointment of Stockholders' Representatives

In light of the statements in *Crispo* regarding agency appointments, to eliminate any doubt regarding the validity of a typical arrangement in a private company merger agreement providing for the appointment of a stockholders' representative, new Section 261(a)(2) is being adopted to provide that parties to a merger agreement may, through express provision in the agreement, appoint one or more persons to serve as the representative of stockholders of any constituent corporation, including stockholders whose shares shall be cancelled, converted or exchanged in the merger or consolidation, and to delegate to such person(s) the exclusive authority to enforce the rights of such stockholders, such as rights to receive payments and enforce stockholders' rights under earn-out, escrow or indemnification provisions, and to enter into settlements with respect thereto. The stockholders' representative may be appointed at or after the stockholders' adoption of the merger agreement and will thereafter be binding on all stockholders.

Section 261(a)(2) codifies the key aspects of existing Delaware law regarding the appointment and functions of stockholders' representatives in merger transactions. The provisions of subchapter IX of the DGCL governing mergers have for decades included provisions allowing provisions in merger agreements to be made dependent on facts ascertainable outside of the agreement. *See Aveta Inc. v. Cavallieri*, 23 A.3d 157 (Del. Ch. 2010). The "facts ascertainable" provisions set forth in several sections of subchapter IX already provide a corporation broad authorization to include in an agreement of merger or consolidation one or more provisions making the consideration received by stockholders subject to any future determinations made by, or documents entered into in the future by, a stockholder representative. It has become market practice, however, to refer to a stockholders' representative appointed in an agreement of merger or consolidation as an agent of the stockholders of the constituent corporation whose shares are cancelled and converted in the merger into the right to receive cash or other property. Accordingly, new Section 261(a)(2) provides express authorization for these representative provisions, avoiding any implication that such an arrangement is an impermissible agency appointment. It further provides that a stockholders' representative appointed pursuant to the terms of a merger agreement 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. As indicated above, the amendments should not be construed to limit the broad authority permitted under the

DGCL and recognized in opinions of the Delaware courts, including *Aveta*, for constituent entities to make provisions in agreements or other instruments dependent on facts ascertainable outside of the agreement or instrument.

The amendments to Section 261(a)(2) do not allow for a provision of an agreement of merger or consolidation empowering a stockholders' representative to exercise powers beyond those related to the enforcement of the rights of stockholders under the agreement. Thus, for example, the amendments do not empower a stockholders' representative, acting solely pursuant to a provision adopted 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, nor do the amendments empower the stockholders' representative to consent, in the name of any stockholder, to restrictive covenants, such as a covenant not to compete or a non-solicitation covenant. An individual stockholder or group of stockholders, however, would still be entitled in their own capacity to grant any such powers to a stockholders' representative or other agent, whether through execution of a joinder to a merger agreement, consent or support agreement or other instrument evidencing assent to the grant of such power.

Section 268: Amendments to Surviving Corporation Certificate of Incorporation; Disclosure Schedules

Amendments to the Surviving Corporation Certificate of Incorporation

New Section 268(a) provides that, if an agreement of merger (other than a holding company reorganization under Section 251(g) (*i.e.*, a holding company reorganization not requiring a stockholder vote)) entered into pursuant to subchapter IX provides, with respect to a constituent corporation, that 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), then the merger agreement approved by the board need not include any provision relating to the certificate of incorporation of the surviving corporation. Rather, under new Section 268(a), the board of directors of the target or buyer that will be the sole stockholder of the surviving corporation following the merger, or any person acting at either of their direction, may approve any amendment or amendment and restatement of the certificate of incorporation of the surviving corporation. Additionally, no alteration or change to the certificate of incorporation of the surviving corporation will be deemed to constitute an amendment to a merger agreement within the scope of Section 268(a).

New Section 268(a) is being adopted in light of the *Activision* opinion discussed above, in which the plaintiff also alleged that the board of directors did not approve the post-merger certificate of incorporation of the surviving corporation. Among other things, 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 surviving corporation that, following the effectiveness of the merger, will be wholly owned and controlled by the buyer. Despite the additional statutory flexibility, a target corporation may insist, however, that the merger agreement expressly provide that the certificate of incorporation of the surviving corporation be adopted in a specified form or contain specified provisions, such as those relating to exculpation, indemnification and advancement of expenses of directors, officers and others, as applicable.

Disclosure Schedules, Disclosure Letters and Other Similar Documents

The 2024 amendments also add new Section 268(b), which provides that a disclosure letter or disclosure schedules or any similar documents or instruments delivered in connection with an agreement of merger or consolidation that modify, qualify, supplement or make exceptions to representations, warranties, covenants or conditions in the merger agreement will not, unless otherwise provided by the agreement, be deemed part of the agreement for purposes of the DGCL. New Section 268(b) is being adopted to avoid any implication from the Court's decision in *Activision* that, in order for a merger agreement to have been duly authorized, the board of directors 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. New Section 268(b) reflects the fact that disclosure schedules and similar documents frequently operate as extrinsic facts incorporated by reference into the agreement but are not themselves part of the agreement and, as such, may be negotiated and prepared by officers and agents at the direction of the board of directors without the need, as a statutory matter, for formal approval by the board of directors or the stockholders.

Effective Date of Amendments

If enacted, the amendments will become effective on August 1, 2024 and will apply to all contracts made by a corporation, all agreements, instruments or documents approved by the board of directors, and all agreements of merger or consolidation entered into by a corporation, in each case whether made or approved before or after August 1, 2024. Consistent with Section 393 of the DGCL, which provides "[a]ll rights, privileges and immunities vested or accrued by and under any laws enacted prior to the adoption or amendment of [the DGCL], all suits pending, all rights of action conferred, and all duties, restrictions, liabilities and penalties imposed or required by and under laws enacted prior to the adoption or amendment of [the DGCL], shall not be impaired, diminished or affected by [the DGCL]," the proposed legislation states that the amendments will not apply to or affect any civil action or proceeding completed or pending before August 1, 2024. Nevertheless, given that the proposed 2024 amendments, as evidenced by the synopsis to the draft legislation, have the apparent intent of dispensing with claims along the lines of those asserted in *Moelis* and *Activision*, the legislation's effective date should not be viewed as an incentive for plaintiffs' firms to rush to submit "facial validity" complaints on the basis of the current law before August 1, 2024. Any stockholder asserting any such challenge in the face of the proposed 2024 amendments should take into consideration the fact that such stockholder's action should not be viewed as creating a material corporate benefit, if any, in circumstances where a brief passage of time will remedy any of the stockholder's alleged statutory violations or defects.

Conclusion

The 2024 amendments to the DGCL make several important changes, continuing Delaware's commitment to updating its corporate law annually to address issues affecting corporations and practitioners.