

THE REVIEW OF SECURITIES & COMMODITIES REGULATION

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

Vol. 52 No. 4 February 20, 2019

FROM INFLUENTIAL STOCKHOLDERS TO DE FACTO CONTROLLING STOCKHOLDERS: RECENT TRENDS AND UPDATES IN DELAWARE

In March 2018, the Delaware Court of Chancery decided a trio of cases in which the court further refined the standard in Delaware for determining when a minority stockholder should be considered a controlling stockholder for purposes of subjecting a self-interested transaction to entire fairness review. In this article, the authors review notable precedent with respect to reviewing controlling stockholder transactions, analyze the three cases, and provide practice tips for stockholders and corporations in light of the court's updated guidance on de facto controlling stockholders.

By Melissa Sawyer and Emily Lichtenheld *

In Delaware, a controlling stockholder owes fiduciary duties of care and loyalty to minority stockholders.¹ Generally speaking, a controlling stockholder is a stockholder that owns a majority interest in a corporation or exercises control over the corporation's business.² The Delaware courts have emphasized that determining whether a stockholder qualifies as a controlling stockholder is a highly fact-specific inquiry. In other words, because a stockholder's percentage ownership in the company's voting stock is not determinative, even a minority stockholder can be deemed a controlling stockholder if certain facts are present.³ Today,

Delaware courts recognize three broad categories of controlling stockholders: (1) *de jure* controlling stockholders (those that own, either directly or indirectly, over 50% of a corporation's voting shares),⁴ including stockholders that have control by virtue of shareholdings in companies with dual-class capital structures,⁵ (2) *de facto* controlling stockholders (those that own less than 50% of a company's voting shares, but exercise sufficient influence over the board of directors of the company or the company's business to

¹ *Kahn v. Lynch Commc'n. Sys., Inc.*, 638 A.2d 1110, 1113-15 (Del. 1994).

² *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987).

³ *Lynch*, 638 A.2d at 1113-15.

⁴ *Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499, 507 (Del. 2005).

⁵ *In re EZCorp Inc. Consulting Agreement Derivative Litig.*, No. CV 9962-VCL, 2016 WL 301245 (Del. Ch. Jan. 25, 2016); see also *IRA Tr. FBO Bobbie Ahmed v. Crane*, No. CV 12742-CB, 2017 WL 7053964 (Del. Ch. Dec. 11, 2017).

* MELISSA SAWYER is a partner in the New York office of Sullivan & Cromwell LLP, where she co-heads the firm's Corporate Governance & Activism Practice. EMILY LICHTENHELD is an M&A associate in Sullivan & Cromwell's New York office. Their respective e-mail addresses are sawyerm@sullcrom.com and lichtenhelde@sullcrom.com.

INSIDE THIS ISSUE

- **INTERVAL FUNDS HAVE TURNED 25 AND ARE INCREASINGLY POPULAR, Page 39**
- **CLE QUESTIONS, Page 44**