

DELAWARE ADOPTS SAFE HARBORS FOR CONFLICTED TRANSACTIONS AND NARROWS RIGHT OF STOCKHOLDERS TO DEMAND BOOKS AND RECORDS

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WHAT HAPPENED

On March 25, 2025, the Governor of Delaware signed [amendments to its corporation law \(DGCL\)](#):

- Establishing a safe harbor for conflicted transactions with directors or officers.
- Establishing separate safe harbors for conflicted transactions involving controlling stockholders and going private transactions.
- Narrowing the scope of books and records that stockholders can demand to inspect.

The safe harbors provide protection against claims for equitable relief or damages, subject to certain limitations, as described below.

The amendments became effective immediately for all acts and transactions, whether occurring before, on, or after their signing – except for litigation commenced, or demands for books and records made, on or before February 17, 2025.

TAKEAWAYS

Delaware corporations will now have greater certainty when engaging in conflict of interest transactions involving directors, officers or controlling stockholders, and when responding to books and record demands. Key changes include:

SAFE HARBOR FOR DIRECTOR AND OFFICER TRANSACTIONS

- Replacing the previous defense for conflicted insider transactions, which only prevented invalidation, with protection from claims for breach of fiduciary duty.
- Not requiring the establishment of special committees before initiation of negotiations.

- Generally not requiring that special committees consist solely of disinterested directors.
 - However, if a majority of directors are not disinterested with respect to the transaction, all members of the special committee must be disinterested.
- Presuming non-party “independent” directors of listed companies are disinterested.
- Expressly allowing stockholders to cleanse conflicted transactions through ratification.

SAFE HARBOR FOR CONTROLLING STOCKHOLDER TRANSACTIONS

- Establishing an express safe harbor for controlling stockholder transactions, generally with the same features listed above.
- Establishing a bright-line definition of a controlling stockholder.
- Allowing cleansing of transactions with controlling stockholders (other than going private transactions) by approval of either a special committee or disinterested stockholders. Going private transactions will require the approval of both the committee and stockholders.

BOOKS AND RECORD DEMANDS

The amendments to the books and record provision:

- Limit documents companies are required to provide to certain board-level materials.
- Require stockholders seeking additional materials to show “compelling need” and to provide “clear and convincing evidence” they are “necessary and essential.”
- Expressly permit the company to impose reasonable confidentiality restrictions and redact content unrelated to the stockholder’s stated purpose.

As with any new law, the scope of protection for companies or their insiders and controlling stockholders remains to be developed through court decisions. For example, [one commentator](#) has questioned whether the restriction on equitable relief violates the Delaware constitution. [Another commentator](#) questioned whether courts might retain general common law authority to remediate unfair or inequitable corporate action.

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CONFLICTED TRANSACTIONS WITH DIRECTORS OR OFFICERS

Amended Section 144(a) provides a safe harbor for directors and officers who have a direct or indirect interest in any transaction with the company, or participate in the approval, initiation or

negotiation of the transaction if:

- The material facts of the insider's interest and participation are disclosed or known to the other directors or committee members, and a majority of disinterested directors authorize the transaction, acting in good faith and without gross negligence; or
- Disinterested stockholders approve or ratify the transaction by an "informed, uncoerced, affirmative" vote of a majority of the votes cast; or
- The transaction fair as to the corporation and its stockholders.

If a majority of the directors are not disinterested with respect to the transaction, then the transaction should instead be approved by a committee consisting of two or more disinterested directors.

CONFLICTED TRANSACTIONS WITH CONTROLLING STOCKHOLDERS GENERALLY

Amended Section 144(b) provides a safe harbor for "controlling stockholders" for breaches of fiduciary duty by any director, officer, the controlling stockholder or member of the control group if:

- The material facts of the person's interest and participation are disclosed or known to the members of a committee to which the board has expressly delegated authority, and a majority of disinterested directors negotiates and authorizes the transaction, acting in good faith and without gross negligence.
 - This committee is required to consist of at least two disinterested directors and to have been expressly delegated authority to negotiate, or oversee negotiation, and to reject the transaction; or
- The transaction is conditioned on approval or ratification by disinterested stockholders by an "informed, uncoerced, affirmative" vote of a majority of the votes cast (and is so approved or ratified); or
- The transaction fair as to the company and its stockholders.

GOING PRIVATE TRANSACTIONS WITH CONTROLLING STOCKHOLDERS

New Section 144(c) provides a safe harbor for going private transactions if:

- The transaction is approved, or recommended for approval, in accordance with both of the first two bullets above (relating to committee and stockholder approval); or
- The transaction is fair as to the company and its stockholders.

PRESUMPTION OF DISINTERESTED STATUS

For listed companies, a director is presumed disinterested if the individual is not a party to the transaction and satisfies the relevant stock exchange criteria for director independence, including with respect to the specific transaction. The presumption will be heightened, and may only be rebutted, by “substantial and particularized facts” that the director has a material interest or has a material relationship with a person with a material interest.

The designation or nomination of a director by any person with a material interest in a transaction will not by itself constitute evidence that the director is not disinterested, where the director is not a party.

SCOPE OF SAFE HARBORS

The safe harbors provide:

- For directors and officers, that they may not be subjected to equitable relief or assessed damages or denied any benefit.
- For controlling stockholder transactions, including going private transactions, that a director, officer, controlling stockholder or member of the control group may not be subjected to equitable relief or assessed damages by reason of a claim based on breach of fiduciary duty.

The safe harbors will not:

- Limit the right to seek equitable relief on the grounds that an act or transaction was not properly approved under the DGCL or the charter or bylaws or violates any governmental requirement or order.
- Limit judicial review for purposes of injunctive relief for actions to deter, delay, or preclude a change of control or other transaction involving the company or a change in the composition of the board.
- Limit the right to seek relief on the grounds that a stockholder or other person knowingly aided and abetted a breach of fiduciary duty by a director of the company.

SAFE HARBOR FOR CONTROLLING STOCKHOLDERS AND MEMBERS OF CONTROL GROUPS

New Section 144(d)(5) provides that controlling stockholders and members of control groups will not have liability for monetary damages for breach of fiduciary duty other than for:

- A breach of the duty of loyalty to the corporation or the other stockholders.

- Acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law.
- Any transaction from which the person derived an improper personal benefit.

BRIGHT-LINE DEFINITION OF CONTROLLING STOCKHOLDER

A “controlling stockholder” means any stockholder that (1) has majority voting power; (2) has the right, by contract or otherwise, to designate or elect a majority of the board; or (3) has the function equivalent to majority voting power through (x) at least one-third voting power and (y) power to exercise managerial authority over the business and affairs of the company.

BOOKS AND RECORDS

Amended Section 220 entitles stockholders to request only the following information:

- The certificate of incorporation and bylaws, including a copy of any document incorporated by reference.
- Minutes of all meetings or actions by written consent of stockholders in the past three years.
- All communications in writing or by electronic transmission to stockholders generally within the past three years.
- Minutes of any meeting or actions by written consent of the board or any committee of the board and records of any action of the board of directors or any such committee.
- Materials provided to the board or committee in connection with actions they took.
- Annual financial statements of the company for the past three years.
- Any stockholder agreement.
- Director and officer independence questionnaires.

Additionally, Section 220(g) allows the court of chancery to compel production of other books and records if the stockholder has made a showing of “compelling need . . . to further the stockholder’s proper purpose” and demonstrated by “clear and convincing evidence” that the materials are “necessary and essential.”

Section 220(b)(2) clarifies the requirements that:

- The demand must be made in good faith and for a proper purpose.
- The demand must describe the purpose and materials with “reasonable particularity.”

- The materials sought must specifically relate to the stated purpose.

Section 220(b)(3) expressly permits the company to impose reasonable confidentiality restrictions and redact content unrelated to the stated purpose.

The amended section does not affect the right of stockholders to seek discovery of books and records when litigating with the company, to the same extent as any other litigant.

RELATED PRACTICE AREAS

- Securities & Corporate Governance
- Corporate
- M&A & Corporate Finance

MEET THE TEAM



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