# Recent Amendments to the Delaware General Corporation Law

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# Drivers for Recent Amendments

- Recent Delaware court decisions (*MFW*, *Moelis*, *In re Match*) and market reactions thereto have prompted new legislative changes to the DGCL to better protect corporate fiduciaries.

- Key Changes to the DGCL:

  – New safe harbor procedures for conflict transactions involving directors, officers, controlling stockholders and control groups

  – Increased clarity regarding statutory "books and records" inspection rights

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# DGCL 144 – Transactions with Conflicted Directors and Officers

- Applies to any act or transaction between a corporation or any its subsidiaries, on the one hand, and any director or officer (or any entity or organization in which they are a director, officer, stockholder, partner, member, manager, officer, or otherwise have a financial interest, on the other hand.
- The act or transaction would not be the subject of equitable relief and would not give rise to an award of damages against a director or officer if **<u>either</u>** of the following conditions are met:
  - <u>Disinterested Director Approval</u>: The act or transaction is authorized by the affirmative vote of a majority of the disinterested directors
    - If a majority of the directors are not disinterested, the act or transaction must be approved by a majority vote of the disinterested directors serving on an independent committee.
    - All material facts as to the director's or officer's relationship/interest and as to the act or transaction—including any involvement in the initiation, negotiation or approval thereof—must be disclosed or known to all board members.
    - Act or transaction must be approved in good faith and without gross negligence.
  - <u>Disinterested Stockholder Approval</u>: 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.

# DGCL 144 – Going Private Transactions with Controlling Stockholders

- Applies to any “going private” transaction with a controlling stockholder or control group (e.g., squeeze-out merger).
- Going private transaction would not be the subject of equitable relief and would not give rise to an award of damages against a director, officer, controlling stockholder, or member of a control group, if **<u>both</u>** of the following conditions are met:
  - <u>Independent Committee Approval</u>: Transaction is approved by majority of the disinterested directors then serving on an independent committee
    - Independent committee must have exclusive authority to negotiate and to reject the going private transaction.
    - Independent committee must have at least two disinterested directors.
    - All material facts as to the going private transaction (including the controlling stockholder's or control group's interest therein) must be disclosed or are known to all members of the independent committee.
    - Transaction must be approved in good faith and without gross negligence.
  - <u>Disinterested Stockholder Approval</u>: Going private transaction is approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders
    - Transaction must be preconditioned on approval or ratification by disinterested stockholders when it is submitted to the stockholders for their approval or ratification.

# DGCL 144 – Other Transactions with Controlling Stockholders

- Applies to any act or transaction—other than a going private transaction—with a controlling stockholder or a control group, or from which a controlling stockholder or control group receives a benefit not shared with the corporation's stockholders generally.
- Act or transaction would not be the subject of equitable relief and would not give rise to an award of damages against a director, officer, controlling stockholder, or member of a control group, if **either** of the following conditions are met:
  - Independent Committee Approval: Same rules apply for a going private transaction (committee must be fully informed, must have exclusive authority to negotiate/reject the transaction, etc.)
  - Disinterested Stockholder Approval: Same rules apply for a going private transaction (transaction must be preconditioned on obtaining disinterested stockholder approval when it is submitted to the stockholders).

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# DGCL 144 – Other Changes

- Controlling stockholders and members of control groups are now automatically exculpated from liability for monetary damages for breaches of the duty of care—without any need for a charter amendment.

- DGCL 144 now includes statutory definitions for relevant concepts/terminology previously delinated by caselaw (“controlling stockholder,” “control group,” “disinterested stockholder”, “disinterested director”, “material interest”, “material relationship”, etc.).

- Fiduciaries still have opportunity to demonstrate act/transaction was entirely fair to the corporation and its stockholders (consistent with prior law).

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# DGCL 220 – Inspection Rights

- "Books and records" is now defined by statute to include the following documents:
  - Certificate of incorporation and bylaws (and documents incorporated therein by reference)
  - Stockholder agreements
  - Annual financial statements for past three years
  - All stockholder minutes/consents for past three years
  - All written/electronic communications to stockholders within the past three years
  - All board and committee minutes/consents
  - All materials provided to the board or any committee in connection with actions taken by the board or such committee
  - D&O independence questionnaires (for publicly traded corporations)
  - Stock ledger and stockholder list

# DGCL 220 – Inspection Rights

- Technical requirements for making a valid inspection demand under DGCL 220(b):
  - Demand must be made in good faith and for a purpose reasonably related to a stockholder's interest as a stockholder
  - Demand must describe, with reasonable particularity, the stockholder's purpose and the books and records being sought for inspection
  - Requested books and records must specifically relate to the stockholder's purpose
  - Demand must be directed to the corporation's registered office or its principal place of business
  - If party demanding inspection is a beneficial owner of stock, demand needs to provide documentary evidence of beneficial ownership
  - If party demanding inspection is an attorney or agent, demand needs to include a writing establishing the attorney's or agent's authority to demand inspection.

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# DGCL 220 – Inspection Rights

- Corporation can impose reasonable restrictions on the confidentiality, use, or distribution of corporate books and records (e.g., NDA requirement).
- Corporation can redact produced books and records to remove information not specifically related to the stockholder's purpose.
- Corporation can condition production on the stockholder agreeing that all information produced will be "deemed incorporated by reference in any complaint filed by or at the direction of the stockholder in relation to the subject matter referenced in the demand."
  - Litigation benefit (court can consider information in produced books and records at motion to dismiss stage, even if not included in the stockholder's complaint).

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# DGCL 220 – Inspection Rights

- If the corporation is missing certain records described in DGCL 220(a) (stockholder minutes/consents, board/committee minutes/consents, annual financial statements, D&O independence questionnaires), the Court of Chancery can <u>order</u> the production of additional records constituting the <u>functional equivalent</u> of the missing records "to the extent necessary and essential to fulfill the stockholder's proper purpose."

- Court of Chancery can order the production of other books and records beyond those described in DGCL 220(a), but only if:
  - Stockholder has made a <u>showing of a compelling need</u> for an inspection of the books and records to further the stockholder's proper purpose
  - Stockholder has demonstrated by <u>clear and convincing evidence</u> that the specific records are necessary and essential to further such purpose.

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