



SPONSOR: Rep. Phillips

HOUSE OF REPRESENTATIVES
153rd GENERAL ASSEMBLY

HOUSE AMENDMENT NO. 1
TO
SENATE SUBSTITUTE NO. 1
FOR
SENATE BILL NO. 21

AMEND Senate Substitute No. 1 for Senate Bill No. 21 by deleting lines 1-244 in their entirety and inserting in lieu thereof:

"Section 1. Amend § 102, Title 8 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 102. Contents of certificate of incorporation.

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

(8) A provision adopting the safe-harbor rules reflected in § 144A of this title and the books-and-records rules reflected in § 220A of this title (an "Opt-In Provision"), provided that the Opt-In Provision (i) is in the initial charter of a corporation organized under this chapter, (ii) in the case of an existing corporation with more than one class of common stock, is approved by a majority of the outstanding shares of each class; and (iii) in the case of an existing corporation with a single class of common stock, is approved by a majority vote of the outstanding stock and by a majority vote of the shares not owned or otherwise controlled by a party owning one-third or more of the outstanding stock (a "disinterested majority").

Section 2. Amend Title 8 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 144A. Interested directors and officers; controlling stockholder transactions; quorum.

(a) If a corporation has adopted an Opt-In Provision, then except for a controlling stockholder transaction under subsection (b) or (c) of this section, an act or transaction involving or between a corporation, or 1 or more of the corporation's subsidiaries, on the one hand, and 1 or more of the corporation's directors or officers, on the other hand, or involving or between a corporation or 1 or more of the corporation's subsidiaries, on the one hand, and any other corporation, partnership (general or limited), limited liability company, statutory trust, association, or any other entity or

23 organization in which 1 or more of its directors or officers are directors, stockholders, partners, managers, members, or
24 officers, or have a financial interest, on the other hand, may not be the subject of equitable relief, or give rise to an award of
25 damages, against a director or officer of the corporation because of the foregoing circumstances or the receipt of any benefit
26 by any such director, officer, entity, or organization or because the director or officer is present at or participates in the
27 meeting of the board or committee which authorizes the act or transaction or was involved in the initiation, negotiation, or
28 approval of the act or transaction (including by virtue of a director's vote being counted for such purpose), if:

29 (1) The material facts as to the director's or officer's relationship or interest and as to the act or transaction,
30 including any involvement in the initiation, negotiation, or approval of the act or transaction, are disclosed or are
31 known to all members of the board of directors or a committee of the board of directors, and the board or committee in
32 good faith and without gross negligence authorizes the act or transaction by the affirmative votes of a majority of the
33 disinterested directors then serving on the board of directors or such committee (as applicable), even though the
34 disinterested directors be less than a quorum; provided that if a majority of the directors are not disinterested directors
35 with respect to the act or transaction, such act or transaction shall be approved (or recommended for approval) by a
36 committee of the board of directors that consists of 2 or more directors, each of whom the board of directors has
37 determined to be a disinterested director with respect to the act or transaction; or

38 (2) The act or transaction is approved or ratified by an informed, uncoerced, affirmative vote of a majority of
39 the votes cast by the disinterested stockholders; or

40 (3) The act or transaction is fair as to the corporation and the corporation's stockholders.

41 (b) If a corporation has adopted an Opt-In Provision, then a controlling stockholder transaction (other than any
42 going private transaction) may not be the subject of equitable relief, or give rise to an award of damages, against a director
43 or officer of the corporation or any controlling stockholder or member of a control group, by reason of a claim based on a
44 breach of fiduciary duty by a director, officer, controlling stockholder, or member of a control group, if:

45 (1) The material facts as to such controlling stockholder transaction (including the controlling stockholder's or
46 control group's interest therein) are disclosed or are known to all members of a committee of the board of directors to
47 which the board of directors has expressly delegated the authority to negotiate (or oversee the negotiation of) and to
48 reject such controlling stockholder transaction, and such controlling stockholder transaction is approved (or
49 recommended for approval) in good faith and without gross negligence by a majority of the disinterested directors then
50 serving on the committee; provided that the committee consists of 2 or more directors, each of whom the board of
51 directors has determined to be a disinterested director with respect to the controlling stockholder transaction; or

52 (2) Such controlling stockholder transaction is conditioned, by its terms, as in effect at the time it is submitted
53 to stockholders for their approval or ratification, on the approval of or ratification by disinterested stockholders, and
54 such controlling stockholder transaction is approved or ratified by an informed, uncoerced, affirmative vote of a
55 majority of the votes cast by the disinterested stockholders; or

56 (3) Such controlling stockholder transaction is fair as to the corporation and the corporation's stockholders.

57 (c) If a corporation has adopted an Opt-In Provision, then a controlling stockholder transaction constituting a going
58 private transaction may not be the subject of equitable relief, or give rise to an award of damages, against a director or
59 officer of the corporation or any controlling stockholder or member of a control group by reason of a claim based on breach
60 of fiduciary duty by a director, officer, controlling stockholder, or member of a control group, if:

61 (1) Such controlling stockholder transaction is approved (or recommended for approval) in accordance with
62 paragraph (b)(1) of this section and approved in accordance with paragraph (b)(2) of this section; or

63 (2) Such controlling stockholder transaction is fair as to the corporation and the corporation's stockholders.

64 (d)(1) If a corporation has adopted an Opt-In Provision, then common or interested directors may be counted in
65 determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the act or
66 transaction.

67 (2) If a corporation has adopted an Opt-In Provision, then any director of a corporation that has a class of
68 stock listed on a national securities exchange shall be presumed to be a disinterested director with respect to an act or
69 transaction to which such director is not a party if the board of directors shall have determined that such director
70 satisfies the applicable criteria for determining director independence from the corporation and, if applicable with
71 respect to the act or transaction, the controlling stockholder or control group, under the rules (and interpretations
72 thereof) promulgated by such exchange (treating the applicable controlling stockholder and control group as if the
73 controlling stockholder and control group were the corporation for purposes of applying such criteria to determine
74 independence from a controlling stockholder or control group), which presumption shall be heightened and may only
75 be rebutted by substantial and particularized facts that such director has a material interest in such act or transaction or
76 has a material relationship with a person with a material interest in such act or transaction.

77 (3) If a corporation has adopted an Opt-In Provision, then the designation, nomination, or vote in the election
78 of the director to the board of directors by any person that has a material interest in an act or transaction shall not, of
79 itself, be evidence that a director is not a disinterested director with respect to an act or transaction to which such
80 director is not a party.

81 (4) If a corporation has adopted an Opt-In Provision, then no person shall be deemed a controlling stockholder
82 unless such person satisfies the criteria in paragraph (e)(2) of this section. No 2 or more persons that are not controlling
83 stockholders shall be a control group unless they satisfy the criteria in paragraph (e)(1) of this section.

84 (5) If a corporation has adopted an Opt-In Provision, then no person who is a controlling stockholder or
85 member of a control group shall be liable in such capacity to the corporation or its stockholders for monetary damages
86 for breach of fiduciary duty other than for:

87 a. A breach of the duty of loyalty to the corporation or the other stockholders;

88 b. Acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of
89 law; or

90 c. Any transaction from which the person derived an improper personal benefit.

91 (6) Nothing in subsections (a), (b), or (c) of this section shall:

92 a. Limit or eliminate the right of any person to seek equitable relief on the grounds that an act or
93 transaction, including a controlling stockholder transaction, was not authorized or approved in compliance with the
94 procedures set forth in this chapter, was not authorized or approved in compliance with the certificate of
95 incorporation or bylaws of the corporation, or is in violation of any plan, agreement, or order of any governmental
96 authority to which the corporation is a party or subject; or

97 b. Limit judicial review for purposes of injunctive relief of provisions or devices designed or intended to
98 deter, delay, or preclude a change of control or other transaction involving the corporation or a change in the
99 composition of the board of directors; or

100 c. Limit or eliminate the right of any person to seek relief on the grounds that a stockholder or other
101 person knowingly aided and abetted a breach of fiduciary duty by one or more of the directors of the corporation.

102 (7) If a corporation has adopted an Opt-In Provision, then shares irrevocably accepted for purchase or
103 exchange pursuant to an offer contemplated by § 251(h) of this title shall be deemed voted in favor of the act or
104 transaction and shares owned or controlled by disinterested stockholders that have not been irrevocably accepted for
105 purchase or exchange pursuant to such an offer shall be deemed voted against the act or transaction for purposes of
106 determining whether the act or transaction has been approved for purposes of paragraphs (a)(2), (b)(2), and (c)(1) of
107 this section.

108 (e) For purposes of this section:

109 (1) "Control group" means 2 or more persons that are not controlling stockholders that, by virtue of an
110 agreement, arrangement, or understanding between or among such persons, constitute a controlling stockholder.

111 (2) “Controlling stockholder” means any person that, together with such person’s affiliates and associates:

112 a. Owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote
113 generally in the election of directors or in the election of directors who have a majority in voting power of the
114 votes of all directors on the board of directors;

115 b. Has the right, by contract or otherwise, to cause the election of nominees who are selected at the
116 discretion of such person and who constitute either a majority of the members of the board of directors or directors
117 entitled to cast a majority in voting power of the votes of all directors on the board of directors; or

118 c. Has the power functionally equivalent to that of a stockholder that owns or controls a majority in
119 voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors by
120 virtue of ownership or control of at least one-third in voting power of the outstanding stock of the corporation
121 entitled to vote generally in the election of directors or in the election of directors who have a majority in voting
122 power of the votes of all directors on the board of directors and power to exercise managerial authority over the
123 business and affairs of the corporation.

124 (3) “Controlling stockholder transaction” means an act or transaction between the corporation or 1 or more of
125 its subsidiaries, on the one hand, and a controlling stockholder or a control group, on the other hand, or an act or
126 transaction from which a controlling stockholder or a control group receives a financial or other benefit not shared with
127 the corporation’s stockholders generally.

128 (4) “Disinterested director” means a director who is not a party to the act or transaction and does not have a
129 material interest in the act or transaction or a material relationship with a person that has a material interest in the act or
130 transaction.

131 (5) “Disinterested stockholder” means any stockholder that does not have a material interest in the act or
132 transaction at issue or, if applicable, a material relationship with the controlling stockholder or other member of the
133 control group, or any other person that has a material interest in the act or transaction.

134 (6) “Going private transaction” means:

135 a. For a corporation with a class of equity securities subject to § 12(g) or 15(d) of the Securities Exchange
136 Act of 1934 or listed on a national securities exchange, a Rule 13e-3 transaction (as defined in 17 CFR § 240.13e-
137 3(a)(3) or any successor provision); and

138 b. For any other corporation to which paragraph (e)(6)a. of this section does not apply, any controlling
139 stockholder transaction, including a merger, recapitalization, share purchase, consolidation, amendment to the
140 certificate of incorporation, tender or exchange offer, conversion, transfer, domestication or continuance, pursuant

to which all or substantially all of the shares of the corporation's capital stock held by the disinterested stockholders (but not those of the controlling stockholder or control group) are cancelled, converted, purchased, or otherwise acquired or cease to be outstanding.

(7) "Material interest" means an actual or potential benefit, including the avoidance of a detriment, other than one which would devolve on the corporation or the stockholders generally, that (i) in the case of a director, would reasonably be expected to impair the objectivity of the director's judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue and (ii) in the case of a stockholder or any other person (other than a director), would be material to such stockholder or such other person.

(8) "Material relationship" means a familial, financial, professional, employment, or other relationship that (i) in the case of a director, would reasonably be expected to impair the objectivity of the director's judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue and (ii) in the case of a stockholder, would be material to such stockholder.

Section 3. Amend Title 8 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 220A. Inspection of books and records.

(a) As used in this section:

(1) "Books and records" means all of the following:

a. The certificate of incorporation, as defined in § 104 of this title, including a copy of any agreement or other instrument incorporated by reference in the certificate of incorporation.

b. The bylaws then in effect, including a copy of any agreement or other instrument incorporated by reference in the bylaws.

c. Minutes of all meetings of stockholders and the signed consents evidencing all action taken by stockholders without a meeting, in each case for the 3 years preceding the date of the demand under subsection (b) of this section.

d. All communications in writing or by electronic transmission to stockholders generally within the past 3 years preceding the date of the demand under subsection (b) of this section.

e. Minutes of any meeting of the board of directors or any committee of the board of directors and records of any action of the board of directors or any such committee.

f. Materials provided to the board of directors or any committee of the board of directors in connection with actions taken by the board of directors or any such committee.

g. Annual financial statements of the corporation for the 3 years preceding the date of the demand under subsection (b) of this section.

h. Any agreement entered into under § 122(18) of this title.

i. Director and officer independence questionnaires.

(2) “Proper purpose” means a purpose reasonably related to a stockholder’s interest as a stockholder.

(3) “Stockholder” means a person who is a holder of record of stock in a stock corporation, or a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person.

(4) “Subsidiary” means any entity directly or indirectly owned, in whole or in part, by the corporation of which the stockholder is a stockholder and over the affairs of which the corporation directly or indirectly exercises control, and includes, without limitation, corporations, partnerships, limited partnerships, limited liability partnerships, limited liability companies, statutory trusts and/or joint ventures.

(5) “Under oath” includes statements the declarant affirms to be true under penalty of perjury under the laws of the United States or any state.

(b) (1) If a corporation has adopted an Opt-In Provision, then subject to paragraph (b)(2) of this section, any stockholder, in person or by attorney or other agent, shall, upon written demand under oath, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from:

a. The corporation’s stock ledger, a list of its stockholders, and its other books and records; and

b. A subsidiary’s books and records, to the extent that:

1. The corporation has actual possession and control of such records of such subsidiary; or

2. The corporation could obtain such records through the exercise of control over such subsidiary,

provided that as of the date of the making of the demand:

A. The stockholder inspection of such books and records of the subsidiary would not constitute a breach of an agreement between the corporation or the subsidiary and a person or persons not affiliated with the corporation; and

B. The subsidiary would not have the right under the law applicable to it to deny the corporation access to such books and records upon demand by the corporation.

(2) If a corporation has adopted an Opt-In Provision, then a stockholder may inspect and copy the corporation’s books and records only if all of the following apply:

a. The stockholder’s demand is made in good faith and for a proper purpose.

200 b. The stockholder's demand describes with reasonable particularity the stockholder's purpose and the
201 books and records the stockholder seeks to inspect.

202 c. The books and records sought are specifically related to the stockholder's purpose.

203 (3) If a corporation has adopted an Opt-In Provision, then the corporation may impose reasonable restrictions
204 on the confidentiality, use, or distribution of books and records and may require, as a condition to producing books and
205 records to a stockholder under any demand under this subsection, that the stockholder agree that any information
206 included in the corporation's books and records is deemed incorporated by reference in any complaint filed by or at the
207 direction of the stockholder in relation to the subject matter referenced in the demand. The corporation may redact
208 portions of any books and records produced to such stockholder under this subsection to the extent the portions so
209 redacted are not specifically related to the stockholder's purpose.

210 (4) This section does not affect:

211 a. The right of a stockholder to seek discovery of books and records if the stockholder is in litigation with
212 the corporation, to the same extent as any other litigant; or

213 b. The power of a court, independently of this chapter, to compel the production of corporate records for
214 inspection and to impose reasonable restrictions as provided in paragraph (b)(3) of this section, provided that, in
215 the case of production of books and records defined in paragraph (a)(1) of this section at the request of a
216 stockholder, the stockholder has met the requirements of this subsection.

217 (5) If a corporation has adopted an Opt-In Provision, then in every instance where the stockholder is other
218 than a record holder of stock in a stock corporation, or a member of a nonstock corporation, the demand under oath
219 shall state the person's status as a stockholder, be accompanied by documentary evidence of beneficial ownership of
220 the stock, and state that such documentary evidence is a true and correct copy of what it purports to be.

221 (6) If a corporation has adopted an Opt-In Provision, then in every instance where an attorney or other agent
222 shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of
223 attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the stockholder.

224 (7) If a corporation has adopted an Opt-In Provision, then the demand under oath shall be directed to the
225 corporation at its registered office in this State or at its principal place of business.

226 (c) If a corporation has adopted an Opt-In Provision, then if the corporation, or an officer or agent thereof, refuses
227 to permit an inspection sought by a stockholder or attorney or other agent acting for the stockholder pursuant to subsection
228 (b) of this section or does not reply to the demand within 5 business days after the demand has been made, the stockholder
229 may apply to the Court of Chancery for an order to compel such inspection. The Court of Chancery is hereby vested with

230 exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought. The
231 Court may summarily order the corporation to permit the stockholder to inspect the corporation's stock ledger, an existing
232 list of stockholders, and its other books and records, and to make copies or extracts therefrom; or the Court may order the
233 corporation to furnish to the stockholder a list of its stockholders as of a specific date on condition that the stockholder first
234 pay to the corporation the reasonable cost of obtaining and furnishing such list and on such other conditions as the Court
235 deems appropriate. Where the stockholder seeks to inspect the corporation's books and records, other than its stock ledger
236 or list of stockholders, such stockholder shall first establish that:

237 (1) Such stockholder is a stockholder;

238 (2) Such stockholder has complied with this section respecting the form and manner of making demand for
239 inspection of such documents; and

240 (3) The inspection such stockholder seeks is for a proper purpose.

241 Where the stockholder seeks to inspect the corporation's stock ledger or list of stockholders and establishes
242 that such stockholder is a stockholder and has complied with this section respecting the form and manner of making
243 demand for inspection of such documents, the burden of proof shall be upon the corporation to establish that the
244 inspection such stockholder seeks is for an improper purpose. The Court may, in its discretion, prescribe any
245 limitations or conditions with reference to the inspection, or award such other or further relief as the Court may deem
246 just and proper. The Court may order books, documents and records, pertinent extracts therefrom, or duly authenticated
247 copies thereof, to be brought within this State and kept in this State upon such terms and conditions as the order may
248 prescribe.

249 (d) If a corporation has adopted an Opt-In Provision, then any director shall have the right to examine the
250 corporation's stock ledger, a list of its stockholders, its books and records, and other corporate records for a purpose
251 reasonably related to the director's position as a director. The Court of Chancery is hereby vested with the exclusive
252 jurisdiction to determine whether a director is entitled to the inspection sought. The Court may summarily order the
253 corporation to permit the director to inspect the stock ledger, the list of stockholders, the books and records, and other
254 corporate records and to make copies or extracts therefrom. The burden of proof shall be upon the corporation to establish
255 that the inspection such director seeks is for an improper purpose. The Court may, in its discretion, prescribe any limitations
256 or conditions with reference to the inspection, or award such other and further relief as the Court may deem just and proper.

257 (e) If a corporation has adopted an Opt-In Provision, then except as otherwise expressly provided in subsection (f)
258 or subsection (g) of this section, in any proceeding brought by a stockholder under subsection (c) of this section to compel

259 the inspection of books and records, the Court of Chancery may not order the corporation to produce any records of the
260 corporation other than the books and records set forth in paragraph (a)(1) of this section.

261 (f) If a corporation has adopted an Opt-In Provision, then if the corporation does not have any of the books and
262 records described in paragraphs (a)(1)c., (a)(1)e., or (a)(1)g. of this section or, in the case of a corporation that has a class of
263 stock listed on a national securities exchange, paragraph (a)(1)i. of this section, the Court of Chancery may order the
264 corporation to produce additional records of the corporation constituting the functional equivalent of any such books and
265 records in response to a demand for inspection brought by a stockholder under subsection (b) of this section only if and to
266 the extent the stockholder has met the requirements of subsection (b) of this section, and only to the extent necessary and
267 essential to fulfill the stockholder's proper purpose.

268 (g) If a corporation has adopted an Opt-In Provision, then in any proceeding brought by a stockholder under
269 subsection (c) of this section to compel the inspection of books and records, the Court of Chancery may order the
270 corporation to produce, in addition to any books and records or other records ordered to be produced under subsection (e) of
271 this section, other specific records of the corporation only if and to the extent: (1) Such stockholder has met the
272 requirements of subsection (b) of this section; (2) Such stockholder has made a showing of a compelling need for an
273 inspection of such records to further the stockholder's proper purpose; and (3) Such stockholder has demonstrated by clear
274 and convincing evidence that such specific records are necessary and essential to further such purpose.

275 (h) If a corporation has adopted an Opt-In Provision, then the Court of Chancery may impose reasonable
276 restrictions as provided in paragraph (b)(3) of this section to any records of the corporation produced under subsection (f) or
277 subsection (g) of this section."

278 FURTHER AMEND Senate Substitute No. 1 for Senate Bill No. 21 by deleting lines 245 through 248 in their
279 entirety.

280 FURTHER AMEND Senate Substitute No. 1 for Senate Bill No. 21 by inserting a new Section after line 248 as
281 follows:

282 "Section 4. Sections 1, 2, and 3 of this Act take effect on enactment of this Act."

SYNOPSIS

This Amendment mirrors the proposed changes in SS 1 for Senate Bill 21, but provides that the corporation must "opt-in" to adopt them. It adds a new section one, which describes the method by which the corporation may opt in to the changes from the default, existing law.