

THE REVIEW OF
**BANKING & FINANCIAL
SERVICES**
A PERIODIC REVIEW OF SPECIAL LEGAL DEVELOPMENTS
AFFECTING LENDING AND OTHER FINANCIAL INSTITUTIONS

Vol. 36 No. 10 October 2020

“CREDIBLE BASIS” TO INVESTIGATE MISMANAGEMENT: DEVELOPMENTS IN § 220 BOOKS-AND-RECORDS INSPECTIONS

Under a Delaware statute, stockholders of Delaware corporations seeking to investigate corporate books and records must show a “proper purpose,” usually involving a credible basis from which corporate wrongdoing may be inferred. In this article, the authors first discuss the general requirements of the statute, and then turn to a detailed discussion of recent applications by the Delaware courts of the credible-basis standard.

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For years, the Delaware Supreme Court has been urging stockholder-plaintiffs to use the so-called “tools at hand” to advance a public policy in favor of well-researched complaints. One of the most important — and, now, often utilized — tools is the qualified right to inspect a corporation’s books and records, as codified in Section 220 of Title 8 of the Delaware General Corporation Law.

Recently, Delaware courts have issued numerous opinions deciding stockholder inspection rights under Section 220. This increased frequency is attributable to several factors, including the curtailment of litigation options for stockholders challenging mergers before closing and the corresponding increase of post-closing challenges that depend on factual showings that stockholder votes were uninformed or that controlling stockholders were involved in the transaction. Section 220 provides a possible means for stockholder-plaintiffs to obtain facts necessary to try to make this showing. Likewise, stockholders also frequently turn to Section 220 to collect information relating to other alleged forms

of actionable officer and director conduct, including director oversight claims under *Caremark*.¹ Those claims, like all derivative claims, are subject to heightened pleading standards, and stockholders use Section 220 to try to plead with the factual particularity required to survive a motion to dismiss.

Whether in the M&A or *Caremark* context, stockholders claiming wrongful conduct must show a “credible basis” of wrongdoing to proceed under Section 220. The cases discussed below illustrate the recent applications by the Delaware courts of that standard.

BACKGROUND

Stockholders who wish to inspect corporate books and records or other materials are not automatically

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¹ *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996) (“Caremark”).