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CLIENT ALERT

Delaware Passes Major Amendment to Its Leading General Corporation Law

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On March 25, 2025, the State of Delaware passed a major amendment to Sections 144 and 220 of the Delaware General Corporation Law, known as "SB 21."[1] The amendment was designed to provide corporations with clarity and predictability when structuring certain transactions involving controlling stockholders. Among other amendments, SB 21 adopted a safe harbor for certain transactions involving controlling stockholders that may have otherwise potentially been subject to difficult and protracted litigation. The amendment also introduced a statutory presumption regarding which directors will be deemed "disinterested"; a more rigorous definition of who constitutes a controlling stockholder under Delaware law; and stricter limits on the information available to stockholders through statutory demands for corporate books and records.

[1] Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law ("DGCL"), SB 21, 153 General Assembly (2025).

Key features of the new legislation include:

- **New Safe Harbor Provisions:** Apart from "going private transactions" involving a controlling stockholder,[2] transactions between a corporation and its directors, officers, and controlling stockholders may be subject to a new safe harbor provision that, if successfully applied, will insulate the transaction from claims for damages or equitable relief.

    - **For transactions between a corporation and interested parties other than controlling stockholders**, taking advantage of the safe harbor requires either (1) approval by fully informed and disinterested directors, either through a majority of the disinterested board or, in the event that a majority of the directors are not disinterested with respect to the transaction, through a disinterested committee of directors that consists of 2 or more directors **or** (2) approval or ratification by fully informed and disinterested stockholders, through an "informed, uncoerced, affirmative vote of a majority of the votes cast by disinterested stockholders."[3]

    - **For controlling stockholder transactions other than "going private transactions,"** taking advantage of the safe harbor is similar, but requires (1) approval of a committee of 2 or more disinterested directors **or** (2) conditioning the transaction on approval or ratification of the disinterested stockholders through an "informed, uncoerced, affirmative vote of a majority of the votes cast by disinterested stockholders."[4]

    - **"Going private transactions"** involving a controlling stockholder continue to be subject to the framework of both procedural protections set forth in the Delaware Supreme Court's decision in *MFW*, which requires both disinterested director approval **and** disinterested majority-of-the-minority stockholder approval to take advantage of the safe harbor.[5]

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2 A "going private transaction" is defined in DGCL § 144(e)(6) as follows:

> For a corporation with a class of equity securities subject to § 12(g) or 15(d) of the Securities Exchange Act of 1934 or listed on a national securities exchange, a Rule 13e-3 transaction (as defined in 17 CFR § 240.13e-3(a)(3) or any successor provision); and
>
> For any other corporation to which [the foregoing paragraph] of this section does not apply, 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 cancelled, converted, purchased, or otherwise acquired or cease to be outstanding.

3 DGCL § 144(a).

4 DGCL § 144(b).

5 DGCL § 144(c)(1); *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014).

- In a departure from prior Delaware law, however, with respect to each safe harbor provision, each of the safe harbors now operate even if the transaction is not conditioned *ab initio* on disinterested majority-of-the-minority stockholder approval and approval by a special committee.[6]

- **Statutory Definition of Controlling Stockholder:** The amendment contains a new definition of what constitutes a "controlling stockholder" under Delaware law.

  - As before, a stockholder will be deemed a "controlling stockholder" if the stockholder has a majority of the voting power of the outstanding stock of the corporation or has the contractual power to elect a majority of a corporation's directors.[7]

  - Outside of majority voting control, however, the statute provides that the only other stockholders who will be deemed to be "controlling stockholders" are stockholders that (1) have the contractual right to "cause the election of nominees" constituting a majority of the board's voting power **or** (2) have control at least one third of the voting power of outstanding stock of the corporation over the election of directors such that the stockholder has power "functionally equivalent" to a stockholder who holds majority of the voting power, and also have the "power to exercise managerial authority over the business and affairs of the corporation."[8]

  - Furthermore, the statute defines a "control group" as "2 or more persons that are not controlling stockholders that, by virtue of an agreement, arrangement, or understanding between or among such persons, constitute a controlling stockholder."[9]

- **Statutory Definition and Presumption Regarding Disinterested Directors:** A director is deemed "disinterested" under the amendment if the director has neither a "material interest" in the transaction nor a "material relationship" with a person that has a material interest in the transaction.[10] Further, a director of a corporation listed on a national securities exchange is statutorily presumed to be disinterested if the corporation's board of directors has "determined that such director satisfies the applicable criteria for determining director independence . . . under the rules (and interpretations thereof) promulgated by such exchange."[11] This statutory presumption can only be rebutted by "substantial and particularized facts" that show the director is not disinterested.[12]

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6 DGCL §§ 144(a)(2), (b)(2), (c)(1).
7 DGCL §§ 144(e)(2)(a)–(b).
8 DGCL §§ 144(e)(2)(c).
9 DGCL § 144(e)(1).
10 DGCL § 144(e)(4).
11 DGCL § 144(d)(2).
12 *Id.*

- **Stricter Limit on Books and Records Demands:** The amendment restricts the range of materials that Delaware courts may allow stockholders to inspect under Section 220 of the DGCL.
    - "Books and records" are defined to include only certain enumerated categories of high-level board materials, such as board meeting minutes and materials, communications to stockholders, and annual financial statements.[13]
    - Stockholders are generally limited to inspecting the books and records as defined in the statute, and can compel inspection of other books and records only by satisfying heightened statutory standards.
        - A court may order production of the "functional equivalent" of certain enumerated books and records if the corporation cannot provide them and, then, "only to the extent necessary and essential to fulfill the stockholder's proper purpose."[14] Additionally, a stockholder can compel inspection of other corporate records by showing "a compelling need for an inspection of such records to further the stockholder's proper purpose" and presenting "clear and convincing evidence that such specific records are necessary and essential to further such purpose."[15]
- **Retroactivity:** The amendment applies to transactions that occur before or after its enactment.[16] However, the amendment does not apply to any transaction or books and records demand that was already subject to "any action or proceeding commenced in a court of competent jurisdiction" on or before February 17, 2025.[17]

These amendments will have significant implications for corporate planners and for Delaware stockholder litigation, and practitioners should closely monitor how the amendments are put into practice and interpreted by the Courts. Please reach out to attorneys at Willkie Farr & Gallagher LLP with any related questions or issues.

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13 DGCL § 220(a)(1). The "formal" books and records includes the certificate of incorporation and incorporated documents, bylaws and incorporated documents, board meeting minutes and related materials, stockholder meeting minutes and signed consents for the past three years, communications to stockholders for the past three years, annual financial statements for the past three years, agreements entered under Section 122(18) of the DGCL, and director and officer independence questionnaires. *Id.*

14 DGCL § 220(f).

15 DGCL § 220(g).

16 SB 21, Sec. 3.

17 *Id.*

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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