
Amendments to Delaware General Corporation Law

April 3, 2025

William Burnett, Mariel Giletto, Anthony Gruzdis

On March 25, Delaware amended two (2) sections of the Delaware General Corporation Law (DGCL) in response to reports that prominent corporations are considering leaving Delaware in light of several significant court decisions perceived as damaging to Delawares reputation as the preferred state of incorporation for major companies. The amendments target sections of the DGCL that govern the relationship between a corporation and its directors, officers, and stockholders. The amendments only affect Delaware corporations, so Delaware limited liability companies and other entities are unaffected by the amendments.

Section 144 Controlling Stockholder Transactions

Prior to the amendment, Section 144 of the DGCL governed transactions in which a corporations director or officer was a party to a transaction with the corporation. The amended Section 144 has been expanded to include transactions between a corporation and its controlling stockholder, provide several statutory safe harbors for such transactions, and limit the circumstances in which a controlling stockholder can owe monetary damages for breaches of fiduciary duties. These changes respond to several recent decisions that required complicated, fact-based analyses that prevented efficient adjudication and that resulting in outcomes perceived as unfriendly to management.

Safe Harbors for Controlling Stockholder Transactions

The amendment provides a safe harbor that permits transactions between a controlling stockholder and the corporation if:

1. The facts of the transaction are known of and approved by a committee of the board of directors that has express authority to negotiate the transaction, provided the committee consists of at least two disinterested directors (ie, directors who do not have a material interest in the transaction or have a material relationship with the controlling stockholder).
2. The transaction is approved by a majority of the disinterested stockholders of the corporation (ie, stockholders that do not have a material interest in the transaction or have a material relationship with the controlling stockholder).
3. The transaction is deemed fair to the corporation and its stockholders (ie, the transaction is comparable to what might have been obtained by the corporation in an arms length transaction).

The amendment also provides a similar statutory safe harbor for transactions in which a controlling stockholder causes a corporation listed on a national securities exchange to go private.

Monetary Damages

Continued

Controlling stockholders can now only be liable to a corporation or its shareholders for monetary damages in the following circumstances:

1. A breach of the duty of loyalty to the corporation or its stockholders.
2. Acts or omissions not in good faith which involved intentional misconduct or a knowing violation of the law.
3. Any transaction in which the controlling stockholder gained an improper personal benefit.

Section 220 Stockholder Inspection Rights

Section 220 of the DGCL grants stockholders the right to demand inspection of the books and records of a corporation. Prior to the amendments, books and records was not a defined term in the DGCL. In an effort to simplify inspection demands and limit litigation over the scope of such demands, the amended Section 220 now defines books and records to be limited to:

- The certificate of incorporation.
- The bylaws.
- The minutes of all meetings and consents in lieu of a meeting of stockholders for the previous three (3) years.
- All written communications to stockholders within the previous three years.
- Minutes of all meetings of the board of directors and records of actions of the board of directors or any committee of the board of directors.
- Materials provided to the board of directors or any committee of the board of directors.
- Annual financial statements for the previous three (3) years.
- Any stockholder agreements.
- Director and officer independence questionnaires.

Additionally, the amended Section 220 now requires that an inspection demand:

- Be made in good faith and for a proper purpose.
- Describe with particularity the stockholders purpose and the books and records they seek to inspect.
- Be specifically related to the stockholders purpose.

Conclusion

The amendments to the DGCL alter the relationships between corporations and their directors, officers, and stockholders. Flaster Greenberg attorneys continue to monitor the evolving corporate legal landscape, are experienced in providing counsel to the management teams of Delaware corporations, and are prepared to assist your Delaware business.

If you have any questions about this alert, please contact your attorney at Flaster Greenberg, or any attorney in the Business & Corporate Department for more information.

Continued

A controlling stockholder means a stockholder that either (i) owns a majority in the voting power of a corporation, (ii) has the right to cause election of the majority of the board of directors; or (iii) has a functional equivalent of the majority in voting power by virtue of controlling at least one-third of the voting power of the corporation.

ATTORNEYS MENTIONED

William Burnett

Mariel Giletto

Anthony Gruzdis, CIPP/US