CLIENT ALERTS & INSIGHTS

Delaware Amends DGCL Section 144 to Add Safe Harbors for Interested and Controlling Stockholder Transactions

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On March 25, 2025, the governor of Delaware signed into law significant changes to Section 144 of the Delaware General Corporation Law ("DGCL"). The changes provide safe harbors to Boards of Directors and controlling stockholders for certain types of interested transactions and controlling stockholder transactions.

Three Transaction Categories Now Legislatively Covered by Safe Harbors

The amendments to Section 144 establish safe harbors for three categories of transactions:

1. Interested transactions
2. Controlling stockholder transactions (other than going private)
3. Going private transactions

Provided that the transactions fall within the new legislatively defined safe harbor, the officers, directors and controlling stockholders are protected from liability. Thus, if directors want to avoid or limit litigation, they should ensure that any transaction falling within one of the three categories is structured in a way to fall within the safe harbor.

If a transaction does not fall within the safe harbor, the officer, director or controlling stockholder will need to prove the deal "is fair as to the corporation and the corporation's stockholders." 8 Del. C. § 144(a)(3), (b)(3), and (c)(2). This "entire fairness" standard has been described as "Delaware's most onerous," which makes the safe harbors of great value to officers, directors and controlling stockholders. *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013).

The amendments also provide legislative definitions of controlling stockholder and disinterested directors.

Key Definitions

Controlling Stockholder: Anyone, when combined with their affiliates and associates, who:

1. Owns or controls a majority of the voting power of the corporation's stock;

2. Owns or controls less than a majority voting power but controls the ability to elect a majority of a board's directors; or
3. Owns or controls at least one-third of the voting power "of the outstanding stock of the corporation entitled to vote generally in the election of directors or in the election of directors who have a majority in voting power of the votes of all directors on the board of directors and power to exercise managerial authority over the business and affairs of the corporation."

Disinterested Director: 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."

Interested Transactions

Section 144 now provides for a safe harbor for transactions (a) between a corporation (or its subsidiaries) and "1 or more of the corporation's directors or officers" or (b) between a corporation (or its subsidiaries) and another entity "in which 1 or more of its directors or officers are directors, stockholders, partners, managers, members, or officers, or have a financial interest." 8 Del. C. § 144(a).

To qualify for the safe harbor, the interested transaction must satisfy one of two conditions:

1. A committee of directors consisting of at least 2 directors who the board "has determined to be a disinterested director" knows the material facts of the director's or officer's relationship or interest in the transaction authorizes the transaction "in good faith and without gross negligence;" or
2. The act or transaction is approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders.

8 *Del. C.* § 144(a)(1)-(2).

Controlling Stockholder Transactions

Subsections (b) and (c) of Section 144 cover controller stockholder transactions. Subsection (b) applies to all controlling stockholder transactions other than going private transactions, and subsection (c) applies to going private transactions.

Among other things, the amendment is a legislative override of the Delaware Supreme Court's decision last year in *In re Match Group, Inc. Derivative Litigation*, 315 A.3d 446 (Del. 2024). Match Group reiterated that entire fairness was the standard of review that Delaware courts would use to review controlling stockholder transactions unless the transaction satisfied the requirements of *Kahn v. M&F Worldwide Corp.*,88 A.3d 635, 645 (Del. 2014) ("*MFW*") and its progeny. *MFW* required that controlling stockholder transactions have the following requirements established ab initio (i.e., before any economic "horse trading" had occurred):

1. The transaction would be approved by an independent and fully empowered committee of disinterested directors who satisfied their duty of care; and

2. The transaction would be approved by a fully informed majority of disinterested stockholders.

The safe harbor now for controlling stockholder transactions other than going private transactions requires just one of the two MFW provisions. Further, the protections do not need to be established ab initio. For example, the requirement that the transaction be subject to the approval of a majority of disinterested stockholders only needs to be established "at the time it is submitted to stockholders for their approval or ratification." 8 *Del. C.* § 144(b)(2).

However, going private transactions still require both of *MFW*'s protections. It requires both approval by a committee of disinterested directors and a vote of a majority of disinterested stockholders. Counsel should be consulted early to determine whether a transaction can-and should-be structured to fit within the new statutory safe harbors.

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