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DELAWARE STATE SENATE
152nd GENERAL ASSEMBLY

SENATE BILL NO. 313

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

Section 1. Amend § 122, Title 8 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 122. Specific powers.

Every corporation created under this chapter shall have ~~power~~ power, whether or not so provided in the certificate of incorporation, to:

(1) Have perpetual succession by its corporate name, unless a limited period of duration is stated in its certificate of incorporation;

(2) Sue and be sued in all courts and participate, as a party or otherwise, in any judicial, administrative, arbitral or other proceeding, in its corporate name;

(3) Have a corporate seal, which may be altered at pleasure, and use the same by causing it or a facsimile thereof, to be impressed or affixed or in any other manner reproduced;

(4) Purchase, receive, take by grant, gift, devise, bequest or otherwise, lease, or otherwise acquire, own, hold, improve, employ, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated, and to sell, convey, lease, exchange, transfer or otherwise dispose of, or mortgage or pledge, all or any of its property and assets, or any interest therein, wherever situated;

(5) Appoint such officers and agents as the business of the corporation requires and to pay or otherwise provide for them suitable compensation; provided that any contract or other appointment or delegation of authority that empowers an officer or agent to act on behalf of the corporation shall be subject to § 141(a) of this title, to the extent it is applicable;

(6) Adopt, amend and repeal bylaws in accordance with § 109 of this title;

(7) Wind up and dissolve itself in the manner provided in this chapter;

(8) Conduct its business, carry on its operations and have offices and exercise its powers within or without this State;

(9) Make donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof;

(10) Be an incorporator, promoter or manager of other corporations of any type or kind;

(11) Participate with others in any corporation, partnership, limited partnership, joint venture or other association of any kind, or in any transaction, undertaking or arrangement which the participating corporation would have power to conduct by itself, whether or not such participation involves sharing or delegation of control with or to others;

(12) Transact any lawful business which the corporation's board of directors shall find to be in aid of governmental authority;

(13) Make contracts, including contracts of guaranty and suretyship, incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds and other obligations, and secure any of its obligations by mortgage, pledge or other encumbrance of all or any of its property, franchises and income, and make contracts of guaranty and suretyship which are necessary or convenient to the conduct, promotion or attainment of the business of (a) a corporation all of the outstanding stock of which is owned, directly or indirectly, by the contracting corporation, or (b) a corporation which owns, directly or indirectly, all of the outstanding stock of the contracting corporation, or (c) a corporation all of the outstanding stock of which is owned, directly or indirectly, by a corporation which owns, directly or indirectly, all of the outstanding stock of the contracting corporation, which contracts of guaranty and suretyship shall be deemed to be necessary or convenient to the conduct, promotion or attainment of the business of the contracting corporation, and make other contracts of guaranty and suretyship which are necessary or convenient to the conduct, promotion or attainment of the business of the contracting corporation;

(14) Lend money for its corporate purposes, invest and reinvest its funds, and take, hold and deal with real and personal property as security for the payment of funds so loaned or invested;

(15) Pay pensions and establish and carry out pension, profit sharing, stock option, stock purchase, stock bonus, retirement, benefit, incentive and compensation plans, trusts and provisions for any or all of its directors, officers and employees, and for any or all of the directors, officers and employees of its subsidiaries;

(16) Provide insurance for its benefit on the life of any of its directors, officers or employees, or on the life of any stockholder for the purpose of acquiring at such stockholder's death shares of its stock owned by such ~~stockholder~~.
stockholder;

(17) Renounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or 1 or more of its officers, directors or ~~stockholders~~. stockholders; and

(18) Notwithstanding § 141(a) of this title, make contracts with one or more current or prospective stockholders (or one or more beneficial owners of stock), in its or their capacity as such, in exchange for such minimum consideration as determined by the board of directors (which may include inducing stockholders or beneficial owners of stock to take, or refrain from taking, one or more actions); provided that no provision of such contract shall be enforceable against the corporation to the extent such contract provision is contrary to the certificate of incorporation or would be contrary to the laws of this State (other than § 115 of this title) if included in the certificate of incorporation. Without limiting the provisions that may be included in any such contracts, the corporation may agree to: (a) restrict or prohibit itself from taking actions specified in the contract, (b) require the approval or consent of one or more persons or bodies before the corporation may take actions specified in the contract (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation), and (c) covenant that the corporation or one or more persons or bodies will take, or refrain from taking, actions specified in the contract (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation). Solely for purposes of applying the proviso in the first sentence of this subsection, a restriction, prohibition or covenant in any such contract that relates to any specified action shall not be deemed contrary to the laws of this State or the certificate of incorporation by reason of a provision of this title or the certificate of incorporation that authorizes or empowers the board of directors (or any one or more directors) to take such action. With respect to all contracts made under this paragraph (18), the corporation shall be subject to the remedies available under the law governing the contract, including for any failure to perform or comply with its agreements under such contract.

Section 2. Amend Subchapter IV, Chapter 1, Title 8 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 147. Authorization of agreements and other instruments.

Whenever this chapter expressly requires the board of directors to approve or take other action with respect to any agreement, instrument or document, such agreement, instrument or document may be approved by the board of directors in

79 final form or in substantially final form. If the board of directors shall have acted to approve or take other action with
80 respect to an agreement, instrument or document that is required by this chapter to be filed with the Secretary of State or
81 referenced in any certificate so filed, the board of directors may, at any time after providing such approval or taking such
82 other action and prior to the effectiveness of such filing with the Secretary of State, adopt a resolution ratifying the
83 agreement, instrument or document. A ratification under this section shall be deemed to be effective as of the time of the
84 original approval or other action by the board of directors and to satisfy any requirement under this chapter that the board of
85 directors approve or take other action with respect to such agreement, instrument or document in a specific manner or
86 sequence. Ratification under this section shall not be deemed to be the exclusive means of ratifying an agreement,
87 instrument or document approved by the board of directors pursuant to this section, but shall be in addition to any
88 ratification or validation that may be available under §§ 204 and 205 of this title or under the common law.

89 Section 3. Amend § 232, Title 8 of the Delaware Code by making deletions as shown by strike through and
90 insertions as shown by underline as follows:

91 § 232. Delivery of notice; notice by electronic transmission.

92 (g) If a notice is given pursuant to paragraph (a)(1) or (a)(2) of this section, each document enclosed with the
93 notice or annexed or appended to the notice shall be deemed part of the notice solely for purposes of determining whether
94 notice was duly given under this title, the certificate of incorporation or bylaws.

95 ~~(g)(h)~~ No provision of this section, except for paragraphs (a)(1), (d)(2) and (d)(3) of this section, shall apply to §
96 164, § 296, § 311, § 312, or § 324 of this title.

97 Section 4. Amend § 261, Title 8 of the Delaware Code by making deletions as shown by strike through and
98 insertions as shown by underline as follows:

99 § 261. Remedies; appointment of stockholder representatives; ~~effect~~ Effect of merger upon pending actions.

100 (a) Any agreement of merger or consolidation governed by § 251, other than a merger effected pursuant to §
101 251(g) of this title, § 252, § 254, § 255, § 256, § 257, § 258, § 263 or § 264 of this title may provide:

102 (1) That (i) a party to the agreement that fails to perform its obligations under such agreement in accordance
103 with the terms and conditions of such agreement, or that otherwise fails to comply with the terms and conditions of
104 such agreement, in each case, required to be performed or complied with prior to the time such merger or consolidation
105 becomes effective, or that otherwise fails to consummate, or fails to cause the consummation of, the merger or
106 consolidation (whether prior to a specified date, upon satisfaction or, to the extent permitted by law, waiver of all
107 conditions to such consummation set forth in such agreement, or otherwise) shall be subject, in addition to any other
108 remedies available at law or in equity, to such penalties or consequences as are set forth in the agreement of merger or

consolidation (which penalties or consequences may include an obligation to pay to the other party or parties to such agreement an amount representing, or based on the loss of, any premium or other economic entitlement the stockholders of such other party would be entitled to receive pursuant to the terms of such agreement if the merger or consolidation were consummated in accordance with the terms of such agreement) and (ii) if, pursuant to the terms of such agreement, a corporation is entitled to receive payment from another party to an agreement of merger or consolidation of any amount representing such a penalty or consequence (as specified in clause (i) of this paragraph (a)(1)), such corporation shall be entitled to enforce the other party's payment obligation and, upon receipt of any such payment, shall be entitled to retain the amount of such payment so received.

(2)(i) For the appointment, at or after the time at which the agreement of merger or consolidation is adopted by the stockholders of a constituent corporation to such merger or consolidation in accordance with the requirements of this subchapter, of one or more persons (which may include the surviving or resulting entity or any officer, manager, representative or agent thereof) as representative of the stockholders of a constituent corporation of this State, including those whose shares of capital stock shall be cancelled, converted or exchanged in the merger or consolidation and for the delegation to such person or persons of the sole and exclusive authority to take action on behalf of such stockholders pursuant to such agreement, including taking such actions as the representative determines to enforce (including by entering into settlements with respect to) the rights of such stockholders under the agreement of merger or consolidation, on the terms and subject to the conditions set forth in the agreement, (ii) that any appointment pursuant to clause (i) of this paragraph (a)(2) shall be irrevocable and binding on all such stockholders from and after the adoption of the agreement of merger or consolidation by the requisite vote of such stockholders pursuant to this subchapter, and (iii) that any provision adopted pursuant to this paragraph (a)(2) may not be amended after the merger or consolidation has become effective or may be amended only with the consent or approval of persons specified in the agreement of merger or consolidation.

Any provision of the agreement of merger or consolidation adopted pursuant to this subsection (a) may be made dependent upon facts (including, but not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation) ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation.

(b) Any action or proceeding, whether civil, criminal or administrative, pending by or against any corporation which is a party to a merger or consolidation shall be prosecuted as if such merger or consolidation had not taken place, or the corporation surviving or resulting from such merger or consolidation may be substituted in such action or proceeding.

Section 5. Amend Subchapter IX, Chapter 1, Title 8 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 268. Amendments to certificate of incorporation of the surviving corporation; disclosure schedules.

(a) If an agreement of merger entered into pursuant to any provision of this subchapter, other than § 251(g) of this title, provides, with respect to any constituent corporation, that all of the shares of capital stock of such constituent corporation issued and outstanding immediately before the time at which the merger becomes effective shall be converted into or exchanged for cash, property, rights or securities (excluding stock of the surviving corporation), then, notwithstanding any other provision of this subchapter, with respect to such constituent corporation, (i) the agreement of merger as approved by the board of directors need not include any provision regarding the certificate of incorporation of the surviving corporation in order for the agreement of merger to be considered in final form or substantially final form, (ii) any amendment or amendment and restatement of the certificate of incorporation of the surviving corporation may be adopted by the board of directors of such constituent corporation or any person acting at the direction thereof (or, if under the terms of the agreement of merger the shares or equity interests of a constituent entity are to be converted into all of the shares of capital stock of the surviving corporation, the board of directors or governing body of such constituent entity or other person acting at the direction thereof), and (iii) no alteration or change of such certificate of incorporation shall be deemed to constitute an amendment to the agreement of merger.

(b) Unless otherwise expressly provided by an agreement of merger or consolidation, 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 this title but shall have the effects provided in the agreement.

Section 6. Sections 1 through 5 of this Act shall become effective on August 1, 2024, and shall 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, in each case whether or not the contracts, agreements, instruments, documents or agreements of merger or consolidation are made, approved or entered into on or before such date, except that these Sections 1 through 6 of this Act shall not apply to or affect any civil action or proceeding completed or pending on or before such date.

SYNOPSIS

Section 1. Section 1 of this Act amends § 122. New § 122(18) sets forth certain types of provisions that may be included in contracts between a corporation and its current or prospective stockholders or beneficial owners of its stock, even if those provisions are not set forth in, or referenced as a fact ascertainable in, the certificate of incorporation pursuant to § 141(a). The Court of Chancery recently observed that “[t]he expansive use of stockholder agreements suggests that

greater statutory guidance may be beneficial[.]” *West Palm Beach Firefighters’ Pension Fund v. Moelis & Company*, 2024 WL 747180 (Del. Ch. Feb. 23, 2024) at n.272. Accordingly, new § 122(18) specifically authorizes a corporation to enter into contracts with one or more of its stockholders or beneficial owners of its stock, for such minimum consideration as approved by its board of directors, and provides a non-exclusive list of contract provisions by which a corporation may agree to:

- a. restrict or prohibit future corporate actions specified in the contract;
- b. require the approval or consent of one or more persons or bodies (including the board of directors or one or more current or future directors, stockholders or beneficial owners of stock) before the corporation may take actions specified in the contract; and
- c. covenant that the corporation or one or more persons or bodies (including the board of directors or one or more current or future directors, stockholders or beneficial owners of stock) will take, or refrain from taking, future actions specified in the contract.

New § 122(18) also provides that the corporation may be subject to the remedies available under applicable contract law, including in connection with any breach or attempted breach of the contract. Notwithstanding any choice of law provision in the contract, the reference in the last sentence of § 122(18) to the law “governing” the contract shall be deemed to refer to the laws of this State if and to the extent choice of law principles (such as the internal affairs doctrine) so require. New § 122(18) provides bright-line authorization for contractual provisions addressing the matters listed above, and therefore would provide for a different rule than the portion of the *Moelis* decision in which the Court held that contract provisions of this nature must be included in the certificate of incorporation to be valid. The Court in *Moelis* found that provisions in a stockholder agreement that required a stockholder’s approval before the corporation could take a number of actions constituted, in the aggregate, impermissible internal governance restrictions in violation of § 141(a), and therefore those approval rights should have been included in the certificate of incorporation to be valid.

New § 122(18) also includes a proviso confirming that no provision of a contract shall be enforceable against the corporation to the extent such contract provision is contrary to the certificate of incorporation or would be contrary to the laws of this State (other than § 115 of Title 8) if included in the certificate of incorporation. The proviso excludes § 115, so that corporations may enter into contracts under § 122(18) with exclusive forum and arbitration provisions that do not select the courts of this State to adjudicate claims under the contracts. New § 122(18) also provides that, for purposes of applying the proviso, a restriction, prohibition or covenant in any such contract that relates to any specified action shall not be deemed contrary to Title 8 or the certificate of incorporation by reason of a provision of Title 8 or the certificate of incorporation that authorizes or empowers the board of directors (or any one or more directors) to take such action. For example, a general recitation in the certificate of incorporation of the default provisions of § 141(a) would not be sufficient to render inoperable the provisions of § 122(18) because such recitation merely authorizes the board of directors to manage, or direct the management of, the business and affairs of the corporation. In addition, other provisions of Title 8 or the certificate of incorporation that generally or specifically empower or authorize a board of directors to authorize or take any action would not prohibit a corporation from entering into a contract with current or prospective stockholders containing provisions (i) restricting or prohibiting the corporation from taking that action, (ii) requiring the approval or consent of one or more other persons or bodies before the corporation may take that action or (iii) agreeing that the corporation (or other persons or bodies) will take, or refrain from taking, that action. However, as explained in detail below, new § 122(18) would not preclude a provision in a corporation’s certificate of incorporation, in reliance on the provisions of §§ 102(b)(1), 102(b)(4) and 102(d), that limits the authority granted to the board of directors by § 122(18). Thus, to render inoperable the provisions of § 122(18), a certificate of incorporation could state the corporation lacks the power and authority to enter into the contracts authorized by § 122(18), or could state that the corporation lacks the power and authority to authorize specific contracts, or types of contracts, that would otherwise be authorized by § 122(18).

The amendments do not impact certain other principles articulated in existing case law, including the following:

1) Amended § 122(5) clarifies that management contracts and other arrangements appointing or delegating authority to an officer or agent to act on behalf of the corporation continue to be subject to § 141(a) and the related common law addressing an over-delegation of duties and authority by a board of directors. See *Grimes v. Donald*, 673 A.2d 1207 (Del. 1996), *Politan Capital Management LP v. Masimo Corporation*, C.A. No. 2022-0948-NAC (Del. Ch. Feb. 3, 2023) (transcript); *In re Bally’s Grand Derivative Litigation*, 1997 WL 305803 (Del. Ch. June 4, 1997).

2) New § 122(18) does not authorize a corporation to enter into contracts with stockholders or beneficial owners of stock that impose remedies or other consequences against directors if they take, or fail to take, specified actions as required by the contract or that purport to bind the board of directors or individual directors as parties to the contract. Contracts that would impose such remedies or consequences on directors or that would bind directors as parties are subject to existing law. *Abercrombie v. Davies*, 123 A.2d 893 (Del. Ch. 1956); *Chapin v. Benwood Foundation, Inc.*, 402 A.2d 1205 (Del.

Ch. 1979). Instead, new § 122(18) authorizes contracts that impose remedies only against the corporation, including as a result of any failure by the corporation, its board of directors, or its current or future directors, stockholders or beneficial owners of stock, to take, or refrain from taking, actions specified in the contract. If an action addressed in a covenant by the corporation requires director or stockholder approval under Title 8, that approval must still be obtained in order to effect the action pursuant to Title 8. For example, the lack of stockholder approval of an action under Title 8 requiring such approval would render specific performance of the covenant unavailable. Moreover, as noted below, even the enforceability of a claim for money damages for breach of the covenant may be subject to equitable review, and related equitable limitations, if the making or performance of the contract constitutes a breach of fiduciary duty.

3) Amended § 122(18) authorizes only contracts with stockholders and beneficial owners of stock if the contracts are supported by consideration received by the corporation and if the minimum amount of that consideration is approved by the board of directors. Accord *In re infoUSA, Inc. Shareholders Litigation*, 953 A.2d 963 (Del. Ch. 2007) (“[A] board is empowered to make agreements with other actors in commerce, including its own shareholders”); *Unisuper Ltd. v. News Corporation*, 2005 WL 3529317 (Del. Ch. Dec. 20, 2005) (noting that a board policy could be enforceable if stockholders relied to their detriment on that policy by voting to redomicile the corporation in Delaware). Accordingly, new § 122(18) would not change the outcome in cases that invalidated bylaws, and other arrangements, where consideration had not been provided to the corporation and the provisions at issue conflicted with § 141(a) of Title 8. See e.g. *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998) (applying § 141(a) to invalidate a provision in a stockholder rights plan, which is a nominal agreement between a corporation and a rights agent in which the corporation does not receive consideration for distributing rights to its stockholders); *Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180 (Del. Ch. 1998) (testing a stockholder rights plan for compliance with §§ 141(a) and 141(d)); *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008) (holding that a bylaw amendment would violate § 141(a) if adopted by stockholders, in circumstances where no new consideration was provided to the corporation in connection with a vote on the bylaw amendment).

4) New § 122(18) does not relieve any directors, officers or stockholders of any fiduciary duties they owe to the corporation or its stockholders, including with respect to deciding to cause the corporation to enter into a contract with a stockholder or beneficial owner of stock and with respect to deciding whether to perform, or cause the corporation to perform, or to breach, the contract, whether in connection with their management of the corporation’s business and affairs in the ordinary course or their approval of extraordinary transactions, such as a sale of the corporation. New § 122(18) also does not affect the case law empowering a court to grant equitable relief in respect of a contract, such as when a contract is set aside because the counterparties thereto have aided and abetted a breach of fiduciary duty or when a court reviews director actions under an enhanced form of judicial scrutiny. See e.g. *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994); *ACE Limited v. Capital Re Corporation*, 747 A.2d 95 (Del. Ch. 1999). Instead, the amendments are intended to promote a policy of granting such relief based on the application of equitable principles, including equitable principles relating to fiduciary duties and public policy.

Corporations may continue to rely upon § 122(13) to make contracts, including contracts containing the types of provisions addressed by § 122(18), with counterparties who are not contracting with the corporation in their capacities as current or prospective stockholders and beneficial owners of stock.

An amendment to the opening clause of § 122 provides that a corporation is authorized to take any of the actions specified in § 122, whether or not such actions are provided in the certificate of incorporation. This amendment clarifies existing law, other than with respect to § 122(18). Accordingly, when a certificate of incorporation is silent with respect to the matters addressed by § 122, the powers in § 122 apply to the corporation. A corporation may limit these default powers if a limitation is provided for, or referenced as a fact ascertainable in, the certificate of incorporation, in accordance with §§ 102(b)(1), 102(b)(4) and 102(d). An amendment to § 122(6) clarifies that the adoption, amendment or repeal of bylaws must be effected in accordance with § 109 of Title 8.

Section 2. Section 2 of this Act enacts a new § 147, which provides that whenever Chapter 1 of Title 8 expressly requires a board of directors to approve or take other action (such as making an advisability determination or a recommendation to stockholders) with respect to an agreement, instrument or document, the agreement, instrument or document may be approved in final form or substantially final form. The Delaware Court of Chancery recently considered competing interpretations of § 251 of Title 8 as to whether a board of directors must approve an agreement of merger on final or essentially final terms. *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, 2024 WL 863290 (Del. Ch. Feb. 29, 2024) (corrected March 19, 2024). New § 147 is intended to enable a board of directors to approve an agreement, instrument or document 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. New § 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 by Chapter 1 of Title 8 to be filed with the Secretary of State or referenced in any certificate so filed, the board may, after providing such approval or taking such action and before making such filing, ratify the agreement, instrument or document at any time before such filing is made, 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. Although new § 147 may be used to ratify an agreement, instrument or document after a stockholder vote or consent, it does not, of itself, enable the board to make changes to an agreement, instrument or document that is required by the statute to be adopted by stockholders after that stockholder vote or consent is obtained. (New § 147 does not affect the board's ability to amend an agreement, instrument or document without further vote or consent of the stockholders in circumstances where such an amendment would otherwise be permitted, including, for example, any amendment to a merger agreement accomplished in accordance with § 251(d) that does not fall within one of the enumerated categories of amendments requiring an additional vote of stockholders.) 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. Although a board may elect to use § 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. Ratification under § 147, where available, is an alternative to ratification under §§ 204 and 205 of Title 8. Accord *Activision Blizzard, Inc.*, 2024 WL 863290, at *5-6 (indicating "Delaware law offers solutions for missteps" and referencing §§ 204 and 205). The ratification procedure available under § 147 is in addition to any ratification or validation that may be available under §§ 204 and 205 or under the common law. As with ratification or validation under §§ 204 and 205 or under the common law, ratification under § 147 relates back to the time of the original board approval. New § 147 is not intended to, and does not, exclude any equitable remedies, nor does it alter the fiduciary duties of directors in connection with approving, taking other action with respect to, or ratifying an agreement, instrument or document.

Section 3. Section 3 of this Act amends § 232. New § 232(g) provides that a notice given to stockholders is deemed to include any document enclosed with, or appended or annexed to, the notice (such as a proxy statement provided along with a notice of a stockholder meeting to approve an agreement of merger). § 251 of Title 8 requires a corporation to include either a copy of an agreement of merger, or a brief summary thereof, in a notice of a stockholder meeting to adopt the merger agreement. There are similar requirements in other provisions of Title 8. The Court of Chancery recently observed that Title 8 could be amended to indicate how this statutory notice requirement relates to proxy materials that are given to stockholders. *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, 2024 WL 863290 (Del. Ch. Feb. 29, 2024) (corrected March 19, 2024) at n.55. Amended § 232 provides that information in any document enclosed with, or appended or annexed to, a notice is incorporated in the notice. However, a document is incorporated in a notice solely for purposes of satisfying the requirements of giving notice under Title 8, the certificate of incorporation or the bylaws. Accordingly, the enclosed, appended or annexed information is not intended to be deemed "per se" material to stockholders. Amended § 232 does not affect the equitable disclosure obligations of directors or officers (or, as applicable, stockholders) with respect to any corporate action as to which notice is given.

Section 4. Section 4 of this Act amends § 261 of Title 8. The amendments to § 261 address two separate topics in §§ 261(a)(1) and 261(a)(2), respectively.

New § 261(a)(1) clarifies that parties to an agreement of merger or consolidation may, through express provision in the agreement, specify the penalties or consequences of a party's failure to perform its obligations under, or comply with the terms and conditions of, such agreement before the effective time of the merger, or to consummate the merger or consolidation contemplated by such agreement. Such penalties or consequences may include an obligation to make payments to the other party if the merger or consolidation is not consummated, including damages based on the lost premium that stockholders of a constituent corporation would be entitled to receive if the merger becomes effective in accordance with the terms of the agreement and reverse termination fees. New § 261(a) provides that in the event a corporation is entitled to so receive such payment, the corporation may enforce the other party's payment obligation, and, upon receipt of any such payment, the corporation is entitled to retain the amount of any such payment.

New § 261(a)(1) is being adopted in light of the Court of Chancery's decision in *Crispo v. Musk*, 304 A.3d 567 (Del. Ch. 2023), to clarify the authority under Title 8 to include in an agreement of merger or consolidation provisions for penalties or consequences (including a requirement to pay lost premium damages) upon a party's failure to perform or consummate the merger or consolidation, regardless of any otherwise applicable provisions of contract law, such as those addressing liquidated damages and unenforceable penalties. Consistent with the Delaware General Corporation Law's role as an enabling statute, new § 261(a)(1) confirms that constituent corporations have latitude to allocate the risk of non-performance by provisions expressly set forth in agreements of merger or consolidation. New § 261(a)(1) is not intended to, and does not, exclude any remedies otherwise available to any party at law or in equity (including without limitation, specific performance), nor does it alter the fiduciary duties of directors in connection with determining whether to approve,

perform or enforce any such provision, including any provision requiring a corporation to pay a termination fee or lost premium damages under certain circumstances.

New § 261(a)(2) confirms that parties to an agreement of merger or consolidation 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 an escrow or indemnification arrangement, and to enter into settlements with respect thereto. Any such appointment of a representative of stockholders of a constituent corporation may be made effective as of, or at any time following, the time at which the agreement of merger or consolidation is adopted by stockholders in accordance with the requirements of this subchapter, and thereafter shall be binding on all stockholders of such constituent corporation. The merger and consolidation provisions of Subchapter IX of Chapter 1 of Title 8 have for decades included provisions allowing agreements of merger or consolidation 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. *Id.* 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 § 261(a)(2) is intended to provide express authorization for these representative provisions, confirming 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. These amendments should not be construed to limit the broad authority permitted under Title 8 and recognized in opinions of the Delaware courts, including *Aveta*, for constituent entities to make agreements or other instruments dependent on facts ascertainable outside of the agreement or instrument. The amendments to § 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 would not empower a stockholders' representative, acting solely pursuant to a provision adopted under new § 261(a)(2), to waive, compromise or settle, in the name of any stockholder, any rights to appraisal under § 262 or any direct claim for breach of fiduciary duty that such stockholder is entitled to assert following a merger or consolidation, or to consent, in the name of a stockholder, to restrictive covenants, such as a covenant not to compete or a non-solicitation covenant. The amendments do not, however, restrict any individual stockholder or group of stockholders from granting a stockholders' representative or other agent any such power or any other delegable power, whether through execution of a joinder to the agreement of merger or consolidation, consent or support agreement or other instrument evidencing assent the grant of such power.

Section 5. Section 5 of this Act adds a new § 268(a), which provides that if an agreement of merger (other than a holding company reorganization under § 251(g)) 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, the board of directors or any person acting at its direction may approve any amendment or amendment and restatement of the certificate of the surviving corporation, and no alteration or change to the certificate of incorporation of the surviving corporation will be deemed to constitute an amendment to the merger agreement. New § 268(a) is being adopted in light of the Court of Chancery's decision in *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, 2024 WL 863290 (Del. Ch. Feb. 29, 2024)(corrected March 19, 2024), which involved a merger transaction in which the board of directors did not approve the certificate of incorporation for the corporation surviving the merger. Among other things, this amendment will provide flexibility to a buyer in a typical "reverse triangular merger" to adopt the terms of the certificate of incorporation of the 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 provision, such as those relating to indemnification and advancement of expenses of directors, officers and others.

Section 5 of this Act also adds a new § 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, supplement, qualify, or make exceptions to representations, warranties, covenants or conditions in the agreement will not, unless otherwise expressly provided by the agreement of merger or consolidation, be deemed part of the agreement for purposes of the provisions of Title 8. New § 268(b) is being adopted to avoid any implication from the Court's decision in

Activision that, in order for an agreement of merger or consolidation 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. The new section 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.

New § 268 is not intended to, and does not, alter the fiduciary duties of directors with respect to the delegation of authority to approve the documents addressed by § 268 or the fiduciary duties of officers, as applicable, in exercising any such authority delegated to them or to inform the directors of material provisions, if any, in those documents in connection with a decision by the board of directors to approve an agreement of merger.

Section 6. Section 6 of this Act provides that Sections 1 through 5 of this Act shall become effective on August 1, 2024, and shall 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, in each case whether or not the contracts, agreements, instruments, documents or agreements of merger or consolidation are made, approved or entered into on or before such date, except that Sections 1 through 6 of this Act shall not apply to or affect any civil action or proceeding completed or pending on or before such date. With respect to such suits and proceedings, the law predating the amendments will apply.

This Act requires a greater than majority vote for passage because § 1 of Article IX of the Delaware Constitution requires the affirmative vote of two-thirds of the members elected to each house of the General Assembly to amend the general corporation law.

Author: Senator Townsend