SB 21 Explainer Provided By
Lawyers Who Represent Pension Funds and Other Public Investors

Summary

We are committed to ensuring Delaware's continued dominance as a home for corporations. We are opposed to the passage of SB 21 because it undermines Delaware's distinctive features and strengths, which hurts Delaware's efforts to preserve the franchise.

What makes Delaware unique is our well-earned reputation as a State with an expert judiciary and well-developed case law respecting the fiduciary duties owed to *all* stockholders by founders, corporate executives, and controlling stockholders. SB 21 would overturn more than 30 decisions of the Delaware Supreme Court. It would prevent future litigation by public investors seeking to protect their rights. We think that changes to the current bill are necessary to preserve the role of Delaware's judiciary and to preserve the constitutionally protected status of the Court of Chancery's jurisdiction.

When insiders enter into conflict-of-interest transactions, it is important to preserve a role for judicial oversight and enforcement of fiduciary duties. The need to preserve judicial oversight is especially critical when public investors did not vote to approve the conflict-of-interest transaction.

We have drafted a markup to the version of SB 21 proposed by the Corporation Law Council ("CLC") of the Delaware State Bar Association. The CLC mostly consists of representatives of law firms who regularly represent controlling stockholders and other corporate defendants in stockholder litigation. We understand that the CLC was instructed not to make significant changes to SB 21.

Our markup represents a compromise position. We are prepared to accept statutory changes to current law to address the issues that the supporters of the current bill have said are important, including: (i) mechanical, "bright line" rules defining "controlling stockholders" and (ii) reduced judicial oversight of so-called "ordinary-course" transactions.

What we believe—and we think it important for the General Assembly to ensure—is that any legislation must:

1. Preserve existing structural protections for extraordinary conflict-of-interest transactions in which the economic interests of public investors are most at risk from abuse by controllers and other insiders.

2. Preserve the Court of Chancery's ability to make determinations of director independence (rather than simply deferring to a decision by conflicted directors that others are "independent").

3. Preserve the Court of Chancery's authority in determining the proper scope of a stockholder's inspection of corporation books and records.

4. Protect the right of parties to litigate claims under current law that involve acts or transactions approved before the passage of any legislation.

   When SB 21 was first announced, Senator Townsend proclaimed that SB 21 would not be retroactive. Yet, the CLC's proposed version of SB 21 is fully retroactive (except for claims that were pending on February 17, 2025) and would allow fiduciaries who already breached their duties to avoid accountability merely because books-and-records investigations are ongoing.

Specific Changes

A. **Changes to Sections 144(e)(6) and 144(e)(7)** (this also relates to the changes to 144(b) and (c)):

   Our proposed changes would restore the protections provided by existing law to extraordinary conflict-of-interest transactions, such as multi-billion-dollar mergers in which the controlling stockholder receives billions of dollars at the expense of ordinary investors.

   Under current law, as reaffirmed unanimously by the Delaware Supreme Court last year, a controlling stockholder must allow other stockholders to vote on a conflict-of-interest transaction in order for the controlling stockholder to avoid judicial review.

   The CLC version of the bill removes the requirement that other stockholders vote and would instead allow a board of directors hand-picked by the controlling stockholder to approve a conflict-of-interest transaction without any vote by the other stockholders.

   Our proposed changes would allow controlling stockholders to avoid a stockholder vote for so-called "ordinary course" transactions. But, for extraordinary transactions, such as multi-billion-dollar conflict-of-interest transactions, controlling stockholders can choose whether to (i) submit the transaction to a vote of public stockholders or (ii) defend the fairness of the transaction in court.

B. Changes to Section 144(a):

We propose changes to 144(a) to allow the Court of Chancery to continue to review certain transactions where a company is sold and public investors are either (1) not given a right to vote or (2) are given a right to vote but are not given all of the material facts.

These transactions present a particularly strong risk of conflicts of interest that harm investors because corporate executives are often provided extra benefits that incentivize them to agree to the transaction, such as multi-million-dollar severance payments (so-called "golden parachutes") or the opportunity to stay on with the company after the merger, that are not shared with public investors.

We have removed unconstitutional language ("shall not ... be the subject of equitable relief"), and we have clarified that a board vote should not be given weight if directors are coerced.

C. Changes to Sections 144(a)(1), 144(b)(1), 144(d)(2), and 144(d)(3):

Our changes preserve the ability of the courts to decide whether a director is independent of a conflicted beneficiary of a self-dealing transaction.

We oppose the creation of a new standard that would have the practical impact of making it virtually impossible to plead or prove that a director lacks independence.

We note that Leo Strine, Jr., the former Chief Justice who now works for the most profitable corporate law firm in the country, was the author of some of the most important opinions on director independence under existing law. Strine now favors the legislative reversal of his own opinions. Our changes are consistent with Strine's judicial opinions.

Also, under current law, as unanimously decided by the Delaware Supreme Court last year, any board committee set up to negotiate against conflicted insiders has to be made up of all independent directors. The CLC's version would allow the board to determine whether all of the committee's members are independent instead of the Court. Under the CLC version, the best friend of a controlling stockholder could be on a committee that is supposed to negotiate against the controlling stockholder, which makes no sense.

D. Changes to Section 220(g)

Our change preserves the Court's role in determining whether circumstances support the production of limited additional documents beyond formal board materials. The CLC bill introduces a new standard of "compelling need" that itself needs to be proven by "clear and convincing evidence." The standard we propose is taken directly from a Supreme Court decision written by former Chief Justice Strine, *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738 (Del. 2019).

E. Retroactivity:

Our changes ensure the legislation is not retroactive and applies only to acts or transactions that occur after the law is amended. Acts or transactions will therefore be evaluated based on the law that was in place at the time of the act or transaction.