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Delaware Adopts Significant DGCL Amendments Related to Control Person Transactions and Stockholder Books and Records Requests

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On March 25, 2025, the Delaware governor signed into law amendments to the Delaware General Corporation Law ("DGCL"), which went into effect upon the governor's signing. The below overview highlights the most significant changes to these statutes.

Safe Harbors for Control Person Transactions Have Been Expanded, Are Easier to Satisfy, and Limit Liability (Section 144)

Director and Officer Conflicting Interest Transactions (Section 144(a))

Prior to the amendments, the DGCL provided a safe harbor for director and officer conflicting interest transactions, which generally provided that such transactions would not be void or voidable if certain cleansing procedures in the DGCL were followed or the transaction was fair as to the corporation and its stockholders. However, under the prior law, such transactions were still subject to litigation for breach of fiduciary duties, even if the cleansing procedures were followed.

The amendments expand the safe harbor by precluding equitable relief and monetary liability altogether for director and officer conflicting interest transactions if the cleansing procedures are followed or the transaction is shown to be fair as to the corporation and its stockholders. Additionally, the amendments lowered the voting standard for conflicting interest transactions that are submitted to disinterested stockholders for approval to a majority of votes cast standard (from a majority outstanding standard).

Now, conflicting interest transactions between a corporation and one or more of its directors or officers may not be the subject of equitable relief, or give rise to damages liability, against a director or officer of the corporation if the transaction meets *either* of the following criteria:

- It is approved by an informed majority of the disinterested directors[1] then serving on the board or a board committee, provided that if a majority of the directors are not disinterested with respect to the

[1] The amendments define "disinterested director" as a director who is not a party to the act or transaction and does not have a material interest in the act or transaction or a material relationship with a person that has a material interest in the act or transaction.

transaction, such transaction shall be approved or recommended for approval by a board committee that consists of two or more disinterested directors with respect to the transaction.

- It is approved or ratified by the vote of an informed majority of votes cast by disinterested stockholders.[2]

If neither of these conditions is satisfied, the transaction must be fair as to the corporation and its stockholders for the safe harbor to apply.

Presumption of Disinterest for Directors (Section 144(c))

Prior to the amendments, the DGCL did not expressly define or address what constituted a disinterested director. The Delaware cases that have addressed the issue generally have viewed the satisfaction of independence requirements under applicable stock exchange rules (for public companies) as relevant but not dispositive under Delaware law.

The amendments now establish a presumption that a director of a public company is a disinterested director with respect to transactions to which such director is not a party if the board has determined that such director satisfies the applicable criteria for director independence under the applicable national securities exchange's rules (including any applicable criteria regarding independence from the controlling stockholders or control group). This presumption may only be rebutted by substantial and particularized facts showing that a director has a material interest[3] in the act or transaction or a material relationship[4] with a party who has a material interest in the act or transaction. This is similar to the independence standard adopted in the Model Business Corporation Act.

Further, the amendments clarify that the mere fact that a director was designated, nominated, or voted for in the election of such director by any person with a material interest in a transaction shall not, of itself, be evidence that a director is not a disinterested director with respect to a transaction to which such director is not a party. This does not represent a major departure from the case law on this issue in Delaware.

Controlling Stockholder Transactions (Sections 144(b)-(c), (e))

Prior to the amendments, the DGCL did not expressly address controlling stockholder transactions. However, Delaware case law generally provided that controlling stockholder transactions, including going private transactions, would be reviewed by a court under the entire fairness standard of review, with the burden to prove entire fairness (as to price and as to process) on the controlling stockholder unless certain cleansing procedures were used to approve the transaction, commonly referred to as the "MFW framework." If the MFW framework was

[2] The amendments define "disinterested stockholder" as any stockholder that does not have a material interest in the act or transaction at issue or, if applicable, a material relationship with the controlling stockholder or other member of the control group, or any other person that has a material interest in the act or transaction.

[3] The amendments define "material interest" as an actual or potential benefit, including the avoidance of a detriment, other than one that would devolve on the corporation or the stockholders generally, that (i) in the case of a director, would reasonably be expected to impair the objectivity of the director's judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue and (ii) in the case of a stockholder or any other person (other than a director), would be material to such stockholder or such other person.

[4] The amendments define "material relationship" as a familial, financial, professional, employment, or other relationship that (i) in the case of a director, would reasonably be expected to impair the objectivity of the director's judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue and (ii) in the case of a stockholder, would be material to such stockholder.

followed, any claim against the control persons and/or the other directors would be dismissed under the deferential business judgment standard of review unless a plaintiff could show that no rational person could have believed the transaction was favorable to the minority stockholders.

The MFW framework generally provided that a controlling stockholder transaction would be subject to the business judgment standard of review only if a completed transaction was conditioned, *ab initio*, on approval by a fully informed and uncoerced vote of both (1) an independent, fully functioning board committee of independent directors (*i.e.*, the committee (a) is empowered to freely select its own advisors and reject the transaction and (b) meets its fiduciary duty of care in negotiating a fair price) and (2) a majority of the outstanding voting shares held by disinterested stockholders (*i.e.*, the "majority of the minority" vote).

The amendments add a safe harbor for controlling stockholder[5] transactions[6] and, similar to the expanded safe harbor for director or officer conflicting interest transactions, provide that a controlling stockholder transaction (other than a going private transaction) may not be the subject of equitable relief or give rise to an award of damages against a director, officer, or controlling stockholder if such transaction meets *either* of the following criteria:

- It is approved (or recommended for approval) by an informed majority of the disinterested directors then serving on a board committee (to which the board has expressly delegated the authority to negotiate and to reject such transaction), provided that such committee consists of two or more disinterested directors with respect to the transaction.
- It is conditioned, at the time it is submitted to stockholders for approval or ratification, on the approval of or ratification by an informed majority of votes cast by disinterested stockholders, and such transaction is approved or ratified by such vote.

Like director or officer conflicting interest transactions, if neither of these conditions is satisfied, the controlling stockholder transaction must be fair as to the corporation and its stockholders for the safe harbor to apply.

For controlling stockholder transactions that constitute going private transactions,[7] the

[5] The amendments define "controlling stockholder" as any person that, together with such person's affiliates and associates, (i) owns or controls a majority in voting power of the corporation's outstanding stock entitled to vote in the election of directors; (ii) has the right to cause the election of a majority of the board selected at such person's discretion (by heads or by voting power); or (iii) has the power (a) functionally equivalent to that of a stockholder that owns or controls a majority in voting power by virtue of ownership or control of at least one-third in voting power of the outstanding stock entitled to vote in the election of directors *and* (b) to exercise managerial authority over the corporation's business and affairs.

[6] The amendments define "controlling stockholder transaction" as an act or transaction between the corporation or one or more of its subsidiaries, on the one hand, and a controlling stockholder or a control group, on the other hand, or an act or transaction from which a controlling stockholder or a control group receives a financial or other benefit not shared with the corporation's stockholders generally.

[7] The amendments define "going private transaction" as (a) a Rule 13e-3 transaction (as defined in 17 CFR § 240.13e-3(a)(3) or any successor statute) for a corporation with a class of equity securities subject to Section 12(g) or 15(d) of the Securities Exchange Act of 1934, as amended, or listed on a national securities exchange, and (b) for private corporations, any controlling stockholder transaction, including a merger, recapitalization, share purchase, consolidation, amendment to the certificate of incorporation, tender or exchange offer, conversion, transfer, domestication, or continuance, pursuant to which all or substantially all of the shares of the corporation's capital stock held by the disinterested stockholders (but not those of the controlling stockholder or control group) are canceled, converted, purchased, or otherwise acquired or cease to be outstanding.

expanded safe harbor protects the transaction against equitable relief and directors and officers against damages liability if such transaction meets *both* of the following criteria:

- It is approved (or recommended for approval) by an informed majority of the disinterested directors then serving on a board committee (to which the board has expressly delegated the authority to negotiate and to reject such transaction), provided that such committee consists of two or more disinterested directors with respect to the transaction.
- It is conditioned, at the time it is submitted to stockholders for approval or ratification, on the approval of or ratification by an informed majority of votes cast by disinterested stockholders, and such transaction is approved or ratified by such vote.

If both of these conditions are not satisfied, the going private transaction must be fair as to the corporation and its stockholders for the safe harbor to apply.

Limitation of Controlling Stockholder Fiduciary Duties (Section 144(c))

Prior to the amendments, a recent Delaware Court of Chancery opinion provided that controlling stockholders owe the fiduciary duty of care to the corporation and its stockholders in certain scenarios.

The amendments now eliminate the monetary liability of a controlling stockholder (including members of a control group) to the corporation or its stockholders for breach of fiduciary duty, except in the following instances:

- A breach of the duty of loyalty to the corporation or other stockholders
- Acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law
- Any transaction from which the controlling stockholder derived an improper personal benefit

Effect on Stockholder Litigation

There is considerable debate about whether these changes will have a material effect on the amount of litigation filed in Delaware related to controlling stockholder transactions. The amendments do overturn some key court precedents related to director independence and the cleansing procedures required in a controlling stockholder transaction for a board to enjoy the presumption of the business judgment rule. How that will affect stockholder plaintiffs' ability to bring successful derivative litigation challenging those transactions is unclear at this point.

The independence presumption, while useful for directors' defendants in a lawsuit, may not prove to be much of a departure from prior law because directors have long enjoyed a similar presumption of independence. The legislation does not affect the requirement that directors act in good faith and without gross negligence in approving these transactions. Equally, while the safe harbors in controlling stockholder transactions do take down barriers for cleansing the transaction, it is not yet clear how the removal of those barriers will curtail litigation challenging controlling stockholder transactions.

New Limitations on Stockholder Books and Record Requests (Section 220)

The DGCL provides a statutory right for stockholders to request and inspect a corporation's books and records for any proper purpose. Prior to the amendments, the DGCL did not define "books and records" and defined "proper purpose" broadly to include a purpose reasonably related to such person's interest as a stockholder. Delaware courts have interpreted that language broadly, recognizing a long list

of proper purposes. Once a proper purpose was established, Delaware case law generally provided that stockholders were entitled to inspect any books and records that were deemed necessary and essential to that proper purpose, which similarly included a long list of materials well beyond the historical understanding of what constituted a corporation's books and records. Recent decisions in Delaware courts had continued to expand that access. The new amendments overturn many of those recent precedents and restrict the types of records a stockholder may inspect, bringing Delaware's restrictions closer to, though they're still not nearly as strict as, the restrictions on stockholder access set forth in the Model Business Corporation Act, which has been adopted by a majority of states in the United States.

The amendments now require that (1) books and records requests or inspections be conducted in good faith, (2) such demands describe with reasonable particularity a purpose reasonably related to such stockholder's interest as a stockholder for the inspection of the books and records so demanded, and (3) the books and records sought be specifically related to the stockholder's purpose.

Additionally, the amendments define "books and records" as a specific list of materials that include the following:

- Organizational documents (including copies of any agreements or other instruments incorporated by reference therein)
- Minutes of all meetings of stockholders, signed written consents evidencing action taken by stockholders without a meeting, and all communications in writing or by electronic means to stockholders, in each case from the three years preceding the date of the demand
- Minutes of any board or committee meeting, records of any action of the board or any committee, and materials provided to the board or any committee in connection with actions taken by the board or any committee
- Annual financial statements of the corporation for the three years preceding the date of the demand
- Certain corporate contracts with stockholders
- Director and officer independence questionnaires

Stockholders requesting materials beyond those listed above must show a compelling need for those materials and provide clear and convincing evidence that the materials are necessary and essential to their proper purpose.

The amendments also authorize corporations to impose reasonable restrictions on the confidentiality, use, or distribution of books and records, and may also require, as a condition to producing such materials, that the stockholder agree to incorporate information from the books and records into any complaint filed by or at the direction of the stockholder. The amendments also expressly authorize corporations to redact portions of the books and records that are not related to the stockholder's proper purpose.

Please note that this article contains information regarding only the amendments to the DGCL highlighted above and not all amendments to the DGCL that were adopted. The amendments in their totality are complex; therefore, companies are encouraged to seek guidance from counsel regarding the details of the aforementioned changes as well as information regarding additional changes to the DGCL.

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