Recent Amendments to the Delaware General Corporation Law Provide New Safe Harbors for Transactions Involving Conflicted Directors or Controlling Stockholders, and Place New Procedural and Content Limitations on Stockholders' Access to Corporate Books and Records

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The General Corporation Law of the State of Delaware (the "**DGCL**") has recently been amended to offer processes by which corporate acts or transactions involving conflicted directors, officers, or controlling stockholders can be shielded from most stockholder claims. In addition, the DGCL provisions regarding stockholder access to corporate information have been amended to limit the categories of books and records that a stockholder can inspect without meeting a new "compelling need" standard. These amendments took effect on March 25, 2025, but do not apply to any proceeding commenced, or any inspection demand made, on or before February 17, 2025.[1]

Safe Harbors for Conflicted Transactions (DGCL § 144)

The new safe-harbor provisions, contained in rewritten DGCL § 144, largely consolidate doctrines that were previously found only in Delaware case law.[2] The new provisions draw primarily upon the Delaware Supreme Court's 2014 decision *Kahn v. M & F Worldwide Corp.*, commonly referred to as "*MFW*."[3] *MFW* adopted a six-part process that, when followed, would insulate a going-private merger with a controlling stockholder from fiduciary-breach claims on any basis other than corporate waste.[4]

MFW held that such a merger would be insulated from challenge if (i) the controlling stockholder conditioned the transaction, *ab initio*, on approval by a special committee of the subsidiary's board and by a majority of the subsidiary's minority stockholders; (ii) the committee was independent; (iii) the committee had the power to select its advisers freely and to definitively reject any proposal by the controlling stockholder; (iv) the committee complied with its duty of care in negotiating a fair price; (v) the stockholder vote was fully informed; and (vi) the minority stockholders were not coerced.[5] The *MFW* doctrine was adapted in subsequent decisions for application to non-transactional corporate acts, such as dissolution,[6] and to transactions involving fiduciary conflicts but no controlling stockholder. In the latter setting, a special committee's approval was not required for attaining *MFW*-level protection.[7]

Amended § 144 reflects, and in some respects simplifies, the *MFW* process. Under amended § 144, as under *MFW*, a going-private transaction involving a controlling stockholder, or a control group of stockholders, will not be subject to a fiduciary-breach claim if the transaction is negotiated and approved by a committee of fully informed disinterested directors, acting "in good faith and without gross negligence," and approved by a majority vote of the informed and uncoerced disinterested stockholders.[8] But amended § 144 differs from *MFW* in some of its specifics. Thus, under amended § 144, the board committee approving the transaction must consist of at least two directors, and the board must have determined them to be disinterested. Also, the transaction need not be conditioned, whether *ab initio* or later, on approval by the committee.[9]

Likewise, while amended § 144 does require that the transaction be conditioned on approval

by the disinterested stockholders, that condition need not be set *ab initio*. Rather, the condition can be agreed upon up to the time when the transaction is presented to the stockholders for their vote. This eliminates the uncertainty under *MFW*, addressed in subsequent cases, regarding how strictly the *ab initio* requirement was to be applied.[10] Further, the cleansing steps under amended § 144, unlike those under *MFW*, will shield a controlling-stockholder transaction from **all** fiduciary-breach challenges, including the claim of waste that *MFW* compliance did not foreclose.[11]

Amended § 144 provides separate, less onerous safe-harbor procedures for transactions that involve controlling stockholders but are not going-private transactions, and for transactions that involve director or officer conflicts but not controlling stockholders. A non-going-private transaction that involves a controlling stockholder will be shielded from a claim of fiduciary breach if the transaction receives either of the two approvals that are together required for the cleansing of a going-private transaction—i.e., by a disinterested board committee or by the disinterested stockholders.[12] This standard constitutes a departure from the *MFW* line of cases, under which special-committee and disinterested-stockholder approvals are both needed for cleansing any transaction involving a conflicted controlling stockholder, even if the controller is not taking the company private.[13]

An act or transaction involving a conflicted director or officer, but no controlling stockholder, will be shielded from claims based on the conflict if the act or transaction is approved by a majority vote of either the disinterested directors or the disinterested stockholders. In this situation, a board committee must be used only if a majority of the directors are not disinterested, and the committee must consist of at least two disinterested directors.[14]

The amendments further assist planners by defining a number of concepts central to Delaware courts' review of conflicted transactions. Perhaps most significant is the definition of "controlling stockholder" as a person that together with its affiliates and associates (i) owns or controls stock representing a majority of the vote in director elections or the power to elect directors having a majority vote on the board, (ii) has the power to cause the election of designees having a majority vote on the board, or (iii) owns or controls stock representing at least one third of the vote, has power functionally equivalent to that of a majority stockholder, and can exercise management authority.[15] The definition thus ties controlling-stockholder status to a majority vote or its equivalent.

Amended § 144 also simplifies to some extent the determination whether a director is disinterested. Directors of a publicly traded corporation will be presumed disinterested for purposes of the § 144 protections if they are not themselves parties to the act or transaction, and meet the criteria for independence established by the applicable exchange—criteria typically consisting of bright-line rules that yield predictable results.[16] This presumption can be rebutted in each instance only by "substantial and particularized facts" showing that the director had a material interest in the transaction or a material relationship with a person having a material interest in the transaction.[17] "Material interest" is defined, solely for purposes of § 144, as an actual or potential benefit that is not shared with the stockholders generally and that "would reasonably be expected to impair the objectivity of [a] director's judgment" respecting the transaction or would be "material" in the case of anyone other than a director.[18] A "material relationship" is a "familial, financial, professional, employment, or other relationship" that would have the same effects on an individual as a material interest.[19]

The amendments also limit the liability of controlling stockholders and control groups. Under amended § 144, they can be liable in money damages to the corporation or other stockholders

for only (i) a breach of the duty of loyalty, (ii) acts or omissions in bad faith or involving intentional misconduct or a knowing violation of law, or (iii) a transaction from which they derive an improper benefit.[20] Accordingly, a controlling stockholder or control group cannot be liable in damages for a breach of the duty of care. This limitation of liability mirrors that afforded to directors and officers when (as is typically the case) the corporation's charter contains an optional exculpatory provision permitted by DGCL § 102(b)(7).

The amendments specify certain types of claims that can be brought regardless of compliance with the safe-harbor processes. Thus, amended § 144 will have no effect on a claim for equitable relief based on the failure of a corporate act or transaction to comply with the DGCL, the corporation's charter or bylaws, or a contract or government order. Likewise, amended § 144 will not limit judicial review, for purposes of injunctive relief, of devices adopted by a board of directors to fend off threats to control. Also unaffected are claims that a person knowingly aided and abetted a fiduciary breach by a director.[21]

Limits on Stockholder Inspection Rights (DGCL § 220)

In addition to creating new safe harbors under § 144, the recent amendments have changed the showing that stockholders must make to inspect corporate records. As previously drafted, § 220 of the DGCL entitled stockholders to inspect, for a proper purpose, their corporation's stock ledger, list of stockholders, and books and records. "Books and records," however, was an undefined category that could include almost any kind of retrievable information belonging to the corporation. This category has now been defined. Under amended § 220, "books and records" encompass only a relatively limited set of corporate materials. For a court to order production of materials beyond the stock ledger, the stockholder list, and the defined "books and records," stockholders proceeding under § 220 now need to show more than just a proper purpose.

Under amended § 220, "books and records" consist of solely the corporation's charter and bylaws; minutes of stockholder meetings and stockholder consents, in each case from the three years before the stockholder's inspection demand; minutes of board and board committee meetings, and board and committee consents; communications directed to the stockholders generally in the three years before the demand; materials provided to the board or a board committee in connection with taking action; the corporation's annual financial statements from the three years before the demand; director and officer independence questionnaires; and any governance agreement between the corporation and a stockholder as permitted by DGCL § 122(18).[22]

As under the previous version of § 220, a stockholder seeking to inspect these books and records, as well as the stock ledger and stockholder list, must have a proper purpose. The definition of "proper purpose" has been moved within § 220 but has not been changed in substance—a proper purpose is one "reasonably related to a stockholder's interest as a stockholder."[23] But amended § 220 makes express the further requirements that the inspection demand be "made in good faith," that the demand describe "with reasonable particularity" the stockholder's purpose and the materials that are sought, and that the materials sought be "specifically related" to the stockholder's purpose.[24]

Nonetheless, amended § 220 contemplates three scenarios in which a stockholder may inspect materials other than the stock ledger, stockholder list, and "books and records." First, the court can order the corporation to produce additional materials to the extent that the stockholder has shown a "compelling need" for the additional materials "to further the stockholder's

proper purpose" and has shown by "clear and convincing evidence" that the "specific" materials sought are "necessary and essential to further such purpose."[25]

Second, if the corporation does not have minutes of stockholder or board meetings, stockholder or board consents, or financials (and, if publicly traded, does not have director and officer independence questionnaires), then the court may order the corporation to produce materials "constituting the functional equivalent" of the non-existent records "to the extent necessary and essential to fulfill the stockholder's proper purpose."[26]

Third, amended § 220 recognizes "the power of a court, independently of [the DGCL], to compel the production of corporate records for inspection[.]" If, however, a court exercising this independent power orders the production of materials that fall within the statutory definition of "books and records," the stockholder's demand must be made in accordance with § 220.[27]

The amendments make clear that the corporation may impose "reasonable" restrictions on the use of the books and records subject to inspection and may redact any portions of such books and records that "are not specifically related to the stockholder's purpose." In addition, the corporation can condition the production of books and records on the stockholder's agreement that "any information included in the corporation's books and records is deemed incorporated by reference in any complaint" filed by the stockholder relating to "the subject matter referenced" in the stockholder's inspection demand.[28]

No changes have been made to the provisions of § 220 regarding how inspection rights can be enforced in the Court of Chancery, how an inspection demand can be made through an agent or by a beneficial owner that is not a stockholder of record, and when a stockholder may inspect books and records of a subsidiary of the corporation whose shares the stockholder owns.[29] In addition, amended § 220 continues to prescribe a burden shift where the only materials sought are the stock ledger and stockholder list. Instead of placing on the stockholder the burden of showing a proper purpose when just those materials are sought, § 220, as before the amendments, places on the corporation the burden of showing that the stockholder's purpose is improper.[30] Finally, no change has been made to the broad inspection rights afforded to directors.[31]

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1 Del. S. Sub. 1 for S.B. 21, 153d Gen. Assem. § 3 (2025).

2 8 *Del. C.* § 144.

3 88 A.3d 635 (Del. 2014).

4 *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 730, 741 (Del. Ch. 2016), *aff'd*, 156 A.3d 697 (Del. 2017) (order).

5 *MFW*, 88 A.3d at 644-45.

6 *Huff Energy Fund, L.P. v. Gershen*, C.A. No. 11116-VCS, 2016 WL 5462958, at *15-16 (Del. Ch. Sept. 29, 2016).

7 *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 1003 (Del. Ch. 2014) (dismissing stockholder challenge to merger where waste was not alleged, because no controlling stockholder was involved and merger was approved by majority-in-interest of disinterested stockholders in fully informed vote), *aff'd sub nom. Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015).

8 8 *Del. C.* § 144(c) (by cross-reference to subsection (b)). The stockholder approval must consist, specifically, of the "affirmative vote of a majority of the votes **cast** by the disinterested stockholders." *Id.* § 144(b)(2) (emphasis added). The "votes cast" standard appears to contemplate that, when approval is not obtained from an absolute majority-in-interest of the disinterested stockholders, the corpora-

tion will seek votes for and against the transaction, and can meet § 144's stockholder-approval requirement if the votes cast for the transaction exceed those cast against it. In other words, abstentions from voting are not necessarily equivalent to "no" votes, contrary to how abstentions were treated under *MFW*. *Cf.* 8 *Del. C.* § 242(d)(2) (providing that unless the corporation's charter states otherwise, the number of authorized shares of a publicly traded corporation may be changed by a charter amendment if, at a stockholder meeting, "the votes cast for the amendment exceed the votes cast against the amendment").

This interpretation of "votes cast" is supported by subsection (b)(7) of amended § 144, which treats abstentions as "no" votes when the transaction is structured such that stockholders have no opportunity actually to vote "no." Specifically, § 144(b)(7) provides that in a transaction where a tender offer takes the place of a stockholder vote (under DGCL § 251(h)), any shares of disinterested stockholders that are not tendered and accepted "shall be deemed voted against" the transaction for purposes of determining whether stockholder approval has been obtained in accordance with the § 144 processes.

[9] 8 *Del. C.* § 144(c) (by cross-reference to subsection (b)).

[10] *E.g., Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 763-64 (Del. 2018) (discussing the purpose of "*MFW*'s '*ab initio*,' or from inception, prong" and rejecting a literal interpretation of that requirement).

[11] Subsections (b) and (c) of DGCL § 144 provide that if the prescribed steps are taken, a transaction will not be subject to equitable relief or a damages award "by reason of a claim based on a breach of fiduciary duty[.]" As waste is a claim based on a breach of fiduciary duty, *Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979), the quoted language includes waste claims.

[12] 8 *Del. C.* § 144(b).

[13] *In re Match Gp., Inc. Deriv. Litig.*, 315 A.3d 446, 451 (Del. 2024).

[14] *Id.* § 144(a).

[15] *Id.* § 144(e)(2).

[16] 8 *Del. C.* § 144(d)(2); *see, e.g., Teamsters Union 25 Health Serv. & Ins. Plan v. Baiera*, 119 A.3d 44, 61 (Del. Ch. 2015) (discussing NYSE rules for determining director independence).

[17] 8 *Del. C.* § 144(d)(2).

[18] *Id.* § 144(e)(7).

[19] *Id.* § 144(e)(8).

[20] *Id.* § 144(d)(5).

[21] *Id.* § 144(d)(6).

[22] *Id.* § 220(a)(1).

[23] The definition of "proper purpose" was formerly in the last paragraph of subsection (b) of § 220. It is now in subsection (a)(2).

[24] 8 *Del. C.* § 220(b)(2).

[25] *Id.* § 220(g).

[26] *Id.* § 220(f).

[27] *Id.* § 220(b)(4)b. Neither this requirement nor any other provision of amended § 220 will have any effect on "[t]he right of a stockholder to seek discovery of books and records if the stockholder is in litigation with the corporation, to the same extent as any other litigant[.]" *Id.* § 220(b)(4)a.

[28] *Id.* § 220(b)(3).

[29] *Id.* § 220(c) (enforcement), (b)(5)-(6) (demand by beneficial owner or through agent), (b)(1)b. (inspection of subsidiary's books and records).

[30] *Id.* § 220(c).

[31] *Id.* § 220(d).

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