

Delaware Enacts Changes to the Delaware General Corporation Law

On March 25, 2025, the Delaware Governor, Matthew Meyer, signed into law Senate Bill 21 (“SB 21”) which amends Sections 144 and 220 of the Delaware General Corporation Law (the “DGCL”). SB 21 codifies (a) the process to approve conflict transactions and (b) the process for stockholders to access corporate books and records.

A clear purpose of SB 21 is to stop companies from leaving Delaware for other states. SB 21 is viewed as a pro-Company law as it provides safe harbors for companies and their controlling stockholders to arrange deals that cannot later be challenged in court by the other stockholders. Critics of SB 21 call this bill the “billionaire’s bill” because of these safe harbors.

Amendments to Section 144 of the DGCL

Prior to SB 21, Section 144 of the DGCL provided that contracts or transactions involving the corporation and an interested director or officer would not be void or voidable solely for that reason if approved by the disinterested directors or stockholders. Before the amendments, Section 144 of the DGCL lacked a roadmap to follow which resulted in high costs, unpredictability, and unnecessary cases being brought to court. SB 21 lowers costs by reducing the number of cases being brought to court and increases predictability for corporations, directors and officers, and stockholders. In particular, SB 21 amends Section 144 of the DGCL to provide a procedural process for corporate boards to invoke safe harbor protections from litigation over potentially conflicted transactions for (i) interested directors and officers and (ii) controlling stockholders.

Safe Harbor Protections for Transactions Involving Interested Directors and Officers

Newly amended Section 144(a) provides that transactions involving interested officers and directors may not be subject to equitable relief or give rise to an award of damages against a director or officer if:

1. the transaction is made known to the board or a board committee and the board or committee in good faith and without gross negligence authorizes the transaction (or act) by the affirmative vote of a majority of the disinterested directors; provided, that if majority of the directors are not disinterested, such transaction (or act) must be approved by a committee of the board consisting of at least two directors whom the board has determined are disinterested; or
2. the transaction is approved or ratified by the informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders entitled to vote thereon; or
3. the transaction is fair as to the corporation and its stockholders.

Safe Harbor Protections for Transactions Involving Controlling Stockholders

Newly amended Section 144(b) provides that (other than in the case of a “going private” transaction) a “controlling stockholder transaction” may not be subject to equitable relief or give rise to an award of damages against a director, officer, controlling stockholder, or member of a control group by reason of a breach of fiduciary duty by a director, officer, controlling stockholder, or member of a control group if any of the following conditions are met:

1. the transaction (or act) is made known to a board committee and approved or recommended for approval by such committee of the board, expressly delegated the authority to approve or recommend for approval, or reject, in good faith and without gross negligence, by a majority of the informed, disinterested directors on the committee; or
2. the transaction is conditioned on the approval of or ratification by disinterested stockholders (at or prior to the time the transaction is submitted to a vote of stockholders) and is approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders; or
3. the transaction is fair as to the corporation and its stockholders.

Newly amended Section 144(c) provides that “controlling stockholder transactions” that constitute a “going private transaction” may not be subject to equitable relief or give rise to an award of damages against a director, officer, controlling stockholder or member of a control group by reason of a breach of fiduciary duty by a director, officer, controlling stockholder, or member of a control group if:

1. the transaction is approved or recommended for approval by a committee of the board, expressly delegated the authority to approve or recommend for approval, or reject, in good faith and without gross negligence, by a majority of the informed, disinterested directors on the committee and the transaction is approved by the uninformed, uncoerced, affirmative vote of the disinterested stockholders (at or prior to the time the transaction is submitted to a vote of stockholders); or
2. the transaction is fair to the corporation and its stockholders.

Statutory Definitions

Newly created Section 144(e) provides for the following defined terms: “control group,” “controlling stockholder,” “controlling stockholder transaction,” “disinterested director,” “disinterested stockholder,” “material interest,” and “material relationship.”

Under Section 144(e), a “controlling stockholder” means, “any person that, together with such person’s affiliates and associates: (a) owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors or in the election of directors who have a majority in voting power of the votes of all directors on the board of directors; (b) has the right, by contract or otherwise, to cause the election of nominees who are selected at the discretion of such person and who constitute either a majority of the members of the board of directors or directors entitled to cast a majority in voting power of the votes of all directors on the board of directors; or (c) has the power functionally equivalent to that of a stockholder that owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors by virtue of ownership or control of at least one-third in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors or in the election of directors who have a majority in voting power of the votes of all directors on the board of directors and power to exercise managerial authority over the business and affairs of the corporation.”

Further, under Section 144(e), a “controlling stockholder transaction” means, “an act or transaction between the corporation or 1 or more of its subsidiaries, on the one hand, and a controlling stockholder or a control group, on the other hand, or an act or transaction from which a controlling stockholder or a control group receives a financial or other benefit not shared with the corporation’s stockholders generally.”

Amendments to Section 220 of the DGCL

Prior to SB 21, Section 220 of the DGCL provided that stockholders could inspect a corporation's books and records upon a written demand under oath stating such purpose. Further, the original Section 220 of the DGCL did not define "books and records." Without a defined term for "books and records," corporations were inundated with Section 220 demands. As such, before the amendments, corporations consistently complained of the high costs and unnecessary time devoted to the increasing volume of demands requiring the production of voluminous records. To fix these issues, SB 21 amends Section 220 to limit a stockholder's right to inspect books and records by (1) defining "books and records" and (2) imposing procedural requirements.

Books and Records Definition

Section 220(a)(1) defines "books and records" as: (i) the corporation's certificate of incorporation (including a copy of any agreement or other instrument incorporated by reference therein), (ii) the corporation's bylaws (including a copy of any agreement or other instrument incorporated by reference therein), (iii) the minutes of all meetings of stockholders and the signed consents evidencing all actions taken by stockholders without a meeting in each case in the past three years, (iv) all communications by the corporation in writing or by electronic transmission to stockholders generally within the past three years, (v) the minutes of any meeting of the board of directors or any committee thereof and any actions taken by consent of the board or a committee thereof without a meeting, (vi) the annual financial statements of the corporation for the past three years, (vii) any agreement entered into under Section 122(18) of the DGCL and (viii) any director and officer independence questionnaires. Additionally, Section 220(d) clarifies that a director's inspection rights also include inspection of other records of the corporation for a purpose reasonably related to the director's position as a director.

Books and Records Procedures

Section 220(b)(2) now provides that a stockholder may be entitled to inspect books and records if all of the following conditions are satisfied:

1. the stockholder's demand is made in good faith and for a proper purpose;
2. the stockholder's demand describes with reasonable particularity the stockholder's purpose and the books and records the stockholder seeks to inspect; and
3. the books and records sought are specifically related to the stockholder's purpose.

Further, Section 220(b)(3) permits a corporation to impose reasonable restrictions on the confidentiality, use, or distribution of books and records produced in response to a demand under Section 220 and to require the stockholder to agree that any such books and records be deemed incorporated by reference in any complaint filed by or at the direction of the stockholder in relation to the subject matter of such demand.

Section 220(g) permits the Court of Chancery, in a proceeding brought by a stockholder, to compel a corporation to produce, in addition to any books and records, other specific records of the corporation only if and to the extent:

1. the stockholder has met the requirements of Section 220(b)(2);
2. the stockholder has made a showing of a compelling need for an inspection of such records to further the stockholder's proper purpose; and
3. the stockholder has demonstrated by clear and convincing evidence that such specific records are necessary and essential to further such purpose.

Effective Date For Distribution

SB 21 is effective as of March 25, 2025, and applies to all prior and future acts and transactions, except it does not apply to court proceedings that were pending or completed on or before February 17, 2025, or to Section 220 demands made on or before February 17, 2025.

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