

# Delaware Strengthens Its Corporate Law Advantage:

## What Bankers Need to Know About Senate Bill 21

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**O**n March 25, 2025, Delaware Governor Matt Meyer signed Delaware Senate Bill 21 into law, marking a significant moment in the evolution of American corporate law. This bipartisan legislation amends the Delaware General Corporation Law (DGCL) in response to concerns expressed by Delaware corporations, law firms, and others corporate stakeholders about providing greater clarity and predictability in Delaware corporate law. For banking and financial services professionals, these amendments create important new opportunities for advising corporate clients and structuring transactions with enhanced legal certainty.

Delaware has long maintained its position as the corporate capital of America, with more than two-thirds of Fortune 500 companies incorporated in the state and approximately 81% of domestic IPOs being Delaware corporations. This dominance has created a robust ecosystem that benefits the financial services industry through predictable legal outcomes, specialized judicial expertise, an experienced and highly modernized secretary of state, and responsive legislative updates. However, developments over the last several years tested Delaware’s supremacy, making Senate Bill 21’s swift passage a critical response to preserve Delaware’s corporate law dominance while maintaining the fundamental qualities that have made it the jurisdiction of choice for sophisticated business transactions.

### The Competitive Landscape

Delaware’s position as the premier incorporation jurisdiction has faced increasing challenges in recent years. Texas introduced a specialized court system for corporate matters

in 2024, explicitly targeting Delaware’s market share. A handful of high-profile departures and threatened relocations had raised concerns, with a limited number of companies reincorporating in Texas<sup>1</sup> and Nevada.<sup>2</sup> This competitive pressure comes at a time when Delaware’s corporate franchise faces unprecedented scrutiny. As early as 2022, prominent former members of Delaware’s judiciary and leading corporate-law academics highlighted certain concerns with discrete aspects of Delaware corporate law.<sup>3</sup> Over the subsequent years, Delaware law was, at times, applied in ways that created uncertainties in the corporate approval processes for certain “interested” or “conflicted” transactions and in determining the scope of corporate records that stockholders are entitled to receive.

The answer to these concerns includes the statutory amendments in Senate Bill 21.

### Key Provisions of Senate Bill 21

#### 1. Clarification of Controlling Stockholder Definition

Perhaps the most significant aspect of Senate Bill 21 is its amendment to Section 144 of the DGCL, which establishes clear procedural safe harbors for approving transactions involving corporations and their directors, officers, and controlling stockholders.

The legislation specifically defines what constitutes a “controlling stockholder” – a classification now limited to persons or entities that:

- Control a majority in voting power of outstanding stock entitled to vote in director elections;
- Control the election of directors possessing a majority of the board’s total voting power; and/or

- Possess the functional equivalent of majority control by having both control of at least one-third in voting power of the outstanding stock and the power to exercise managerial authority.

Defining controlling stockholders more clearly brings invaluable clarity for structuring transactions involving large stockholders. Previously, companies had to navigate considerable uncertainty about whether a stockholder might be deemed “controlling” based on a web of complex factors. The new bright-line rules provide greater predictability when advising clients on governance structures and transaction approval mechanisms.

## 2. Heightened Presumption of Director Independence

The amendments establish a heightened presumption of independence for directors a board determines are independent under the rules of a national stock exchange. This provision gives corporate boards significantly more deference in determining which directors can participate in approving transactions with interested parties. The enhanced independence presumption reduces the risk that transactions approved by independent directors will later be subject to judicial review based on uncertain and evolving common law independence standards.

## 3. Statutory Definition of Books and Records Pursuant to DGCL Section 220

Senate Bill 21 also amends Section 220 of the DGCL to specify the types of corporate records a stockholder is entitled to receive by making a statutory Section 220 demand on a Delaware corporation, and provides a definition for a “proper purpose” for making such records demands. Under the amended Section 220, stockholders are only entitled to inspect a discrete set of formal corporate documents, such as board minutes, board books related to corporate actions, and financial statements. The legislation creates a heightened standard for accessing informal corporate documents like internal emails, requiring stockholders to demonstrate a “compelling reason” for such inspection. This change directly addresses the explosion of books-and-records litigation that has imposed substantial costs on Delaware corporations (and Delaware courts, with over 10% of the Court of Chancery’s docket consumed with such cases) in recent years. These amendments also allow a corporation to impose reasonable restrictions on confidentiality of corporate records provided in response to a Section 220 demand, providing greater certainty that confidential information shared with corporate clients during the deal process may remain protected from fishing expeditions by activist investors or opportunistic plaintiffs’ attorneys.

## Benefits of the Amendments

### 1. Enhanced Transaction Certainty

The amendments to Section 144 provide clearer rules for conflict-of-interest transactions, reducing the risk that corporate actions will be reviewed by courts applying possibly amorphous standards. This clarity translates into more predictable outcomes and a reduced likelihood of post-closing litigation if companies follow one or more of the new Section 144’s safe harbors.

Companies can now more confidently:

- Structure deals for related-party transactions with greater certainty;
- Develop compliance frameworks that align with Delaware’s statutory safe harbors; and
- Underwrite securities offerings with reduced risk of subsequent stockholder challenges.

## 2. Reduced Litigation Exposure for Corporate Clients

The legislation discourages stockholder strike suits and narrows inspection rights, which will help companies manage legal risk more effectively.

This translates into:<sup>4</sup>

- Lower litigation reserves required for corporate lending clients/borrowers; and
- Reduced contingent liability assessments in credit underwriting.

## Delaware’s Enduring Advantages for Corporate Clients

Senate Bill 21 reinforces the state’s traditional advantages for corporations and their financial partners. Delaware continues to offer unique benefits that no other jurisdiction can match, outlined below:

### 1. Sophisticated Specialized Court System

The Delaware Court of Chancery remains unique as a specialized trial court with judges selected for their corporate law expertise. Unlike nearly every other jurisdiction, corporate cases in Delaware are decided by judges, not juries, resulting in more predictable and business-savvy rulings. In a stark contrast, courts in states like Texas and Nevada permit jury trials in corporate cases, which can add considerable unpredictability. A famous example is the 1980s case *Pennzoil Co. v. Texaco Inc.*, where a Texas state court jury awarded \$10.53 billion in damages (including \$3 billion in punitive damages). The Court of Chancery cannot award punitive damages in corporate cases, providing an additional layer of risk mitigation not available in states like Nevada, where “breach of fiduciary duty ... is a separate tort upon which punitive damages may be based,”<sup>5</sup> or Texas, where exemplary or punitive damages are available for fraud, malice, and even gross negligence.<sup>6</sup>

### 2. Unmatched Speed and Efficiency

The Court of Chancery and Delaware Supreme Court are uniquely equipped to resolve disputes on an expedited basis when appropriate to meet business needs. This efficiency extends to the Delaware Secretary of State’s Office, which processes corporate filings with remarkable speed – a critical advantage for time-sensitive transactions like mergers, IPOs, and other significant corporate actions that banks often finance or advise upon. The Court of Chancery’s history and ability to resolve complex commercial cases on an expedited timeline is unmatched. For example, in late 2023, the Court of Chancery worked through the holidays to issue a highly expedited decision during the week between Christmas and New Year’s in a hotly contested proxy contest.<sup>7</sup>

The Delaware Supreme Court can also expeditiously resolve highly expedited appeals.<sup>8</sup> Recently, it expedited the appeal of a dispute between an early-stage biotech company and one of its lead investors that was holding up the company’s impending IPO, holding oral argument on the appeal just over two weeks after an expedited post-trial decision was issued by the Court of Chancery.<sup>9</sup>

By contrast, state courts in Texas and Nevada lack a history of resolving expedited appeals of complex corporate cases, which may be further drawn out by an intermediate appeals process.

### 3. Independent and Experienced Judiciary

The seven judges serving on the Court of Chancery and five justices serving on the Delaware Supreme Court are all appointed by the

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governor for twelve-year terms, with a long tradition of the judges on each Court being evenly split between major political parties. Judicial candidates are screened in advance by Delaware's Judicial Nominating Commission comprised of prominent Delaware attorneys and officials. In Nevada, judges are elected to six-year terms, and judges have a docket that includes both civil and criminal cases. Judges serving on the Texas Business Court are appointed for terms of just two years, subjecting them to political scrutiny.

#### 4. Developed Body of Case Law and Familiarity with Corporate Transactions

Delaware's highly developed body of corporate case law assists in corporate planning by providing enhanced clarity on the resolution of corporate and commercial issues undecided in other jurisdictions. Nevada case law concerning the effects of its statutes and regulations is significantly more limited, and the Texas Business Court has only been operational since September 1, 2024.

Delaware courts are familiar with sophisticated corporate transaction structures and their underlying documentation. They have interpreted the NVCA Model Legal Documents, many common charter and bylaw provisions, many common merger agreement provisions, and many common commercial agreement provisions.

#### Delaware's Corporate Franchise: Economic Impact and Benefits for Residents

The importance of Delaware's corporate franchise extends far beyond the legal community, as it provides benefits to all residents of the state. The corporate franchise fees and associated revenues fund roughly one-third of Delaware's annual state budget, supporting schools, infrastructure, and social services, as well as creating jobs and serving as an engine of growth in the local economy. It is also identified as a reason that the State of Delaware does not have a sales tax.

For every Delaware resident, the corporate franchise provides critical financial benefits:

- 1. Direct Revenue Generation:** Delaware collects billions of dollars annually in corporate franchise taxes and related fees, which flow directly into the state's general fund.
- 2. Employment Opportunities:** The corporate franchise creates thousands of high-paying jobs in the legal, financial, and service sectors that support Delaware corporations.
- 3. Infrastructure Investment:** Corporate franchise revenues help fund infrastructure improvements throughout the state, benefiting all residents regardless of their connection to the corporate sector.
- 4. Property Tax Relief:** The substantial contribution of franchise taxes to state revenues helps keep property taxes lower than they would otherwise be, benefiting Delaware homeowners.
- 5. Educational Funding:** A significant portion of Delaware's education budget is supported by corporate franchise revenues, enhancing educational opportunities for Delaware's children.

The loss of direct and indirect revenue from the corporate franchise would be devastating to the state's finances, risking the need for drastic cost-cutting measures that would hamstring the state's ability to provide core services to ordinary Delawareans as well as critical support to the state's most vulnerable residents.

## Practical Guidance for Banking Professionals

### 1. Develop Specialized Expertise

Consider establishing a dedicated team or center of excellence focused on Delaware corporate law developments. This specialized knowledge can provide a competitive advantage in structuring and facilitating complex corporate transactions.

### 2. Monitor Client Incorporation Decisions

Track clients' decisions regarding their state of incorporation and be prepared to discuss the strategic implications of these choices for their governance, financing, and transaction approval processes.

## Delaware's Corporate Law Renaissance

Senate Bill 21 represents Delaware's strategic response to competitive pressures and reflects the state's commitment to maintaining its position as the premier jurisdiction for corporate law. By addressing concerns about excessive litigation and providing clearer safe harbors for transaction approval, the legislation reinforces the fundamental attributes that have made Delaware the preferred home for sophisticated corporations and their financial partners. While other states may continue their efforts to attract corporations, Delaware's unmatched combination of judicial expertise, legislative responsiveness, and institutional knowledge should maintain Delaware as the jurisdiction of choice for corporate and other entity formations.

The financial services industry stands to benefit significantly from the enhanced predictability and reduced litigation risk that Senate Bill 21 provides. With an understanding of Senate Bill 21 and the benefits it provides to their corporate clients, financial institutions will be well positioned to facilitate complex transactions with their corporate clients with confidence. Senate Bill 21 doesn't merely preserve Delaware's advantages – it strengthens them for a new era of corporate governance and finance, ensuring that Delaware's corporate franchise will continue to serve as an engine of prosperity for the state and its residents for generations to come.



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Notes:

1- See Tesla, Inc. (2024) Definitive Proxy Statement (DEF14A) filed with the Securities Exchange Act Commission on April 10, 2024.

2- See The Trade Desk, Inc. (2023) Definitive Proxy Statement (DEF14A) filed with the Securities Exchange Act Commission on April 24, 2023; see also Cannae Holdings, Inc. (2023) Definitive Proxy Statement (DEF14A) filed with the Securities Exchange Act Commission on April 11, 2023.

3- See "Optimizing The World's Leading Corporate Law: A 20-Year Retrospective," by Lawrence Hamermesh, Jack B. Jacobs *et al.*

4- The authors also speculate that Senate Bill 21 creates the potential for possible improved valuations for M&A targets incorporated in Delaware.

5- See *Clark v. Lubritz*, 944 P.2d 861, 867 (Nev. 1997).

6- Tex. Civ. Prac. & Rem. Code Ann. §41.003(a).

7- See *Kellner v. AIM ImmunoTech Inc.*, 307 A.3d 998 (Del. Ch. Dec. 28, 2023).

8- In *Paramount Commc'ns, Inc. v. Time Inc.*, the Delaware Supreme Court issued a bench ruling 10 days after an appealed decision was issued by the Court of Chancery in a hostile takeover. 571 A.2d 1140 (Del. 1990); see also *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994) (resolving expedited appeal in hostile takeover just over two weeks after a ruling was issued by the Court of Chancery).  
9- *Alcon Research LLC v. Aurion Biotech Inc.*, C.A. No. 34, 2025 (Del. Supr.).