

2024 Delaware Entity Statutory Amendments

by Brian Burke and Amelia R. Messa

On August 1, 2024, the 2024 amendments to Delaware's entity statutes went into effect. These include amendments to the Delaware General Corporation Law (the "DGCL"), the Delaware Limited Liability Company Act (the "LLC Act"), the Delaware Revised Uniform Limited Partnership Act (the "DRULPA"), the Delaware Revised Uniform Partnership Act (the "DRUPA" and together with the LLC Act and the DRULPA, the "Alt Entity Acts"). Descriptions of some of the most notable amendments to each of the Delaware entity statutes are set forth below. There were also several other technical and clarifying amendments enacted for each of the Delaware entity statutes that are not discussed.

DGCL Amendments

Authorization of Stockholder Agreements

In February of this year, the Delaware Court of Chancery issued its decision in West Palm Beach Firefighters v. Moelis & Company which voided certain pre-approval and governance provisions in a stockholder's agreement. The court held that provisions granting a stockholder consent rights over board actions and governance rights over board and committee composition ran afoul of DGCL Section 141(a) by restricting the ability of the board to manage and direct the business and affairs of the corporation. Instead, as set forth in Section 141(a), the court noted that such restrictions are only permitted in a corporation's certificate of incorporation.

In response, a new Section 122(18) was added to the DGCL, which expressly permits a corporation to enter into agreements with stockholders or beneficial owners of stock, including agreements which restrict the corporation from taking certain actions, grant the stockholders consent rights over board actions or restrict the board from taking certain actions. The agreements may not contradict the corporation's certificate of incorporation and may not abrogate required approvals set forth in the DGCL for certain corporate actions. Furthermore, a board must still comply with its fiduciary duties when deciding to enter into or perform a stockholder's agreement. The new Section 122(18) applies to all

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existing stockholder agreements.

Board Approval of Agreements

Also in February of this year, the Delaware Court of Chancery held in *Sjunde Ap-Fonden v. Activision Blizzard, Inc.* that 251(b) of the DGCL requires a board to, at a minimum, approve an “essentially complete” version of the merger agreement. The court found that it was reasonably conceivable the board failed to satisfy this requirement where the final form of the merger agreement approved by the board did not include the pricing terms, disclosure schedules or surviving company charter.

In response, Delaware added Sections 147 and 268 to the DGCL. New Section 147 states that whenever the DGCL requires board approval of an agreement, the board may approve the agreement in “final form or substantially final form.” The legislative synopsis indicates that the intent of this provision is to permit a board to approve an agreement “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.” Section 147 only applies to board approval of agreements, and not stockholder approval.

New Section 268(a) provides that a merger agreement does not need to contain provisions regarding the surviving corporation’s charter where the deal consideration involves cash, property or securities (other than in the surviving corporation). The legislative synopsis indicates this is to allow a buyer in a reverse triangular merger to determine the terms of the surviving corporation’s charter. Additionally, Section 268(b) provides that disclosure schedules are not deemed a part of the agreement for purposes of board approval.

Lost Premium Damages Provisions

Section 262 of the DGCL was amended to expressly authorize parties to a merger agreement the ability to contractually specify penalties for one party’s failure to perform the agreement, including reverse termination fees payable by a buyer to a corporation upon the buyer’s failure to perform the agreement. This provision is in response to last year’s decision in *Crispo v. Musk* which had invalidated the commonly used “Con Ed” provisions which allow the target corporation to collect and retain, on behalf of its stockholders, lost premium damages in the form of reverse termination fees from a buyer under a merger agreement.

Alt Entity Amendments

Merger Amendments

The Alt Entity Acts were all amended this year to allow a certificate of merger or a certificate of ownership and merger to include any desired amendments to the certificate of formation, certificate of limited partnership, statement of partnership existence or statement of qualification, as applicable, of the surviving Delaware alternative entity in

the merger. The amendments effected by a merger are also now permitted to be achieved by amending and restating the applicable certificate or statement. The LLC Act and the DRULPA were further amended to provide that a certificate of merger of registered series of a limited liability company or a limited partnership may also include any desired amendments to the certificate of registered series of the surviving registered series of the merger. These amendments to the Alt Entity Acts are an expansion on the limited amendments that were previously allowed to certificates in connection with mergers.

Notably, one of the amendments that can now be made in connection with a merger to a certificate of limited partnership or a certificate of registered series of a limited partnership, is to admit one or more new general partners of the surviving limited partnership or series. The amendments to the DRULPA require that each such new general partner sign the certificate of merger, certificate of ownership and merger or certificate of merger of registered series, as applicable.

The DRUPA was also amended to require that if a Delaware general partnership is effecting a merger under the DRUPA, it must file a statement of partnership existence if it has not done so in the past.

Revocation Amendments

The LLC Act and the DRULPA were also amended to clarify that in the sections of those statutes addressing when the dissolution of a limited liability company, limited partnership or registered series, or termination of a protected series needs to be revoked, the reference to the vote of “other persons” to affect such revocation, includes only those persons whose approval was required for such dissolution or termination, as applicable.