Simpson Thacher

Memorandum

Newly Proposed Amendments to the Delaware General Corporation Law

February 19, 2025

On February 16, 2025, Senate Bill 21 (the "New Legislation") was introduced in the Delaware General Assembly to amend the Delaware General Corporation Law ("DGCL"). The New Legislation provides welcome clarity and greater predictability for Delaware law regarding director independence, controlling stockholders, entire fairness review, and when compliance with "*MFW* protections"[1] is necessary to secure business judgment review. The New Legislation also proposes practical guardrails on stockholder "books and records" demands, which have proliferated in recent years.

The New Legislation is sponsored by a bipartisan group of legislators who seek to "promote clarity and balance in Delaware's corporate law" by addressing "[u]ncertain standards." The New Legislation also appears to be a reaction to growing concerns about Delaware's prominence as the leading jurisdiction for incorporation and news of several high-profile companies reincorporating or considering reincorporation in other states. The New Legislation also has the support of Delaware's Governor Matt Meyer, whose statement "thank[s] the Legislature for moving swiftly to respond to the evolving needs of the global market" and "continu[ing] Delaware's tradition of a balanced and measured approach."

Over the next few weeks and months, the New Legislation will be subject to debate in the General Assembly as well as consideration by the Council of the Corporation Law Section of the Delaware State Bar Association ("CLS"), which has historically reviewed and recommended changes to the DGCL. Senate Concurrent Resolution 17, introduced at the same time as the New Legislation, also seeks a report and recommendation from CLS regarding changes to the legal standards applicable to the award of attorneys' fees in stockholder litigation.

Further information on the legislative proposals is provided below.

DGCL Section 144 Amendments

Current Section 144 of the DGCL, governing conflicted transactions, provides that corporate acts or transactions involving interested directors are not "void or voidable" solely because of an interested director's involvement if they are approved by fully-informed disinterested directors or stockholders, or are "fair" to the corporation. The current statute is limited to voidability and does not address equitable challenges such as through fiduciary

[1] In *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"), the Delaware Supreme Court held that the business judgment standard of review applies to a controlling stockholder transaction if the transaction "is conditioned *ab initio* upon the approval of both an independent, adequately-empowered [s]pecial [c]ommittee that fulfills its duty of care, and the uncoerced, informed vote of a majority of the minority stockholders."

litigation. The New Legislation would expand Section 144 to provide a series of safe harbors applicable to transactions involving interested directors and officers, and controlling stockholders.

First, the New Legislation expands the current DGCL 144 safe harbor to bar equitable attack against a potentially conflicted director involved in the corporate action who: (i) discloses the material facts regarding his or her "relationship" or "interest" and "involve[ment]"; and (ii) the action is ratified by a majority of disinterested directors or stockholders, or is "fair to the corporation." *See* Proposed § 144(a).

Second, the New Legislation provides greater clarity on director independence standards by creating a presumption of independence if a board explicitly finds a director independent or if they satisfy NYSE or NASDAQ independence standards. This presumption can only be rebutted with "substantial and particularized facts" of a material disabling interest or relationship. Nomination by a controller does not automatically undermine independence. *See* Proposed § 144(d)(2)-(3).[2]

Third, the New Legislation provides for safe harbors for transactions involving "controlling stockholders." Conflicted controller transactions—other than "going private transactions"[3]—will not be subject to equitable challenge if: (i) approved in good faith by a fully-informed and empowered committee of disinterested directors (*i.e.*, the committee has ability to say "no"); or (ii) approved by a fully informed and uncoerced majority of disinterested stockholders. *See* Proposed § 144(b). In effect, the New Legislation charts a path advocated before the Delaware Supreme Court's 2024 *Match* opinion which limits the application of "entire fairness" absent "*MFW*" procedural protections to going private transactions, while other transactions involving controlling stockholders could proceed without entire fairness review if they employed either a special committee or an unaffiliated stockholder vote.[4]

The New Legislation also provides that "going private transactions" are not subject to equitable challenge if both procedural protections above are employed. Under the New Legislation, the controller must commit to the unaffiliated stockholder vote only "at or prior to the time it is submitted to stockholders." *See* Proposed § 144(c).

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[2] The Proposed Legislation defines "disinterested" directors and stockholders as persons who do "not have a material interest in the act or transaction or a material relationship" with an interested person. *See* Proposed § 144(e)(4)-(5). It defines "material interest" as a specific (not generally shared) benefit that "would reasonably be expected to impair the objectivity of the director's judgment" or "be material to such stockholder." *See* Proposed § 144(e)(8). And it defines "material relationship" as "a familial, financial, professional, employment or other relationship" that "would reasonably be expected to impair the objectivity of the director's judgment" or "be material to such stockholder." *See* Proposed § 144(e)(9).

[3] The New Legislation defines "controlling stockholder transaction" as an act or transaction: (i) with a controlling stockholder or control group; or (ii) where the controller or control group "receives a financial or other benefit not shared with the corporation's stockholders generally." *See* Proposed § 144(e)(3).

[4] In *In re Match Grp., Inc. Der. Litig.*, No. 368,2022, 2024 WL 1449815 (Del. Apr. 4, 2024), the Delaware Supreme Court held that entire fairness is applicable to all types of conflicted controller transactions, not just going private transactions, and held that the dual *MFW* protections are required to reduce the standard of review, even where its application is unusual or impracticable. The Court also strictly applied *MFW*'s requirements, finding that a lack of independence by 1 of 3 special committee members was sufficient to defeat *MFW* cleansing. The New Legislation provides that only majority independence is required for a committee to fall within the safe harbor. *See* Proposed § 144(b)(1).

Under *MFW* and its progeny, such a commitment had to be made "*ab initio*" and led to a number of controller commitments being denied *MFW* protections.

The New Legislation also elaborates on the standards for judicial review for whether such transactions are "fair to the corporation" if one of the procedural safe harbors is not satisfied. *See* Proposed § 144(b)-(c), § 144(e)(6). Such review would look to whether a corporate act or transaction is "beneficial to the corporation, or its stockholders" "given the consideration paid or received. . . or other benefit conferred" and considering both whether it is: (i) "fair in terms of the fiduciary's dealings with the corporation"; and (ii) "comparable to what might have been obtained in an arm's length transaction." *See* Proposed § 144(e)(6).

Finally, the New Legislation provides more bright-line standards for who is deemed to be a "controlling stockholder" or in a "control group." It defines "controlling stockholder" as any person and his or her affiliates that: (i) owns or controls a majority in voting power for the election of directors; or (ii) has the "power functionally equivalent" to the foregoing by owning or controlling at least 1/3 in voting power for the election of directors "*and* power to exercise managerial authority over the business and affairs of the corporation." It requires "an agreement, arrangement or understanding" to form a "control group." *See* Proposed § 144(e)(1)-(2). It also limits controller liability to instances of disloyalty, bad faith, or improper personal benefit (*i.e.*, not duty of care).[5] *See* Proposed § 144(d)(5).

DGCL Section 220 Amendments

Section 220 of the DGCL provides for stockholder access to corporate books and records. The New Legislation would limit the universe of obtainable "books and records" to formal corporate documents (charter, bylaws, financial statements, stockholders' agreements, etc.) and formal board and committee materials (minutes, books, director questionnaires) during the preceding three years. It permits the Chancery Court to order production of a "functional equivalent" if formal materials are unavailable. The New Legislation also imposes a "reasonable particularity" standard for proper purpose to access books and records and requires records sought to be "specifically related" to the stated purpose. It finally provides that all books and records are incorporated into stockholder complaints and can be considered at motions to dismiss.

If you have any questions, please reach out to your regular Simpson Thacher contact.

[5] In effect, the New Legislation reflects a different approach than *In re Sears Hometown & Outlet Stores, Inc. Stockholder Litigation*, No. 2019-0798, 2024 WL 262322 (Del. Ch. Jan. 24, 2024) by providing that controlling shareholders can only be liable for loyalty violations.