

2025 DGCL Amendments Take Effect, Introducing Sweeping Safe Harbor Provisions for Conflict Transactions

WRITTEN BY

[Taylor B. Bartholomew](#) | [Christopher B. Chuff](#) | [Matthew M. Greenberg](#)

On March 25, 2025, sweeping changes to the Delaware General Corporation Law (the DGCL) took effect (the amendments). The amendments introduce new “safe harbor” provisions designed to cleanse conflict transactions involving directors, officers, and controlling stockholders, subject to certain conditions. The amendments also substantially narrow the categories of information to which a stockholder demanding books and records of a corporation would be entitled.

Conflict Transactions Involving Directors and Officers

Under amended Section 144(a) of the DGCL, conflict transactions involving directors or officers may not be the subject of equitable relief or monetary damages against a director or officer if:

1. The conflict was known to the board or committee and it is approved in good faith and without gross negligence by the affirmative votes of the disinterested directors then serving on the board or the committee (and if a majority of the directors then serving as such are not disinterested, then the act or transaction must be recommended for approval by a committee consisting of at least two directors who have been determined by the board to be disinterested);
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; or
3. The act or transaction is fair to the corporation and its stockholders (essentially invoking Delaware’s “entire fairness” standard of review).

The new safe harbor provision prescribed by Section 144(a) of the DGCL generally follows current Delaware case law, except that it imposes no timing requirement with respect to the formation of any special committee created for purpose of a conflict transaction. That case law imposed a requirement that any such committee be formed *ab initio* (i.e., before any economic terms are negotiated). The new provision also departs from current Delaware case law in that any special committee need not be composed *entirely* of disinterested directors.

Under new Section 144(d)(2) of the DGCL, a director of a public company is presumed disinterested if the board determines that the director satisfies applicable stock exchange standards. However, this presumption can be

rebutted by a showing of “substantial and particularized” facts that the director has a material conflict. Current Delaware case law found stock exchange standards to be persuasive, but not presumptive, for purposes of any conflicts analysis.

Finally, amended Section 144(a) of the DGCL introduces a “majority of votes cast” threshold for approval or ratification by the stockholders, and cleansing is not limited to simply prior approval of an act or transaction, but contemplates ratification of the act or transaction after the fact.

Conflict Transactions Involving Controlling Stockholders (Other Than Go-Private Transactions)

Under amended Section 144(b) of the DGCL, a conflict transaction involving a controlling stockholder (but other than a go-private transaction) may not be the subject of equitable relief or monetary damages against an officer, director, or the controlling stockholder by reason of a fiduciary breach if:

1. The facts as to the transaction are disclosed to a committee to which the board has expressly delegated the authority to negotiate and to reject the transaction, and such transaction is approved (or recommended for approval) in good faith and without gross negligence by a majority of the disinterested directors then serving on the committee (and the committee must consist of at least two directors, each of whom has been determined by the board to be disinterested);
2. The transaction is conditioned, at the time it is submitted to stockholders for their approval or ratification, on the approval of, or ratification by, disinterested stockholders, and the controlling stockholder transaction is approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders; or
3. The transaction is fair as to the corporation and its stockholders (essentially invoking Delaware’s “entire fairness” standard of review).

In addition to the key differences described under the above section of this article with respect to amended Section 144(a) of the DGCL, which also generally apply to amended Section 144(b) of the DGCL, amended Section 144(b) of the DGCL departs from current Delaware case law involving conflicted controller transactions in that only requires that the conflicted controlling stockholder transaction be approved *either* by a special committee *or* by a vote of disinterested stockholders. Current Delaware case law mandates that a conflicted controlling stockholder transaction be approved by both mechanisms to bring the scrutiny of the transaction back to the protections of the business judgment rule.

Go-Private Transactions

Under new Section 144(c) of the DGCL, a go-private transaction may not be the subject of equitable relief or monetary damages against a director, officer, or any controlling stockholder by reason of a fiduciary breach if:

1. The transaction is approved (or recommended for approval) by *both* a special committee and the disinterested stockholders as required under amended Section 144(b); or

2. The going private transaction is fair as to the corporation and its stockholders (essentially invoking Delaware's "entire fairness" standard of review).

The key differences described under the above sections of this article with respect to amended Sections 144(a) and 144(b) of the DGCL also generally apply to new Section 144(c) of the DGCL. However, new Section 144(c) of the DGCL preserves the so-called *MFW* doctrine under current Delaware case law with respect to the necessity for the go-private transaction to be approved by *both* a disinterested special committee and the disinterested stockholders to bring the scrutiny of the transaction back to the protections of the business judgment rule.

Defining Controlling Stockholder

Under new Section 144(e)(2) of the DGCL, a controlling stockholder is defined to be a stockholder who (i) wields majority power, (ii) has the right (such as pursuant to a stockholders agreement) to designate a majority of the members of the board, or (iii) has the power functionally equivalent to that of a majority stockholder through the control of (A) at least one-third in voting power of the outstanding voting stock and (B) the power to exercise managerial authority over the business and affairs of the corporation. Current Delaware case law set no such "floor" for the finding of a controlling stockholder for the purposes of a specific transaction.

In addition, under new Section 144(d)(5) of the DGCL, no controlling stockholder can be liable for monetary damages for the breach of the duty of care. Unlike exculpatory provisions for directors and officers authorized under Section 102(b)(7) of the DGCL, no "opt-in" certificate of incorporation provision is required for this provision to take effect.

Books and Records

Section 220 of the DGCL has been amended to substantially narrow the types of books and records to which a demanding stockholder would be entitled. Historically, stockholder litigation over books and records demands had become expensive and burdensome, especially with the advent of stockholder demands seeking to obtain electronic communications of directors.

New Section 220(a)(1) and 220(b) of the DGCL now contemplate that a demanding stockholder would only be entitled to the following types of information/documents:

1. The certificate of incorporation (including a copy of any agreement or other instrument incorporated by reference in the certificate of incorporation);
2. Bylaws (including a copy of any agreement or other instrument incorporated by reference in the certificate of incorporation);
3. The minutes of all meetings of stockholders and any actions taken by written consent of stockholders in the past three years;
4. All communications by the corporation in writing or by electronic transmission to stockholders generally within

the past three years;

5. The minutes of any meeting of the board of directors or any committee of the board and any actions taken by written consent of the board or a committee of the board;
6. Materials provided to the board or any committee of the board in connection with actions taken by the board or the committee of the board;
7. The annual financial statements of the corporation for the past three years;
8. Any stockholders agreement; and
9. Any director and officer independence questionnaires.

Importantly, new Section 220(b)(4) of the DGCL makes clear that this narrowed entitlement would not affect a stockholder's right to seek discovery of other books and records if the stockholder is in active litigation. New Section 220(g) of the DGCL also introduces a carve-out to the new rules, making clear that a stockholder seeking to compel production of books and records may obtain other specific records if the stockholder can demonstrate that the specific records are (i) necessary and essential to its purpose and (ii) makes a showing of a compelling need for an inspection of the records to further its purpose.

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