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Operational AI Washing: The Section 220 Information Strategy

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Identifying a legal theory is only half the battle. For a plaintiffs attorney, the real hurdle is proving it.

In the first installment of this five-part series, we defined operational AI washing as the theory that a company used artificial intelligence claims to obscure the true operational or financial drivers behind material corporate decisions, including workforce reductions.

Operational AI washing is a compelling basis for a U.S. Securities and Exchange Commission Rule 10b-5 claim, but the Private Securities Litigation Reform Act — which imposes heightened pleading requirements and stays discovery pending any motion to dismiss — makes such claims exceptionally difficult to plead because plaintiffs are denied access to the very evidence needed to allege their claims with the requisite particularity.

To make it past a motion to dismiss, the plaintiff will be required to plead specific facts showing an intent to deceive. To bypass this roadblock, the plaintiffs bar will rely on the tools at hand provided by state law.

Specifically, they will most likely use Section 220 of the Delaware General Corporation Law to attempt to get to the internal board records. But the March 2025 amendments to Section 220 have fundamentally changed the landscape of presuit shareholder document demands in ways that create both risk and opportunity for companies that understand the changes.

The New Map: Navigating the March 2025 Amendments

For years, Section 220 was a nightmare for many companies, often devolving into expansive discovery. Plaintiffs routinely demanded every executive email sent over a three-year period.

That changed on March 25, 2025. With the enactment of S.B. 21, Delaware handed defense counsel a much-needed shield.

The amended statute narrows the presumptive definition of "books and records" to an enumerated list of formal documents, shifting the burden for anything outside that list to plaintiffs. Plaintiffs are now only obtaining, as a matter of course, a company's certificate of incorporation, current bylaws, board and

committee minutes, and materials actually provided to the board. Plaintiffs may also receive the company's annual financial statements for the last three years and director independence questionnaires.

However, if a plaintiff wants informal records, like internal drafts or executive emails, they must show a "compelling need" and prove by "clear and convincing evidence" that those specific records are "necessary and essential." It is a high bar, and it means the fight has moved. Plaintiffs seeking to bring operational AI washing claims will now be forced to hunt for evidence of pretext almost exclusively within the formal board record.

Notably, on Feb. 27, 2026, the Delaware Supreme Court issued a unanimous decision in Rutledge v. Clearway Energy Group LLC, upholding the constitutionality of S.B. 21's Section 144 safe harbor provisions and their retroactive application. The Section 220 amendments were not before the court in Rutledge, but the decision confirms that S.B. 21's amended framework rests on solid constitutional ground and practitioners may rely on it with confidence.

The "Credible Basis" Bar

Section 220 is not a generic right to fish through corporate files. It grants stockholders the right to inspect books and records for a proper purpose, like investigating suspected mismanagement. The problem for the defense is that the evidentiary bar is famously low.

In its 2020 decision in AmerisourceBergen Corp. v. Lebanon County Employees' Retirement Fund, the Delaware Supreme Court reaffirmed that a stockholder only needs to show a "credible basis" from which a court can infer that something went wrong.

They do not have to prove the mismanagement actually happened. They do not even have to prove the wrongdoing would stand up in court. They just need enough smoke to warrant looking for the fire.

In an operational AI washing context, the plaintiffs do not need a whistleblower. If a skeptical report or critical media analysis documents a concrete gap between a company's public AI-automation claims and its reported operational results, that evidence can be sufficient to establish the credible basis required for a Section 220 inspection.

Plaintiffs routinely anchor demands to that kind of documented divergence, and Delaware courts have repeatedly held that such third-party evidence can justify inspection without proof of actual wrongdoing.

Where the Scrutiny Lands

This is not just theory. We have seen this playbook before.

Look at the securities litigation in E. Ohman J:or Fonder AB v. Nvidia Corp. In that case, in August 2023, the U.S. Court of Appeals for the Ninth Circuit allowed claims to proceed past the pleading stage based on allegations of a fundamental disconnect between Nvidia's public narrative — that its GPU revenue growth was driven by gaming demand — and its internal reality, where crypto-mining demand was allegedly the dominant driver.

While the U.S. District Court for the Northern District of California initially dismissed the complaint in 2021, and the case's procedural history reflects unsettled law across circuits following a 2024 U.S. Supreme Court dismissal as improvidently granted, the Ninth Circuit's reasoning remains deeply instructive. It shows

exactly how a structural disconnect between a public narrative and internal data can keep a lawsuit alive.

An AI washing claim fits the same template: The disconnect between "our AI-driven transformation has fundamentally changed how we operate" in a public filing and "full deployment is expected in Q3 2026" in the board deck is precisely the kind of direct contradiction that survives a motion to dismiss. That gap is what plaintiffs come to the formal board record to prove.

When a plaintiff picks up your formal board record after a restructuring, they are likely looking for three specific points of friction.

1. The Capital Expenditure Gap

If your Form 8-K attributes a 15% headcount reduction to "generative AI integration," the plaintiffs will go straight to the audit committee decks. They want to see the checkbook. If the financial models presented to the board show no significant investments in computing infrastructure or enterprise software licenses, plaintiffs will argue the AI pivot was pretextual.

This is a classic litigation move. Using internal financial records to contradict a public claim about technological readiness is a standard opening gambit.

2. The Executive Incentive Structure

Compensation committee minutes are now part of the formal record. Plaintiffs will look at how your executive bonuses were actually earned during the reduction in force. If the board was telling the public about a "technological transformation" while internally incentivizing executives solely on overhead reduction or cash preservation, that discrepancy will be the centerpiece of their complaint.

Because these minutes are now presumptively subject to production in response to a demand under Section 220 following the March 2025 amendments, the plaintiffs bar is becoming increasingly sophisticated at scrutinizing them to compare public restructuring narratives against internal executive incentive structures.

3. The CTO's Reality Check

Board presentations from the chief technology officer are high-value targets. Every CTO has a so-called cautionary slide, where they admit that a new tool is still in beta or requires heavy human oversight.

Plaintiffs will take those internal, risk-adjusted assessments and hold them up against the confident, definitive claims you made in your public disclosures.

A Tactical Counterweight: Incorporation by Reference

The 2025 amendments did not just limit what plaintiffs can take. They also codified a powerful procedural maneuver: the "incorporation by reference" doctrine.

Under amended Section 220(b)(3), a corporation may condition production on the stockholder's acceptance that all produced records will be deemed incorporated by reference into any complaint the stockholder files related to the subject matter of the demand and may withhold production entirely if the stockholder refuses.

This is a massive tactical advantage. Normally, a federal judge can only look at the plaintiff's version of the

facts during a motion to dismiss. With this agreement, the defense can put its own exonerating board documents directly in front of the judge.

It allows you to use the plaintiff's own Section 220 victory to defeat the resulting Rule 10b-5 claim before it ever gets to discovery. But incorporation by reference only works when the internal record is clean and the board deck corroborates the public narrative or documents a good-faith acknowledgment of the deployment gap.

However, it could backfire if the CTO deck describes a program as a multiquarter pilot while the Form 8-K describes it as operational, or if the audit committee's capital expenditure records show no meaningful technology investment in the period when the company was publicly attributing headcount reductions to AI-driven transformation. In that scenario, the Section 220(b)(3) condition does not protect you; it arms the plaintiff.

Start the documentation work now, before any demand is filed, and remember that rigorous documentation is more than just taking notes. Tell your corporate secretaries that board minutes on AI initiatives need to reflect actual deliberation, not a sanitized summary of conclusions.

That may mean formally referencing or attaching high-level CTO assessments that describe deployment status, constraints and risks — without embedding proprietary technical detail — so those assessments are clearly part of the formal record. If the board materials reflect a legitimate technological strategy and a good faith debate about the risks, that record becomes the company's best defense.

Looking Ahead

The Section 220 battlefield is won or lost in the boardroom. If you wait until the demand letter arrives to worry about your documentary record, you have already lost the initiative. You have to treat every internal board deck as if a federal judge will eventually read it.

A clean board record is necessary, but it is not sufficient. Once a company's internal AI narrative is memorialized in formal board materials, the litigation risk turns on how that record is translated into public disclosures. A single sentence in a Form 8-K, earnings call or investor presentation can sever the alignment between internal deliberation and external justification, and convert exculpatory board materials into alleged evidence of pretext.

In Part 3 next week, we will turn to the disclosure record itself. We examine how mixed statements, those that blend present operational claims with forward-looking projections, can defeat the PSLRA safe harbor and pull technical AI disputes into federal court. We then show how disciplined drafting across every public channel can preserve safe harbor protection, reinforce the Section 220(b)(3) incorporation doctrine and position the company to win at the motion to dismiss stage before discovery begins.

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