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Delaware's Recent Governance Reforms: Seawall or Changing Tides?

Last year, the Delaware legislature enacted a significant change to the Delaware General Corporate Law ("DGCL"). Ordinarily, this development would not get much notice. Amendments to the DGCL and business entity laws are presented to the Delaware General Assembly by the Delaware State Bar Association's Corporation Law Council (the "Council") every year. These amendments usually entail technical, minor changes to the DGCL. This time, however, the amendments were anything but technical. The Council proposed, the legislature passed, and the governor signed into law, the addition of three statutes and the amendment of two more. The bar is abuzz regarding the controversial addition of DGCL Section 122(18). The other additions and amendments are viewed as welcome clarifications and changes. Regardless of their reception, however, these amendments could (and likely will) have widespread ramifications on how Delaware companies conduct themselves in the future.

New Statutory Authorization for Stockholders' Agreements (DGCL § 122(18))

Stockholders' agreements are not new. They are a mechanism often used to vest a corporation's stockholders or the beneficial owners of its stock with certain contractual rights for so long as they continue to own specified amounts of the corporation's stock.

Recently, however, the Court of Chancery refused to enforce one such stockholder agreement. In *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, C.A. No. 2023-0309-JTL (Del. Ch. Feb. 23, 2024), Vice Chancellor Laster struck down a stockholder agreement that Ken Moelis reached with Moelis & Co. when he took it public, and which allowed him functionally to remain in control of the business even

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Legal 500 China Names Xiao Liu "Lawyer of the Year"

Quinn Emanuel is proud to announce that Xiao Liu, Partner in our Beijing office and Chair of our China Practice, has been named Lawyer of the Year in Litigation by the *Legal 500* China Awards 2024. Xiao's unique practice focuses on representing China-based companies and individuals in cross-border litigation, arbitrations, and government enforcement actions.

Kevin Arquit Featured in *Lawdragon's* "Legend of the 500" Recognition

Washington, D.C. partner Kevin Arquit has been featured by *Lawdragon* in their "Legends of the 500" feature, which is reserved for the elite few recognized 10 or more times as a Lawdragon 500 member. Since Kevin's election in 2015, only 250 other *Lawdragon* Legends have been selected.

Quinn Emanuel Names Olga Vieira as Co-Managing Partner of Miami Office

Olga Vieira has been named the firm's newest Co-Managing Partner of the Miami Office. Olga joined Quinn Emanuel as a Partner in 2021, where she played a key role in building the firm's Miami office. Serving alongside co-managing partner, Samuel G. Williamson, she is the first woman to serve this role in the Miami office.

when his voting stake dropped below a majority. Vice Chancellor Laster held the arrangement violated DGCL Section 141(a), which requires that corporations be managed by their boards of directors.

Vice Chancellor Laster held that every time a corporation enters into any kind of contract, the board of directors' authority to make decisions is somewhat constrained. For example, if a company enters into an exclusive supplier contract, then the corporation can only buy from that supplier. The Court held, however, that there is a limit to how much a board can contract away its power of choice. Those contracts sit on a sliding scale, Vice Chancellor Laster said, starting with ordinary commercial contracts (clearly permissible) and ending with arrangements that ultimately intrude so far into corporate governance that they leave the realm of the commercial and raise a Section 141(a) issue (clearly not acceptable under the previous DGCL). Vice Chancellor Laster did observe, however, that it arguably was acceptable to adopt these governance restrictions on the board's authority in preferred shares, instead of separate contracts.

In reaction to this decision, the Delaware Assembly passed Section 122(18), which expands significantly on what a stockholder agreement can authorize. Section 122(18) allows corporations to:

> Make contracts with one or more current or prospective stockholders (or one or more beneficial owners of stock), in its or their capacity as such, in exchange for such minimum consideration as determined by the board of directors (which may include inducing stockholders or beneficial owners of stock to take, or refrain from taking, one or more actions). Without limiting the provisions that may be included in such contracts, the corporation may agree to: (a) restrict or prohibit itself from taking actions specified in the contract, whether or not the taking of such action would require approval of the board of directors under this title, (b) require the approval or consent of one or more persons or bodies before the corporation may take actions specified in the contract (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation), and (c) covenant that the corporation or one or more persons or bodies will take, or refrain from taking, actions specified in the contract (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation). With respect to all contracts made under this subsection, the corporation shall be subject to the remedies available under the law governing the contract, including for any failure to perform or comply with its agreements under such contract.

In short, this new section allows companies to do what *Moelis* (and Section 141) proscribed: give stockholders governance power instead of the company's board of directors. In conjunction with this amendment, there is also a new change to DGCL §122(5) (changes **bolded**), which permits a corporation to:

> Appoint such officers and agents as the business of the corporation requires and to pay or otherwise provide for them suitable compensation; **provided that any contract or other appointment or delegation of authority that empowers an officer or agent to act on behalf of the corporation shall be subject to § 141(a) of this title, to the extent it is applicable**.

These changes mark a watershed in Delaware law. Unlike the previous board-centric model of governance codified in DGCL Section 141, these amendments allow for stockholder agreements to contain the type of governance rights once otherwise reserved for the board of directors, or if delegated, that were previously contained in a corporate charter or in preferred shares. But, unlike previous limitations concerning the issuance of preferred shares, the Section 122(18) amendments do not seem to place any limits on the rights that can be given to stockholders through contract.

If a corporation could already enact governance restrictions or delegations through a preferred share issuance, why does the right to assign these obligations through a contract matter? First, if the company is private, then the stockholder agreement containing these restrictions are private too—they likely are unknown to the public or even other investors. That fact means that managerial control could change hands in relative secrecy. Second, even in a public company, stockholder agreements may be more easily amended than preferred share terms. So, in short, these amendments make it easier for companies to pass governance control from the board and hand it to a single stockholder.

Stockholders and corporations also now have unfettered choice to determine which law applies to determining remedies for breaches of these agreements. Section 122(18) provides: "With respect to all contracts made under this subsection, the corporation shall be subject to the remedies available under the law governing the contract." That provision adds the possibility that California law, or Maryland law, or any other state law, will determine the remedy. That determination, in turn, might allow a savvy actor to avoid or necessitate certain remedies. A thoughtful drafter would do well to look to the available remedies in each state before choosing the law of their contract.

These amendments raise yet more questions: how much authority must a Delaware corporation's board of directors retain, if any? Would a stockholder, when given managerial control, owe the exact same fiduciary duties currently assigned to the board? If yes, how much power would the stockholder need to obtain through contract before it owes those fiduciary duties? Could further private ordering allow for the stockholder to contract away these fiduciary duties, assuming they bind the stockholder in the first place? Could a stockholder contract away their contract-given managerial control? What effect will these stockholder agreements have on the disclosure of "risk factors" in registration statements and other SEC disclosure documents? We anticipate that the courts will soon address these questions, and many others.

Resurrecting the "Dead Hand" Poison Pill

Another potential consequence of Section 122(18)'s enactment is the possible return of the "dead hand" poison pill. Like other poison pills, the job of a dead hand poison pill is to make a hostile takeover prohibitively expensive. Once a hostile bidder acquires a designated amount of the target company's shares, the poison pill kicks in, allowing only previously existing stockholders to buy newly issued shares at reduced prices. The poison pill thus lowers the price of shares, but it saves the company from a takeover.

Where the dead hand differs from a traditional poison pill, however, is who can exercise the right to buy the newly issued shares. These pills contain provisions that only permit them to be redeemed by "continuing directors." Said differently, if a hostile actor were successful in replacing the board via a proxy contest, then the new board members would lack the power to redeem the pill—leaving that right for the previous directors. Notably, the Court of Chancery previously invalidated these dead hand pills in *Carmody v. Toll Bros.*, 723 A.2d 1180 (Del. Ch. 1998), on the basis that the adoption of such a provision involved both a violation of Section 141(a) of the DGCL and a breach of the directors' fiduciary duties.

Enter Section 122(18). Under that amendment, a corporation might be able to contract with a private stockholder to name stockholders (who also happen to be current directors) as responsible for determining whether to redeem the poison pill. In that same contract, the board could not redeem the pill unless the stockholders/present directors assent. So, under this agreement, even if the directors are replaced in a proxy contest, their specters will prevent the new board members from acting in a manner they believe is consistent with their fiduciary duties. Whether the new statutory language will trump, limit, or leave the court's previous ruling unchanged with respect to the dead hand poison pill remains to be seen.

Enforcing Contractual Limitations on Stockholders

As yet another possible consequence, Section 122(18) might have opened the door to enforce broad contractual limitations on stockholders generally. The statute's language says that "[w]ithout limiting the provisions that may be included in any such contracts, the corporation may agree to . . . covenant that . . . one or more persons or bodies will . . . refrain from taking actions specified in the contract, (which persons . . . may include . . . one or more current . . . stockholders or beneficial owners of stock of the corporation." The language means that the corporation can covenant on behalf of its stockholders to have them take or refrain from taking actions, suggesting that the corporation could bind stockholders to a covenant even if the stockholders were not parties to the agreement. That language further suggests, then, that stockholders that are not parties to a governance agreement could still be bound by the governance agreement.

A few questions follow from this reading: Could stockholders authorize a waiver of information rights (under DGCL Section 220) without being actual parties to the waiver by virtue of Section 122(18)'s language? Can companies now use internal affairs documents to impose restrictive covenants, with a Delaware choice of law clause, to affect an employment relationship that would otherwise be governed by the law of another state (and thereby avoid *Focus Financial Partners, LLC v. Holsopple*, 250 A.3d 939 (Del. Ch. 2020), and similar cases holding that Delaware choice of law clauses in such governance documents were invalid)? Again, these questions have no current answers.

Board Approval and Merger Agreements (DGCL §§ 147, 268, and amended § 232)

In *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, C.A. No. 2022-1001-KSJM (Del. Ch. Feb. 29, 2024), the Delaware Court of Chancery observed that it was disrupting the "practical realities of negotiating merger agreements" by finding that a board must approve an "essentially complete" version of a merger agreement, rather than a substantially final form. The Court also noted that proxy notices to stockholders must also contain an "essentially complete" version of such agreement or brief summary thereof. In response, the Delaware Assembly passed DGCL Sections 147 and 268 and amended DGCL Section 232.

DGCL Section 147 provides that, where Delaware law expressly requires the board of directors approve or take other action with respect to an agreement, instrument or document, it must be approved in final form or a *substantially* final form. The synopsis of the amendment observes that competing interpretations of Section 251(b) were previously addressed in *Activision* and states that Section 147 is intended to provide clarification by enabling the board of directors to approve or ratify an agreement, instrument or document if the material terms are (i) set forth therein or (ii) determinable through information or materials presented or known by the board of directors. Section 147 also allows the board of directors to ratify an agreement or document that has to be filed or is referred to in a certificate that has to be filed with the Secretary of State, and such ratification will be deemed to relate back to the time of the original approval, so long as the ratification occurs prior to the effectiveness of such filing.

The amended DGCL Section 232 introduces a new paragraph (g), providing that documents enclosed with, annexed or appended to a notice given to stockholders are deemed to be included with such notice. Those documents are incorporated solely for the purposes of satisfying the notice requirements of Title 8 of the DGCL; the certificate of incorporation or the bylaws are not intended to be deemed *per se* material to stockholders.

DGCL Section 268(a) lists the necessary board approvals and requirements for a merger agreement (other than a holding company reorganization under DGCL Section 251(g)) that provides that all of the shares of capital stock of the constituent corporation are converted into or exchanged for cash, property, rights or securities. Specifically, (i) board-approved merger agreements do not need to include any provision relating to the surviving corporation's certificate of incorporation, (ii) any amendment to the surviving corporation's certificate of incorporation may be adopted by the board or any other person acting at its direction, and (iii) any changes to the surviving corporation's certificate of incorporation will not be considered an amendment to the merger agreement.

Lost Premium Damages and Stockholder Representatives (Amended DGCL § 261)

In *Luigi Crispo v. Elon R. Musk*, C.A. No 2022-0666-KSJM (Del. Ch. Oct. 31, 2023), the Delaware Court of Chancery called into question the viability of two previously accepted interpretations in defining damages in merger agreements to include lost stockholder premiums, or so-called "*Con Ed* provisions" (adapted from *Consolidated Edison, Inc. v. Northeast Utilities*, 426 F. 3d 524 (2d Cir. 2005)). In response, SB 313 amends DGCL § 261 in two subsections to address expressly the uncertainty created by the *Crispo* ruling.

DGCL Section 261(a)(1) clarifies that, through an express provision, parties to a merger or consolidation agreement may enumerate the remedies (including a requirement to pay lost premium damages) of a party's failure to perform its obligations under the agreement. Remedies may include payment obligations to the other party if the merger or consolidation is not consummated, such as termination fees, and that the nonbreaching corporation is entitled to retain such payment (so the corporation would not have to distribute the proceeds to its stockholders).

DGCL Section 261(a)(2) further clarifies that, through an express provision, parties to merger or consolidation agreement can: (i) appoint a stockholders' representative of any constituent corporation; (ii) delegate sole and exclusive authority to take action on behalf of the stockholders under that appointment agreement, (iii) make such appointment irrevocable and binding on all stockholders from and after adoption of the agreement by vote of the stockholders, and (iv) agree that the foregoing provisions cannot be amended after the effective date of the merger or consolidation, or may be amended solely by consent or approval of specified persons. The synopsis further clarifies that the stockholder representative's authority under Section 261(a)(2) only authorizes the exercise of power to enforce rights under the agreement—and no more.

* * *

This discussion is not in any way exhaustive, and much about how Section 122(18) will change the Delaware landscape remains unknown. Quinn Emanuel as should businesses and practitioners—will closely follow further developments in this space.

New CFPB Rule Requires Data Providers to Allow Consumers to Authorize Third Parties to Access Their Financial Information

The Consumer Financial Protection Bureau (CFPB) has published its final rule implementing Section 1033 of the Dodd-Frank Act. The rule requires "data providers," which generally includes banks, credit unions, and credit card issuers, to allow consumers to access their financial information and authorize third parties to access their information. Required Rulemaking on Personal Financial Data Rights, 89 Fed. Reg. 90,838 (Nov. 18, 2024) (to be codified at 12 C.F.R. pts. 1001, 1033).

The Dodd-Frank Act, a sweeping set of financial reforms Congress passed in response to the 2008 financial crisis, also established the Consumer Financial Protection Bureau (CFPB). Title X of Dodd-Frank, known as the Consumer Financial Protection Act, authorized the CFPB to act as an independent consumer protection agency and implement certain sections of Dodd-Frank. *See* 12 U.S.C. §§ 5491-5492. One such section is Dodd-Frank Act Section 1033, which allows consumers to request certain financial information about themselves from "data providers." 12 U.S.C. Section 5533. However, § 1033 does not contain many details. It simply states that "a covered person shall make available to a consumer, upon request, information in the control or possession of the covered person." It then provides examples of this information, which would include information such as transaction history and data usage. It left the details to rules the CFPB might later promulgate. *Id.*

The CFPB did not touch Section 1033 until October 2023, when it issued a proposed rule implementing the section. Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74,796 (Oct. 31, 2023) (to be codified at 12 C.F.R. pts. 1001, 1033). After a notice-and-comment period, the agency issued its final rule in November 2024. The rule has two main aspects: (1) requiring "data providers" to provide consumers with access to their financial information, and (2) allowing consumers to authorize third parties to access that information.

The rule defines a "data provider" generally as a financial institution, card issuer, or provider of a consumer financial product or service. In effect, this means that the rule covers banks, credit unions, and credit card issuers but excludes certain lenders (like auto loan lenders) and providers of retirement accounts and other investment products. Personal Financial Data Rights, 89 Fed. Reg. at 90,853-54.

The main obligation for a data provider under this rule is to provide customers and certain third parties with what the rule calls "covered data." *Id.* at 90,992. Covered data includes common financial information like certain transaction information, account balance information, and the consumer's account and routing number. *Id.* The data provider must provide this data through a consumer interface and a developer interface, and it cannot charge fees for maintaining these databases or for consumer and third party requests to access the data. *Id.* at 90,992-93. This sole provision, therefore, establishes not only a consumer's right to his or her data under the regulation but also a third party's right to access that information.

The rights of third parties under the regulation are novel as Dodd-Frank Section 1033 is limited to directly addressing the rights of consumers. But the regulation seeks both to provide those third parties with rights while also restraining their actions. A third party is anybody other than the consumer or the data provider. *Id.* at 90,991. To become authorized to act on behalf of a consumer, the third party must fulfill three main requirements. First, it must provide the consumer with an authorization disclosure. Second, the disclosure must include a statement certifying that the third party agrees to the obligations described elsewhere in the regulation. Finally, the third party must obtain the consumer's express informed consent to access covered data on behalf of the consumer. To satisfy the consent requirement, the third party must have the consumer sign the authorization disclosure electronically or in writing. *Id.* at 90,996.

In addition to acting on behalf of consumers, the regulation also allows third parties to use "data aggregators" to assist them. Data aggregators work with the third party to access the data. *Id.* at 90,991. However, the data aggregator itself must obtain the same authorization from the consumer as the third party. *Id.* at 90,997-98.

Although the regulation benefits authorized third parties by granting them access to consumers' covered data, it subsequently limits them by imposing affirmative obligations upon them. The main obligation is a limit on collection, use, and retention of the data to what is "reasonably necessary" to provide the consumer with the service he or she requested. *Id.*

Finally, the rule authorizes "standard-setting bodies" to create "consensus standards" to guide compliance with the regulation. *Id.* at 90,991-92. To be a standard-setting body, the organization must apply for a certification from the CFPB and meet attributes of openness, balance, due process and appeals, consensus, and transparency. *Id.* The CFPB began accepting applications for these bodies in the summer of 2024. *Id.* at 90,861.

The CFPB framework overall creates what is called an "open banking" framework. Open banking is a system where banks allow third parties to access consumer information and interact across financial institutions. For example, a third party could collect all of a consumer's loan information to provide suggestions on future loans, or an app could provide a consumer access to all of his or her account information in one place. This unilateral creation of a new type of banking system through a single agency's regulation was a major source of controversy during the initial notice-and-comment period. *See, e.g.*, *id.* at 90,880.

On the day the CFPB released the final rule, Forcht Bank, N.A., the Kentucky Bankers Association, and the Bank Policy Institute filed a lawsuit challenging the regulation on statutory and constitutional grounds. Complaint, *Forcht Bank, N.A. v. CFPB*, No. 5:24-cv-00304-DCR (E.D. Ky. Oct. 23, 2024), ECF No. 1. The complaint focuses on this "open banking" concern—in effect, the CFPB is using Dodd-Frank to create a new banking system that Congress never authorized. *Id.* ¶ 1. The lawsuit also raises constitutional concerns with outsourcing policymaking authority to the standard-setting bodies. The claims are all brought under various provisions of the Administrative Procedure Act. *Id.* ¶¶ 92-133.

The final rule became effective on January 17, 2025. Personal Financial Data Rights, 89 Fed. Reg. at 90,838. However, compliance dates will depend on the assets of the firm and will range from April 1, 2026, to April 1, 2030. *Id.* The earliest date applies to depository institutions that hold at least $250 billion in assets and non-depository institutions that generated at least $10 billion in total receipts in either 2023 or 2024. *Id.* at 90,991. Depository institutions with fewer than $850 million in assets are exempt from the rule. *Id.* at 90,988. Q

PRACTICE AREA NOTES

White Collar Litigation Update

The Misuse of INTERPOL in Commercial Disputes and Risk-Mitigating Measures

For nearly a century, INTERPOL (called the International Criminal Police Commission before being renamed the International Criminal Police Organization-INTERPOL in 1956) has served a critical role in facilitating cooperation among police organizations in member countries. As set forth in Article 2 of its Constitution, one of the core aims of INTERPOL——which today has 196 member countries—is to "ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the 'Universal Declaration of Human Rights.'" Constitution of the ICPO-INTERPOL, U.N. Doc. I/CONS/GA/1956 (2023).

In practice, INTERPOL fosters international cooperation among law enforcement authorities by, among other things, publishing "notices" for the identification, detention and/or arrest of fugitives sought by a member country. Contrary to a common misconception, INTERPOL itself has neither the authority to detain or arrest individuals nor any prosecutorial powers. Rather, its function is primarily to serve as a centralized data source for information about fugitives, as well as persons who may pose risks to the public, provided by all its member countries. In particular, the most well-known type is a "Red Notice," which is "a request [by one member country] to law enforcement worldwide to locate and provisionally arrest a person pending extradition, surrender, or similar legal action." INTERPOL, "Red Notices," *available at* https://www.interpol.int/en/How-we-work/Notices/Red-Notices. By publishing Red Notices—information about which is available in an internal database accessible by member countries—INTERPOL can simultaneously alert police authorities globally about fugitives sought by their fellow member countries. INTERPOL also publishes notices for different purposes—each designated by a different color—such as, among others, (1) requests from a member country for information on missing persons ("Yellow Notice") and the identity of a person relevant to a criminal investigation ("Blue Notice"); and (2) warnings by a member country regarding a person who may pose a "serious and imminent threat to public safety" ("Orange Notice"). INTERPOL, "About Notices," *available at* https://www.interpol.int/en/How-we-work/Notices/About-Notices.

Inherent in any request by a member country that INTERPOL publish a notice is that the member country operates in good faith for the purpose of achieving legitimate law enforcement purposes, both in accordance with that country's national laws and principles of fundamental human rights. This is reflected in Article 2 of the INTERPOL Constitution as set forth above, as well as Article 2 of INTERPOL's Rules on the Processing of Data ("RPD"), which states: "The aim of the present Rules is to ensure the efficiency and quality of international cooperation between criminal police authorities through INTERPOL channels, with due respect for the basic rights of the persons who are the subject of this cooperation, in conformity with Article 2 of the Organization's Constitution and the Universal Declaration of Human Rights to which the said Article refers." INTERPOL's Rules on the Processing of Data, U.N. Doc. III/IRPD/GA/2011 (2023).

It has been well documented, however, that member countries—particularly those with authoritarian regimes—have abused their privileges with INTERPOL by requesting notices for illegitimate purposes inconsistent with the aims of facilitating international police cooperation. This includes, among other things, requesting that INTERPOL publish Red Notices seeking the detention and arrest of political opponents and religious dissidents. *See, e.g.*, Bill Whitaker and Aliza Chasan, "INTERPOL—The International Police Organization—Accused of Doing the 'Dirty Work' of Authoritarian Members," 60 Minutes (CBS News) (Jan. 28, 2024), *available at* https://www.cbsnews.com/news/interpol-policing-success-failures-60-minutes/; Sam Meacham, "Weaponizing the Police: INTERPOL as a Tool of Authoritarianism," HARVARD INT'L REV. (Apr. 11, 2022), *available at* https://hir.harvard.edu/weaponizing-the-police-authoritarian-abuse-of-interpol/; Josh Jacobs, "Has INTERPOL Become the Long Arm of Oppressive Regimes?" The Guardian (Oct. 17, 2021), *available at* https://www.theguardian.com/global-development/2021/oct/17/has-interpol-become-the-long-arm-of-oppressive-regimes.

Notably, abuse of INTERPOL is not limited to authoritarian regimes seeking to persecute political and religious leaders or other members of civil society simply for voicing their opinions. Indeed, the Firm has handled a number of cross-border cases in recent years where adversaries in civil litigation and arbitration matters have threatened to seek Red Notices or convinced INTERPOL to publish Red Notices against individuals as a means to gain leverage in commercial disputes. This may include, for instance, threatening the pursuit of Red Notices as a means to extort a settlement on more favorable terms. In cases where the adversary is a national government or organ of a national government (*e.g.,* a state-owned oil company), an example of how the process may play out is as follows: (1) the government directs its criminal authorities to initiate an investigation against private actors with whom there is a commercial dispute and issue arrest warrants against them, even if there is no factual or legal basis for them; and, in turn, (2) the government agency designated to act as the central bureau, or authority, for that country makes a request to INTERPOL that it publish a Red Notice pertaining to the private actors. In those cases where the adversary is a private party, the process is similar but would generally commence with a referral to criminal authorities and request that the authorities initiate an investigation against counterparties in a commercial dispute. These typically are based on factually weak, if not altogether false, allegations of misconduct.

Apart from the reputational damage that may result from the issuance of a Red Notice—even where based on factually and legally baseless claims—there are significant practical consequences for the targets of Red Notices. For instance, because the targets of a Red Notice are at risk of detention and arrest by police authorities worldwide, one common mitigation measure is to not travel at all internationally. This is particularly the case where the target of the Red Notice is the citizen and resident of a country that, either by express law or general precedent, does not extradite its own citizens to other countries. This measure can have a detrimental impact on the target both personally and professionally, notably in instances where the Red Notice remains pending for years. Other potentially crippling adverse consequences include the target of a Red Notice (1) being deported from the United States, even if that individual has legal status (*e.g.*, a work visa); (2) not being able to open bank accounts or execute financial transactions; or (3) having his or her accounts closed, as banks and other financial institutions may flag him or her as a risk through KYC and due diligence processes.

Companies and their executives, employees or representatives may, in particular, face threats of the above in the context of disputes where the commercial adversary is located in a country with weaker democratic and institutional norms and where governmental authorities (such as those with investigatory and prosecutorial authority) are prone to bribery and corruption. Such political conditions are ripe for instances where, for example, a private company or individual improperly influences its national law enforcement authorities to (1) initiate meritless criminal investigations and issue arrest warrants against counterparties in a commercial dispute and, in turn; (2) request that INTERPOL publish Red Notices against those counterparties. As a hypothetical example, in an arbitral proceeding over a contract dispute filed by a U.S. counterparty (the claimant) against a state-owned Brazilian company (the respondent), the latter may influence the Brazilian criminal authorities to investigate and issue arrest warrants against executives of the U.S. company (for instance, on sham charges of corruption), which, in turn, results in the Brazilian central authority requesting that INTERPOL issue Red Notices pertaining to those executives.

As an institution, INTERPOL has become increasingly cognizant that certain member countries instrumentalize it for illegitimate law enforcement purposes and is taking steps to impose heightened controls on the issuance of notices, including Red Notices. *See, e.g.*, Jane Bradley, INTERPOL Tightens Oversight on Databases Misused by Autocrats," N.Y. Times (Nov. 7, 2024), *available at* https://www.nytimes.com/2024/11/07/world/europe/interpol-oversight-red-notices-blue-notices-databases-abuse-dissidents.html. In addition, and importantly, for those companies and individuals who, in the context of a commercial dispute, confront circumstances where adversaries threaten the use of Red Notices—or have successfully lobbied their national governments to have INTERPOL issue Red Notices—there is a process to seek recourse.

Specifically, INTERPOL permits the targets of a Red Notice to submit requests seeking the "deletion of data" (*e.g.*, cancelation and removal of a Red Notice from INTERPOL's databases). *See, e.g.*, Article 18(1), INTERPOL Rules on the Processing of Data ("Rights of access, correction and deletion of data": "Any person or entity shall be entitled to submit directly to the Commission for the Control of INTERPOL's Files a request for access to, or correction and/or deletion of data processed in the INTERPOL Information System concerning that person or entity."); Commission for the Control of INTERPOL's Files, "Procedural Guidelines for Applicants to the Commission" (Feb. 29, 2024), *available at* https://www.interpol.int/en/Who-we-are/Commission-for-the-Control-of-INTERPOL-s-Files-CCF/How-to-submit-a-request. In addition, INTERPOL accepts for consideration requests from parties asking preemptively that INTERPOL not issue any notices against them. *See* INTERPOL, "Who We Are: Commission for the Control of INTERPOL's Files (CCF)," *available at* https://www.interpol.int/en/Who-we-are/Commission-for-the-Control-of-INTERPOL-s-Files-CCF/How-to-submita-request ("Remark[:] The Statute of the Commission for the Control of INTERPOL's Files does not use the term 'pre-emptive requests', but the term has generally been understood to refer to those requests addressed to the Commission in which the requester asks INTERPOL not to process any future data in its files even when there are no data currently in INTERPOL's files, arguing that doing so would violate the Organization's rules. The requester may provide information that the requester believes supports the contention that processing such data would violate INTERPOL's rules."

In prior cases, the Firm has succeeded in efforts to have INTERPOL cancel Red Notices, or not issue any in the first instance, pursuant to the above procedures. The bases for such requests typically include that the notice (*e.g.*, Red Notice, Blue Notice, Orange Notice) does not comply with the INTERPOL Constitution and/or RPD. Critically, Article 83 of the RPD explicitly prohibits the issuance of Red Notices in cases involving purely private commercial disputes where there is no connection whatsoever to criminal conduct, as it states: "Red notices may not be published for the following categories of offences: . . . offences originating from a violation of laws or regulations of an administrative nature or deriving from private disputes, unless the criminal activity is aimed at facilitating a serious crime or is suspected of being connected to organized crime." Other bases to support the cancelation or invalidation of a Red Notice include, *inter alia*, the following: (1) the Notice is premised upon an arrest warrant that was not issued in compliance with national laws (*e.g.*, the target was not afforded due process); (2) the Notice does not, in any way, promote international police cooperation, as it was requested and issued for purposes of leverage in a commercial dispute and/or based on false claims; and (3) the Notice violates the fundamental human rights of its target (*e.g.*, the country that sought the Notice did so as a means of punishing a political opponent of the ruling government).

Delaware Update

Mindbody Decision: Delaware Court Preserves Traditional Boundaries of M&A Buyer Liability

The Delaware Supreme Court has decisively blocked what could have been a dramatic expansion of acquirer liability in M&A transactions. In *In re Mindbody, Inc. Stockholder Litigation*, C.A. No. 484, 2023 (Del. Dec. 2, 2024), the Court rejected an argument that would have exposed buyers to post-closing litigation based on standard merger agreement provisions that create duties to a seller's shareholders.

Vista, a private equity buyer, became interested in an opportunity to purchase software company Mindbody. Mindbody management had conversations with Vista regarding Mindbody's transaction process, transaction timeline, its likely acceptable offer price, and a potential post-transaction position for Mindbody's CEO at Vista. The Delaware Chancery court held that Mindbody's CEO breached his duty to shareholders by withholding information about these meetings from the board in Mindbody's proxy statement. Because the merger agreement provision required Vista to correct errors in proxy disclosures, the Delaware Court of Chancery also found that Vista was liable to seller's shareholders for aiding and abetting management's disclosure violations.

Had this theory stood, it would have significantly expanded potential buyer liability in fiduciary duty cases. In its 1986 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* decision, the Delaware Supreme Court held that boards of directors must face an enhanced level of scrutiny when attempting to sell their companies. This decision was narrowed in the Court's 2015 decision in *Corwin v. KKR Financial Holdings LLC*, which held that, so long as the transaction was approved by a "fully informed, uncoerced majority of the disinterested stockholders," *Revlon* scrutiny would not apply.

On appeal, the Delaware Supreme Court emphatically rejected this potential expansion of fiduciary duty liability, reaffirming that arm's length buyers enjoy protection from aiding and abetting claims. *In re Mindbody, Inc. Stockholder Litigation*, C.A. No. 484, 2023 (Del. Dec. 2, 2024). The court emphasized that, unlike financial advisors or other transaction intermediaries, buyers are expected to negotiate aggressively in their own interests. Converting standard contractual obligations into fiduciary duties to a seller's stockholders would fundamentally alter the dynamics of M&A negotiations.

Instead, the court held that buyers can only held be liable if they "attempt to create or exploit conflicts of interest" through active steps. Mere knowledge of or silence regarding seller misconduct—even when combined with a contractual duty to speak up—cannot support liability. This holding preserves a buyer's ability to pursue advantageous deals without fear of routine post-closing exposure.

The impact of this decision should be immediate and significant. The trial court's approach would have made many more buyers potential defendants in take-private litigation, based on provisions that are standard in merger agreements. The Delaware Supreme Court's reversal maintains important boundaries between arm's length negotiation and improper participation in fiduciary breaches.

Importantly, although this opinion related to disclosure obligations, plaintiffs did not plead abettor liability for process violations. Both the trial and appellate courts noted that they were not weighing in on whether Vista's conversations with Mindbody's CEO rose to "active participation." The decision reaffirms that Delaware law scrutinizes the conduct of a selling company's fiduciaries while protecting arm's'-length buyers acting in their own interests - even when those interests lead them to remain silent about seller misconduct they observe.

Education Litigation Update

Kentucky Federal Court Vacates 2024 Updates to Title IX

Title IX is a landmark federal law that prohibits sex-based discrimination in educational institutions. Enacted in 1972, the law has undergone numerous amendments over the years and, more recently, has become a focal point of political debate with constantly changing standards. Title IX received a lot of attention in 2024 and so far in 2025 after the Biden Administration issued a new amendment, expanding its protection. A legal battle followed, leaving educational institutions confused, frustrated, and wondering about next steps in Title IX compliance.

2024 Amendment to Title IX

On April 29, 2024, the Department of Education ("DOE") issued the Title IX Final Rule (the "2024 Amendment"), which, most notably, broadened Title IX protections by including "gender identity" as prohibited discrimination on the basis of sex. In particular, this change expanded the definition of sexual harassment to encompass sex stereotyping, gender identity, and gender expression discrimination. The 2024 Amendment also offered more protections for pregnant and postpartum students, provided stronger language regarding retaliation, and set out new procedural requirements for the investigation and adjudication of Title IX complaints. The 2024 Amendment went into effect on August 1, 2024.

Injunctions Block Enforcement of the Final Rule

The 2024 Amendment was controversial upon enactment and immediately drew legal challenges from twenty-six states. The chief objection was the rule's inclusion of gender identity in the definition of sex discrimination. These states obtained federal injunctions that allowed them to block enforcement of the 2024 Amendment.

In August 2024, the DOE sought emergency relief from the U.S. Supreme Court partially to curb the injunctions, but the request was denied on August 16, 2024. In a short opinion, the Court rejected the DOE's argument that the three challenged provisions that newly define sex discrimination to cover gender identity should be severed, allowing the other unchallenged parts of the rule to go into effect.

As a result of the injunctions and the DOE's unsuccessful attempt at scaling them back, a patchwork enforcement of Title IX was implemented whereby the twenty-six states (and certain schools nationwide) that challenged the 2024 Amendment were to adhere to the 2020 Title IX Regulations, whereas the other twenty-four states were to comply with the 2024 Amendment.

State of Tennessee v. Cardona *Ruling*

Piecemeal enforcement of Title IX continued until the United States District Court for the Eastern District of Kentucky vacated the 2024 Amendment on January 9, 2025 in *State of Tennessee v. Cardona,* No. 2:24-cv-00072-DCR (E.D. Ky. Jan. 9, 2025). This ruling follows the Eastern District of Kentucky's earlier June 17, 2024 decision granting an injunction to block enforcement of the 2024 Amendment. The court granted summary judgment against the DOE and vacated the 2024 Amendment on three bases:

First, the court held the DOE exceeded its authority in expanding the scope of prohibited discrimination to include gender identity, rejecting the DOE's argument that the U.S. Supreme Court decision in *Bostock v. Clayton County Ga.,* 590 U.S. 644 (2020) supported an expanded definition of discrimination "on the basis of sex." The court found the *Bostock* decision, which involved a transgender employee, is limited to employment discrimination under Title VII and does not apply to Title IX.

Second, the court determined that the 2024 Amendment was unconstitutional because its new definitions would compel schools and teachers to "use names and pronouns associated with a student's asserted gender identity" in violation of the First Amendment. It also found the new definitions were "so vague" that educational institutions would "have no way of predicting what conduct would violate the law."

Third, the court found the 2024 Amendment was arbitrary and capricious, reasoning that the DOE had not provided a sufficient basis for its Title IX changes.

Implications

The court's decision in *Cardona* has several significant implications for educational institutions. Critically, now that the 2024 Amendment has been vacated nationwide, the pre-existing 2020 version of Title IX is re-instated. Therefore, it is imperative that educational institutions ensure their policies are compliant with the 2020 Title IX regulations and that staff is trained to follow and implement those regulations. Educational institutions should seek legal advice on how to proceed with cases involving Title IX misconduct between August 1, 2024, when the 2024 Amendment went into effect, and January 9, 2025, when the 2024 Amendment was vacated. They should also consult a lawyer on whether to keep certain elements of their 2024 policies.

The next major implication is that the *Cardona* decision held that the Supreme Court's *Bostock* decision, which provides that Title VII's protections against sex discrimination apply to gender identity and sexual orientation, does not apply to Title IX. This places educational institutions in the unusual situation where transgender faculty and staff are protected from discrimination under *Bostock*, but transgender students are not similarly protected. Institutions must be conversant in both sets of laws and should seek legal assistance in navigating these issues. The *Bostock* decision will likely be further scrutinized and challenged under the Trump Administration, so educational institutions should monitor any developments. Q

VICTORIES

Quinn Emanuel Secures $72 Million Victory for Brazilian Energy Company in Landmark ICC Arbitration and in U.S. Court Action Against Chinese Solar Giant

In a hard-fought legal battle, Quinn Emanuel successfully represented a Brazilian energy company in its dispute with one of the largest Chinese solar panel manufacturers, securing a landmark victory in both an ICC International Arbitration and U.S. court proceedings. The case, which centered on the breach of supply contracts for solar panels, culminated in a $72 million settlement, nearly 100% of the direct damages awarded by the ICC tribunal.

Quinn Emanuel, alongside its Brazilian co-counsel Demarest Advogados (now XGIVS Advogados), secured a favorable decision for its client in the ICC International Arbitration, with the tribunal finding that the Chinese company had materially breached the contracts and awarding the Brazilian company nearly all its claimed direct damages, plus interest and legal fees, totaling over $70 million.

However, the Chinese company refused to pay the award and attempted to vacate it, prompting further legal action. Quinn Emanuel then successfully defeated the Chinese company's petition to vacate the award in the Southern District of New York, while also securing confirmation of the arbitral award through a cross-petition.

With the legal victory in hand, Quinn Emanuel escalated the pressure on the Chinese company by employing aggressive asset discovery tactics, freezing assets held by U.S. service providers, and subpoenaing a U.S. company involved in a highly valuable joint venture with the Chinese company.

This strategic leverage led to a highly favorable settlement for Quinn Emanuel's client, which ultimately will receive $72 million, along with strong protections to ensure the Chinese company will not renege on its agreement to pay. The case serves as a critical precedent for breach of supply contracts in the renewable energy sector, where the fact that there are very few players for each supply chain means these players have enormous bargaining power, and highlights Quinn Emanuel's ability to achieve exceptional results in complex international disputes.

This victory not only secured significant financial compensation for our client but also solidified Quinn Emanuel's position as a leader in handling high-stakes international arbitration and litigation, especially in industries like renewable energy where legal strategies can have far-reaching consequences. Q

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