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DELAWARE LAW

Thirty Years Later – Why Corporations Continue to Choose Delaware: General Perspectives and Thoughts on 2025 DGCL Amendments

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Thirty years ago, our now-retired partner Lew Black released his widely read article, "Why Corporations Choose Delaware." Describing the legislature's role in the Delaware corporate franchise, Lew wrote, "[a]s a result of its long experience with corporation law matters, and the importance of those matters to Delaware, the legislature has developed a philosophy which emphasize[s] the stability of Delaware corporate law." Lew also observed that "[t]he guiding principle that underlies legislation affecting corporations in Delaware is to achieve a balanced law."

Consistent with that philosophy and guiding principle, on March 25, 2025, the General Assembly adopted, and the Governor signed into law, amendments to the Delaware General

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Corporation Law ("DGCL").[1] The amendments, which we refer to in this article as the "Balancing Amendments," are intended to rebalance certain aspects of Delaware law relating to conflict transactions, controlling stockholder liability, and books and records demands.

They do so by: (i) clarifying the means by which disinterested directors or disinterested stockholders may approve conflict transactions; (ii) limiting the liability of controlling stockholders to breaches of the duty of loyalty and actions taken in bad faith or involving improper self-interested actions; and (iii) setting forth certain conditions that a stockholder must satisfy in order to demand inspection of a corporation's books and records, and describing the materials that a stockholder may obtain in such an inspection. The Balancing Amendments offer a practical path for corporations to approach conflict transactions while still preserving accountability of corporate decision-makers to stockholders.

With public debate rising over whether Delaware continues to be the optimal forum for incorporation, we believe the adoption of the Balancing Amendments, in and of itself, is illustrative of one of the many "only in Delaware" factors that continue to differentiate our state positively from others. In this article, we: (i) revisit the factors that make Delaware unique among states in its balanced and efficient approach to corporation law; (ii) describe how the Balancing Amendments fit within longstanding Delaware tradition, of both the judiciary and legislature, revisiting law to maintain that balance and efficiency; (iii) summarize some of the issues the Balancing Amendments are designed to address; and (iv) with that background, describe the Balancing Amendments in some detail.

Why Corporations Continue to Choose Delaware

Towards the end of his 1995 article, Lew opined that it is likely "that Delaware will continue to enjoy its preeminent position into the twenty-first century." A quarter-way through that century, we recognize that some question his sentiment. In this part of the article, we describe why we believe Delaware continues to be the most attractive venue for corporations to incorporate.

The Unique Importance Of The Corporate Franchise To The State

One hundred years ago, President Coolidge stated that "the chief business of the American people is business." In no other state does that ring truer than Delaware. As Senator Nicole Poore and Speaker of the House Melissa Minor-Brown recently observed, the benefits of the corporate law franchise to all Delawareans "are undeniable."[2] Approximately one-third of Delaware's general revenue comes from corporate license fees and associated tax revenues. As the legislators noted, that revenue allows Delaware to "make meaningful investments in [Delaware] communities" such that the corporate franchise "doesn't just serve business; it serves our state."[3]

As discussed in the next section of this article, that does not mean Delaware is in a "race to the bottom" to cater solely to corporate managers. Instead, it means that, to the extent there is a "special interest" driving Delaware corporate law, it is Delawareans as a whole, and the four key pillars of Delaware's corporate franchise – the courts and their caselaw, the legislature and the DGCL, the Governor and Secretary of State's office, and the bar – all aim to create a balanced, efficient, collegial corporate law and environment to further that singular special interest.

The Judicial Branch: The Courts And Their Caselaw

The crown jewel of the Delaware franchise is our court system and its jurisprudence. Corporate law disputes in Delaware are brought initially to the trial-level Court of Chancery, a court of equity comprised of just seven judges.

These highly qualified and dedicated judges typically are selected through initial vetting by a nonpartisan judicial nominating commission, followed by gubernatorial nomination and Senate confirmation. There are no jury trials, no punitive damages, and the Court of Chancery has a general policy of issuing opinions within 90 days of the matter being finally submitted, and often is called upon to act more rapidly in highly expedited litigation, including in actions seeking interim relief and in expedited trials. Appeals are taken directly to the Supreme Court;[4] there is no appeal to an intermediate court.

The Supreme Court's members are selected in the same manner as those of the Court of Chancery, and the Supreme Court has a well-deserved reputation for efficiency and expertise in corporate law matters; indeed, all of its current members had corporate law experience before joining the bench. For more than a hundred years, these two courts have issued thousands of opinions on nearly every aspect of corporation law. This depth and breadth of judicial caselaw is a benefit to corporate planners.

As Lew said, "[t]he likelihood that a particular issue will have been addressed by the courts and that there is law on the subject is greater for Delaware corporations than for corporations incorporated elsewhere" and the existence of this precedent, in and of itself, "makes it less likely that resort to [the] courts will be needed." That statement has only become more apt in the thirty years since, as caselaw has continued to develop on issues both seminal and mundane. This court system and its well-developed caselaw cannot, as Lew said, "be transplanted in an instant to some other jurisdiction as if by magic." Although we acknowledge that some recent opinions were viewed by some as leading to unpredictability in certain areas of corporate law, what is remarkable is not that criticism of those opinions exists, but how few and far between such criticism has occurred in the hundred-plus year history of Delaware corporate law. By and large, Delaware corporation law is rooted in over a century of precedent and tradition that simply cannot be recreated elsewhere.

The Legislative Branch: The General Assembly And the DGCL

The DGCL is, by design, a broadly enabling and flexible statute. As Lew observed in 1995, "[i]t does not purport to be a code of conduct" and "is written with a bias against regulation." As noted above, the General Assembly understands how central the corporate franchise is to Delaware. Therefore, the General Assembly is highly attuned to the need to maintain that franchise through amendments to the DGCL and, when necessary, willing to act quickly to do so. More often than not, the General Assembly is the near-final, rather than first, stop for DGCL amendments.

Amendments often begin with the "customers" of the corporate franchise themselves – the corporations who use the franchise, investors in those corporations, and their respective counsel and advisers. Those customers will report to local Delaware counsel their experience in using the corporate franchise and provide feedback with respect to ways to improve that experience. Local Delaware counsel, in turn, may suggest consideration of amendments reflecting the feedback of the various stakeholders to the Council.

The Council, comprised of a diverse representation of twenty-six plaintiff- and defense-side lawyers, including litigators and transaction planners, as well as a representative of the Secretary of State's office, will consider such amendments, often through the assistance of focused committees comprising an even broader cross-section of the Delaware bar. Any such proposed amendments are presented to the General Assembly only if they are approved by the Corporation Law Section and the executive committee of the DSBA.[5] It is through this process that Delaware is typically at the vanguard of business-facilitating corporate amendments. Examples from the last quarter-century of Delaware leading the way include amendments facilitating mergers by tender offer, reverse stock splits (often necessary to maintain stock exchange listing), and corporate actions in connection with domestications (helpful during the SPAC boom of the last decade), the use of captive D&O liability insurance, and offering procedures to ratify defective corporate acts that otherwise could result in uncertain capitalization structures, just to name a few. The close working relationship among the General Assembly, the Delaware bar, and the customers of the franchise has built up over decades and, like the century of caselaw developed by the judiciary, could not be replicated overnight.

The Executive Branch: The Governor And The Secretary Of State's Office

Through successive administrations, regardless of party, the Governor of Delaware has been committed to maintaining the corporate franchise. As current Governor Matthew Meyer was quoted earlier this year, he is "working hard to make sure Delaware remains No. 1."[6]

A key function of the executive branch is the operation of the office of the Secretary of State. That office is responsible for all corporate filings – be they initial incorporation documents, charter amendments, certificates of mergers, conversions or domestications, or certificates of validation in connection with ratifications. Government agencies often function more like a bureaucracy than a business. Not so in Delaware. Instead, we are blessed with a Secretary of State's office focused on customer service. It offers filing turnaround times in as little as thirty minutes, maintains staffing from 8:00 am through midnight Monday through Friday, and has procedures both for pre-clearing documents and for effecting filings even when staff is not present (highly valuable for closings for non-U.S. transactions).

As a result, the office is effectively open for business 24-7. Like the caselaw precedent, and judicial and legislative traditions, the expertise and business-friendly mindset of the Secretary of State's office is based on decades of precedent that is not transportable across state lines. It is an immutable aspect of the Delaware franchise that is unmatched by other states.

The Delaware Bar

There is a fourth pillar that is responsible for the prestige of the Delaware franchise – the members of the Delaware bar that function as stewards of the franchise. Within our office library, we have the notes of the commission that drafted the wholesale amendments to the DGCL in 1967, as well as legislative history and commentary on every amendment to the DGCL since.

We also have what we affectionately refer to as the "Corporate Binders." Those binders contain learning – including firm opinions and memos – that go back decades, in some cases fifty years or more. We know that we are not alone among the Delaware firms with our deep institutional knowledge of the corporate law. Today's practitioners are not "reinventing the wheel" or creating new forms of precedent out of whole cloth.

Instead, they stand on the figurative shoulders and draw upon the work of their predecessors and the body of both law and lore that those predecessors passed down. They do so in an environment that is collegial by design, and with a respectful understanding of their role as stewards of the Delaware franchise. There is a tradition of decency and common understanding in Delaware that, once again, we do not believe can be transported to another jurisdiction.

Delaware's Tradition of Balance and Efficiency

As noted above, of the four pillars of the Delaware franchise, the judiciary is the keystone. By and large, the caselaw it has created over the years has developed slowly, incrementally, and in balanced fashion. Befitting its historical status as a court of equity, the Court often tries to reach an equitable, narrow, and case-specific result. Gradually, those case-specific results develop into an efficient, balanced corporation law jurisprudence providing clear guidelines for practitioners.

Every once in a while, that is not the case. As a result, whether immediately apparent or apparent only over time as an opinion is applied in future cases, the corporation law loses its desired balance. In those instances, Delaware has responded to rebalance the law. Sometimes that rebalancing has been judicial, other times legislative. Whether judicial or legislative, the response has sometimes been to rebalance toward what could be perceived as a more manager- and controlling stockholder-friendly manner and sometimes toward what could be perceived as a more individual investor or minority stockholder friendly manner.

Examples of Judicial Responses

An early example of what could be perceived as a manager-friendly judicial rebalancing forms the basis for the doctrine of independent legal significance. In the 1936 opinion *Keller v. Wilson & Co., Inc.*,[7] the Supreme Court held that accrued but unpaid dividends could not be canceled by charter amendment. Such a rule created inefficiencies in capital raising in the middle of the Great Depression.

Four years later, in *Federal United Corp. v. Havender*,[8] the Court effectively (if not technically) reversed itself by allowing cancellation of accrued dividends through dummy mergers. The seminal 1983 Supreme Court opinion *Weinberger v. UOP, Inc.* represented two judicial responses that each pulled in a different direction. In the less manager-friendly direction, the Court reversed an opinion issued two years earlier purporting to limit a stockholder's monetary relief in an appraisal claim to a specific formula (known as the "block method"), instead adopting "a more liberal, less rigid, and stylized approach" to awards in such a proceeding.[9]

Conversely, in the more manager-friendly direction, the Court reversed a 1977 opinion that a merger could not be effected "for the sole purpose of eliminating a minority on a cash-out basis."[10] Perhaps the most impactful example of judicial (or even legislative) response to rebalance the law came from a quartet of cases issued by the Courts between 2014 and 2016. Those cases – *Kahn v. M&F Worldwide Corp.*[11]*, C&J Energy Services, Inc. v. City of Miami General Employees' & Sanitation Employees' Retirement Trust*[12]*, Corwin v. KKR Financial Holdings, LLC*[13]*, and In re Trulia, Inc. Stockholder Litigation*[14] – represented, as Vice Chancellor Laster observed in *In re Dell Technologies Inc. Class V Stockholders Litigation*, a part of "Delaware's multi-pronged responses to the M&A litigation epidemic."[15] More recently, in *Brookfield Asset Management, Inc. v. Rosson*, the Supreme Court revisited and overruled a 15-year-old precedent suggesting that certain claims arising from an equity issuance to a controlling stockholder are direct, rather than derivative.[16]

And in early February of this year, the Supreme Court overruled a Court of Chancery opinion that held a conversion from Delaware to Nevada provided a nonratable benefit to a controlling stockholder in the form of reduced litigation exposure in future claims that, in turn, triggered entire fairness review. Instead, the Supreme Court held that any such benefit was too speculative to trigger heightened review, and that the business judgment rule applied.[17]

Examples of Legislative Responses

Courts generally do not revisit precedent in the absence of it being raised by litigants in a matter brought before them. In other words, courts generally do not unilaterally revisit precedent absent a ripe dispute. Moreover, as the Supreme Court recognized in *Brookfield*, it is reluctant to overrule "very recent precedent," even when it has the opportunity to do so.[18] Sometimes, however, a judicial outcome merits a legislative response.

In those cases, the General Assembly has historically stepped in. As with judicial responses, sometimes the legislative response balances toward what could be perceived as a more manager- and controlling stockholder-friendly manner. Examples include the adoption, following the Supreme Court's *Smith v. Van Gorkom*[19] opinion, of Section 102(b)(7)[20], empowering corporations to shield directors from monetary liability for breach of the duty of care, and the extension of that empowerment to shield officers from monetary liability in direct duty of care claims following the Supreme Court's opinion in *Morrison v. Berry.*[21] In 2000, the General Assembly adopted Section 122(17) clarifying that, notwithstanding the Court of Chancery's opinion in *Siegman v. Tri-Star Pictures, Inc.*,[22] a corporation may renounce in advance certain corporate opportunities.

More recently, in 2022, the General Assembly adopted Section 145(g), allowing corporations to use "captive insurance" to protect directors and officers from derivative liability. Importantly, however, there are many instances of a legislative response balancing toward what could be perceived as a *less* manager- and controlling stockholder-friendly manner.

For example, in 2003, in the wake of the Enron collapse, the General Assembly amended Delaware's long-arm statute to enable Delaware courts to exercise personal jurisdiction over officers. In that same time period, the General Assembly also amended Section 220 to extend Section 220 inspection rights to beneficial owners, eliminate the need to submit an inspection demand with notary seal, and expand inspection rights to encompass records of subsidiaries. Following the Supreme Court's 2014 opinion *ATP Tour v. Deutscher Tennis Bund*[23] that some read as suggesting "loser-pays" fee-shifting bylaws may be enforceable under Delaware law, the General Assembly quickly adopted Section 102(f) and amended Section 109(b) to prohibit such fee shifting in connection with internal corporate claims.

The General Assembly's stated rationale was "to preserve the efficacy of the enforcement of fiduciary duties in stock corporations."[24] Indeed, amendments currently under consideration by the General Assembly would, if adopted, prohibit forum selection provisions that could (as suggested by the decision of the United States Court of Appeals for the Ninth Circuit in *Lee v. Fisher*[25]) prevent stockholders from bringing derivative claims under the Securities Exchange Act.[26]

We believe this history shows Delaware's commitment to a balanced approach to corporation law. Although we are aware that some perceive the Balancing Amendments as rebalancing Delaware law in a more manager- and controlling stockholder-friendly manner, we believe they are better characterized as an attempt to empower disinterested decision-makers, mitigate the costs associated with nonmeritorious litigation challenging the decisions of those disinterested bodies, and maintain the historical role of the plaintiff's bar and the courts in monitoring the actions of disloyal fiduciaries. We now turn to the background leading to the Balancing Amendments.

Background To The Balancing Amendments

Over thirty years ago, in *Kahn v. Lynch Communication Systems, Inc.*, the Supreme Court held that a cash-out merger effected by a controlling stockholder would be subject to entire fairness review regardless of whether (i) the target board was comprised of a majority of independent and disinterested directors, (ii) a special committee of directors negotiated and approved the merger, or (iii) the merger was conditioned on approval of a majority of the minority ("*MoM*") stockholders.[27]

As then-Vice Chancellor Strine observed in *In re Pure Resources, Inc. Shareholders Litigation*, this decision reflected a policy judgment that, in the context of a controlling stockholder cash-out transaction, "protective devices like special committees and majority of the minority conditions . . . were not trustworthy enough to obviate the need for an entire fairness review."[28] The Supreme Court held that the use of either protective device has some value, such that their use could shift the burden of proof.

Because, however, claims subject to entire fairness review generally cannot be dismissed before burdensome and costly discovery and trial, this outcome resulted in almost any challenge to a controlling stockholder cash-out transaction having settlement value regardless of its merits. In its 2014 *Kahn v. M&F Worldwide Corporation* opinion, the Supreme Court offered controlling stockholders a method to avoid entire fairness review of cash-out mergers.[29]

That method, colloquially referred to as "*MFW*," requires the controlling stockholder irrevocably to condition the transaction, prior to the start of substantive economic negotiations (generally referred to as the "*ab initio*" requirement), on *both* the approval of a fully empowered special committee of independent and disinterested directors and the fully informed, uncoerced vote of the minority stockholders. The special committee, in functioning, must satisfy its duty of care in negotiating a fair price. If a transaction were *MFW* compliant, an irrebuttable version of the business judgment rule would apply and any litigation challenging the transaction would be dismissed.

Lynch and *MFW* involved cash-out transactions proposed by controlling stockholders. In the 2024 opinion *In re Match Group, Inc. Derivative Litigation*, the Supreme Court held that the default entire fairness rule from *Lynch*, and the requirement to use *both* procedural protections of a special committee of independent directors and disinterested stockholder approval to avoid that default rule, applies to *any* transaction in which a controlling stockholder stands on both sides and receives a "non-ratable" benefit.[30]

Whether one believes *Match* applied, or departed from, longstanding precedent, the result was a clear rule that the requirement to comply with *MFW* – including receiving a MoM vote – in order to avoid costly entire fairness review applied to a much larger array of transactions, including those that would not otherwise require the delay and cost of *any* stockholder vote, much less a MoM vote. While the reach of the combined *Lynch*/*MFW* rules seemed to be expanding in applicability, jurisprudence from the Delaware courts introduced uncertainty regarding when and how to comply with those rules, including as to: (i) who is a controlling stockholder; (ii) what is a "non-ratable" benefit; (iii) when "substantive economic negotiations" would be deemed to have started such that *MFW* is no longer available; (iv) what is a disabling conflict or relationship that would result in a director lacking independence for *MFW* purposes; (v) which stockholders are considered disinterested for purposes of a MoM vote; and (vi) what facts are material for purposes of obtaining a fully informed MoM vote.

Concomitantly, the Courts held that the lack of independence of even one member of a special committee would result in the failure of the *MFW* conditions[31] and, in *Salladay v. Lev*, the Court of Chancery imported the *MFW ab initio* requirement to the context of a transaction involving a majority-conflicted board even in the absence of a controlling stockholder.[32] This confluence of caselaw made transaction planning increasingly difficult.

Adding yet another factor to the mix, in its 2024 opinion *In re Sears Hometown & Outlet Stores, Inc. Stockholder Litigation*, the Court of Chancery suggested that controlling stockholders have a fiduciary duty any time they act to change the status quo – whether through a stockholder vote or stock sale.[33] This fiduciary duty could theoretically apply to commonplace, non-conflict decisions, such as electing a new independent director or changing the corporation's auditor. Although the Court suggested that these duties require only that the controller not harm the corporation through intentional, knowing, or reckless action, the prospect of controlling stockholder liability in such instances created further uncertainty in the market.

While these developments were percolating, Delaware's Section 220 jurisprudence was also evolving. Section 220 allows stockholders to obtain books and records of a corporation for a "proper purpose." When a stockholder seeks to inspect books and records for the purpose of investigating suspected wrongdoing, Delaware applies "the lowest possible burden of proof,"[34] precludes defendants from asserting a merits-based defense to the inspection,[35] and allows the court, notwithstanding hearsay's perceived unreliability, to consider hearsay evidence to establish both a proper purpose and a credible basis for the inspection.[36]

Recent years have seen a further expansion of the scope of the ordered production to include personal emails (even after the voluntary production in one case of more than 530,000 pages of books and records),[37] stockholders demanding inspection going back more than a decade, and even the prospect of a Rule 30(b)(6) deposition to determine if an even broader scope of production should be ordered.[38]

Substance of The Balancing Amendments – Amended Section 144

The lynchpin of the Balancing Amendments is amended Section 144. Historically, Section 144 was viewed solely as a means of abrogating the common law rule that interested directors could neither vote on, nor be counted for quorum purposes with respect to, interested transactions, such that all transactions involving a majority-conflicted board were voidable.[39] It did not change the standard of review applicable to conflict transactions.[40] Amended Section 144, to the contrary, provides the means by which an irrebuttable version of the business judgment rule would apply to interested transactions.[41]

Amended Section 144 divides conflict transactions into three categories, and sets out the safe harbor for each. The following table sets out those three categories and summarizes for each: (i) the requirements to invoke the irrebuttable presumption of the business judgment rule under common law; (ii) the requirements to invoke the safe harbor under the Balancing Amendments; and (iii) the key differences.

Determining "Disinterested" Status

Much of amended Section 144 turns on the "disinterested" status of the cleansing decisionmaker. For purposes of determining disinterested director or stockholder status, under Sections 144(e)(4) and (5), such a person is deemed disinterested if he, she or it: (i) does not have a "material interest" in the act or transaction and (ii) does not have a "material relationship" with a person that has a "material interest" in the act or transaction. With respect to directors, the directors must also not be a party to the act or transaction, and with respect to stockholders, the stockholder must also have no "material relationship" with the controlling stockholder or other member of the control group.

Under Sections 144(e)(7) and (e)(8), respectively, an "interest" means "an actual or potential benefit, including the avoidance of a detriment, other than one which would devolve on the corporation or the stockholders generally" and a "relationship" means "a familial, financial, professional, employment, or other relationship." With respect to directors, such an interest or relationship is only material if it "would reasonably be expected to impair the objectivity of the director's judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue," and with respect to stockholders and other persons, the statute simply states that the relevant interest or relationship must be "material" to such stockholder or person.

Under Section 144(d)(2), with respect to directors of corporations that have "a class of stock listed on a national securities exchange," a director is presumed to be a disinterested director with respect to an act or transaction to which he or she is not a party if the board determined that such director satisfies the applicable criteria for determining director independence from the corporation, and if a conflicted controller transaction, from the controller (treating the controller as the corporation for purposes of applying the stock exchange independence rules). That presumption is "heightened" and may be rebutted as to a director only by "substantial and particularized facts" (presumably alleged at the pleading stage, or proven at trial) regarding such director's material interest in the act or transaction or material relationship with a person having a material interest in the act or transaction.

Category	Common Law	Amended Section 144	Key Differences
Interested Board, No Conflicted Controlling Stockholder Or Control Group – All Transactions[42]	Transaction **either** (i) conditioned before start of substantive economic negotiations on approval of independent committee **or** (ii) approved by disinterested stockholders.	Transaction **either** (i) approved (or recommended for approval) by majority of disinterested directors serving on at least a two-person committee, all of whose members were determined by board to be disinterested, **or** (ii) approved or ratified by informed, uncoerced disinterested stockholder vote.	• If director cleansing, need not be conditioned on such approval before start of substantive economic negotiations; however, minimum two-person committee and board must determine all members of committee are disinterested. • If stockholder cleansing, can either be approval of transaction or ratification after fact, and vote requirement is "majority of votes cast."
Conflicted Controlling Stockholder Or Control Group – Transactions Other Than Going Private	Transaction must be irrevocably conditioned before start of relevant substantive economic negotiations on approval by **both** (i) a committee comprising solely independent directors **and** (ii) disinterested stockholders.	Transaction must be **either** (i) approved (or recommended for approval) by majority of disinterested directors serving on at least two-person committee, all of whose members were determined by board to be disinterested, **or** (ii) be conditioned on informed, uncoerced disinterested stockholder approval or ratification before it is submitted to stockholders.	• Either (as opposed to both) disinterested director or disinterested stockholder approval required. • Committee must at minimum be two-person committee and board must determine all members of committee are disinterested. • No express timing requirement on conditioning transaction on committee approval, and timing requirement for conditioning transaction on stockholder approval or ratification is before submission to stockholders. • For stockholder vote safe harbor, denominator is "votes cast" standard instead of "outstanding" standard.
Conflicted Controlling Stockholder Or Control Group – Going-Private Transactions	Transaction must be irrevocably conditioned before start of relevant substantive economic negotiations on approval by **both** (i) a committee comprising solely independent directors **and** (ii) disinterested stockholders.	Transaction must be **both** (i) approved (or recommended for approval) by majority of disinterested directors serving on at least two-person committee, all of whose members were determined by board to be disinterested, **and** (ii) conditioned on informed, uncoerced disinterested stockholder approval before it is submitted to stockholders.	• Committee must at minimum be two-person committee and board must determine all members of committee are disinterested. • No express timing requirement on conditioning transaction on committee approval, and timing requirement for conditioning transaction on stockholder approval is before submission to stockholders. • For stockholder vote safe harbor, denominator is "votes cast" standard instead of "outstanding" standard.

In addition, under Section 144(d)(3), the designation, nomination, or vote in the election of the director to the board by any person that has a material interest in an act or transaction will not, of itself, be evidence that the director is not a disinterested director.

Interested Directors, No Conflicted Controlling Stockholder Or Control Group

At common law, if "a board approves a transaction and 'at least half of the directors who approved the transaction were not disinterested or independent', then the transaction would be by default subject to entire fairness review."[43] Business judgment rule review can be restored if the transaction is approved *either* by "a fully-empowered, independent special committee"[44] *or* "a fully informed, un-coerced vote of disinterested stockholders."[45]

With respect to committee approval, the special committee must be constituted before the start of substantive economic negotiations to restore the business judgment rule presumption.[46] With respect to disinterested stockholder approval, where the statute requires a majority of the outstanding stock to approve the underlying transaction (as in the case of mergers), a majority of the disinterested shares *outstanding* must vote in favor of restoring the business judgment rule presumption.[47]

Under amended Section 144(a), the safe harbor applies in transactions in which directors or officers have a conflict and there is no conflicted controlling stockholder if either disinterested directors or disinterested stockholders approve the transaction. With respect to disinterested directors, assuming a majority of the board has a conflict, that approval must be obtained through a committee comprised of at least two directors, each of whom the board has determined to be disinterested with respect to the transaction.

Although not expressly stated by the statute, by only requiring that the board *determine* that all members of the committee are disinterested directors, and not that such members of the committee actually be disinterested directors, the statute appears to allow for the safe harbor to apply (assuming all other conditions are satisfied) if, in hindsight, a court disagrees with certain of the board's determinations regarding the "disinterested" status of members of the committee. Unlike a committee addressing conflicted controller transactions (discussed below), the statute does not expressly require a committee addressing conflicted board transactions to be delegated the authority to negotiate and reject the transaction.

The statute does leave room for review of any disinterested director or committee approval if adequate facts are alleged that the approval was not provided "in good faith and without gross negligence."[48] With respect to disinterested stockholder approval, that approval can be either the approval for the transaction or an after-the-fact ratification vote.[49] In addition, the voting threshold has been lowered to "a majority of the votes cast by the disinterested stockholders."[50]

This will be especially helpful for companies with a large base of retail stockholders who, as experience has shown, often do not vote on the transaction (which would have the effect of a vote against under a "majority of the outstanding" standard) out of rational apathy as opposed to opposition to the transaction. In the case of disinterested director or committee approval, the material facts as to the director's or officer's relationship or interest and as to the act or transaction, including any involvement in the initiation, negotiation, or approval of the act or transaction, must be disclosed to, or known by, the disinterested directors or committee, and in the case of stockholder approval, the vote must be informed and uncoerced.

Conflicted Controlling Stockholder or Control Group Transactions

As noted above, at common law, to avoid entire fairness review in connection with a conflicted controlling stockholder or group transaction, the controlling stockholder or group must have irrevocably conditioned the transaction, prior to the start of substantive economic negotiations, on *both* the approval of a fully empowered special committee of independent and disinterested directors *and* the fully informed, uncoerced vote of the disinterested stockholders. In addition, the special committee, in functioning, must satisfy its duty of care in negotiating a fair price. Under amended Section 144, conflicted controlling stockholder or group transactions still require enhanced procedural protections for the safe harbor to apply, but those protections have been modified.

Section 144(e)(2) defines a controlling stockholder, for purposes of Section 144, as any person that, together with its affiliates or associates, either: (i) owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors ("Majority Voting Power") (or in the election of directors who have a majority in voting power of the votes of all directors); (ii) has the right, by contract or otherwise, to cause the election of nominees who are selected at the discretion of such person and who constitute either a majority of the directors (or directors entitled to cast a majority in voting power of the votes of all directors); or (iii) has the power (1) functionally equivalent to Majority Voting Power *and* (2) to exercise managerial authority over the business and affairs of the corporation.[51]

Importantly, for non-majority stockholders to be considered controlling stockholders, the functionally-equivalent-to-Majority Voting Power must be by virtue of ownership or control of ***at least one-third*** in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors or for the election of directors who have a majority in voting power of the votes of all directors on the board of directors. This change was intended to prevent the existence of controlling stockholder status from being found if the alleged controller does not own a minimum level of stock.[52]

Under Section 144(e)(1), it remains the case that two or more persons that are not, individually, controlling stockholders may together constitute a controlling stockholder group "by virtue of an agreement, arrangement, or understanding between or among such persons." Under Section 144(e)(3), it would also continue to be the case that a controlling stockholder or group would be deemed conflicted in any act or transaction where *either* (i) the transaction is between the corporation or its subsidiaries, and the controlling stockholder or group *or* (ii) if not on the other side of the transaction, the controlling stockholder or group receives a financial or other benefit not shared with the corporation's stockholders generally. Under Section 144(d)(5), no person or group will be deemed a controlling stockholder or group unless they satisfy these criteria.

The new statute sets out two categories of conflicted controller transactions – those involving a "going private" transaction, and all others. For corporations with a class of equity securities subject to Section 12(g) or Section 15(d) of the Securities Exchange Act of 1934 ("Exchange Act") or listed on a national securities exchange, a going private transaction is defined by reference to a "Rule 13e-3 transaction" under the Exchange Act.

For all other corporations, a "going private transaction" means any controlling stockholder transaction, including a merger, charter amendment, or tender offer, pursuant to which all or substantially all of the corporation's capital stock held by the disinterested stockholders (but not those of the controlling stockholder or group) are canceled, converted, purchased or otherwise acquired or cease to be outstanding.

Notably, in the private company context, a sale of substantially all assets to a controlling stockholder would not, alone, constitute a going private transaction. For going private controlling stockholder transactions, which are governed by Section 144(c), the safe harbor applies only if *both* committee approval *and* disinterested stockholder approval are obtained. However, and in a departure from *Match*, for other conflicted controlling stockholder transactions, governed by Section 144(b), the safe harbor applies if *either* committee approval *or* disinterested stockholder approval is obtained.[53]

With respect to committee approval, the committee must be comprised of at least two directors, each of whom the board has determined to be disinterested with respect to the transaction, and must be expressly delegated the authority to negotiate (or oversee the negotiation of) and to reject the controlling stockholder transaction, and the controlling stockholder transaction must be approved (or recommended for approval) in good faith and without gross negligence by the committee.

There is no *express* requirement for the committee to be delegated this authority before the start of substantive economic negotiations. This should assist in avoiding foot faults if, for example, limited nonmaterial discussions regarding the matter raising the potential conflict have occurred before the committee authority is put in place, and will provide clarity for transactions where a potential conflict may not arise until discussions regarding the underlying transaction are well underway (*e.g.*, a later request by a third-party buyer for the controlling stockholder to rollover a portion of its equity). As with Section 144(a) committees, the statute appears to allow for the safe harbor to apply (assuming all other conditions are satisfied) if, in hindsight, a court disagrees with certain of the board's determinations regarding the "disinterested" status of members of the committee.

Given the requirement that the committee be delegated the authority to negotiate the transaction (which is not present in Section 144(a) dealing with interested transactions in the absence of a conflicted controlling stockholder), the statute contemplates a committee having a direct or oversight role in negotiations, and not just approving a fully-negotiated transaction, to function as a cleansing mechanism. There also is not an express requirement that the delegation to the committee be irrevocable. Like committee approval, there is no requirement to condition the transaction on stockholder approval before the start of substantive economic negotiations. Instead, the condition for stockholder approval must be agreed at or prior to the time it is submitted to stockholders for their approval or (in the case of Section 144(b)) ratification.

As with interested director transactions, the voting threshold would be lowered to "a majority of the votes cast by the disinterested stockholders" standard. For committee approval, the material facts as to the controlling stockholder transaction (including the controlling stockholder's or control group's interest therein) must be disclosed or known, and any stockholder approval must be informed and uncoerced.

Transaction May Still Be Determined Fair If Cleansing Mechanisms Not Used

For each category of conflict transaction, if either no cleansing mechanism is used, or the Court determines the cleansing mechanism used did not satisfy the requirements of the statute, the transaction will still not result in liability to the applicable fiduciaries if it is "fair as to the corporation and the corporation's stockholders." The synopsis to the Balancing Amendments states that this test is "intended to be consistent with the entire fairness doctrine developed in the common law."

Common Law Paths Still Applicable

The synopsis to the Balancing Amendments also states that they "do not displace any safe harbor procedures or other protections available at common law, including processes and procedures that comply with the pre-amendment common law but do not conform to the § 144 safe harbors." This observation should be especially helpful for private companies, who may not have the requisite two disinterested directors to satisfy the requirement for a conflict-cleansing committee under amended Section 144.

Limitation of Liability For Controlling Stockholders

As noted above, in *In re Sears Hometown & Outlet Stores, Inc. Stockholder Litigation*,[54] the Court of Chancery suggested that controlling stockholders have fiduciary duties, including a fiduciary duty of care, any time they act to change the status quo – whether through vote or stock sale. New Section 144(d)(5) eliminates potential liability of a controlling stockholder or member of a control group for breach of the duty of care. Although Section 144(d)(5) borrows language from the director exculpation statute (Section 102(b)(7)), unlike director exculpation, controlling stockholder or control group exculpation need not be included in the certificate of incorporation. Instead, it automatically applies without any option to opt-out.

Express and Implied Limitations Of The Statute

By its terms (as set out in Section 144(d)(6)), the statute does not limit the ability of any person to seek equitable relief on technical grounds – *i.e.*, to allege that a transaction was approved in violation of the DGCL, the corporation's charter or bylaws or any plan, agreement or governmental order to which the corporation is party or subject. That same section provides that the statute will not limit judicial review for purposes of injunctive relief with respect to defensive actions intended to deter, delay, or preclude a change in control or other transaction involving the company or a change in the composition of the board.

Thus, challenges to, for example, poison pills or provisions such as recommendation change provisions and forward termination fees will continue to be subject to enhanced scrutiny review by default.[55] That same section also states the statute does not limit the right of a person to pursue claims regarding alleged aiding and abetting a breach of the directors' fiduciary duties.

More generally, and perhaps most importantly, the statute still leaves room for stockholders to monitor conflict transactions. Regardless of the category of conflict, generally: (i) any board or committee approval intended to function as a cleansing mechanism must be provided "in good faith and without gross negligence"; (ii) any cleansing mechanism requires "disinterested" persons; (iii) there must be disclosure of relevant material facts; and (iv) if a cleansing stockholder vote is utilized, it must be "uncoerced."

If a stockholder can adequately allege that any of these requirements is not satisfied, entire fairness will be the default standard of review, and a stockholder still will be entitled to discovery and, in most cases, the case will proceed to a trial regarding the fairness of the transaction. The Balancing Amendments certainly changed some of the requirements for utilizing a cleansing mechanism and will likely require stronger pleadings to survive a motion to dismiss, but they do not foreclose fiduciary duty-based lawsuits.

Substance of The Balancing Amendments – Amended Section 220

The Balancing Amendments amended Section 220 of the DGCL by adding a new paragraph defining the types of books and records to which a stockholder is entitled, and in certain instances, adding a three-year limitation to how far before the date of the demand the production may extend. Amended Section 220(a)(1) identifies as "books and records" the corporation's charter (including a copy of any agreement or other instrument incorporated by reference therein), its bylaws (including a copy of any agreement or other instrument incorporated by reference therein), minutes of stockholder meetings and stockholder consents in the three years before the demand, communications in writing or by electronic transmission with stockholders in the three years before the demand, board, and committee minutes, records of action taken by them and materials provided to the board or committees in connection with such actions, financial statements for the three years preceding the demand, any agreement under Section 122(18) of the DGCL, and director and officer independence questionnaires.

Amended Section 220(e) states that the Court of Chancery may not order production of any other records of the corporation in a Section 220 action, subject to the two limited exceptions. First, under Section 220(f), if the corporation does not have minutes of board or stockholders' meetings, financial statements, or for public companies, director and officer independence questionnaires, the Court may order a corporation to produce "the functional equivalent" of such documents only if and to the extent (i) the stockholder meets the other requirements of Section 220(b) and (ii) it is "necessary and essential to fulfill the stockholder's proper purpose."

Second, the Court may order a corporation to produce other specific records only "if and to the extent": (i) the stockholder meets the other requirements of Section 220(b); (ii) the stockholder has made a showing of a compelling need for an inspection of such records to further the stockholder's proper purpose; and (iii) the stockholder has demonstrated by clear and convincing evidence that such specific records are necessary and essential to further such purpose.

Amended Section 220 provides that a demand must be made in good faith and for a proper purpose and borrows from the heightened pleading standard for alleging demand futility in derivative litigation by requiring that a stockholder's demand describe both the purpose, and the books and records sought, with "reasonable particularity." The Balancing Amendments further codified existing caselaw recognizing that a confidentiality agreement for the production of books and records may expressly provide that any production made shall be deemed incorporated by reference into any complaint filed by or on behalf of the stockholder relating to the subject matter of the demand, and make clear that the corporation may redact from the books and records portions that are not specifically related to the purpose of the demand. Amended Section 220 makes clear that the statute preserves stockholders' independent rights to inspection of books and records in litigation.

Effective Time

The Balancing Amendments generally apply to all acts and transactions, including those occurring before their enactment. However, they expressly "do not apply to or affect any action or proceeding commenced in a court of competent jurisdiction that is completed or pending, or any demand to inspect books and records made," on or before February 17, 2025 (which is the date the original version of the Balancing Amendments was introduced in the General Assembly).

Conclusion

For over a hundred years, Delaware has developed its law and traditions in a balanced and efficient way. Managers and investors alike have been attracted to the State for this balance, and for the business-minded nature of all the franchise's stakeholders. Like all things, from time to time a rebalancing is helpful. The Balancing Amendments, in the best tradition of Delaware law, reflect just such a rebalancing. We look forward to Delaware, as Lew predicted in 1995, continuing to enjoy its preeminent position well into the twenty-first century.

Notes

1. The amendments, along with the concurrent resolution discussed below, initially were introduced as Senate Bill 21. A substitute bill, Senate Substitute 1 for Senate Bill 21, is the version actually adopted into law. That version reflects input from the Council ("*Council*") of the Corporation Law Section of the Delaware State Bar Association ("*DSBA*"). Certain plaintiff stockholders have asserted in pending litigation that the Proposed Amendments are contrary to the Delaware constitution.

2. Nicole Poore & Melissa Minor-Brown, *Delaware's Corporate Laws Sustain the First State. We Have To Protect Them* (Feb. 6, 2025), *available at https://www.delawareonline.com/story/opinion/2025/02/06/delawares-corporate-franchise-is-under-attack-pinion/78210109007/* (last accessed June 4, 2025).

3. *Id.*

4. References in this article to the "Supreme Court" are to the Delaware Supreme Court.

5. We recognize that the Balancing Amendments did not follow this typical process. We note, however, that the Balancing Amendments were introduced by a bipartisan coalition of all members of the leadership of the General Assembly – the Senate Majority Leader, Senate Majority Whip, President Pro Tempore of the Senate, Senate Minority Leader, Senate Minority Whip, Speaker of the House, House Majority Leader, House Majority Whip, House Minority Leader and House Minority Whip. As noted in a press release announcing the Balancing Amendments, they were introduced to "address[] specific concerns that lawmakers have received since late January's flurry of reincorporation announcements regarding the importance of certainty as companies undertake efforts to have unconflicted directors make key corporate decisions." Press Release: Bipartisan Legislation Filed to Promote Clarity and Balance in Delaware's Corporate Laws (Feb. 17, 2025), *available at https://senatedems.delaware.gov/2025/02/17/bipartisan-legislation-filed-to-promote-clarity-and-balance-in-delawares-corporate-laws/* (last accessed June 4, 2025). It is indeed a rare confluence of events and bipartisan agreement to address them that led to the

introduction of the Balancing Amendments. And even given that confluence of events, the Governor asked the Council that, "[a]s with all proposed updates to our corporate legal code," it "immediately take up SB21 for review, comment and recommendation." *Id.* The Council's recommendations then were incorporated into the proposed legislation. We do not anticipate this rare confluence of events necessitating departure from the more typical way amendments to the DGCL are proposed to arise frequently in the future.

6. Katie Tabeling, *Meyer Launches Campaign To Retain And "Win" Top Incorporation Status*, Delaware Business Times (Feb. 5, 2025), *available at https://delawarebusinesstimes.com/news/meyer-campaign-win-incorporation/* (last accessed June 4, 2025).

7. 190 A. 115 (Del. 1936).

8. 11 A.2d 331 (Del. 1940).

9. 457 A.2d 701, 703 (Del. 1983) (overruling *Lynch v. Vickers Energy Corp.*, 429 A.2d 497 (Del. 1981)).

10. *Id.* (overruling *Singer v. Magnavox Co.*, 380 A.2d 969, 980 (Del. 1977) and progeny).

11. 88 A.3d 635 (Del. 2014).

12. 107 A.3d 1049 (Del. 2014).

13. 125 A.3d 304 (Del. 2015).

14. 129 A.3d 884 (Del. Ch. 2016).

15. 300 A.3d 679, 686 (Del. Ch. 2023).

16. 261 A.3d 1251, 1267-1280 (Del. 2021).

17. *Maffei v. Palkon*, 2025 WL 384054 (Del. Feb. 4, 2025).

18. *Brookfield Asset Management, Inc.*, 261 A.3d at 1279.

19. 488 A.2d 858 (Del. 1985).

20. References to "Sections" in this article are to sections of the DGCL.

21. 191 A.3d 268 (Del. 2018).

22. 1989 WL 48746 (Del. Ch. 1989).

23. 91 A.3d 554 (Del. 2014).

24. S.B. No. 75 (148th General Assembly).

25. 70 F.4th 1129 (9th Cir. 2023).

26. S.B. No. 95 (153rd General Assembly).

27. 638 A.2d 1110 (Del. 1994).

28. 808 A.2d 421, 436 (Del. Ch. 2002).

29. 88 A.3d 635 (Del. 2014).

30. 315 A.3d 446 (Del. 2024). The Supreme Court did hold that, in the context of a derivative claim triggering entire fairness review under *Match*, the plaintiff would still need to satisfy the requirements of Court of Chancery Rule 23.1 that the plaintiff plead with particularity either that demand was wrongfully refused or excused. *Id.* at 469.

31. *Id.* at 472-73.

32. 2020 WL 954032, at *9-*12 (Del. Ch. Feb. 27, 2020).

33. 309 A.3d 474 (Del. Ch. 2024).

34. *Seinfeld v. Verizon Commcn's, Inc.*, 909 A.2d 117, 123 (Del. 2006).

35. *Amerisourcebergen Corp. v. Lebanon Cnty. Emp. Ret. Fund*, 243 A.3d 417, 437 (Del. 2020).

36. *NVIDIA Corp. v. City of Westland Pol. & Fire Ret. Sys.*, 282 A.3d 1, 22 (Del. 2022).

37. *Id.* at 10.

38. *Amerisourcebergen Corp.*, 243 A.3d at 439.

39. *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1169 (Del. 1995).

40. *Id.*

41. The specific language of amended Section 144 provides that, if the applicable procedures are followed, the relevant transaction "may not be the subject of equitable relief, or give rise to an award of damages" against directors, officers, controlling stockholders or members of a control group, as applicable. This is merely a recitation of the consequence of the invocation of an irrebuttable version of the business judgment rule.

42. Section 144(a) also applies to transactions in which less than a majority of the board is interested. Because entire fairness is unlikely to apply in that circumstance, this article discusses Section 144(a) solely through the lens of a majority conflicted board.

43. *Salladay*, 2020 WL 954032, at *8 (quoting *Calesa Assocs., L.P. v. Am. Capital, Ltd.*, 2016 WL 770251, at *9 (Del. Ch. Feb. 29, 2016)).

44. *Id.* (citing *In re Trados Inc. Shareholder Litigation*, 73 A.3d 17 (Del. Ch. 2013)).

45. *Id.* (citing *Corwin v. KKR Holdings LLC*, 125 A.3d 304 (Del. 2015)).

46. *Id.* at *12.

47. *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *15 (Del. Ch. Aug. 8, 2006).

48. The use of "gross negligence" is intended, per the synopsis to the bill, only to "mak[e] clear that the statute does not displace the common law requirements regarding core fiduciary conduct." As noted by the Supreme Court in *Flood v. Synutra*, 195 A.3d 754 (Del. 2018), challenging price and disagreeing on strategy are not sufficient to plead a due care violation. Instead, a "plaintiff can plead a duty of care violation only by showing that the [s]pecial [c]ommittee acted with gross negligence, not by questioning the sufficiency of the price." *Id.* at 768. Moreover, "[f]

or purposes of Delaware entity law, a showing of gross negligence requires conduct akin to recklessness." *In re McDonald's Corp. S'holder Deriv. Litig.*, 289 A.3d 343 (Del. Ch. 2023).

49. The statute does not expressly state that disinterested director approval is available to ratify a transaction after the fact.

50. Consistent with *In re Volcano Corporation Stockholder Litigation*, 143 A.3d 727 (Del. Ch. 2016), under Section 144(d)(7), shares irrevocably accepted for purchase or exchange pursuant to a tender offer preceding a medium-form merger under Section 251(h) of the DGCL would be deemed voted in favor of the act or transaction and shares not irrevocably accepted for purchase or exchange pursuant to such an offer would be treated as votes against the act or transaction.

51. By requiring a person to "exercise managerial authority over the business and affairs of the corporation", Amended Section 144 can be read to have eliminated the concept of "transaction-specific control," under which a minority stockholder could be deemed a controller if such stockholder exercised actual control over the specific transaction at issue. *See e.g.*, *In re Oracle Corp. Derivative Litig.*, 2025 WL 249066, at *12 (Del. Jan. 21, 2025).

52. This would reach a contrary outcome to cases finding the existence of a controlling stockholder, or control group, when the purported controller owned less than one-third of the voting stock in the aggregate. *E.g.*, *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024) (finding holder of under 22% of stock to be a controlling stockholder); *FrontFour Cap. Grp. LLC v. Taube*, 2019 WL 1313408 (Del. Ch. Mar. 11, 2019) (finding that two brothers, who together owned less than 15% of the company, acted as a controlling stockholder with respect to the challenged transaction). Similarly, this would appear to reject the Court of Chancery's suggestion that a nonstockholder could, individually, exercise effective control sufficient to render it a "controller" that owes fiduciary duties. *In re Pattern Energy Grp. Inc. S'holders Litig.*, 2021 WL 1812674, at *40 (Del. Ch. May 6, 2021) ("[C] onsidering evolving market realities and corporate structures affording effective control, Delaware law may countenance extending controller status and fiduciary duties to a nonstockholder that holds and exercises soft power that displaces the will of the board with respect to a particular decision or transaction.").

53. As noted in footnote 30, *supra*, the Supreme Court held in *Match* that, in the context of a derivative claim triggering entire fairness review, the plaintiff would still need to satisfy the requirements of Court of Chancery Rule 23.1 that the plaintiff plead with particularity either that demand was wrongfully refused or excused. *In re Match Group, Inc. Deriv. Litig.*, 315 A.3d at 469. Under that rule, to plead demand excusal, a plaintiff must plead facts indicating that at least half of the directors either: (i) received, or lack independence from a person who received, a material benefit from the act or transaction or (ii) face a substantial likelihood of liability relating to the act or transaction. For purposes of this analysis, "demand is not excused for the sole reason that entire fairness is the standard of review in a controlling stockholder transaction." *Id.* at 469-70. Because most controlling stockholder transactions that are not going private transactions would give rise to derivative claims, even prior to the Balancing Amendments, challenges to such conflicted controlling stockholder transactions generally would be subject to dismissal under a demand excusal analysis if the demand board was comprised of a majority of disinterested directors.

54. 309 A.3d 474 (Del. Ch. 2024).

55. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 930 (Del. 2003); *Paragon Tech's, Inc. v. Cryan*, 2023 WL 8269200, at *15 (Del. Ch. Nov. 30, 2023).