Debevoise & Plimpton

MARKETCHECK

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Editorial Board

> “The ubiquity of termination fees in public company transactions stems from the tension between a buyer’s desire for closing certainty and the target company board’s need to retain flexibility to fulfill its fiduciary duties to the target company’s stockholders.”

Termination Fees: Breaking Up Usually Comes with a Price

Termination fees, or “break-up fees”, are a common tool used to compensate the buyer for the loss of a signed deal as a result of the exercise of the target board’s fiduciary duties. Typically, payment of a fee is triggered either when (i) the target board terminates the agreement to accept a superior offer from an interloping bidder or (ii) the buyer terminates the agreement because the target board no longer supports the buyer’s deal for any number of reasons, including the occurrence of an “intervening event” that materially increases the value of the target (practitioners often colloquially describe an intervening event as “discovering gold under the company headquarters”). Some agreements limit the payment of a fee to circumstances where the deal is terminated and the target signs or closes a transaction with the interloping bidder or another third party within a negotiated “tail” period after termination. Agreements may also call for termination fees (x) if the target company materially or willfully breaches the “no-shop”[1] covenant, or (y) less commonly, if the target shareholders fail to approve a deal (even in the absence of a superior offer or a failure by the target company to comply with the agreement), also known as a “naked no vote fee”. This note provides a brief primer or refresher on the law and practice of termination fees.

The ubiquity of termination fees in public company transactions stems from the tension between a buyer’s desire for closing certainty and the target company board’s need to retain flexibility to fulfill its fiduciary duties to the target company’s stockholders. In Delaware,[2] in a change of control setting directors are meant to obtain the highest value reasonably attainable for the stockholders.[3] Director duties do not end upon the signing of a definitive agreement, and, as the case law has evolved, the target board may need

1. Most public acquisition agreements will include a “no-shop” covenant—a provision that restricts the target and its representatives from soliciting or even engaging in discussions regarding alternative proposals—though targets will commonly negotiate for a fiduciary exception (a “fiduciary out”) that would permit it to enter into discussions with another party making an alternative proposal that is, or is reasonably likely to result in, a superior offer.
2. The specific fiduciary duties of a target’s directors requires an analysis of the relevant state corporate law. Since most public companies continue to be organized under Delaware law, Delaware is the focus of this article.
3. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

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to consider, and ultimately accept, a competing superior offer even after the buyer and the target have signed definitive agreements—until a fully informed, uncoerced stockholder vote approving the deal.

From the buyer's perspective, a termination fee somewhat reduces the risk of losing the deal between signing and closing by making competing offers a bit more expensive and provides the buyer with some recompense for the time, expense and opportunity cost it has incurred in connection with the terminated deal. From the target company's perspective, it wants to make sure that any termination fee is not so large as to preclude competing bids, and is not triggered in circumstances where it does not have an actionable competing superior transaction.

There are some lessons to keep in mind when considering the size of a termination fee:

Equity value is the typical metric, though there may be circumstances that warrant looking at enterprise value too. Relating the size of the break-up fee to equity value is the most common approach. However, the Delaware Court of Chancery in *Lear*[4] and later in *Cogent*[5] acknowledged that relating the fee to enterprise value could also be appropriate for transactions with highly leveraged targets, because most such acquisitions require the buyer to pay for the company's equity and refinance all of its debt.

The typical size of termination fees is in the 2.0% - 3.5% range. Generally speaking, the most common range for termination fees is between 2.0% and 3.5% of equity value though negotiations may result in a termination fee outside of this range. In Houlihan Lokey's most recent termination fee study, the smallest termination fee observed was 0.2% and the largest was 6.0%.[6] The Delaware Court of Chancery has mentioned, while declining to decide the issue of whether a termination fee was coercive, that a 6.3% termination fee "seems to stretch the definition of range of reasonableness."[7] The average termination fee for deals announced in 2024 was 2.4% of equity value, slightly down from 2.5%, 2.7% and 2.9% in 2023, 2022 and 2021, respectively.[8]

But, there is no bright-line test for reasonableness. Delaware courts[9] have been clear that a purely formal, mechanical view based on percentage is not sufficient and there is no percentage that is *per se* acceptable. The reasonableness of the size of the termination fee will necessarily be informed by the specific deal dynamics. A target company board should take the same approach when assessing a termination fee proposal from a buyer.

The reasonableness of the size of the termination fee needs to be assessed holistically based on the particular facts surrounding the deal. This includes the negotiation history and the parties' relative negotiation strength. Dealmakers should be sure to take account of other deal protection mechanisms, such as expense reimbursement obligations, when assessing the reasonableness

4. *In re Lear Corp. S'holders Litig.*, 926 A.2d 94, 120 (Del. Ch. 2007).
5. *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 503 (Del. Ch. 2010).
6. Approximately 63% of the termination fees expressed as a percentage of equity value were between 2.0% and 3.5% according to the Houlihan Lokey 2024 Transaction Termination Fee Study. https://cdn.hl.com/pdf/2025/2024-transaction-termination-fee-study.pdf
7. *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, 1999 WL 1054255 (Del. Ch. 1999).
8. https://cdn.hl.com/pdf/2025/2024-transaction-termination-fee-study.pdf
9. See, e.g., *Cogent* at 503; *La. Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1181 n.10 (Del. Ch. 2007).

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of the target's overall break-up costs for a transaction. Timing and other conditions for payment of the fee can also be relevant.

The presence or absence of a robust pre-signing market check may also affect the assessment of whether the size of the termination fee is reasonable. Where there has been a robust pre-signing market check, regardless of whether it leads to a competitive bidding process, a higher termination fee may be justified on the theory that the target company board has taken pre-signing procedural steps to seek the highest value reasonably attainable. However, the target company board can also use a robust pre-signing market check in the negotiations to put downward pressure on the size of the termination fee by arguing that there should be a lower risk of the deal being topped by a higher offer.

Transactions with fewer restrictions on a target company's ability to entertain and accept competing offers tend to support higher termination fees than deals with more stringent deal-protection mechanisms. Further, if the agreement includes a "go-shop" covenant—a provision that allows the target, for a window of time after signing, to solicit alternative proposals—there will often be bifurcated termination fees.[10] A lower fee typically would be triggered during the "go-shop" period and a higher fee after the "go-shop" period.[11]

The absolute size of the transaction can also be relevant, with mega-deals typically carrying termination fees that are lower when measured on a percentage basis, likely due to the poor optics of outsized dollar amounts when compared to buyer's actual or anticipated expenses in the deal.

A "naked no vote" trigger will generally not support a large termination fee. Boards are sensitive to the fiduciary implications of large termination fees and the effect that they may have on stockholders' ability to freely reject a transaction in the exercise of their voting rights. In *Lear*, while the Delaware Court of Chancery upheld a "naked no vote" termination fee of approximately 0.9% of the equity value, it emphasized that the fee was negotiated in exchange for a post-announcement price increase.

It is worth noting that reverse termination fees (RTFs), which are fees payable by the buyer if it fails to consummate the transaction in certain circumstances, do not implicate the same fiduciary duty concerns for buyers as termination fees do for target company boards. Buyers are not undergoing a change of control and so their directors' duties to stockholders are generally subject to the deferential business judgment rule, at least in Delaware. As a result, the size of RTFs are less scrutinized by the courts. The most prevalent types of RTFs are financing RTFs and antitrust RTFs, with antitrust RTFs generally seeing an uptick since 2021, coinciding with increased antitrust regulatory scrutiny and enforcement in M&A transactions. The size of the antitrust RTFs generally are less impacted by what is "market" as compared to financing RTFs (where the risk being allocated relates to macroeconomic conditions that could lead to financing failure, such as rising interest rates and general availability of capital). While antitrust risk exists against

10. "Go-shop" covenants are included in a minority of deals. Approximately 8.5% of deals include this provision according to the ABA 2024 U.S. Public Target Deal Point Study.
11. https://cdn.hl.com/pdf/2025/2024-transaction-termination-fee-study.pdf

the backdrop of a given antitrust enforcement environment, it is specific to the companies involved and can be heavily influenced by the scope of the antitrust efforts covenants that the parties negotiate in their acquisition agreement.

Target company boards and their advisors should be armed with knowledge of the types of termination fees available to allocate completion risk between the parties and be prepared to consider and document the target company board's assessment of the use of termination fees in the context of their deal, particularly with a view to appropriately discharging the target company directors' fiduciary duties.

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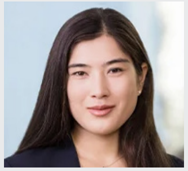

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DGCL Amendments' Impact on Going Private Transactions

In the Spring 2024 issue of *MarketCheck*, we published *What to Think About if You're Thinking About Going Private*, an article that discussed the duties, risks, procedures and other factors public company directors should consider when contemplating a going private transaction. Given Delaware's status as the most common jurisdiction of incorporation for public companies in the U.S., our discussion focused on Delaware law.[1]

However, some of our discussion became outdated on March 25, 2025, when Delaware Governor Matt Meyer signed into law Senate Bill 21 (S.B. 21), which amended the Delaware General Corporation Law (the DGCL) to provide greater clarity as to the treatment of transactions, including going private transactions, involving conflicted directors or controlling stockholders.

S.B. 21 was adopted against the backdrop of several high-profile corporate departures from Delaware and rumors about possible additional departures. According to the Office of the Governor, it was "aimed at ensuring the state remains the premier home for U.S. and global businesses." It applies retroactively to all transactions, except as to any proceeding completed or pending on or before February 17, 2025.

Below we discuss the key changes resulting from S.B. 21 and their impact on Delaware-incorporated public companies considering a going private transaction involving a conflicted director or controlling stockholder.[2] While the changes are beneficial to companies hoping to avoid protracted deal-related litigation, they are by no means an absolute shield against plaintiffs opposing controller transactions. Companies, their boards and committees and controlling stockholders should not view the changes as an excuse to relax their processes.

Recap of PRE-S.B. 21 Case Law

As we discussed in the Spring 2024 issue of *MarketCheck*, prior to S.B. 21, transactions in which a controlling stockholder is the buyer or is otherwise receiving a material benefit not shared by other stockholders were subject to the most stringent standard of review from Delaware courts, requiring the defendants to demonstrate that both the price and process for the transaction were fair to the company and its stockholders (the entire fairness standard). This stringent standard of review made it difficult for defendants to prevail at the motion to dismiss stage of a lawsuit challenging the transaction. The way to avoid the entire fairness standard was to follow the court-established *MFW* procedural protections, which required conditioning the transaction from the outset of economic negotiations (or *ab initio*) on the approval of both (i) a fully independent, disinterested special committee that is fully empowered to negotiate and approve (or reject) a transaction and (ii) the fully informed and uncoerced approval by holders of a majority of the outstanding shares held by disinterested stockholders. Satisfying the *MFW* conditions restored the standard of review to the deferential business judgment rule.

In practice, determining whether a party was a controller or whether the *MFW* requirements were met was not always straightforward. As a result, many transactions that the parties

1. As we noted in the Spring 2024 issue of *MarketCheck*, many states follow Delaware case law and therefore similar rules—albeit with sometimes important variations—may apply to corporations formed in other U.S. jurisdictions. However, it is important to note that since S.B. 21 is a legislative change, barring other state legislatures passing similar bills, non-Delaware courts are not likely to overrule their existing case law (which in many cases will be closer to pre-S.B. 21 Delaware law).
2. S.B. 21 also addresses non-going private transactions involving conflicted directors and controllers.

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structured to receive business judgment review were nevertheless examined under the entire fairness standard test, effectively precluding pre-discovery dismissal.

Key S.B. 21 Changes Applicable to Going Private Transactions

Codifies and Reduces Procedural Requirements

S.B. 21 codifies the court-established *MFW* procedural requirements of (i) a disinterested special committee and (ii) a fully informed, uncoerced vote of the disinterested stockholders. However, it does so with some notable revisions:

- First, it eliminates the *ab initio* requirement —i.e., the transaction no longer needs to be conditioned on compliance with the requirements at the outset of economic negotiations as long as it is made subject to the disinterested stockholder vote no later than the time it is submitted for stockholder approval;
- Second, the disinterested stockholder vote threshold is reduced to require that a majority of the votes *cast* by disinterested stockholders are voted in favor of the transaction (rather than a majority of the disinterested votes outstanding);[3] and
- Third, if the board determines in good faith that all members of the special committee are independent, the protections offered by the special committee will not be lost merely because it later turns out that one or more committee members were, in fact, interested or conflicted, as long as a majority of the disinterested directors on the committee had approved the transaction.

Finally, compliance with these requirements no longer results in the application of the deferential business judgment rule; rather, if the court finds that these requirements are satisfied, S.B. 21 expressly bars equitable relief or an award of damages arising from a fiduciary duty breach by a director or controller. A conflicted controller transaction that does not comply with these requirements will remain subject to entire fairness review.

Increased Clarity About Controllers and Disinterested Directors

As noted in the Spring 2024 issue of *MarketCheck*, prior to S.B. 21, there was no bright-line minimum stockholding requirement for a minority stockholder to be treated as a controller. The applicable test was multifactored and flexible with an "I know it when I see it" quality.

Now, a stockholder holding less than one third of the voting stock cannot be a controlling stockholder unless that stockholder has a right to cause the election of directors having a majority of the voting power of the board. A minority stockholder that holds more than one-third of the voting stock would be considered a controller only if it has the "power functionally equivalent" to that of a majority stockholder, with the "power to exercise managerial authority over the business." S.B. 21 also eliminates the court-created concept of "transactional control," in which a stockholder not otherwise a controller could nevertheless be deemed to be a controller if it had significant influence with respect to the specific transaction being challenged.

With respect to directors, while some recent Delaware judicial opinions have taken a broad view of the circumstances that could give a director a disabling conflict, S.B. 21 codifies defined terms and presumptions that govern whether a director is considered "interested," including: (i) setting out more clearly what interests and relationships are considered "material" and (ii) creating a presumption of disinterestedness where the director is deemed to be independent for national securities exchange purposes, which presumption may be rebutted

3. This threshold reduction does not apply to tender offers since S.B. 21 makes clear that in a tender offer, shares of stock tendered are deemed to have voted for the transaction, and all other shares of stock are deemed to have voted against the transaction for purposes of determining whether the required approval of disinterested stockholders has been obtained.

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only by "substantial and particularized facts" that a director has a material interest in the transaction or a material relationship with a person who has a material interest in the transaction.

Books-and-Records Demands

S.B. 21 also significantly limits the scope of materials available pursuant to books-and-records demands under Section 220 of the DGCL. Although plaintiffs still have the right to access a fairly comprehensive set of materials, the list does not include electronic communications (other than a narrowly defined set of such communications to stockholders)—effectively meaning that directors' emails and text messages can no longer routinely be requested as part of books-and-records demands. Prior to S.B. 21, such requests often led to expansive pre-suit discovery, with plaintiffs using the materials obtained to support allegations that the transacting parties failed to comply with the *MFW* requirements.

Practical Impacts on Future Going Private Processes

While the changes implemented by S.B. 21 should make dealmaking more efficient by providing a more predictable path for avoiding protracted deal litigation, they do not spell the end of stockholder litigation over controller transactions. Participants in such transactions will need to remain vigilant.

Two ways in which plaintiffs are likely to recalibrate their approach include the following:

- **Challenging Good Faith Determination of Disinterestedness:** While no longer able to have their claim survive by disqualifying a single member of a special committee as not disinterested, plaintiffs might instead challenge whether the board acted *in good faith* in determining the disinterestedness of the committee members (with questions about "good faith" being used as justification for additional discovery); and
- **Challenging "Fully Informed" Requirement:** Even as the disinterested stockholder approval threshold is reduced to a majority of the shares voted, the requirement that the vote be fully informed remains. As a result, allegations of inadequate or misleading disclosure are poised to become an even more important argument by plaintiffs looking to get past a motion to dismiss or summary judgment and back to the entire fairness test.

Additionally, while S.B. 21 removes the *ab initio* requirement, companies should remain attentive to the need to establish a special committee promptly upon determining that a potential transaction involves a controller as the buyer or the controller otherwise receiving a material benefit not shared with other stockholders. Not only is it helpful as a practical matter to give the special committee as much time as possible to act on its mandate, it will also provide protection in case the transaction ends up subject to entire fairness review as a result of (i) a plaintiff's successful argument that the *S.B. 21* requirements were not complied with or (ii) the company ultimately deciding to not seek a separate disinterested stockholder vote. Parties sometimes decide to forgo such a vote due to concern that activist stockholders could seek to hold up the transaction, particularly when there is a small public float or a concentrated disinterested stockholder base. Ensuring that the special committee had sufficient time to negotiate and consider the transaction with its advisors will remain a key element in establishing that the "process" was fair.

In summary, while S.B. 21 provides a welcome set of clarifying ground rules, *there remains a lot to think about if you're thinking about going private.*

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Economic Security Is National Security

In clarifying that economic security is national security, the Trump administration could increasingly use national security regulatory regimes to enhance U.S. economic objectives. The Trump administration's February 21, 2025 America First Investment Policy has formalized its policy that economic statecraft is a part of U.S. national security policy by declaring that "[e]conomic security is national security." As a result, we can expect to see the United States government increasingly employ its national security tools to enhance the United States's economic interests, including in support of industrial policies such as increased domestic manufacturing, energy productions, technological development, and domestic supply chains. These national security tools include inbound investment restrictions, outbound investment restrictions, and supply chain regulations, among others.

Expansion of U.S. Inbound Investment Restrictions

The America First Investment Policy states that "the United States will use all necessary legal instruments"—such as the Committee on Foreign Investment in the United States (CFIUS), which has the power to limit foreign investment in the United States including through the imposition of risk mitigation measures—to restrict China-connected investments in critical U.S. sectors, including "technology, critical infrastructure, healthcare, agriculture, energy, [and] raw materials...." In particular, we expect CFIUS increasingly to protect real estate and farmland near sensitive military sites, strengthen its authority over greenfield investments, and limit foreign adversary access to U.S. talent and operations in sensitive technologies (especially those related to Artificial Intelligence) through expansion of the range of "emerging and foundational" technologies within CFIUS' jurisdiction.

CFIUS will apply a proportional standard in restricting investments in key areas such as critical technologies, critical infrastructure, personal data and other sensitive areas. These "restrictions on foreign investors' access to United States assets will ease in proportion to their verifiable distance and independence (which has yet to be defined) from the predatory investment and technology-acquisition practices" of foreign adversaries or other "threat actors." Further, through "objective standards," the administration will create an expedited review process for investments from yet-to-be-specified allied and partner sources. This

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"fast track" will apply to investments in advanced technology and "other important areas," and it will require investors to "avoid partnering" with foreign adversaries.

As a result of these developments, foreign investors into the United States will face difficult choices. For example, because eligibility for expedited CFIUS reviews will be conditioned in part on investors' "distance" from China, firms may have to pare back their China-related investments and supply chains if they want to gain "fast-track" access. The increased scrutiny of China- and other foreign adversary-affiliated investments, including through private equity and complex acquisition structures, can be expected to extend to minority investments as the administration seeks to determine whether investments are sufficiently "passive" to overcome concerns regarding "affiliation."

Further, CFIUS has been instructed to limit its use of complex and open-ended risk mitigation measures. While this instruction may be intended to address the concerns of investors from allied countries regarding onerous risk mitigation measures, in taking a more targeted and less resource-intensive approach to mitigation, CFIUS can be expected to prohibit "adversary" investment outright rather than entering into mitigation agreements.

Expansion of U.S. Outbound Investment Restrictions

As part of its ongoing review of President Biden's Executive Order 14105 ("Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern"), the administration is weighing new or expanded restrictions on outbound investment in the PRC. These restrictions would target areas of concern related to China's military-industrial sector, including semiconductors, AI, quantum computing, biotechnology, hypersonics, aerospace, advanced manufacturing, directed energy, and other areas related to the PRC's Military-Civil Fusion strategy.

Notably, the memorandum reflects the administration's posture towards universities by stating, "[i]t is past time for American universities to stop supporting foreign adversaries with their investment decisions, much as they should stop granting university access to supporters of terrorism," and signals the use of national security regulatory tools to address the administration's priorities.

Expansion of U.S. Supply Chain Regulations

On February 4, 2025, the final rule implementing Information and Communications Technology and Services (ICTS) supply chain restrictions became effective. The ICTS supply chain rule prohibits certain transactions involving information and communications technology and services that are "designed, developed, manufactured, or supplied by persons, owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries," whenever the Secretary of Commerce, in consultation with other federal officials, determines that such a transaction poses an undue or unacceptable risk to U.S. national security.

The supply chain rule broadly defines the scope of covered ICTS transactions to include information and communications technology and services that are integral to critical infrastructure; data hosting, computing, or storage; connected software applications, including for use in autonomous vehicles; certain network or communications systems such as mobile networks, wireless local area networks, and satellite operations; or certain sensitive technologies including AI, quantum computing, clean energy generation, drones, and robotics.

We have already seen the U.S. government use its ICTS supply chain authority based on the prior interim rule: on June 20, 2024, the government issued its first final determination under the ICTS supply chain rule, targeting Kaspersky Lab Inc., the U.S. subsidiary of a Russia-based antivirus

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software and cybersecurity company, and its affiliates, subsidiaries, and parent companies. The final determination prohibits Kaspersky from providing certain antivirus products and services in the U.S. or to U.S. persons wherever located. It also prohibits, in the U.S. or to U.S. persons, the resale of Kaspersky cybersecurity or antivirus software, its integration into other products and services, or its licensing for purposes of resale or integration into other products or services.

The U.S. Department of Commerce, Bureau of Industry Security, Office of ICTS have identified several technology priorities as the most critical ICTS national security risks most likely to be the focus of investigations and relating to regulatory attention, including enforcement actions:

- Satellite Access Points
- Mobile Network Hardware
- Advanced and Networked Sensors
- Energy Generation and Storage
- Autonomous Systems and Robotics
- Semiconductors and Microprocessors
- Infrastructure as a Service
- Advanced Cloud Services
- Network Security & Operations
- Artificial Intelligence
- Space Technologies and Systems
- Advanced Computing
- Data Privacy and Cybersecurity
- Positioning, Navigation, and Timing
- Quantum Information Technologies

The Executive Director of BIS's Office of ICTS has announced that BIS will conclude several ongoing investigations and publish final determinations impacting these industries in the near future.

As the administration's formalized policy that economic security is national security takes root, we expect to see other national security regulatory regimes—such as economic sanctions, export controls, and data localization rules—also used in a protectionist manner.

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GUEST ARTICLE: Current Market Trends in M&A Insurance Products

Over the past 25 years, the primary M&A-focused lines of insurance—Representations & Warranties Insurance (RWI), Tax Insurance and Litigation/Contingent Liability Insurance—have all evolved from somewhat esoteric novelties into reliable and (mostly) predictable tools in the M&A practitioner's toolbox. Of the three, RWI is the clear leader of the pack in terms of volume and overall impact on M&A negotiation, with more than half of all private M&A transactions closed annually in North America featuring insurance as the sole or primary source of recovery to a buyer in the event of breach of the seller's representations and warranties. As placement levels have reached critical mass over the years with thousands of RWI policies bound per annum, the market has evolved and now behaves like a truly mature ecosystem for established financial products, responding rationally to both macroeconomic and industry-specific factors.

In 2021, the massive volume of M&A activity was both a challenge and a blessing for the RWI marketplace. The activity in 2021 exhausted the capacity of several underwriters by the time the fourth quarter arrived, both financially and practically, as some carriers hit annual limit of liability caps or premium caps, while others (and their underwriting counsel) were simply not staffed adequately to handle the deluge. This supply/demand conundrum resulted in premiums skyrocketing by the end of the year to levels not previously seen. Some clients, in fact, struggled to find any available insurance capacity at all if their target operated in a heavily regulated industry or if the purchase price/premium opportunity was too small. The rational response of the market was to staff up and increase budget projections—however, given the comparatively mild level of M&A activity that we have seen since 2022, the supply/demand dynamic has flipped. With a record number of carriers now quoting deals and facing heady budget expectations, we have essentially had too much capital chasing too few deals, and not surprisingly, competition plunged rates in 2024 to the lowest levels that we have seen in well over a decade and the lowest levels that we have ever seen for the current coverage iteration of RWI (i.e., expansive definitions of loss that do not carve out multiplied damages/diminution in value claims, very few exclusions and very low self-insured retentions (i.e., deductibles)).

While the front end of the RWI marketplace has sped along this roller coaster of rate fluctuation, the back end of the market—i.e., claim activity—has remained remarkably constant. RWI carriers have for many years experienced a remarkably consistent claim notice rate of approximately 20-25% of policies bound. While most of those claims do not result in payouts under the policy because they either settle within the retention/deductible, or simply fade into the mist with no client follow-up after the initial notice, roughly 3-5% of policies will pay at least a dollar of loss above the policy limit. However, because current RWI policies no longer exclude claims for diminution in value that can yield damages in a settlement premised on a multiple of "missing" EBITDA resulting from the breach, many of these claims can be quite significant. What was once thought to be a claim-free (or at least claim-light) insurance marketplace has actually yielded billions of dollars in claims payments, and the industry as a whole now pays out hundreds of millions of dollars in claims on an annual basis. It is not at all uncommon for a carrier to have an "upside-down" policy year (i.e., a year in which the amount paid out for claims is greater than the premiums received).

This combination of a prolonged period of historically low rates coupled with a steady stream of material claims, with several carriers

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suffering one or more unprofitable years in the recent past, has resulted in a push by underwriters to increase rates in order to maintain long-term profitability and viability. The industry is now armed with more economic data than ever before, and the reinsurance community that absorbs a significant portion of the risk taken on by RWI underwriters has stated in no uncertain terms that the continued availability of reasonable reinsurance support requires some adjustment to the industry's average premium rate. It should be noted here that this same reinsurance community also reinsures Tax Insurance, which is essentially insurance against an adverse finding on an ambiguous tax position taken by a client, and Litigation/Contingent Liability Insurance, which is largely focused on protection against an adverse judgment in a litigation or the overturning of a judgment in the insured's favor by an appeals court. While the Tax Insurance market has generally fared well from a claims perspective, the Litigation/Contingent Liability Insurance Market has been beset by several large, nine-figure claims in the last 18 months. Although a different product line than RWI, all of these policies are generally underwritten by the same "M&A Insurance" unit within a carrier and will often be lumped together in a package of reinsurance called a "treaty." The significant losses on the Litigation/Contingent Liability Insurance book have only added more urgency to the reinsurance community's push for premium rate relief on each of the product lines discussed above.

So, where does this leave us in 2025, and where do we expect the transaction liability insurance market to go from here?

On the RWI front, I think we can safely assume that, given the benefits that the product affords M&A practitioners and clients—namely, increased efficiency in deal process, broader indemnity terms for buyer, faster release of closing proceeds to sellers and more efficient claim processes that do not typically involve the seller(s) (who, by the way, may now be the buyer's minority equity partner or the management team running the acquired business for the buyer)—RWI as an M&A solution is not going anywhere. However, we should expect carriers, particularly those who have established themselves as responsible partners on the claims side, to push for increased rates over the coming year. RWI (like most insurance products) is priced in terms of "rate on line," or the cost of the policy as a function of the limit of liability purchased. So, a $250,000 premium on a policy with a $10,000,000 limit of liability would be reflected as a 2.50% rate on line. That 2.50% is roughly where rates have been sitting for some time, plus or minus 25 basis points in either direction. Several of the largest carriers in the space have expressed that their claims data now indicates that rates should sit roughly 100 basis points higher, in the 3.50% rate on line range, in order to ensure long-term profitability. Whether that is the correct threshold or not for profitability is obviously debatable and will remain subject to broader market forces, but the message is clear: carriers that have consistently paid claims responsibly will be pushing for rates that start with a "3" in the very near term. While most of the industry was expecting a meaningful uptick in deal activity this year with interest rates continuing to recede and a supply/demand dynamic that would support such an increase in rate, it will be fascinating to watch the RWI market respond to the macroeconomic volatility and lack of economic and political predictability that we all now face. As of this writing in mid-April, M&A activity has once again slowed dramatically given the lack of certainty around global tariffs proposed by the United States and their negative impact not only on near-term trade but also on longer-term inflation and projected cash flow at potential targets. This continued lack of deal volume will provide a strong headwind against the broad carrier sentiment for an increased premium environment.

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Current Market Trends in M&A Insurance Products (continued from page 12)

While a meaningful increase in deal flow could afford carriers additional leverage to dictate deal terms and impose coverage limitations, we do not expect an uptick in activity to produce drastically different coverage terms aside from pricing. Broad loss definitions and reasonable exclusions/limitations on the breadth of the representations and warranties being covered should now be considered the price of admission for experienced underwriters in any M&A environment. Similarly, while self-insured retention levels have declined alongside premium over the past five years, the general consensus is that these lower retention levels have not increased moral hazard for the carriers or contributed negatively to overall loss experience on a level close to the perceived premium imbalance, and so we are not expecting retentions to move materially even in the event of a bull run.

It is worth noting with regard to Tax Insurance and Litigation/Contingent Liability Insurance that the negative loss experience on the litigation side of the house discussed above has had a major impact on not just the pricing of litigation-based policies but the very availability of insurance capacity to underwrite those risks. Several carriers have simply stopped underwriting litigation risk, and the overall market capacity for litigation risk has declined precipitously. Other carriers have opted to underwrite only known legal risks that are not in active litigation. By contrast, and despite generating generally successful underwriting results, the Tax Insurance market has been a bit of an innocent bystander in this equation, and while available capacity for tax risk has also contracted, it has done so marginally and only for a narrow subset of tax risks. Pricing for tax risks has generally remained static, whereas the question around litigation risk is no longer one of pricing alone but also one of availability depending on issue size and type.

Ultimately, the next few months and years promise to be a fascinating period for the M&A community, and the transactional insurance market will continue to be a material participant in that journey, always sensitive and responsive to macroeconomic trends and ever-increasing claims data.

Guest Author

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The Blurbs

Delaware Supreme Court Clarifies Standard of Review for Controlled Companies Seeking to Redomesticate Outside Delaware

Delaware corporations looking to redomesticate[1] to another state should take note of a recent Delaware Supreme Court opinion[2] that reverses a February 2024 Court of Chancery decision and clarifies that the business judgment rule is the presumptive standard of review for redomestication. In *Palkon v. Maffei*,[3] the Delaware Court of Chancery permitted stockholders to pursue claims that TripAdvisor's board of directors and Greg Maffei, its controlling stockholder, CEO and Chairman, breached their fiduciary duties when TripAdvisor's board decided to move TripAdvisor's state of incorporation from Delaware to Nevada. The lower court determined that the conversion was a self-interested transaction because it would provide a non-ratable benefit to the controlling stockholder and directors in the form of greater litigation protection from suits by minority stockholders. As a result, the lower court denied the defendants' motion to dismiss, finding that the conversion should be judged under the test of entire fairness.

On appeal, the Delaware Supreme Court reversed the Court of Chancery in a unanimous decision, holding that the business judgment rule is the presumptive standard for reviewing a corporation's decision to redomesticate to another state. The Court found that the lower court erred in determining that the stockholder plaintiffs had alleged sufficient facts to subject the conversion to entire fairness review, stating that the "hypothetical and contingent" impact of Nevada law on future unknown corporate actions was too speculative to constitute a material non-ratable benefit that would trigger entire fairness review. An important factor in the Court's holding was that at the time the board approved the redomestication, TripAdvisor was not facing any threatened or pending claims that would be impaired by redomesticating to Nevada. Accordingly, the Court concluded that the stockholder plaintiffs failed to show that any reduction in exposure to liability under Nevada law would provide a material benefit to the controlling stockholder and directors. In contrast, the Court seemed to suggest that if a corporation's decision to redomesticate was made in order to avoid litigation claims or in contemplation of a particular transaction, the redomestication might provide a material non-ratable benefit, citing several precedents where entire fairness was found to be the appropriate standard of review when transactions impacting stockholder litigation rights were not approved on a "clear day" (i.e., when the corporation is not facing any existing or threatened litigation and is not contemplating a particular transaction).

The Delaware Supreme Court's holding in *Maffei v. Palkon* should provide assurance to Delaware companies seeking to redomesticate that their decision will not be subject to entire fairness review, so long as the decision is made on a clear day.

1. While the Delaware judiciary has received some public criticism in recent years, particularly from Elon Musk following the Court of Chancery's decision in *Tornetta v. Musk* in January 2024 (rescinding Musk's compensation award at Tesla), the number of Delaware public companies seeking to redomesticate to another U.S. state remains relatively small, but there has been a notable uptick in 2025 compared to prior years. For an overview of Delaware public companies that have sought to redomesticate to another U.S. state in the last five years, please refer to the charts starting on page 20 of this issue. The charts summarize the companies' stated rationales for redomestication, what states they are moving to, and whether they are a controlled company. It is also worth noting that we saw a substantial uptick in the number of U.S. IPOed companies choosing Nevada as their state of incorporation following the *Tornetta* decision (16.8% of companies that IPOed following the January 2024 decision compared to only 6.6% of companies in the 3 years prior to the decision). For more information on the state of incorporation chosen by U.S. IPOed companies in recent years please refer to the chart on page 25 of this issue.
2. *Maffei. v. Palkon*, C.A. No. 2023-0449-JTL (Del. Feb. 4, 2025).
3. *Palkon v. Maffei, et al.*, C.A. No. 2023-0449-JTL (Del. Ch. Feb. 20, 2024). For a more detailed summary of the Chancery Court's opinion, see our blurb "Leaving Delaware? It May Cost You" in the Spring 2024 issue of *Market Check*.

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Practice Note: SEC Updates Guidance on Use of Sign-and-Consent Structures in Stock Deals

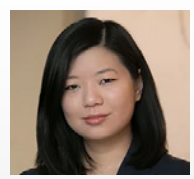
On March 6, 2025, the staff of the Division of Corporation Finance of the Securities and Exchange Commission (SEC) issued an updated Compliance and Disclosure Interpretation (C&DI) relating to the use of written consents in certain business combination transactions, reversing its previous guidance on the topic and confirming the change in enforcement that we reported on in a prior practice note.

In a business combination transaction involving a target company with a majority stockholder, an acquiror often requests the stockholder to deliver a written consent immediately after the execution of the transaction agreement. This is known as a "sign-and-consent" structure, which has the advantages of eliminating the need to convene a stockholders' meeting to approve the transaction, accelerating the closing timeline and enhancing the acquiror's deal certainty, because the deal cannot be disrupted by an interloper once the stockholder vote is obtained. Absent a written consent, an acquiror might seek to bind management and principal security holders through a voting agreement to vote in favor of the transaction at the stockholders' meeting, but these voting agreements are subject to scrutiny under Delaware law.

In a 2008 C&DI, the SEC staff objected to sign-and-consent structures in transactions where the target stockholders were to receive stock consideration registered on a Form S-4. The staff's rationale was that the sign-and-consent structure effectively resulted from a private offer by the buyer to management and significant stockholders to purchase buyer's common stock, and "once begun privately, the transaction must end privately." The staff would therefore object to the subsequent registration of buyer's common stock on the Form S-4. As noted in our prior practice note, the SEC was no longer in the practice of enforcing this portion of the C&DI, and several transactions have closed under the sign-and-consent and a subsequent Form S-4 filing playbook with no objections from the SEC.

The SEC has now officially updated the C&DI to align with its current practice of permitting subsequent registration of offers and sales of the buyer's securities on Form S-4 (or Form F-4) when a sign-and-consent structure has been implemented, provided that: (1) the insiders of the target company who provided written consents are offered and sold buyer securities only in an offering validly exempt from the Securities Act, and (2) the registered securities (on either Form S-4 or F-4) are offered and sold only to security holders who did not sign onto such written consent. This means that the SEC staff will allow stock-for-stock mergers to proceed with a combination of exempt offerings to target company insiders who executed written consents approving the transaction and a registered offering for other target company stockholders.

Author



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Industry Updates

Life Sciences Regulatory

The second Trump administration is expected significantly to affect Food and Drug Administration (FDA) policies and priorities, creating potential opportunities—and obstacles—for life sciences companies and investors. HHS Secretary Robert F. Kennedy Jr. will likely play a bigger role in directing policy at FDA than has been typical in past administrations. Dr. Martin A. Makary, tapped for the role of FDA commissioner, is respected within the medical community and is a proponent of technology-driven, innovative approaches to healthcare, which will be essential as FDA continues to develop policies addressing the use of artificial intelligence in medical devices, drug discovery and manufacturing.

At the same time, FDA recently lost approximately 700 of its 18,000 employees, about 25 of whom, according to industry trade association AdvaMed, are experts in artificial intelligence (although some have purportedly been rehired since). Although it is too early to assess the impact of the loss of so many employees with technical expertise, the industry could expect fewer inspections, recall delays, longer review times (including for devices incorporating AI), and slower development of the agency's regulatory agenda (including AI regulatory framework). Future rounds of firings could impact other FDA centers as well.

In addition, Mr. Kennedy, a critic of the pharmaceutical industry, has proposed cutting FDA's $7.2 billion budget in half and doing away with industry user fees (which account for nearly half of the agency's budget). Although such changes should require congressional approval, any significant budget cuts could ultimately negatively impact product review timelines.

Given Mr. Kennedy's long-standing focus on vaccine safety, we anticipate greater scrutiny in this area, both regarding vaccines under development and those already on the market. He already directed the Centers for Disease Control and Prevention (CDC) to cease a campaign promoting seasonal flu shots, cancelled a meeting of the Advisory Committee on Immunization Practices (ACIP), and is reportedly planning on removing ACIP members due to alleged conflicts. It remains to be seen how Mr. Kennedy's efforts ultimately drive vaccine policy changes at FDA.

Mr. Kennedy's "Make American Healthy Again" agenda is expected to affect FDA regulation of foods, food additives, and color additives but could also result in an emphasis on consumer health, including digital health innovations and over-the-

Continued on next page

counter drugs that permit greater self-care without physician intervention.

Life sciences companies and investors should be cognizant of the potential for abrupt policy changes impacting FDA regulated companies, including potential increased enforcement in certain areas. For example, Mr. Kennedy has expressed a desire to ban direct-to-consumer prescription drug advertisements, and although a ban would be subject to challenge under the First Amendment, FDA's Office of Prescription Drug Promotion may nonetheless increase enforcement of prescription drug advertising. In addition, we anticipate greater scrutiny of foreign suppliers of FDA-regulated products and ingredients, particularly those located in China.

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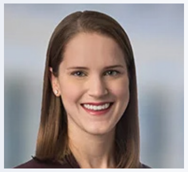

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Technology M&A

Dealmakers are expecting to see increased M&A activity in the technology space in 2025. After a multiyear industry stall, deal activity in the technology space saw an uptick in 2024. This trend has continued into 2025, where a number of major transactions have already occurred, including IBM's announcement of its acquisition of HashiCorp (known for its Terraform infrastructure automation tool) and its intent to acquire DataStax to increase its artificial intelligence capabilities. The enthusiasm for artificial intelligence and possible changes in the regulatory landscape in the United States are likely to continue to drive this increase in deal activity forward.

The Corporate Focus on AI

Corporations are recognizing the need to build—or buy—artificial intelligence technologies to remain competitive. This strategic shift has occurred concurrently with increased deal activity among large technology companies and fewer common players in the tech M&A space. Recently, there has been an increase in M&A activity by non-technology companies looking to invest in artificial intelligence and by private equity firms, who are expected to be active in the tech M&A space in 2025 after decreased capital spend in 2024 related to the uncertainty generated by the United States presidential election.

A Shifting Regulatory Landscape

While the current political landscape in the United States remains volatile, expected post-election policy changes, including a reduction in interest rates and a policy of deregulation, would invite M&A activity in the tech space. President Trump's campaign focused on deregulation, including potentially reducing the size and oversight powers of regulatory groups such as the AI Safety Institute and removing regulatory frameworks overseeing the growth and use of cryptocurrency. Political changes, such as the new oversight of the Federal Trade Commission, could lead to fewer regulatory roadblocks in the technology space or reduced antitrust enforcement.

The IPO Market Continues to Lag

While the tech M&A space has opened up in recent months, initial public offerings (IPOs) have continued to lag. Newly introduced tariffs have resulted in the pause of anticipated IPOs by Klarna and StubHub. However, if the extreme market volatility can lessen and interest rates can stabilize, we may very well see increased IPO activity in the second half of 2025 or early 2026.

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The Evolving Climate for Diversity, Equity and Inclusion

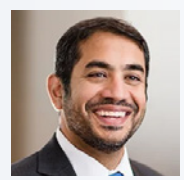
In the first four months of the second Trump administration, the President and federal agencies have pursued DEI practices that they consider to be illegal, sending companies and institutions scrambling to ensure compliance with the changing legal landscape for DEI. President Trump has issued a number of DEI-related executive orders, such as "Ending Radical and Wasteful Government DEI Programs and Preferencing" (EO 14151), which, among other actions, dissolves the Employee Engagement Diversity Equity Inclusion Accessibility Council within the Office for Civil Rights and requires the cancellation of ongoing DEI training contracts at federal contractors, and "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (EO 14173), which notably revokes Lyndon B. Johnson's Executive Order No. 11246, which had required federal contractors to comply with race and gender affirmative action obligations.

Multiple lawsuits have been filed challenging the various DEI-related actions of the administration. In *National Association of Diversity Officers in Higher Education, et al. v. Trump, et al.*, a Maryland district court enjoined parts of EO 14151 and EO 14173; however, that injunction was lifted on March 14 by a Fourth Circuit panel. On March 27, in *Chicago Women in Trades v. Trump*, an Illinois district court enjoined the Department of Labor from implementing a requirement for federal contractors and grant recipients to certify that they do not operate DEI programs in violation of the relevant executive orders. As these lawsuits wend their way through the courts, the enforcement status and the scope of these DEI-related executive orders and related actions will continue to change.

Regardless of the enforcement of the executive orders, the focus on corporate DEI activities at the federal level is unlikely to wane any time soon. On March 19, 2025, the EEOC and DOJ issued two joint guidance documents on DEI-related workplace discrimination, shedding more light on the types of practices considered as "illegal DEI" under this administration. The guidance highlighted that impermissible discrimination includes employment decisions motivated by protected characteristic (e.g., using hiring quotas) and "limiting, segregating, or classifying employees" based on protected characteristics (e.g., closed-membership affinity groups). The guidance further warned that DEI trainings, based on their content, application, or context, may give rise to a hostile work environment, and opposition to attending such trainings by employees may constitute a protected activity. Inclusive and neutral DEI programs and practices remain permissible.

Accordingly, companies should consider auditing their own DEI-related practices and conducting due diligence the DEI practices of targets in M&A transactions—whether related to employment or other business practices—to determine the level of risk that each of the practices may present in the current environment. For example, companies should ensure current practices comply with existing anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 (which prohibits employment discrimination based on race, color, religion, sex, or national origin) or Section 1981 of the Civil Rights Act of 1866 (which prohibits racial discrimination in the making and enforcement of contracts). Companies should also consider assessing whether corporate communications and marketing material touching on DEI-related topics describe the company's policies and practices thoughtfully and accurately.

Authors



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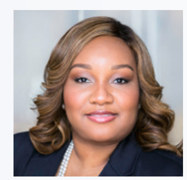

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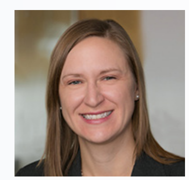

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Deal Nook

On March 6, 2025, after nearly a century as a publicly traded company, Walgreens Boots Alliance, Inc. (WBA) announced it had entered into a definitive agreement to be taken private by Sycamore Partners. As part of the transaction, Stefano Pessina, the executive chairman of the board of directors of WBA and beneficial owner of approximately 17% of the shares of WBA's common stock, agreed to reinvest his cash merger consideration and invest additional cash into the equity of the post-closing business.

WBA stockholders are entitled to receive per-share consideration that consists of $11.45 in cash and one divested asset proceed right (the DAP Right). The DAP Right is a contingent right that generally entitles the holder to receive its pro rata portion of 70% of the net proceeds from any monetization of VillageMD, up to a cap of $3.00 per share. The per-share cash consideration represented a premium of 29%, and the per-share consideration including the maximum payment under the DAP Right represented up to a 63% premium, to the WBA closing share price of $8.85 on the day prior to the first media reports regarding the potential transaction.

This DAP Right is a rare instance of a contingent value right being used outside of the life sciences industry. In the life sciences industry, contingent value rights are typically tied to future milestone events such as product commercialization, clinical trial outcomes and obtaining regulatory approvals. In the WBA take-private, the DAP Right provides WBA stockholders with potential upside in the event of any disposition of the VillageMD business, which WBA had previously tried to divest and Sycamore Partners had difficulty valuing for purposes of the cash merger consideration to be paid at closing. To protect the rights of WBA stockholders to future proceeds under the DAP Right, a committee of three pre-closing directors of WBA will be formed to act as "Shareholder Representative." A representative of the Shareholder Representative, together with two representatives appointed by Stefano Pessia and Sycamore Partners, will participate in a three-person sales committee tasked with conducting the sales process, taking into consideration the benefit of maximizing the value of the VillageMD business.

The board of directors of WBA negotiated for additional procedural protections for its stockholders, including a "go-shop" provision and an unaffiliated vote requirement. The 35-day go-shop period permitted WBA to solicit alternative proposals with a lower termination fee ($158,000,000, or 1.55% of fully diluted equity value, instead of $316,000,000, or 3.1% of fully diluted equity value) to enter into superior proposals during the go-shop period or for 20 days thereafter with respect to any qualifying excluded parties if they had made a proposal during the go-shop period. The go-shop period expired without receipt of an acquisition proposal. The deal is also conditioned on approval by shareholders holding a majority of WBA's outstanding shares, as well as a majority of the votes cast by unaffiliated stockholders (which excludes Stefano Pessina; John Lederer, a member of the board who is also a senior advisor to Sycamore and chief executive officer of Staples, Inc., a Sycamore portfolio company; and Sycamore Partners and their respective affiliates) at the stockholders meeting.

Note: Debevoise represents Stefano Pessina, executive chairman of the board of directors of WBA, in this transaction.

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The Charts

Delaware Public Companies Redomesticating to Another U.S. State: 2020-2025[1]

2025					
Company Name	**Proxy Filing Date**	**Controller?[2]**	**Status**	**New State**	**Rationale**
Affirm Holdings, Inc.	5/12/25	Yes	Pending (stockholder vote scheduled for June 25, 2025)	Nevada	• Predictability in decision-making and less judicial interpretation • Inceasingly litigious environment in DE
MercadoLibre, Inc.	4/28/25	No	Pending (stockholder vote scheduled for June 17, 2025)	Texas	• Significant operations in TX • More flexibility and simplicity in corporate governance • DE Franchise Tax
Fidelity National Financial, Inc.	4/28/25	No	Pending (stockholder vote scheduled for June 11, 2025)	Nevada	• Predictability in decision-making and less judicial interpretation • Greater protection for D&O • Inceasingly litigious environment in DE • DE Franchise Tax
AMC Networks, Inc.	4/25/25	Yes	Pending (stockholder vote scheduled for June 5, 2025)	Nevada	• Predictability in decision-making and less judicial interpretation • Greater protection for D&O • Inceasingly litigious environment in DE • DE Franchise Tax
Madison Square Garden Entertainment Corp.	4/24/25	Yes	Pending (stockholder vote scheduled for June 9, 2025)	Nevada	• Predictability in decision-making and less judicial interpretation • Greater protection for D&O • Inceasingly litigious environment in DE • DE Franchise Tax
Madison Square Garden Sports Corp.	4/23/25	Yes	Pending (stockholder vote scheduled for June 10, 2025)	Nevada	• Predictability in decision-making and less judicial interpretation • Greater protection for D&O • Inceasingly litigious environment in DE • DE Franchise Tax
Sphere Entertainment Co.	4/22/25	Yes	Pending (stockholder vote scheduled for June 4, 2025)	Nevada	• Significant operations in NV • Predictability in decision-making and less judicial interpretation • Greater protection for D&O • Inceasingly litigious environment in DE • DE Franchise Tax

1. *Source: EDGAR* and *Stephen M. Bainbridge,* DExit Drivers: Is Delaware's Dominance Threatened? *UCLA School of Law, Law-Econ Research Paper No. 24-04, July 29, 2024.*

2. *For purposes of this chart and in line with the recent amendments to the DGCL (see our article titled "DGCL Amendments' Impact on Going Private Transactions" on page 5 of this issue for more information on those amendments), we assume that a corporation does not have a controlling stockholder if there is no one person or entity that holds more than one-third of the corporation's voting stock.*

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Delaware Public Companies Redomesticating to Another U.S. State: 2020-2025[1]

2025 (continued)

Company Name	Proxy Filing Date	Controller?[2]	Status	New State	Rationale
Roblox Corp.	4/17/25	Yes	Pending (stockholder vote scheduled for May 29, 2025)	Nevada	• Predictability in decision-making and less judicial interpretation • Inceasingly litigious environment in DE
Xoma Royalty Corp.	4/15/25	No	Pending (stockholder vote scheduled for May 21, 2025)	Nevada	• Predictability in decision-making and less judicial interpretation • Greater protection for D&O • DE Franchise Tax
Zion Oil & Gas Inc.	4/10/25	No	Pending (stockholder vote scheduled for June 4, 2025)	Texas	• Significant operations in Texas • Value of home-state incorporation and local decision-making • DE Franchise Tax
TempusAI	4/7/25	Yes	Pending (stockholder vote scheduled for May 19, 2025)	Nevada	• Predictability in decision-making and less judicial interpretation • DE Franchise Tax • More flexibility and simplicity in corporate governance
Simon Property Group, Inc.	4/1/25	No	Pending (stockholder vote scheduled for May 14, 2025)	Indiana	• Significant operations in Indiana • Value of home-state incorporation and local decision-making • DE Franchise Tax
Trump Media & Technology Group Corp.	3/18/25	Yes	Completed	Florida	• Significant operations in Florida • Inceasingly litigious environment in DE • Greater protection for directors and officers • DE Franchise Tax
Dropbox	2/10/25	Yes	Completed	Nevada	• Predictability in decision-making and less judicial interpretation • Inceasingly litigious environment in DE

1. *Source: EDGAR* and *Stephen M. Bainbridge*, DExit Drivers: Is Delaware's Dominance Threatened? *UCLA School of Law, Law-Econ Research Pape No. 24-04, July 29, 2024.*

2. *For purposes of this chart and in line with the recent amendments to the DGCL (see our article titled "DGCL Amendments' Impact on Going Private Transactions" on page 5 of this issue for more information on those amendments), we assume that a corporation does not have a controlling stockholder if there is no one person or entity that holds more than one-third of the corporation's voting stock.*

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Delaware Public Companies Redomesticating to Another U.S. State: 2020-2025[1] (continued)

2024

Company Name	Proxy Filing Date	Controller?[2]	Status	New State	Rationale
Revelation Biosciences, Inc.	12/16/24	No	Abandoned (not approved by stockholders at January 17, 2025 vote)	Nevada	• Greater protection for directors and officers • DE Franchise Tax
Eightco Holdings, Inc.	12/10/24	No	Abandoned (not approved by stockholders at January 16, 2025 vote)	Nevada	• Greater protection for directors and officers • DE Franchise Tax
Gaxos.AI Inc.	11/19/24	No	Completed	Nevada	• Greater protection for directors and officers • DE Franchise Tax
The Trade Desk, Inc.	10/3/24	Yes	Completed	Nevada	• Predictability in decision-making and less judicial interpretation • Inceasingly litigious environment in DE • Greater protection for D&O
PAM Transportation Services, Inc.	9/20/24	Yes	Completed	Nevada	• Greater protection for directors and officer • DE Franchise Tax
Tesla, Inc.	4/29/24	No	Completed	Texas	• Significant operations in Texas • Value of home-state incorporation and local decision-making
Cannae Holdings, Inc.	4/26/24	No	Completed	Nevada	• Significant operations in Nevada • Predictability in decision-making and less judicial interpretation • Greater protection for directors and officers • DE Franchise Tax
Viewbix, Inc.	2/5/24	Yes	Abandoned (approved by stockholders, but cancelled by board in 2025)	Nevada	• More flexibility and simplicity in corporate governance • Greater protection for directors and officers • DE Franchise Tax

1. *Source: EDGAR* and *Stephen M. Bainbridge,* DExit Drivers: Is Delaware's Dominance Threatened? *UCLA School of Law, Law-Econ Research Pape No. 24-04, July 29, 2024.*

2. *For purposes of this chart and in line with the recent amendments to the DGCL (see our article titled "DGCL Amendments' Impact on Going Private Transactions" on page 5 of this issue for more information on those amendments), we assume that a corporation does not have a controlling stockholder if there is no one person or entity that holds more than one-third of the corporation's voting stock.*

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Delaware Public Companies Redomesticating to Another U.S. State: 2020-2025[1] (continued)

2023					
Company Name	**Proxy Filing Date**	**Controller?[2]**	**Status**	**New State**	**Rationale**
Applied UV, Inc. (see notes)	10/2/23	Yes	Completed	Nevada	• Minimal reporting and disclosure requirements • DE Franchise Tax
Mitesco, Inc.	9/22/23	No	Completed	Nevada	• Greater protection for directors and officers • DE Franchise Tax
N2Off, Inc.	8/15/23	No	Completed	Nevada	• Greater protection for directors and officers • More flexibility and simplicity in corporate governance • DE Franchise Tax
Augusta Gold Corp.	7/28/23	Yes	Completed	Nevada	• Significant operations in Nevada • More flexibility and simplicity in corporate governance • DE Franchise Tax
Mullen Automotive, Inc.	7/10/23	No	Abandoned (originally proposed in 2022, but withdrawn before stockholder meeting, proposed again in 2023, but no quorum to be considered)	Maryland	• Greater protection for directors and officers • DE Franchise Tax
TripAdvisor, Inc.	4/26/23	Yes	Pending	Nevada	• Greater protection for directors and officers • DE Franchise Tax
LogicMark, Inc.	1/31/23	No	Completed	Nevada	• More flexibility and simplicity in corporate governance • DE Franchise Tax

1. *Source: EDGAR* and *Stephen M. Bainbridge,* DExit Drivers: Is Delaware's Dominance Threatened? *UCLA School of Law, Law-Econ Research Pape No. 24-04, July 29, 2024.*

2. *For purposes of this chart and in line with the recent amendments to the DGCL (see our article titled "DGCL Amendments' Impact on Going Private Transactions" on page 5 of this issue for more information on those amendments), we assume that a corporation does not have a controlling stockholder if there is no one person or entity that holds more than one-third of the corporation's voting stock.*

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The Charts (continued from page 23)

Delaware Public Companies Redomesticating to Another U.S. State: 2020-2025[1] (continued)

Company Name	Proxy Filing Date	Controller?[2]	Status	New State	Rationale
2022					
Fundamental Global Inc. (FG Financial Group)	10/31/22	Yes	Completed	Nevada	• Greater protection for directors and officers • DE Franchise Tax
Alset EHome International, Inc.	4/25/22	Yes	Completed	Texas	• No business in DE • DE Franchise Tax
2021					
USA Equities, Inc.	6/21/21	Yes	Completed	Nevada	• Minimal reporting and disclosure requirements • DE Franchise Tax
Enservco Corp.	5/10/21	No	Abandoned (not approved by stockholders at June 25, 2021 vote)	Nevada	• Greater protection for directors and officers • DE Franchise Tax
2020					
INDUS Realty Trust, Inc.	10/28/20	Yes	Completed	Maryland	• More flexible laws for REITs in Maryland • Most REITs are in Maryland, so more comprehensive body of law
Bravo Multinational, Inc.	9/25/20	Yes	Completed	Wyoming	• More flexibility and simplicity in corporate governance • DE Franchise Tax
Predictive Oncology Inc.	7/29/20	No	Abandoned (first proposed in July 2020; wasn't approved at stockholder meeting in September 2020; proposed again in November 2020; cancelled stockholder meeting for lack of quorum)	Nevada	• Greater protection for directors and officers • DE Franchise Tax
Saga Communications, Inc.	4/16/20	Yes	Completed	Florida	• DE Franchise Tax

1. *Source: EDGAR* and *Stephen M. Bainbridge,* DExit Drivers: Is Delaware's Dominance Threatened? *UCLA School of Law, Law-Econ Research Pape No. 24-04, July 29, 2024.*

2. *For purposes of this chart and in line with the recent amendments to the DGCL (see our article titled "DGCL Amendments' Impact on Going Private Transactions" on page 5 of this issue for more information on those amendments), we assume that a corporation does not have a controlling stockholder if there is no one person or entity that holds more than one-third of the corporation's voting stock.*

Continued on next page

The Charts (continued from page 24)

US IPOs by State of Incorporation

	1/01/2021 – 1/29/2024 Three Years Prior to *Tornetta v. Musk* Decision		1/30/2024 – 4/30/2025 Post *Tornetta v. Musk* Decision	
State of Incorporation	**IPOs**	**% of IPOs**	**IPOs**	**% of IPOs**
Alabama	1	0.2%	0	–
Arizona	0	–	1	0.9%
California	2	0.4%	0	–
Colorado	0	–	4	3.5%
Delaware	489	86.7%	84	74.3%
Florida	7	1.2%	0	–
Maryland	12	2.1%	2	1.8%
Michigan	0	–	1	0.9%
Nebraska	2	0.4%	0	–
Nevada	37	6.6%	19	16.8%
New Jersey	1	0.2%	0	–
New York	1	0.2%	0	–
North Carolina	1	0.2%	0	–
Texas	5	0.9%	0	–
Utah	2	0.4%	1	0.9%
Virginia	0	–	1	0.9%
Washington	1	0.2%	0	–
Wyoming	3	0.5%	0	–
Total IPOs	**564**		**113**	

Source: DealPointData.com

Debevoise Quarter

Below are links to articles and publications of interest.

Debevoise Digest: Securities Law Synopsis-May 2025

ESG Update-May 5, 2025

Practicing Law Institute: Insurance and Investment Management M&A Deskbook

The Federal Trade Commission Bureau of Consumer Protection Under the Second Trump Administration: Top 10 Things to Know About Priorities, Enforcement and Case Law Developments

FCPA Update April 2025

Lessons from 18 Months of EU FSR Enforcement

Washington Becomes First State to Enact a General Pre-Merger Notification Regime

Special Committee Report Issue 9

Special Committee Report Issue 8

Governance Round-Up Issue 15

Delaware Enacts Sweeping Changes to Treatment of Conflicted Transactions

New SEC Guidance for M&A Sign-and-Consent Structures and Tender Offers

Practical Guidelines for Newly Effective HSR Form

China's Foreign Investment Law – A Look Back and Ahead

Treasury Changes Course: Proposed Regulations for Spin-Offs and Other Separation Transactions

The UK Takeover Code Will Apply to Fewer Companies from 3 February 2025

Public Company M&A Priorities for 2025

2025 Checklist for Insurance Businesses

Crossword Puzzle

Across

1 Co-Founder of Trian Fund Management

5 With 9 Across, Retail Chain that Agreed to be Acquired by Sycamore Partners in March 2025

7 With 6 Down, Target of the Barbarians at the Gate

9 See 5 Across

10 Synonym for Tranche

Down

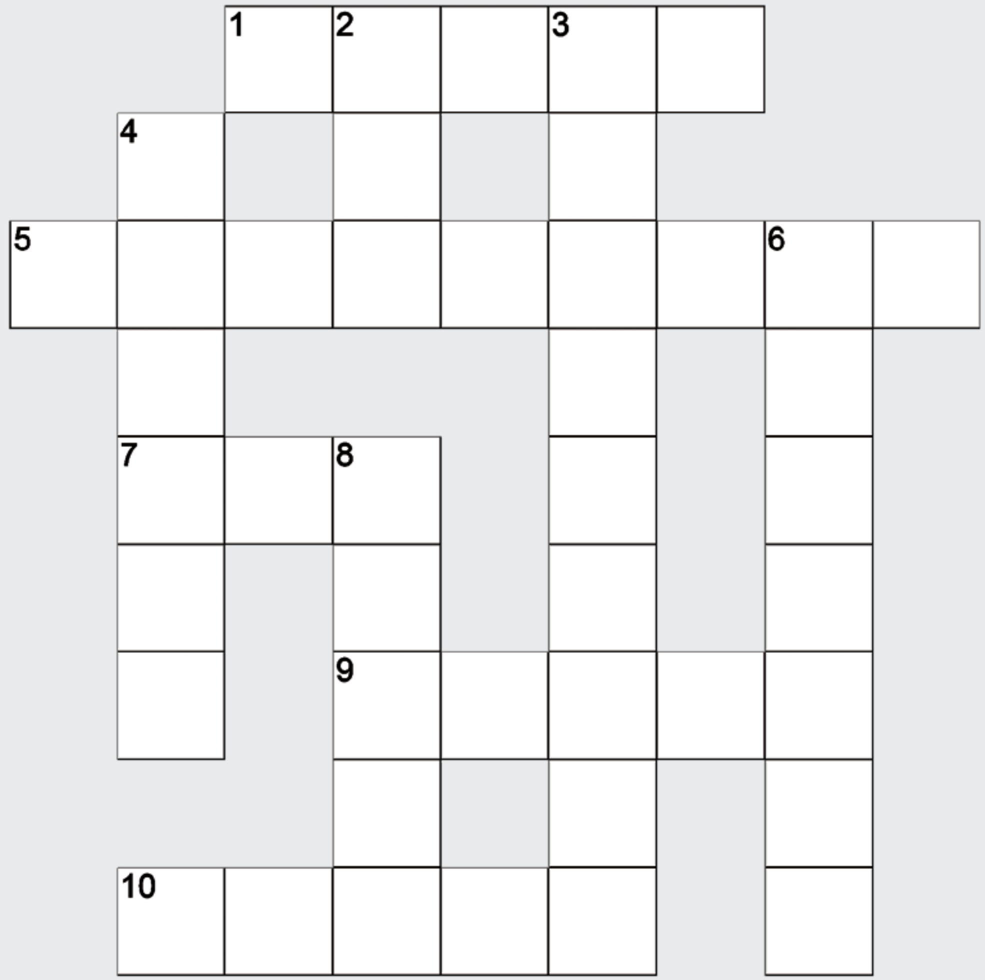
2 Framework to Assess a Company's Sustainability Efforts and Societal Impact

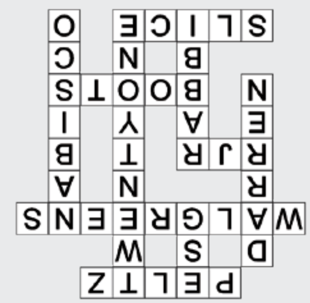
3 Delaware Senate Bill No. Addressing Conflicted Transactions

4 _____ Woods, CEO of ExxonMobil

6 See 7 Across

8 _____ Trust, Used to Defer Taxability of Certain Compensation Payments





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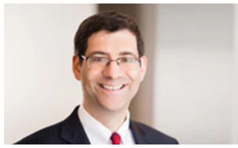

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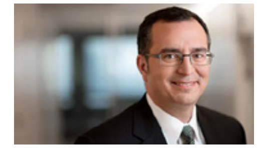

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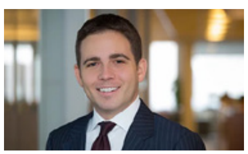

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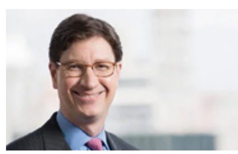

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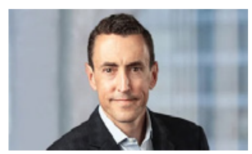

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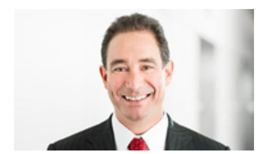

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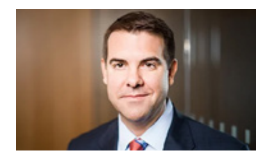

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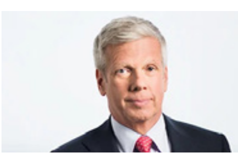

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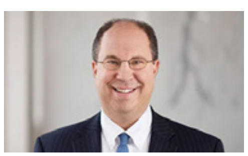

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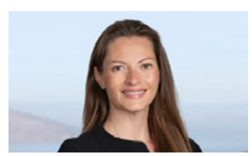

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