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Delaware Corporate Law Update

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Overview of the DGCL's Newly-Enacted Safe Harbor Procedures and Books and Records Regime

On March 25, 2025, Delaware's governor, Matt Meyer, signed Senate Substitute 1 to Senate Bill 21, enacting significant changes to the Delaware General Corporation Law (the "DGCL"). The bill, as enacted, reflects the basic principles set forth in the original legislation introduced on February 17, 2025, but includes the recommendations made by the Council of the Corporation Law Section of the Delaware State Bar Association. The newly-enacted legislation, among other things:

- Amends Section 144 of the DGCL to provide a safe harbor for transactions in which a director or officer, or a controlling stockholder or control group, may have a conflict of interest. The changes to Section 144 set forth clear procedures for corporations and transaction planners to follow to obtain the protection of the safe harbor for transactions that might otherwise be subject to judicial review under the entire fairness standard. As the procedural protections are obtained through disinterested director or disinterested stockholder approval, revised Section 144 provides statutory definitions of those and other terms necessary to implement and uniformly apply the statute. Revised Section 144 also defines when a party may be found to be a controlling stockholder or a member of a control group, relying principally upon notions of ownership and control of voting stock.

- Amends Section 220 of the DGCL, which governs stockholders' and directors' statutory rights to inspect books and records, to specify the core corporate documents that are required to be produced in a books and records action. The amendments also permit a corporation to impose reasonable restrictions on the confidentiality, use or distribution of books and records, to require that the stockholder agree that any information included in the corporation's books and records is deemed incorporated by reference in any complaint filed by or at the direction of the stockholder in relation to the subject matter referenced in the demand, and to redact portions of any books and records produced not specifically related to the stockholder's purpose. Stockholders seeking records beyond those listed in the statute—including emails and text messages—must, among other things, show a compelling need and demonstrate by clear and convincing evidence that the additional records are necessary and essential to further the stockholder's proper purpose.

Section 144 of the DGCL: Interested Directors and Officers; Controlling Stockholder Transactions; Quorum

Before the amendments became effective, Section 144 of the DGCL provided that contracts or transactions between a corporation and one or more of its directors or officers (or an entity in which one or more of its directors or officers are directors or officers or have a financial interest) would

not be "void or voidable" solely for that reason if approved by disinterested directors or stockholders, in each case upon disclosure of material facts, or if the contract or transaction was fair as to the corporation. Although the prior version of Section 144 appeared on its face to provide safe harbor protection to insulate transactions from equitable review, its application was far more limited, as it operated principally to ensure the technical validity of specified interested transactions by statutorily overturning the common law principle, not universally followed, that disregarded the presence of "common or interested" directors for quorum purposes.

Revised Section 144 provides meaningful safe harbor protection for acts or transactions in which directors or officers, as well as controlling stockholders and members of a control group, may have an interest, so long as the parties follow the procedures set forth in the statute or the acts or transactions are fair to the corporation and its stockholders.

Transactions Involving Directors and Officers

Revised Section 144(a), which applies to acts or transactions that do not involve interests on the part of a controlling stockholder or control group, provides that an act or transaction involving the corporation in which one or more directors or officers either have a financial interest or are the corporation's counterparty may not be the subject of equitable relief or give rise to an award of damages against a director or officer as a result of the fact that (i) the foregoing circumstances exist, (ii) the director or officer received any benefit from the transaction or (iii) the director or officer is present at or participates in the meeting of the board or committee which authorizes the transaction, or was involved in the initiation, negotiation or approval of the transaction, as long as any of the following conditions are met:

1. The material facts as to the director's or officer's relationship or interest in the act or transaction, including any involvement in the initiation, negotiation or approval of the transaction, are disclosed or known to the board of directors or a board committee, and the board or committee in good faith and without gross negligence authorizes the act or transaction by the affirmative vote of a majority of the disinterested directors. Notably, if a majority of the directors are not disinterested directors, to obtain safe harbor protection, it must be approved by a committee of the board consisting of at least two directors whom the board has determined to be disinterested. Thus, where parties are seeking safe harbor under Section 144(a), and it is necessary to form a committee due to the presence of material interests on the part of a majority of the directors, it will be critical for the board to form a committee consisting of not less than two directors and to make a specific, good faith finding that each of the directors serving on the committee is in fact disinterested. The fact that any individual director is later found not to have been disinterested, however, should not, of itself, defeat the application of the safe harbor, so long as the original determination that all directors serving on the committee were disinterested was in fact made in good faith and the act or transaction is approved by the committee with a vote of a majority of the disinterested directors serving on the committee. As Section 144(a) (and the corresponding provisions of Section 144(b) and Section 144(c)) require the decision to be made "without gross negligence," the directors should be mindful of the scrutiny placed upon their discharge of the duty of care. Thus, directors should continue to observe best practices in governance, including ensuring that they have received and reviewed all information material to any decision they are being asked to make and, where appropriate, sought

guidance and advice from competent outside experts and advisors selected in good faith and with reasonable care.

2. The act or transaction is approved or ratified by the informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders. Notably, under Section 144(a), the act or transaction need not be expressly conditioned upon the requisite stockholder vote; the safe harbor will apply if the vote is validly obtained. The statute does not expressly define what constitutes an "informed" or "uncoerced" vote, relying instead on Delaware's well-developed body of common law on those matters.

3. The transaction is fair as to the corporation and its stockholders.

Transactions Involving Controlling Stockholders

New Section 144(b) provides that, except in the case of a "going private transaction," an act or transaction between the corporation and a controlling stockholder or a control group, or an act or transaction from which a controlling stockholder or a control group receives a financial or other benefit not shared with the corporation's stockholders generally (a "controlling stockholder transaction"), may not be the subject of equitable relief or give rise to an award of damages against a director, officer, controlling stockholder or member of a control group by reason of a breach of fiduciary duty by a director, officer, controlling stockholder or member of a control group if any of the following conditions are met:

1. The material facts as to the controlling stockholder transaction are disclosed or known to a committee of the board of directors expressly delegated the authority to negotiate (or oversee the negotiation of) and to reject the 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 disinterested directors on the committee. As with Section 144(a), the determination regarding the disinterestedness of the committee members must be made in good faith at the outset, and a subsequent determination that one or more of the members was not disinterested will not, of itself, prevent reliance on the safe harbor procedures. Unlike Section 144(a), however, it must be clear that the committee has the power to reject the transaction. The statute does not, however, incorporate from the common law any requirement that the committee be formed, or delegated the authority to negotiate and reject, any controlling stockholder transaction before the commencement of substantive economic negotiations. While that requirement was crafted with a salutary purpose in mind, it proved in practice to introduce an unacceptable level of "foot-fault" risk and perversely provided a disincentive to the deployment of sound procedural protective devices.

2. The controlling stockholder transaction is conditioned, by its terms as in effect at the time it is submitted for a stockholder approval or ratification, on the approval of or ratification by disinterested stockholders and is approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders. Although the controlling stockholder transaction must be expressly conditioned upon the minority stockholder vote where a party is relying on such vote for safe harbor protection, the condition need only be in place before the act or transaction is submitted to a vote of

stockholders; it need not be in place prior to the time at which substantive negotiations commence.

3. The controlling stockholder transaction is fair as to the corporation and its stockholders.

New Section 144(c) provides that a controlling stockholder transaction that constitutes a "going private transaction"—which is defined as a Rule 13e-3 transaction (for a publicly listed corporation) and as specified transactions (including mergers, consolidations, conversions, recapitalizations, share purchases, charter amendments, tender or exchange offers, etc.) in which all shares of capital stock held by disinterested stockholders are cancelled, converted, purchased, acquired or otherwise cease to be outstanding (for all other corporations)—may not be the subject of equitable relief or give rise to an award of damages against a director, officer, controlling stockholder or member of a control group by reason of a breach of fiduciary duty by a director, officer, controlling stockholder or member of a control group if both disinterested committee approval and disinterested stockholder approval are validly obtained as set forth in Section 144(b), or if the going private transaction is fair as to the corporation and its stockholders.

Notably, for approval of a controlling stockholder transaction or a going private transaction under Section 144(b) or (c), a separate vote (or recommendation) of a committee comprised of at least a majority of disinterested directors is required. As with Section 144(a), the standard for approval of such a transaction by the stockholders is a majority of the votes cast by the disinterested stockholders, but in order to validly obtain disinterested stockholder approval under Section 144(b) or (c), the controlling stockholder transaction or going private transaction must be conditioned on a vote of disinterested stockholders at the time that it is submitted to stockholders for approval.

Exculpation of Controlling Stockholders

New Section 144(d)(5) sets forth an exculpatory provision for controlling stockholders that eliminates liability of a controlling stockholder or member of a control group for monetary damages for breach of fiduciary duty other than for breach of the duty of loyalty, acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, or transactions from which they derive an improper personal benefit. By reciting the core concepts imported from Section 102(b)(7) of the DGCL, which allows for the exculpation of directors and officers, Section 144(d)(5) confirms that controlling stockholders cannot be liable for monetary damages to the corporation or its stockholders for a breach of the duty of care. The recitation of the corresponding provisions of Section 102(b)(7), however, should not be viewed as creating or imposing on controlling stockholders or members of a control group any additional duties that were not already imposed upon them at common law.

Definitions

One of the principal goals of the new legislation was to provide clarity and predictability in the law, including by codifying concepts that are core to any review of fiduciary conduct.

Disinterested Director

New Section 144(e)(4) defines "disinterested director" as a director who is not a party to the act or transaction and does not have a material interest in the act or transaction or a material relationship

with a person that has a material interest in the act or transaction. In addition to supplying a definition of "disinterested director," new Section 144(d)(2) provides that any director of a publicly listed corporation shall be presumed to be a disinterested director with respect to an act or transaction that such director is not a party to if the board of directors shall have determined that such director satisfies the relevant criteria for determining director independence under any rules promulgated by an applicable exchange or, with respect to controlling stockholder transactions, satisfies such exchange independence rules when substituting the company for the controlling stockholder for purposes of that inquiry. The statute provides that the presumption arising out of satisfaction of independence standards under the listing rules is heightened and may only be rebutted by substantial and particularized facts that a director who meets the criteria for independence under the applicable listing rules has a material interest in the transaction or has a material relationship with a person with a material interest in the transaction. New Section 144(d)(3) also codifies the common law rule that the mere designation, nomination or vote in the election of the director to the board of directors by any person that has a material interest in an act or transaction shall not, of itself, be evidence that a director is not a disinterested director with respect to an act or transaction to which such director is not a party.

Disinterested Stockholder

New Section 144(e)(5) defines "disinterested stockholder" as any stockholder that does not have a material interest in the act or transaction at issue or a material relationship with any person that has a material interest in the act or transaction.

Material Interest

New Section 144(e)(8) defines "material interest" as 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.

Material Relationship

New Section 144(e)(9) defines "material relationship" as 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.

Controlling Stockholder

New Section 144(e)(2) defines "controlling stockholder" as any person that, together with such person's affiliates and associates, either (i) owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors who have a majority in voting power of all director votes, (ii) has contractual or other rights to elect nominees to the board having a majority in voting power of all director votes, or (iii) has the power functionally equivalent to that of a majority stockholder by virtue of ownership or control of at least

one-third in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors with a majority in voting power of all director votes and the power to exercise managerial authority over the business and affairs of the corporation. Notably, by limiting the third category to instances in which a large stockholder has the power to "exercise managerial authority over the business and affairs of the corporation," this definition functionally excludes large stockholders who may be able to control the outcome of a specific transaction (so-called "transaction-specific" control) but do not possess control over the entity generally.

Control Group

New Section 144(e)(1) defines a "control group" as two or more persons that are not individually controlling stockholders, but that, by virtue of an agreement, arrangement or understanding between them, collectively constitute a controlling stockholder. In general, the provisions described above applicable to a "controlling stockholder" are also applicable to a "control group." New Section 144(d)(4) provides that no person will be a controlling stockholder or part of a control group unless the criteria set forth in the foregoing definitions are met.

Miscellaneous

New Section 144(d)(6) clarifies that revised Section 144 is not intended to limit the right of any person to seek equitable relief on the grounds that an act or a transaction, including a controlling stockholder transaction, was not validly authorized or approved in compliance with Delaware law. Thus, the safe harbor procedures do not displace any existing authorization requirements under the corporation's certificate of incorporation or bylaws or the default provisions of the DGCL. Section 144(d)(6) also clarifies that revised Section 144 is not intended to limit judicial review for purposes of injunctive relief of provisions or devices designed to deter, delay or preclude a change of control or other transaction (such as stockholder rights plans) or a change in the composition of the board of directors. It further provides that Section 144 does not limit persons' rights to seek relief on grounds that a person aided or abetted a breach of fiduciary duty by a director.

New Section 144 is designed solely to provide safe harbor for acts or transactions that follow its procedures. It is not intended to displace any protections available at common law. Thus, the failure to comply expressly with one or more of the procedures will not result in the application of heightened review if the act or transaction that is the subject of a challenge, at common law, would have otherwise been entitled to the presumption of the business judgment rule.

Section 220 of the DGCL: Inspection of Books and Records

Before the amendments were signed into law, Section 220 provided that stockholders and beneficial owners could inspect a corporation's stock ledger, a list of its stockholders and its other "books and records" upon written demand under oath stating the purpose of the demand. That version of Section 220 did not specifically define the term "books and records," and as a result, the scope of the books and records that may be obtained by a stockholder under Section 220 has largely been developed by common law. In recent years, books and records demanded under Section 220 have often included informal documents and other materials, such as emails, text messages and other forms of electronic communication and documentation, that would traditionally have been produced only in the context of discovery during adversarial litigation. As a result, books and records

demands under Section 220 have become increasingly costly, time-consuming and burdensome on Delaware corporations.

The amendments to Section 220 seek to relieve some of this burden by statutorily defining the scope of "books and records" available for inspection to documents and materials that are most relevant to the business and governance of Delaware corporations. The list of books and records is largely consistent with the list set forth in the corresponding provisions of the Model Business Corporation Act. Specifically, new Section 220(a)(1) defines "books and records" to mean all of the following:

1. the corporation's certificate of incorporation (including a copy of any agreement or other instrument incorporated by reference therein);

2. the corporation's bylaws (including a copy of any agreement or other instrument incorporated by reference therein);

3. the minutes of all meetings of stockholders and any actions taken by consent of stockholders without a meeting, in each case in the past three years;

4. all communications by the corporation in writing or by electronic transmission to stockholders generally within the past three years;

5. the minutes of any meeting of the board of directors or any committee thereof and any actions taken by consent of the board or a committee thereof without a meeting;

6. the annual financial statements of the corporation for the past three years;

7. any agreement entered into under Section 122(18) of the DGCL; and

8. any director and officer independence questionnaires.

New Section 220(b)(2) sets forth procedural requirements relating to a stockholder's demand to inspect books and records. In order for a stockholder or beneficial owner to inspect a corporation's books and records, (i) the stockholder's demand must be made in good faith and for a proper purpose, (ii) the stockholder's demand must describe with reasonable particularity the stockholder's purpose and the books and records the stockholder seeks to inspect, and (iii) the books and records that are sought must be specifically related to the stockholder's purpose. New Section 220(b)(3) expressly permits a corporation to impose reasonable restrictions on the confidentiality, use or distribution of books and records produced in response to a demand under Section 220 and to require, as a condition to producing any such books and records, that the stockholder agree that any such books and records be deemed incorporated by reference in any complaint filed by or at the direction of the stockholder in relation to the subject matter of the demand.

New Section 220(b)(4) clarifies that nothing in Section 220 affects the right of a stockholder to seek discovery of books and records of the corporation if the stockholder is in litigation with the corporation or the power of a court to compel the production of corporate records for inspection by a stockholder who has otherwise met the requirements of Section 220 and to impose reasonable restrictions on the production of such books and records. Consistent with the corresponding

provision of the Model Business Corporation Act, this provision merely preserves whatever independent rights of inspection exist under the sources referenced in the statute and does not create any additional rights, either expressly or by implication.

Revised Section 220(d) clarifies that a director's inspection rights are not limited to the "books and records" of the corporation as defined in Section 220(a)(1), but also include inspection of other records of the corporation for a purpose reasonably related to the director's position as a director.

New Section 220(e) makes clear that the Delaware Court of Chancery cannot order inspection of records beyond those listed above unless either of two statutory exceptions applies.

The first exception, set forth in new Section 220(f), permits the Court of Chancery to order a corporation that does not have records of stockholder or board meetings or actions by consent or financial statements (or, in the case of a publicly listed corporation, that does not have director independence questionnaires) to produce additional records of the corporation constituting the functional equivalent of any such books and records in response to an otherwise proper demand for inspection to the extent doing so would be necessary and essential to fulfill the stockholder's proper purpose.

The second exception, set forth in new Section 220(g), permits the Court of Chancery to compel inspection of additional materials only if: (i) the petitioning stockholder has satisfied all requirements of Section 220(b) (which includes the proper purpose requirement, "reasonable particularity" requirement, and "form and manner" requirements for inspection demands), (ii) such stockholder shows a compelling need for inspection to further the stockholder's proper purpose, and (iii) such stockholder has demonstrated by clear and convincing evidence that the records the stockholder seeks are necessary and essential to further such proper purpose.

New Section 220(h) permits the Court of Chancery to impose restrictions and conditions on court-ordered productions of the same type permitted by Section 220(b)(3)—that is, restrictions on confidentiality, use, and distribution, as well as a requirement that the recipient agree that all records disclosed are deemed part of any complaint filed in a follow-on plenary action related to the demand.

Effective Time

The new legislation took effect upon its signing on March 25, 2025. It applies both prospectively (to acts and transactions occurring on and after that date) and retroactively (to acts and transactions occurring before it), subject to an exception: the new regime does not apply to any court proceeding that is pending, nor to any books and records demand made, on or before February 17, 2025.

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Taken together, the amendments to Sections 144 and 220 are intended to responsibly reduce the costs and burdens associated with excessive stockholder litigation, particularly in lawsuits involving controlling stockholders and actions to inspect corporate books and records, both of which have proliferated in recent years. In so doing, it continues Delaware's commitment to updating its corporate law in a manner that is both balanced and responsive to the needs of Delaware corporations and their investors and managers.