AMERICANBARASSOCIATION

A Sea Change for Transactions Involving Controlling Stockholders:

New Delaware Law Section 144

Friday, September 19, 2025 | 8:00 am Eastern Daylight Time

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Speakers

- **Stephanie Norman**, norman@rlf.com
  Director - Richards, Layton & Finger, P.A.
- **Kyle Pinder**, kpinder@morrisnichols.com
  Partner - Morris Nichols Arsht & Tunnell LLP
- **Chris McKinnon**, cmckinnon@mofo.com
  Partner - Morrison & Foerster LLP
- **Deborah Walker Kool**, dwalkerkool@fredlaw.com
  Of Counsel - Fredrikson & Byron, P.A.
  Moderator

Materials will be available online through the ABA website.

Learning Objectives

In March 2025, Delaware enacted changes to Section 144 of the DGCL through "S.B. 21" in relation to decisions of independent directors and disinterested stockholders regarding transactions with directors, officers, and controlling stockholders, as well as to Section 220 in relation to stockholder books and records rights and demands.

- Context and background to the Section 144 amendments, including the *MFW* Doctrine and recent case law
- Understand the Section 144 amendments, including what they do and do not address
- Practice points – Practical application of the amendments to Section 144, including upon:
  - Interested party transactions
  - Growing companies
  - Challenges of advising boards, sponsors, and controlling stockholders

Cleansing Under 'MFW'

- Kahn v. M&F Worldwide Corp.

- Recent Case Law as Background to "S.B. 21"

Stephanie Norman

Cleansing Under 'MFW' – Requirements

The *MFW* Requirements. The Delaware Supreme Court held in *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (2014) ("*MFW*") that the business judgment rule applies to a transaction that would otherwise be subject to the entire fairness standard of review due to the presence of a conflicted controlling stockholder so long as the parties:

- (1) condition the transaction **at the outset** on
- (2) approval by a fully empowered **committee of disinterested and independent directors** who comply with their duty of care and
- (3) approval by a majority of **disinterested stockholders** voting on a fully informed and uncoerced basis.

Cleansing Under 'MFW' – Success Rates

Success Rates of *MFW* Defenses. There have been at least 26 Delaware cases in which defendants argued that the business judgment rule, and not entire fairness, applied by operation of *MFW*.

- During the first five years after the Delaware Supreme Court issued the *MFW* opinion (early 2014 to mid-2019), *MFW* defenses succeeded in 6 of 11 cases for a **success rate of 54.5%**.
- During the next five years (mid-2019 to the present), *MFW* defenses succeeded in only 4 of 15 cases for a **success rate of 26.7%**.
- Overall, during *MFW*'s ten-year history, *MFW* defenses succeeded in 10 of 26 cases for an aggregate **success rate of 38.5%**.
- In the first 9.5 years after *MFW*, the Delaware Supreme Court reversed a lower court dismissal under *MFW* only once, but it has done so 3 times recently.
- Causes of *MFW* defenses' failure, listed in decreasing order of frequency, were the ab initio requirement (8 cases), the majority-of-the-minority requirement (7 cases), and the committee requirement (4 cases).

Cleansing Under 'MFW' – *"MFW Creep"*

***"MFW* Creep."** While *MFW* itself applied in the context of a controlling stockholder squeeze-out transaction, the Court of Chancery has subsequently required its application to restore the business judgment standard in a number of additional contexts, including:

- "Side deal" with buyer in a merger transaction
  In re Martha Stewart Living Omnimedia, Inc. S'holder Litig., 2017 WL 3568089 (Del. Ch. Aug. 18, 2017)
- Stock reclassification transaction
  IRA Tr. FBO Bobbie Ahmed v. Crane, 2017 WL 7053964 (Del. Ch. Dec. 11, 2017)
- Equity compensation award to controlling stockholder
  Tornetta v. Musk, 250 A.3d 793 (Del. Ch. 2019) (dictum)

Cleansing Under 'MFW' – MFW *Creep Affirmed?*

MFW* Creep *Affirmed? The Delaware Supreme Court recently confirmed that *MFW* applies to cases beyond controlling stockholder squeeze-out transactions.

- *In re Match Group, Inc. Deriv. Litig.*, 215 A.3d 446 (Del. 2024): "In a suit claiming that a controlling stockholder stood on both sides of a transaction . . . and received a non-ratable benefit, entire fairness is the presumptive standard of review" unless *MFW* is used.
  - The Supreme Court relied heavily on *Kahn v. Tremont*, in which the Supreme Court explained that even in non-freezeout transactions, the logic underlying application of entire fairness – i.e., that the controller will continue to dominate the company regardless of the outcome, thereby creating a risk of retaliation – applies.
  - However, the court repeatedly cabined this holding to transactions in which the controller stands **on both sides**, not transactions in which the controller stands **on one side** but competes with the minority for consideration.

Cleansing Under 'MFW' – Case Law Updates

Satisfying the *MFW* Requirements: Case Law Updates. Several recent decisions from the Delaware Supreme Court, including *Match*, have arguably made the *MFW* requirements more stringent:

The Special Committee Requirement

- *In re Match Group*: Holding that the special committee must be 100% independent.
  - Reasoning that "the inherently coercive presence of a controlling stockholder" requires the controller to minimize its influence, including by having no loyalists on the committee

Cleansing Under 'MFW' – Case Law Updates

Satisfying the *MFW* Requirements: Case Law Updates.

<u>The Disinterested Stockholder Vote Requirement</u>

- *City of Dearborn Police and Fire Revised Ret. Sys. V. Brookfield Asset Management Inc.*, 314 A.3d 1108 (Del. 2024): Finding the vote not fully informed.
  - Morgan Stanley's **$470 million investment in the controller**, which amounted to 0.01% of its portfolio, **should have been disclosed**.
    - "[T]he materiality determination must include an examination of the alleged omission **from the perspective of the stockholder**, not just a comparative analysis based upon the overall size of the advisor's portfolio of business."
    - The investment was for Morgan Stanley's own benefit, not for the benefit of Morgan Stanley's clients or investors.

Cleansing Under 'MFW' – Case Law Updates

Satisfying the *MFW* Requirements: Case Law Updates.

The Disinterested Stockholder Vote Requirement (cont'd)

- *City of Dearborn Police and Fire* (con't): Finding the vote not fully informed.
  - **Legal counsel's prior and concurrent representations of the controller**, which included advice in connection with a $500 million loan, a $2 billion asset sale, a take-private, and a $260 million equity investment, should have been disclosed.
  - The court also suggested (without holding) that committee members may **have breached their fiduciary duties** by hiring conflicted advisors.

Cleansing Under 'MFW' – Case Law Updates

Satisfying the *MFW* Requirements: Case Law Updates.

The Disinterested Stockholder Vote Requirement (cont'd)

- *City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings, Inc.*, 2024 WL 1896096 (Del. May 1, 2024): Finding the vote not fully informed.
  - **Evercore's concurrent conflicts were not adequately disclosed.** The proxy stated that Evercore "may provide" advisory and other services to the buyer, when it was alleged that in reality Evercore **concurrently represented** the buyer in a different transaction.
  - **JPMorgan's concurrent conflicts were not adequately disclosed.** The proxy disclosed the existence of representations generally, but not the specific representations nor the fees JPM stood to receive, when it was alleged that JPM concurrently represented the buyer on a stock offering and on a **potential sale of a $3 billion asset** and "appeared to be" concurrently representing another party on a **de-SPAC and $240 million investment**.

Cleansing Under 'MFW' – Case Law Updates

Satisfying the *MFW* Requirements: Case Law Updates.

The Disinterested Stockholder Vote Requirement (cont'd)

- *City of Sarasota Firefighters* (cont'd): Finding the vote not fully informed.
  - **JPMorgan's prior representations were not adequately disclosed.**
    - The proxy disclosed that JPM has and, during the prior 2 years, had relationships for which it received $15.2 million and will receive customary compensation, whereas it was alleged that **JPM earned $400 million in fees** from equity consortium members
    - The court reasoned in part that this was material because the actual fees were roughly **25x the disclosed fees and 10x the fees earned** in the transaction itself.

Cleansing Under 'MFW' – Case Law Updates

Satisfying the *MFW* Requirements: Case Law Updates.

The Disinterested Stockholder Vote Requirement (cont'd)

- *Tornetta v. Musk*, 310 A.3d 430 (Del. CH. 2024): Finding the vote not fully informed.
  - **Process flaws were not adequately disclosed.**
    - The court observed that process flaws (ex. Musk's level of control over the transaction's timing; the lack of adversarial negotiations; the failure to perform a benchmarking analysis) were not disclosed.
    - "Generally, when a plaintiff proves process defects as significant as those in this case, the defendants will find it difficult to prove that the stockholder vote was fully informed."
  - **The compensation committee's conflicts were not adequately disclosed.**
    - The proxy stated that all members of the committee were independent and did not disclose contacts or relationships with Musk.

'S.B. 21' & Amended § 144

- *Background and Public Developments*
- *Changes to § 144 – What is addressed? What is not addressed?*
- *Protections, Backstops, and Limitations*
- *Pending Litigation clarifying amended § 144*

Stephanie Norman

'S.B. 21' Amendments – Background

- Generally, amendments to the DGCL are proposed once a year and originate from the Council of the Corporation Law Section of the Delaware State Bar Association (the "Council").
- Recent case law led to some questioning whether Delaware remains the optimal forum for incorporation.
- Controlling stockholder jurisprudence introduced uncertainty regarding who is a controlling stockholder and the scope of controlling stockholder fiduciary duties, and made it more difficult to successfully use procedural protections to mitigate potential for litigation.
- Uncertainty regarding independence determinations.
- Broader books and records production, including of electronic materials, in § 220 actions.
- This, in turn, led to an increase in the number of corporations leaving Delaware (Tesla, TripAdvisor), publicly considering leaving Delaware (Meta, Dropbox, Pershing Square), or discussing with counsel the potential to leave Delaware – a.k.a "DExit."

'S.B. 21' Amendments – Background

- In response, on February 17, 2025, Senate Majority Leader Townsend introduced Senate Bill (S.B.) 21, which was co-sponsored by all members of leadership of both parties in both houses of the Delaware General Assembly.
- In a press release issued upon introduction of the bills, Delaware Governor Matt Meyer requested that Council immediately take up S.B. 21 for review, comment, and recommendation.
- On March 3, 2025, Council distributed to the Corporate Law Section of the Delaware State Bar Associate a revised version of S.B. 21. S.B. 21 was ultimately adopted by the General Assembly and enacted into law in substantially the revised form recommended by Council.
- The statute retroactively applies to all transactions and § 220 demands, but does not apply to or affect any pending litigation or § 220 actions made on or before February 17, 2025 (the date of public announcement of the original bill).

'S.B. 21' Amendments – Summary

- The synopsis states S.B. 21 is "intended to provide a comprehensive liability exculpation scheme with respect to the fiduciary duties owed by stockholders."
- Became effective on March 25, 2025, and has **retroactive effect except** as to claims pending and/or demands made on or prior to February 17, 2025.
- Amends § 144 of the DGCL to create **"safe harbor"** procedures for transactions in which one or more directors or officers or a controlling stockholder or control group have a conflicting interest. Creates **3 categories** of safe harbors.
- Eliminates potential liability for controlling stockholders for breach of **duty of care**.
- Adds greater **definitional clarify around who constitutes** a "controlling stockholder" or member of a "control group" as well as who constitutes a "disinterested director" or "disinterested stockholders."
- Imposes additional procedures and limitations on a stockholder's right to demand an inspection **books and records** of the corporation (§ 220).

'S.B. 21' Amendments – Remaining SH Protections

- The amended statute is **not intended** to eliminate all stockholder litigation, and still leaves room for stockholders to monitor conflicted transactions:
  - Any board or committee approval intended to function as a cleansing mechanism must be provided in good faith and without gross negligence;
  - Any cleansing mechanism must be comprised of disinterested persons;
  - There must be disclosure of relevant material facts; and
  - If a cleansing stockholder vote is utilized, it must be uncoerced.
- If a stockholder can adequately allege that any of these requirements are not satisfied, the statutory **safe harbor will not apply**.
- Accordingly, although the 2025 Amendments change some requirements for utilizing a cleansing mechanism and likely require stronger pleadings to survive a motion to dismiss, they **do not foreclose fiduciary duty-based lawsuits**.

'S.B. 21' Amendments – Common Law Backstops

- **Entire Fairness:** Amended § 144 contemplates that, even if the safe harbor procedural protections are not utilized, the safe harbor would still apply if the transaction satisfies a **fairness test**.
  - Synopsis states this "is intended to be consistent with the entire fairness doctrine developed in the common law."
- **Common Law Protections:** The Synopsis of S.B. 21 makes clear that the amendments "**do not displace** any safe harbor procedures or other protections available at **common law**, including processes and procedures that comply with the pre-amendment common law but do not conform to the Section 144 safe harbors."
  - Thus, if, for example, § 144(c) is unavailable because the board only has one disinterested director, successful compliance with the *MFW* framework should still result in the application of an irrebuttable version of the business judgment rule.

'S.B. 21' Amendments – Express Limitations

- Amended § 144(d)(6)(c) expressly states that the statute **does not "limit or eliminate** the right of any person to seek **relief on the grounds** that a stockholder or other person knowingly aided and abetted a **breach of fiduciary duty** by one or more of the directors of the corporation."
  - However, because the safe harbor contemplates disclosure of material facts to the board, it presumably would not have applied in a "fraud on the board" scenario regardless of this express limitation.
- **Equitable relief remains available** if the transaction was not authorized or approved in compliance with the DGCL, charter, or bylaws, or is in violation of any plan, agreement or order of any governmental authority to which the corporation is a party or subject.
- The statute does not limit judicial review for purposes of **injunctive relief** of protective devices, such as deal protection measures (such as provisions limiting a target board's right to change its recommendation or providing for a termination fee upon accepting a topping bid) and devices intended to preclude a change in control (such as poison pills).

'S.B. 21' Amendments – Clarifying Litigation

- In *Rutledge v. Clearway Energy Group LLC*, the Court of Chancery certified the following questions to the Delaware Supreme Court:
  - Does Section 1 of S.B. 21—Eliminating the Court of Chancery's ability to award "equitable relief" or "damages" where the Safe Harbor Provisions are satisfied—Violate the Delaware Constitution of 1897 by purporting to divest the Court of Chancery of its equitable jurisdiction?
  - Does Section 3 of S.B. 21—Applying the Safe Harbor Provisions to plenary breach of fiduciary claims arising from acts or transactions that occurred before the date that S.B. 21 was enacted—Violate the Delaware Constitution of 1897 by purporting to eliminate causes of action that had already accrued or vested?
- Other litigation has been stayed pending resolution of these Delaware constitutional law questions. (*Plumbers & Fitters Local 295 Pension Fund v. Dropbox, Inc.*)
- Briefing scheduled to be completed by September 19, 2025.

Amended § 144: Definitions and Clarifications

Kyle Pinder

Amended § 144(e) – Enhanced Definitional Clarity

- A "**controlling stockholder**" means a person that, together with its affiliates and associates *(with "affiliates" and "associates" undefined in the statute*), either:
  - Owns or controls a majority in voting power entitled to vote generally in the election of directors (a **"Majority Stockholder**");
  - Has the right, by contract or otherwise, to cause the election of nominees who are selected at the discretion of such person and who constitute either a majority of the members of the board or directors entitled to cast a majority in voting power of the votes of all directors; or
  - Is not a Majority Stockholder, but (i) owns or controls at least one-third in voting power entitled to vote generally in the election of directors and (ii) has the power to exercise managerial authority over the business and affairs of the corporation.
- A "**control group**" consists of two or more persons that are not controllers that by agreement, arrangement or understanding constitute a controlling stockholder.
- Cannot be deemed a controlling stockholder / control group if the above is not satisfied.

Amended § 144(e) – Enhanced Definitional Clarity

- A "**controlling stockholder transaction**" means either:
  - An act or transaction between the corporation (or its subsidiaries) and a controlling stockholder or 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 "**going private transaction**" is
  - for Public Companies: A 13e-3 Transaction.
  - for Private Companies: Any controlling stockholder transaction pursuant to which all or substantially all the shares of the corporation's capital stock held by the disinterested stockholders (but not those of the controlling stockholder or control group) are cancelled, converted, purchased or otherwise acquired or cease to be outstanding.
    - Note: Does not include asset sales followed by liquidating distributions.

Amended § 144(e) – Enhanced Definitional Clarity

- A "**material interest**" is an actual or potential benefit, including the avoidance of a detriment (which detriment would not devolve on the corporation or the stockholders) that:
  - In the case of a director, would reasonably be expected to impair the objectivity of her judgement; and
  - In the case of a stockholder or other person, would be material to such person.
- A "**material relationship**" is a familial, financial, professional, employment, or other relationship that:
  - In the case of a director, would reasonably be expected to impair the objectivity of her judgment; and
  - In the case of a stockholder or other person, would be material.

Amended § 144(e) – Enhanced Definitional Clarity

- A "**disinterested director**" means a director who:
  - Is not a party to the transaction;
  - Does not have a material interest in the transaction; or
  - Does not have a material relationship with someone with a material interest in the transaction.
- A "**disinterested stockholder**" means a stockholder who:
  - Does not have a material interest in the act or transaction;
  - Does not have a material relationship with the controlling stockholder or control group; or
  - Does not have a material relationship with any other person that has a material interest in the act or transaction.

Amended § 144: Procedural Safe Harbors for Interested Transactions

Kyle Pinder

Amended § 144 – 3 Safe Harbors

§ 144 is not new, but historically was viewed as a means of abrogating the common law rule that interested directors could neither vote on, nor be counted for quorum purposes with respect to, interested transactions; such that, among other things, all transactions involving a majority-conflicted board were voidable.

Amended § 144 creates **safe harbor procedures for 3 categories** of interested transactions:

- **§ 144(a):** Transactions involving directors or officers where there is no unique benefit to a controlling stockholder or control group.
- **§ 144(b):** Transactions involving controlling stockholders or control groups outside of the "going private" context.
- **§ 144(c):** "Going private" transactions involving controlling stockholders or control groups.

Amended § 144 does not address exculpation or safe harbors for stockholders who are not controlling stockholders or part of a control group because those stockholders do not owe fiduciary duties.

Amended § 144(a) – Safe Harbor for Director/Officer Transactions

Achieved by Director Approval: Outside of the controller transaction scenario, a conflicted transaction involving a director or officer may obtain safe harbor protection if:

- **Approval by majority of disinterested** – Approved or recommended by a majority of the disinterested directors serving on the board; provided that if a majority of the directors on board are not disinterested directors, then the transaction must be approved by a committee of the board that consists of two or more directors who have been determined to be disinterested directors;
- The directors' approval is made in **good faith and without gross negligence** (compliance with fiduciary duties); and
- **Disclosure of material facts** – The material facts as to the director's or officer's involvement is disclosed to or known to all members of the board or committee approving the transaction.

or Achieved by Stockholder Approval: Any such conflict transaction involving a director or officer may also obtain safe harbor protection if:

- The act or transaction is approved or ratified by **the holders of a majority of the votes cast by disinterested stockholders**; and
- The approval is given on an **informed and uncoerced basis**.

Amended § 144(a) – Safe Harbor for Director/Officer Transactions

Previous Law: Transaction either (i) conditioned before start of substantive economic negotiations on approval of independent committee, **or** (ii) approved by disinterested stockholders.

Key Differences with Previous Law:

- If director-based safe harbor, **need not be conditioned on such approval before start** of substantive economic negotiations; however, minimum two-person committee and board must determine all members of committee are disinterested (even if ultimately one or more are determined not to be).
- If stockholder-based safe harbor, can **either be approval of transaction or ratification after** the fact, and vote requirement is "majority of votes cast."

Amended § 144(a) – Safe Harbor for Director/Officer Transactions

Compliance with Fiduciary Duties for Director-Based Safe Harbor:

Decisionmaker must act in good faith and without gross negligence.

- The reference to "gross negligence" is intended, per the synopsis, only to "mak[e] clear that **the statute does not displace the common law requirements regarding core fiduciary conduct**."
- As noted by the Supreme Court in *Flood v. Synutra*, 195 A.3d 754 (Del. 2018), challenging price and disagreeing on strategy are not sufficient to plead a due care violation.
  - Instead, a "plaintiff can plead a duty of care violation only by showing that the Special Committee acted with gross negligence, not by questioning the sufficiency of the price."
- Moreover, "[f]or purposes of Delaware entity law, a showing of gross negligence requires conduct akin to recklessness." *In re McDonald's Corp. S'holder Deriv. Litig.*, 289 A.3d 343 (Del. Ch. 2023).

Amended § 144(b) – Safe Harbor for Conflicted Controller Transactions (Other than Go Private)

Achieved by Director Approval: Approved by a majority of disinterested directors serving on a committee of two or more directors, each of whom has been determined to be a disinterested director.

or Achieved by Stockholder Approval: Conditioned, before its submission to stockholders, on stockholder approval and approved by a majority of the votes cast by disinterested stockholders.

As with § 144(a), the committee approval must be in good faith and without gross negligence, with disclosure or knowledge of material facts, and the stockholder approval must be fully informed and uncoerced.

Amended § 144(b) – Safe Harbor for Conflicted Controller Transactions (Other than Go Private)

Previous Law: Transaction must be irrevocably conditioned before start of relevant substantive economic negotiations on approval by **both** (i) a committee comprising solely independent directors, **and** (ii) disinterested stockholders.

Key Differences with Previous Law:

- Either (as opposed to both) disinterested director or disinterested stockholder approval required.
- Committee must be minimum two-person committee and board must determine all members of committee are disinterested (even if ultimately one or more are determined not to be).
- No express timing requirement on conditioning transaction on committee approval, and timing requirement for conditioning transaction on stockholder approval or ratification is before submission to stockholders.
- For stockholder safe harbor, denominator is "votes cast" standard instead of "outstanding" standard.

Amended § 144(c) – Safe Harbor for Conflicted Controller Go Private Transactions

Achieved by Director and Stockholder Approval:

Approved by a majority of disinterested directors serving on a committee of two or more directors, each of whom has been determined to be a disinterested director;

and Conditioned, before its submission to stockholders, on stockholder approval and approved by a majority of the votes cast by disinterested stockholders.

As with § 144(a), the committee approval must be in good faith and without gross negligence, with disclosure or knowledge of material facts, and the stockholder approval must be fully informed and uncoerced.

Amended § 144(c) – Safe Harbor for Conflicted Controller Go Private Transactions

Previous Law: Transaction must be irrevocably conditioned before start of substantive economic negotiations on approval by **both** (i) a committee comprising solely independent directors and (ii) disinterested stockholders.

Key Differences with Previous Law:

- Committee must be minimum two-person committee and board must determine all members of committee are disinterested (even if ultimately one or more are determined not to be).
- No express timing requirement on conditioning transaction on committee approval, and timing requirement for conditioning transaction on stockholder approval or ratification is before submission to stockholders.
- For stockholder safe harbor, denominator is "votes cast" standard instead of "outstanding" standard.

Amended § 144(d)(5) – Presumption of Director Independence for Public Companies

Presumption of independence for any public company director that is an independent director under the listing rules.

- The board must determine the director satisfies the relevant rules for independence from the controlling stockholder or control group.
- Statute includes a translator for the relevant stock exchange determination to apply to the controlling stockholder or control group (in addition to the company).

This presumption is "heightened" and may only be **rebutted by substantial and particularized facts** that a director has a material interest in the act or transaction or has a material relationship with a person with a material interest in the act or transaction.

Under § 144(d)(3), for both private and public companies, the **designation, nomination or vote** in the election of a director to the board by any person that has a material interest in an act or transaction **is not, of itself, evidence** that director is not a disinterested director with respect to an act or transaction to which such director is not a party.

Amended § 144(d)(5) – Duty of Care Damages

§ 144(d)(5) **eliminates** potential money damages liability of a controlling stockholder or member of a control group for breach of the **duty of care** in its capacity as such.

- Although the language derives from the director and officer exculpation statute (§ 102(b)(7)), unlike that statute, controlling stockholder or control group exculpation **need not be included in the certificate of incorporation** and there is **no option to opt out**.

Amended § 144(d)(7) – Tender Offers

§ 144(d)(7) clarifies what many deal practitioners understood the law to be—that a tender of shares into a tender offer preceding a medium-form merger under § 251(h) **is treated as a vote in favor of the transaction**.

- However, because the new safe harbors lower the stockholder safe harbor mechanism to a "votes cast" standard (as opposed to "majority of the outstanding"), and all shares not tendered are deemed votes against, it is less likely a § 251(h) deal will be used to qualify for the safe-harbor than a long-form merger.

Practice Points: Key Considerations for Interested Transactions

Chris McKinnon

Practice Points – Key Considerations

- Certain elements of the new legislation are currently being challenged in Delaware courts. The progress of these challenges needs to be monitored closely in the coming months. *See slide 23*.
- Amended § 144 provides meaningful safe harbor protection for conflicted transactions, so long as the parties follow the procedures set **or** the acts or transactions are fair to the corporation and its stockholders.
- The successful use these safe harbor procedures turns on board determinations of disinterestedness and/or informed stockholder votes. Accordingly, **strict compliance with these two procedural requirements is merited**.
- Taken together, the amendments to § 144 and § 220 are intended to responsibly reduce the costs and burdens associated with excessive stockholder litigation, signaling Delaware's commitment to the corporate franchise.

Practice Points: Interested Transactions Outside the Safe Harbors

Chris McKinnon

Practice Points – Failing S.B. 21 Safe Harbors

- Even if the approval procedures of § 144(a), (b) or (c) are not used (or properly employed), the **safe harbor will still apply** (and the transaction will not give rise to liability) **if it is found to be fair** to the corporation and its stockholders.
- This provision relies on the entire fairness doctrine at common law, which consists of a non-bifurcated analysis into fair process and fair price.
- The synopsis to the legislation makes clear that the **amendments do not displace safe harbor procedures at common law**.
- Accordingly, *MFW* framework may still be followed if, for example, there are not two disinterested directors serving on the board.

Practice Points: Advising Growing Companies, Boards, and Sponsors

Chris McKinnon

Practice Points – Advising

Sponsors: *MFW* standards present challenges in terms of compliance in practice, including pre-committing to a disinterested stockholder vote at the outset.

- Difficult to predict disinterested stockholder votes.
- High disclosure burdens to fully inform the vote.

Boards: The S.B. 21 Amendments make it easier to comply with prescribed procedural safeguards.

- Additionally, they provide (i) optionality as to which vote(s) to seek, and (ii) clarity as to disinterested status.

Growing Companies: In the context of venture financings where an investor-director is associated with a venture firm that is investing in a financing round…

- Amendments provide more protection than ensuring the transaction is not voidable.
- If insufficient number of directors, then stockholder vote route made easier to achieve.

Questions?

All online attendees can submit questions using the Q&A function on their screen

Panelists

For More Information

- **Stephanie Norman**, norman@rlf.com
  Director - Richards, Layton & Finger, P.A.
- **Kyle Pinder**, kpinder@morrisnichols.com
  Partner - Morris Nichols Arsht & Tunnell LLP
- **Chris McKinnon**, cmckinnon@mofo.com
  Partner - Morrison & Foerster LLP
- **Deborah Walker Kool**, dwalkerkool@fredlaw.com
  Of Counsel - Fredrikson & Byron, P.A.
  Moderator and Program Chair
- **Daniel M. Cole**, dmcole@ycst.com
  Associate - Young Conaway Stargatt & Taylor, LLP
  Materials Preparer

Materials will be available online through the ABA website.

Summary

- Please see *Practice Points* slides.

AMERICANBARASSOCIATION

A Sea Change for Transactions Involving Controlling Stockholders:
New Delaware Law Section 144

Thank You!