Simpson Thacher

Memorandum

Delaware Enacts Sweeping Corporate Law Amendments

March 28, 2025

Delaware Governor Matt Meyer has signed bipartisan legislation (the "New Legislation") amending Sections 144 and 220 of the Delaware General Corporation Law ("DGCL"). The New Legislation statutorily enshrines common-sense protections for directors, provides clearer standards for controlling stockholder transactions and limits vexatious books and records demands. It applies to all corporate acts and transactions after March 25, 2025, and is retroactive except for stockholder lawsuits or books and records processes pending before February 17, 2025.

The New Legislation provides welcome clarity and greater predictability in Delaware law regarding director independence, controlling stockholders, and when *MFW*-like protections[1] are necessary to secure business judgment deference. While some academics and members of the class action bar have predicted dire consequences from the New Legislation, any suggestion that it will end stockholder class action litigation is hyperbole. We believe the New Legislation will give boards and transaction planners greater confidence in navigating Delaware law.

Introduced on February 17, 2025, the New Legislation reached Governor Meyer's desk in less than 40 days. The New Legislation passed Delaware's House on March 25 by a 32-7 vote after clearing the Senate on March 13 with a 20-0 approval. This is the second year in a row that state lawmakers have amended the DGCL in response to concerns about the state's corporate law.[2] Many have commented that the speed of enactment reflects Delaware's growing concern about challenges to its position as the nation's preeminent state of incorporation for public companies. Beyond social media criticism and noted high-profile reincorporations, states like Nevada and Texas have been increasingly courting companies to incorporate in their jurisdictions and are considering legislation of their own as part of such regulatory competition. The Governor acknowledged such concerns in signing the New Legislation: "Delaware is the best place in the world to incorporate your business, and Senate Bill 21 will help keep it that way, ensuring clarity and predictability, balancing the interests of stockholders and corporate boards."

[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." The New Legislation simplifies *MFW*'s requirements, eliminating the "*ab initio*" requirement and setting ground rules for committee composition and process.

[2] For more on the 2024 DGCL amendments, see our memo Delaware Governor Signs Corporate Law Amendments Into Law.

The New Legislation Sets Clearer Standards for Directors and Controllers

HEIGHTENED PRESUMPTION OF DIRECTOR INDEPENDENCE

Delaware law has long reflected a presumption of director independence. The New Legislation crystallizes that presumption as a burden of pleading and proof in litigation.

Under the New Legislation's "heightened" presumption, a director of a NYSE- or NASDAQ-listed corporation shall be presumed to be disinterested, with respect to an act or transaction to which that director is not a party, if the board has determined that the director satisfies the applicable criteria for determining director independence from the corporation or a controlling stockholder under the exchange's rules, which shall only be rebutted by "substantial and particularized facts" that the director has a material interest[3] in the act or transaction or material relationship[4] with a person with a material interest in the act or transaction.

By centering the presumption around exchange definitions, the New Legislation provides more consistent standards for public companies in considering director appointment and committee service.

STATUTORY DEFINITIONS OF CONTROLLING STOCKHOLDER AND GROUPS

The New Legislation defines a "controlling stockholder" as one who, together with its affiliates:

- Owns or controls a majority in voting power of the corporation's outstanding stock, or the right to cause the election of directors with a majority of voting power on the board (a "Majority Stockholder"); OR
- Has the power "functionally equivalent" to a Majority Stockholder by virtue of owning or controlling at least one-third in voting power AND possessing the power to exercise managerial authority over the business and affairs of the corporation.

The New Legislation thus helps to address critiques that the law of controlling stockholders had departed from its traditional focus of majority control, or at least significant voting power combined with influence over management, by the adoption of a brighter-line test.[5]

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[3] The New Legislation defines a "material interest" to mean "an actual or potential benefit, including the avoidance of a detriment, other than one which 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 New Legislation defines a "material relationship" to mean "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."

[5] Lawrence A. Hamermesh, et al., O*ptimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 Bus. Law. 321, 345 (2022); *see also* Elizabeth Pollman & Lori W. Will, *The Lost History of Transaction-Specific Control*, __ J. Corp. L. __ (forthcoming 2025).

The New Legislation Creates Clear Safe Harbors for Conflicted Transactions

The New Legislation amends Section 144[6] of the DGCL to provide safe harbor procedures.

DEALS INVOLVING A CORPORATION AND ITS DIRECTORS OR OFFICERS

The New Legislation provides safe harbors for acts or transactions involving directors or officers, where:

- A majority of the disinterested directors on the board or committee, or in certain circumstances a special committee, authorizes the act or transaction with knowledge or disclosure of all material facts; OR
- A majority of disinterested stockholders approves or ratifies the act or transaction by an informed, uncoerced vote; OR
- The act or transaction is adjudicated as fair as to the corporation and its stockholders.

DEALS INVOLVING CONTROLLING STOCKHOLDERS OTHER THAN GOING PRIVATE TRANSACTIONS

The New Legislation provides safe harbors for acts or transactions involving controlling stockholders, other than going private transactions (discussed below), where:

- A majority of a committee of disinterested directors, with full authority to negotiate and reject the transaction, and with knowledge or disclosure of all material facts, approves the transaction ("Special Committee Approval"); OR
- A majority of disinterested stockholders, who are informed and uncoerced, approve or ratify the transaction, and such approval or ratification is made a condition of the transaction before such vote ("Unaffiliated Stockholder Approval"); OR
- The transaction is adjudicated as fair as to the corporation and its stockholders.

The statutory changes thus dramatically simplify the circumstances in which a dual commitment to both Special Committee Approval *and* Unaffiliated Stockholder Approval are necessary to obtain business judgment review.[7]

GOING PRIVATE TRANSACTIONS

The New Legislation provides safe harbors for controlling stockholder going private transactions, where:

- There is BOTH Special Committee Approval AND Unaffiliated Stockholder Approval; OR

[6] Section 144 was originally adopted for the limited purpose of protecting certain transactions–those in which the directors and officers of a corporation have an interest–from *per se* voidability under the common law. The New Legislation expands the provision to address equitable relief such as fiduciary duty claims and other actions for damages.

[7] The legislation thus overturns the Delaware Supreme Court's decision in *In re Match Group, Inc. Derivative Litigation*, 315 A.3d 446 (Del. 2024), which applied entire fairness to all conflicted controller transactions unless *MFW* was followed.

- The transaction is adjudged as fair as to the corporation and the corporation's stockholders.

A "going private transaction" for a public company is defined as "a Rule 13e-3 transaction (as defined in 17 CFR § 240.13e-3(a)(3)."

The New Legislation Limits Access to Books and Records

The New Legislation expands the rules applicable to books and records access by increasing the burden on stockholders to access formal materials (*e.g.*, stock ledger, financial statements, board minutes and books) through a "reasonable particularity" standard; creates a higher "compelling need" standard for access to any informal materials like emails and text messages; and provides that companies can impose reasonable restrictions on books and records access and that produced books and records will be incorporated by reference into legal complaints.

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