

Publications

Significant Amendments to Delaware General Corporation Law Enacted

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On March 25, 2025, the Governor of Delaware signed into law Senate Bill 21 (SB 21) which amends Sections 144 and 220 of the Delaware General Corporation Law (DGCL) to codify and clarify safe harbors for transactions involving interested directors or officers or controlling stockholders and impose limits on stockholder books and records inspection demands, respectively. These amendments apply to all corporate acts and transactions, except for any actions or proceedings that were completed or pending, or any inspection demands made, on or before February 17, 2025.

Amendments to Section 144 of DGCL

The amendments to Section 144 are intended to provide more certainty and clarity regarding the availability of, and the protections afforded by, business judgment rule safe harbors for transactions involving interested directors or officers or controlling stockholders.

Interested Director or Officer Transactions

SB 21 provides that transactions involving interested directors or officers that satisfy the safe harbor under Section 144(a) of the DGCL will be exempt from actions for equitable relief or awards for damages by reason of a claim based on a breach of fiduciary duty. SB 21 also lowers the threshold for stockholder approval of interested director or officer transactions from approval by a majority of the votes of all outstanding shares held by disinterested stockholders to approval by a majority of all votes cast by disinterested stockholders.

Controlling Stockholder Transactions

SB 21 codifies safe harbors for transactions involving controlling stockholders, reverses the application of the *MFW*¹ procedural requirements to transactions involving controlling stockholders and exculpates controlling stockholders from liability for duty of care violations. Before the enactment of SB 21, a controlling stockholder transaction would only be subject to the business judgment rule, as opposed to the significantly more demanding “entire fairness” standard of review, if the transaction satisfied the *MFW* framework. Under the *MFW* framework, a controlling transaction must be

approved by both (1) a special committee consisting entirely of independent directors and (2) a majority of the votes of all outstanding shares held by disinterested stockholders. In addition, the transaction had to be conditioned on these approval requirements before substantive negotiations could begin.

The amendments to Section 144 instead provide that a *non-going private transaction* involving a controlling stockholder will be subject to business judgment rule review if the transaction is approved by (1) a majority of the disinterested directors on a special committee of the board (not including the controlling stockholder) that has full authority to negotiate and reject the transaction and has disclosure or knowledge of all material facts regarding the transaction OR (2) a majority of the votes cast by disinterested stockholders who are informed and uncoerced provided that the transaction is conditioned on such stockholder approval before it is submitted to the stockholders for approval.

The amendments to Section 144 provide that a *going private transaction* involving a controlling stockholder will be subject to business judgment rule review if the transaction is approved by (1) a majority of the disinterested directors on a special committee of the board (not including the controlling stockholder) that has full authority to negotiate and reject the transaction and has disclosure or knowledge of all material facts regarding the transaction AND (2) a majority of the votes cast by disinterested stockholders who are informed and uncoerced provided that the transaction is conditioned on such stockholder approval before it is submitted to the stockholders for approval. For public companies, a going private transaction is an Rule 13e-3 transaction². Otherwise, a going private transaction is one in which all shares of capital stock held by disinterested stockholders are cancelled or acquired.

Definition of Controlling Stockholder

The amendments to Section 144 define a controlling stockholder as a person who, together with its affiliates and associates, (1) owns or controls a majority of the corporation's voting power or (2) has (a) the power functionally equivalent to majority voting power by virtue of ownership or control of at least one-third of voting power in the election of directors and (b) power to exercise managerial authority over the corporation's business and affairs.

Disinterested Status

The amendments provide that a director of a corporation listed on the NYSE or NASDAQ will be presumed to be disinterested with respect to a transaction to which the director is not a party if the board of directors of the corporation determines that the director is independent from the corporation and, if applicable, the controlling stockholder under the stock exchange's director independence requirements. This presumption may only be rebutted by "substantial and particularized facts" that the director has a material interest in the transaction or a material relationship with a person that has a material interest in the transaction.

Amendments to Section 220 of DGCL

Delaware courts have expanded stockholder inspection rights in recent years to apply to an increasingly broad range of corporate records, including certain emails, text messages and electronic chat discussions.

The amendments to Section 220(b) require a stockholder demanding inspection of the corporation's books and records to (1) make its demand in good faith and for a proper purpose and (2) describe with reasonable particularity in its demand for inspection the stockholder's proper purpose and the books and records

sought to be inspected (which must specifically relate to the stockholder's proper purpose).

The amendments to Section 220 specifically define the books and records subject to stockholder inspection to include the certificate of incorporation, bylaws, minutes of meetings (or consents in lieu of meetings) of stockholders and the board or committees of the board, communications with stockholders generally, materials provided to the board or committees, annual financial statements, director independence questionnaires, and Section 122(18) contracts³. The list does not include electronic communications between directors or members of management that Delaware courts have subjected to stockholder inspection in recent years.

The amendments also specifically limit the minutes and consents of stockholder meetings, financial statements, and communications with stockholders subject to inspection to those within three years of the date of the books and records demand.

Delaware courts may only order the production of records outside the list set forth in Section 220 if the stockholder demonstrates a compelling need for the materials to further a proper purpose and provides clear and convincing evidence that the additional records are necessary and essential to further such purpose.

The amendments also confirm that corporations may impose reasonable restrictions on the confidentiality, use and distribution of the books and records that it makes available in response to an inspection demand and redact portions of requested documents that are not specifically related to the stockholder's specific purpose.

¹ *MFW, or Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014), established certain procedural requirements that must be satisfied to subject a transaction to the business judgment rule instead of entire fairness review. *In re Match Group, Inc. Derivative Litigation*, 315 A.3d 446 (Del 2024), applied the MFW framework to all controlling stockholder transactions.

² A "Rule 13e-3" transaction is a transaction or series of transactions involving a securities purchase, tender offer or specified proxy solicitation by an issuer or an affiliate of the issuer, which has a reasonable likelihood or purpose of directly or indirectly: (1) causing any registered class of equity securities to be eligible for termination of registration, or eligible for termination or suspension of reporting obligations; or (2) causing any listed class of equity securities to cease to be listed on a national securities exchange.

³ Section 122(18) contracts, or *Moelis* agreements, are agreements between a corporation and one or more of its stockholders that (1) restrict or prohibit the corporation from taking certain actions, (2) require the corporation to obtain approval or consent from one or more persons before taking certain actions, or (3) require the corporation to take or refrain from taking certain actions.