Delaware's Recalibration Didn't Happen in a Vacuum

Senate Bill 21 shows Delaware's legislature is willing to act when stakeholders think the courts have gone too far.

BY DOUG RAYMOND AND JENNIFER LUCAS

Delaware just made life a little easier for corporate boards, particularly at companies with a controlling stockholder. On March 25, 2025, Governor Matt Meyer signed amendments to the Delaware General Corporation Law (DGCL) that expand protections for directors and officers, give corporations more control over stockholder demands and codify clearer safe harbors for conflicted transactions. But these amendments did not come out of nowhere. They are part of a broader, increasingly visible pattern: Delaware's legislature stepping in to recalibrate the state's corporate governance framework when high-profile companies and powerful insiders signal discomfort with where the courts are going.

This isn't the first time the Delaware General Assembly has intervened to rebalance the relationship among courts, boards and stockholders. But the 2025 amendments are arguably the most sweeping response yet to concerns from the corporate community, particularly after a recent wave of high-profile departures and vocal dissatisfaction with some recent Delaware decisions regarding controlling stockholder transactions.

A key source of concern was the Delaware Supreme Court's April 2024 decision in *In re Match Group Inc. Derivative Litigation*, which reinforced that a stockholder without majority voting power can still be deemed "controlling" if it exercises control over the board or the transaction. In such cases, courts will apply the entire fairness standard unless the deal satisfies both procedural protections from *Kahn v. M&F Worldwide (MFW)*: it must be conditioned from the very outset on approval by an independent, properly empowered special committee that fulfills its duty of care and a fully informed, uncoerced vote of disinterested stockholders. While the overall legal framework remained intact, Match amplified unease among companies with influential insiders, fueling fears that an entire fairness review could become increasingly difficult to avoid, even where the challenged action was not a "going private" transaction.

The reaction was swift and unusually public. Elon Musk announced plans to reincorporate Tesla outside Delaware. Mark Zuckerberg initiated a similar move for Meta. Others began exploring alternatives more quietly. With the corporate franchise making up a meaningful portion of the state's annual budget, Delaware's legislature responded — with Senate Bill 21 (SB 21).

The law provides boards with clarity and protection while relaxing much of the Match case's requirements. Conflict transactions — those involving directors, officers or controlling stockholders — can no longer be unwound, nor serve as a basis to award damages or equitable relief, if they meet one of several procedural paths:

- Approval by disinterested directors (even if they become involved at a later stage of the deal)
- Approval by disinterested stockholders, under a "majority of votes cast" standard
- A showing that the transaction was substantively fair

This represents a reversion to, and expansion of, prior DGCL principles, eliminating the requirement for the dual protections that had become standard in case law for conflict transactions.

The amendment also expressly codified safe harbors, making them more difficult for courts to limit. For conflict transactions that do not involve a "going private deal," the statute provides that liability will not attach, and equitable relief will not be available, if any one of the following is satisfied:

- Approval by a committee of the board composed of a majority of disinterested directors with full negotiating authority
- Approval by disinterested stockholders, conditioned on their uncoerced vote
- Substantive fairness

Going-private transactions require both procedural protections — independent committee and disinterested stockholder approval — unless the

transaction can be shown to be fair as to the corporation, tracking the familiar MFW rules in the new statutory framework.

The law also takes a major step forward in clarifying when a stockholder is actually "controlling." As the courts developed the case law, control was sometimes analyzed as the ability to influence, based on relationships or other factors, leaving boards to guess whether a significant investor might later be deemed controlling, particularly in light of decisions like *Match*, which emphasized control over board decision-making, rather than control derived from majority voting power. New Section 144 eliminates much of that uncertainty. It limits the classification of "controlling stockholder" to those who either:

- Own or control a majority of the voting power in director elections.
- Possess the functional equivalent of that power – owning or controlling at least one-third of the voting power, the ability to elect directors who hold a majority of board voting power and the authority to manage the corporation's business and affairs.

For directors and advisors, this clarity is a welcome relief, even as it likely closes the door on challenges to most other, less direct ways of shaping an outcome.

Other practical updates matter, too. The statute eliminates the often-strict ab initio requirement from MFW, potentially allowing special committees to be formed later in the negotiation process, so long as they have real authority. It also creates a presumption that public company directors are disinterested if they satisfy the stock exchange's standards for independence (rebuttable only by specific, material facts) and permits post-closing stockholder ratification of conflict transactions using a majority-of-votes-cast standard, a more realistic threshold than a majority of shares outstanding. This change may prove particularly useful in approving executive compensation arrangements, which frequently involve interested directors and have historically been difficult to ratify under the old case law.

The amendments also reshape how companies handle stockholder books-and-records inspection demands under Section 220. For years, these demands have been used to fuel litigation by giving stockholders a first look at boardroom discussions. Now, corporations have more control. The updated law defines the types of documents a stockholder can inspect and permits companies to redact information not related to the stockholder's purpose, impose confidentiality and use restrictions and require that all documents produced be incorporated by reference into any related complaint. This gives companies a much stronger position in responding to what many have viewed as tactical, pretextual demands and should help deter some of the most aggressive uses of Section 220 as a litigation fishing expedition.

But perhaps the most interesting thing about SB 21 isn't what it says; it's what it represents. Delaware's corporate law is dynamic. These amendments reflect a legislature willing to act when corporate stakeholders signal the courts may have gone too far. They also reveal a deeper truth about the state's governance model: Delaware's ability to remain the jurisdiction of choice depends on its responsiveness to the practical needs of the companies it serves.

For directors, particularly those at companies with significant insider ownership or control dynamics, this is a moment to reexamine governance practices and take stock of where flexibility has expanded. It's also a moment to ensure board processes, especially around committee formation, independence determination and disclosure, are aligned with the new rules. And while Section 220 demands are typically managed by legal departments, directors should understand what the statute now allows and make sure their companies are prepared to take full advantage of it.

For public and private companies alike, the 2025 DGCL amendments offer something increasingly rare in corporate governance: clarity, predictability and protection. Life in the boardroom is never simple but, in Delaware, it just got a little easier. ■

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