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DELAWARE STATE SENATE
153rd GENERAL ASSEMBLY

SENATE BILL NO. 21

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

1 Section 1. Amend § 144, Title 8 of the Delaware Code by making deletions as shown by strike through and
2 insertions as shown by underline as follows:

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

4 (a) ~~No contract~~ An act or transaction involving or between a corporation and 1 or more of its directors or officers,
5 or involving or between a corporation and any other corporation, partnership (general or limited), limited liability company,
6 statutory trust, association, or other organization in which 1 or more of its directors or officers, officers are directors,
7 partners, managers, members, or officers, or have a financial interest, shall be void or voidable solely for this reason, or
8 solely because may not be the subject of equitable relief, or give rise to an award of damages or other sanction against a
9 director or officer of the corporation, because of the foregoing circumstances or the receipt of any benefit by any such
10 director, officer, or entity or because the director or officer is present at or participates in the meeting of the board or
11 committee which authorizes the contract act or transaction, or solely because any such or was involved in the initiation,
12 negotiation, or approval of the act or transaction (including by virtue of a director's or officer's votes are vote being
13 counted for such purpose, purpose), if:

14 (1) The material facts as to the director's or officer's relationship or interest and as to the ~~contract act~~ or
15 transaction transaction, including any involvement in the initiation, negotiation, or approval of the act or transaction,
16 are disclosed or are known to the board of directors or the committee, and the board or committee in good faith
17 authorizes the ~~contract act~~ or transaction by the affirmative votes of a majority of the disinterested directors, even
18 though the disinterested directors be less than a quorum; or

19 (2) The material facts as to the director's or officer's relationship or interest and as to the ~~contract act~~ or
20 transaction transaction, including any involvement in the initiation, negotiation, or approval of the act or transaction,
21 are disclosed or are known to the stockholders entitled to vote thereon, and the ~~contract act~~ or transaction is specifically

22 approved or ratified ~~in good faith~~ by the uncoerced, affirmative vote of a majority of the votes cast by the disinterested
23 stockholders; or

24 (3) The ~~contract act~~ or transaction is fair as to the corporation ~~as of the time it is authorized, approved or~~
25 ~~ratified by the board of directors, a committee or the stockholders.~~ corporation.

26 (b) A controlling stockholder transaction (other than any going private transaction) may not be the subject of
27 equitable relief, or give rise to an award of damages or other sanction against a director or officer of the corporation or any
28 controlling stockholder or member of a control group, by reason of a breach of fiduciary duty by a director, officer,
29 controlling stockholder, or member of a control group, if:

30 (1) The material facts as to such controlling stockholder transaction are disclosed or are known to a committee
31 of the board of directors expressly delegated the authority to negotiate (or oversee the negotiation of) and to reject such
32 controlling stockholder transaction, and such controlling stockholder transaction is approved (or recommended for
33 approval) in good faith by the committee (provided that the committee does not include the controlling stockholder and
34 that a majority of the members of the committee approving such controlling stockholder transaction are disinterested
35 directors); or

36 (2) The material facts as to such controlling stockholder transaction are disclosed or are known to the
37 stockholders entitled to vote thereon, such controlling stockholder transaction is conditioned on a vote of the
38 disinterested stockholders at or prior to the time it is submitted to stockholders for their approval or ratification, and
39 such controlling stockholder transaction is approved or ratified by the uncoerced, affirmative vote of a majority of the
40 votes cast by the disinterested stockholders; or

41 (3) Such controlling stockholder transaction is fair as to the corporation.

42 (c) A controlling stockholder transaction constituting a going private transaction may not be the subject of
43 equitable relief, or give rise to an award of damages or other sanction against a director or officer of the corporation or any
44 controlling stockholder or member of a control group by reason of a breach of fiduciary duty by a director, officer,
45 controlling stockholder, or member of a control group, if:

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

48 (2) Such controlling stockholder transaction is fair as to the corporation.

49 ~~(b)(d)(1)~~ Common or interested directors may be counted in determining the presence of a quorum at a meeting of
50 the board of directors or of a committee which authorizes the ~~contract act~~ or transaction.

51 (2) Any director of a corporation that has a class of stock listed on a national securities exchange shall be
52 presumed to be a disinterested director with respect to an act or transaction to which such director is not a party if the
53 board of directors shall have determined that such director is an independent director or satisfies the relevant criteria
54 for determining director independence under any rules promulgated by such exchange, which presumption shall be
55 heightened and may only be rebutted by substantial and particularized facts that such director has a material interest in
56 such act or transaction or has a material relationship with a person with a material interest in such act or transaction.

57 (3) The nomination or election of the director to the board of directors by any person that has a material
58 interest in an act or transaction shall not, of itself, be evidence that a director is not a disinterested director with respect
59 to an act or transaction to which such director is not a party.

60 (4) No person shall be deemed a controlling stockholder unless such person satisfies the criteria in paragraph
61 (e)(2) of this section. No 2 or more persons that are not controlling stockholders shall be a control group unless they
62 satisfy the criteria in paragraph (e)(1) of this section.

63 (5) No person who is a controlling stockholder or member of a control group shall be liable in such capacity to
64 the corporation or its stockholders for monetary damages for breach of fiduciary duty other than for:

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

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

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

69 (6) Nothing in subsections (a) or (b) of this section shall:

70 a. Limit or eliminate the right of any person to seek equitable relief on the grounds that an act or
71 transaction, including a controlling stockholder transaction, was not authorized or approved in compliance with the
72 procedures set forth in this chapter, was not authorized or approved in compliance with the certificate of
73 incorporation or bylaws of the corporation, or is in violation of any plan or agreement to which the corporation is a
74 party; or

75 b. Limit judicial review for purposes of injunctive relief of provisions or devices designed to deter, delay,
76 or preclude a change of control or other transaction involving the corporation or a change in the composition of the
77 board of directors.

78 (7) Shares irrevocably accepted for purchase or exchange pursuant to an offer contemplated by § 251(h) of
79 this title shall be deemed voted in favor of the act or transaction.

80 (e) For purposes of this section:

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

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

84 a. Owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote
85 generally in the election of directors; or

86 b. Has the power functionally equivalent to that of a stockholder that owns or controls a majority in
87 voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors by
88 virtue of ownership or control of at least one-third in voting power of the outstanding stock of the corporation
89 entitled to vote generally in the election of directors or for the election of directors who have a majority in voting
90 power of the votes of all directors on the board of directors and power to exercise managerial authority over the
91 business and affairs of the corporation.

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

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

99 (5) “Disinterested stockholder” means any stockholder that does not have a material interest in the act or
100 transaction at issue or a material relationship with any person that has a material interest in the act or transaction.

101 (6) “Fair as to the corporation” means the act or transaction at issue, as a whole, is beneficial to the
102 corporation, or its stockholders in their capacity, as such given the consideration paid to or received by the corporation
103 or its stockholders or other benefit conferred on the corporation or its stockholders and taking into appropriate account
104 whether the act or transaction meets both of the following:

105 a. It is fair in terms of the fiduciary’s dealings with the corporation.

106 b. It is comparable to what might have been obtained in an arm’s length transaction available to the
107 corporation.

108 (7) “Going private transaction” means:

109 a. For a corporation with a class of securities registered under § 12(d) or 15(g) of the Securities Exchange
110 Act of 1934 or listed on a national securities exchange, a 13e-3 transaction (as defined in 17 CFR § 240.13e-
111 3(a)(3) or any successor provision); and

112 b. For any other corporation not subject to paragraph (e)(7)a. of this section, any controlling stockholder
113 transaction, whether by merger, consolidation, amendment, tender or exchange offer, conversion, transfer,
114 domestication or continuance, pursuant to which all or substantially all of the shares of capital stock held by the
115 disinterested stockholders (but not those of the controlling stockholder or control group) are cancelled or acquired.

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

121 (9) “Material relationship” means a familial, financial, professional, employment, or other relationship that (i)
122 in the case of a director, would reasonably be expected to impair the objectivity of the director’s judgment when
123 participating in the authorization or approval of the act or transaction at issue and (ii) in the case of a stockholder,
124 would be material to such stockholder.

125 Section 2. Amend § 220, Title 8 of the Delaware Code by making deletions as shown by strike through and
126 insertions as shown by underline as follows:

127 § 220. Inspection of books and records.

128 (a) As used in this section:

129 (1) “Books and records” means all of the following:

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

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

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

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

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

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

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

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

146 i. Director and officer independence questionnaires.

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

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

151 (2)(4) “Subsidiary” means any entity directly or indirectly owned, in whole or in part, by the corporation of
152 which the stockholder is a stockholder and over the affairs of which the corporation directly or indirectly exercises
153 control, and includes, without limitation, corporations, partnerships, limited partnerships, limited liability partnerships,
154 limited liability companies, statutory trusts and/or joint ventures.

155 (3)(5) “Under oath” includes statements the declarant affirms to be true under penalty of perjury under the
156 laws of the United States or any state.

157 (b)(1) Any Subject to paragraph (b)(2) of this section, any stockholder, in person or by attorney or other agent,
158 shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to
159 inspect for any proper purpose, and to make copies and extracts from:

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

161 (2)b. A subsidiary’s books and records, to the extent that:

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

163 b.2. The corporation could obtain such records through the exercise of control over such subsidiary,
164 provided that as of the date of the making of the demand:

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

168 2-B. The subsidiary would not have the right under the law applicable to it to deny the
169 corporation access to such books and records upon demand by the corporation.

170 (2) A stockholder may inspect and copy the corporation's books and records only if all of the following apply:

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

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

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

175 (3) The corporation may impose reasonable restrictions on the confidentiality, use, or distribution of books
176 and records and may require, as a condition to producing books and records to a stockholder under any demand under
177 this subsection, that the stockholder agree that any information included in the corporation's books and records is
178 deemed incorporated by reference in any complaint filed by or at the direction of the stockholder in relation to the
179 subject matter referenced in the demand. The corporation may redact portions of any books and records produced to
180 such stockholder under this subsection to the extent the portions so redacted are not specifically related to the
181 stockholder's purpose.

182 (4) This section does not affect:

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

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

189 (5) In every instance where the stockholder is other than a record holder of stock in a stock corporation, or a
190 member of a nonstock corporation, the demand under oath shall state the person's status as a stockholder, be
191 accompanied by documentary evidence of beneficial ownership of the stock, and state that such documentary evidence
192 is a true and correct copy of what it purports to be. ~~A proper purpose shall mean a purpose reasonably related to such~~
193 person's interest as a stockholder.

194 (6) In every instance where an attorney or other agent shall be the person who seeks the right to inspection,
195 the demand under oath shall be accompanied by a power of attorney or such other writing which authorizes the
196 attorney or other agent to so act on behalf of the stockholder.

197 (7) The demand under oath shall be directed to the corporation at its registered office in this State or at its
198 principal place of business.

199 (d) Any director shall have the right to examine the corporation's stock ledger, a list of its ~~stockholders and~~
200 stockholders, its other books and records records, and other corporate records for a purpose reasonably related to the
201 director's position as a director. The Court of Chancery is hereby vested with the exclusive jurisdiction to determine
202 whether a director is entitled to the inspection sought. The Court may summarily order the corporation to permit the
203 director to inspect ~~any and all books and records, the stock ledger and ledger,~~ the list of stockholders stockholders, the
204 books and records, and other corporate records and to make copies or extracts therefrom. The burden of proof shall be upon
205 the corporation to establish that the inspection such director seeks is for an improper purpose. The Court may, in its
206 discretion, prescribe any limitations or conditions with reference to the inspection, or award such other and further relief as
207 the Court may deem just and proper.

208 (e) In any proceeding brought by a stockholder under subsection (c) of this section to compel the inspection of
209 book and records, the Court of Chancery may not order the corporation to produce any records of the corporation other than
210 the books and records set forth in paragraph (a)(1) of this section.

211 (f) If the corporation does not have any of the books and records described in paragraphs (a)(1)c., (a)(1)e., or
212 (a)(1)g. of this section or, in the case of corporation that has a class of stock listed on a national securities exchange,
213 paragraph (a)(1)i. of this section, the Court of Chancery may order the corporation to produce additional records of the
214 corporation constituting the functional equivalent of any such books and records in response to a demand for inspection
215 brought by a stockholder under subsection (b) of this section and to impose reasonable restrictions as provided in paragraph
216 (b)(3) of this section, only if and to the extent the stockholder has met the requirements of subsection (b) of this section, and
217 only to the extent necessary and essential to fulfill the stockholder's proper purpose.

SYNOPSIS

Section 1 of this Act amends § 144 of Title 8 to provide safe harbor procedures for acts or transactions in which one or more directors or officers as well as controlling stockholders and members of control groups have interests or relationships that might render them interested or not independent with respect to the act or transaction. Under revised § 144(a), certain acts or transactions involving such directors or officers will be protected if approved or ratified by a majority of the disinterested directors or by a majority of the votes cast by the disinterested stockholders entitled to vote thereon, in each case upon disclosure or in full knowledge of the material facts giving rise to the conflict or potential conflict. In addition, the amendments define what parties constitute a controlling stockholder or control group and provide safe harbor procedures that can be followed to insulate from challenge specified acts or transactions from which a controlling stockholder or control group receives a unique benefit. Under new § 144(b), a controlling stockholder transaction that does not constitute a "going private transaction" may be entitled to the statutory safe harbor protection if it is approved or recommended, as applicable, by a committee consisting of a majority of disinterested directors or approved or ratified by a majority of the votes cast by the disinterested stockholders. Under new § 144(c), a controlling stockholder transaction that constitutes a "going private transaction" may be entitled to the statutory safe harbor protection if it is negotiated and approved or recommended, as applicable, by a committee consisting of a majority of disinterested directors and approved or ratified by a vote of a majority of the votes cast by the disinterested stockholders entitled to vote thereon. The amendments to § 144 also set forth criteria for determining the independence and disinterestedness of directors and stockholders. The

amendments provide that controlling stockholders and control groups, in their capacity as such, cannot be liable for monetary damages for breach of the duty of care. The amendments do not displace any safe harbor procedures or other protections available at common law.

Section 2 of this Act amends § 220 of Title 8 to define the materials that a stockholder may demand to inspect pursuant to a request for books and records of the corporation. The amendments also set forth certain conditions that a stockholder must satisfy in order to make an inspection of books and records. The amendments make clear that information from books and records obtained by a stockholder from a production under § 220 will be deemed to be incorporated by reference into any complaint filed by or at the direction of a stockholder on the basis of information obtained through a demand for books and records. New § 220(b)(4) preserves whatever independent rights of inspection exist under the referenced sources and does not create any rights, either expressly or by implication. New § 220(f) provides that if the corporation does not have specified books and records, including minutes of board and committee meetings, actions of board or any committee, financial statements and director and officer independence questionnaires, the Court of Chancery may order the production of additional corporate records necessary and essential for the stockholder's proper purpose.

This Act requires a greater than majority vote for passage because § 1 of Article IX of the Delaware Constitution requires the affirmative vote of two-thirds of the members elected to each house of the General Assembly to amend the general corporation law.

Author: Senator Townsend