

# Client Alert

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## Recent DGCL Amendments Provide Increased Clarity and Certainty for Delaware Corporations Seeking to Go Private or Engage in Interested Transactions

On March 25, 2025, Delaware adopted amendments to the Delaware General Corporation Law (“DGCL”) that provide a clearer path for Delaware corporations to go private or engage in interested (conflicted) transactions. The legislature amended DGCL §144 to clarify what constitutes a “controlling stockholder” and the processes required by stockholders and directors to take a corporation private and avoid entire fairness scrutiny. The amendments to DGCL §144 also clarify which directors are disinterested and therefore eligible to serve on a special committee in connection with a going private or interested transaction. In addition, the legislature amended DGCL §220 to limit the scope of, and tighten the requirements for, a stockholder’s inspection of a corporation’s books and records. Together, these amendments should provide corporations with the benefit of more certainty in effecting going private and other interested transactions.

### Controlling Stockholders, Control Groups and Controlling Stockholder Transactions

The amendments define what constitutes a “controlling stockholder,” “control group,” and a “controlling stockholder transaction.” Prior to the amendments, the definition of controlling stockholder and the approval requirements for transactions involving controlling stockholders were a matter for the courts to decide based on the facts and circumstances of each case. Under new DGCL §144(e)(2), a stockholder who does not meet the statutory definition will not be considered a controlling stockholder.

Under new DGCL §144(e)(2), a “controlling stockholder” is a stockholder who either:

- owns a majority of the corporation’s voting power;
- has the right, by contract or otherwise, to appoint a majority of the directors to the corporation’s board of directors; or

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- controls at least one-third of the corporation's voting power and has the power to exercise managerial authority over the corporation.

The amendments define a "control group" as two or more persons that are not controlling stockholders but, by virtue of an agreement, arrangement, or understanding between or among such persons, constitute a controlling stockholder.

The amendments define a "controlling stockholder transaction" as an act or transaction between the corporation or one or more of its subsidiaries, on the one hand, and a controlling stockholder or a control group, on the other hand, 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.

Through these new definitions, Delaware has increased clarity as to which stockholders are controlling stockholders and which transactions will require heightened approval standards.

### **Disinterested Directors and Disinterested Stockholders**

The amendments also define the terms "disinterested director" and "disinterested stockholder." These definitions provide guidance on which directors can serve on a special committee to approve a going private or interested transaction and which stockholders need to approve such a transaction for purposes of DGCL §144(e)(4).

Under DGCL §144(e)(4), a "disinterested director" is a director who is not a party to the relevant 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. Under DGCL §144(e)(5), a "disinterested stockholder" is any stockholder that does not have a material interest in the act or transaction at issue, or, if applicable a material relationship with the controlling stockholder or other member of the control group, or any other person that has a material interest in the act or transaction. The amendments also introduce definitions of "material interest" and "material relationship," further clarifying which directors and stockholders are disinterested under the DGCL.

New DGCL §144(d)(2) adds a presumption that a director is a disinterested director if the corporation's securities are listed on a national exchange and the board has determined that the director satisfies the applicable criteria for determining director independence from the corporation or the controlling stockholder (or control group), if applicable, under the exchange's rules (and interpretations thereof). This presumption may only be rebutted by substantial and particularized facts that a director has a material interest in the relevant act or transaction or has a material

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relationship with a person with a material interest in the act or transaction. Furthermore, the nomination of a director by a stockholder does not, in and of itself, render that director interested in transactions involving that stockholder.

The statutory definitions aim to provide greater certainty to corporations that they are receiving required approvals from the appropriate directors and stockholders for purposes of DGCL §144.

### **Required Approvals for Going Private Transactions Involving Controlling Stockholders and Interested Directors or Officers**

The amendments clarify the required approvals to cleanse interested transactions and controlling stockholder transactions. Under amended DGCL §144(c), a controlling stockholder transaction that constitutes a going private transaction will not be subject to equitable relief or give rise to an award of damages against a director or officer or any controlling stockholder or member of a control group if:

- the transaction is:
  - approved or recommended for approval, as applicable, in good faith and without gross negligence, by a majority of the informed, disinterested members of a committee of the board, which has been expressly delegated the authority to negotiate (or oversee the negotiation) and to reject the transaction; provided that the committee consists of two or more directors, each of whom the board has determined to be a disinterested director; and
  - conditioned, by its terms, on a vote of the disinterested stockholders at or prior to the time it is submitted to the stockholders for their approval, and the transaction is approved by the informed, uncoerced, affirmative vote of a majority of the votes cast by disinterested stockholders entitled to vote thereon; or
- the transaction is fair as to the corporation and its stockholders.

Under amended DGCL §144(a), interested transactions with officers and directors (other than transactions involving a controlling stockholder) will not be subject to equitable relief or give rise to an award of damages against an officer or director if:

- the transaction or act is approved in good faith and without gross negligence by the affirmative vote of a majority of the informed, disinterested directors of the board or a committee of the board, even though the disinterested directors constitute less than a quorum;

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provided that if a majority of the directors are not disinterested directors, such act or transaction must be approved (or recommended for approval) by a committee of the board that consists of two or more directors, each of whom the board of directors has determined to be a disinterested director; or

- the transaction or act is approved or ratified by the informed, uncoerced, affirmative vote of a majority of the votes cast by disinterested stockholders entitled to vote thereon; or
- the transaction or act is fair as to the corporation and its stockholders.

These amendments provide corporations with a clearer roadmap to ensure these transactions satisfy the cleansing requirements of DGCL §144.

### **Additional Protections for Controlling Stockholders**

The amendments also protect controlling stockholders and control groups from liability for breaches of the duty of care. DGCL §144(d)(5) states that no person who is a controlling stockholder or member of a control group will be held liable for monetary damages for a breach of fiduciary duty other than for:

- a breach of the duty of loyalty;
- acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or
- any transaction from which the person derives an improper personal benefit.

### **Books and Records Requests**

In addition, the amendments to the DGCL revise the requirements for books and records requests to narrow the scope of the materials that may be demanded by a stockholder and, potentially, a stockholder's ability to challenge a transaction. Amended DGCL §220 now defines "books and records," limiting them to certain core materials (such as board minutes). The Court of Chancery may order a corporation to produce records beyond this only if and to the extent that (a) the stockholder met the requirements for a demand, (b) the stockholder made a showing of a compelling need for an inspection of such records to further its proper purpose, and (c) the stockholder demonstrated by clear and convincing evidence that the specific records are necessary and essential to further the purpose. Notably, the defined list does not include emails, text messages, or informal board communications, which is a departure from previous case law. In addition, Delaware corporations may impose reasonable

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restrictions on the confidentiality, use, or distribution of books and records and may redact portions of any books and records produced to the extent they are not specifically related to the stockholder's purpose.

### Conclusion

The amendments to the DGCL provide corporations with a clearer path to go private or undertake other interested transactions, as they elucidate matters by defining terms and establishing approval requirements that were previously subject to judicial interpretation under Delaware law. By defining terms such as “controlling stockholder” and “disinterested director” and specifically outlining the required approvals for controlling stockholder and other interested transactions, Delaware seeks to afford greater consistency and certainty to corporations incorporated in The First State.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys below if you would like to discuss further or have questions.

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