Insights:
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This issue focuses on important, developing areas of Delaware corporation law and deal litigation, including plaintiff litigation tactics focused on financial advisors, recent decisions considering *MFW* and *Corwin*, and rulings addressing the applicability of Sections 204 and 205 to certain defective acts.

Delaware Litigation Developments Impacting Financial Advisors

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Over the last few years, significant developments in Delaware law and practice have changed the traditional M&A litigation landscape. These developments resulted in a dramatic reduction in pre-closing applications for injunctions that dominated the M&A litigation practice in Delaware for decades and a marked decrease in M&A-related filings overall in the Delaware Court of Chancery.[1] Instead, stockholder plaintiffs have focused their efforts primarily on selected cases pursued post-closing as money damages actions or, in certain instances, statutory appraisal proceedings.

These changes — particularly the increased attention in the Court of Chancery on money damages as a remedy — have resulted in stockholder plaintiffs crafting new litigation tactics that focus on defendants they believe have "deep pockets," including financial advisors. As the court has explained, it is well-established under Delaware law that "because of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, this Court has required full disclosure of investment banker compensation and potential conflicts."[2] Plaintiffs have also looked to purported banker conflicts, particularly those that are undisclosed to the board or stockholders approving a transaction, as a basis to name a financial advisor as a defendant in deal litigation on an aiding-and-abetting theory.

Plaintiffs have maintained this focus on financial advisors, notwithstanding the Delaware Supreme Court's clarification in *RBC Capital Markets, LLC v. Jervis* that the high bar for pleading scienter "makes an aiding and abetting claim among the most difficult to prove." Financial institutions that are responding to subpoenas or are named as defendants in litigation challenging M&A transactions in which they acted as advisors should keep these plaintiff litigation strategies in mind and develop potential defenses accordingly.

[1] "M&A Litigation Developments: Where Do We Go From Here?" *Insights: The Delaware Edition* (May 29, 2018); *see also* "Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation," *Cornerstone Research* (July 18, 2018) (reporting that "[t]he number of deals litigated in Delaware declined 81 percent from 2016 to 2017").

[2] *See, e.g.*, *Vento v. Curry*, 2017 WL 1076725 (Del. Ch. Mar. 22, 2017) (requiring disclosure regarding the amount of financing-related fees the financial advisor for the acquiror stood to receive in connection with stock-for-stock merger).

Responding to a Subpoena

Traditionally, the financial advisor's role in M&A litigation was perceived as that of a nonparty, limited to responding to a subpoena. The role often entailed producing limited documents or offering a single banker witness to testify about narrow topics, such as the financial advisor's role in the deal process and valuations provided to the board. This perception has evolved along with the current M&A landscape.

For example, the Court of Chancery has recently remarked that financial advisors faced with a subpoena are considered more than just nonparties with little stake in the dispute. Specifically, in a recent transcript ruling, the Court of Chancery granted a motion to compel against a nonparty financial advisor faced with a subpoena and ordered it to produce documents consistent with the "ambitious schedule" to which the parties in the case had agreed. *Cumming v. Edens*, C.A. No. 13007-VCS (Del. Ch. July 12, 2018) (Transcript). In its decision, the court emphasized that "when investment bankers are involved in complex transactions, they take a very important role," and "the bankers are compensated well for the work that they have done," such that responding to a subpoena is simply a "cost of doing business." As a result, the court felt it was "not the case" that financial advisors should be considered "third part[ies] with marginal involvement in the dispute," justifying imposing a minimal burden. Thus, financial advisors responding to subpoenas should be cognizant that arguments about burden in responding to subpoenas may not have as much force as they have in the past.

Until the last several years, financial advisors rarely were named as defendants. However, in the current M&A litigation landscape, plaintiffs increasingly have targeted financial advisors. The plaintiffs' intentions, though, are not always transparent at the outset of litigation. Instead, plaintiffs' attorneys pursuing a post-closing breach of fiduciary duty action in a deal litigation against a board of directors attempt to lull financial advisors into a false sense of security by serving them with a subpoena, making them believe they are not a focus of the litigation, and coaxing them into providing extensive documents. Then, with just a few months left in the case schedule, sometimes near or after the close of discovery, the complaint will be amended to add the financial advisor as an additional defendant on an aiding and abetting theory.

In *RBC* — well known for affirming a more than $75 million damages award against the financial advisor — that is precisely the tactic the plaintiff employed. Doing so may have downplayed the risk the financial advisor believed it faced when responding to the subpoena and forced the financial advisor to quickly review and assess the discovery already taken in the case in order to develop a trial defense. One notable risk for a financial advisor is post-trial monetary liability for aiding and abetting breaches of fiduciary duty, even in a circumstance where monetary damages may not be available against directors because of a Section 102(b)(7) exculpatory provision barring damages for duty-of-care violations. Plaintiffs have continued to follow this blueprint in subsequent cases. Therefore, it is crucial that financial advisors identify this tactic early so that they have a greater opportunity to strategize and approach subpoena discovery with an eye toward the possibility of becoming a defendant.

Discovery in Appraisal Litigation

Plaintiffs' attorneys have even used appraisal litigation as an angle to ultimately reach financial advisors. In the current deal litigation landscape where pre-closing injunctions are rare, many plaintiffs' attorneys have complained that they no longer have access to the documents or deposition testimony they once received in expedited discovery as part of an injunction application. Stockholder plaintiffs therefore have gotten creative in their efforts to obtain discovery to challenge fiduciary conduct post-closing, including by seeking documents through appraisal proceedings.[3] By statute, parties to appraisal proceedings are limited and include stockholder petitioners and a respondent corporation. However, petitioners that seek appraisal typically obtain

[3] Stockholder plaintiffs also have increasingly turned to Section 220 books-and-records requests for documents they can use to bolster post-closing breach of fiduciary claims for money damages relating to a merger or other transaction on behalf of a stockholder class. *See*, *e.g.*, *Lavin v. West Corporation*, 2017 WL 6728702 (Del. Ch. Oct. 9, 2017).

access to liberal discovery in preparation for the appraisal trial, which, in light of recent case law suggesting that deal price is often the best evidence of fair value,[4] usually includes discovery regarding the conduct of fiduciaries and financial advisors during the deal process. As Vice Chancellor J. Travis Laster explained recently in *In re Appraisal of Columbia Pipeline Group, Inc.*, where broad discovery about the merger process was sought, "[n]o one forced [respondent] to rely on the deal price as the principal evidence of fair value. Having chosen to advance that valuation argument, [respondent] opened the door to discovery into its sale process."

With this increased focus on deal process, it is perhaps unsurprising that recent appraisal cases have also delved into perceived conflicts on the part of financial advisors. For example, in *In re Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, the Court of Chancery found that unaffected market price was the "most reliable" indication of fair value and also found what the court characterized as certain "defects" in the sales process, which included the seller's financial advisor seeking to "rehab" its strained relationship with the buyer instead of zealously advocating on its client's behalf. In *Blueblade Capital Opportunities LLC v. Norcraft Cos.*, Inc., the court declined to rely on the deal price as evidence of fair value, citing, among other things, its view that the sell-side advisor acted improperly by affirmatively dissuading potential buyers from coming forward to make a bid during a post-signing go-shop period.

Additionally, some petitioners will use the discovery obtained in an appraisal action to amend their pleading and add new claims on behalf of a stockholder class — for breach of fiduciary duty against the target board members, and aiding and abetting against the financial advisors or others. This creates the possibility that both the appraisal action and the classwide breach of fiduciary duty action may be tried simultaneously. Depending on when this happens, much like the approach stockholder plaintiffs are taking with subpoenas, stockholder plaintiffs can take steps in an appraisal action to leave a financial advisor rushing to catch up to develop a merits-based trial defense to an aiding-and-abetting claim for money damages.

Partial Settlements Excluding Financial Advisor Defendants

Stockholder plaintiffs have also used strategies to place financial advisor defendants at a disadvantage when negotiating a settlement. One such strategy involves the stockholder plaintiffs pressing for a partial settlement with the fiduciaries named in the lawsuit while excluding the financial advisor. The timing of such a partial settlement can create complications. For example, in *RBC*, the plaintiffs entered into a partial settlement with the fiduciary defendants mere days before trial. This significantly increased the financial advisor's burden at trial not only to defend itself against aiding-and-abetting claims but also to assume the mantle of arguing that no predicate breach of fiduciary duty had occurred. The Court of Chancery in *RBC* denied the financial advisor's motion to continue the trial. The plaintiffs in the *Good Technology* litigation also tried this tactic, but in that case the financial advisor reached a settlement on the eve of trial that was fully funded by the acquirer. The relevant terms of a financial advisor's engagement letter may have bearing on this type of partial settlement tactic. Even when the financial advisor is part of a pre-trial partial settlement, the court may still make post-trial findings about its perceived conflicts that have bearing on process-related issues, resulting in unwanted publicity. For example, in *In re PLX Technology Inc. Stockholders Litigation*, in addition to addressing the facts and claims against the remaining trial defendant, the court noted, regarding its views about the process, that the financial advisor's motivations appeared to have "influenced the [target company's] boardroom dynamic and therefore deserve mention." In particular, the court looked to the financial advisor's "contingent fee arrangement" and "longstanding and thick relationship" with the buyer as reasons why the financial advisor had "significant reasons to favor a near-term sale" to the buyer.

[4] *See, e.g., Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1 (Del. 2017).

Takeaways

In light of the current deal litigation landscape, financial advisors should be prepared to respond and adapt to new stockholder plaintiff tactics in order to protect their interests.

- Plaintiffs' attorneys pursuing deal litigation are hyper-focused on financial advisor "conflicts," both in terms of disclosure claims and as the basis for claims of aiding and abetting and breach of fiduciary duty. Building a record of disclosing any potential conflicts to the board and client company in the transaction process and, where applicable, to stockholders voting to approve a transaction is one method for mitigating against such claims.
- Disclosures to stockholders in the deal litigation context are particularly important in light of the Delaware Supreme Court's decision in *Corwin v. KKR Financial Holdings LLC*, which requires a fully informed vote of disinterested, uncoerced stockholders before an irrebuttable business judgment presumption may apply.
  - In *Singh v. Attenborough*, the Delaware Supreme Court affirmed the dismissal of an aiding-and-abetting claim against a financial advisor, holding that because "the stockholder vote was fully informed and voluntary, the Court of Chancery properly dismissed the plaintiffs' claims against all parties."
- When responding to a subpoena, financial advisors should keep in mind that the court may be less receptive to arguments about undue burden, in part because the court does not credit financial advisors as mere nonparties with marginal involvement in the dispute.
- Financial advisors also should be aware that even if they are not named as defendants at the outset of litigation, they could be named later on in the case. Accordingly, financial advisors should consider developing litigation strategies with their counsel early, before they are named as defendants, and approach subpoenas or other nonparty discovery (including potential objections as to privilege, relevance and scope) with that strategy in mind. Financial advisors should take these precautions not only in traditional deal cases alleging breaches of fiduciary duty but also in appraisal litigation.
- In addition to litigation strategy, financial advisors that are named as defendants also need to understand their indemnification and settlement rights and consider strategy around those rights as early as possible once litigation is filed.

From the Get-Go: Interpreting *MFW's Ab Initio* Requirement

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> **See page 7 for takeaways**

The Delaware Supreme Court's seminal decision in *Kahn v. M&F Worldwide Corporation* (*MFW*) offers a pathway for having challenges to controlling stockholder "squeeze-out" mergers reviewed under the highly deferential business judgment rule rather than Delaware's most onerous standard of review, entire fairness.[1] According to the Supreme Court, "[T]he business judgment standard of review will be applied *if and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority."

Although the Supreme Court set forth six requirements, courts and practitioners often condense the rule to its two core principles, or "dual procedural protections" — namely, that the transaction must be approved by (i) an empowered, independent special committee and (ii) a fully informed, uncoerced majority of the minority vote. In *MFW*, the Supreme Court instructed that a transaction must be conditioned on these dual protections *ab initio*, *i.e.*, "from inception" or before "procession of the transaction." The court reasoned that the *ab initio* requirement is necessary because it forces the controlling stockholder to acknowledge from the outset "that it cannot bypass the special committee's ability to say no," and that "it cannot dangle a majority-of-the-minority vote before the special committee late in the process as a deal-closer rather than having to make a price move."

Recently, the Delaware Supreme Court and the Court of Chancery have had the opportunity to further develop the *ab initio* requirement.

Discussions vs. Negotiations

In October 2018, the Supreme Court opined on the *ab initio* requirement for the first time since *MFW* in *Flood v. Synutra International, Inc.*[2] In the Court of Chancery, the stockholder plaintiff argued that *MFW* did not apply to a squeeze-out merger because the control group's initial nonbinding proposal "did not condition a potential transaction on both a favorable committee recommendation and approval by a majority of the disinterested stockholders." The control group did, however, send a follow-up letter two weeks after its initial proposal in which it "expressly conditioned the transaction on the approval of the Special Committee and a majority of the minority stockholders." The trial court applied *MFW*, explaining that "[a] process meets the *ab initio* requirement when the controller announces the conditions 'before any negotiations took place.'" It then observed that "[t]he only arguably substantive event that happened before the Follow-up Letter" was that the target company's CFO authorized the company's primary outside counsel to represent the control group by waiving any conflict that the outside counsel might have. In rejecting the plaintiff's challenge to the *ab initio* requirement, the court noted that "[t]he prompt sending of the Follow-up Letter prevented the [control group] from using the [*MFW*] conditions as bargaining chips." The Court of Chancery thus held that "[t]he plaintiff has not pled facts sufficient to call into question compliance with the *ab initio* requirement."

The Supreme Court affirmed the Court of Chancery's decision. It explained that *MFW*'s *ab initio* requirement was satisfied because the "required preconditions were ... in place before any economic negotiation between the Special Committee and the controller occurred." The Supreme Court further explained that *MFW*'s *ab initio* requirement recognized that under prior doctrine, controllers had little incentive to condition approval

[1] 88 A.3d 635 (Del. 2014).

[2] No. 101, 2018 (Del. Oct. 9, 2018).

on a majority-of-the-minority vote at the outset and often times used a minority vote at the end of negotiations as a bargaining chip in lieu of a price bump. Under that circumstance, "those subject to the economic consequences of the process — the minority stockholders — were left either without a say or with a say at the potential expense of additional consideration that might have been extracted by tougher economic bargaining." Thus, "[t]he essential element of *MFW*, then, is that the [minority vote condition] cannot be dangled in front of the Special Committee, when negotiations to obtain a better price from the controller have commenced, as a substitution for a bare-knuckled contest over price." In other words, *MFW* requires a "controller to self-disable before the start of substantive economic negotiations."

Shortly before the Supreme Court issued its decision in *Flood*, the Court of Chancery addressed the difference between discussions and negotiations in *Olenik v. Lodzinski*.[3] The case involved an "Up-C" transaction, whereby two companies with the same controller entered into a stock-for-stock merger. The acquiring company's stockholders, who ended up with a minority interest in the resulting company, filed suit alleging that the controller and others had breached their fiduciary duties by using the merger as a bailout of their investments in the acquired company. They argued that *MFW* did not apply because, among other things, the controller did not condition the deal upon satisfaction of the dual procedural protections until after 10 months of "extensive" premerger discussions had occurred.

Despite those "extensive" discussions, the Court of Chancery held that the *ab initio* requirement was satisfied because the acquirer's first offer letter — the starting point of "negotiations" — expressly conditioned the deal on approval of both a special committee of independent directors and a majority vote of the acquirer's stockholders unaffiliated with the controller. In drawing a distinction between "discussions" and "negotiations," the court noted that "for purposes of the *MFW* analysis, in most instances, 'negotiations' begin when a proposal is made by one party which, if accepted by the counter-party, would constitute an agreement between the parties regarding the contemplated transaction."

[3] C.A. No. 2017-0414-JRS (Del. Ch. July 20, 2018).

Third-Party Transactions

In 2017, the Court of Chancery addressed the applicability of the *MFW* framework in a unique setting — third-party transactions where the controller receives a non-ratable benefit. The case, *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litigation*,[4] involved a merger where Sequential Brands Group acquired Martha Stewart Living Omnimedia (MSLO). The MSLO board established an independent special committee in 2014 with full authority to evaluate and recommend strategic transactions. In the spring of 2015, Sequential emerged as a possible buyer after having been spurned by MLSO six months earlier. Sequential did not mention a majority-of-the-minority vote in its initial proposal, but three weeks later sent a revised proposal, conditioning procession of the deal on the minority's approval. MSLO received the revised proposal before Sequential approached the special committee about negotiating separately with Stewart regarding her employment and intellectual property agreements, which were material benefits she alone would receive in the transaction.

After the merger was announced, minority stockholder plaintiffs filed suit alleging that Martha Stewart was MSLO's controlling stockholder and that she extracted non-ratable "side deals" in the form of the employment and intellectual property agreements. They argued that the transaction did not satisfy *MFW*'s *ab initio* requirement because Sequential did not condition procession of the deal on a majority-of-the-minority vote until well after it began negotiating with MSLO. The Court of Chancery disagreed. The court framed the question as, "[A]t what point must the parties to a potentially conflicted third-party transaction involving a controlling stockholder agree to the dual procedural protections in order for the controller to earn pleadings-stage business judgment deference?" The court stated the

[4] Consol. C.A. No. 11202-VCS (Del. Ch. Aug. 18, 2017).

plaintiffs' argument that the procedural protections must be in place at the outset of discussions between the target and the third party "would make no sense." Instead, the court held the *ab initio* requirement will be satisfied in a third-party transaction if the dual procedural protections are in place at "the point where the controlling stockholder actually sits down with an acquiror to negotiate for additional consideration." Ultimately, the Court of Chancery found that the transaction satisfied the *ab initio* requirement because both the independent special committee and the majority-of-the-minority vote were in place at the time Stewart began negotiating with Sequential.

Terminating Negotiations

In 2016, the Court of Chancery held that a controller can regain business judgment rule protection if an offer that does not comply with *MFW* is terminated and negotiations later begin anew and are conditioned on compliance with *MFW*. In *In re Books-A-Million, Inc. Stockholders Litigation*,[5] plaintiff stockholders argued that the *ab initio* requirement was not satisfied because the controllers' 2015 proposal to acquire Books-A-Million, which was conditioned from the outset on *MFW*'s dual protections, was a continuation of a prior, rejected proposal from 2012, "which did not have the twin conditions necessary for the [*MFW*] framework." Relying on contract law, the court held that was "not a reasonably conceivable inference" because the plaintiffs had acknowledged that "a special committee rejected the 2012 offer, thereby terminating it." The court went on to explain that "[t]he 2015 offer came nearly three years after the 2012 offer and contained a different price and different terms. The 2015 proposal was a different offer, and it generated a separate process." The court, therefore, held that the deal satisfied the *ab initio* requirement and dismissed the complaint.

[5] Consol. C.A. No. 11343-VCL (Del. Ch. Oct. 10, 2016).

Takeaways

Although perhaps straightforward in concept, the *ab initio* requirement has been the subject of judicial refinement in the four years that have followed the *MFW* decision. Recent decisions from the Delaware Supreme Court and Court of Chancery construing the *ab initio* requirement offer guidance for structuring controlling stockholder transactions in the future. These decisions teach that in certain circumstances:

- *MFW*'s dual protections may be established after initial discussions have occurred, as long as a potential transaction is expressly conditioned on the dual protections before economic negotiations begin.
- Third-party transactions where the controlling stockholder receives a material benefit that is not shared with the minority may receive business judgment rule review if the dual protections are in place before the controller begins negotiating with the third party.
- Once noncompliant negotiations are terminated, the controlling stockholder may get a fresh start by conditioning a new round of negotiations on the dual protections.

'Partial and Elliptical Disclosures' May Preclude *Corwin* Doctrine

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> See page 9 for key takeaways

Under *Corwin v. KKR Financial Holdings LLC*[1] and its progeny, "when disinterested, fully informed, uncoerced stockholders approve a transaction absent a looming conflicted controller," the irrebuttable business judgment rule applies.[2] *Corwin* "cleansing" precludes all challenges to a transaction except those predicated on waste, which are unlikely to succeed. As a result, whether *Corwin* applies can be case dispositive. In the recent *Morrison v. Berry* decision, the Delaware Supreme Court reversed a Delaware Court of Chancery dismissal that relied on the *Corwin* doctrine, reiterating when the application of *Corwin* would be appropriate and emphasizing the importance of complete and accurate disclosures in establishing a fully informed vote for purposes of invoking the *Corwin* doctrine.

In *Morrison* the court reversed a dismissal under *Corwin*, in which the plaintiff raised fiduciary duty claims arising from the sale of The Fresh Market (Market) to an entity controlled by private equity fund Apollo Management VII, L.P. (Apollo).[3] The acquisition was structured as a two-step merger pursuant to 8 *Del. C.* § 251(h). As part of the deal, Market's founder, Ray Berry, who together with his son owned approximately 9.8 percent of Market's outstanding common stock, rolled over his equity ownership for an approximate 20 percent stake in the acquiror post-closing. Nearly 80 percent of Market's outstanding shares tendered into the merger.

In connection with the transaction, Market publicly filed a Schedule 14D-9 and Apollo filed a Schedule TO, both of which included descriptions of the background of the transaction. While the tender offer was still pending, stockholder plaintiff Morrison sought and obtained books and records from the company pursuant to 8 *Del. C.* § 220. The plaintiff then filed a plenary action challenging the merger, alleging, among other things, that the 14D-9 contained material disclosure violations concerning Mr. Berry's role in the sale process.

The Court of Chancery found that, despite having "pursued documents to bolster her pleading under Section 220," the plaintiff had failed to plead facts from which it was reasonably conceivable that the potentially ratifying tender was materially uninformed. But on appeal, the Delaware Supreme Court disagreed with the vice chancellor and reversed, focusing on four alleged disclosure violations that rendered the 14D-9 materially misleading.

The court first concluded that the 14D-9 was misleading because it failed to disclose the timing of Mr. Berry's agreement to roll over his shares in a transaction with Apollo. An email, produced as part of the Section 220 demand, indicated that Mr. Berry and his son had agreed to roll over their equity as early as October 2015. That email contradicted Mr. Berry's prior statements to the Market board, memorialized in board minutes, that he did not have any such agreement with Apollo at that time. This undisclosed discrepancy was likely material, the court explained, because a "reasonable stockholder" "would want to know" that Mr. Berry had not been "forthcoming" with the board.

Next, the court concluded that the 14D-9 was misleading because it "impl[ied]" Mr. Berry's "openness to consider other bidders," but did not disclose that he had expressed to the board his view that "*only* Apollo would suffice."

In addition, the court found that the 14D-9 failed to disclose a "threat" that Mr. Berry would sell his shares if the board did not undertake a sale process. The Court of Chancery had found that the omission was not material because it would not "have made investors

[1] 125 A.3d 304 (Del. 2015). The *Corwin* doctrine, and its evolution, have been discussed at length in previous issues of this publication.

[2] *Larkin v. Shah*, C.A. No. 10918-VCS, slip op. at 20-21 (Del. Ch. Aug. 25, 2016).

[3] *Morrison v. Berry*, 191 A.3d 268, 288 (Del. 2018).

less likely to tender." But, the Supreme Court noted, "[t]hat is not the test." Rather, the proper inquiry of whether "omitted information is material" is whether "there is a substantial likelihood that a reasonable stockholder would have considered the omitted information important when deciding whether to tender her shares or seek appraisal."

Finally, the court concluded that the 14D-9's disclosure regarding the Market board's reason for forming a strategic committee was materially misleading. The 14D-9 stated the committee was formed because the company "could become" the subject of shareholder pressure, but Market had, in fact, "*already* become" subject to such pressure. Because "the Company chose to speak on the topic, stockholders were entitled to know the depth and breadth of the pressure confronting the Company, especially given that it already existed."

Based on these four disclosure violations, the Supreme Court reversed the Court of Chancery's dismissal and remanded the case for further proceedings.

Key Takeaways

- In *Morrison v. Berry*, the Delaware Supreme Court "offer[ed] a cautionary reminder to directors and the attorneys who help them craft their disclosures: 'partial and elliptical disclosures' cannot facilitate the protection of the business judgment rule under the *Corwin* doctrine."
- With fewer cases seeking pre-closing injunctions, there is less opportunity for companies to resolve disclosure challenges with supplemental disclosures prior to a stockholder vote. This further underscores the importance for boards to retain and rely on knowledgeable and experienced legal and financial advisors throughout the sale process, particularly when the transaction structure permits the potential application of the *Corwin* defense to dismiss any post-closing litigation.
- *Morrison* comes on the heels of the Delaware Supreme Court's recent decision in *Appel v. Berkman*,[4] in which the court similarly reversed a dismissal under *Corwin* based, in part, on perceived inconsistencies between the company's public disclosures and documents obtained in response to a Section 220 demand. As these cases illustrate, Section 220 demands are an increasingly common tactic that may be utilized by stockholder plaintiffs in attempting to overcome a *Corwin* ratification defense.

[4] 180 A.3d 1055 (Del. 2018). *Appel v. Berkman* is discussed at length in "Delaware Supreme Court Reverses Court of Chancery's Dismissal Under *Corwin*," *Skadden Insights*.

Can It Be Fixed? Further Judicial Guidance Concerning Sections 204 and 205

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> See page 12 for key takeaways

As discussed in an earlier edition of *Insights: The Delaware Edition*, Sections 204 and 205 of the Delaware General Corporation Law (DGCL) provide methods for Delaware corporations to unilaterally ratify defective corporate acts without court involvement (Section 204) or seek relief from the Delaware Court of Chancery to validate a corporate act under certain circumstances (Section 205).[1] Recently, the Court of Chancery issued rulings in three cases addressing the applicability of Sections 204 and 205 to the following defective corporate acts: (i) a stock issuance effected by a corporation even after it was rejected by a majority stockholder; (ii) technical defects related to reverse stock splits perpetuated by allegedly self-interested board members whose consequences manifested years later; and (iii) technical defects related to written consents for stockholder approval of a merger. Each of these cases is examined below.

Nguyen v. View, Inc.

In *Nguyen v. View, Inc.*, the Court of Chancery held, as a matter of first impression, that a corporate act taken after being deliberately rejected by a majority stockholder was not a "defective corporate act" subject to ratification under Section 204.[2] In 2009, View, Inc. (View, or the Company) asked its stockholders to consent to a round of Series B preferred stock financing. At the time, View's founder and former CEO Paul Nguyen owned approximately 70 percent of the Company's common stock. As part of a broader resolution of claims regarding his termination earlier that year, Nguyen signed a settlement agreement that included his consent to the Series B financing, subject to a seven-day revocation period. During the revocation period, Nguyen revoked his consent, but — unbeknownst to Nguyen — View had already closed the Series B financing. The parties arbitrated the issue, where it was determined that Nguyen had properly revoked his consent to the Series B financing, rendering the Series B financing invalid and void.

Nevertheless, View attempted to ratify the financing. In response, Nguyen filed a complaint in the Court of Chancery, arguing that the attempted ratifications were improper. Vice Chancellor Slights agreed with Nguyen. He explained that in order to fall within the "remedial purposes" of Section 204, the ratifications at issue must have been directed at acts that were within the corporation's power at the time such acts were purportedly taken. To the contrary, at the time View closed the Series B financing, it did not have the power to do so, because Nguyen "deliberately withheld his consent for the transaction — consent that was required for the transaction to be valid as a matter of law." The court found that Nguyen's revocation of consent was "more than a mere 'failure of authorization' as contemplated by Section 204," and therefore, View could not use Section 204 to ratify the financing.

Almond v. Glenhill Advisors

In *Almond v. Glenhill Advisors*, the Court of Chancery decided, post-trial, to validate the ratification of defective stock issuances and stock splits impacting the requisite vote for stockholder approval of a merger because the ratifications were not inequitably motivated.[3] *Glenhill* is notable for being the first post-trial opinion to validate defective corporate acts under Section 205.

[1] *See* Jenness E. Parker and Kaitlin E. Maloney, "Sections 204 and 205 of Delaware Corporation Law: Effective Tools to Remedy Defective Corporate Acts," *Insights: The Delaware Edition*, May 8, 2017. The Delaware legislature made minor amendments to Section 204 to clarify the types of defective corporate acts susceptible to cure by this provision, which became effective on August 1, 2018. *See* "Delaware Enacts Amendments to LLC Act and Delaware General Corporation Law," by Allison L. Land and Anne E. Connolly in this edition of *Insights: The Delaware Edition* for further explanation of the Section 204 amendments this year.

[2] C.A. No. 11138-VCS, 2017 WL 2439074 (Del. Ch. June 6, 2017), *reargument denied*, C.A. No. 11138-VCS, 2017 WL 3169051 (Del. Ch. July 26, 2017).

[3] *Almond v. Glenhill Advisors LLC*, C.A. No. 10477-CB, 2018 WL 3954733 (Del. Ch. Aug. 17, 2018).

Following the acquisition of Design Within Reach (DWR) by Herman Miller, Inc. through a short-form merger, Herman Miller stockholders contended that the acquisition was never properly consummated due to a series of technical mistakes. These included that (i) DWR failed to properly issue shares of common stock upon the conversion of certain shares, (ii) which caused a reverse stock split prior to its acquisition by Herman Miller to fail, and (iii) those technical mistakes meant that Herman Miller owned less than the requisite 90 percent of DWR stock to effectuate a short-form merger.

In response, DWR's board used Section 204 to ratify the stock issuance and stock split, and the corporation requested validation from the Court of Chancery under Section 205. Stockholders that objected to the validation request made allegations of self-dealing in connection with that request, and Chancellor Andre G. Bouchard[4] ordered a trial. After trial, Chancellor Bouchard validated the ratifications because, among other things, there was "no inequitable motivation" underlying the defective acts or the board's subsequent ratification of them, and the corporation promptly took corrective action to fix them.[5]

Chancellor Bouchard also rejected the plaintiffs' argument that the ratification was ineffective because too much time had passed between the board's failure to amend the certificate of incorporation in 2010 and the stock conversions in 2013. Chancellor Bouchard explained that "Section 205 does not contain a temporal limitation on the court's power to validate defective corporate acts, nor would such a limitation make sense where, as here, the effect of a defective corporate act may not manifest itself until years into the future."

[4] *Almond v. Glenhill Advisors LLC*, C.A. No. 10477-CB (Del. Ch. Jan. 31, 2017) (TRANSCRIPT).

[5] The plaintiffs also brought breach of fiduciary duty claims against the director defendants alleging that one or more of them engaged in self-dealing in connection with the merger. The court held that because it validated the defective corporate acts, those claims "necessarily fail[ed]."

Cirillo Family Trust v. Moezinia

In *Moezinia*, the court validated deficiencies in written consents approving the merger between DAVA Pharmaceuticals, Inc. (DAVA) and an affiliate of Endo Pharmaceuticals, Inc., holding that "[t]he failure to properly date [written consents] is the epitome of a technical shortcoming that the Delaware General Assembly sought to address when it promulgated Section 205."[6]

Following the board's approval of the merger, DAVA obtained written consents approving the merger from its nine largest stockholders collectively holding over 95 percent of shares. However, seven of the nine written consents were undated or contained a typewritten date added by DAVA's counsel after they were submitted. Because the written consents were not dated when signed, they were considered *per se* invalid under Section 228(c) of the DGCL, and the merger thus technically failed to be approved by a majority of stockholders. Like in *Glenhill*, a stockholder asserted, among other things, that the board engaged in self-dealing, which the court rejected. DAVA and its board sought validation of the written consents under Section 205.

Rejecting plaintiffs' arguments, Chancellor Bouchard validated the written consents and stockholder approval of the merger because the failure to properly date the written consents is exactly the type of technical mistake that the Delaware legislature sought to address when it enacted Section 205. The court also noted that Section 228 was amended in 2017 to eliminate the requirement that written consents bear the date of signature of the consenting stockholder, "suggest[ing] that this requirement was technical in nature and a superfluous condition to the use of written consents."

[6] *Cirillo Family Trust v. Moezinia*, C.A. No. 10116-CB, 2018 WL 3388398 (Del. Ch. July 11, 2018).

Key Takeaways

Sections 204 and 205 remain effective mechanisms for Delaware corporations to unilaterally fix issues and obtain validation of defective corporate acts from the Court of Chancery. The recent cases discussed in this article underscore several important developments concerning Sections 204 and 205:

- The *View* opinion suggests that Section 204 may not be used to ratify corporate acts deliberately rejected by a majority of stockholders because they are not within the corporation's power.
- In circumstances similar to *Glenhill* and *Moezinia*, corporations and their counsel may consider utilizing Section 205 to facilitate the correction of technical corporate mistakes to avoid potentially disruptive consequences or resolve fiduciary challenges.
- As Chancellor Bouchard explained in *Moezinia*, Section 205 does not contain a specified time limit for a corporation to seek judicial validation of a ratified corporate act, particularly when the effect of such an act may not manifest itself until years into the future.
- When facing potential fall-out from a defective corporate act, consultation with counsel knowledgeable about Sections 204 and 205 may be beneficial to implementing a strategy to effectively remedy the problem.

Dieckman and *Mesirov* Highlight That Differences in Limited Partnership Agreements Impact Aiding-and-Abetting Claims

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> See page 15 for implications

Two decisions from the Court of Chancery — *Dieckman v. Regency GP LP*, C.A. No. 11130-CB (Del. Ch. Feb. 20, 2018) and *Mesirov v. Enbridge Energy Co.*, C.A. No. 11314-VCS (Del. Ch. Aug. 29, 2018) — emphasize a significant distinction between Delaware limited partnership agreements (LPAs) that expressly eliminate all fiduciary duties and those that merely supply a contractual standard that replaces traditional fiduciary duties.

While both decisions deny motions to dismiss primary liability claims for breach of a LPA, the Court of Chancery reached opposite conclusions on whether an aiding-and-abetting claim was viable. These different conclusions are attributable to the court's interpretation of how each LPA contractually addressed fiduciary duties. The LPAs in both cases utilized a contractual governance structure that replaces common law fiduciary duties with contractual standards. However, one LPA, in *Dieckman*, expressly eliminated all fiduciary duties, while the other LPA, in *Mesirov*, modified but did not eliminate all fiduciary duties.

General LPA Principles

The two rulings are best understood in the context of Delaware law on limited partnerships. As first explained in *In re USACafes, L.P. Litigation*, in a Delaware limited partnership, those who control a general partner, which may include the directors of a general partner that is a corporation, may owe common law fiduciary duties to the limited partnership because they control the limited partnership's property.

However, under 6 *Del. C.* § 17-1101(d), a Delaware limited partnership may include provisions in its LPA that expand, limit or eliminate the default common law fiduciary duties. When an LPA validly eliminates these duties, the LPA creates a purely contractual relationship, which (compared to a fiduciary relationship) provides limited partners with fewer avenues to seek redress. Under general principles of contract law in Delaware, only a party to a contract may be sued for breach of that contract and there is no claim for aiding and abetting a breach of contract. Therefore, in a purely contractual relationship, a limited partner may seek to enforce only the terms of the LPA against parties to the LPA.

In this context, the viability of aiding-and-abetting claims against financial advisors or directors of a general partner hinges on whether the LPA expressly eliminates all fiduciary duties. The Court of Chancery's approach to this critical inquiry is illustrated by the following comparison of the *Dieckman* decision, involving an express elimination of all fiduciary duties that foreclosed aiding-and-abetting claims, and the *Mesirov* decision, involving a mere modification of fiduciary duties in favor of contractual standards that, as opposed to eliminating all fiduciary duties, created contractual fiduciary duties that left the door open for aiding-and-abetting claims.

Dieckman

In *Dieckman*, the Court of Chancery addressed claims brought by a unitholder of Regency Energy Partners, LP (Regency) challenging Regency's merger with its parent entity. The plaintiff asserted that Regency's general partner breached the Regency LPA by approving the merger without believing it was in the best interests of Regency. The plaintiff also brought, among others, claims against the directors and the indirect owner of Regency's general partner for aiding and abetting the general partner's breach of the Regency LPA.

Interpreting the Regency LPA, the court determined that it "eliminated fiduciary duties" and that the parties to the Regency LPA had established a purely contractual relationship. Therefore, the court granted the motion to dismiss the aiding-and-abetting claims against the directors and the indirect owner of Regency's general partner on the grounds that "a theory of aiding and abetting a breach of contract is unavailable in this case." The court's finding turned on the following provision, Section 7.9(e) of the Regency LPA:

> Except as expressly set forth in this Agreement, neither the General Partner nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Partnership or any Limited Partner and the provisions of this Agreement, to the extent that they restrict, eliminate or otherwise modify the duties and liabilities, including fiduciary duties, of the General Partner or any other Indemnitee otherwise existing at laws or in equity, are agreed by the Partners to replace such other duties and liabilities of the General Partner or such other Indemnitee.

The court denied the motion to dismiss the primary claim against Regency's general partner for breach of Section 7.9(b) of the Regency LPA, which "replaced [fiduciary duties] with a contractual obligation requiring the General Partner to subjectively believe that its actions were in the best interests of the Partnership."

Mesirov

In *Mesirov v. Enbridge Energy Co.*, C.A. No. 11314-VCS (Del. Ch. Aug. 29, 2018), the Court of Chancery addressed claims brought by a unitholder of Enbridge Energy Partners, L.P. (EEP) challenging EEP's repurchase of an asset that EEP previously had contributed to a joint venture with its parent five years before. The plaintiff alleged that EEP's general partner breached the provision of the EEP LPA that required that the transaction be "fair and reasonable" to the partnership. The plaintiff also alleged that the directors of EEP's general partner and the financial advisor that advised EEP in the transaction aided and abetted the general partner's breach.

The court's construction of the EEP LPA turned on the following provision, Section 6.10(d):

> Any standard of care and duty imposed by this Agreement or under the Delaware Act or any applicable law, rule or regulation shall be modified, waived or limited as required to permit the General Partner to act under this Agreement … and to make any decision pursuant to the authority prescribed in this Agreement, so long as such action is reasonably believed by the General Partner to be in the best interests of the Partnership.

Relying on Delaware Supreme Court decisions interpreting the same language, including *Brinckerhoff v. Enbridge Energy Co.*, No. 273, 2016 (Del. Mar. 28, 2017), the court concluded that this provision "modifies, waives, or limits common law duties in favor of a contractual scheme that imports familiar fiduciary standards" or, in other words, this provision "eliminates any [common law fiduciary] duties that otherwise exist and replaces them with a contractual fiduciary duty." Under this interpretation, the court explained that "the fact that the aiding and abetting claim is tied to a contractual duty does not necessarily defeat the claim." Rather, "[w]hen a contract embraces a fiduciary standard of conduct, … one who aids and abets a breach of that standard can be held liable for aiding and abetting a breach of a 'contractual fiduciary duty.'" Therefore, the court found that the aiding-and-abetting claims were "conceptually viable."[1]

[1] Regarding the substance of the aiding-and-abetting allegations, the court found that the plaintiff adequately stated a claim by alleging that the financial advisor manipulated its valuation to support a fairness opinion that completely ignored a comparable transaction involving the exact same asset and the same parties five years prior. Importantly, the court noted that there were no allegations of any conflict-driven misconduct as was at issue in *In re Rural Metro Stockholders Litigation*, and that its holding that an aiding-and-abetting claim adequately was stated was "a far cry from predicting that Plaintiff will prevail in the Herculean task of supporting the pled facts in discovery or proving them at trial." Nonetheless, even in the absence of any transactional conflicts, the court concluded that the combination of allegations against the financial advisor, including that it had created an informational vacuum, used fully baked financial projections to support its fairness opinion, failed to consider a precedent transaction involving the same asset and had a long-standing relationship with the limited partnership's parent/counterparty, stated a claim for aiding and abetting a breach of fiduciary duty.

The distinction between *Mesirov* and *Dieckman* is subtle but significant. In both *Mesirov* and *Dieckman*, the court found that the LPAs each established a contractual standard that governed in the place of common law fiduciary duties. And in both cases, the court found that the primary claims for breach of the governing contractual standard survived dismissal. However, to assess the viability of aiding-and-abetting claims, the court looked to the precise provisions of each LPA to determine whether each LPA expressly eliminated all fiduciary duties, which would foreclose any aiding-and-abetting claims.

Implications

The Court of Chancery's recent decisions in *Dieckman* and *Mesirov* highlight the impact of a significant distinction between limited partnership agreements that expressly eliminate all fiduciary duties and those that replace common law fiduciary duties with contractual standards:

- Limited partnership agreements that expressly eliminate all fiduciary duties are distinct from those that merely replace common law fiduciary duties with contractual standards, and this distinction may have important consequences, including with respect to secondary liability claims for aiding and abetting.
- If a limited partnership agreement uses language that expressly eliminates all fiduciary duties, based on *Dieckman*, there can be no claim for aiding and abetting a breach of the agreement under Delaware law.
- However, based on *Mesirov*, if the agreement does not expressly eliminate all fiduciary duties, then the agreement may create a contractual fiduciary duty that can support a claim for aiding and abetting.

Delaware Enacts Amendments to LLC Act and Delaware General Corporation Law

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On July 24, 2018, Delaware Gov. John Carney signed into law amendments to the Delaware Limited Liability Company Act (DLLCA) and the Delaware General Corporation Law (DGCL) (collectively, the Acts), which are intended to keep the Acts current and maintain their national pre-eminence. All of the amendments discussed herein became effective August 1, 2018, except for the amendments relating to registered series, which will become effective August 1, 2019.

This year's amendments provide for (i) the division of an LLC into two or more separate LLCs, (ii) the formation of registered series of LLCs and statutory public benefit LLCs, (iii) the use of blockchain technology for maintenance of LLC and LP records and for electronic transmissions, among other things, (iv) the application of the "market out" exception to appraisal rights for Section 251(h) short-form mergers, and (v) certain changes to the procedures for ratification of defective corporate acts.

Division of LLCs

The amendments enable a single LLC to divide into two or more newly formed LLCs with the dividing company either continuing or terminating its existence, as the case may be.

A division may be utilized to facilitate, among other things, a spin-off, the sale of one or more lines of business, or the sale of assets, rights and properties, along with related liabilities, thereby eliminating the need to transfer assets and liabilities, or assign contracts or licenses, to newly formed LLCs. Rather, upon effectiveness of a division, the dividing company's assets and liabilities are "allocated" to, and vested in, the resulting LLCs, as specified in a plan of division, without the need for any further action by any party. The division of an LLC could also be utilized, for example, to facilitate the sale of several lines of business to separate buyers simultaneously, and the equity interests in the resulting LLCs would be issued solely to the buyers of such lines of business.

Interests in the dividing LLC may remain outstanding (if the dividing LLC survives) or be exchanged for, or converted into, cash, property, or interests in one or more of the resulting LLCs or in any other business entity, in each case, as set forth in the plan of division.

Plan of Division

The plan of division need not specifically identify each asset and liability to be allocated to a resulting LLC, so long as each asset and liability of the dividing company is reasonably identified and attributable to a resulting LLC, by any method where the identity is objectively determinable. While a certificate of division is required to be filed with the Delaware secretary of state in order to effectuate the division, the underlying plan of division setting forth the specific terms, conditions and allocation between the resulting LLCs is not required to be filed with the Delaware secretary of state or otherwise be publicly available.

Protective Provisions

Existing creditors are protected by a provision that makes each division company jointly and severally liable for any liabilities that are not allocated in the plan of division, or if the division constitutes a fraudulent transfer with respect to such liabilities. In addition, for LLCs formed prior to August 1, 2018, that are parties to written agreements entered into prior to August 1, 2018, containing restrictions, conditions or prohibitions on mergers, consolidations or asset transfers, such provisions shall be deemed to apply to a division as if it were a merger, consolidation or asset transfer. Parties that enter into agreements with LLCs on or after August 1, 2018, that desire to restrict, condition or prohibit divisions must specifically provide for such restriction, condition or prohibition in their agreements. The amendments provide further protection for creditors by requiring a division contact to be named in the certificate of division. The division contact must provide any creditor of the dividing company with the name and address of the division company to which such creditor's claim was allocated for six years following the division.

Tax Implications

A division can be treated as a tax-free transaction in certain circumstances, including, for example, a division used to effectuate a pro rata spin-off to existing members. Because the amendments to the DLLCA specifically provide that the allocation of assets in a division is not deemed a transfer or assignment, transfer taxes also may not be imposed, though the laws of each applicable jurisdiction would need to be reviewed to confirm such treatment.

Registered Series

The amendments authorize the formation of "registered series," a new type of series of an LLC. Registered series address certain issues and limitations that have arisen in connection with existing series, including (i) the inability of an existing series to obtain a good standing certificate, (ii) the inability of an existing series to merge with other series of the same LLC, and (iii) the fact that existing series are not considered "registered organizations" for purposes of the Uniform Commercial Code (UCC), thereby creating issues in perfecting a security interest against a series' assets.

Addressing the Limitations of Existing Series

Under the amendments, a registered series is an "association" and has the attributes of a "registered organization," for purposes of the UCC, which may facilitate the use of registered series in secured financing transactions. In order to form a registered series, a certificate of registered series must be filed with the secretary of state. Accordingly, under the amendments and accompanying amendments to Delaware's UCC, the rules for filing UCC statements in Delaware against a registered series formed under the DLLCA should become simplified. While registered series will have the same rights, powers and interseries limitations on liabilities as series previously formed under Section 18-215(b) of the DLLCA, which will be known as "protected series," registered series are able to obtain good standing certificates from the secretary of state. Note that if an LLC is not in good standing, any registered series associated with such LLC will not be able to obtain a good standing certificate. Because registered series have many of the attributes of a separate entity, and the state is required to maintain a record for registered series, an annual fee of $75 will be payable by each registered series to the secretary of state. The attributes of a protected series will remain unchanged, and thus no annual fee will be payable by a protected series to the secretary of state.

Conversion and Merger of Registered Series

A protected series can convert to a registered series by filing a certificate of conversion and a certificate of registered series. Similarly, a registered series is able to convert back to a protected series. Conversion requires the approval of members holding 50 percent of the profits of such series (unless otherwise provided in the LLC agreement). Additionally, one or more registered series of an LLC may merge or consolidate with or into one or more other registered series of the same LLC, a more practical way to combine the assets and liabilities of two series than previously available under applicable law (*i.e.*, transferring all assets and liabilities). The merger of a registered series must be approved in accordance with the LLC agreement or, if the LLC agreement is silent, then by members holding more than 50 percent of the interest in profits of each merging series. The plan of merger of two registered series could amend a provision of the LLC agreement that relates only to the constituent registered series, without obtaining the vote required by the LLC agreement for an amendment to the LLC agreement.

Additional Considerations

Notwithstanding the amendments, it remains unclear how, and to what extent, the separateness of series will be respected by courts outside Delaware. A bankruptcy court, for example, may not apply Delaware law regarding the separateness of the series and could consolidate the assets of separate series in the event of a bankruptcy. Similarly, courts of other states may not honor the internal affairs doctrine and apply Delaware law if a suit is brought outside Delaware. The Uniform Protected Series Act has been approved by the Uniform Law Commission, which may result in more states having series provisions. This development could increase the likelihood of a court in an adopting jurisdiction correctly interpreting Delaware law and respecting separateness of series.

Statutory Public Benefit LLCs

The amendments to the DLLCA provide for the formation of statutory public benefit LLCs which, like public benefit corporations, are intended to produce a public benefit and operate in a responsible and sustainable manner. Examples of public benefits include effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature. A statutory public benefit LLC permits a for-profit LLC to balance the members' pecuniary interests with the public benefit to be promoted by the statutory public benefit LLC (as set forth in its certificate of formation) and the best interests of those materially affected by the statutory public benefit LLC's conduct.

The managers, members or other persons managing the business and affairs of the statutory public benefit LLC are required to balance the members' pecuniary interests with the stated public benefit, though there is no personal liability for monetary damages for failure to balance such interests in accordance with this provision. Fiduciary duties of the statutory public benefit LLC may otherwise be modified or eliminated, though the ability to restrict duties is more limited than in LLCs generally.

The amendments impose a two-third member voting requirement for a statutory public benefit LLC seeking to amend its certificate of formation in order to revise the statement of its public benefit, merge into an entity that is not a statutory public benefit LLC (or similar entity) or otherwise cease to be a statutory public benefit LLC. The amendments correspond to provisions of the DGCL that relate to public benefit corporations, though formation of a statutory public benefit LLC is not the exclusive means of forming an LLC operated for a public benefit. The amendments provide an additional structure for the increasingly popular goal of seeking to balance pecuniary interests with a public benefit.

Cancellation of LLC Upon Abuse of Powers

Under the amendments, the Delaware attorney general may file a motion in the Court of Chancery to cancel the certificate of formation of any LLC for abuse or misuse of its powers, privileges or existence. Upon any such cancellation, the court has the power to appoint trustees, receivers or otherwise wind up the LLC's affairs. This new Section 18-112 corresponds to newly amended Section 284 of the DGCL, which provides a similar process for terminating a corporation for abuses.

Blockchain Maintenance of Records and Electronic Transmissions

The amendments to the DLLCA and the Delaware Revised Uniform Limited Partnership Act provide specific statutory authority for LLCs and LPs to use networks of electronic databases, known as blockchains or distributed ledgers, to create and maintain LLC or LP records, as applicable. These amendments correspond to last year's amendments to the DGCL relating to blockchain technology and will allow for the use of this new technology in connection with the governance of LLCs.

Application of 'Market Out' Exception to Appraisal Rights for Section 251(h) Mergers

The amendments to DGCL Section 262(b) apply the "market out" exception to the availability of statutory appraisal rights for back-end mergers consummated pursuant to Section 251(h) following an exchange offer without a vote of stockholders. Previously, Section 262(b)(3) provided that appraisal rights were available for mergers effected pursuant to Section 251(h) so long as any shares were held by persons other than the parent. This differs from mergers generally, in which appraisal rights are not available for shares of any class or series of stock of a target corporation that are listed on a national securities exchange or held of record by more than 2,000 holders if the merger consideration for such shares consists solely of (i) stock of the surviving corporation or any other corporation (or depositary receipts in respect thereof) that is listed on a national securities exchange or held of record by more than 2,000 holders, (ii) cash in lieu of fractional shares or depositary receipts, or (iii) any combination of the foregoing. However, this "market out" exception did not apply to mergers effected pursuant to Section 251(h). As a result, Section 251(h) rarely was utilized in acquisitions where the merger consideration paid to target stockholders is shares of stock. Mergers effected after August 1, 2018, under Section 251(h) following a stock-for-stock exchange offer of publicly traded shares will receive treatment for appraisal rights equal to that afforded to holders in one-step acquisitions where a vote of target stockholders is required to approve the merger.

Information Required by Appraisal Statement

The amendments to Section 262(e) modify the information to be included in the statement that must be furnished to dissenting stockholders upon their request in connection with Section 251(h) mergers. Previously, Section 262(e) required that the statement to dissenting stockholders provide the aggregate number of shares not voted in favor of the merger and for which appraisal rights were demanded, and the aggregate number of holders of such shares. In recognition of the fact that no shares are "voted" for the adoption of the merger agreement in a Section 251(h) transaction, the amendments clarify that the surviving corporation must provide stockholders, upon their request, with the number of shares not purchased in the tender or exchange offer, rather than the number of shares not voted for the merger.

Ratification of Defective Corporate Acts

Several amendments have been made to Section 204, originally adopted in 2014 to provide a mechanism for a corporation to ratify defective corporate acts. First, the amendments confirm that Section 204 remains available for ratifying defective corporate acts in circumstances where no shares of valid stock are outstanding. This amendment eliminates the need for any stockholder vote on the ratification of a defective corporate act in such circumstances, even if a vote of stockholders would otherwise be required under Section 204.

Second, the amendments clarify that, in cases where a vote of stockholders is required for the ratification of a defective corporate act, the notice of the stockholder meeting required to be given to holders of valid or putative stock may be given to such holders as of the record date for the defective corporate act if it involved the establishment of a record date. This change will facilitate a corporation's ability to use the ratification mechanisms in Section 204 since most corporations, especially large ones, are more likely to have a list of stockholders as of the record date for the defective corporate act. The amendments also allow public companies to give such notice to such stockholders through disclosure in a proxy statement or other document publicly filed with the Securities and Exchange Commission pursuant to Section 13, 14 or 15(d) of the Securities Exchange Act.

Next, the amendments clarify and confirm that any act or transaction that a corporation takes that is within its power under the DGCL may be ratified under Section 204 if such act or transaction was void or voidable due to a "failure of authorization." Such amendment is intended to eliminate any implication arising from *Nguyen v. View, Inc.*, C.A. No. 11138-VCS (Del. Ch. June 6, 2017) that an act or transaction may not be within the power of a corporation — and therefore may not constitute a "defective corporate act" susceptible to cure by ratification — solely on the basis that it was not approved in accordance with the provisions of the DGCL or the corporation's certificate of incorporation or bylaws. The amendments, however, do not alter the power of the Court of Chancery to decline to validate a defective corporate act that has been ratified under Section 204 on the basis that the failure of authorization that rendered such act void or voidable involved a deliberate withholding of any consent or approval required under the DGCL, the certificate of incorporation or bylaws.

Finally, the amendments clarify that the failure of an act or transaction to be approved in compliance with disclosures in any proxy statement or consent solicitation statement may constitute a failure of authorization. Thus, an act or transaction alleged to be defective due to deficiencies in the disclosure documents whereby the vote or consent of stockholders to such act or transaction was sought may be cured through ratification pursuant to Section 204.

Forfeiture of Charter

The amendments also modify Section 284 to make clear that the Delaware attorney general has the exclusive authority to move for the revocation or forfeiture of a corporation's charter for abuse, misuse or nonuse of its corporate powers, privileges or franchises by filing a complaint in the Court of Chancery. Furthermore, as amended, Section 284 provides that the Court of Chancery has the power to appoint a trustee to administer and wind up the affairs of a corporation whose charter has been revoked or forfeited pursuant to Section 284.

Copies of the amendments, which have been enacted, are available here and here.

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