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2021 DELAWARE CORPORATE LAW AND LITIGATION YEAR IN REVIEW

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Introduction

A number of Delaware law and related corporate governance developments occurred in 2021 that should be of significant interest to boards, management, and stockholders of Delaware corporations. The year was busy for the Delaware courts, which issued hundreds of noteworthy corporate decisions, as well as for corporate activity and practice. This *2021 Delaware Corporate Law and Litigation Year in Review* focuses on the Delaware law-related corporate governance issues that we think are most noteworthy for those who run Delaware corporations and those who invest in them.

In particular, we address: potential oversight liability for boards of directors; the increased use of the public benefit form, particularly in the midst of an increased focus on environmental, social, and governance issues and the purpose of the corporation; busted deals and lessons for mergers and acquisitions practice going forward; stockholders' ability to access director emails; and an important decision by the Delaware Supreme Court on private company corporate governance.

It also bears noting that the Delaware courts have continued to address other recurring matters that are important for corporations, including board independence and director conflicts of interest, controlling stockholder conflicts of interest, and various procedural rules relating to stockholder litigation over fiduciary duties. This publication focuses on the most novel and practice-changing developments of the year.

Potential Oversight Liability for Boards of Directors

Stockholders continued to bring oversight claims against boards of directors this past year, gaining ongoing traction in an area of the law that has historically been very difficult for plaintiffs. The obligation of oversight, broadly speaking, requires directors to (1) make a good-faith effort to ensure there are monitoring and reporting systems in place to allow for the corporation's legal compliance and (2) respond to red flags that arise.

The test for directors is favorable to them: an oversight claim requires a plaintiff to allege either that (1) "the directors utterly failed to implement any reporting or information system or controls" or (2) "having implemented such a system or controls," directors "consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[1] In other words, directors must have either completely failed to establish a reporting system or they must have turned a blind eye to red flags in front of them, and there must be a sustained or systemic failure of the board's oversight.

In some recent cases, however, plaintiffs have had success where the facts supported a strong pleading-stage claim, particularly where the oversight issues affected "essential and mission critical" areas of the business. These claims are important for directors to understand, given plaintiffs' success and various lessons from the recent case law. The most recent example is a suit brought against Boeing's board of directors relating to its handling of the Boeing 737 MAX airplane crashes.[2] The Court of Chancery allowed the claims to proceed past a motion to dismiss, identifying the following as the key problems, at least based on the plaintiff's allegations: (1) as in other recent successful oversight claims, the board record allegedly did not reflect much or any time dedicated to airplane safety issues, even though they are "mission critical" to Boeing's business; (2) allegedly only the audit committee handled "risk" issues, but its activities mostly related to financial risk, and no board committee was specifically tasked with overseeing airplane safety; (3) the company allegedly had a culture that prioritized profits, political connections, and efficiency over engineering and safety, all the way up to the composition of its board; and (4) there was allegedly no regular process or protocols requiring management to report airplane safety issues to the board. Boeing's board ultimately settled the case for $237.5 million. That case, along with others in recent years, underscores some important points for directors to consider, including: setting the proper tone at the top; identifying critical oversight issues; determining whether the board or an existing committee has the capacity to address them or whether a different committee is needed; and ensuring adequate whistleblowing and reporting mechanisms are in place. As with other significant corporate governance issues, it is also critical that the board and its committees build a good record around these issues, to reflect its efforts and fend off challenges to its oversight activities.

At the same time, it is important to remember that oversight claims still involve a high bar for plaintiffs and that far from all claims are successful. For example, in 2021, the Court of Chancery dismissed oversight claims against directors and officers of Marriott International, Inc. relating to its 2018 cyberattack that resulted in the disclosure of personal information of up to 500 million Marriott guests.[3] The record reflected that cybersecurity was consistently considered a top-level risk by the board, the board and audit committee were regularly updated on risks and mitigation measures, outside consultants were engaged and advised on cybersecurity issues, mechanisms were in place for management to report red flags up to the board, and there was no specific allegation of knowledge of violations of applicable law. Although, according to the case, mitigation of the underlying data security risk may have proceeded more slowly than it should have in some respects, there was not a sustained or systemic failure of oversight that subjected directors to potential liability.

The Increased Use of the Public Benefit Corporation Form

In 2021, the purpose of the corporation and environmental, social, and governance issues received ongoing attention. The market also began making particularly notable use of recent statutory developments relating to the Delaware public benefit corporation (PBC), a form of for-profit corporation in which fiduciaries are obligated to balance stockholders' monetary interests, the best interests of those materially affected by the corporation's conduct, and a particular public benefit purpose selected by the corporation. This balancing requirement replaces the rule for a traditional Delaware corporation, which is that—although boards have considerable latitude in how they oversee the business and can take into account a wide range of factors in making decisions—a board's decisions must ultimately relate to advancing stockholder value.

In 2013, Delaware introduced the statutory framework for Delaware law-governed PBCs and then, through 2020, implemented amendments to reduce the barriers to become a PBC. Ultimately, by late 2020, the statute no longer imposed supermajority stockholder votes, or triggered unique appraisal rights, for a

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