

THE REVIEW OF  
**SECURITIES & COMMODITIES  
REGULATION**

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS  
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 54 No. 12 June 16, 2021

## THE DUTY OF DISCLOSURE FOR CORPORATE OFFICERS: AVOIDING LIABILITY IN THE FACE OF GROWING LITIGATION TREND

*In this article the authors outline the fiduciary duties of officers and directors under Delaware law and the limits of their protections from liability. They then turn to recent Delaware cases involving allegations against officers in M & A transactions for breach of the duty of disclosure. They close with practical guidance for officers in such transactions to mitigate the risk of liability.*

By Tyler J. Leavengood, Jaclyn C. Levy, and Justin T. Hymes \*

In 2009, the Delaware Supreme Court eliminated any doubt as to whether officers of a Delaware corporation owe fiduciary duties to the corporation and its stockholders, confirming in *Gantler v. Stephens* that directors and officers owe the same duties.<sup>1</sup> Yet, in the wake of the *Gantler* decision, there was not a sudden uptick in the number of decisions holding officers liable for breach of fiduciary duty. In the last two years, however, several decisions by Delaware courts have denied motions to dismiss claims against officers – acting solely in their officer-capacity – for breaches of the duty of care, and more specifically, for breaches of the duty of disclosure in connection with proxy statements relating to proposed transactions. Although

the number of such decisions remains relatively small, they nevertheless serve as a warning to officers that their merger-related actions may be subjected to judicial review.

Delaware law requires that when a corporation's fiduciaries request stockholder approval of a transaction (such as a merger, asset sale, or charter amendment), an officer, like a director, is required to disclose fairly and fully all information that would be material to the stockholders' consideration of the proposed transaction. Understandably, corporate officers, who will often have less direct involvement with or control over the transaction process than will a board of directors, may be concerned about the potential for litigation alleging that stockholders were denied access to information that may later be deemed "material" information by a court. While recent cases provide useful lessons for officers about "what not to do" in exercising their disclosure duties, they also demonstrate that officers can minimize litigation risk through the adoption of certain procedures

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<sup>1</sup> *Gantler v. Stephens*, 965 A.2d 695, 708 (Del. 2009) ("In the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold.").

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