Skadden

Insights: Delaware Alert

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Delaware Amendments Provide Safe Harbors for Interested D&O and Controller Transactions, and Restrict Books and Records Demands

On March 25, 2025, Delaware Governor Matt Meyer signed into law amendments to the Delaware General Corporation Law (Amendments). In a February 28, 2025, client alert, we addressed the initial iteration of the Amendments, and explained that they were under ongoing review, and specifically designed to address concerns that led some companies to consider reincorporating in other states.

The core focus of the Amendments, which revise Sections 144 and 220 of the Delaware General Corporation Law (DGCL), remains the same: providing enhanced clarity and certainty concerning corporate decision-making on interested transactions, and reaffirming and clarifying Delaware's long-standing deference to decisions made by disinterested directors and stockholders. The Amendments are also intended to curb protracted stockholder litigation over interested transactions, as well as books and records demands.

Most importantly, the Amendments reinforce Delaware's preeminence as the leading state in which to incorporate, and reflect how swiftly and decisively the Delaware legislature will act to ensure that the DGCL remains current and responsive to developing corporate law issues.

Overview of Section 144 Amendments

The Amendments broaden Section 144 of the DGCL by offering procedural "safe harbors" for acts or transactions in which one or more directors, officers or their affiliates, or controlling stockholders and members of control groups, have interests or relationships that might render directors interested or not independent with respect to the act or transaction.

The Amendments also limit liability of controlling stockholders and members of a control group and clarify the standards for identifying controlling stockholders and determining which directors qualify as disinterested directors.

Director and Officer Conflicts

Under the Amendments, directors and officers who have an interest in an act or transaction with the corporation or one or more of its subsidiaries are generally protected from personal liability for such act or transaction if:

i. the material facts giving rise to such conflicts are disclosed or are known to all members of the board or a committee of the board and the board or committee in good faith and without gross negligence authorizes the act or transaction by a majority of the disinterested directors serving on the board or such committee, **or**

ii. the act or transaction is approved or ratified in good faith by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders, **or**

iii. the act or transaction is fair as to the corporation and its stockholders.

If a majority of directors are not disinterested directors with respect to an act or transaction, the Amendments require that such act or transaction be approved (or recommended for approval) by a board committee consisting of two or more directors, each of whom the board determines is a "disinterested director" with respect to the act or transaction.

Importantly, the Amendments provide a presumption of disinterestedness for directors of a publicly traded company whose shares are listed on a national stock exchange, and who are not a party to the act or transaction at issue, if the board determines that such directors satisfied the criteria for director independence under the applicable stock exchange rules (or, for controlling stockholder transactions, determines that such test would be satisfied if the criteria set forth in such rules were applied using the controlling stockholder and control group in lieu of the corporation). This presumption is "heightened" and can only be rebutted by "substantial and particularized facts" that a director has a material interest in the act or transaction or has a material relationship with a party having a material interest in the act or transaction.

The Amendments further clarify that the mere fact that a director was designated, nominated or elected to the board by a party that has a material interest in the act or transaction does not alone negate independence.

The synopsis to the Amendments explains that the term "fair as to the corporation and its stockholders," in the third prong of the safe harbors, is consistent with the entire fairness doctrine developed by common law. The synopsis also states that the Section 144 "safe harbors" do not "displace the common law requirements regarding core fiduciary conduct as contemplated" in Delaware case law. And the synopsis clarifies that Section 144 does not provide a safe harbor or otherwise limit the right to seek relief against stockholders or other parties for aiding and abetting a breach of fiduciary duty by one or more directors, but underscores that, consistent with existing case law, "knowing participation" is required in order to state a claim.

Controlling Stockholder Transactions

The Amendments also provide procedural "safe harbors" for controlling stockholder transactions: one safe harbor for "going private transactions," and a separate one for transactions not involving a "going private transaction." These provisions implicitly override the Delaware Supreme Court's opinion in *Match Group*, which held that any controlling stockholder transaction that provided a non-ratable benefit to the controller (including going private transactions) requires application of the *MFW* framework to obtain business judgment protection.

Notably, the Amendments define "controlling stockholder" to mean any person or "control group" that: (i) owns or controls a majority of the voting power of the company, or (ii) has the right, by contract or otherwise, to select directors or directors who would hold a majority of the voting power on the board, or (iii) has the power "functionally equivalent" to a controller by virtue of owning or controlling "at least one-third" of the voting power of the outstanding stock entitled to vote in the election of directors generally, or in the election of directors who have a majority of the voting power of all directors and the power to exercise "managerial authority over the business and affairs of the company."

For a "going private transaction," the Amendments insulate directors, officers, controlling stockholders and any members of a control group from liability arising from a breach of fiduciary duty if:

i. the transaction is:

   a. approved or recommended in good faith and without gross negligence by a majority of disinterested directors serving on a committee consisting of two or more disinterested directors, which has bargaining power and the right to reject such transaction, **and**

   b. conditioned, by its terms, on the approval or ratification by an informed and uncoerced majority of votes cast by disinterested stockholders, **or**

ii. the transaction is fair as to the corporation and its stockholders.

For all other controlling stockholder transactions, the safe harbor applies if the transaction meets any one of the three tests:

i. it is approved or recommended in good faith and without gross negligence by a majority of disinterested directors serving on a committee consisting of two or more disinterested directors, which has bargaining power and the right to reject such transaction, **or**

ii. it is conditioned, by its terms, on the approval or ratification by an informed and uncoerced majority of the votes cast by disinterested stockholders, **or**

ii. the transaction is fair as to the corporation and its stockholders.

This marks a change from the *Match Group* decision which, under *MFW*, required both the committee and stockholder vote prongs to be satisfied for non-going private transactions.

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For both going private transactions and other controller transactions, there is no "*ab initio*" requirement as required by *MFW*; instead, a controller must commit to the stockholder vote "at or prior to the time it is submitted to the stockholders for their approval."

Moreover, the Amendments provide that controlling stockholders (or members of a control group) will not be liable in such capacity to the corporation or its stockholders for monetary damages for breaches of their duty of care to minority or unaffiliated stockholders.

Overview of Section 220 Amendments

The Amendments relating to Section 220 specifically define the scope of company records that are available through a books and records demand, and require stockholders seeking more than the core materials described below to comply with a heightened standard.

The Amendments permit a stockholder to inspect books and records only if the stockholder's demand: (i) is made in good faith and for a proper purpose; (ii) describes with reasonable particularity the stockholder's purpose and the books and records the stockholder seeks to inspect; **and** (iii) seeks information specifically related to the stockholder's purpose.

The Amendments also limit "books and records" that may be subject to inspection to mean:

- The certificate of incorporation and any agreements incorporated by reference.
- Bylaws and any agreements incorporated by reference.
- Minutes of meetings and consents of stockholders for the three years preceding the demand.
- All communications written to stockholders within the three years preceding the demand.
- Minutes of meetings of the board or any board committee (and any materials provided to the board or any board committee in connection with actions taken).
- Annual financial statements for the preceding three years.
- Certain corporate contracts with stockholders.
- Director and officer independence questionnaires.

If certain books and records relating to the categories of (i) stockholder meetings and consents, (ii) board and committee minutes, (iii) annual financial statements, or (iv) director and officer independence questionnaires are unavailable, the Amendments contemplate that the court may order the corporation to produce additional records constituting the "functional equivalent" of such documents, but only if the stockholder has met the statutory requirements to inspect books and records and "only to the extent necessary and essential to fulfill the stockholder's proper purpose."

The Amendments also expressly authorize the corporation to impose "reasonable restrictions on the confidentiality, use or distribution of books and records," and to require that any information in the books and records provided will be deemed incorporated by reference into any complaint filed by the demanding stockholder.

Finally, if a stockholder pursues a Section 220 action, the Court of Chancery may order the corporation to produce, in addition to the core books and records described above, additional specific records, but only if the stockholder can satisfy a more exacting standard. Specifically, the stockholder must: (i) satisfy Section 220's statutory requirements; (ii) show a compelling need for additional records to further the stockholder's purpose; **and** (iii) demonstrate, by clear and convincing evidence, that the specific records are "necessary and essential" to further this purpose.

Applicability and Retroactivity

The Amendments were signed into law on March 25, 2025, and apply generally to all prior and future acts and transactions. However, from a litigation and books and records perspective, the Amendments *do not apply* to litigation filed, or books and records demands made, on or before February 17, 2025.

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