

1980 Superfine Lane, #802
Wilmington, Delaware 19802
June 10, 2024

Senator Bryan Townsend, Majority Leader
Representative Krista Griffith
411 Legislative Avenue
Dover, Delaware 19901

Dear Senator Townsend and Representative Griffith:

I write in support of S.B. 313, and in particular the proposed amendments to Section 122 of the Delaware General Corporation Law (DGCL) that validate corporate power to enter into agreements that grant stockholders significant governance rights. These amendments respond to a recent decision by the Court of Chancery in the *Moelis* case, which invalidated a stockholder agreement giving the corporate founder the right to require, among other things, that the board of directors recommend the election of his director nominees. The proposed amendments validate such agreements as a general matter, but leave the courts with the ability to invalidate any such agreement if its adoption or use violates the directors' fiduciary duty.

The proposed amendments address a now pervasive problem: the *Moelis* decision called into question what it acknowledged has been "market practice," creating confusion and uncertainty for untold numbers of Delaware corporations and their executives, employees, investors, and advisors. In the *Moelis* case itself, the invalidated provisions were fully disclosed when the company went public ten years ago, and went unchallenged until recently. Moreover, one study finds that similar provisions exist in 15% of recent initial public offerings. These provisions are also a mainstay of contemporary venture capital investment – they even appear in an industry association collection of corporate forms that are used as the basis for a significant portion of venture financings every year. In all of these situations, planners have relied in good faith on a broader understanding of corporate capacity than the court applied in *Moelis* – an interpretation that was consistent with a 2007 Chancery opinion upholding an agreement in which the corporation agreed to give a new investor veto power, for five years, over board action to issue new stock.

The proposed amendments to the DGCL respond to the *Moelis* opinion's sweeping questioning of such market practice, which includes governance agreements that have been the basis for long-standing investments in both public and private companies. That opinion therefore wisely recognized that legislative action could usefully clarify whether agreements of the sort it invalidated were legally proper: the court said that "the General Assembly could enact a provision stating what stockholder agreements can do."

S.B. 313 responds directly to that invitation: the proposed amendments to Section 122 are vastly superior in predictability and clarity compared to the state of affairs prevailing under the current statute, as interpreted by the Court of Chancery. The uncertainties exposed by the *Moelis* decision are too widespread to be left to case-by-case evaluation, and too disruptive to fester for a year or more without legislative guidance. The need for such guidance is urgent, and the Delaware State Bar Association and its constituent groups should be commended, not condemned, for quickly and carefully preparing and presenting the draft amendments to the Delaware General Assembly that allow it to act before the current legislative session ends on June 30. Even an article critical of the proposed amendments acknowledged that “[c]orporations need guidance, and both the Delaware legislature and the Council of the Corporation Law Section are the right institutions to provide it.”

Nevertheless, the proposed amendments have drawn a lot of criticism that characterizes them as a frontal attack on the core principle of Delaware corporate law that it is the board of directors that manages the business and affairs of the corporation. This criticism misses an essential point: the amendments simply allow Delaware corporations to enter into shareholder agreements that include governance arrangements that unquestionably can be included in the corporation’s certificate of incorporation. In the *Moelis* opinion itself, the court recognized this; it also recognized that the governance rights it invalidated could have been adopted by the board of directors alone (i.e., without stockholder approval), via the power to issue so-called blank check stock—a power held by most publicly-traded corporations. All the proposed amendments would do would be to enable the corporation to grant such rights in an agreement with one or more stockholders, instead of amending the certificate of incorporation or issuing blank check stock containing those rights.

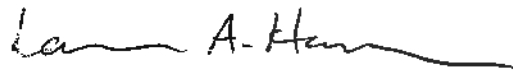
It has been suggested that the proposed amendments are the result of “interest group politics.” In a sense, that suggestion is well taken: this legislation was drafted by lawyers who, like many of us in Delaware, have benefited from the economic engine of Delaware business formation. The “interest” of that “interest group” stems from the recognition that those benefits depend on the preservation of the efficient and predictable system of corporate governance afforded by a regularly updated statute and hard-working, sophisticated judges. When a court decision, however well-reasoned, upsets that efficiency and predictability as the *Moelis* case has, it is the obligation of the stewards of Delaware’s corporate law – ultimately the General Assembly – to restore them as promptly and fully as possible.

Inevitably, maintaining the DGCL means reacting to decisions from Delaware’s respected judiciary that show that the needs of modern corporations and capital markets are no longer being met by a statute whose origins date to the 19th century. These changes do not constitute criticisms of the drafters of the prior statutory provisions or of the courts that interpreted them, but instead reflect the evolving needs of all modern stakeholders in Delaware’s system of corporate laws, from entrepreneurs and financiers to corporate directors, officers, and employees.

In sum, I respectfully urge that the General Assembly act quickly to adopt the proposed amendments. By doing so, Delaware will once again have demonstrated the resilience and reliability of its corporate law, and avoided putting at risk the continued faith in and use of the legal framework we offer.

Please feel free to share this letter with your fellow members of the General Assembly.

Respectfully,

A handwritten signature in black ink, appearing to read "Law A. Hamermesh", with a long horizontal flourish extending to the right.

Lawrence A. Hamermesh
Emeritus Professor,
Widener University Delaware Law School