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## Delaware M&A Quarterly

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### Minority Shareholder's Vote Required by Pre-Disclosure Voting Agreement Did Not Count for *Corwin* Purposes

In *In re Pattern Energy Group Inc. Stockholders Litigation*, the Delaware Court of Chancery denied a motion to dismiss a class action challenging the sale of Pattern Energy to Canada Pension Plan Investment Board due to allegations that the special committee and certain officers involved in the sale process improperly favored Canada Pension due to the preference of Riverstone Holdings LLC, a private equity fund that formed Pattern Energy and controlled its upstream supplier. The court, in an opinion by Vice Chancellor Zurn, held that the approval of the transaction by a majority of the minority stockholders did not cleanse the transaction under *Corwin* because such approval was partly based on the vote of a large holder of preferred shares that was contractually bound, pre-disclosure, to vote in accordance with the board's recommendation, and therefore its vote was not fully informed for purposes of *Corwin*. For the opinion, click [here](#).

### Delaware Court of Chancery Holds 35% Shareholder Not a Controller

In *In re GGP, Inc. Stockholder Litigation*, the Delaware Court of Chancery dismissed a class action challenging the acquisition of GGP by Brookfield Property Partners, L.P. Brookfield, who had rescued GGP from bankruptcy, held approximately 35% of GGP's stock. In addition to its right to designate three members to the GGP board for so long as it owned 20% of GGP's stock, Brookfield had a standstill agreement with GGP that entitled Brookfield to vote its shares, up to 10% of the outstanding shares of GGP, for or against any non-Brookfield nominee to the GGP board. The standstill also required that transactions between GGP and Brookfield be approved by a majority of the minority GGP stockholders, and provided that GGP would not waive certain provisions of the standstill for other large stockholders unless it granted a similar waiver to Brookfield. The plaintiff challenged the acquisition by Brookfield, arguing that Brookfield was a controller owing fiduciary duties to the minority GGP stockholders and therefore the transaction was subject to entire fairness review. The court, in an opinion by Vice Chancellor Slight, held that Brookfield did not exercise control over GGP, in part because the contractual standstill arrangements with GGP decreased the influence that Brookfield had over the company. Nor did Brookfield exercise control over the merger, as the special committee that negotiated and approved the merger was independent from Brookfield. Moreover, the court concluded that the merger was approved by an informed and uncoerced stockholder vote, and therefore the transaction was cleansed under *Corwin*. For the opinion, click [here](#).

## Delaware Supreme Court Holds that Entirely Fair Transaction Must be Reviewed Under Alternative Standards of Review

In *Coster v. UIP Companies, Inc.*, the Delaware Supreme Court held that a stock sale deemed to be entirely fair by the Court of Chancery must nevertheless be subject to alternative standards of review, including *Blasius*. *Coster* involved the deadlock of two equal stockholders of UIP, with one of the stockholders filing suit requesting appointment of a custodian for the company under DGCL 226(a)(1). In response, the board (composed of the other stockholder and two directors aligned with him) approved the issuance of a one-third interest in UIP to one of the directors. The stockholder who sought appointment of the custodian then filed an action alleging that the directors breached their fiduciary duties in approving the stock sale and sought its cancellation. The Court of Chancery determined not to cancel the stock sale, concluding that the sale was entirely fair. The court declined to consider any other aspects of the stock sale, reasoning that it was unnecessary to review it under any less rigorous standard of review given that it had survived the most stringent standard of review, entire fairness. On appeal, the Delaware Supreme Court, sitting *en banc*, reversed and remanded for the Court of Chancery to consider the board's motivations and purpose of the stock sale. According to the Supreme Court in an opinion by Chief Justice Seitz, if the board approved the stock sale for inequitable reasons, the Court of Chancery should have canceled the stock sale. If the board, acting in good faith, approved the stock sale for the "primary purpose of thwarting" the stockholder's vote to elect directors or reduce her leverage as an equal stockholder, it must "demonstrat[e] a compelling justification for such action" to withstand judicial scrutiny under *Blasius*. For the opinion, click [here](#).

## Delaware Court of Chancery Adjusts Appraised Value for Post-Signing Effect of the Tax Cuts and Jobs Act

In *In re Appraisal of Regal Entertainment Group*, the Delaware Court of Chancery, in an opinion by Vice Chancellor Laster, took into account the effect of the Tax Cuts and Jobs Act (the "Tax Act"), a federal statute that reduced the corporate tax rate from 35% to 21%, when appraising the fair value of Regal in connection with its acquisition by Cineworld Group plc. The Tax Act was enacted between the signing and closing of the transaction. In an appraisal action brought in connection with the transaction, the court, consistent with recent precedent, found that the deal price less synergies provided the best indication of fair value of Regal at signing. However, because Delaware's appraisal statute mandates the court to determine the fair value of the corporation at closing, the court determined that the appraisal petitioners were entitled to an additional amount attributable to the increased value of the company resulting from the Tax Act. For the opinion, click [here](#).

## Delaware Court of Chancery Permits Reverse Veil-Piercing in Case of First Impression

The Delaware Court of Chancery in *Manichaeon Capital, LLC v. Exela Technologies, Inc.* denied a motion to dismiss claims where the relief sought was based on the use of veil-piercing and, in a case of first impression, reverse veil-piercing theories. In *Manichaeon*, the plaintiffs obtained a significant appraisal award in connection with the merger of SourceHOV Holdings, Inc. into what is now Exela. Following final judgment, the court entered a charging order against SourceHOV's interests in its subsidiaries, but the judgment remained unsatisfied. The plaintiffs alleged that Exela and its subsidiaries abused the corporate form through fraudulent maneuvers that transferred value subject to the charging order from SourceHOV's subsidiaries indirectly to Exela and bypassing SourceHOV. Plaintiffs' claims sought to pierce the corporate veil upwards to reach Exela and downwards (*i.e.*, reverse veil-piercing) to reach SourceHOV's solvent subsidiaries, which subsidiaries plaintiffs alleged were complicit in the abuse of the corporate form. The court, in an opinion by Vice Chancellor Slights, held that plaintiffs adequately pled facts supporting relief based on a veil-piercing theory, including that Exela engaged in the transaction as part of a scheme to deny SourceHOV of those funds, thereby rendering the charging order worthless. The court also reviewed justifications for and against the adoption of reverse veil-piercing in Delaware and concluded that it is an appropriate means, in limited circumstances, to remedy fraud and injustice. Here, the court found that plaintiffs pled that it was reasonably conceivable that SourceHOV's subsidiaries knowingly participated in the wrongful scheme, and therefore, relief based on reverse veil-piercing was also appropriate. For the opinion, click [here](#).

## Delaware Court of Chancery Dismisses Caremark Claims

In *Petry v. Smith*, the Delaware Court of Chancery dismissed a claim that the board of directors of FedEx Corporation breached their duty of oversight (*i.e.*, a so-called *Caremark* claim) in connection with the company's role in the delivery of untaxed,

unstamped cigarettes. In 2018, FedEx settled actions against it related to delivery of the illegal cigarettes by paying \$35.3 million and agreeing to certain internal reforms. Plaintiff brought a derivative action alleging that the FedEx board breached their fiduciary duties by failing to oversee FedEx's compliance with state and federal laws governing the transportation and delivery of cigarettes, as well as against two officers of the company for their role. Plaintiff elected not to make a demand that the board investigate and prosecute her claims, instead alleging that such demand would have been futile because each member of the board faced a substantial likelihood of personal liability. The court, in an opinion by Vice Chancellor Slights, disagreed, however, and dismissed the complaint, holding that the plaintiff failed to adequately plead that a majority of the board faced a substantial likelihood of liability on the claims or that they otherwise lacked independence. For the opinion, click [here](#).

## 2021 Amendments to the Delaware Business Entity Statutes

The 2021 amendments to the Delaware General Corporation Law ("DGCL"), Delaware Limited Liability Company Act ("LLC Act"), Delaware Partnership Act ("Partnership Act") and the Delaware Limited Partnership Act ("LP Act") have been approved by the Delaware General Assembly and signed into law by the governor. They will become effective on August 1, 2021. Key amendments include the following:

### DGCL Amendments

Voting and Counting of a Corporation's Stock for Quorum Purposes. Section 160 of the DGCL currently provides (prior to the 2021 amendments) that shares of a corporation's stock cannot be counted for voting or quorum purposes if such shares belong to (i) the corporation itself or (ii) to another corporation if a majority of the shares entitled to vote in the election of directors of such other corporation is held, directly or indirectly, by the corporation. The amendments to Section 160 of the DGCL expand this to provide that shares of a corporation's stock also cannot be voted or counted for quorum purposes if such shares belong to any other entity, whether corporate or non-corporate, that the corporation (i) holds a majority of the voting power, either directly or indirectly or (ii) otherwise controls, directly or indirectly.

### LLC Act, Partnership Act and LP Act Amendments

Safe Harbor for Ratifying Defective Acts. The 2021 amendments add new sections to the LLC Act, Partnership Act and LP Act that provide a safe harbor for ratifying defective acts. These amendments were proposed in response to the Delaware Supreme Court's holding in *Composecure, L.L.C. v. Cardux, LLC* (found [here](#)) and the Delaware Court of Chancery's holding in *Absolom Trust v. Saint Gervais LLC* (found [here](#)), which held that acts deemed to be "void" are not able to be later ratified. According to the bill synopsis, the new language confirms "that void or voidable actions may be ratified or requirements may be waived by other means permitted by law," and "is not intended to preempt or restrict other valid means of ratifying acts or transactions or waiving requirements or to impair the effectiveness of any valid ratification or waiver previously effected."

Member or Partner Right to Obtain Information. The 2021 amendments amend the LLC Act, Partnership Act and LP Act to provide that a member, partner or limited partner, as applicable, who has a right to obtain information under the statute or relevant operating agreement is entitled to all information "necessary and essential" to achieving that purpose. The amendments clarify that the right to "necessary and essential" information may be extended or restricted in the relevant operating agreement. These amendments address the holding in *Murfey v. WHC Ventures* (found [here](#)), which held that the "necessary and essential" standard does not apply by default to contractual information rights.

Delegation with Conflict of Interest. The 2021 amendments amend the LLC Act, Partnership Act and LP Act to provide that a member, manager, partner or general partner (as applicable) may delegate any of its rights, powers or duties irrespective of whether it has a conflict of interest with respect to the matter as to which such rights, powers or duties are being delegated, and that the person or persons to whom any such rights, powers or duties are being delegated shall not be deemed conflicted solely by reason of the conflict of interest. This creates a different rule than was established in *Wenske v. Bluebell Creameries, Inc.* (found [here](#)), which held that a conflicted principal is prohibited from delegating authority over matters in which the principal is conflicted, even to an independent delegatee.

Public Benefit Entities. The 2021 amendments to the LLC Act and the LP Act provide that the respective operating agreement of a statutory public benefit limited liability company or limited partnership must (i) state that the entity is a statutory public benefit limited liability company or limited partnership, (ii) state the specific public benefit or benefits to be promoted and (iii) provide that, in the event of any inconsistency between the stated public benefit(s) in such agreement and the certificate of formation or certificate of limited partnership (as applicable), the operating agreement shall control as among those party to or bound by it. With regard to (iii), the certificate of formation or certificate of limited partnership must be amended to accurately reflect the public benefit if any inconsistency is found.

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## M&A Markets

The following issues of *M&A at a Glance*, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

[April 2021](#)

[May 2021](#)

[June 2021](#)

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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