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2022 DELAWARE CORPORATE LAW AND LITIGATION YEAR IN REVIEW

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Introduction

Amid a broader cooldown in the markets, 2022 nonetheless proved to be a significant year with respect to developments in Delaware corporate law and practice. The Delaware courts issued scores of opinions relevant to those in corporate practice and oversaw some of the most high-profile (and exciting) litigation in years. In addition to case law developments, the General Corporation Law of the State of Delaware (the "DGCL") was amended on August 1, 2022, in several significant ways, including to permit corporations to exculpate officers from personal liability in some contexts, provide boards with additional flexibility in delegating authority to officers and others to grant stock options and rights, and alter some of the mechanics of stockholder meetings. These statutory amendments have in turn driven important changes in practice.

Meaningful developments also occurred in the composition of the Delaware courts. Vice Chancellor Joseph R. Slights III, now a partner at our firm, retired from the Delaware Court of Chancery and was replaced by Vice Chancellor Nathan A. Cook. Tamika Montgomery-Reeves announced her resignation from the Delaware Supreme Court following the confirmation of her appointment to the United States Court of Appeals for the Third Circuit.

This *2022 Delaware Corporate Law and Litigation Year in Review* discusses the most notable cases, issues, and trends for practitioners, corporations, boards, and investors, including as to controlling stockholder litigation, multiclass capital structures, director compensation, directors' oversight obligations, stockholder activism, the Twitter battle, stockholders' ability to obtain directors' and officers' emails, and the 2022 DGCL amendments.

Trends in Controlling Stockholder Litigation

Stockholder litigation over controlling stockholder conflicts of interest has been active in Delaware for many years, and this trend continued in 2022.

The theory behind this litigation is that when a controlling stockholder (or a controlling stockholder group) engages in a transaction with the company or receives a special benefit in a transaction involving the company, the controlling stockholder takes on fiduciary duties and an actionable conflict of interest arises. Directors, the controlling stockholder, and members of management can be named as defendants in the litigation, and the fundamental allegation is that the defendants have breached their duty of loyalty and therefore damages or some other remedy should be available to minority stockholders. Control exists where a stockholder or a group of stockholders either has a majority voting stake or, if less than that, has control over the corporation or a particular decision as a factual matter—such as through some combination of a sizeable equity stake, the use of contractual or veto rights, influence over the board of directors, or other facts sufficient to show control. Where a controlling stockholder exists and a transaction of this kind occurs, the transaction is, as a default matter, subject to the difficult entire fairness standard of judicial review—essentially the opposite of the deferential business judgment standard of review and under which a judge examines all aspects of the transaction and the board's process to determine if the transaction was entirely fair.

To avoid this outcome, restore the protection of the business judgment rule, and increase the likelihood of getting any resulting litigation dismissed, a corporation can follow the so-called "*MFW*" framework, which requires conditioning a controlling stockholder transaction on the proper approval of 1) a fully empowered independent board committee and 2) a fully informed, uncoerced minority stockholder vote. These conditions must be declared up front, on a nonwaivable basis and before substantive economic negotiations over the transaction begin, and they must be followed throughout the process.

The controlling stockholder cases from 2022 involved an array of transactional backdrops, reflecting that various types of corporate decisions can give rise to a controlling stockholder conflict. The 2022 cases included the grant of compensation to a controller who is an executive; M&A events in which a controller was said to get a special benefit or combine two companies in which the controller had an interest; a de-SPAC transaction where the sponsor was said to be a controller; a reverse spin-off; and a modification of a corporation's dual-class structure involving a controlling stockholder.[1] Where a corporation relies on the *MFW* framework to avoid the entire fairness standard of review, stockholders challenging the decision frequently assert that the directors who served on the independent board committee were not sufficiently independent of the controller or that the disclosures made to minority stockholders were inadequate such that the protection of *MFW* should not apply, and stockholder litigation in 2022 reflected these themes as well.[2]

Stockholder litigation in 2022 also provided valuable insight into the practical consequences of having the entire fairness standard of review apply to a controlling stockholder transaction—either where a company chooses not to follow the "*MFW*" framework or purports to follow *MFW* but does so incorrectly. Two cases—one involving Tesla's acquisition of SolarCity and another involving the acquisition of a Cantor Fitzgerald affiliate by BGC Partners—went all the way through trial, with the Court of Chancery determining in a lengthy post-trial opinion in each case that the transaction was entirely fair based on the price paid and the directors' decision-making process, such that no damages were owed.[3] At the same time, one of the largest settlement agreements in Delaware corporate law history ($1 billion) was proposed in the litigation over Dell's recapitalization,[4] following a decision by the Court of Chancery in 2020 determining that, for purposes of a motion to dismiss, the recapitalization benefited a controlling stockholder and the company had improperly attempted to comply with the *MFW* framework.[5]

The upshot of the 2022 cases is that, where relevant, boards and large stockholders should work closely with trusted legal counsel to identify a number of issues: whether a large stockholder or group of stockholders could constitute a controller; whether the controller is engaging in a transaction with the company or could derive a special benefit in a transaction such that the entire fairness standard of review could be triggered; whether following the *MFW* framework to cleanse the controlling stockholder conflict is practicable or desirable; and whether the board is prepared to live with the litigation risks, pending that conversation.

Multiclass Capital Structures

As the use of multiclass capital structures—for example, consisting of a class of high-vote stock and a class of low-vote stock—has continued to increase, companies, boards, and founders have had to navigate life, and litigation, under such structures.

As such, various issues involving multiclass companies have become an important part of corporate practice. For example, multiclass structures often impose mandatory conversion provisions on high-vote stock, with the penalty that high-vote stock automatically converts to low-vote stock if certain restrictions are violated. These types of provisions require careful consideration in the context of M&A events and estate planning for founders and other high-vote stockholders, among other things, and have led to litigation in some situations.

In addition, multiclass structures often contain "sunset" provisions specifying, for example, that the high-vote stock will convert to low-vote stock on a particular date in the future or when the high-vote stock drops below a certain percentage of the aggregate outstanding stock (an eventuality that may occur as a result of, among other things, a company issuing low-vote stock in acquisitions or the high-vote stockholders selling stock). Over time, various companies have hit their sunsets and have had their capital structures collapse into a single-class structure. In 2022, some noteworthy developments occurred with respect to companies that sought instead to amend their multiclass structures and adjust their sunset provisions.

In late 2021 and 2022, two companies successfully amended their charters to modify their capital structures and sunset provisions, following approval by an independent board committee and public stockholders.[6] One of those amendments, by the company The Trade Desk, resulted in noteworthy litigation in Delaware.[7]

In *The Trade Desk*, litigation arose after the company eliminated a sunset provision specifying that all of the company's high-vote stock would convert to low-vote stock when the high-vote stock represented less than 10 percent of the aggregate outstanding stock. The company replaced that sunset provision with provisions specifying, among other things, that all high-vote stock would convert at the earlier of 1) the founder ceasing to provide services to the company in certain capacities or 2) the fifth anniversary of the amendment. A stockholder challenged the amendment, claiming that it favored the founder as a controlling stockholder in a manner that triggered the entire fairness standard of review (see the discussion above) and constituted a breach of fiduciary duties by the founder and the board of directors. Significantly, the defendants were able to get the litigation dismissed on the grounds that they had properly used the *MFW* framework—involving approval by an independent board committee and minority stockholders, as discussed above. The Court of Chancery rejected the plaintiff's contention that the committee members were not independent of the controller and that the disclosures to stockholders had been inadequate. The case is an important example both of directors choosing to adjust a company's capital structure after determining that doing so would benefit the company and its public stockholders *and* a company successfully using the *MFW* framework to preserve the directors' well-considered decision.

Apart from amendments to multiclass structures, in 2022, some plaintiffs' lawyers pursued challenges to the validity of multiclass structures, particularly where structures gave certain stockholders or classes of stock a percentage of voting power. In the end, we do not expect these challenges to be successful, but they are a noteworthy development relating to multiclass structures. Additionally, litigation emerged in which the Court of Chancery interpreted the use of the phrases "Class A Common Stock" and "Class B Common Stock" as potentially meaning that those separate securities were their own classes, even if the architecture of the charter might have otherwise indicated that they really were denominated series within a single class of common stock, with the result that the publicly traded Class A Common Stock was entitled to its own separate class vote on certain events.[8] These cases all stand for the proposition that as dual-class structures become more and more common in the market, litigation over their interpretation and validity may follow.

Director Compensation Litigation

In 2017, in *Investors Bancorp*, the Delaware Supreme Court issued a watershed decision addressing director compensation, concluding that whenever directors award themselves compensation—even if they are otherwise independent—that decision is inherently conflicted and potentially subject to the difficult entire fairness standard of review rather than the more deferential business judgment rule.[9] The court also concluded that the only conclusive way to avoid that outcome is if the company's stockholders approve

the specific terms of the compensation or a self-effectuating formula that leaves directors with no discretion in setting their own compensation.

Since that time, dozens of companies have been the target of stockholder litigation or private stockholder demand letters challenging director compensation on those premises. In 2022, in *Knight v. Miller*, the Court of Chancery issued a decision that is emblematic of such litigation.[10] There, a compensation committee of a board of directors issued stock options to themselves and to various other parties, including directors, officers, and controlling stockholders. Certain stockholders filed suit alleging that the members of the committee had violated their fiduciary duties by purposely granting the options during the COVID-19-induced dip in the stock market, and also alleging that the recipients of the awards had violated their fiduciary duties by *accepting* the options. The defendants moved to dismiss the claims, and the court reached several important conclusions.

The *Knight v. Miller* court refused to dismiss the claims challenging the committee members' grants to themselves and the other directors, on the basis that the grants were inherently conflicted and had not been approved by stockholders. The court dismissed the claims against most of the executives, holding, importantly and consistent with prior case law, that the grant of executive compensation is not self-dealing and is a classic business judgment. At the same time, the court refused to dismiss claims against executives who were controlling stockholders, on the basis that where controllers, as discussed above, engage in a transaction with the company, the difficult entire fairness standard of review applies absent robust procedural protections. Finally, as for the claim that the defendants should be liable for *accepting* awards, the court concluded that a high bar exists for such a claim to survive—requiring a defendant's knowingly wrongful acceptance of compensation in bad faith—and such bar had not been met here. The court also noted that for any claim subject to entire fairness review, there must be a showing that the compensation was unfair and that such requirement had been met here, at least for purposes of a motion to dismiss, given the timing of the compensation.

In guarding against claims challenging board compensation, our experience is that it is still relatively unusual for companies to subject the specifics of director compensation to stockholder approval. Absent such stockholder approval, directors may wish to take several steps to mitigate the risk of successful stockholder litigation, including: the use of an independent compensation consultant and outside counsel; thorough deliberation by the directors and good, thoughtfully prepared board minutes and board records; the careful selection of a peer group; and keeping compensation reasonable and market-based, which may also make the ultimate compensation decision a less attractive or viable target.

Directors' Oversight Obligations

Following a series of high-profile cases over the last several years in which the Delaware courts permitted oversight claims against boards to go forward, oversight claims have, to quote Vice Chancellor Glasscock of the Court of Chancery, "bloomed like dandelions after a warm spring rain."[11] These claims require a showing that directors acted in bad faith either by 1) utterly failing to implement any reporting or information system or controls or 2) having implemented such a system or controls, consciously failing to respond to red flags indicating that such a system has failed. Such claims generally arise after a corporate trauma or crisis occurs.

Leading up to 2022, the oversight claims against boards that gained traction involved headline-grabbing facts—such as the Boeing 737 MAX crashes, an oil spill off the Pacific Coast, and contamination at an ice cream factory—where, for purposes of a motion to dismiss, the court found that a board had not spent time on the relevant risks or that board minutes and records were bereft of discussion of oversight matters. Following those cases, many boards rightly dedicated considerable attention to ensuring that they were spending adequate time on mission-critical risks, had in place an appropriate structure at the company for monitoring compliance, and had board minutes and records that accurately reflected the board's oversight efforts.

The oversight cases from 2022 provide a useful reminder that, while boards must take their oversight obligations very seriously, oversight claims against a board typically remain challenging for plaintiffs. On one occasion, the Court of Chancery dismissed an oversight claim against a board where the company was a victim of a major cyberattack that affected thousands of the company's clients and caused a significant drop of the company's stock price.[12] Stockholders brought suit alleging the company's board acted in bad faith, and thus breached their duty of loyalty to the company, by failing to adequately oversee the company's cybersecurity risks. The court rejected the claim, noting, among other things, that the board had delegated oversight of

cybersecurity risk to two separate board committees and that one had received a significant briefing on the company's cybersecurity risks and tests of the company's systems. In response to the plaintiff's criticism that such committee failed to report to the full board for 26 months following this briefing, the court noted that the mere passage of time, "[w]ithout a pleading about the Committees' awareness of a particular threat, or understanding of actions the Board should take," was not itself indicative of an utter failure of reporting and control.

In another case, the board of an energy company was sued on oversight grounds where a subsidiary natural gas company caused an explosion, killing one person and injuring nearly two dozen others.[13] There, the Court of Chancery held that neither of the prongs for oversight liability was satisfied. The court noted that the board had delegated certain safety responsibilities to a committee, which monitored and discussed various pipeline safety matters over the course of a few years. The committee also met five times per year and received extensive reports from senior management. In addition, the court disagreed with the plaintiffs' allegation that the board consciously disregarded "red flags" that had a sufficient connection to the corporate trauma that occurred. There, the plaintiffs pleaded various potential red flags related to improper recordkeeping and engineering issues, but because these red flags involved "different employees, in a different state, in unrelated projects or events," the court held that it was not reasonably conceivable that those red flags would have placed the board on notice of the issues that caused the pipeline explosion.

These cases are an important reminder that claims alleging improper oversight remain difficult cases to plead in Delaware. Nevertheless, oversight obligations should remain top of mind for boards, both as a matter of limiting legal exposure and as a matter of responsible governance. Directors should remain apprised of mission-critical risks that affect the company's business, develop thoughtful, robust systems of controls to respond to those risks, devote the necessary time at meetings to discuss such risks, and, with the help of counsel, sufficiently document the board's efforts in contemporaneous meeting minutes.

Stockholder Activism

The surge in stockholder activism has continued for years and is likely to be further buoyed in 2023 by macroeconomic conditions and the U.S. Securities and Exchange Commission's (SEC's) adoption of universal proxy rules. Against this backdrop, an important tool available to companies is advance notice bylaws, which generally require stockholders mounting their own director nominations or business proposals at a stockholder meeting to provide advance warning and relevant information to the company, all of which helps provide for an orderly contest. In 2022, the Court of Chancery decided two cases analyzing advance notice bylaws and had another such case pending before it at the close of the year.

In one such case, the court enforced the terms of an advance notice bylaw requiring any stockholder that nominates potential directors to disclose any "arrangements or understandings" regarding the nomination between the stockholder submitting the nomination, each proposed nominee, and any other person.[14] There, a stockholder submitted a nomination of two individuals who were aligned with a third party that previously engaged in various forms of activism with respect to the company. Immediately following the nomination, the company's board became suspicious that the stockholder submitting the nominations (or the nominees themselves) had ties to the third party, given the nominees' history with the company and the small number of shares held by the nominating stockholder. After conducting some research, it became apparent to the board that the parties were indeed connected, and the board believed the nominations were prompted by arrangements or understandings that were not disclosed as required by the advance notice bylaw. Accordingly, the board rejected the nominations.

The court analyzed the advance notice bylaw at issue under standard contract interpretation principles and found that the term "arrangement or understanding" was unambiguous. And, based on the factual record before the court, the court found that the nominating stockholder and the proposed nominees did in fact have an arrangement or understanding necessitating disclosure. Specifically, the court noted that the parties engaged in a "coordinated and constructed" effort to locate a record stockholder to make the nominations in an effort to take control of the board. Ultimately, the court determined that this conduct amounted to an "agreement or understanding" among the nominating stockholder, the proposed nominees, and the third party, that such agreement or understanding needed to be disclosed, and that its failure to be disclosed provided the board with technical grounds for rejecting the nominations.

The court then conducted an equitable review of the board's decision to

reject the nominations, noting that a technically permissible action may still be subject to equitable review. In its analysis, the court rejected the plaintiff's equitable arguments that the bylaw should not be enforceable and determined that the requirement that the nominating stockholder and nominees disclose any "arrangements or understandings" was not overly broad. The court also dismissed arguments that the rejection of the nominations was an effort by the board to entrench itself when considering the suspicious factual background upon which the nominations were made.

In another case, the court likewise dismissed claims that a board had improperly rejected a nomination where the stockholder failed to strictly satisfy the applicable advance notice provisions.[15] There, the notice of nomination was made by a subsidiary of a hedge fund that was a beneficial owner—but, importantly, not a record owner—of company stock. In the days leading up to the deadline to submit nominations, the beneficial owner was unable to transfer its shares into record name. Instead, it had Cede & Co. (Cede), as the record holder, provide a notice of nomination on the beneficial owner's behalf. The board rejected the director nominations on the grounds that they were made by a beneficial owner (rather than a record owner as required by the bylaws) and because the nomination did not include a completed and signed questionnaire in the form provided by the company. Instead, the beneficial owner provided a "comprehensive customary written questionnaire . . . that [was] substantially similar in scope to the forms of written questionnaires provided by a company's secretary in like situations." The beneficial owner filed suit, alleging that it had complied with the plain language of the bylaws and that the board had breached its fiduciary duties in rejecting the nominations.

The court began its analysis by noting that the beneficial owner at no point prior to the nomination submission transferred its shares into record name, which meant that the beneficial owner was at odds with the advance notice bylaw. The letter from Cede, the actual record holder as of the notice deadline, likewise did not satisfy the bylaw requirements because Cede did not actually make the nominations—instead, the letter expressly provided that it was the beneficial owner making the nominations. Accordingly, the board could properly reject the nominations for failure to conform with the bylaw requirements. The court also held that the board properly rejected the nominations where the nominations did not include the company's form of director questionnaire. The plaintiff argued that the company refused to provide the form when the plaintiff requested it—a decision that the company made because the plaintiff was not at that time a record stockholder. The court upheld that decision, noting that the bylaws did not require the company to provide the form of questionnaire to a beneficial owner of shares.

The court also reviewed the bylaw provisions through an equitable lens. Importantly, the decision to reject the nominations was made in the context of a takeover attempt—the hedge fund affiliate of the beneficial stockholder had concurrently submitted an unsolicited bid to acquire the company. In this context, the court applied enhanced scrutiny to the decision to reject the nominations, which meant that the board needed to "'identify the proper corporate objectives served by their actions' and 'justify their actions as reasonable in relation to those objectives.'"[16] In the face of this standard, the court held that the board had acted reasonably in rejecting the nominations. The court found no manipulative conduct by the board and noted that the bylaws at issue were adopted well before the takeover effort had begun. Importantly, the court emphasized that if the beneficial owner had simply started the process of transferring the shares into record name earlier, it likely would have been able to easily satisfy the advance notice requirements—or, at the very least, the beneficial owner would have had more time to cure deficiencies.

These two cases emphasize the contractarian approach that the court will take to analyzing and enforcing bylaw provisions, including advance notice provisions. The court will give effect to bylaws that are clear and unambiguous, and partial compliance with these provisions will not suffice—with the upshot that advance notice bylaws can be useful mechanisms for companies to obtain information from stockholders bringing nominations or proposals and allow for the orderly conduct of stockholder meetings. Heading into 2023, the Court of Chancery has another case pending before it in which a stockholder has claimed that the advance notice bylaws are unenforceable, requiring, among other things, disclosure about the identity of an insurgent stockholder's limited partners.[17] As such, we may have additional guidance in the year ahead. In any event, these recent cases, along with high levels of stockholder activism, all reinforce that companies are well-served to keep their bylaws up-to-date and thoughtfully written.

Twitter

We would be remiss if we did not at least briefly mention the Delaware law issues that arose in the takeover battle between Twitter and Elon Musk.[18] As has been reported *ad nauseam*, Musk reached a deal to acquire Twitter, and then later attempted to terminate the transaction, claiming that the company had undergone a material adverse effect and was in breach of its representations and warranties. The litigation filed in the Court of Chancery, referred to as the "Titanomachy of the Twitterverse" in a related proceeding before Chancellor Kathaleen McCormick,[19] cast a favorable national spotlight[20] on the court and its prompt and able resolution of the action, particularly with respect to discovery disputes. The takeaway from the litigation: Delaware courts continue to hold parties to their contracts, regardless of who those parties are and the brightness of the spotlight.

Apart from the litigation, the Twitter battle involved an array of rich issues under Delaware law. Those issues included the fiduciary duties of a board of directors under Delaware law in the face of a takeover offer—and exactly whose interests a board can consider in the face of a bid. The battle also highlighted the value of a poison pill, which the Twitter board adopted promptly after Elon Musk acquired a significant stake to ensure that the board remained in control and could continue to negotiate on behalf of the company's stockholders.

Access to Director and Officer Email Communications

Litigation over stockholders' access to director and officer email communications in various contexts continued in 2022, offering important insight into where directors and officers can have vulnerabilities in this respect.

The Court of Chancery considered whether a public company stockholder was entitled to email communications in response to its demand for books and records under Section 220 of the DGCL for the purpose of investigating possible wrongdoing in connection with a merger.[21] As is typical, the company had provided formal board meeting minutes and materials concerning the merger and events leading up to the merger but declined to produce other documents, such as emails. The stockholder sued. Noting that the analysis is "highly fact-dependent," the court observed that the descriptions of key events in the board minutes did not match up with the proxy's descriptions of those events in important ways. Because the stockholder could not resolve those inconsistencies by looking to the board minutes and materials alone, the court concluded the stockholder was entitled to a broader production beyond the "core materials," including emails between and among officers and board members who oversaw the merger process.

In another ruling, the Delaware Supreme Court was asked to reconsider a decision by the Court of Chancery ordering NVIDIA Corporation to produce a "discrete" set of emails between the company's CEO (who was also a director) and certain officers. In 2021, the trial court reiterated the general rule that formal board materials are the starting, and often ending, point for an adequate books and records production,[22] but nonetheless reasoned that the stockholder had presented evidence—in particular, citing allegations in a related securities action—that the CEO and certain other officers communicated via email regarding topics that were necessary and essential to the stockholder's purpose. In addition to having specifically demanded a limited set of emails identified in the securities action, the stockholder established that at least one officer reported directly to the CEO-director by email regarding topics that went to the crux of the stockholder's purpose and that such information was unavailable from any other source. On appeal, the Delaware Supreme Court affirmed the order, noting that whether email communications should be produced is a fact-specific inquiry.[23] Accordingly, while the production of emails in response to a books and records demand remains the exception in Delaware, companies and board members should be mindful of the possibility that a court will order production if warranted by the facts.

We also saw continued efforts by litigants to access privileged director emails. In 2020 and 2021, the Court of Chancery addressed whether an outside director's use of another company's email account for emails related to his or her board service waived the attorney-client privilege—which only applies to communications where there is a reasonable expectation of privacy. Those decisions were mixed, finding in certain circumstances that privilege over communications with counsel

had been waived. The court considers four factors to determine whether such emails are privileged: 1) whether the employer corporation maintains a policy banning personal or other objectionable use or providing that the account is not private at all; 2) whether the employer corporation actually monitors or accesses employees' work emails; 3) whether third parties have a right to access the employee's computer or emails; and 4) whether the employee was aware of the policy.

Several decisions this past year have tested the bounds of that analysis. In the Twitter litigation, the Court of Chancery was asked to consider whether Musk had a reasonable expectation of privacy over his emails using accounts owned by Tesla and SpaceX: companies he founded and controlled.[24] Both Tesla and SpaceX maintained policies providing that company accounts may be monitored, that employees should have no expectations of privacy or confidentiality with respect to their company email, and that information maintained on company computer networks is company property. Therefore, under the traditional four-factor analysis, Twitter argued that Musk had waived privilege with respect to his communications using those accounts.

Notwithstanding the Tesla and SpaceX policies, the court disagreed. Instead of strictly applying the four factors, the court considered the practical realities of Musk's role at those companies. Critically, Tesla and SpaceX submitted affidavits representing that general company email policies do not apply to Musk and that both companies instead authorized his unrestricted personal use of company email and forbade others to access his accounts without his permission. Those Musk-specific policies, though unsupported by corporate records, outweighed the effect of the employee-wide policies. While recognizing that the decision may be met with speculation, the court noted it had "little doubt" that neither SpaceX nor Tesla view Musk as equal to other employees, that Musk holds the power to direct company decisions, and that nobody at either company would access Musk's information without first obtaining his approval.

The court reached a similar conclusion in litigation involving Madison Square Garden Entertainment Corporation and members of the Dolan family.[25] The court concluded that the emails sent by the Dolans from accounts owned by companies they controlled—but which were not parties to the litigation—remained privileged. While those accounts were subject to policies providing that users should have no expectation of privacy, the court again explained that the Dolans were more than employees of the respective account holders, and thus their subjective expectations of privacy in the emails should account for their positions at and control over the companies that maintained the accounts. The court therefore applied the four-factor test while accounting for "corporate realities on the ground." Indeed, the court expressed concern that an alternative outcome would risk expanding the four-factor test beyond its original purpose to permit a corporation's discovery of its employees' emails and unnecessarily infringe on the baseline assumption that privileged communications are worth encouraging and protecting.

These two decisions reflect a pragmatic approach to assessing a director's expectations of privacy with respect to his or her emails. Nonetheless, companies and their directors should expect further developments in the law and be mindful of a director's use of email for board-related communications. At a minimum, companies or firms that have employees who sit on the boards of other entities should consider their email policies and whether changes should be made to reflect the parties' common understanding that company email accounts will be used for such purposes. The other cases from 2022 described above also reflect that thoughtfully prepared board minutes and records will mitigate the risk of stockholders gaining access to directors' and officers' emails.

2022 DGCL Amendments

Beyond developments in the case law, 2022 was also notable for amendments to the DGCL. In particular, the DGCL was amended to, among other things, 1) permit corporations to exculpate officers from liability for certain breach of fiduciary duty claims against them, 2) provide directors with increased flexibility in delegating authority to officers and others to grant stock options or other rights, and 3) alter the mechanics of stockholder meetings in some respects. The 2022 DGCL amendments also included a number of other noteworthy amendments, including certain procedural changes to the Delaware appraisal statute—Section 262 of the DGCL, which allows stockholders to seek the "fair value" of their shares following a merger and certain other corporate transactions—to allow a beneficial owner of stock to demand appraisal directly instead of relying on the record stockholder.[26]

Officer Exculpation

Perhaps this year's most notable amendment to the DGCL permits Delaware corporations to include provisions in their charters exculpating (i.e., protecting) certain officers from personal liability for direct claims for breaches of the duty of care. This new protection is akin to a similar capability that has existed since 1986 for directors under Section 102(b)(7) of the DGCL, which allows for a charter provision exculpating directors from personal liability for breaches of the duty of care. The primary limitations on this new right for officers are twofold. First, unlike with directors, officers cannot be exculpated for claims brought by or in the right of the corporation—i.e., derivative claims. Second, the exculpation rights apply only to certain officers—certain executive officers specified in the statute, officers identified in public filings with the SEC as one of the most highly compensated executive officers of the corporation, and those officers who have consented in writing to be an officer for these purposes. As is also true for directors, Section 102(b)(7) does not permit exculpation for officers for breaches of the duty of loyalty.

This development in the law arose primarily in response to an increasing number of direct claims brought against officers of a selling company in the M&A context, often related to the company's disclosures in the proxy statement for the deal. These claims, premised only on a breach of the duty of care, often had a "gotcha" quality, allowing plaintiffs to keep officers in litigation where similar allegations against directors were dismissed and obtain high settlement value. In order to provide exculpation for officers, private companies can include the relevant provisions from inception, but existing corporations will need to amend their charters, which will require board and stockholder approval. Public companies will want to consider likely investor reaction and the positions that ISS and Glass Lewis have taken on the matter.[27]

In addition to these points, multiclass companies should be aware of litigation recently filed against two companies in Delaware.[28] Each of the defendant companies has a multiclass capital structure that includes publicly traded nonvoting common stock and amended its charter to allow for officer exculpation based on approval by the voting stock. The stockholder plaintiffs have alleged that, in each instance, contrary to the approach taken by the companies, the publicly traded nonvoting stock was entitled under the Delaware statute to a separate class vote on the charter amendment, on the rationale that the charter amendment adversely affected the "powers, preferences, and special rights" of the nonvoting stock. We represent one of those companies and expect the defendants to be successful in the litigation, particularly given established Delaware precedent, but the litigation is worth monitoring.

The Delegation of Stock Option Grants and Other Rights

As part of the 2022 amendments, Section 157 of the DGCL was amended to provide more flexibility for boards to delegate to officers or others the authority to grant stock options and other rights to acquire stock. Such delegation must include certain limits, including 1) the maximum number of rights or options, and the maximum number of shares issuable upon exercise of those rights or options, that may be issued, 2) a time period during which such rights or options, including any shares issuable upon exercise thereof, may be issued, and 3) a minimum amount of consideration (if any) to be received for those rights or options and a minimum amount of consideration for the shares issuable upon their exercise. As long as those parameters are set forth, officers or other delegates can have significant authority to grant options and rights such as restricted stock units, including even by fixing the terms of the options and rights. These changes to the statute align Section 157 with the other provisions of the Delaware statute relating to outright stock issuances and provide welcome flexibility for corporations. Not surprisingly, many corporations are incorporating this flexibility into their equity award programs. At the same time, corporations should carefully approach the manner in which they issue stock options and other rights and take advantage of this flexibility, as noncompliance with the Delaware statute can result in the invalidity of such issuances under a long line of Delaware cases.

Changes to Stockholder Meeting Mechanics

Two changes were made to the DGCL relating to stockholder meetings. First, Section 219 of the DGCL was amended to remove the requirement that corporations must produce a stock list during stockholder meetings, which could present challenges at virtual meetings. The stock list must still be available for stockholder inspection during the 10 days preceding the meeting. Section 222 was likewise amended to provide additional flexibility to companies when providing notice of adjourned meetings, including where the adjournment is caused by technical failures—a change that was also prompted by the frequency of virtual meetings in response to the pandemic.

These changes themselves are useful, though fairly discrete in nature. In many respects, their greatest impact has been their role in prompting many companies to amend their bylaws, which often track the prior version of the DGCL and may now be outdated. Between these Delaware statutory changes and the advent of the SEC's universal proxy rules—which may make changes to advance notice bylaws advisable—it may be an apt time for companies, especially public companies, to work with outside counsel to update their bylaws and ensure that companies are properly positioned given these developments.

Endnotes

1 *In re Match Grp., Inc. Derivative Litig.*, C.A. No. 2020-0505-MTZ (Del. Ch. Sept. 1, 2022); *In re BGC Partners, Inc. Derivative Litig.*, C.A. No. 2018-0722-LWW (Del. Ch. Aug. 19, 2022); *City Pension Fund for Firefighters & Police Officers in the City of Mia. Beach v. The Trade Desk, Inc.*, C.A. No. 2021-0560-PAF (Del. Ch. July 29, 2022); *Knight v. Miller*, C.A. No. 2021-0581-SG (Del. Ch. Apr. 27, 2022); *In re Tesla Motors, Inc. S'holder Litig.*, C.A. No. 12711-VCS (Del. Ch. Apr. 27, 2022).
2 *See The Trade Desk, Inc.*, C.A. No. 2021-0560-PAF; *In re Match Grp., Inc. Derivative Litig.*, C.A. No. 2020-0505-MTZ.
3 *In re Tesla Motors, Inc. S'holder Litig.*, C.A. No. 12711-VCS; *In re BGC Partners,* C.A. No. 2018-0722-LWW.
4 The settlement still requires both court and stockholder approval. Jeff Montgomery, *Five Firms Brought Home 'Historic' $1B Dell Deal in Chancery*, Law360 (Nov. 17, 2022), http://bit.ly/3XMKU24.
5 *In re Dell Techs. Inc. Class V S'holders Litig.*, C.A. No. 2018-0816-JTL (Del. Ch. June 11, 2020).
6 Our firm represented the founder in both of those matters.
7 *The Trade Desk, Inc.*, C.A. No. 2021-0560-PAF.
8 *Garfield v. Boxed, Inc.*, C.A. No. 2022-0132-MTZ (Del. Ch. Dec. 27, 2022).
9 *In re Invs. Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208 (Del. 2017).
10 *Knight v. Miller*, C.A. No. 2021-0581-SG (Del. Ch. Apr. 27, 2022). Additional information about this decision can be found in a client alert by our firm available at https://www.wsgr.com/en/insights/delaware-courts-continue-strict-review-of-compensation-matters-practical-advice-on-decision-making-processes.html.
11 *Constr. Indus. Laborers Pension Fund v. Bingle*, C.A. No. 2021-0940-SG (Del. Ch. Sept. 6, 2022).
12 *Id.*
13 *City of Detroit Police & Fire Ret. Sys. v. Hamrock*, C.A. No. 2021-0370-KSJM (Del. Ch. June 30, 2022).
14 *Jorgl v. AIM ImmunoTech Inc.*, C.A. No. 2022-0669-LWW (Del. Ch. Oct. 28, 2022).
15 *Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, C.A. No. 2021-1089-LWW (Del. Ch. Feb. 14, 2022).
16 *Id.* at 39 (quoting *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 810 (Del. Ch. 2007)).
17 *See Verified Compl.*, *Politan Cap. Mgmt. LP v. Kiani*, C.A. No. 2022-0948-NAC (Del. Ch. Oct. 21, 2022); *see also* Leslie A. Pappas, *Hedge Fund Sues Masimo Corp. In Del. Over Bylaw Changes*, Law360 (Oct. 21, 2022), http://bit.ly/3WoVg7c.
17 Our firm represented Twitter in this matter.
19 *Crispo v. Musk*, C.A. 2022-0666-KSJM (Del. Ch. Oct. 11, 2022).
20 Ben Cohen, *The Most Honorable Character in Twitter v. Elon Musk*, Wall St. J. (Oct. 13, 2022), https://bit.ly/3ioGNdw.
21 *Hightower v. SharpSpring, Inc.*, C.A. No. 2021-0720-KSJM (Del. Ch. Aug. 31, 2022).
22 *City of Westland Police v. NVIDIA Corp.*, C.A. No. 2020-0075-KSJM, at 37–38 (Del.Ch. Mar. 29, 2021) (TRANSCRIPT).
23 *NVIDIA Corp. v. City of Westland Police & Fire Ret. Sys.*, 282 A.3d 1 (Del. 2022).
24 *Twitter, Inc. v. Musk*, C.A. No. 2022-0613-KSJM (Del. Ch. Sept. 13, 2022).
25 *In re Madison Square Garden Ent. Corp. S'holders Litig.*, C.A. No. 2021-0468-KSJM (Del. Ch. Nov. 3, 2022) (TRANSCRIPT).
26 Additional information about the 2022 DGCL amendments can be found in a client alert by our firm available at https://www.wsgr.com/en/insights/delaware-implements-new-amendments-to-the-delaware-general-corporation-law.html.
27 Additional information about these developments can be found in a client alert by our firm available at https://www.wsgr.com/en/insights/glass-lewis-and-iss-issue-2023-updates.html.
28 *See Verified Class Action Compl.*, *Electrical Workers Pension Fund, Local 103, I.B.E.W. v. Fox Corporation*, C.A. No. 2022-1007-JTL (Del. Ch. Nov. 4, 2022); *Verified Class Action Compl.*, *Sbroglio v. Snap, Inc.*, C.A. No. 2022-1032-JTL (Del. Ch. Nov. 16, 2022); *Verified Class Action Compl.*, *Dembrowski v. Snap, Inc.*, C.A. No. 2022-1042-JTL (Del. Ch. Nov. 17, 2022). Our firm is representing Fox in the litigation.

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