

THIRTY YEARS LATER – WHY CORPORATIONS CONTINUE TO CHOOSE DELAWARE: GENERAL PERSPECTIVES AND THOUGHTS ON PROPOSED AMENDMENTS

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 Monday, February 17, 2025, the General Assembly publicly released proposed amendments to the Delaware General Corporation Law (“DGCL”).¹ The amendments, which we refer to in this memorandum 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, if adopted, would offer a practical path for corporations to approach conflict transactions while still preserving accountability of corporate decisionmakers to stockholders. At the same time as the Balancing Amendments were released, the General Assembly released a proposed concurrent resolution (“Concurrent Resolution”) that would direct the Council (“Council”) of the Corporation Law Section of the Delaware State Bar Association (“DSBA”) to present a report to the Governor and the General Assembly on or before March 31, 2025, with recommendations for legislative action that might help the judiciary ensure that awards of attorney’s fees provide incentives for litigation appropriately protective of stockholders but not so excessive as to act as a counterproductive toll on Delaware companies and their stockholders. The Concurrent Resolution would direct the Council, in considering any such recommendation, to examine the utility of a cap on such awards based on a multiple of lodestar amounts (*i.e.*, amounts determined by multiplying the time devoted by plaintiffs’ counsel to the matter by their ordinary hourly billing rates).

¹ The amendments, along with the concurrent resolution discussed below, were introduced as Senate Bill 21 and Senate Concurrent Resolution 17, respectively. They are sponsored by a bipartisan coalition of all members of the leadership of each of the Senate and House of Representatives.

With public debate rising over whether Delaware continues to be the optimal forum for incorporation, we believe the proposal of the Balancing Amendments and Concurrent Resolution, in and of itself, is illustrative one of the many “only in Delaware” factors that continue to differentiate our state positively from others. In this memorandum, 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 memorandum, 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 memorandum, 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.

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 February 17, 2025).

³ *Id.*

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

⁴ References in this memorandum to the “Supreme Court” are to the Delaware Supreme Court.

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), 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 recently quoted, 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

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 February 18, 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.* 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 February 17, 2025).

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 preclearing 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 whole new forms of precedent out of 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 cancelled 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 damages formula (known as the “block method”), instead adopting “a more liberal, less rigid, and stylized approach” to damages 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 create direct, rather than derivative, claims.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

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).

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 *Siegmán 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 (effective January 1, 2004), 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

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 memorandum 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).

claims. The General Assembly’s stated rationale was “to preserve the efficacy of the enforcement of fiduciary duties in stock corporations.”²⁴ Indeed, amendments recently proposed by the Council 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.

We believe this history shows Delaware’s commitment to a balanced approach to corporation law. Although we anticipate that some may 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 decisionmakers, 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 proposed 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.²⁶ 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.”²⁷ 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.²⁸ 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

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

²⁵ 70 F.4th 1129 (9th Cir. 2023).

²⁶ 638 A.2d 1110 (Del. 1994).

²⁷ 808 A.2d 421, 436 (Del. Ch. 2002).

²⁸ 88 A.3d 635 (Del. 2014).

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.²⁹ Whether one believes *Match* applied, or departed from, longstanding precedent, the result is a clear rule that the requirement to comply with *MFW* – including receiving a MoM vote – in order to avoid costly entire fairness review applies 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* conditions³⁰ 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.³¹ 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.³² 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

²⁹ 315 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.

³⁰ *Id.* at 472-73.

³¹ 2020 WL 954032, at *9-*12 (Del. Ch. Feb. 27, 2020).

³² 309 A.3d 474 (Del. Ch. 2024).

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,”³³ precludes defendants from asserting a merits-based defense to the inspection,³⁴ 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.³⁵ 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),³⁶ 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.³⁷

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.³⁸ It did not change the standard of review applicable to conflict transactions.³⁹ Amended Section 144, to the contrary, would provide the means by which an irrebuttable version of the business judgment rule would apply to interested transactions.⁴⁰

³³ *Seinfeld v. Verizon Commcn’s, Inc.*, 909 A.2d 117, 123 (Del. 2006).

³⁴ *Amerisourcebergen Corp. v. Lebanon Cnty. Emp. Ret. Fund*, 243 A.3d 417, 437 (Del. 2020).

³⁵ *NVIDIA Corp. v. City of Westland Pol. & Fire Ret. Sys.*, 282 A.3d 1, 22 (Del. 2022).

³⁶ *Id.* at 10.

³⁷ *Amerisourcebergen Corp.*, 243 A.3d at 439.

³⁸ *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1169 (Del. 1995).

³⁹ *Id.*

⁴⁰ 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 or other sanction” 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.

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) what is required to invoke the irrebuttable presumption of the business judgment rule under current law; (ii) what would be required to invoke the safe harbor under the Balancing Amendments; and (iii) what the key differences are.

Category	Current Law	Amended Section 144	Key Differences
Interested Board, No Conflicted Controlling Stockholder Or Control Group – All Transactions	Deal <i>either</i> conditioned before start of substantive economic negotiations on approval of independent committee <i>or</i> approved by disinterested stockholders.	Deal <i>either</i> approved by board or committee, by a majority of disinterested directors, <i>or</i> approved or ratified by disinterested stockholders.	<ul style="list-style-type: none"> • If director cleansing, can be either at board or committee level and need not be conditioned on such approval before start of substantive economic negotiations. • If stockholder cleansing, can either be approval of deal or ratification after fact, and vote requirement is “majority of votes cast.”
Conflicted Controlling Stockholder Or Control Group – Going Private Transaction	Deal must be irrevocably conditioned before start of substantive economic negotiations on approval by <i>both</i> a committee comprising solely independent directors <i>and</i> disinterested stockholders.	Deal must be approved by committee comprising majority disinterested directors <i>and</i> be conditioned on disinterested stockholder approval before it is submitted to stockholders.	<ul style="list-style-type: none"> • Relevant committee need only be comprised of a majority (not solely) disinterested directors. • No express timing requirement on conditioning deal on committee approval, and timing requirement for conditioning deal on stockholder approval is before submission to stockholders. • For stockholder cleansing, denominator is “votes cast” standard instead of “outstanding” standard.
Conflicted Controlling Stockholder Or Control Group – All Other Transactions	Deal must be irrevocably conditioned before start of relevant substantive economic negotiations on approval by <i>both</i> a committee comprising solely independent directors <i>and</i> disinterested stockholders.	Deal must be <i>either</i> approved by committee comprising majority disinterested directors <i>or</i> be conditioned on disinterested stockholder approval or ratification before it is submitted to stockholders.	<ul style="list-style-type: none"> • Either (as opposed to both) disinterested director or disinterested stockholder approval or ratification required. • Other differences as reflected above.

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 would be 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. Under Sections 144(e)(8) and (e)(9), respectively, an

“interest” would mean “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” would mean “a familial, financial, professional, employment, or other relationship.” With respect to directors, such an interest or relationship would only be material if it “would reasonably be expected to impair the objectivity of the director’s judgment when participating in the 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 is an independent director or satisfies the relevant criteria for determining director independence under any applicable stock exchange rule. That presumption may only be rebutted as to a director 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. In addition, under Section 144(d)(3), the nomination or 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

Under current 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 is by default subject to entire fairness review.”⁴¹ Business judgment rule review can be restored if *either* the transaction is approved by “a fully-empowered, independent special committee”⁴² or “a fully informed, un-coerced vote of disinterested stockholders.”⁴³ 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.⁴⁴ 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 to restore the business judgment rule presumption.⁴⁵

Under amended Section 144(a), the safe harbor will apply 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

⁴¹ *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)).

⁴² *Id.* (citing *In re Trados Inc. Shareholder Litigation*, 73 A.3d 17 (Del. Ch. 2013)).

⁴³ *Id.* (citing *Corwin v. KKR Holdings LLC*, 125 A.3d 304 (Del. 2015)).

⁴⁴ *Id.* at *12.

⁴⁵ *In re PNB Holding Co. S’holders Litig.*, 2006 WL 2403999, at *15 (Del. Ch. Aug. 8, 2006).

directors, that approval may be obtained *either* at the board level or through a committee, so long as it receives “the affirmative votes of a majority of the disinterested directors” even if those directors are less than a quorum. The statute does leave room for review of this decision if adequate facts are alleged that the approval was not provided “in good faith.” With respect to disinterested stockholder approval, that approval can be either the approval for the transaction or an after-the-fact ratification vote.⁴⁶ In addition, the voting threshold will be lowered to “a majority of the votes cast by the disinterested stockholders.”⁴⁷ 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 either case, 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 body providing the approval.

Conflicted Controlling Stockholder or Control Group Transactions

As noted above, under current law, to avoid entire fairness review in connection with a conflicted controlling stockholder or group transaction, the controlling stockholder or group must irrevocably condition 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 will be modified.

Section 144(e)(2) defines a controlling stockholder, for purposes of Section 144, as any person who, 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; or (ii) has the power (1) functionally equivalent to that of a stockholder that owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors *and* (2) to exercise managerial authority over the business and affairs of the corporation. Importantly, for non-majority stockholders to be considered controlling stockholders, the functionally-equivalent-to-majority 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 (i) generally in the election of directors or (ii) 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 would prevent

⁴⁶ The statute does not expressly state that disinterested director approval is available to ratify a transaction after the fact.

⁴⁷ 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. Although not expressly stated, presumably shares not accepted for purchase or exchange pursuant to such an offer would be treated as votes against the act or transaction.

the existence of controlling stockholder status from being found if the alleged controller does not own a minimum level of stock.⁴⁸ Under Section 144(e)(1), it would still be 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 *either* (i) where 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)(4), no person or group will be deemed a controlling stockholder or group unless they satisfy these criteria.

The new statute would set out two categories of conflicted controller transactions – those involving a “going private” transaction, and all others. For corporations with a class of securities registered under Section 12(d) or Section 15(g) of the Securities Exchange Act of 1934 (“Exchange Act”) or listed on a national securities exchange, a going private transaction would be defined by reference to Rule 13e-3 under the Exchange Act. For all other corporations, a “going private transaction” would mean any transaction where all or substantially all of the shares of capital stock held by the disinterested stockholders (but not those of the controlling stockholder or group) are cancelled or acquired. Notably, sales of substantially all assets to a controlling stockholder would not, in the private company context, constitute a going private transaction. For going private controlling stockholder transactions, which would be governed by Section 144(c), the safe harbor would apply only if *both* committee approval *and* disinterested stockholder approval is obtained. However, and in a departure from *Match*, for other conflicted controlling stockholder transactions, which would

⁴⁸ 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.”).

be governed by Section 144(b), the safe harbor would apply if *either* committee approval *or* disinterested stockholder approval is obtained.⁴⁹

With respect to committee approval, the committee 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 by the committee. This eliminates the requirement from *MFW* that the committee meets its duty of care in negotiating a fair price, so long as the committee acted in good faith. The committee must not include the controlling stockholder, and a majority (as opposed to all) of the members of the committee must be disinterested directors. 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). 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 to approve 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 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 both committee approval and stockholder approval, the material facts as to the controlling stockholder transaction must be disclosed or known to the committee or stockholders.

⁴⁹ As noted in footnote 29, *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 transactions with controlling stockholders that are not going private transactions would be derivative transactions, 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 a board was comprised of a majority of disinterested directors.

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.” “Fair as to the corporation” is defined in Section 144(e)(6) as meaning the “act or transaction at issue, as a whole, is beneficial to the corporation or its stockholders in their capacity as such given the consideration paid to or received by the corporation or its stockholders or other benefit conferred on the corporation or its stockholders.” The fairness determination must take into appropriate account whether the act or transaction is fair in terms of the fiduciary’s dealings with the corporation and is comparable to what might have been obtained in an arm’s length transaction available to the corporation. By referencing transactions “available to the corporation,” the statute recognizes the concept, going back to *Bershad v. Curtiss-Wright Corp.*⁵⁰ and applied in the *MFW* context in *Smart Local Unions & Councils Pension Fund v. BridgeBio Pharma, Inc.*,⁵¹ that, if a controlling stockholder states it does not intend to be a seller, a court can take that into account in considering whether other alternatives are realistically available.

Limitation of Liability For Controlling Stockholders

As noted above, in *In re Sears Hometown & Outlet Stores, Inc. Stockholder Litigation*,⁵² 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) would eliminate 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 challenge a transaction on technical grounds – *i.e.*, to allege that its approval was in violation of the DGCL, the corporation’s charter or bylaws or any contract to which the corporation is party. 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 board composition or deal-protection devices. Thus, challenges to, for example, poison pills or

⁵⁰ 535 A.2d 840 (Del. 1987).

⁵¹ 2022 WL 17986515 (Del. Ch. Dec. 29, 2022).

⁵² 309 A.3d 474 (Del. Ch. 2024).

provisions such as recommendation change provisions and forward termination fees will continue to be subject to enhanced scrutiny review by default.⁵³

More generally, and perhaps most importantly, the statute still leaves room for stockholders to monitor conflict transactions. Regardless of the category of conflict: (i) any board or committee approval intended to function as a cleansing mechanism must be provided “in good faith”; (ii) any cleansing mechanism must be comprised of “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 one 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 whether the transaction was fair to the corporation. The Balancing Amendments certainly change 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 amend 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, its bylaws, 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 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 codify 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. In the event the corporation does not have books and records in certain of the categories identified in new Section 220(a)(1), including board and committee minutes, the court may order the production of additional records constituting the functional equivalent of such books and records.

⁵³ *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).

No Stated Effective Time

Unlike most other amendments to the DGCL, the Balancing Amendments do not contain a proposed effective time. The Balancing Amendments thus do not expressly address whether they will impact either litigation pending, or litigation subsequently filed regarding acts taken, before the Balancing Amendments are signed into law. We note that the primary sponsor of the Balancing Amendments, Senate Majority Leader Bryan Townsend, has been quoted as stating that “this legislation is not retroactive.”⁵⁴ The retroactivity of the Balancing Amendments, once adopted, will await caselaw development.

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 discussing these Amendments with our friends and colleagues, to the Council’s recommendations in response to the Concurrent Resolution, and to Delaware, as Lew predicted in 1995, continuing to enjoy its preeminent position well into the twenty-first century.

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⁵⁴ Tom Hals, *Delaware Bill Would Limit Investor Lawsuits As Companies Threaten To Leave The State*, available at <https://www.reuters.com/legal/delaware-bill-would-limit-investor-lawsuits-companies-threaten-leave-state-2025-02-18> (last accessed February 18, 2025).