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PERSPECTIVES

# RECENT SIGNIFICANT AMENDMENTS TO DELAWARE'S CORPORATE GOVERNANCE LAW

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Many large US corporations, including two-thirds of the Fortune 500, are incorporated in Delaware, making it the preeminent source of corporate governance law in the US. Delaware's legislature has long strived to strike a reasonable balance between deference to boards' business judgments and stockholders' ability to challenge their actions.

On 25 March 2025, Delaware enacted several significant amendments to the Delaware General Corporation Law (DGCL) to address a growing perception that, over the past decade, the Delaware courts' interpretation of the law has swung too far in the direction of stockholder challenges. In turn, that perception has prompted some high-profile US corporations, including Tesla, SpaceX, TripAdvisor and Dropbox, to reincorporate in other states they judged friendlier to directors and large stockholders, such as Texas and Nevada. These moves sparked fear in Delaware of a broader exodus of corporations from the state and a concomitant loss of franchise tax revenue, which funds a third of the Delaware government's budget.

To bring greater certainty to boards, and to ward off the feared 'DExit', Delaware amended the DGCL to establish bright-line rules more favourable to directors and large stockholders in the areas of transactions with controlling stockholders or

conflicted directors or officers (D&Os), standards for director independence, and stockholder access to corporate books and records. In this article, we summarise those amendments and the trends in Delaware case law they have now reversed.

## New standards for controlling stockholder transactions

In a landmark 2014 decision, *Kahn v. M&F Worldwide Corp.*, the Delaware Supreme Court held that a going private transaction with a controlling stockholder would qualify for review under the deferential 'business judgment rule' (with the consequence that a derivative action challenging the transaction could be dismissed at the pleading stage) if it is conditioned, from the outset, on both negotiation by a special committee of independent directors and approval by a majority of the minority stockholders. Initially, *MFW* appeared to be a welcome development for controlling stockholders, since Delaware case law had previously held that going private transactions with a controlling stockholder would always be subject to the stringent 'entire fairness' standard of review (with the consequences that stockholder challenges could almost never be dismissed on the pleadings and costly litigation would almost certainly follow).

Subsequent Delaware decisions, however, held that transactions, in addition to going private transactions, involving controlling stockholders would be subject to 'entire fairness' review if they did not adhere to the *MFW* framework, culminating in a 2024 Delaware Supreme Court decision that extended the *MFW* framework to all controlling stockholder transactions. In the decade between, the Delaware courts held in some cases that stockholders having from 28 percent to as little as 15 percent of the corporation's voting stock qualified as controlling stockholders subject to these rules. And even transactions conditioned on dual procedural protections can spawn litigation over whether special committee members qualified as disinterested. The result has been to block, or impose liability on, directors and large stockholders for an ever-broader range of transactions.

The amendments to section 144 of the DGCL rollback *MFW*'s expansion and partly abrogate *MFW* itself by establishing new 'safe harbours' for transactions with controlling

stockholders. Controlling stockholder transactions (other than going private transactions) cannot be enjoined, and cannot give rise to an award of damages against a director, officer or controlling stockholder for breach of fiduciary duty, if they meet either of two conditions: (i) negotiation and approval by a special committee of directors determined by the board to be disinterested; or (ii) approval or ratification by a majority of the votes cast by disinterested stockholders at a stockholder meeting. For controlling stockholder transactions that constitute going private transactions, both of those conditions must be met for such safe harbour protection. And for all controlling stockholder transactions, the amendments eliminate *MFW*'s requirement that the transaction be conditioned before the start of negotiations on disinterested stockholder approval; it now suffices if by the time of a stockholder vote, the transaction is conditioned on disinterested stockholder approval or ratification.

The amendments also limit the scope of who qualifies as a controlling stockholder by defining "controlling stockholder" to mean a person that either: (i) owns or controls a majority of the voting stock; (ii) has a contractual or other right to cause the election of a majority of the members of the board; or (iii) owns or controls at least one-third of the voting stock and has managerial authority over the corporation. Going forward, this definition should preclude a finding that a stockholder with less than one-third of the voting stock qualifies as a controlling stockholder and limit the range of transactions subject to entire fairness review in the first place.

> **"The recent amendments to the DGCL have crystallised the standards for the important governance matters they cover."**

The amendments also align the standards for director independence with exchange listing rules for public companies and accord substantial deference to board determinations that a director is independent. "Disinterested director" is now statutorily defined to mean a director who is not a party to the transaction, does not have a material interest in the transaction, and does not have a material relationship with a person that has a material interest in the transaction. But in the case of corporations listed on a national stock exchange,

the amendments supplement this definition with a presumption that a director is such a "disinterested director", if the director is not a party to the transaction and the board has determined that the director qualifies as an independent director under the exchange's rules. The amendments describe this as a "heightened" presumption that can only be rebutted by "substantial and particularised facts" that the director has a material interest in the transaction or has a material relationship with a person with a material interest in the transaction. These amendments will limit litigation over whether special committee members were disinterested (and hence whether the new safe harbours are met).

Finally, the amendments provide additional clarity and comfort to controlling stockholders by effectively exculpating them from fiduciary liability based only on a breach of the duty of care.

## New standards for transactions with D&Os

Amended section 144 also provides a safe harbour for certain transactions with conflicted D&Os. Except for controlling stockholder transactions, a transaction between a corporation and one or more of its D&Os (or an entity in which they have an interest) cannot be enjoined and cannot rise to an award of damages against the D&Os, if either: (i) in cases where a majority of the directors are "disinterested" in the transaction (under the new definition discussed above), the board or a committee authorises the transaction by the affirmative votes of a majority of the disinterested directors (even if the disinterested directors are less than a quorum); (ii) in cases where a majority of directors are not disinterested, the transaction is approved by a special committee of directors that the board has determined to be disinterested; or (iii) the transaction is approved or ratified by a majority of votes cast by disinterested stockholders at a stockholder meeting.

## Sharp limits on stockholders' right to inspect corporate books and records

Section 220 of the DGCL had long provided a corporation's stockholders with the right, upon written demand, to inspect its stock ledger, list of stockholders and "other books and records", so long as they state a proper purpose for the demand (such as investigating credible claims of misconduct by D&Os). While the statute did not define the phrase "books and records", traditionally it had been interpreted narrowly to mean the corporation's organic documents, financial statements, and board minutes and presentations.

Over the last 20 years, however, the Delaware courts dramatically expanded the scope of "books and records" deemed to be within the section 220 inspection right. They interpreted "books and records" to encompass informal communications

of D&Os, including in some cases even emails from D&Os' personal email accounts and text messages. The result has been that responding to section 220 demands from would-be derivative plaintiffs has become in some cases nearly as burdensome and costly for Delaware corporations as electronic document discovery in litigation.

The recent amendments largely return the scope of stockholders' inspection right to its traditional limits. As amended, section 220 now expressly defines "book and records" to mean the corporation's articles of incorporation and bylaws, minutes of stockholder meetings, written communications to stockholders generally, board minutes and materials provided to the board, annual financial statements, stockholder rights agreements, and D&O independence questionnaires. In addition, amended section 220 prohibits Delaware courts from ordering a corporation to produce any other types of records in response to a section 220 demand, unless the stockholder has shown a "compelling need" for "other specific records" and has demonstrated by "clear and convincing evidence" that those specific records are "necessary and essential" to further the stockholder's purpose.

Some have questioned whether the fear of a 'DExit' was overblown and whether such a course correction for the Delaware courts was needed or desirable. But the recent amendments to the DGCL have crystallised the standards for the important governance matters they cover. And they provide clear guidance and protections for boards when structuring and assessing transactions involving a large stockholder or interested D&Os. CD

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