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Delaware Revises Corporate Law to Strengthen Deals and Limit Stockholder Rights

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Delaware lawmakers recently enacted Senate Bill 21, a sweeping reform that significantly amends several sections of the Delaware General Corporation Law (DGCL). The law introduces significant revisions aimed at increasing deal protection mechanisms, expanding liability safe harbors for corporate leaders, and curbing stockholder rights.

Key Amendments to the DGCL

The amendments significantly revise Sections 144 and 220 of the DGCL. Specifically, the revisions to Section 144 codify certain deal protection mechanisms used for processing breach of fiduciary duty claims through disinterested stockholders (under *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015), in the absence of a conflicted controlling stockholder transaction) and by the authorization of both an independent director committee and unaffiliated stockholders (under *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (2014), as a conflicted controlling stockholder transaction). Additionally, the revisions to Section 220 largely restrict the inspection of records other than certain formal corporate records.

Section 144: Controller Transactions

Section 144 previously provided a limited safe harbor from the invalidation of transactions that provide a personal benefit to corporate directors at the exclusion of other directors and could potentially present a conflict of interest to benefited directors. The revisions to Section 144 expand these limited safe harbors to officers rather than just solely directors. Specifically, the revised safe harbors prevent certain actions, such as equitable relief, damages, and other sanctions against directors, officers, and controlling stockholders in such transactions. The revisions also amend the procedures for fiduciary duty claims and liability in three distinct situations in which they would arise: (1) transactions that do not involve a controlling shareholder, meaning no single party has the power to unilaterally dictate the terms or influence the approval of the transaction and no shareholder will receive a benefit that other shareholders won't receive ("Non-Controller Transactions"); (2) transactions involving a controlling shareholder, who has significant influence over the company's decisions and can potentially dictate the terms of the transaction and will receive a benefit not shared by the other shareholders ("Controller Transactions"); and (3) transactions in which a publicly traded company is transformed into a privately held entity, typically through the purchase of its outstanding shares by a controlling shareholder, private equity firm, or a consortium of investors (Take-Private Transactions).

The revisions to Section 144 allow stockholders who do not unduly benefit from such transactions ("disinterested stockholders") to approve fiduciary duty claims related to Non-Controller Transactions, while Take-Private Transactions require approval from both an independent director committee and the disinterested stockholders. For Controller Transactions, the revisions state that either disinterested directors or an independent committee may approve fiduciary duty claims.

The procedures for these requirements are generally less burdensome than the previous regime. For example, the fiduciary procedure need not be established from the start, and disinterested stockholder approval may be obtained by a majority of votes cast, rather than a majority of outstanding disinterested stockholders. Additionally, an independent committee needs only a *majority* of independent directors. Public company directors' independence is presumed under stock exchange standards, and Controller Transactions may be approved by either disinterested stockholders or an independent committee. The revisions to Section 144 also define a controlling stockholder more narrowly, requiring either majority voting power or one-third voting power in director elections and managerial control over the corporation.

Prior to the enactment of Senate Bill 21, Delaware case law required judicial scrutiny for Controller Transactions, which were subject to a more stringent review than Non-Controller Transactions and Take-Private Transactions. Controller Transactions were reviewed through an "entire fairness" standard where the court would determine whether such stockholders and others involved did not violate their fiduciary duties. In this situation, a controller would only be able to avoid such stringent review by complying with certain strict procedural safe harbor requirements, which included forming an independent special committee and obtaining consent from a majority of the corporation's minority shareholders. This was recently upheld by the Delaware Supreme Court in *In re Match Group., Inc. Deriv. Litig.*, 315 A.3d 446 (Del. 2024).

However, Senate Bill 21 reverses *Match Group* and lessens the procedural requirements required for a controller transaction to evade the entire fairness review standard. The revisions in Senate Bill 21 significantly curtails who is considered a controller. This revision reduces the level of scrutiny used by Delaware courts in Controlling Stockholder transactions and increases the difficulty to initiate lawsuits and recover damages suffered by shareholders due to controlling stockholder transactions.

Section 220: Stockholder Inspection Rights

Section 220 previously provided stockholders with certain information and inspection rights to demand inspection of corporate books and records, and the right to petition the Delaware Court of Chancery to compel such an inspection based on a credible basis for the inspection. The revisions to Section 220 retain that general framework but broadly limit inspections to only specified formal books and records and restrict the stockholder's ability to obtain redress from the court. The revisions also prevent the court from ordering inspection of other corporate records, such as informal records and director emails, unless the corporation failed to maintain formal records. The revisions also increase the standards applicable to an inspection petition, by requiring (i) the books and records to be delineated to the purpose and (ii) the stockholder to describe the purpose of the request with specificity. By narrowing the scope of books and records available for inspection under Section 220, these revisions generally limit the books and records available pursuant to a director's inspection demand.

1. Revised Procedural Guidelines for Shareholder Requests Pursuant to Section 220

Previously, in order to receive and inspect copies of a corporation's books and records under Section 220, a stockholder would have to make a formal demand that complies with specified procedural requirements. These new requirements include making the request for records in good faith, describing the actual purpose and the specific records the stockholder wishes to inspect, and ensuring that the books and records sought are specifically related to the stockholder's purpose.

2. Restriction of Stockholder Requests to Specific Formal Documents

Previously, stockholders making a demand under Section 220 could obtain both formal records and informal records, such as text messages and emails. However, the new revisions limit the documents available to demanding stockholders to a specific list of formal board materials and financial statements, which are essentially limited to corporate organization and governance documents.

The revisions permit a court to order the production of other records of a corporation, but only if the stockholder (i) demonstrates a compelling need for such record and (ii) shows that these records are necessary for the stockholder's purpose. This new standard is more stringent than the previous standard for evaluating requests for a corporation's records. Consequently, investigations into potential wrongful conduct of stockholders may be less thorough, since fewer records will be available.

3. Non-Disclosure Agreements

The revisions also allow corporations to enforce confidentiality restrictions on corporate books and records. While Non-Disclosure Agreements (NDAs) are standard for stockholders' Section 220 demands, this revision permits corporations to require more restrictive NDAs, which could lead to extended discussions among counsel and delay the production of such records.

4. Redactions of Corporate Books and Records

Senate Bill 21 also allows corporations to remove and restrict parts of any records they produce, so long as the withheld information is not related to such stockholder's purpose. However, the revision does not state the parameters for determining whether corporate records are related to a stockholder's purpose. Because of the unclear guidance here, corporations could extensively redact information that could be pertinent to stockholders' purposes and requests.

Impact on MFW Protections and Controller Transactions

In addition to the DGCL amendments, Senate Bill 21 affects the legal framework surrounding Controller Transactions, particularly in light of Delaware's MFW doctrine. Under *Kahn v. M&F Worldwide Corp. (MFW)*, Delaware courts apply *business judgment review* — rather than the more stringent *entire fairness standard* — to controlling stockholder transactions, provided that the transaction is conditioned from the outset on both:

1. Approval by an independent special committee; and
2. An informed, uncoerced vote of a majority of the minority stockholders.

Senate Bill 21 codifies and decreases the MFW requirements. Controlling stockholder transactions would only need to meet one factor, rather than both factors, simplifying the process for companies to qualify for the business judgment rule. Senate Bill 21 changes the requirements for companies to prove the independence of special committees, affecting the ability of stockholders to challenge controller transactions. This would shield more transactions involving controlling stockholders from higher scrutiny, providing corporations with increased protection from shareholder litigation.

Implications for Corporations and Investors

Senate Bill 21 will likely have far-reaching implications for Delaware-incorporated companies and their stockholders. For corporations, the revisions provide stronger protections against shareholder activism, hostile takeovers, and derivative litigation. By expanding liability safe harbors, the bill reduces personal exposure for directors and officers, making Delaware an even more attractive jurisdiction for corporate leaders.

For stockholders, however, the bill represents a significant erosion of their information and inspection rights. With fewer avenues to access corporate records and more barriers to challenge controlling stockholder transactions, investors may find it increasingly difficult to hold boards accountable. These revisions may essentially discourage stockholders from pursuing litigation, even in cases of legitimate wrongdoing.

Looking Ahead

The revisions in Senate Bill 21 mark one of the most consequential overhauls of Delaware corporate law in recent years. By expanding corporate protections and narrowing stockholder rights, Delaware is signaling its commitment to preserving its pro-business reputation in the face of mounting criticism.

For more information on how these changes may impact your business, feel free to contact the authors or a member of Baker Donelson's Business and Corporate Group.