



April 16, 2024

Srinivas Raju, Chair
James D. Honaker, Vice-Chair
Council of the Corporation Law Section
Delaware State Bar Association
704 N. King Street
Wilmington, DE 19801

Re: Proposed Amendments to the Delaware General Corporation Law

Dear Ladies and Gentlemen:

The Society for Corporate Governance (“Society”) appreciates the opportunity to comment on the proposed amendments to the Delaware General Corporation Law (“DGCL”) recently put forth by the Council of the Corporation Law Section of the Delaware State Bar Association. The Society agrees that the amendments, if adopted, would provide greater clarity and certainty in Delaware law, which would benefit companies, their boards of directors, and investors.

Founded in 1946, the Society is a professional membership association of more than 3,700 corporate and assistant secretaries, in-house counsel, outside counsel, and other governance professionals who serve approximately 1,700 entities, including approximately 1,000 publicly held companies of almost every size and industry. Society members are responsible for supporting the work of corporate boards of directors and the executive managements of their companies on corporate governance, disclosure matters, and mergers and acquisitions.

The Society supports the proposed amendments to DGCL Section 122, which would expressly authorize companies (if approved by their boards) to enter into agreements that grant certain rights to founders and other shareholders. Such stockholder agreements are widely used by companies, particularly pre-IPO enterprises, to incentivize early investments. Subject to their fiduciary duties, we believe that boards are best positioned to determine the rights to grant to founders and stockholders who provide crucial investments to new and growing companies. The Society agrees that the additional certainty by provided by proposed Section 122 (18) would be helpful to forestall a wave of litigation over such agreements.

The Society also supports the proposed amendments to DGCL Section 147, which would align Delaware law with market practice for board approval of merger and acquisition agreements. We welcome the “substantially final” standard, which, if adopted, would provide greater flexibility to boards and allow them to approve merger agreements once all the material terms are known.

Finally, the Society supports proposed DGCL Section 261(a), which would authorize the boards of target companies to negotiate agreements with potential acquirors to require “lost-premium” damages to be paid to target company shareholders if the acquiror wrongfully fails to complete the merger. We believe that boards should have the flexibility to negotiate such terms to protect the interests of their shareholders.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ted', with a stylized flourish at the end.

C. Edward (Ted) Allen
Vice President, Policy & Advocacy
Society for Corporate Governance