"2025 DGCL Amendments: Implications & Unanswered Questions"

Tuesday, April 29, 2025

Course Materials

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2 to 3 p.m. Eastern [archive and transcript to follow]

The debate over the 2025 amendments to the Delaware General Corporation Law ("DGCL") was the most heated in memory, and culminated in the adoption of broad safe harbors for transactions with controlling stockholders and other insiders, as well as language narrowing the information available pursuant to a stockholder books and records demand. While the amendments are now law, it's unlikely that the fight over them and what they mean for Delaware corporations is going to end anytime soon.

Join our panelists as they discuss the changes made by the 2025 DGCL amendments and how they may influence corporate governance and dealmaking practices, as well as some of the unanswered questions that practitioners and the Chancery Court will need to sort through.

- **Johnathon Schronce,** Partner, Hunton Andrews Kurth LLP
- **Julia Lapitskaya,** Partner, Gibson Dunn & Crutcher LLP
- **Eric Klinger-Wilensky,** Partner, Morris Nichols Arsht & Tunnell LLP

Topics:

1. Overview of the 2025 DGCL Amendments
2. Implications of the Amendments for Transactions with Directors and Officers
3. Implications of the Amendments for Controlling Stockholder Transactions
4. Impact on Books and Records Demand Process
5. Unanswered Questions

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Course Outline

1. **Overview of the 2025 DGCL Amendments & Implications of the Amendments for Transactions with Directors and Officers**

    a. Safe Harbor for Transactions Involving Directors and Officers

        i. Amended Section 144(a)

        ii. Generally follows case law except the case law's *ab initio* requirement

        iii. Requires any of the following:

            1. Transaction or act to be authorized in good faith and without gross negligence by:

                a. The affirmative votes of a majority of the disinterested directors then serving on the board or a committee, even though the disinterested directors constitute less than a quorum, except:

                    i. Where less than a majority of directors on the board are disinterested directors, the transaction or act must be approved by a committee consisting of at least two disinterested directors, and

                b. After the material facts were disclosed or known to all members of the board or a committee;

            2. The transaction or act is approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders; or

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

2. Overview of the 2025 DGCL Amendments & Implications of the Amendments for Controlling Stockholder Transactions

a. Safe Harbor for Transactions Involving Controlling Stockholders (Except Going Privates)

i. Amended Section 144(b)

ii. Departs from case law (*e.g.*, *In re Match Group, Inc. Derivative Litigation*, 315 A.3d 446 (Del. 2024) and *Kahn v. M&F Worldwide Corp.,* 88 A.3d 635, 645 (Del. 2014)) in that it only requires approval either by a special committee or vote of disinterested stockholders (not both)

iii. A Gibson Dunn alert details the following changes reflected in the DGCL amendments**:**

Common Law	**Amendments to Section 144**
Entire fairness applies to controller acts or transactions approved by either a special committee of independent and disinterested directors or disinterested stockholders, unless the below elements are satisfied.	A safe harbor insulates controller acts or transactions (other than going private transactions) approved by either a special committee of independent and disinterested directors or disinterested stockholders.
An act or transaction must be conditioned on both special committee and disinterested stockholder approval from inception, i.e. before substantive economic negotiations begin.	For disinterested stockholder approval to be effective, the act or transaction must be conditioned on such approval at or prior to the time it is submitted to stockholders.

All members of the special committee are disinterested and independent.	A special committee must have 2+ members, the board must determine all members are disinterested with respect to the controller, and the act or transaction must be approved by a majority of disinterested members.
The special committee is empowered to select and retain its own advisors.	The special committee need not be empowered to select and retain its own advisors.
The special committee is empowered to reject the proposed act or transaction.	The special committee is empowered to reject the proposed act or transaction (*no change*).
The special committee satisfies its duty of care in negotiating the act or transaction.	The special committee approves the act or transaction in good faith and without gross negligence.
The act or transaction must be approved by a majority of outstanding voting power of disinterested stockholders.	The act or transaction must be approved by a majority of votes cast by disinterested stockholders.
Disinterested stockholder approval must be uncoerced and fully informed.	Disinterested stockholder approval must be uncoerced and fully informed (*no change*).

b. Safe Harbor for Going Private Transactions

   i. A "going private transaction" is: (1) for public companies, a Rule 13e-3 transaction, or (2) otherwise, one in which all shares of capital stock held by disinterested stockholders are cancelled or acquired (other than those of the controlling stockholder)

   ii. Amended Section 144(c)

iii. Largely preserves *MFW* requirements for these transactions (approval by both a special committee and disinterested stockholders)

c. Definitions

i. Controlling Stockholder

1. For a stockholder holding less than the majority of the corporation's voting power, to be "controlling," a stockholder must have both:

a. Power functionally equivalent to majority voting power by virtue of at least **one-third** in voting power of the outstanding stock entitled to vote generally in the election of directors or for the election of directors who have a majority in voting power of the votes of all directors on the board of directors, and

b. Power to exercise managerial authority over the business and affairs of the corporation

2. Independent/Disinterested Director

a. For publicly listed companies, a director is presumed to be disinterested with respect to an act or transaction to which he or she is not a party if the board determined that such director satisfies applicable stock exchange criteria for independence from the company and, if applicable with respect to the act or transaction, the controlling stockholder

b. Unless the plaintiff shows "substantial and particularized facts" of a "material interest" or a "material relationship"

c. Nomination or election of a director to the board does not, by itself, evidence that such director is not a disinterested director

3. Overview of the 2025 DGCL Amendments & Impact on Books and Records Demand Process

a. Amended Section 220 by adding new Section 220(a)(1) and 220(b) to:

i. Limit books and records demands as follows:

1. The scope of "books and records" to the certificate, bylaws, minutes and consents, formal communications to stockholders, materials provided to the board and committees, annual financial statements, stockholder agreements and director independence questionnaires (NOTE: exclusion of other communications like emails and text messages)

2. The period of time to three years for minutes and consents of stockholder meetings, formal communications to stockholders and annual financial statements

ii. Codify the court's practice of permitting a company to impose reasonable restrictions on confidentiality, use and distribution of books and records, and deeming produced materials to be incorporated by reference into any complaint

iii. Prohibit the court from compelling production of other materials, except when:

1. Company does not have minutes and consents of stockholder, board or committee meetings or annual financial statements (and director questionnaires for public companies), in which case, the court may order production of records that are the "functional equivalent" only "to the extent necessary and essential" to fulfill a proper purpose

2. A stockholder shows a compelling need for such records to further a proper purpose and demonstrates by clear and convincing evidence that such specific records are necessary and essential to further such purpose

4. Discussion of Unanswered Questions

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GIBSON DUNN

Securities Litigation Update March 27, 2025

Delaware Legislature Codifies Safe Harbors for Controller Transactions and Moderates Inspection Demands

Note: This updates and supersedes a prior alert (available here).

On March 25, 2025, amendments were adopted by the Delaware legislature and signed into law that both lower Delaware courts' scrutiny of controlling stockholder transactions and moderate the scope of investors' access to company books and records. Senate Bill 21 (SB21) amends Sections 144 and 220 of the Delaware General Corporation Law (DGCL). The amendments apply to all acts or transactions, except for litigations pending or inspection demands made on or before February 17, 2025.

These amendments follow mounting concerns in Delaware about "DExit"—the actual and potential departures of Delaware-incorporated corporations from the State for jurisdictions perceived to be more friendly to certain types of corporations.[1] By enhancing clarity and facilitating proactive evaluation of director appointments, conflicts cleansing, and transactional planning, SB21 continues Delaware's long history of modernizing its corporate law in response to market developments.

Amendments to Section 144

Amendments to Section 144 of the DGCL significantly change how controlling stockholder transactions are reviewed by the court.[2] The amendments also strengthen the presumption that a public company director is disinterested and independent.

- **Controller Transactions Other than Going Private Transactions**. SB21 legislatively reverses the Delaware Supreme Court's recent decision in *In re Match Group, Inc. Derivative Litigation*, 315 A.3d 446 (Del. 2024). As Gibson Dunn discussed in its April 8, 2024 Alert, *Match* reaffirmed that entire fairness is the default standard of review for corporate acts or transactions involving a controlling stockholder unless procedures are in place satisfying the requirements of *Kahn v. M&F Worldwide Corp.*,88 A.3d 635, 645 (Del. 2014) ("*MFW*"), and related case law; *Match* also held that all members of a special committee must be disinterested and independent to shift the burden or standard of review at the pleading stage. SB21 also lowers the requirements of *MFW*.

  SB21 makes the following changes to the common law, as articulated in *Match*, *MFW*, and related cases:

Common Law	**Amendments to Section 144**
Entire fairness applies to controller acts or transactions approved by either a special committee of independent and disinterested directors or disinterested stockholders, unless the below elements are satisfied.	A safe harbor insulates controller acts or transactions (other than going private transactions) approved by either a special committee of independent and disinterested directors or disinterested stockholders.
An act or transaction must be conditioned on both special committee and disinterested stockholder approval from inception, i.e. before substantive economic negotiations begin.	For disinterested stockholder approval to be effective, the act or transaction must be conditioned on such approval at or prior to the time it is submitted to stockholders.
All members of the special committee are disinterested and independent.	A special committee must have 2+ members, the board must determine all members are disinterested with respect to the controller, and the act or transaction must be approved by a majority of disinterested members.
The special committee is empowered to select and retain its own advisors.	The special committee need not be empowered to select and retain its own advisors.
The special committee is empowered to reject the proposed act or transaction.	The special committee is empowered to reject the proposed act or transaction (*no change*).
The special committee satisfies its duty of care in negotiating the act or transaction.	The special committee approves the act or transaction in good faith and without gross negligence.
The act or transaction must be approved by a majority of outstanding voting power of disinterested stockholders.	The act or transaction must be approved by a majority of votes cast by disinterested stockholders.
Disinterested stockholder approval must be uncoerced and fully informed.	Disinterested stockholder approval must be uncoerced and fully informed (*no change*).

- **Going Private Transactions**. Under the amendments, for a safe harbor to apply to going private transactions at the pleading stage, such transactions require informed, uncoerced approval by both a special committee and disinterested stockholders, subject to the other changes to *MFW* discussed above.
    - For public companies, SB21 defines "going private transaction" as a Rule 13e-3 transaction (as defined in 17 CFR § 240.13e-3(a)(3)).
    - Otherwise, a "going private transaction" is one in which all shares of capital stock held by disinterested stockholders are cancelled or acquired (other than those of the controlling stockholder).
- **Definition of Controlling Stockholder**. The amendments define who is a controlling stockholder to address uncertainty in Delaware law regarding who may be a "controlling stockholder."
    - A stockholder with majority voting power is controlling.
    - Otherwise, a stockholder with less than majority voting power is controlling only if it has both (i) power functionally equivalent to majority voting power by virtue of *one-third* in voting power of the outstanding stock of the corporation entitled to vote (A) generally in the election of directors or (B) for the election of directors who have a majority in voting power of the votes of all directors on the board of directors, and (ii) power to exercise managerial authority over the business and affairs of the corporation.
- **Exculpation for Controlling Stockholders**. The amendments exculpate controlling stockholders and members of a control group from liability for duty of care violations. The exculpation automatically applies without any option to opt out.
- **Disinterestedness and Independence of Public Company Directors**. The amendments define what it means to be "disinterested" for purposes of "disinterested" director or stockholder status. Among other things, for publicly listed companies, a director is presumed to be a disinterested director with respect to an act or transaction to which he or she is not a party if the board determined that such director satisfies applicable stock exchange criteria for independence from the company and, if applicable with respect to the act or transaction, the controlling stockholder. This presumption will be more difficult to rebut at the pleading stage, because rebuttal requires "substantial and particularized facts" of a "material interest" or a "material relationship," as defined in the amendments.
- ***Nomination or Election by Interested Person***. Under the amendments, an interested person's nomination or election of a director to the board does not, by itself, evidence that such director, if not a party to an act or transaction, is not a disinterested director. This means that directors designated to a board by a stockholder, for instance, are not automatically disqualified from being considered independent for Delaware law purposes.

Amendments to Section 220

Following judicial expansion of stockholder inspection rights in recent years, corporations have increasingly been subjected to invasive demands for an ever-widening range of corporate

records, including director, officer, or management communications that in some cases courts have permitted for inspection. SB21 amendments to Section 220 of the DGCL narrow the scope of books and records available to stockholders and increase the burden on stockholders for obtaining such records.

- **Scope of Books and Records**. The amendments limit the definition of "books and records" to the certificate, bylaws, minutes and signed consents of stockholder meetings, formal communications to stockholders as a whole, minutes and resolutions of the board and committees, materials provided to the board and committees, annual financial statements, Section 122(18) (i.e., *Moelis*) agreements, and director independence questionnaires. Director, officer, and manager communications like emails and text messages are notably absent from this definition.
- **Relevant Period**. The amendments limit the period of time from which stockholders may obtain minutes and signed consents of stockholder meetings, formal communications to stockholders as a whole, and annual financial statements to those within three years of the date of the demand.
- **Demand Requirement**. Under the amendments, to obtain inspection, a stockholder demand is required to describe its purpose and the records it seeks with "reasonable particularity." At least for the purpose of investigating suspected mismanagement or wrongdoing, this appears to heighten, if not outright replace, the low "credible basis" standard.
- **Protections**. The amendments codify the court's practice of permitting a company to impose reasonable restrictions on confidentiality, use, and distribution of books and records, and deeming produced materials to be incorporated by reference into any complaint. The latter is important because otherwise stockholders can mislead the court by cherry-picking facts from documents in a complaint without permitting the court to consider the whole document. A company also is permitted to redact portions of documents that are not specifically related to the stockholder's purpose.
- **Court's Discretion to Expand "Books and Records."** The amendments prohibit the court from compelling production of materials outside the defined term—e.g., director, officer, or management communications—with a few narrow exceptions. If a company does not have minutes and consents of stockholder meetings, minutes and resolutions of the board and committees, or annual financial statements (and, for public companies, director questionnaires), then the court is permitted to order production of additional records that are the "functional equivalent" of these materials and "only to the extent necessary and essential" to fulfill a proper purpose. Otherwise, the court may only compel the production of other specific records if a stockholder shows a compelling need of such records to further a proper purpose and demonstrates by clear and convincing evidence that such specific records are necessary and essential to further such purpose.

Stay Tuned

Gibson Dunn will continue monitoring these developments as they are interpreted and applied in litigation.

[1] For example, following Tesla's reincorporation in Texas, TradeDesk reincorporated in Nevada, Dropbox filed notice that it is in the process of reincorporating in Nevada, and other controller-led companies announced they are considering reincorporation.

[2] The amendments also provide a safe harbor for an act or transaction for which a majority of directors are conflicted—for example, decisions regarding director compensation—if such act or transaction is approved by a special committee of at least two disinterested, independent directors or approved or ratified by disinterested stockholders, in each case on a fully informed basis.

The following Gibson Dunn lawyers prepared this update: Ari Lanin, Monica K. Loseman, Brian M. Lutz, Mary Beth Maloney, Julia Lapitskaya, Colin B. Davis, Jonathan D. Fortney, and Mark H. Mixon, Jr.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following Securities Litigation, Mergers and Acquisitions, Private Equity, or Securities Regulation and Corporate Governance practice group leaders and members:

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