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Delaware Enacts Conflict Transaction Safe Harbors and Curbs Stockholder Inspection Rights

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A number of recent decisions by the Delaware Court of Chancery and the Delaware Supreme Court have resulted in statutory amendments, enacted on March 25, 2025, designed to ameliorate perceived market concerns and abate a potential wave of companies seeking to reincorporate in other states. The amendments to Sections 144 and 220 of the Delaware General Corporation Law (the “DGCL”), among other things, provide safe harbors for conflict transactions, including transactions with controlling stockholders, and impose limitations on stockholder books and records inspections. Highlights include:

- **Director and Officer Conflict Transactions:** Amended Section 144(a) of the DGCL provides a safe harbor for director and officer conflict transactions if: (i) the material facts as to the director’s or officer’s relationship or interest as to the transaction, including any involvement in the initiation, negotiation, or approval of the transaction, are disclosed or known to all members of the board of directors or a committee of the board, and the board or committee in good faith and without gross negligence authorizes the transaction by the affirmative vote of a majority of “disinterested directors” (as defined in the statute and discussed below) then serving on the board or such committee (if a majority of the directors are not disinterested directors, then the transaction must be approved (or recommended for approval) by a committee that consists of two or more directors, each of whom the board has determined to be a disinterested director with respect to the transaction); or (ii) the transaction is approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders.
- **Controlling Stockholder Going Private Transactions:** New Section 144(b) of the DGCL provides a safe harbor for controlling stockholder going private transactions if: (i) the material facts as to such controlling stockholder transaction are disclosed or known to all members of a committee of the board of directors to which the board has expressly delegated the authority to negotiate (or oversee the negotiation of) and to reject such controlling stockholder transaction and such controlling stockholder transaction is approved (or recommended for approval) in good faith and without gross negligence by a majority of the disinterested directors then serving on the committee; and (ii) such controlling stockholder transaction is conditioned, by its terms, as in effect at the time it is submitted to stockholders for their approval or ratification, on the approval of or ratification by disinterested stockholders, and such controlling stockholder transaction is approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders. The amendments eliminate, among other things, timing constraints under existing Delaware case law for when the dual protections must be implemented to afford the protection of the safe harbor, as well as the requirement that the committee must be entirely disinterested and independent.

- **Other Transactions Involving Controlling Stockholders:** For transactions involving controlling stockholders other than going private transactions, new Section 144(c) of the DGCL provides a safe harbor if such transactions are approved by *either* (i) a disinterested director committee *or* (ii) a disinterested stockholder vote, as described more fully above. These amendments supplant existing case law requiring the dual protections of both disinterested committee approval and a disinterested stockholder vote to reclaim the protections of the business judgment rule in *all* transactions in which a controlling stockholder stands on both sides and receives a material, non-ratable benefit.
- **Definition of Controlling Stockholder and Exculpation:** Amended Section 144 of the DGCL defines a controlling stockholder or control group as anyone who (i) owns or controls a majority in voting power of outstanding stock, (ii) has the right to nominate the majority of the board, or (iii) “[h]as the power functionally equivalent to that of a stockholder that owns or controls a majority in voting power of the outstanding stock” by owning at least one third of the voting power or the power to elect a majority of the directors and the ability to “exercise managerial authority over the business and affairs of the corporation.” Additionally, controlling stockholders cannot be held liable for monetary damages for breaches of their duty of care.
- **“Disinterested Director” Presumption:** Amended Section 144 of the DGCL defines a “disinterested director” as one who is (i) not a party to the transaction, and (ii) lacking both a material interest in a transaction or a material relationship with a person who has a material interest in the transaction. A director of a corporation whose stock is traded on a national stock exchange is presumed to be a disinterested director if the board has determined that the director satisfies the relevant stock exchange listing criteria for independence vis-à-vis the company and the controller or control group. This presumption “shall be heightened” and may only be rebutted by “substantial and particularized facts” that the director has a material interest (as defined by the statute) in the challenged act or transaction or has a material relationship with a person with a material interest in such act or transaction.
- **Limitations on Books and Records Inspections:** Amended Section 220 of the DGCL retains the “proper purpose” requirement as a prerequisite for inspection of books and records and defines a narrow list of what constitutes “books and records” available under Section 220, including: board of directors and committee meeting minutes and materials, annual financial statements, certain types of stockholder agreements, and director and officer independence questionnaires. The amended statute further provides that the Court of Chancery *may not* order the production of any documents other than the statutorily enumerated documents, except in two narrow circumstances. First, if the corporation does not have *any* minutes, financial statements, or, in the case of public companies, director and officer questionnaires, the Court of Chancery may order the corporation to produce documents “constituting the functional equivalent of any such books and records” to the “extent necessary and essential to fulfill the stockholder’s proper purpose.” Second, if a stockholder files an action to compel the inspection of books and records, the Court of Chancery may order the production of “other specific records of the corporation” beyond the statutorily enumerated documents “only if and to the extent” the stockholder, among other things, makes a showing of a “compelling need for an inspection of such records to further the stockholder’s proper purpose” and “such stockholder has demonstrated by clear and convincing evidence that such specific records are necessary and essential to further such purpose.”

We believe these changes to the DGCL should mitigate certain litigation risks and transaction costs for Delaware corporations and their stockholders.

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If you have questions concerning the contents of this alert, or would like more information, please speak to your regular contact at Weil, or to the key practice group contacts or authors listed below:

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