# The Recent Amendments to the Delaware General Corporation Law Make Stockholder Vigilance and Adaptability More Important than Ever

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Warren Buffett famously said: "It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently."[i] Recent amendments to the Delaware General Corporation Law ("DGCL") have observers wondering if lawmakers should have spent more time appreciating how Delaware's common-law-heavy approach sets it apart from competitors like Texas and Nevada. In any event, stockholder vigilance and adaptability are now more important than ever.

## The Recent Statutory Amendments in Delaware Followed an Unusual Process

Delaware's business law and courts are supposed to be relatively insulated from politics. Judge-made common law has a much larger role than in most states, and there is balance in the number of Democrat and Republican judges on and among the state's three major courts. The Corporation Law Council of the Delaware State Bar Association, which includes experienced plaintiff and defense attorneys, typically drafts business legislation. The draft legislation is then approved by the Corporate Law Section of the bar association ***before*** the legislature sees it.

The process that led to the bill containing the recent amendments to the DGCL—sometimes referred to as "SB 21"—was unusual. Delaware Governor Matt Meyer asked a handful of academics and defense-side corporate law practitioners to draft the legislation before it went to the Corporation Law Council. No investor-side attorneys were involved, but the General Counsel of Meta Platforms, Inc. attended at least one meeting early in the drafting process. The legislation received heavy criticism from the plaintiffs' bar and many academics. Many public pension funds and other large investors vocally opposed the legislation. Nevertheless, on March 25, 2025, SB 21 became the law of Delaware.

## SB 21 Affects Books and Records Inspections

SB 21 amended DGCL Section 220, which governs the right of stockholders to inspect corporate books and records. The new law presumes that the proper scope of books and records should be limited to board minutes and materials. Prior to SB 21, it was relatively common for

stockholders to receive additional documents, such as senior management materials or emails. Now, to receive these additional materials under SB 21, the stockholder must prove by clear and convincing evidence that such documents are necessary and essential to the stated purpose of the inspection.

On the bright side, this change may promote a more efficient Section 220 process. But the new standard applicable to non-board materials will give companies an even greater incentive to omit information from board minutes and materials, making it more difficult for stockholders to learn the truth about fiduciary misconduct.

**SB 21 Affects Judicial Review of Transactions Involving Controlling Stockholders**

SB 21 also amended DGCL Section 144 in a way that significantly alters the legal standards applicable to transactions between a corporation and a controlling stockholder. We describe four main changes:

1. **Less stringent review of conflicted controller transactions –** Section 144 changes the standard for a corporate transaction that uniquely benefits a conflicted controlling stockholder. Under prior law, all conflicted transactions were subject to a stockholder-friendly standard of review unless they were approved by both (i) a special committee of independent directors, and (ii) a majority of the unconflicted stockholders. Now, so long as the conflicted controlling stockholder transaction is not a controller take-private (*i.e.*, an acquisition by the controller of the remaining stock the controller does not own), the presence of only one of these protections will subject the transaction to the controller-friendly business judgment rule. This change will result in fewer transactions conditioned on the approval of the unconflicted stockholders and will give minority stockholders far less of a say on conflicted controlling stockholder transactions.

2. **Stockholders less protected during critical juncture of negotiation**s **–** Controller take-private transactions still require approval by both an independent special committee and a minority stockholder vote. But, under amended Section 144, controlling stockholders no longer need to commit to these protections at the outset of negotiations. This change increases the chances of a controlling stockholder demanding during negotiations to pay a reduced price in return for agreeing to a minority stockholder vote.

3. **Overly broad definition of director "independence" –** Section 144 now creates a presumption of independence for a director if the director is deemed independent under national exchange rules. In our experience, national exchange rules do not adequately cover certain conflicts of interest, including long-term friendships or social connections. As such, the recent amendments dilute the benefits of special committees, while at the same time giving special committee approvals more force.

4. **Overly narrow definition of "control" for stockholders –** Section 144 alters the definition of controlling stockholder. In the past, Delaware law looked to several factors to determine whether a stockholder had control over the company. This fact-driven analysis provided the courts with flexibility to determine controller status based on the facts presented. The new law prohibits the court from finding controller status unless the

stockholder owned at least 33% of the outstanding voting power at the time of the transaction. Given the recent trend towards stockholders exerting control via contracts with a company, as opposed to voting power, this new definition is troubling.

**Stockholder Vigilance and Adaptability Are More Important Than Ever**

The passage of SB 21 is disappointing. Instead of introducing clarity—as advertised—it will create years of uncertainty as the Delaware courts interpret the statute and determine which judicial precedents remain good law. It also accelerated the "race to the bottom," as Texas and Nevada promptly responded with statutes that would undercut stockholder rights even more.

Now is the time for institutional investors to be even more vigilant. The billionaires behind SB 21 pushed for the legislation because they ***want*** to engage in conflicted transactions and get away with it. Some of the proponents were found liable in Delaware courts—or have settled lawsuits in which they faced major liability. To protect themselves, institutional stockholders must be more vigilant than ever in monitoring and challenging controlling stockholder overreach.

Institutional stockholders must also be adaptable and consider the full range of available options. We expect the Delaware Court of Chancery to remain America's leading business law court for the foreseeable future. Litigants are only starting to test the contours of SB 21, including through several challenges under the Delaware constitution. The statute contains ambiguities, and it will likely be years before we know how significantly the new amendments will change stockholder litigation. In some circumstances, however, stockholders may need to pursue claims under federal securities laws to fully protect their interests. As always, working with the right legal team provides institutional investors with the best opportunity to protect themselves.

**Disclosures:**



**1-2 Sentence Summary:** This article summarizes the March 2025 amendments to the Delaware General Corporation Law and the enhanced need for institutional stockholder vigilance and adaptability.

**Endnotes:**

[i] James Berman, *The Three Essential Warren Buffet Quotes To Live By*, Forbes (Aug. 20, 2014), https://www.forbes.com/sites/jamesberman/2014/04/20/the-three-essential-warren-buffett-quotes-to-live-by/.