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DELAWARE'S NEW DEFINITION OF "BOOKS AND RECORDS" MAY LIMIT SHAREHOLDER ACCESS TO CORPORATE BOOKS AND RECORDS



By Samantha Buckman

When it comes to shareholder litigation, one of the first signs that litigation may be imminent comes in the form of a "books and records" request. A books and records request is a request, made by or on behalf of a shareholder, for a corporation to produce records relating to an issue the shareholder is investigating. Shareholders who suspect some kind of corporate wrongdoing or mismanagement, or who are contemplating a potential lawsuit against the corporation or its directors, will often use a books and records request to acquire information that is later incorporated into a complaint.

As the volume of data corporations retain grows ever larger, so does the scope of shareholder books and records requests and subsequent size of these early productions. In addressing these expanding requests, some courts have held that corporations must produce emails between and among corporate officers or employees in response to books and records requests. *See, e.g., NVIDIA Corp. v. City of Westland Police & Fire Ret. Sys.*, 282 A.3d 1, 12 (Del. 2022) (affirming lower court holding "the production of certain emails . . . was necessary and essential" because shareholders presented evidence of emails existing related to properly made shareholder requests); see also *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738 (Del. 2019) (holding that the "Court of Chancery abused its discretion by denying wholesale [shareholder's] request to inspect emails" where the shareholder "made a sufficient showing that emails were necessary to investigate potential wrongdoing").

Disagreements as to the permissible scope of books and records requests often spurs its own litigation, through which the parties typically fight over the depth of information the corporation must provide in response to the request, or whether the shareholder has made the request for a proper purpose. Courts, including those in the corporate law lodestar, Delaware, are interested in preventing books and records requests being used as a method to circumvent the discovery process. *See Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156, 165 (Del. Ch. 2006) (stating that statutorily permissible books and records requests are "not a way to circumvent discovery proceedings, and [are] certainly not meant to be a forum for the kinds of wide-ranging document requests permissible under Rule 34.")

In line with this sentiment, recent amendments to Delaware law may signal a pullback on the scope of documents that shareholders can obtain through their books and records requests. On March 25, 2025, Delaware's Senate Bill 21 was signed into law. This bill effects multiple amendments to the Delaware General Corporation Law, including substantive changes to § 220, which governs shareholder access to a corporation's books and records.

The amendment effectively limits shareholder access to corporate records by defining "books and records" through nine enumerated categories of documents. These documents include the certificate of incorporation, bylaws, shareholder meeting minutes for the prior three years, communications to shareholders, materials provided to the board of directors or a committee in connection with a meeting, the prior three years of financial statements, and independence questionnaires. This is in addition to the two previously defined categories of documents permitted to be requested, which are a corporation's stock ledger and a list of its shareholders.

The amendment also now specifically adds the requirement that shareholder demands be made in good faith, a requirement that had previously been required by Delaware courts, but not explicitly stated in the code. *See Highland Select Equity Fund*, 906 A.2d at 164 ("these elements are underlined by a clear requirement that a Section 220 plaintiff has a responsibility to make its demand in good faith").

A shareholder may still demand corporate books and records beyond the pre-defined categories, but these demands are now subject to a heightened showing of need, and further require a specific order from the Court of Chancery and a showing of specific elements set forth in the amended statute to obtain those records.

Although the amended statute has yet to see the same robust application as its predecessor, and although it has not yet been interpreted through judicial decisions, the text of the statute significantly narrows the scope of corporate records available to a shareholder through a written demand. These new definitions, codified requirements, and heightened standards for obtaining other categories of documents are likely to place additional barriers and burdens between shareholders and the records they seek. And although the amended statute applies only to Delaware corporations, other states may choose to follow Delaware's lead and place similar restrictions in their own corporate statutes. If so, then the recent amendments may indicate a fundamental change in the availability or use of books and records requests across the country.

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