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DELAWARE LAW ALERT: A STEP-BY-STEP APPROACH FOR BOARDS EVALUATING CONFLICTED DIRECTOR, OFFICER, AND CONTROLLING STOCKHOLDER TRANSACTIONS UNDER THE AMENDED DELAWARE CORPORATION LAW

In perhaps one of the most significant revisions to the Delaware General Corporation Law (DGCL), on March 25, 2025, the governor signed into law amendments overhauling much of the state's law relating to conflicted transactions between corporations and their directors, officers, and controlling stockholders.[1] The amendments are part of a trend to lend certainty to principles developed by Delaware courts over decades, and while likely to be welcomed by corporate boards and transaction advisors, the amendments themselves will be subject to further interpretation as corporate actors wrestle with the implications of these changes.

This Legal Update summarizes the amendments to DGCL §144, focusing on the step-by-step process boards may use to evaluate and structure conflicted transactions under the new framework. This update is intended to guide boards through the various options under the amended §144 to achieve "safe harbor" status for conflicted transactions and minimize exposure to potential litigation. Where relevant, this update notes the historical context of the amendments and offers further considerations on their practical nuances.

For easy reference, this update includes a summary table of the safe harbors and their requirements.

The amendments apply broadly to all corporate transactions, including certain past transactions. The amendments took effect on March 25, 2025, and apply to all acts and transactions, whether occurring before, on, or after that date.[2] However, the amendments do not apply to any court proceeding that was pending on or before February 17, 2025, the date the original bill with the amendments was first introduced in the Delaware General Assembly.

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[1] The amendments were passed as Senate Substitute No. 1 for Senate Bill No. 21 (referred to as the "Act"). The bill included amendments to DGCL §220 that will be addressed in a separate legal update.

[2] Section 3 of the Act.

Further Considerations: The amendments' wide coverage of past actions has notable benefits for corporations:

In some cases, past corporate acts and transactions may still qualify for safe harbor protection. As discussed in more detail below, safe harbor protection under amended §144 provides significant limitations on equitable and monetary claims against directors, officers, controlling stockholders, and members of control groups. The protections are available for some corporate acts and transactions that occurred at any time before enactment of the amendments. Boards should consider whether any of the following past conflicted corporate acts or transactions would benefit from these safe harbor protections.

- **Disinterested Stockholder Ratification of Conflicted Director or Officer Transactions.** New §144(a) provides safe harbor protection for past corporate acts and transactions involving conflicted directors or officers if such acts or transactions are ratified by an informed, uncoerced, and affirmative vote of a majority of the votes cast by disinterested stockholders. As discussed in more detail below, safe harbor qualification precludes equitable relief and monetary awards against the directors and officers involved. It should be noted, however, that ratification is not available for transactions that were subject to pending litigation as of February 17, 2025, or for conflicted transactions involving a controlling stockholder or a control group.
- **Fairness Fallback.** Under the new §§144(a)(3), (b)(3), and (c)(2), even when a transaction fails to satisfy all other requirements for safe harbor protection, a corporate act or transaction involving a conflicted director, officer, controlling stockholder, or control group may qualify for safe harbor protection if its "fair to the corporation and the corporation's stockholders." This is true of corporate acts and transactions that occurred at any time prior to the enactment of the amendments. Although not specified in the amendments, "fair" will likely be understood with reference to the entire fairness standard of review, which as discussed below, would require a showing that the past transaction was the product of a fair process resulting in a fair price.

Other Deterrents to Claims. Even for past transactions that do not qualify for the §144 safe harbors, the amendments will likely reduce the prospect of litigation for past conflicted transactions in a number of ways:

- As discussed in more detail below, the amendments specifically eliminate monetary damages for breaches of the duty of care (subject to certain limitations) for controlling stockholders and members of control groups, including for past transactions.
- The amendments also limit litigation for past transactions by providing clarity on key aspects of conflicted transactions, including controlling stockholder and control group definitions and standards for determining when directors and stockholders are disinterested.

The amendments limit monetary damages for duty of care claims against controlling stockholders and control group members. New §144(d)(5) provides that controlling stockholders and any person (whether or not a stockholder) that is a member of a control group will not be liable in such capacity to the corporation or its stockholders for monetary damages for breaches of fiduciary duty other than for:

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

Further Considerations: New §144(d)(5) exculpates controlling stockholders and members of control groups with respect to claims relating to their duty of care (subject to the specified limitations) using a formulation comparable to §102(b)(7), which permits a corporation to exculpate directors and officers. It should be noted that §144(d)(5) exculpation is generally applicable and not conditioned on the controlling stockholder or member of a control group qualifying for any of the §144 safe harbors and is not limited to conflicted transactions.

Unlike §102(b)(7) exculpation of directors and officers, which requires that the corporation include a provision in the certificate of incorporation, the §144(d)(5) exculpation applies automatically to all controlling stockholders and members of control groups. Accordingly, existing corporations do not need to amend their certificate of incorporation for controlling stockholder and control group exculpation to take effect.

Historical Context: Under pre-amendment caselaw, a controlling stockholder owed fiduciary duties of loyalty and care similar to a director to the corporation and its minority stockholders.

In addition, a 2024 Chancery Court opinion[3] held that when a controlling stockholder exercises voting power affirmatively to change the "status quo" of the company, the stockholder owes two forms of fiduciary duty:

- A duty of loyalty that requires that the stockholder not intentionally harm the corporation or its minority stockholders; and
- A duty of care that requires that the stockholder not harm the corporation or its minority stockholders through grossly negligent action.

In such circumstances, the court held that the stockholder's actions are subject to enhanced scrutiny, requiring a showing that "he acted in good faith for a legitimate objective and had a reasonable basis for believing that action was necessary [and] that he selected a reasonable means for achieving this legitimate objective."

[3] *In re Sears Hometown & Outlet Stores Inc. Shareholder Litigation*, 309 A.3d 474, C.A. 2019-0798-JTL (Del. Ch. 2024).

New §144(d)(5) is intended to exculpate controlling stockholders and members of a control group from monetary damages for the breaches of the duty of care in a manner comparable to that available to directors and officers under a §102(b)(7) provision in a corporation's certificate of incorporation.

Amended §144 provides a clear process to help boards address conflicted transactions. Under Delaware law, conflicted transactions remain subject to the most onerous level of judicial scrutiny—entire fairness. Delaware courts had developed procedures that, if employed by a board, would cause the transaction to be reviewed under the more deferential business judgment standard of review, but these procedures were often labyrinthine and subject to uncertainty as courts continuously clarified their application and effect. Amended §144 remedies this by establishing clear safe harbors for the approval of conflicted transactions. In a departure from pre-amendment caselaw, the new safe harbor regime not only allows qualifying transactions to proceed, but it also shields the board and other corporate actors from most legal challenges potentially stemming from such transactions.

Below we outline a three-step process that boards can use to evaluate and structure potentially conflicted transactions.

Step One: Does the act or transaction involve a controlling stockholder or a control group?

Historical Context: Under pre-amendment caselaw, a stockholder became a controlling stockholder (with accompanying fiduciary duties to the corporation and the other stockholders) if it exercised control over the business and affairs of the corporation. A minority stockholder (i.e., a person holding less than a majority in voting power of the corporation's stock) could exercise control if various indicia of control were present. In addition, a group of minority stockholders (and possibly other persons) could be deemed a controlling stockholder if they had an agreement to exercise actual control over the board.

In all of these cases, control could be defined as control over the corporation generally or control over the specific transaction in question. These were fact-intensive considerations and difficult for a board to evaluate in advance. In an effort to address this uncertainty, new §§144(e)(1) and (2) specify the circumstances in which stockholders and other persons are deemed to be a controlling stockholder or part of a control group.

1. ***Is there a controlling stockholder or a control group?*** The board must use the following criteria set forth in new §§144(e)(1) and (2) to determine whether any of the corporation's stockholders are controlling stockholders or whether any stockholders or other persons have formed a control group. If there is no controlling stockholder or control group, the board should skip to the "Step Two" analysis below.

Controlling Stockholder	**Control Group**
A person is a controlling stockholder if, together with such person's affiliates and associates, it: 1. Owns or controls a majority in voting power of the outstanding stock entitled to vote generally in the election of directors or in the election of directors who have a majority in voting power of the votes of all directors on the board; 2. Has contractual or other rights to cause the election of nominees who are selected at the discretion of such person and who constitute either a majority of the members of the board or directors entitled to cast a majority in voting power of the votes of all directors on the board; or 3. Has power functionally equivalent to that of a stockholder that owns or controls a majority in voting power of the outstanding stock entitled to vote generally in the election of directors by virtue of: • The ownership or control of at least 1/3 in voting power of the outstanding stock entitled to vote generally in the election of directors or in the election of directors who have a majority in voting power of the votes of all directors on the board; and • Power to exercise managerial authority over the business and affairs of the corporation.	A control group exists if two or more persons: 1. Are not controlling stockholders; and 2. By virtue of an agreement, arrangement, or understanding among such persons, constitute a controlling stockholder.

Further Considerations: The amendments eliminate much (but not all) of the guesswork in controlling stockholder and control group determinations. In particular, boards should be aware of the following:

- The amendments set 1/3 in voting power as the threshold for minority stockholders to exercise control—a stockholder holding less cannot be a controlling stockholder (unless separately qualifying by having a right to elect a majority of the board or directors holding a majority of the board votes).

- Boards should be able to easily identify stockholders that meet either of the first two criteria for determining controller status. However, for the third criterion, boards will find it more challenging to determine, with certainty, when a minority stockholder has "managerial authority," which is not defined in §144. Boards and courts will likely understand the term with reference to the body of Delaware caselaw that addresses the indicia of minority stockholder control. Such indicia are often imprecise, and boards may be best served by taking a conservative approach and, when in doubt, implementing safeguards to qualify for the new statutory safe harbors.

  Potential indicia of managerial authority could include:

  - A right to nominate and cause the election of directors (even if not a majority of the board);
  - An ability to influence corporate policies through approval rights or other governance privileges;
  - Holding multiple influential roles within the company, such as founder, c-suite positions, and/or board chair;
  - Evidence of personal relationships with directors, including travel together and attendance at family events;
  - Evidence of financial leverage over directors, including other business relationships;
  - Evidence of commercial leverage over the corporation as a key customer, supplier, or partner;
  - Statements in securities law filings indicating significant influence over the corporation; and
  - Indications of deferential loyalty from directors.
- Unlike pre-amendment caselaw, the concept of control under new §144(e)(2) is determined only with reference to the corporation generally and not with reference to individual transactions. This means that a stockholder is either a controlling stockholder for all of its transactions with the corporation or none of its transactions with the corporation.
- The control group definition resolves two significant points under pre-amendment caselaw:
  - The definition applies to "persons" (not just stockholders), which means for example, that non-stockholder members of management could be included in a control group.

- The definition clarifies that only non-controlling stockholders may form a control group, which means that minority stockholders and other persons cannot be deemed to be a control group by entering into an arrangement with an existing controlling stockholder.

2. ***If the corporation has a controlling stockholder or a control group, are they involved in the act or transaction?*** The board must determine whether either of the following criteria defined under new §144(e)(3) apply:

The act or transaction involves the corporation (or one or more of its subsidiaries) on one side and a controlling stockholder or control group on the other side.	OR	A controlling stockholder or control group receives a financial or other benefit from the act or transaction that is not shared with the corporation's stockholders generally.

If none of these criteria apply, the board should skip to the "Step Two" analysis below.

3. ***Is the act or transaction a going private transaction?*** The board must determine whether the act or transaction with a controlling stockholder or control group meets either of the following definitions of a going private transaction under new §144(e)(6):

For a corporation that has a class of equity securities subject to §12(g) or §15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") or listed on a national securities exchange, the transaction is a "Rule 13e-3 transaction" as defined in Rule 13e-3(a)(3) of the Exchange Act. Generally, a Rule 13e-3 transaction is a transaction, such as a merger, involving a public company and one or more of its affiliates that results in the de-registration or de-listing of a class of equity securities of the public company.	OR	For any other corporation, the act or transaction is one in which all or substantially all of the shares of the corporation's capital stock held by the disinterested stockholders (but not those of the controlling stockholder or control group) are cancelled, converted, purchased, or otherwise acquired or cease to be outstanding. Such an act or transaction can include a merger, recapitalization, share purchase, consolidation, amendment to the certificate of incorporation, tender offer, exchange offer, conversion, transfer, domestication, or continuance.

If the act or transaction is a going private transaction, then one of the following sets of procedural safeguards under new §144(c) must be employed in order for the transaction to qualify for safe harbor status:

Option A – Committee and Minority Stockholder Approval

1. The board forms a committee consisting of two or more directors, each of whom the board has determined to be a disinterested director with respect to the act or transaction. The board must expressly delegate to the committee the authority to negotiate (or oversee the negotiation of) and to reject such act or transaction.
2. The material facts of the act or transaction (including the interests of the controlling stockholder or the control group) are disclosed or are known to all members of the committee.
3. The act or transaction is approved (or recommended for approval) in good faith and without gross negligence by a majority of the disinterested committee members.
4. The act or transaction is conditioned, by its terms (as in effect at the time it is submitted to stockholders for their approval or ratification), on the approval or ratification by the disinterested stockholders.
5. The act or transaction is approved or ratified by an informed, uncoerced, and affirmative vote of a majority of the votes cast by the disinterested stockholders.

Option B – Fairness Approach

The act or transaction is fair as to the corporation and its stockholders.

Further Considerations: A going private transaction may be structured as a two-step intermediate-form merger relying on DGCL §251(h), which does not require stockholder approval if, upon consummation of the tender offer, the controlling stockholder holds sufficient shares to approve the merger. However, for such a transaction to qualify for the safe harbor under the amendment, a vote of the disinterested stockholder is still required. New §144(d)(7) provides that for such a vote:

- Shares irrevocably accepted for purchase or exchange pursuant to an offer contemplated under §251(h) shall be deemed voted in favor of the act or transaction.
- Shares owned or controlled by disinterested stockholders that have not been irrevocably accepted for purchase or exchange under such an offer shall be deemed voted against the act or transaction.

Obtaining the disinterested stockholder approval using a two-step intermediate-form merger relying on §251(h) would, as a practical matter, require the approval of a greater number of shares than obtaining such approval at a stockholder meeting because a two-step transaction requires the tender of a majority of the outstanding shares held by disinterested stockholders,

while approval for a one-step merger transaction only requires approval by a majority of the votes cast by the disinterested stockholders at a stockholders meeting.

4. ***If the act or transaction is NOT a going-private transaction,*** then it will qualify for safe harbor status under new §144(b) if the board employs any one of the following sets of procedural safeguards:

Option A – Committee Approval

1. The board forms a committee consisting of two or more directors, each of whom the board has determined to be a disinterested director with respect to the act or transaction. The board must expressly delegate to the committee the authority to negotiate (or oversee the negotiation of) and to reject such act or transaction.
2. The material facts of the act or transaction (including the interests of the controlling stockholder or the control group) are disclosed or are known to all members of the committee.
3. The act or transaction is approved (or recommended for approval) in good faith and without gross negligence by a majority of the disinterested committee members.

Option B – Minority Stockholder Approval

1. The act or transaction is conditioned, by its terms (as in effect at the time it is submitted to stockholders for their approval or ratification) on the approval or ratification by the disinterested stockholders.
2. The act or transaction is approved or ratified by an informed, uncoerced, and affirmative vote of a majority of the votes cast by the disinterested stockholders.

Option C – Fairness Approach

The act or transaction is fair as to the corporation and its stockholders.

Historical Context: Delaware courts have long recognized the danger of a controlling stockholder using its control to "freeze out" or "squeeze out" the minority stockholders by adopting a transaction that forces the minority stockholders to sell their shares for cash, often in a going-private transaction. Delaware courts reviewed such transactions for entire fairness, the most onerous standard of review.

However, if the transaction were approved after applying stringent procedural safeguards (referred to as the "*MFW* framework"), then the court would review the transaction under the

more deferential business judgment rule.[4] Specifically, the *MFW* framework required defendants to show that the transaction was conditioned from the outset (*ab initio*—before substantive negotiations) on approval by both (1) a special committee of the board that was independent, fully empowered, and meets its duty of care and (2) an informed, uncoerced vote of the majority of the minority stockholders.

In 2024, the Delaware Supreme Court held that the *MFW* framework applied not only to freeze-out mergers but to all transactions in which a controlling stockholder receives a non-ratable benefit, including for example, charter amendments and compensation packages benefitting a controlling stockholder.[5]

The amendments depart from this approach and instead limit full *MFW*-like safeguards to going-private freeze-out transactions. All other controlling stockholder transactions require either committee approval or minority stockholder approval, but not both.

Notable differences between the pre-amendment safeguards and those of the amendments include the following:

- The amendments make clear that the procedural safeguards apply to control groups.
- To satisfy the pre-amendment *MFW* framework, the transaction had to be conditioned from the outset (*ab initio*) on special committee and minority stockholder approval. It was not uncommon for corporations to fail to qualify for business judgment protection due to inadvertent or technical violations of this requirement. New §144(b)(2) does away with the *ab initio* requirement and requires that the terms of the transaction (as in effect at the time it is submitted for stockholder approval) condition the transaction only on the approval of the disinterested stockholders.
- Where pre-amendment minority stockholder approval required the affirmative vote of a majority of shares outstanding held by all of the disinterested stockholders, the new §144(b)(2) requires approval of only the majority of votes cast by the disinterested stockholders.

[4] *In re MFW Shareholders Litigation*, 67 A.3d 496, C.A. No. 6566-CS (Del. Ch. 2013), affirmed sub nom., *Khan v. M & F Worldwide Corp.*, 88 A.3d 635, No. 334, 2013 (Del. 2014).

[5] *In re Match Group, Inc.*, 315 A.3d 446, No. 368, 2022 (Del. 2024) (applying the so-called "*MFW* framework").

<u>Step Two</u>: If the act or transaction does not involve controlling stockholders or a control group, are directors or officers of the corporation involved? Under new §144(a), the board must determine whether directors or officers are involved in the transactions in one of two ways:

The act or transaction involves: 1. The corporation (or one or more of its subsidiaries) on one side; and 2. One or more of the corporation's directors or officers on the other side.	OR	The act or transaction involves: 1. The corporation (or one or more of its subsidiaries) on one side; and 2. On the other side is a corporation, partnership (general or limited), limited liability company, statutory trust, association, or other entity or organization; and 3. One or more of the directors or officers of the corporation are directors, stockholders, partners, managers, members, or officers, or have a financial interest in such other entity or organization.

If the board determines that directors or officers of the corporation are involved in the act or transaction, then one of the following sets of procedural safeguards under new §144(a) must be employed for the transaction to qualify for safe harbor status:

Option A – Board/Committee Approval

1. The material facts as to the director's or officer's relationship or interest and as to the act or transaction (including any involvement in its initiation, negotiation, or approval) are disclosed or known to all members of the board or a board committee; and
2. The board or committee in good faith and without gross negligence authorizes the act or transaction by the affirmative votes of a majority of the disinterested directors of the board or committee (as applicable), even though the number of disinterested directors is below the threshold for a quorum.

Note: If a majority of the directors are not disinterested directors with respect to the act or transaction, the act or transaction must be approved (or recommended for approval) by a board committee that consists of two or more directors, each of whom the board has determined to be a disinterested director with respect to the act or transaction.

Option B – Minority Stockholder Approval

The act or transaction is approved or ratified by an informed, uncoerced, and affirmative vote of a majority of the votes cast by the disinterested stockholders.

Option C – Fairness Approach

The act or transaction is fair as to the corporation and its stockholders.

Historical Context: The special committee prong of the *MFW* framework required that the conflicted transaction be approved by a committee composed entirely of independent directors. For director and officer conflicted transactions, the new §144(a)(1) does not require a special committee, unless a majority of the directors are not disinterested, in which case the transaction must be approved by a committee that consists of at least two directors, each of whom the board has determined to be disinterested.

Also, given the limited case law addressing officer conflicted transactions, the new §144(a) provides welcome clarity for how boards are to address such transactions.

Step Three: Are the safe harbor requirements met? Even if a transaction is eligible for a safe harbor, the board must ensure that all of the requirements are actually met, including the following criteria for identifying disinterested directors and stockholders. This section also discusses the fairness approach as a fallback option.

1. Determine which directors and stockholders are disinterested. A key element for the board in determining whether an act or transaction qualifies for a safe harbor is whether it has been approved by the requisite disinterested directors and/or stockholders. Under new §§144(e)(4) and (5), the board must use the following criteria to determine, on a case-by case basis, whether a director or stockholder is disinterested:

Disinterested Director	**Disinterested Stockholder**
A director who: 1. Is not a party to the act or transaction; 2. Does not have a material interest in the act or transaction. "Material interest" is defined as an actual or potential benefit, including the avoidance of a detriment, other than one which would devolve on the corporation or the stockholders generally that would reasonably be expected to impair the objectivity of the director's judgment when participating in the negotiation,	Any stockholder that: 1. Does not have a material interest in the act or transaction. "Material interest" is defined as an actual or potential benefit, including the avoidance of a detriment, other than one which would devolve on the corporation or the stockholders generally that would be material to the stockholder; and 2. Does not have, if applicable, a material relationship with the controlling stockholder or other

authorization, or approval of the act or transaction; and 3. Does not have a material relationship with a person that has a material interest in the act or transaction. "Material relationship" is defined as a familial, financial, professional, employment, or other relationship that would reasonably be expected to impair the objectivity of the director's judgment when participating in the negotiation, authorization, or approval of the act or transaction. **Note:** Under new §144(d)(3), the designation, nomination, or vote in the election of the director to the board by any person that has a material interest in the act or transaction is not, of itself, evidence that a director is not a disinterested director with respect to an act or transaction to which the director is not a party.	member of the control group or any other person that has a material interest in the act or the transaction. "Material relationship" is defined as a familial, financial, professional, employment, or other relationship that would be material to the stockholder.

Further Considerations:

- **Listed Company Directors:** Under new §144(d)(2), directors of companies that have a class of stock listed on a national securities exchange are presumed to be disinterested if:
    1. He or she is not a party to the act or transaction; and
    2. The board has determined that such director satisfies the applicable criteria for determining director independence from the corporation and, if applicable with respect to the act or transaction, the controlling stockholder or control group under the rules (and their interpretation) promulgated by the exchange (treating the controlling stockholder and control group as if the controlling stockholder and control group were the corporation in applying such criteria to determine independence from the controlling stockholder or control group).

This presumption is "heightened" and may only be rebutted by substantial, particularized facts that the director has a material interest in the act or transaction or a material relationship with a person with a material interest in the act or transaction.

- **Factual Inquiries:** Although the amendments have simplified the standards of disinterestedness compared to pre-amendment caselaw, they employ a materiality standard that will continue to require boards to engage in a factual assessment of interests and relationships and their relative benefit to individual directors and stockholders.
- **Quorum:** New §144(d)(1) provides that common or interested directors may be counted in determining the presence of a quorum at board and committee meetings authorizing an act or transaction.

Historical Context: Under pre-amendment caselaw, a transaction involving a director was deemed conflicted (and subject to entire fairness scrutiny) if a majority of the directors approving the transaction were not disinterested and independent. The amendment safe harbors require only a showing of disinterestedness and have simplified the various caselaw standards to focus on a material interest and material relationships.

2. Will the corporation rely on the fairness safe harbor? Even if none of the other safe harbor requirements are met, amended §144 offers safe-harbor status as a fallback to transactions that are "fair to the corporation and the corporation's stockholders." Amended §144 does not define "fairness" for this purpose, but it is likely that courts will look to the caselaw principles that govern entire fairness review. Entire fairness requires corporate actors to prove that a conflicted transaction involved both (1) fair dealing, where the court reviews how the transaction was proposed, structured, negotiated, and approved; and (2) fair price, where the court reviews the economic and financial aspects of the transaction.

Further Considerations: The entire fairness standard of review is the most onerous under Delaware law and subject to a variety of considerations that hinge on the facts and circumstances of a particular transaction. In planning the approval of a conflicted transaction, it is advisable that the board seek to satisfy the other safe harbor options and view the fairness approach as a fallback.

In any event, in approving any conflicted transaction, the board should seek to obtain a fair outcome for the stockholders. Generally, this may be done in the following ways:

- Establish a fair process showing that, for example, the timing of the transaction was right for the company, the deal was effectively negotiated on behalf of the company (such as negotiating better terms than originally proposed by leveraging information

obtained through due diligence), conflicted parties did not dominate the process, and the deal terms were fully disclosed to and approved by appropriate stakeholders.

- Reach a fair price, including with reference to market data and a financial advisor's fairness opinion. For Delaware courts, approval by disinterested stockholders is strong evidence that the price obtained was fair.

Safe harbor qualification carries significant benefits but does not eliminate all potential liabilities. Under pre-amendment caselaw, a conflicted transaction that satisfied the procedural safeguards was no longer subject to entire fairness review and was instead reviewed under the deferential business judgment rule. Qualifying for a safe harbor under amended §144 goes further and exempts the corporate actors from the following categories of claims related to the act or transaction:

Controlling Stockholder and Control Group Transactions	**Director and Officer Transactions**
Under the new §§144(b) and (c), the act or transaction may not be the subject of equitable relief or an award of damages against any director, officer, controlling stockholder, or member of a control group by reason of a claim based on a breach of fiduciary duty by a director, officer, controlling stockholder or a member of a control group.	Under the new §144(a), the act or transaction may not be the subject of equitable relief or give rise to an award of damages against a director or officer: • Because of the circumstances giving rise to the conflicted transaction • Because of the receipt of any benefit by such director, officer, entity, or organization • Because the director or officer was present at or participated in the meeting of the board or committee authorizing the act or transaction • Because the director or officer was involved in the initiation, negotiation, or approval of the act or transaction (including by virtue of the director's vote being counted for such purpose).

However, new §144(d)(6) provides that even if a transaction qualifies for safe harbor status, the following categories of claims cannot be limited or eliminated:

- The right of any person to seek equitable relief on the grounds that the act or transaction was not authorized or approved in compliance with the procedures set forth in the DGCL or the certificate

of incorporation or bylaws, or is in violation of any plan, agreement, or governmental order to which the corporation is a party or subject.

- Judicial review for purposes of injunctive relief of provisions or devices designed or intended to deter, delay, or preclude a change of control or other transaction involving the corporation or a change in the composition of the board.
- The right of any person to seek relief on grounds that a stockholder or other person knowingly aided and abetted a breach of fiduciary duty by one or more directors.

Further Considerations: In addition to ensuring that safe harbor requirements are satisfied, the board should also ensure that the transaction is otherwise approved in accordance with the charter documents and does not violate existing agreements or governmental orders.

The safe harbor protections from liability are formidable, especially when combined with the new §144(d)(5) controlling stockholder exculpation for duty of care claims (discussed above) and any provision for exculpation of directors and officers in the certificate of incorporation.

For officers, the safe harbor protections are especially helpful. Pre-amendment caselaw with regard to officer fiduciary duties, conflicts, and potential liability is much less developed than that applicable to directors and controlling stockholders, leaving many areas of uncertainty.

Notably, the safe harbor protections do not extend to third parties such as advisors and counter-parties to the transaction. The amendments specifically preserve aiding and abetting claims against stockholders and other persons, such as advisors and counterparties, who knowingly participate in a director's breach of fiduciary duty.

What if a conflicted transaction fails to qualify for a safe harbor? If a conflicted transaction fails to satisfy any of the safe harbor criteria, including the fairness fallback, the relevant directors, officers, controlling stockholders, and control group members may be exposed to liability, including monetary damages, for breaches of their fiduciary duties. Delaware courts will assess whether to impose liability based on the individual conduct of such corporate actors:

- For breaches of the duty of care, controlling stockholders benefit from §144(d)(5) exculpation, and directors and officers may benefit from similar exculpation under the certificate of incorporation, subject to limitations relating to bad faith, intentional misconduct, knowing violations of law, and receipt of an improper personal benefit.
- Breaches of the duty of loyalty cannot be exculpated and will result in liability if proven that the director, officer, or controlling stockholder acted in a self-interested manner adverse to stockholder interests, lacked independence, or acted in bad faith.

The §144 safe harbors are not exclusive protections and do not preclude other Delaware common law protections, including circumstances under which the business judgment rule is presumed to apply.

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Summary Table

Applicable To	**Controlling Stockholders** [§144(e)(2)] and **Control groups** [§144(e)(1)]		**Directors** and **Officers**
Conflicted Transactions	[§144(e)(6)] **Going private transactions**, defined as any of the following: • Generally a transaction under Rule 13e-3 that results in the de-registration or de-listing of a class of equity securities of a public company; or • Any transaction in which all or substantially all of the capital stock held by disinterested stockholders is cancelled, converted, purchased, or otherwise acquired or ceases to be outstanding	[§144(e)(3)] **All other transactions**: • The act or transaction involves the corporation (or one or more of its subsidiaries) on one side and a controlling stockholder or control group on the other side; or • A controlling stockholder or control group receives a financial or other benefit from the act or transaction that is not shared with the corporation's stockholders generally.	[§144(a)] The act or transaction involves the corporation (or one or more of its subsidiaries) on one side and on the other side either: • One or more of the corporation's directors or officers; or • A corporation or other entity or organization in which one or more of the directors or officers of the corporation are directors, stockholders, partners, managers, members, or officers, or have a financial interest in such other entity or organization
Safe Harbor Requirements	Option A [§144(c)(1)] 1. The board forms a committee consisting of two or more directors, each of whom the board has determined to be a disinterested director with respect to the act or transaction. The board delegates to the committee the authority to negotiate and reject the act or transaction. 2. The material facts of the act or transaction (including the interests of the controlling stockholder or the control group) are disclosed or are known to all members of the committee. 3. The act or transaction is approved (or recommended for approval) in good faith and without gross negligence by a majority of the disinterested committee members. 4. The act or transaction is conditioned, by its terms (as in effect at the time it is submitted to stockholders for their approval or ratification) on the approval or ratification by the disinterested stockholders. 5. The act or transaction is approved or ratified by an informed, uncoerced, and affirmative vote of a majority of the votes cast by the disinterested stockholders. Option B [§144(c)(2)] The act or transaction is fair as to the corporation and its stockholders.	Option A [§144(b)(1)] 1. The board forms a committee consisting of two or more directors, each of whom the board has determined to be a disinterested director with respect to the act or transaction. The board delegates to the committee the authority to negotiate and reject the act or transaction. 2. The material facts of the act or transaction (including the interests of the controlling stockholder or the control group) are disclosed or are known to all members of the committee. 3. The act or transaction is approved (or recommended for approval) in good faith and without gross negligence by a majority of the disinterested committee members. Option B [§144(b)(2)] 1. The act or transaction is conditioned, by its terms (as in effect at the time it is submitted to stockholders for their approval or ratification) on the approval or ratification by the disinterested stockholders. 2. The act or transaction is approved or ratified by an informed, uncoerced, and affirmative vote of a majority of the votes cast by the disinterested stockholders. Option C [§144(b)(3)] The act or transaction is fair as to the corporation and its stockholders.	Option A [§144(a)(1)] 1. The material facts as to the director's or officer's relationship or interest and as to the act or transaction are disclosed or known to all members of the board or a board committee; and 2. The board or committee in good faith and without gross negligence authorizes the act or transaction by the affirmative votes of a majority of the disinterested directors of the board or committee, even though the disinterested directors be less than a quorum. Note: If a majority of the directors are not disinterested directors with respect to the act or transaction, the act or transaction must be approved by a board committee that consists of two or more directors, each of whom the board has determined to be a disinterested director with respect to the act or transaction. Option B [§144(a)(2)] The act or transaction is approved or ratified by an informed, uncoerced, and affirmative vote of a majority of the votes cast by the disinterested stockholders. Option C [§144(a)(3)] The act or transaction is fair as to the corporation and its stockholders.

Summary Table

Applicable To	**Controlling Stockholders** and **Control groups**	**Directors** and **Officers**
Safe Harbor Protection	[§144(b) & (c)] The transaction may not be the subject of equitable relief or an award of damages against any director, officer, controlling stockholder, or member of a control group by reason of a claim based on a breach of fiduciary duty by a director, officer, controlling stockholder or a member of a control group.	[§144(a)] The act or transaction may not be the subject of equitable relief or give rise to an award of damages against a director or officer: • Because of the circumstances giving rise to the conflicted transaction • Because of the receipt of any benefit by such director, officer, entity, or organization • Because the director or officer was present at or participated in the meeting of the board or committee authorizing the act or transaction • Because the director or officer was involved in the initiation, negotiation, or approval of the act or transaction (including by virtue of the director's vote being counted for such purpose).
Preserved Claims	[§144(d)(6)] These safe harbor cannot limit or eliminate the following: • The right of any person to seek equitable relief on the grounds that the act or transaction was not authorized or approved in compliance with the procedures set forth in the DGCL or the certificate of incorporation or bylaws, or is in violation of any plan, agreement, or governmental order. • Judicial review for purposes of injunctive relief of provisions or devices designed or intended to deter, delay, or preclude a change of control or other transaction involving the corporation or a change in the composition of the board. • The right of any person to seek relief on grounds that a stockholder or other person knowingly aided and abetted a breach of fiduciary duty by one or more directors.	