

Trends and Developments

Contributed by:

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Richards, Layton & Finger

Richards, Layton & Finger has shaped Delaware law since 1899 and its lawyers remain at the forefront of the state's evolving corporate practice. The multidisciplinary firm offers clients a broad range of experience and regularly handles nationally prominent matters. It has contributed to drafting and amending key Delaware business statutes, including the Delaware General Corporation Law, Delaware Limited Liability Company Act, Delaware Limited Partnership Act and Delaware Statutory Trust Act, and has authored

and maintains two leading treatises, the Delaware Law of Corporations and Business Organizations and Lubaroff & Altman on Delaware Limited Partnerships. The firm's lawyers and alumni have served in the Third Circuit, U.S. District Court, and Delaware Court of Chancery, and in Delaware leadership roles: as chief justice of the Supreme Court, governor, and secretary of state. Richards Layton is Delaware's Lex Mundi member and part of SCG Legal and USLFG.

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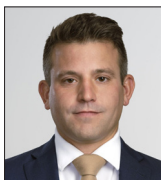
Rudolf Koch litigates complex corporate and commercial disputes in Delaware state and federal courts. His practice includes stockholder class actions, derivative litigation, contested M&A transactions,

corporate control disputes, contractual litigation, appraisal actions, and books-and-records proceedings. He advises managers, general partners, corporate boards and committees on governance, internal investigations, litigation and control matters. Rudy has extensive trial and appellate experience. He frequently speaks on Delaware corporate law, including at the Tulane Corporate Law Institute, and has published in *The Business Lawyer*, *Business Law Today* and the *Cornell Law Review*. He has also lectured on corporate governance, class action litigation and executive compensation.



John Mark Zeberkiewicz advises corporations, boards, special committees and executives, focusing on transactional matters involving Delaware corporations, including mergers and acquisitions, corporate

governance and corporate finance. A member of Delaware's Corporation Law Council, he has served on drafting subcommittees responsible for significant amendments to the Delaware General Corporation Law. John Mark co-edits *The Delaware Law of Corporations & Business Organizations*, serves on the editorial advisory board of *Insights*, and writes extensively on corporate governance and M&A. He frequently presents on developments in Delaware corporate law and has served as an expert and special master in Delaware Court of Chancery proceedings.



Robert Greco advises clients on a broad range of transactions and corporate governance matters involving Delaware corporations, including mergers, acquisitions, de-SPAC transactions, hostile takeovers, rights plans, proxy contests and stockholder meetings, charter and by-law amendments, internal restructurings, equity and debt financings, dividends, stock repurchases and redemptions, and dissolutions. As part of his practice, Rob renders legal opinions on various matters of Delaware law, and is frequently involved in litigation before the Delaware Court of Chancery. He serves on the ABA Business Law Section's Mergers and Acquisitions Committee, and contributes to The Delaware Law of Corporations and Business Organizations.

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Despite increased competition from other jurisdictions seeking to expand their corporate franchise and business courts, Delaware remains the pre-eminent jurisdiction for incorporation in the USA, with roughly two-thirds of the Fortune 500 and well over two million business entities continuing to call Delaware their corporate home.

In the past two years, Delaware has seen significant developments in its corporate law. These developments have bolstered the predictability and stability of Delaware corporate law without meaningfully eroding stockholder rights, solidifying Delaware as the jurisdiction of choice for corporations and stockholders alike.

Board Designation Rights, Proxy Contest Settlements and Other Stockholders' Agreements

In the 2024 decision *West Palm Beach Firefighters' Pension Fund v Moelis & Co.*, the Delaware Court of Chancery held that various governance provisions in a stockholders' agreement, including those granting a large stockholder the right to designate specific directors and veto rights over fundamental corporate actions, were facially invalid and could only be included in a corporation's certificate of incorporation under Delaware law (311 A.3d 809 (Del. Ch. 2024), rev'd on other grounds, --- A.3d ---, 2026 WL 184868 (Del. Jan. 20, 2026)). The Court reasoned that the power granted to the large stockholder pursuant to the agreement constituted an impermissible infringement of the board's statutory power to manage and direct the corporation's business and affairs. However, the ruling called into question the validity of a variety of commonplace agreements between corporations and their stockholders, including contractual board designation rights, proxy contest settlements and other stockholders' agreements.

The Delaware legislature responded swiftly. Before *Moelis* was even heard on appeal, the legislature enacted a new statutory provision, Section 122 (18) of the Delaware General Corporation Law (DGCL). Section 122 (18) was adopted to restore the expectations of market participants and foster freedom of contract by legislatively overturning *Moelis*. Under Section 122 (18), corporations are granted the express power to

enter into contracts with one or more current or prospective stockholders that:

- restrict or prohibit the corporation from taking specified action;
- require the approval or consent of one or more stockholders or other persons or bodies in order for the corporation to take specified actions; or
- covenant that the corporation, its board of directors, current or future directors or stockholders, or other persons or bodies, take or refrain from taking specified action.

Section 122 (18) therefore confirms the authority of corporations to enter into common governance agreements with activists and other significant stockholder activists, including proxy contest settlements and other types of stockholders' agreements.

Delaware's New Statutory Safe Harbour Regime for Conflict of Interest Transactions

In 2025, Delaware substantially revised Section 144 of the DGCL to provide "safe harbour" procedures to insulate conflict of interest transactions (ie, those in which the interests of directors, officers or controlling stockholders may diverge from the interests of the corporation and its stockholders generally) from challenges for breach of fiduciary duty. The adoption of Section 144 was widely lauded by business groups and leading national law firms, and reaffirmed a foundational public policy of Delaware corporate law: deference to the decisions of independent directors and disinterested stockholders.

Section 144 establishes clear procedures for corporations and transaction planners to follow to obtain the protection of the safe harbour for transactions that might otherwise be subject to heightened judicial review. In general, Section 144 protects transactions from judicial review that are:

- approved in good faith and without gross negligence by a disinterested board majority or a committee of disinterested directors; or
- approved by an informed and uncoerced vote of disinterested stockholders.

By offering this protection, Section 144 provides strong incentives for corporations and boards of directors to place decisions regarding conflict of interest and change of control transactions in the hands of independent and disinterested decision-makers in accordance with recognised best practices of corporate governance.

Section 144 was designed to reduce the costs of excessive representative stockholder litigation, which is frequently driven by enterprising plaintiffs' attorneys rather than the interests of stockholders or the merits of the underlying transaction. This type of litigation, which is often brought by stockholders with nominal holdings and a limited financial stake, carries significant costs that are borne by corporations and, indirectly, by their investors.

Section 144 strikes the appropriate balance of curbing this type of opportunistic litigation while still allowing for a meaningful degree of fiduciary oversight. For example, disinterested director approval only invokes Section 144's statutory safe harbour to the extent that the directors granted such approval in good faith and without gross negligence. Moreover, by its terms, Section 144 does not prevent judicial review where the stockholder plaintiff is seeking to enjoin defensive measures intended to deter, delay or preclude a change in board composition or a change of control or other transaction.

Accordingly, activists and other types of investors still have recourse in circumstances where the board is acting improperly to impede a proxy contest or a prospective change of control transaction, which invokes enhanced judicial scrutiny under Delaware law. For example, a board that adopts a defensive measure that is disproportionate to a threat to corporate policy and effectiveness and that is coercive would not be entitled to rely on the safe harbour provisions of Section 144 to insulate its actions from equitable review. This stands in contrast to other jurisdictions, where defensive measures that a board unilaterally adopts, even those that might be viewed as punitive or retributive, could be protected by a statutory business judgement rule.

Heightened Presumption of Independence

In addition to establishing Delaware's new statutory safe harbour, Section 144 implemented a heightened presumption of independence for directors whom a board determines to be independent under the rules of a national stock exchange. Under the new statute, a director of a publicly listed corporation is presumed to be disinterested in relation to acts or transactions in which the director is not a party so long as the board has determined that the director is independent under applicable stock exchange rules.

In cases where the conflict of interest involves a controlling stockholder, the statute requires the board to use the listing rules to test the directors' independence against the controlling stockholder in addition to the corporation. The determination that a director is independent under the applicable listing rules provides a heightened presumption that the director is a "disinterested director" for Delaware law purposes, which may only be rebutted by substantial and particularised facts that the director, or a person with whom the director has a material relationship, has a material interest in the underlying act or transaction.

Section 144 also codifies longstanding Delaware common law in providing that the mere 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 is not, in and of itself, evidence that the director lacks disinterestedness.

Section 144's heightened presumption of independence should serve as a layer of protection for directors designated or nominated to the board by activists or other large investors. In the years preceding the adoption of the new Section 144, Delaware courts called into question the independence of directors affiliated with activist investors, observing that they could have a divergent interest in pursuing a short-term sale – for example, see *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535 (Del. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019). Now, directors nominated or designated by activists and other significant investors who are determined to be independent for exchange purposes are entitled to a heightened presumption of independence and disinterestedness if their board decisions,

such as a decision to sell the company, are later subject to judicial challenge.

Access to Corporate Books and Records

As part of the 2025 legislation adopting Section 144, Delaware also enacted reforms to the rights of stockholders to inspect corporate books and records under Section 220 of the DGCL. These reforms were introduced in response to the volume of books-and-records demands and follow-on litigation brought by stockholders in recent years, which largely stemmed from the same type of attorney-driven representative litigation and imposed substantial costs on Delaware corporations.

Under the amended Section 220, stockholders are generally only entitled to inspect a discrete set of formal corporate documents, such as board minutes, board books relating to corporate actions, director and officer independence questionnaires, financial statements, the corporation's stock ledger, and a list of the corporation's stockholders. A stockholder may now only inspect informal corporate documents, such as internal emails, upon a heightened showing that there is a compelling reason to conduct the inspection. Importantly, the amendments to Section 220 did not restrict the ability of activists or other stockholders to obtain a list of the corporation's stockholders, as is usually sought by dissidents in connection with a proxy or consent solicitation process.

Separately, in a series of cases over the past several years, the Delaware courts have developed the information rights of directors who serve at the request or by designation of a particular investor or group of investors (so-called "blockholder" directors). As the Delaware courts have confirmed, when a director is appointed to the board as the designee or representative of a particular stockholder, there is an implicit expectation that the director can share information obtained in that capacity with that stockholder, recognising that investors frequently obtain designation or appointment rights as a means of securing additional information to monitor their investment.

Other jurisdictions with less developed case law have not expressly established the same degree of information sharing among blockholder directors and the

investors who designate or appoint them. Although the Delaware courts have recognised that information may be shared between blockholder directors and the related investor, they have made clear that the blockholder directors and the investors will remain liable for breach of fiduciary duty or other sanctions in circumstances where the information is used improperly.

Enforcement of M&A Agreements

Delaware has robust case law interpreting and enforcing M&A agreements. In the M&A context, Delaware law generally favours granting specific performance when appropriate. In recent years, Delaware has a well-established track record of granting specific performance of acquirors' obligations under M&A agreements. This has included Delaware cases ordering specific performance of:

- the obligations of an acquirer attempting to back out of an acquisition because of the COVID-19 pandemic;
- an acquiror's obligation to obtain the financing needed to consummate an acquisition; and
- an acquiror's obligation to obtain the regulatory clearance needed to close an acquisition.

In doing so, Delaware offers significant comfort to the target corporations and their stockholders seeking a premium return.

While specific performance remains the preferred remedy, in circumstances where an acquiror breaches a merger agreement and specific performance is not available for regulatory reasons or otherwise, there has long been a question whether the target corporation could seek, on behalf of its stockholders, the loss of any premium the stockholders would have enjoyed had the acquiror not breached the merger agreement beyond the damages incurred by the target itself. While many practitioners historically believed that Delaware would allow a target corporation to recover lost premium damages on behalf of its stockholders, in 2023 the Court of Chancery suggested, in dicta, that this may not be the case – see *Crispo v Musk*, 304 A.3d 567 (Del. Ch. 2023).

Once again, the Delaware legislature responded quickly, enacting Section 261 of the DGCL in early

2024. Among other things, Section 261 provides that a target company may include in a merger agreement a provision that allows the target to seek damages, including damages attributable to the stockholders' loss of a premium, against an acquiror that has failed to perform its obligations under the merger agreement, including any failure to cause the merger to be consummated. Section 261 eliminates uncertainty and furthers the certainty of value offered to stockholders of Delaware corporations in M&A transactions.

Stockholder Proposals

Longstanding Delaware law generally allows all voting stockholders to submit nominations and stockholder proposals for consideration at annual meetings of stockholders, provided that the stockholder complies with any advance notice or other procedural requirements. Unlike other areas of corporate law that have seen considerable development in recent years, this remains the case in Delaware.

At the federal level, however, questions have been raised as to the future of stockholders' rights under Rule 14a-8 under the Exchange Act to use the corporation's proxy statement to present proposals. These developments are coinciding with initiatives (or discussions around initiatives) to curb stockholder proposals. Texas, for example, has enacted legislation allowing nationally listed corporations to impose ownership limitations that would restrict stockholders from submitting proposals unless they hold shares representing USD1 million in market value or 3% of the corporation's outstanding voting shares.

Conclusion

In recent years, Delaware's corporate law has undergone significant development. This, in turn, has provided corporations, activist investors and other stockholders with greater predictability regarding the rules that govern their relationships, while preserving the fiduciary principles and core stockholder rights that have long distinguished Delaware corporate law. With the overwhelming majority of significant corporations choosing Delaware as their corporate home, the jurisdiction remains one in which issues of corporate law are routinely raised and sensibly resolved, either through rulings of its expert court or through prompt attention from a legislature committed to maintaining Delaware's corporate pre-eminence.

Rather than tilting the scales in favour of management or stockholders, Delaware remains committed to striking the balance between respect for managerial prerogatives and the protection of stockholders against overreach, with the ultimate goal of maximising value and ensuring sustainable economic growth for the long term.