YOUNG CONAWAY

Delaware Transactional & Corporate Law Update

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Recent Amendments to Delaware's General Corporation Law Give Boards Greater Flexibility in Approving Mergers and Permit Stockholder Agreements Restricting Corporate Governance, Among Other Changes

By John J. Paschetto, Leah E. Burcat, and Craig E. Rushmore

Following recent amendments to the General Corporation Law of the State of Delaware (the "**DGCL**"), a merger agreement need not be in its final form when a board of directors approves it for purposes of the DGCL, and a corporation can validly contract that it will not take certain actions without a particular stockholder's consent. Except as otherwise explained below, these and the other amendments discussed in this article took effect on August 1, 2024.

Changes to the Merger-Approval Process

For almost every type of merger, the DGCL requires that the board of directors of each constituent corporation approve the contemplated merger agreement.[1] This requirement has given rise to uncertainty whether a board must approve the final, execution-ready version of the merger agreement, as opposed to a version that still has some blanks and incomplete exhibits. Earlier this year, in *Sjunde AP-fonden v. Activision Blizzard, Inc*., the Delaware Court of Chancery addressed this uncertainty in connection with Microsoft's acquisition of Activision.[2] The defendant board had approved a draft merger agreement that lacked, among other things, the amount of the merger consideration, disclosure schedules, and the surviving corporation's charter. Denying, in relevant part, the defendants' motion to dismiss, the court held that even assuming DGCL § 251 did not require approval of the execution-ready version, it was reasonably conceivable that the draft the board approved was too preliminary to satisfy the statute.[3]

Prompted largely by the court's analysis in *Activision*, the 2024 amendments have made several changes to clarify what a board must approve to comply with the DGCL's merger provisions. First, entirely new DGCL § 147 makes clear that whenever the DGCL requires board approval of any agreement or document, a board can meet that requirement by approving the agreement or document in "substantially final" form.[4] As explained in the legislative synopsis accompanying the amendments, DGCL § 147 is intended to enable a board to approve a document for purposes of a DGCL requirement when "all of the material terms are either set forth in the . . . document or are determinable through other information or materials presented to or known by the board."[5] The amendments thus establish that a board need not approve the execution-ready version of an agreement, including a merger agreement, to satisfy the DGCL.

Second, as regards any agreement or document that, under the DGCL, must be filed with the

***Inside this* Update . . .**

The Delaware LLC and LP Acts Have Recently Been Amended to Permit Certificates of Merger to Make Any Change to an LLC's Certificate of Formation or an LP's Certificate of Limited Partnership....................***page* 5**

The Delaware Statutory Trust Act Has Been Amended to Permit "Pass-Through" Voting of Securities Held by a Statutory Trust, Among Other Changes............................***page* 7**

Delaware Secretary of State or referenced in any certificate filed with the Secretary of State, the board can ratify the agreement or document at any time after the board's approval of it but before the filing takes effect.[6] Thus, if a board has any doubt that a merger agreement was in substantially final form when it was approved, the board can subsequently ratify the agreement when it is in its final form, as long as the board does so before the effective time of the associated filing. The ratification will relate back to the time of the original approval and will be deemed to satisfy any DGCL requirement that the merger agreement be approved by the board in any specific manner or sequence.[7]

Third, the amendments specify certain information that need not be included in a draft merger agreement for it to be considered in substantially final form. Under new DGCL § 268(b), unless a merger agreement expressly provides otherwise, any disclosure schedule, disclosure letter, or similar document that is to be delivered in connection with the merger agreement, and will modify its terms, is not deemed part of the agreement for purposes of the DGCL.[8] DGCL § 268(b) has no impact, however, on the contractual effect of such a document or on the fiduciary duties of directors and officers.[9]

Fourth, the DGCL's general section on delivery of notice to stockholders has been amended to provide that a notice given by mail or courier service will be deemed to include not just the notice proper but also any documents enclosed with or appended to it.[10] Thus, where the DGCL requires that the notice of a stockholders' meeting "contain" certain information, that requirement is satisfied if the specified information is contained in a proxy statement enclosed with the meeting notice.[11] But a notice is deemed to contain enclosures or attachments under this amendment solely for purposes of determining whether a notice requirement in the DGCL, charter, or bylaws has been met. The amendment does not affect directors' and officers' discharge of their fiduciary duties of disclosure.[12]

Fifth, new DGCL § 268(a) specifies circumstances under which a merger agreement will be considered in substantially final form even if (contrary to DGCL § 251(b)) the agreement does not set forth changes to be made through the merger in the surviving corporation's charter. The merger agreement does not have to include any provision regarding the survivor's charter to be substantially final when, in the merger, all outstanding shares of a constituent corporation will be converted into or exchanged for cash, property, rights, or securities other than shares of the survivor, and the merger is not a holding-company reorganization under DGCL § 251(g).[13] In addition, under these same circumstances, the survivor's charter can be amended by the constituent corporation's board or by a person acting at that board's direction, and no amendment of the survivor's charter will be deemed an amendment of the merger agreement.[14]

Remedies Available in Merger Agreements

Last year, in *Crispo v. Musk*, the Delaware Court of Chancery considered the enforceability of "*Con Ed* provisions" in merger agreements.[15] So named because they were devised in response to *Consolidated Edison, Inc. v. Northeast Utilities*,[16] *Con Ed* provisions can, in one common form, entitle a target company to recover as damages for breach of a merger agreement an amount equal to the premium that the target stockholders would have received if the merger had closed.[17] In *Crispo*, the court held that a claim seeking to enforce such a *Con Ed* provision lacked merit. Specifically, the damages to be awarded under the provision were impermissible penalties, since they were expectation damages payable to the target company itself rather than to its stockholders, who actually bore the loss of the merger premium.[18]

The 2024 amendments have made this form of *Con Ed* provision enforceable under Delaware law. Under new subsection (a)(1) of DGCL § 261, a merger agreement may impose "penalties or consequences" on a party that does not consummate the merger or that prevents consummation by failing to comply with the merger agreement. Such penalties or consequences may include a requirement that the breaching party pay an amount representing the premium that the non-breaching party's stockholders would have received if the merger had closed as agreed.[19] The merger agreement can also require that the breaching party pay such an amount to the non-breaching party, and if so, the non-breaching party will be entitled to enforce the payment obligation and retain the payment.[20] This amendment has thus eliminated the concern raised in *Crispo* that such damages provisions create an unenforceable right to penalties.

In addition, the amendments have clarified how stockholder representatives can be used in mergers. New subsection (a)(2) of DGCL § 261 states that a merger agreement may provide for the appointment of a representative for stockholders of a Delaware constituent corporation, including stockholders whose shares will be converted, exchanged, or canceled in the merger. The appointment must take effect upon or after stockholder approval of the merger agreement. The representative, which may be the surviving entity or one of its agents, can be given exclusive authority to enforce and settle claims under the merger agreement and otherwise to act on behalf of the stockholders. The merger agreement may make the appointment of the stockholder representative irrevocable and may provide that once the merger becomes effective, the appointment provisions cannot be amended or can be amended only with the consent of specified persons.[21]

As explained in the legislative synopsis, the amendments do not permit the representative's authority to extend beyond the rights of stockholders under the merger agreement.[22] Accordingly, for example, the representative may not be given authority to settle dissenting stockholders' claims for appraisal of their shares under DGCL § 262. But the amendments do not restrict delegations of authority by stockholders contracting on their own behalf.[23]

Governance Agreements Between Corporations and Stockholders

Although DGCL § 141(a) lodges managerial authority in a corporation's board of directors, Delaware courts have recognized that it is not necessarily impermissible for a corporation to enter into an agreement that restricts to some degree a future board's exercise of its decision-making power. Thus, for example, when obtaining a loan, a corporation could validly agree that it will not declare a dividend without first obtaining the lender's consent. Delaware courts have also held, however, that an agreement could encroach upon the board's managerial authority to such an extent that the agreement becomes unenforceable under § 141(a).[24]

How far a corporation may go in agreeing to restrict its board's authority was recently tested in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co*.[25] In that case, the Delaware Court of Chancery held unenforceable an agreement between the defendant corporation and its founding stockholder insofar as the agreement entitled the founder to, among other things, block board actions falling within any of 18 categories. While such far-reaching governance arrangements might have been permissible if included in the defendant's charter, they could not be imposed by contract. Specifically, these contractual arrangements were void for violating the provisions of DGCL § 141 that vest managerial authority in the board of directors unless the DGCL or the charter provides otherwise.[26]

The 2024 amendments have largely removed the statutory bar to agreements giving a stockholder

power to determine the actions a corporation may take. New DGCL § 122(18) provides that every Delaware corporation is permitted to enter into a contract with one or more current or prospective stockholders under which, without limitation, the corporation may be prohibited from taking specified actions, required to take specified actions, or required to obtain consent from certain stockholders or other persons before taking specified actions.[27]

The corporation's board must find that the contract is supported by minimum consideration, which may consist of a promise by the stockholder parties to do or not do certain things. In addition, the contract will not be enforceable against the corporation insofar as its provisions conflict with the corporation's charter or would conflict with Delaware law if such provisions were contained in the charter.[28] But a contract provision will not be deemed to conflict with the charter or Delaware law solely on the grounds that the charter or Delaware law authorizes the board to take an action covered by the contract provision, even if the contract provision prohibits that action. If drafters want to block or restrict the application of DGCL § 122(18) to a corporation, they should provide in its charter that the corporation has no power to enter into any contract, or certain types of contracts, made lawful by § 122(18).[29]

Importantly, as the legislative synopsis explains, the purpose of the amendment is to establish simply that governance agreements between corporations and their stockholders are permitted by the DGCL. The amendment has no effect on directors', officers', or controlling stockholders' fiduciary duties that may be implicated by approval of the corporation's entry into, or performance of, an agreement of the type made possible by DGCL § 122(18). Accordingly, such an agreement may not bind the fiduciaries or provide for remedies against them, as opposed to remedies against the corporation itself, which § 122(18) does permit. Likewise, the agreement cannot excuse the corporation from obtaining any board or stockholder approval that may be required by other DGCL provisions.[30]

The permission granted by new DGCL § 122(18) applies only to contracts with stockholders. Accordingly, DGCL § 122(5), which gives every corporation the power to appoint agents for conducting its business, has been amended to make clear that this power remains subject to the board's retention of ultimate managerial authority as set forth in DGCL § 141(a).[31]

Effective Time of the Amendments

All of the 2024 amendments to the DGCL took effect on August 1, 2024. They apply both prospectively and retroactively, except that they do not apply to any civil action pending on or completed before that date.[32]

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1 A merger agreement is not required in the case of "short-form" parent-subsidiary mergers under DGCL §§ 253 and 267. 8 *Del. C.* §§ 253, 267.

2 C.A. No. 2022-1001-KSM, 2024 WL 863290 (Del. Ch. Feb. 29, 2024, corrected Mar. 19, 2024). Microsoft and its merger subsidiary were represented in this case by Young Conaway Stargatt & Taylor, LLP and Simpson Thacher & Bartlett LLP. The views expressed herein are those of the authors alone and should not be taken as representing the views of either firm, its professionals, or its clients.

3 *Id.* at *7-8.

4 8 *Del. C.* § 147.

5 Del. S.B. 313 syn. § 2, 152d Gen. Assem. (2024).

6 8 *Del. C.* § 147.

7 *Id.* DGCL § 147 further provides that it does not limit or otherwise change the ratification procedures already available under DGCL §§ 204 and 205 or under common law.

8 8 *Del. C.* § 268(b).

9 *Id.*; Del. S.B. 313 syn. § 5, 152d Gen. Assem. (2024).

[10] 8 *Del. C.* § 232(g).

[11] *See, e.g.*, 8 *Del. C.* § 251(c) (notice of stockholders' meeting to vote on merger agreement "shall contain a copy of the agreement or a brief summary thereof"); Del. S.B. 313 syn. § 3, 152d Gen. Assem. (2024).

[12] 8 *Del. C.* § 232(g); Del. S.B. 313 syn. § 3, 152d Gen. Assem. (2024).

[13] 8 *Del. C.* § 268(a).

[14] *Id.*

[15] 304 A.3d 567 (Del. Ch. 2023).

[16] 426 F.3d 524 (2d Cir. 2005).

[17] *Crispo*, 304 A.3d at 580-81.

[18] *Id.* at 582-84.

[19] 8 *Del. C.* § 261(a)(1)(i).

[20] 8 *Del. C.* § 261(a)(1)(ii).

[21] 8 *Del. C.* § 261(a)(2).

[22] Del. S.B. 313 syn. § 4, 152d Gen. Assem. (2024).

[23] *Id.* New DGCL § 261(a) does not apply to short-form mergers under DGCL §§ 253 and 267, and holding-company reorganizations under DGCL § 251(g). 8 *Del. C.* § 261(a).

[24] *E.g.*, *Abercrombie v. Davies*, 123 A.2d 893, 899 (Del. Ch. 1956) (holding stockholder agreement invalid because it "tend[ed] to limit in a substantial way the freedom of director decisions on matters of management policy"), *rev'd on other grounds*, 130 A.2d 338 (Del. 1957).

[25] 311 A.3d 809 (Del. Ch. 2024).

[26] *Id.* at 820-22.

[27] 8 *Del. C.* § 122(18).

[28] *Id.*

[29] *Id.*; Del. S.B. 313 syn. § 1, 152d Gen. Assem. (2024).

[30] Del. S.B. 313 syn. § 1, 152d Gen. Assem. (2024).

[31] 8 *Del. C.* § 122(5).

[32] Del. S.B. 313, 152d Gen. Assem. § 6 (2024); *see also Seavitt v. N-Able, Inc.*, — A.3d —, 2024 WL 3534476, at *1 n.3 (Del. Ch. July 25, 2024) (discussing continued application of now-superseded version of DGCL § 122 to pending cases).

The Delaware LLC and LP Acts Have Recently Been Amended to Permit Certificates of Merger to Make Any Change to an LLC's Certificate of Formation or an LP's Certificate of Limited Partnership

By Lauren M. McCrery and Daniel M. Cole

Effective August 1, 2024, the Delaware Limited Liability Company Act (the "**DLLCA**") and the Delaware Revised Uniform Limited Partnership Act (the "**DRULPA**" and, together with the DLLCA, the "**Acts**") have been amended to provide, among other things, that a certificate of merger respecting a limited liability company ("**LLC**") or limited partnership ("**LP**") surviving a merger may effectuate any change to the LLC's certificate of formation or the LP's certificate of limited partnership.

Amendments Made by Certificates of Merger

The DLLCA and DRULPA permit a Delaware LLC or LP to amend, respectively, its certificate of formation or its certificate of limited partnership by means of a certificate of merger where the LLC or LP is the surviving entity following the merger.[1] As the Acts were previously drafted, only three kinds of changes could be made via a certificate of merger: changes to the entity's name, its registered office in Delaware, or its registered agent in Delaware. The 2024 amendments have removed those limitations. A certificate of merger may now amend (or amend and restate) the certificate of formation or certificate of limited partnership in any respect that is otherwise permitted.[2] Likewise, in connection with a merger of registered series of an LLC or LP, a certificate of merger of registered series may now effect any change to the surviving series' certificate of registered series.[3]

Similar amendments have been made to allow a certificate of ownership and merger to effectuate any amendment to a surviving LLC's certificate of formation or a surviving LP's certificate of

limited partnership.[4] A certificate of ownership and merger, rather than a certificate of merger, can be used when the merger is between a parent Delaware LLC or LP and a subsidiary corporation, and the parent holds 90% or more of the subsidiary's voting shares.[5] The Acts were previously silent regarding the possibility of amendment by means of a certificate of ownership and merger.

Specifically with respect to LPs, the 2024 amendments provide that when the admission of any new general partners is reflected in a certificate of merger or certificate of ownership and merger, those general partners must sign the certificate.[6] Any new general partners whose association with an LP registered series is reflected in a certificate of merger of registered series must likewise sign the certificate.[7] Finally, where the entity surviving a merger is a Delaware limited liability limited partnership ("**LLLP**"), the statement of qualification that the LLLP is required to file with the Delaware Secretary of State may be amended in any respect by a certificate of merger or certificate of ownership and merger.[8]

Clarifying Revocation of Dissolution

Under the DLLCA and DRULPA, the dissolution of an LLC or LP is separate from, and precedes, the termination of the LLC's or LP's existence. Dissolution, by itself, commences a period of indefinite length during which the LLC or LP is to wind up its affairs in preparation for its death as a juridical person.[9] The dissolved LLC or LP finally ceases to exist upon the effectiveness of a certificate of cancellation filed with the Delaware Secretary of State.[10]

During the period between an LLC's or LP's dissolution and termination, it is not uncommon for those who own or control the entity to wish to revoke the dissolution. The DLLCA and DRULPA set forth several default revocation methods whose availability depends in part on how dissolution was effected. One of these methods is available by default when the entity has been dissolved pursuant to a vote. In that event, the dissolution can be revoked by such vote.[11] As previously drafted, however, the DLLCA and DRULPA provisions describing the revocation-by-vote method were susceptible of a reading under which the vote of any non-member or non-partner who approved the dissolution was also required for the revocation, even if that person's vote was not *necessary* for the dissolution.

The amended text now makes clear that the revocation-by-vote method requires the vote of non-members or non-partners only when the operating agreement required their votes to effect the dissolution.[12] Thus, for example, if an LLC's non-member chief executive voted in favor of dissolution where the LLC was dissolved pursuant to a vote, but the LLC's operating agreement did not require such a vote by that executive, then the executive's vote would not now be needed to revoke the dissolution. Similar amendments have been made to the sections providing for the revocation of termination of an LLC or LP protected series,[13] and the revocation of dissolution of an LLC or LP registered series.[14]

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1 6 *Del. C.* §§ 18-209(c)(4) (LLCs), 17-211(c)(4) (LPs).

2 6 *Del. C.* §§ 18-209(c)(4), 17-211(c)(4).

3 6 *Del. C.* §§ 18-221(b)(4), 17-224(b)(4).

4 6 *Del. C.* §§ 18-209(i), 17-211(l).

5 6 *Del. C.* §§ 18-209(i), 17-211(l).

6 6 *Del. C.* § 17-204(a)(4).

7 6 *Del. C.* § 17-204(a)(11).

8 6 *Del. C.* §§ 17-211(c)(4), 17-211(l).

9 6 *Del. C.* §§ 18-803(b), 17-803(b).

10 6 *Del. C.* § 18-203(a), (c); § 17-203(a), (c).

11 6 *Del. C.* §§ 18-806(1), 17-806(1).

12 6 *Del. C.* §§ 18-806(1), 17-806(1).

13 6 *Del. C.* §§ 18-215(d)(1), 17-218(d)(1).

14 6 Del. C. §§ 18-218(f)(1), 17-221(f)(1).

The Delaware Statutory Trust Act Has Been Amended to Permit "Pass-Through" Voting of Securities Held by a Statutory Trust, Among Other Changes

By Travis G. Maurer and Kenneth L. Norton

Recent amendments to the Delaware Statutory Trust Act (the "**DSTA**") provide for, among other things, so-called "pass-through" voting, allowing trustees to give beneficial owners the authority to direct how securities held by a Delaware statutory trust ("**DST**") will be voted. All of the amendments discussed below took effect on August 1, 2024.

Enabling Pass-Through Voting

Under new DSTA § 3806(p), the trustees of a DST may authorize any of its beneficial owners to direct how securities held, directly or indirectly, by the DST will be voted.[1] The trustees will not have any duties or liabilities in connection with the beneficial owners' exercise of that authority as long as the trustees have complied with the applicable standard of care when granting the authority to the beneficial owners. Since trustees are now enabled by default to authorize pass-through voting, a DST's governing instrument will need to provide otherwise if the parties want to limit the use of pass-through voting or prohibit it entirely.

Other Amendments

The DTSA's definition of "governing instrument" has been amended to make clear that a series of a DST, like the DST as a whole, is not required to sign the DST's governing instrument, and that the governing instrument will bind each series, as well as the DST, even if the series and/or DST does not sign.[2] This corresponds to similar amendments made in 2022 to the Delaware Limited Liability Company Act ("**DLLCA**") and the Delaware Revised Uniform Limited Partnership Act ("**DRULPA**").[3]

The DSTA provisions on conversion of entities to, and domestication of non-United States entities as, DSTs have been amended to provide that the conversion or domestication must be approved before the effectiveness, rather than before the filing, of the certificate of conversion or certificate of domestication.[4] Accordingly, when a certificate of conversion or domestication provides for an effective date later than the date on which the certificate is filed with the State, the effective date is the deadline by which the conversion or domestication must be approved. Similar amendments were made to the DLLCA and DRULPA in 2022.[5]

Finally, the amendments have revised the denotation of the short title "Delaware Statutory Trust Act," such that now the short title refers to *all* of Chapter 38 of Title 12.[6] Previously, the short title referred to only Subchapter I ("Domestic Statutory Trusts") of Chapter 38, without reference to Chapter 38's other subchapters—Subchapter II ("Foreign Statutory Trusts") and Subchapter III ("Control Beneficial Interest Acquisitions," which was added in 2022). Similar amendments have made clear that all of Chapter 38, not just Subchapter I, enacts the policy of giving maximum effect to freedom of contract and the enforceability of governing instruments;[7] is not subject to the rule that statutes in derogation of the common law are to be strictly construed;[8] and may be altered by the State from time to time, notwithstanding any rights of DSTs, trustees, and beneficial owners.[9]

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1 12 *Del. C.* § 3806(p).
2 12 *Del. C.* § 3801(e).
3 6 *Del. C.* §§ 18-101(9) (LLCs), 17-101(14) (LPs).
4 12 *Del. C.* §§ 3820(g), 3822(g).
5 6 *Del. C.* §§ 18-212(g), 17-215(g), 18-214(h), 17-217(h).
6 12 *Del. C.* § 3829.
7 12 *Del. C.* § 3828(b).
8 12 *Del. C.* § 3828(a).
9 12 *Del. C.* § 3827.

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