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Drafting of Corporate and M&A Documents for 2024 Delaware General Corporation Law Amendments

By Diane N. Ibrahim, Nathan P. Emeritz and Justin E. Mann, Greenberg Traurig, LLP

The 2024 amendments to the General Corporation Law of the State of Delaware (the DGCL) have been signed into law and will become effective August 1, 2024. These amendments address issues that arose in recent decisions by the Delaware Court of Chancery and relate to foundational issues of corporate law. These important changes include:

- Expressly empowering the corporation to enter into governance agreements with current and prospective stockholders, including specified provisions for restrictions on corporate action, approvals and consents over corporate action, and covenants that the corporation or other person or body will take or refrain from actions, under new subsection 18 of Section 122 of the DGCL;
- Permitting the board of directors to approve agreements, instruments, and documents in substantially final form and to ratify agreements, instruments, and documents that are required by the DGCL to be filed with the Delaware Secretary of State, under new Section 147 of the DGCL;
- Expressly permitting a merger agreement to provide for: (i) penalties and consequences of a breaching or noncompliant party (including lost-premium damages), and (ii) appointment of a stockholder representative under new subsection (a) of Section 261 of the DGCL; and
- Creating exceptions to documents that might otherwise be required to be attached to a merger agreement, including the surviving corporation's certificate of incorporation in certain scenarios and disclosure letters, disclosure schedules, and similar documents that modify, supplement, qualify, or make exceptions to representations, warranties, covenants, or conditions in the merger agreement, under new Section 268 of the DGCL.

Although these changes do not represent all of the amendments, this article discusses the impact of the legislation on corporate and M&A documents, including stockholder agreements, board resolutions, and merger agreements, and certain related drafting considerations.

These amendments go into effect August 1, 2024, and expressly apply to "all contracts made by a corporation, all agreements, instruments or

documents approved by the board of directors and all agreements of merger and consolidation entered into by a corporation," including those made before such date, except that these amendments will not "apply to or affect any civil action or proceeding completed or pending" before then.

These amendments do directly not alter existing fiduciary duties, though the amendments and particularly Section 122(18) may allow a contract to significantly affect the governance of a corporation and the space in which fiduciary duties apply to key governance matters. Nor do these amendments mandate changes to pre-existing paths for authorization of corporate actions but instead provide alternative paths to certain authorizations. Commentary around these amendments suggests that they are intended to shift the focus of litigation from technical validity to compliance with equitable principles. Although these amendments were adopted in response to specific judicial decisions, the new statutory language may be viewed as departing from the specific contours of the holdings in those cases and may deviate in meaningful ways. In light of the substantial and relatively novel nature and scope of these amendments, it would be appropriate to take a thoughtful and even cautious approach to interpretive issues that may arise when applying these amendments in practice.

Stockholder Agreements

Contracts with Current and Prospective Stockholders. New Section 122(18) expressly provides that the corporation may enter into an agreement with current and prospective stockholders. Such agreements may be supported by minimum consideration as determined by the board of directors and may provide, without limitation and notwithstanding Section 141(a) of the DGCL, for: (a) restrictions and prohibitions on corporate actions, (b) required approvals and consents of persons or bodies for corporate actions, and (c) covenants of the corporation or persons or bodies to take or refrain from actions (persons or bodies in Section 122(18) includes the board of directors and current or future directors, stockholders, or beneficial owners of stock). When drafting stockholder agreements, parties can take increasing comfort that their agreements have statutory support by more closely aligning contractual provisions with these expressly authorized categories, including current and prospective stockholders, restrictions, prohibitions, approvals, and consents, as applicable, to actions of the corporation, and covenants of the corporation or applicable other persons or bodies. Section 122(18) provides that the corporation is subject to remedies available under the governing law, so remedies under a stockholder agreement should be directed toward the corporation.

Limited by the Certificate of Incorporation. Section 122(18) provides that the agreement may not conflict with the certificate of incorporation or contain any term that would violate Delaware law (other than Section 115 of the DGCL, prohibiting exclusive selection of a forum other than Delaware courts) if contained in the certificate of incorporation. The statutory language explains that a contractual restriction, prohibition, or covenant related to a specified action will not be deemed such a conflict by reason of a provision of the DGCL or certificate of incorporation that authorizes or empowers the board of directors or specific directors to take such action. Section 122(5) was also modified to provide that, unlike agreements entered into under Section 122(18),

any appointment or delegation of an officer or agent, including by contract, is subject to the board's managerial authority under Section 141(a). Since the amendments were initially proposed, the Delaware Court of Chancery has also interpreted other sections of the DGCL to require that the board have discretion to consider, approve, and recommend to stockholders significant corporate actions, such as a charter amendment, merger agreement, and sale of all or substantially all assets. Parties and counsel should carefully draft with these potential conflicts in mind. Investors' counsel may also consider whether such contracts are an appropriate subject matter for charter-based protective provisions.

Board Resolutions

New Section 147 provides that, whenever the board of directors is required by the DGCL to approve an agreement, instrument, or document, the agreement, instrument, or document may be "in final form or in substantially final form." Although "substantially final" is undefined in the DGCL, commentary suggests that it will be limited to inconsequential and immaterial changes. Board resolutions providing such approvals may now be drafted accordingly to permit some flexibility, though counsel should exercise caution when determining whether a board has approved a "substantially final" form of the applicable document. A more conservative approach would track pre-existing best practices of board approval in final form.

Section 147 further provides that, if the board of directors is required by the DGCL to approve an agreement, instrument, or document that is required to be filed or referenced in a certificate to be filed with the Delaware Secretary of State (*e.g.*, charter amendment, merger agreement), then, if the board "shall have acted to approve or take other action with respect to" the document or agreement, the board may thereafter ratify the document or agreement with such ratification effective as of the earlier approval or action. For such approvals, and particularly if the board did not approve the completely final version, it may be prudent to ensure proper authorization and good governance for the board to adopt pre-closing resolutions providing such ratifying approval with retroactive effect as of the earlier approval. The amendments do not alter the pre-existing DGCL provisions for stockholder approvals.

Merger Agreements

Provisions for Breaches. New Section 261(a) provides terms that may be included in a merger agreement adopted under the DGCL (other than Section 251(g)). Section 261(a)(1) permits such a merger agreement to provide for "penalties or consequences," including a claim against a breaching buyer in a busted deal for lost-premium damages. Drafters should keep in mind that these DGCL amendments do not alter fiduciary duties, including those of sell-side and buy-side directors and officers which may be implicated by break-up fees and related terms. Section 261(a)(2) also permits such a merger agreement to provide for appointment of a representative of stockholders of a constituent corporation, which would be binding on all such stockholders and only amendable after the merger effectiveness with the consent or approval of persons specified in the agreement. Clarity in the requirements for such an amendment may help to avoid disputes under such an appointment provision.

Attached and Referenced Documents. New Section 268 limits the required contents of certain merger agreements for DGCL purposes.

Section 268(a) provides that in a merger other than under Section 251(g), if all shares of capital stock of a constituent corporation issued and outstanding immediately before the effective time will be converted or exchanged for cash, property, rights or securities (other than stock of the surviving corporation), then notwithstanding any other provision of the DGCL (*e.g.*, Section 251(b)(3)): (i) the merger agreement approved by the board need not include any provision regarding the surviving corporation's certificate of incorporation to be in final or substantially final form; (ii) the surviving corporation's certificate of incorporation may be amended by the board of such constituent corporation or any person acting at its direction (or if the equity of a constituent entity will be converted into all shares of the surviving corporation, by the board or governing body of such constituent entity); and (iii) an amendment to the surviving corporation's certificate of incorporation won't constitute an amendment to the merger agreement. Section 268(b) provides that, unless otherwise provided in a merger agreement, any "disclosure letter, disclosure schedules or similar documents or instruments delivered in connection with the agreement that modify, supplement, qualify, or make exceptions to representations, warranties, covenants or conditions contained in the agreement shall not be deemed part of the agreement for purposes of any provision of [the DGCL] but shall have the effects provided in the agreement." It may be advisable to draft a merger agreement to clearly identify letters, schedules, documents, and instruments that are intended to fall within the ambit of this deemed treatment. Counsel should also be cognizant of the interplay between this DGCL provision and the integration or entire agreement provision of the merger agreement. The amendments do not directly alter the pre-existing DGCL provisions for stockholder approval of a merger agreement.

Stockholder Notices

New Section 232(g) provides that any document enclosed, annexed, or appended with a notice given under the DGCL, certificate of incorporation, or bylaws will be deemed part of the notice solely for purposes of determining whether notice was duly given under the DGCL, certificate of incorporation, or bylaws. Section 232(g) does not, however, provide such deemed inclusion for purposes of notice given under a contract or agreement. As a belt-and-suspenders approach, notices for covered actions may track this new DGCL language to make clear to stockholders that the notice includes all enclosed, annexed, or appended documents and potentially to identify at least the key documents in that group.

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