

Via-Email

July 10, 2024

The Honorable John C. Carney
Governor of Delaware
Tatnall Building
150 Martin Luther King, Jr. Boulevard South
Dover, Delaware 19901

Dear Governor Carney:

The Council of Institutional Investors (CII or Council) writes to respectfully request that you veto Senate Bill 313: An Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law (S.B. 313).¹

CII is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$5 trillion. CII members are major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than fifteen million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4.8 trillion in assets, and a range of asset managers with approximately \$55 trillion in assets under management. CII is a leading voice for effective corporate governance, strong shareowner rights and sensible financial regulations that foster fair, vibrant capital markets. CII promotes policies that enhance long-term value for U.S. institutional asset owners and their beneficiaries.²

We note that in an unprecedented action, S.B. 313 overturns a trial court ruling that is not yet even final. In our view, there is no need for a legislative rush to judgment as to whether the opinion in the *West Palm Beach Firefighters’ Pension Fund v. Moelis & Company*, C.A. No. 2023-0309-JT³ was correct. The opinion is subject to review by the Delaware Supreme Court, which may or may not agree with the opinion.

As you are aware, S.B. 313 was drafted in response to the opinion by Vice Chancellor Laster in late February that upheld the facial validity of some provisions – but not others – in an agreement between Moelis & Company and its founder, who was also the controlling shareholder. The opinion characterized that agreement as part of a “new wave” of agreements between companies and certain minority shareholders or, as in the *Moelis* case, a controlling

¹ S.B. 313, 152nd Gen. Assemb., Reg. Sess. (Del. 2024), available at [Bill Detail - Delaware General Assembly](#).

² For more information about the Council of Institutional Investors (CII) please visit our website at www.cii.org.

³ *West Palm Beach Firefighters’ Pension Fund v. Moelis & Company*, C.A. No. 2023-0309-JTL (Del. Ch. Feb. 23, 2024), available at <https://law.justia.com/cases/delaware/court-of-chancery/2024/c-a-no-2023-0309-jtl-0.html>.

shareholder.⁴ Such agreements do not “involve stockholders contracting among themselves about how they will exercise their stockholder rights,”⁵ but instead “contain extensive veto rights and other restrictions on corporate action.”⁶

For CII and its members, we strongly believe that permitting stockholder agreements to contain the provisions at issue in the *Moelis* case as authorized by S.B. 313 would disadvantage long-term investors. One of the core principles of corporate governance is the principle of one share, one vote.⁷ Currently, for a powerful founder to have full control rights -- of the sorts granted to Mr. Moelis and authorized by S.B. 313 -- a company generally must put these provisions into the certificate of incorporation and go public with a multi-class capital structure.

Because this is such an important protection for investors, both the New York Stock Exchange and the Nasdaq Stock Market prohibit companies traded on those exchanges from engaging in a “midstream” recapitalization that would create a new class of super-voting stock.⁸ However, it appears that under the provisions of S.B. 313, a company could instead go public with a single-class capital structure and then, after the company is already public, confer comprehensive control rights by contract *without any shareholder vote*. We believe many CII members and other long-term investors – whether they object to multi-class capital structures or not – would find

⁴ *Id.* at 3 & n.10 (providing examples of certain “new wave” agreements giving minority shareholders veto rights over important corporate decisions, such as whether to fire the CEO or effect a change of control, waive a director’s obligation to present opportunities to the firm, and in some instances limit the ability of stockholders to sell their shares and citing Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 Yale J. Reg. 1124, 1148-54 (2021), available at https://openyls.law.yale.edu/bitstream/handle/20.500.13051/8341/08_Rauterberg_Article_Final_1124_1181.pdf?sequence=2&isAllowed=y).

⁵ *West Palm Beach Firefighters’ Pension Fund v. Moelis & Company*, C.A. No. 2023-0309-JTL at 3.

⁶ *Id.*

⁷ CII, Policies on Corporate Governance 3.3 (last updated Mar. 6, 2023), available at https://www.cii.org/corp_gov_policies (“Voting Rights: Each share of common stock should have one vote [and] [c]orporations should not have classes of common stock with disparate voting rights.”); see generally Letter from Ken Bertsch, Executive Director, CII et al. to Henry E. Gallagher, Jr., Council Chair, Corporation Law Section of the Delaware State Bar Association 1 (Sept. 13, 2019) available at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/September%2013%202019%20Final%20DGC%20letter.pdf (CII requesting “that the Delaware State Bar Association propose to the Delaware General Assembly that Delaware General Corporation Law (DGCL) be amended to limit the authority of Delaware corporations listed on national securities exchanges to adopt multi-class common stock structures with differential voting rights.”).

⁸ See NYSE Listed Company Manual § 313.00(A) (last visited July 10, 2024), available at <https://nyseguide.srornrules.com/listed-company-manual/09013e2c8503fcb5> (“Voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Exchange Act cannot be disparately reduced or restricted through any corporate action or issuance [and] [e]xamples of such corporate action or issuance include, but are not limited to, the adoption of time phased voting plans, the adoption of capped voting rights plans, the issuance of super voting stock, or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer.”); Nasdaq Stock Market Listing Rules § 5640 (Mar. 12, 2009), available at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series> (“Voting rights of existing Shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance [and] [e]xamples of such corporate action or issuance include, but are not limited to, the adoption of time-phased voting plans, the adoption of capped voting rights plans, the issuance of super-voting stock, or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer.”).

very troubling this post-IPO transformation to a type of multi-class capital structure without a shareholder vote.

A hallmark of Delaware General Corporation Law is the careful and deliberate nature in which it is adopted and enforced, as well as the ways in which Delaware law balances boards' decision-making with accountability to shareholders.' That reputation could be seriously impaired by a perception that influential actors can easily change the law whenever the Delaware Court of Chancery has the temerity to rule against them.

Thank you for your consideration of this request. Please do not hesitate to contact me if the Council can provide any additional information.

Sincerely yours,

A handwritten signature in blue ink that reads "Jeff Mahoney". The signature is written in a cursive, flowing style with a long horizontal tail on the "y".

Jeffrey P. Mahoney
General Counsel