WILSON SONSINI



2020 DELAWARE CORPORATE LAW AND LITIGATION YEAR IN REVIEW

Table of Contents

Introduction ..... Page 1

Board Compensation ..... Page 2

Board Oversight Obligations ..... Page 2

Board Conflicts of Interest Based on Relationships and Personal Interests ..... Page 2

Disputes Among Board Members ..... Page 3

Controlling Stockholder Conflicts of Interest ..... Page 3

Rights Offerings ..... Page 4

Self-Tender Offers ..... Page 4

The Treatment of Preferred Versus Common Stockholders ..... Page 4

Advance Notice Bylaws and Stockholder Activism ..... Page 5

Rights Plans and Delaware's Anti-Takeover Statute ..... Page 5

Preferred Stock Redemption Rights ..... Page 5

Technical Defects and Validity ..... Page 6

Public Benefit Corporations ..... Page 6

LLCs and Partnerships ..... Page 6

Stockholder Inspection of Books and Records ..... Page 8

M&A Litigation ..... Page 9

Intersection of Delaware Law and Other Jurisdictions ..... Page 10

About Wilson Sonsini's Corporate Governance Practice ..... Page 11

Introduction



As in prior years, 2020 involved many significant Delaware law developments that will continue to shape business decisions for companies, boards, and investors in the year ahead. As the preeminent jurisdiction in the country for business disputes, the Delaware courts were extraordinarily busy, due in part to several disputes arising over pending mergers and acquisitions that unraveled in the midst of the pandemic. We do not expect the pace to slow in 2021, and some attention will be trained on the Delaware Court of Chancery given the recent announcement that Chancellor Andre Bouchard will be retiring effective April 30, 2021. This year-in-review publication highlights the recent Delaware law developments that will be of most interest to our clients, and we will continue to monitor developments in the year ahead.

Attorneys from Wilson Sonsini's Delaware office contributed to the content of the *2020 Delaware Corporate Law and Litigation Year in Review*. Contributing authors and editors included partners Amy Simmerman, Brad Sorrels, Ryan Greecher, Lori Will, and Adrian Broderick. Also contributing to the report were attorneys Shannon German, Nate Emeritz, Sara Pollock, James Griffin-Stanco, Jessica Hartwell, Benjamin Potts, and Emily Marco.

If you have any questions or comments, please contact a member of the firm's corporate governance practice or Delaware office.

Board Compensation

In 2020, we continued to see increased stockholder litigation activity over board compensation, either in the form of private demand letters to boards of directors or through outright litigation in court. This activity is rooted in a series of recent Delaware cases, which provided that when boards of directors, whether or not majority independent, set their own compensation, that decision is inherently conflicted. As a result, should litigation arise, such compensation is likely to be subject to the more rigorous "entire fairness" standard of judicial review, unless stockholders approve the specific compensation at issue. Under the entire fairness standard, the court determines whether the directors breached their duty of loyalty and whether the compensation and the board's process were entirely fair.

In November 2020, the Court of Chancery refused to dismiss a stockholder claim challenging the compensation of outside directors of a life sciences company with a $2.5 billion market capitalization.[1] The amounts of compensation at issue were $978,251 per director in 2015, $251,064 in 2016, $713,915 in 2017, and $748,652 in 2018, involving a mix of cash and equity. In alleging that the compensation amounts were inappropriately high and unfair, the plaintiff contended that the court should consider not just the company's self-identified peer group, but also companies outside of the company's industry with a similar market capitalization. As of the time of this publication, the case is proceeding through discovery. This line of cases underscores the importance of carefully considering the size and form of board compensation, building a good board process around compensation, and considering a stockholder vote on compensation (although such votes remain atypical).

Board Oversight Obligations

Under Delaware law, and as part of a board's fiduciary duties of care and loyalty, a board of directors has an oversight obligation, pursuant to which the board must implement a system of controls to promote a company's compliance with its legal obligations and respond to any "red flags" that materialize suggesting that a failure in that system has occurred. Although fiduciary-duty-based oversight claims against a board have historically been very difficult for plaintiffs, stockholders have been successful in a series of recent cases involving fairly egregious facts in surviving a company's motion to dismiss such a claim.

The Court of Chancery decided one such case in January 2020.[2] In that case, the court refused to dismiss a claim against a natural gas company following a pipeline rupture that spilled billions of gallons of oil into the Pacific Ocean. According to the facts of the case, the company's CEO testified in subsequent criminal proceedings that no oversight of the company's pipeline integrity occurred at all at the board level. In light of those admissions, the court allowed the claim to go forward. Although the Delaware courts also dismissed a number of oversight claims in 2020, this decision and similar ones before it illustrate the importance of handling corporate crises carefully, constructing board processes, and building the board record in a manner that does not leave a board vulnerable to stockholder claims.

Board Conflicts of Interest Based on Relationships and Personal Interests

For years now, stockholder claims have regularly focused on whether directors have a conflict of interest based on relationships in the boardroom, personal interests, or affiliations—for example, with venture firms, another company, or some other interested party. For their part, Delaware courts have remained attentive to this issue on the basis that courts are unwilling to apply the deferential business judgment rule if half or more of the board has a conflict of interest, or if an officer or director of a corporation conceals a personal conflict of interest from the board when it makes a decision. The cases in 2020 were no exception.

When a Relationship-Based Conflict Exists

Whether a board member has a conflict of interest for Delaware law purposes is fact-specific and contextual, taking into account all circumstances based on the particular decision that a board, or a board committee, is making. The Delaware law inquiry has some similarities to, and can take into account, independence determinations under stock exchange rules, but is separate and distinct.

A 2020 decision[3] illustrates this approach. That decision involved a challenge to Dell's decision to collapse a publicly traded class of tracking stock and exchange it for common stock. Because of potential benefits to the company's controlling stockholders—Michael Dell and a private equity firm—the company established a two-person independent committee of the board of directors to negotiate the transaction. In subsequent litigation, the stockholder plaintiff successfully alleged at the motion-to-dismiss stage that both committee members were not independent of the controlling stockholders. The court focused on a number of factors, including a history of business dealings between one committee member and Dell; a close personal relationship between one of the committee members and Michael Dell individually; and potential signs of

Also available as part of the eCourse
2021 Technology Law eConference

First appeared as part of the conference materials for the
34th Annual Technology Law Conference session
"Mergers and Acquisitions of Private Companies: Recent Developments in Deal Terms and an Overview of SPAC Transaction Structure"