Debevoise & Plimpton

MARKETCHECK

The Debevoise M&A Report | Summer 2024

Editorial Board

Editor-in-Chief
Andrew L. Bab
albab@debevoise.com

Emily F. Huang
efhuang@debevoise.com

Andrew G. Jamieson
agjamieson@debevoise.com

Jonathan E. Levitsky
jelevitsky@debevoise.com

Katherine Durnan Taylor
ketaylor@debevoise.com

Caitlin Gibson
cgibson@debevoise.com

> "Sponsors or portfolio companies may want to terminate and cash out TRA rights for a host of reasons, including a perception that the timing is right to monetize the rights, a need to generate liquidity, or a desire to avoid the complexity attendant to making TRA payments over an extended period of time."

Everything You Ever Wanted to Know About Up-Cs and TRAs But Were Afraid to Ask (Part 2)

In our last issue of MarketCheck, we provided an overview of the Umbrella Partnership Corporation (Up-C) IPO structure and the Tax Receivable Agreements (TRA) that accompany such structures. This second installment will discuss some of the challenges to the structure and recent litigation involving TRAs.

For all the benefits the Up-C IPO offers to investors, the structure is not without its critics. As a reminder, in an Up-C IPO, a private equity sponsor creates and takes public a holding company (PubCo) that uses the proceeds of the offering to acquire interests in the sponsor's portfolio company (an operating entity that is taxed on a "flow through" basis (e.g., limited liability companies and partnerships)). Following completion of the Up-C IPO, pre-IPO investors typically remain in effective control of the underlying business through their voting control over PubCo, and the separation of their voting interest at the PubCo level from their economic interest at the operating entity level increases the risk of claims that decisions made by pre-IPO investors at one level or the other disproportionately benefit the pre-IPO investors over public shareholders. Unless the board implements procedural protections for minority shareholders, there is a material risk that pre-IPO investors' governance decisions will be reviewed under the strict "entire fairness" standard of review.

Early terminations of TRAs present one such risk. TRAs typically pay out most of their value in the 16 years following the IPO. Sponsors understandably look for options to monetize their TRA rights before the end of the contract's lengthy term, since they generally hold investments for substantially shorter periods. While a relatively nascent TRA market exists, the buyer of the TRA has in certain cases been the PubCo itself, which in some circumstances squarely pits the TRA holders' interests against those of the public shareholders.

In addition, individual pre-IPO investors may require distributions from the operating company to pay taxes and the operating company may elect to dividend cash for other reasons. The corresponding cash distribution made to PubCo may exceed PubCo's own tax liability, because the tax rate for corporations is lower and the tax base smaller. If PubCo does not pay the excess cash out as a dividend to the public shareholders, there is a question as to whether pre-IPO investors benefit twice from the cash, once directly when they receive the tax distribution and once indirectly

Continued on next page

when they exercise their 1:1 exchange right and succeed to an interest in PubCo, whose value may have been enhanced by such excess cash.

TRAs can also create incentives to engage in transactions that may unlock more value under the TRA. For example, pre-IPO investors might choose to effect a particular change-in-control transaction or a sale of specified assets, in order to trigger significant payments under the TRAs, even if a different transaction, or a sale of different assets, might be in the best interest of the company as a whole. Situations like these recently have spawned shareholder litigations arising in connection with such contracts.

I. Litigation Challenges to TRA Exit Transactions.

A. Firefighters' Pension System v. Foundation Building Materials, Inc.

One such example is *Firefighters' Pension System v. Foundation Building Materials, Inc.*, in which plaintiffs filed a shareholder derivative action challenging the sale by Lone Star Fund (Lone Star) of Foundation Building Materials (FBM) to another private equity buyer.[1] Lone Star had originally acquired FBM in 2015 and took the company public via an Up-C IPO in 2017. Plaintiffs alleged that Lone Star used its controlling position in the company to structure the sale in a manner that would trigger an obligation to make an accelerated termination payment of approximately $75 million under FBM's TRA with a Lone Star affiliate. Plaintiffs also alleged that Lone Star rejected an offer by another bidder on the basis that such bid—contemplating a stock-for-stock deal—would not trigger an accelerated payment under the TRA. Defendants filed a motion to dismiss the complaint, which the Delaware Court of Chancery granted in part and denied in part.

As to the allegations challenging the early TRA termination payment, the court held that the complaint stated a claim for breach of fiduciary duty against Lone Star and its affiliated directors because Lone Star was conflicted in its decision between (x) continuing to operate FBM and receiving payments under the TRA over time and (y) engaging in a change-in-control transaction that would trigger an early termination payment. In particular, the court noted that Lone Star had only begun pursuing a sale of the company after an intervening change in tax law reduced the stream of payments that Lone Star expected to receive over the normal course of the TRA. That sequence of events supported an inference that Lone Star chose a change-in-control transaction because it would trigger an accelerated payment under the TRA that exceeded the expected value of future payments under such agreement.[2]

However, the court rejected the claim that the early TRA termination payment constituted a diversion of a portion of the merger consideration in the transaction. Because the TRA, including its provision requiring early payment upon a change-in-control, was in place long before the merger was contemplated, plaintiffs could not credibly allege that the payment constituted diversion. Lone Star was entitled to stand on the terms of the TRA and insist on the payment.

B. IBEW Local Union 481 v. Winborne (GoDaddy)

GoDaddy involved a shareholder derivative action against GoDaddy's $850 million buyout from KKR and Silver Lake of the TRAs entered into with GoDaddy Inc. in connection with its April 2015 Up-C IPO.[3] The buyout was negotiated by a special committee of GoDaddy's board and the ultimate decision to enter the agreement was voted on by the full board, but was not submitted to shareholders.

1. Case No. 2022-066 (Del. Ch.).
2. The amount of a TRA termination payment typically is calculated based on a number of favorable "valuation assumptions" which in some cases can produce a significantly higher payment than the NPV of future payments that would occur naturally if the TRA were left outstanding.
3. Case No. 2022-0497 (Del. Ch.)

Continued on next page

The plaintiff subsequently challenged the transaction, alleging that the price was excessive and constituted a breach of fiduciary duty. In September 2023, Vice Chancellor Laster of the Delaware Court of Chancery held that the plaintiff's allegations stated a viable cause of action against GoDaddy's board for breach of the duty of good faith. Although the board had formed a special committee to evaluate and negotiate the buyout, and although the purchase price was supported by a valuation prepared by KPMG, the Vice Chancellor concluded that a combination of factors—including (1) the disparity between the value of the TRA liabilities, as reflected in the company's financial statements ($175 million) and the purchase price ($850 million), (2) the special committee's alleged failure to inquire into this disparity, (3) the board's alleged failure to consider whether GoDaddy's pursuit of growth through M&A would preclude it from ever triggering the obligation to make TRA payments, as the costs of acquisition would tend to offset taxable income, and (4) connections between certain voting directors and KKR and Silver Lake—taken together sufficiently pled a claim of bad faith corporate waste. Following the court's decision, GoDaddy formed a special litigation committee to investigate the claims at issue, and the parties have agreed to stay discovery pending the outcome of that investigation.

One notable aspect of the decision in *GoDaddy* is the court's conclusion that the plaintiff adequately pled bad faith, thereby ensuring that the business judgment rule did not apply to the director's valuation decision. Instead, the more stringent entire fairness standard of review applied, making it nearly impossible to dismiss the case on the pleadings. In reaching the conclusion that the plaintiff adequately pled bad faith, the court rejected the argument that the defendants had followed the proper procedures (setting up a special committee), noting that it was not the court's job to rubber stamp transactions that follow a procedural checklist, but to evaluate whether the pleadings support an inference that rebuts the business judgment rule. The decision in *GoDaddy* is a helpful reminder that courts may be prone to view transactions more holistically, *i.e.*, in a more plaintiff-friendly manner, where the board's decision appears extreme or excessive on its face.

II. Takeaways for Deal Professionals

Sponsors or portfolio companies may want to terminate and cash out TRA rights for a host of reasons, including a perception that the timing is right to monetize the rights, a need to generate liquidity, or a desire to avoid the complexity attendant to making TRA payments over an extended period of time. Some Up-Cs have faced business headwinds and find themselves with TRA rights of uncertain and potentially limited current value given the current absence of taxable income.

Companies might also decide that the Up-C structure is no longer advantageous, and that it should be unwound. When unwinding, a key issue will be how to treat the TRA. For example, certain unwinding transactions could trigger a change-in-control buyout provision in a TRA, and the buyout price may be more (or less) favorable to the sponsor than the projected present value of the TRA payment stream. As the recent decisions discussed herein show, however, the value of TRA rights is a fact-intensive question that depends on future projections for business performance, which are vulnerable to attack by the plaintiffs' bar and may create substantial uncertainty for change-in-control and unwinding transactions.

What is certain is that the presence of a TRA can impact a variety of proposed transactions and will often, if not always, cause TRA holders—who may have board representation or various control or veto rights—to have interests different from those of public shareholders. The result is a group of economic, negotiation, and potential fiduciary issues that are beginning to surface in many deals.

Continued on next page

Everything You Ever Wanted to Know About Up-Cs and TRAs But Were Afraid to Ask (Part 2) (continued from page 3)

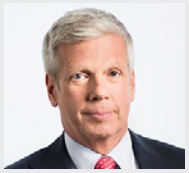
Some examples of transactions that raise these issues are:

- An unwind of an Up-C structure that the company wants to structure to avoid triggering the termination provisions of the TRAs, but which the sponsor would like to structure to trigger termination.
- A company would like to buy out the sponsor's TRA and needs to negotiate price under circumstances where entire fairness review may apply—the subject of the pending litigation in *GoDaddy*.
- A company's board would like to pursue a change-in-control transaction, and the termination and buyout provisions of its TRA vastly undervalue the rights of pre-IPO investors—rendering it possible such investors will block or oppose the transaction.
- A sponsor would like to sell a company that has an Up-C structure in a transaction that would result in the termination of the TRA and a concomitant payout of a contractually set termination amount, where that amount vastly overstates the value of the TRA—potentially triggering the entire fairness standard of review of the transaction.

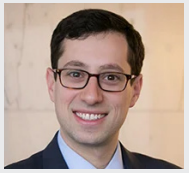
Deal professionals should be sensitive to these issues as the market increasingly encounters transactions involving the Up-C structure and their attendant TRAs.

Authors

Stephen M. Jordan
Partner



Jeffrey J. Rosen
Partner



Zachary H. Saltzman
Partner

Shannon Rose Selden
Partner

Matthew J. Sorensen
Associate

For an overview summarizing how TRAs have been handled in selected recent M&A transactions, see the chart on page 24.

FTC's Noncompete Ban Blocked: What Employers Need to Know

On August 20, 2024, the United States District Court for the Northern District of Texas set aside the final rule promulgated by the Federal Trade Commission (FTC), which would have banned nearly all post-employment noncompetes.[1] As anticipated by many, the court granted summary judgment in favor of the challengers in *Ryan LLC v. Federal Trade Commission*, concluding that the FTC's final rule exceeded its statutory authority and was arbitrary and capricious. Consequently, the court vacated the rule with nationwide effect. Although the FTC may appeal this decision, the final rule will not take effect on September 4 or at any time before a successful appeal.

Key Elements of the FTC's Final Rule Include:

No new post-employment noncompetes: The FTC's rule would ban employers from entering into or attempting to enter into new post-employment noncompetes with any worker after the effective date of the rule, including senior executives. The rule applies broadly to all workers, paid or unpaid, including employees, independent contractors and sole proprietors who provide services to a person. The rule defines a noncompete as a term or condition of employment that prohibits a worker from, penalizes a worker for or functions to prevent a worker from seeking or accepting work, or operating a business, after conclusion of his or her employment.

Limited grandfathering of existing noncompetes for senior executives; prohibition on enforcement of noncompetes for others (with notice required): The FTC's rule would allow noncompetes with certain senior executives entered into before the effective date to remain in effect. However, employers would be prohibited from enforcing or attempting to enforce an existing noncompete clause with any other worker. In addition, employers would be required to provide notice to any such worker by September 4, 2024 that the noncompete will not be enforced. The FTC's rule would not require individualized notice or rescission (i.e., legal modification) of existing noncompetes.

Exception for seller noncompetes: The FTC's rule would not apply to noncompetes entered into pursuant to a *bona fide* sale of a business entity, of the person's ownership interest in a business entity or of all or substantially all of a business entity's operating assets. The final rule does not include the proposed rule's requirement that the worker have at least a 25% ownership threshold for this exception to apply.

Effect on state law: The FTC's rule would supersede state law to the extent state law would otherwise permit or authorize a person to engage in conduct that is "an unfair method of competition" under the FTC's rule or conflict with its notice requirement. State noncompete law would still govern the enforceability of senior executive noncompetes that are grandfathered by the FTC's final rule and noncompetes permitted under the FTC's sale-of-business exception.

What Happens Next?

Unless the FTC appeals the *Ryan* decision and wins, the final rule will not go into effect. If the FTC chooses to appeal, it must file a notice of appeal by September 19, 2024. Although the FTC may request an expedited appeal, this request would only be granted if the appellate court finds there is good cause. Even then, it is unlikely that an expedited appeal will result in a contrary decision before September 4.

Parallel litigation is also ongoing in the United States District Court for the Eastern District of Pennsylvania (*ATS Tree Services, LLC v. Federal Trade Commission*) and in the United States District Court for the Middle District of Florida (*Properties of the Villages, Inc. v. Federal Trade Commission*). Both courts have ruled on motions for preliminary injunctions but have not yet received motions for summary judgment from the parties. Given the current status of those two cases and the Ryan decision, it is highly unlikely that any conflicting rulings will be issued before the original effective date of the rule, September 4.

1. Our Debevoise In Depth on the FTC's final rule can be accessed here, and we write about the impact of the noncompete rule on Section 280G planning for M&A in a prior issue of MarketCheck.

Continued on next page

FTC's Noncompete Ban Blocked: What Employers Need to Know (continued from page 5)

Advice for Employers

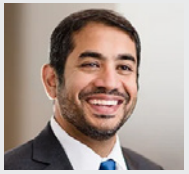
Since the Texas court has set aside the FTC's rule, there is no immediate need for employers to send notices to current and former covered employees with noncompetes by September 4. However, because the FTC may appeal this decision, employers should continue to monitor developments closely.

In addition, employers should consider the evolving state law landscape, which has been a source of significant change as more states find compelling local public policies in the areas of competition and worker mobility. These policy developments have to date only been in one direction—making noncompetes harder to enforce—and the invalidation of the FTC's rule is likely to prompt further state-level actions.

As a result, we continue to recommend that employers enhance trade secret protections beyond the use of noncompetes and consider compensation changes and alternative arrangements, such as garden leave, repayment agreements, retention bonuses or longer vesting periods for long-term incentives (e.g., cliff-vesting or back-loaded schedules).

Finally, even if the FTC's rulemaking efforts are blocked, we anticipate that the FTC will continue to pursue enforcement actions against companies that broadly use noncompete agreements, particularly for lower-wage workers, under Section 5 of the FTC Act. We recommend that employers before or soon to be before the FTC in other contexts (e.g., merger review under the Hart-Scott-Rodino Act) be aware of, evaluate and consider proactively modifying their use of noncompetes. If such employers are using noncompetes broadly, the FTC may hold up their mergers or subject them to separate post-closing investigations.

Authors



Jyotin Hamid
Partner

Frank Mitchell
Partner

Alison Buckley-Serfass
Counsel

Tricia Bozyk Sherno
Counsel

> On July 17, 2024, Delaware Governor, John Carney, signed into law a series of significant amendments to the Delaware General Corporation Law (DGCL), which aim to address what many practitioners see as a disconnect between recent Delaware case law and current market practice.

Recent Amendments to the Delaware General Corporation Law

On July 17, 2024, Delaware Governor, John Carney, signed into law a series of significant amendments to the Delaware General Corporation Law (DGCL), which aim to address what many practitioners see as a disconnect between recent Delaware case law and current market practice. In effect, the amendments reverse three recent decisions of the Delaware Court of Chancery interpreting questions around the validity of certain provisions in stockholders' agreements, the necessary procedural requirements to approve a merger agreement and permissible recourse for failed transactions. Whether or not the concerns of some that these decisions damaged Delaware's stature as the capital of corporate law and risked a flight by corporations out of Delaware to states like Texas or Nevada are well-founded, the amendments should put them to rest.[1] And yet, despite support from many in private practice, the amendments have drawn criticism from a number of legal scholars and bar associations, who have expressed concerns over what they view as a rushed process with potential unintended consequences.[2] The amendments are effective as of August 1, 2024 and apply retroactively to all contracts, whether or not made, approved or entered into prior to the effective date, with the important exception of any agreements subject to pending litigation.

Stockholders Agreements (§122)[3]

Perhaps the most important of the amendments addresses a Delaware corporation's agreements with its stockholders. Stockholders' agreements have become a critical tool for significant stockholders of a corporation, including many private equity firms, and are frequently used to secure specific contractual rights relating to the governance of a corporation. Settlements with activists also typically include agreements that convey veto rights and board seats, among other things, to activist stockholders in exchange for the activist's promise to cease its campaign.

In the recent case of *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, however, the Delaware Court of Chancery held that the provisions of a stockholders' agreement between Moelis & Company (the Company) and its chief executive officer and largest stockholder, Ken Moelis (Moelis), granting Moelis approval

1. For an overview of some key differences among Delaware, Nevada and Texas law relating to corporate governance matters, see page 28 in the Charts section in this issue.
2. https://corpgov.law.harvard.edu/2024/06/07/letter-in-opposition-to-the-proposed-amendment-to-the-dgcl/
3. https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=141480&legislationTypeId=1&docTypeId=2&legislationName=SB313

Continued on next page

rights over key corporate actions were void as an unauthorized delegation of the board's managerial powers under DGCL Section 141(a), which establishes that the business and affairs of a corporation are managed by or under the direction of a board of directors, except as provided otherwise in the corporation's certificate of incorporation.[4] The court found that the provisions of the stockholders' agreement effectively transferred management of the Company from the board to Moelis in violation of DGCL Section 141(a), but it also recognized that the provisions being held as facially invalid could have been appropriately implemented through adoption in the Company's certificate of incorporation. In suggesting a mechanical versus substantive objection to the governance provisions in question, the court seemed to invite lawmakers to address these types of governance arrangements head on.

The amendments to DGCL Section 122 attempt to mitigate the uncertainty around the validity of stockholder governance arrangements that have become commonplace in commercial practice by explicitly permitting corporations to enter into agreements with stockholders and beneficial owners, so long as such agreements do not conflict with the corporation's certificate of incorporation or would not be contrary to Delaware law if included in the corporation's certificate of incorporation.[5] The amendments provide that such contracts may (a) restrict or prohibit corporate actions, (b) require the approval or consent of one or more persons (such as the corporation's stockholders) prior to the taking of a corporate action and (c) include covenants by the corporation to take or refrain from taking certain corporate actions. Notably, however, the amendments exclusively impact the statutory validity of these types of agreements, and not a board's or controlling stockholder's fiduciary duties with respect to entry into or exercise of its rights under such agreements, meaning that any rights created via contract will still need to comply with a corporation's charter as well as the broader body of Delaware statutory and case law.

The amendments to DGCL Section 122 attracted considerable controversy when proposed, with academics criticizing lawmakers for hastily proposing the legislation without giving enough thought to the potential consequences. Conversely, the amendments have been welcomed by many practitioners who see the amendments as catching up to a commercial practice that has evolved beyond the current statutory regime.

Board Approval of Agreements, Disclosure Schedules and Notice Requirements (§§147 and 268)[6]

In *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, the Court of Chancery addressed the question of when a merger agreement may be submitted to the board for approval. In that case, the plaintiffs alleged that Microsoft Corporation ran afoul of the approval mechanics under DGCL Section 251 by approving a merger agreement that was not in final form and submitting to stockholders an incomplete notice in connection with its request for stockholder approval.[7] Under DGCL Section 251, (a) the board is required to adopt a resolution approving an agreement of merger, (b) the agreement so adopted is then executed and (c) upon execution, the agreement is submitted to

4. *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, No. 2023-0309-JTL (Del. Ch. Feb. 23, 2024).
5. The amendment makes clear that the fact that the DGCL may authorize the board to take an action will not in itself mean that a contract restricting that action conflicts with Delaware law.
6. https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=141480&legislationTypeId=1&docTypeId=2&legislationName=SB313
7. *Sjunde AP-Fonden v. Activision Blizzard, Inc.* C.A. No. 2022-1001-KSJM, 2024 WL 863290 (Del. Ch. Feb. 29, 2024, corrected March 19, 2024).

Continued on next page

the stockholders for approval with a copy of the agreement or a brief summary thereof. The court held that the merger agreement submitted to the board was not "an essentially complete" version of the agreement in accordance with DGCL Section 251. Additionally, the court held that the stockholder notice was incomplete for failing to include a summary of the merger agreement and attaching to the notice a merger agreement that did not include the surviving company charter.

In response, and again to align with current market practices, the amendments clarify that a board may approve, in final or "substantially final" form, any agreement, instrument or document requiring board approval, provided that all material terms are present. Notably, the amendments go beyond the treatment of merger agreements and create a uniform standard across all agreements required to be approved by a company's board, which should help avoid foot faults when applied in practice.

The amendments also include a new DGCL Section 268(a), which provides that if the target stockholders in a merger will not receive stock of the surviving corporation, then the merger agreement submitted to the stockholders for approval need not include a copy of the certificate of incorporation of the surviving corporation, and no change to such certificate of incorporation will be deemed an amendment to the merger agreement. These provisions will provide buyers with greater flexibility to adopt terms to the surviving corporation certificate of merger following the transaction. Additionally, the amendments include a new DGCL Section 268(b), which clarifies that disclosure schedules and disclosure letters or similar documents delivered in connection with a merger agreement that qualify, modify or supplement representations and warranties, covenants and conditions will not be deemed to be part of the agreement and need not be submitted to the board in order for a merger agreement to be considered in final or substantially final form for approval.

Remedies for Breach and Stockholders' Representatives (§261)[8]

Other amendments were proposed primarily in response to the court's opinion in *Crispo v. Musk*, in which a former Twitter stockholder sued Elon Musk and his affiliates for specific performance and damages after Musk attempted to terminate his merger agreement with Twitter.[9] After Musk eventually reversed course and closed the transaction, the plaintiff sought a fee based on the grounds that his claims contributed to Musk's decision to close the transaction. The court ruled that the plaintiff was not entitled to a fee because he was not a third-party beneficiary of the merger agreement and, even if he were, his rights to bring a claim had not vested. In its decision, the court relied on a 2005 case from the Second Circuit Court of Appeals, *Consolidated Edison, Inc. v. Northeast Utilities*, holding that a target corporation cannot seek lost premiums for stockholders in the case of a failed merger.[10] In the aftermath of that case, many practitioners began adding express language allowing target corporations to sue for lost stockholder premiums in the event of a buyer breach. Additionally, it has become common practice to appoint a stockholders' representative to enforce the rights of stockholders in such transactions. The

8. https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=141480&legislationTypeId=1&docTypeId=2&legislationName=SB313
9. *Crispo v. Musk et al.*, A.3d, 2023WL7154477 (Del. Ch. Oct. 31, 2023).
10. *Consolidated Edison, Inc. v. Northeast Utilities* 426 F.3d 524 (2d Cir. 2005).

Continued on next page

holding in *Crispo*, however, called into question the enforceability of those provisions seeking to confer third-party beneficiary status on stockholders.

The amendments to DGCL Section 261(a)(1) address these cases head on and provide that a merger agreement may include penalties for breach, and, specifically, may include obligations to pay damages based on lost premiums otherwise payable to stockholders in the merger. Notably, however, the amendments expressly state that the party receiving such damages need not distribute the proceeds to stockholders. Additional language to DGCL Section 261(a)(2) also codifies the validity of appointing a stockholders' representative to a merger transaction, eliminating any ambiguity over these arrangements in current practice. Such stockholders' representatives may be appointed through express provisions in the merger agreement and may be given the authority to enforce the rights of the stockholders, including rights to receive payments and escrow amounts as well as rights to indemnification, among others.

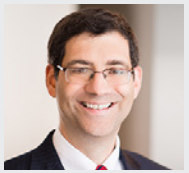
Effective Dates and Implementation

The amendments are effective as of August 1, 2024, and apply retroactively to all contracts, whether or not made, approved or entered into prior to the effective date, with the exception of any agreements subject to pending litigation, to which the court will apply the relevant law predating the amendments. While the amendments aim to address recent case law, this exception for pending litigation creates what Vice Chancellor Laster called a "donut hole", obligating the Court to apply different law to similar fact patterns, possibly resulting in some uneven outcomes.[11]

11. *Brian Seavitt et al. v. N-Able Inc.*, case number 2023-0326.

For an overview of certain key differences among Delaware, Nevada and Texas on corporate governance matters, see the chart on page 28.

Authors



Andrew L. Bab
Partner

Katrina Mari Kaczynski
Associate

The Death of *Chevron*: Implications of the *Loper* Decision for Public Companies

On June 28, 2024, the Supreme Court reversed a 40-year-old doctrine—known as "*Chevron* deference"—that instructed courts to defer to a federal agency's interpretation of an ambiguous federal statute as long as the agency's interpretation was reasonable. Based upon the decision, *Loper Bright Enterprises v. Raimondo* (*Loper*), courts will no longer be required to defer to an agency's reasonable interpretation and instead must make an independent judgment as to whether an agency's actions are statutorily authorized.

***Chevron* Deference.** The Supreme Court introduced *Chevron* deference in a watershed 1984 case, establishing a two-step process for courts to review disputed statutory interpretations in cases involving agency actions. In step one, the court determined whether the intent of Congress was clear; if so, the court interpreted the statute according to established canons of statutory construction—without regard to agency interpretation. If the statute was ambiguous or silent on the issue, however, the court would generally defer to an agency's interpretation of a statute as long as the agency offered "a permissible construction of the statute," even if the court might have reached a different interpretation in the first instance.

As *Loper* explains, the abolition of *Chevron* deference did not arise in a vacuum. For the past two decades, the Supreme Court has been curbing judicial deference to agency action in a variety of ways:

- It created "*Chevron* step zero," which limited agency deference to instances of rulemaking (provided the agency followed appropriate procedures governing notice and comment) and formal agency adjudication.
- It held that the deference does not apply to issues that are of "deep economic and political significance."[1]
- It declined to defer to agency interpretations of statutory provisions that govern judicial review of agency actions.

The Supreme Court has not deferred to an agency interpretation of a statute since 2016 (although many lower courts have continued to apply *Chevron* deference).

The Opinion. *Loper* involved a challenge to a rule promulgated by the National Marine Fisheries Service (NMFS) that required certain commercial fishing vessels to fund at-sea monitoring programs. Petitioners alleged the governing statute did not authorize the NMFS to create funding mandates. The lower courts disagreed, explaining that to the extent there was ambiguity as to the statutory text, they deferred to the agency's interpretation.

The Supreme Court, in a 6-3 decision, overruled *Chevron*, holding that courts may not defer to agency interpretations but must "exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[2]

The Supreme Court held that *Chevron* deference is incompatible with a core legal tenet that has existed since the founding of the republic, namely that "courts decide legal questions by applying their own judgment."[3] The Administrative Procedure Act (APA), a federal law that establishes procedures governing agency rulemaking and judicial review of such decisions, codifies that principle by requiring the courts (not agencies) to decide "all relevant questions of law," including with respect to ambiguous statutes. The Court rejected the argument that agencies are better suited than courts to issue binding interpretations of federal law, holding that statutory interpretation is the exclusive province of the courts because only the

1. *Loper Bright Enterprises v. Raimondo*, No. 22-451, slip op. at 27 (June 28, 2024).
2. *Id.* at 35.
3. *Id.* at 14.

Continued on next page

courts have "special competence" in resolving statutory ambiguities. The Court also rejected the argument that an agency's technical expertise is binding on the Court. Rather, the Court noted that an agency's technical expertise is relevant to the extent it is persuasive to a court, but "Congress expects courts to handle technical statutory questions."[4]

While *Loper* precludes courts from deferring to agency interpretation of ambiguous statutes, that does not mean that the agency's perspective is now irrelevant. *Loper* identifies circumstances where an agency's interpretation is likely to be persuasive:

- It affirmed a longstanding practice of courts affording "respect" to an agency interpretation, particularly when it was issued "roughly contemporaneously with enactment of the statute and remained consistent over time."[5]
- It emphasized that an agency's interpretation "may be especially informative to the extent it rests on factual premises within the agency's expertise."[6]
- It recognized that Congress may delegate discretionary authority to agencies, including (i) the delegation of authority to an agency "to give meaning to a particular statutory term";[7] (ii) authorizing an agency to issue rules to "fill up the details"[8] of a statutory regime; and (iii) providing the agency with flexible regulatory authority using terms such as "appropriate" or "reasonable." In such circumstances, the court's role is generally to determine if the delegation is constitutionally authorized and whether the agency has acted within its delegated authority.

Loper's Implications. *Loper* provides companies greater ability to challenge agency actions based upon the argument that they are not authorized by statute. Challengers are likely to focus on areas where they believe agencies have overreached—especially where agencies have sought to use their regulatory authority for the first time to govern certain types of activities. Where applicable, challengers may also seek to invoke other recent Supreme Court opinions that curtail the power of regulatory agencies, including *West Virginia v. EPA*, where the Supreme Court set forth the "major questions doctrine," which provides that agencies may enact regulations of great economic or political significance only if they have explicit congressional authorization to do so.[9]

The following are examples of situations where regulated companies may now be in better position to challenge agency action based upon the *Loper* decision:

- Members of the technology industry that develop artificial intelligence (AI) or incorporate it into their operations may use *Loper* to challenge the Biden Administration's efforts to develop regulations to limit or curtail AI usage.
- Members of the banking industry may use *Loper* to challenge efforts by the Biden Administration to use regulatory authority to prohibit certain types of banking practices on the basis that they are harmful to consumers.
- Members of industries that are subject to extensive regulatory oversight by the Environmental Protection Agency, including energy and manufacturing, may challenge environmental regulations on the basis that they are not statutorily authorized and (where relevant) impose the types of significant economic burdens that implicate the "major questions doctrine."
- Pharmaceutical and medical device companies may challenge rules issued by the Food and Drug Administration based on a lack of clear statutory authority. For example, it may now be easier for

4. *Id.* at 24.
5. *Id.* at 8.
6. *Id.* at 17.
7. *Id.*
8. *Id.*
9. *West Virginia v. EPA*, 597 U.S. 697 (2022).

Continued on next page

clinical laboratories to challenge the FDA's rule subjecting Laboratory Developed Tests (LDTs) to regulation as "devices" under the Federal Food, Drug, and Cosmetic Act.

- Members of a variety of industries may consider using *Loper* to challenge efforts by the Biden Administration to implement regulations that impact employer-employee relations, *e.g.*, regulations by the Federal Trade Commission that seek to bar certain non-compete agreements.

On the other hand, many public companies depend on the stability of the regimes under which they operate—and may be harmed by attempts by competitors or policy advocates who seek to upend elements of those regimes:

- As *Loper* shifts power of judicial review to the courts, there may be circumstances where judges who lack technical sophistication issue rulings that are impractical or unworkable.
- As *Loper* recognizes, the abolition of deference will likely result in circumstances where different courts take varying positions with respect to the same regulation—potentially creating a challenging business environment where regulations are applicable in certain jurisdictions but not others.
- Many companies may benefit from existing agency interpretations of statutory provisions and may be negatively impacted by judicial scrutiny in the absence of regulatory deference. Companies may rely on agency approvals or clearances and may have invested significant resources to comply with certain regulatory requirements that may now be subject to a greater risk of being overturned in court. Companies that deploy risk-mitigation strategies that are predicated on satisfying applicable regulations could find such strategies upended if the regulations at issue are overturned. Similarly, corporate defendants who base their litigation strategy on their compliance with applicable government regulations risk plaintiffs arguing that those regulations are invalid—and therefore the defendant's compliance is irrelevant. While *Loper* states that prior judicial opinions cannot be revisited simply because they relied on *Chevron* deference, that may not insulate existing agency regulations for a variety of reasons, including that a regulation was not previously challenged or that a current challenge is ongoing.
- To the extent a future administration seeks to modernize or streamline regulations that are perceived to be harmful to businesses, advocates who disagree with those policies may challenge those pro-business efforts on the basis that they are not statutorily authorized.

In light of these developments, companies should carefully consider whether changes to their litigation and business strategies would be prudent in light of *Loper*. Experienced regulatory and litigation counsel may be of valuable assistance in considering such changes, including whether, for example, it may now be possible to challenge unfavorable regulations or whether any of the companies' practices should be altered in light of a potentially changing regulatory environment.

Authors

Maura Kathleen Monaghan
Partner

Jacob W. Stahl
Counsel

The Blurbs

Practice Note: SEC Permitting "Sign-and-Consent" Structures in Stock Deals

Buyers in public M&A transactions typically prefer that a holder of a majority of then-outstanding stock of a target deliver a written consent approving the merger immediately after signing the transaction agreement, known as a "sign-and-consent" structure. This certainty of stockholder approval removes the delay and expense of holding a stockholders meeting and avoids fiduciary duty issues raised by delivery of consent at or prior to signing (Delaware courts have generally upheld "sign-and-consent" structures in the *Openlane* and *Optima* decisions).[1]

However, a 2008 Compliance and Disclosure Interpretation (C&DI) from the Securities and Exchange Commission (SEC) had created an impediment to using a "sign-and-consent" structure in deals where stock consideration was to be registered on a Form S-4. In the C&DI, for a transaction approved by written consent by stockholders, the SEC staff objected to the subsequent registration of the stock-for-stock exchange on Form S-4 for any of the stockholders, on the grounds that offers and sales had already been made and completed privately, and "once begun privately, the transaction must end privately."[2]

It appears that the SEC's position on this matter has evolved and that the staff is no longer enforcing this C&DI. We have identified several recent transactions in which the target's stockholders delivered a written consent and the acquirer subsequently registered shares on a Form S-4 without any apparent objection from the SEC.

1. *Optima International of Miami, Inc. v. WCI Steel, Inc.* 2008 WL 3822430 (Del. Ch. June 27, 2008); *In re Openlane, Inc.* 2011 WL 4599662 (Del. Ch. Sept. 30, 2011).
2. Securities Act Forms: Questions and Answers of General Applicability. Section 225. Form S-4; 225.10. (November 26, 2008). https://www.sec.gov/corpfin/securities-act-forms.html.

Authors

Emily F. Huang
Partner

Marisa Demko
Associate

Continued on next page

Developments in Cross-Border Deals

Merger control review has long been a key factor in M&A transactions, with public companies well accustomed to making the necessary filings, managing substantive risk and factoring approvals into the timeline to close. In the wake of COVID-19 highlighting national economic vulnerabilities and supply chain disruption, however, foreign direct investment (FDI) screening regimes have become an equally important consideration.

Internal restructurings and new investments, even passive minority interests, have the potential to trigger an FDI review. This cuts both ways: On the one hand, the low thresholds mean that FDI adds to the regulatory burden of public companies doing deals, with their shareholder composition a potentially complicating factor. On the other, stakebuilding by institutional investors who previously may have largely escaped regulatory scrutiny is now also possibly notifiable.

What is FDI review?

Historically, FDI regimes were typically very narrowly focused on inbound investment into sensitive areas such as defense. That has expanded substantially to include a wide range of economically strategic sectors such as energy, healthcare, biotech, food security, raw materials, telecoms and businesses that collect or maintain sensitive personal data.

There is no consistent bright line percentage threshold below which transactions escape regulatory scrutiny and, unlike merger control, FDI rules vary greatly among countries. While most jurisdictions do have minimum thresholds, governments usually have the ability to "call in" (i.e., request to review) any investment they deem of national interest. The most relevant factors to consider for an FDI analysis are therefore:

- *Target risk:* Any acquirer or investor needs to consider whether a target comes within the relevant national FDI rules and, if so, how sensitive its activities are and whether those may give rise to a national security risk. That could include factors such as whether any IP it owns and develops could also be used for military or surveillance purposes.

- *Acquirer risk:* There is heightened scrutiny of any third-country acquirers considered to be state or government investors. This typically incudes not only state-owned enterprises and sovereign wealth funds, but also entities such as public sector pension funds, universities, and the like. A public company's shareholder base can therefore potentially change its own risk profile if it includes such investors.

Managing FDI scrutiny

Given current geopolitical tensions, scrutiny of foreign investment will continue to increase. A number of recent high-profile deals such as the strategic partnership between Vodafone and Emirates Telecommunications Group have had to accept material conditions in order to proceed due to the sensitivity of the target's operations and the identity of the investor. Others have been abandoned altogether, such as U.S.-incorporated Flowserve

Continued on next page

Corporation's acquisition of Canadian company Velan Inc., which was blocked by France on national security grounds (see this Debevoise Debrief for more information).

Public companies should also be mindful of the impact their shareholder base may have on any approval process. Even if an individual investor's holding may not itself trigger a filing requirement, the overall investor composition of a public company in the aggregate (third-country government investors are aggregated by country) may impact the company's risk profile for FDI purposes. The fact that public companies are regulated and subject to greater scrutiny by authorities does not translate into a lighter FDI review.

Finally, a public company's business activities may be sufficiently sensitive for FDI purposes that larger minority or stakebuilding investors trigger an FDI filing. This in turn might require a public company to disclose potentially sensitive information about itself in any filing that a non-controlling investor has to make. While there would typically not be any contractual obligation to assist in making any filings for market purchases, the notified governmental agencies can request any necessary information directly from the company.

Challenges

FDI filings can be onerous. In many cases, FDI reviews are suspensory, take longer than merger control, and are more opaque and less predictable due to the involvement of different government stakeholders and intelligence services. In addition, FDI filings often have burdensome disclosure requirements including governmental (supply) relationships, R&D efforts and the like, and potentially personal information about the officers and directors may have to be provided.

Care and consistency in the disclosure of information is therefore particularly important given the increased information sharing taking place among national governments and intelligence agencies involved in FDI screening. For example, the European Commission and its member states actively cooperate with each other to exchange information and share concerns related to specific investments, as well as with international partners such as the United States. Failure to do so risks potentially invasive follow-up questioning—and, potentially, fines for providing misleading information.

Authors

Timothy McIver
Partner

Anne-Mette Heemsoth
International Counsel

Industry Updates

Insurance

A confluence of insurance industry trends has created a moment in which asset managers and insurance industry participants are keenly interested in engaging in M&A and other corporate transactions with each other. For the past several years, the emergence of private equity in the insurance industry, coupled with a strategic refocusing by some insurers on less capital-intensive businesses, has driven M&A activity. The recent emergence of private credit has been an additional catalyst, as insurers seek to quench their insatiable thirst for private credit assets.

One such example is last year's acquisition by PGIM, the global investment management business of Prudential Financial, of a majority interest in Deerpath Capital Management. The partnership with Deerpath was designed to enhance PGIM's direct origination platform in the middle and lower middle markets, while PGIM would help bring scale and expertise to Deerpath. More recently, MassMutual announced a transaction in which it would become a minority equity investor in and capital partner to ATLAS SP Partners, the warehouse finance and securitized products business majority owned by Apollo. The partnership gives MassMutual access to asset-backed credit originated by ATLAS and Apollo, while giving ATLAS and Apollo a steady pipeline in which to pump those credit assets they originate.

For insurers that are less strategically focused on the asset management functions in their businesses, partnerships with asset managers can provide a solution to outsource such functions, as well as access to a wide array of alternative assets. Partnerships like these can provide managers with access to large general accounts of insurers and a steady stream of asset management fees. We expect to see an uptick in these types of partnerships, especially among alternative asset managers that were not among the first wave of private equity investment in the insurance industry.

Author

Andrew G. Jamieson
Partner

Continued on next page

AI/IP

Artificial intelligence is increasingly significant in business operations as companies across industries are developing and embracing the benefits of AI tools. While potentially valuable assets, these tools and AI-generated content present risks. The Federal Trade Commission (FTC) recently announced an investigation into several companies' use of AI-powered surveillance pricing tools and the impact such tools might have on privacy, competition and consumer protection. According to the FTC, companies may now be exploiting consumer information, such as demographics, credit history and shopping history, to set specific prices for individuals. This investigation itself may cause reputational harm to the companies under review, and the FTC's findings may lay the groundwork for enforcement actions against some or all of the companies under investigation. Given the increasing regulatory and legal complexities surrounding AI, a buyer conducting due diligence should identify the types of AI technologies used by a target company, as well as their purpose and value to the company, and should also include the areas of key AI-related risks outlined in this note.

Intellectual Property and Proprietary Rights

If the target company develops its own AI models, a buyer should determine whether the company has taken appropriate steps to secure competitive advantage by protecting the models from unlicensed use. In addition, a target company should be able to identify the sources of training data and confirm that it has all necessary rights to use the training data, as well as future training data, for current and planned purposes, including intellectual property rights as well as rights to use any personal information or other potentially sensitive data in the dataset. A buyer should also bear in mind that rights to use training data do not necessarily include rights to the output. For example, if AI output includes reproductions or derivatives of copyrighted content that are not expressly licensed from the copyright owner, the AI output might infringe third-party rights.

A buyer or its counsel should review contracts with data sources to confirm that the target company has obtained rights necessary to own or use the output as required for the company's current and intended use.

Privacy Regulations

Whether the target company is using third-party datasets as training data (if the target company has its own AI model) or providing training data to a vendor's AI model, a buyer should confirm that the target company is aware of and compliant with all applicable data privacy laws relating to the collection, use and protection of such training data, as well as any other activities performed on the data. But buyers should not stop there. As AI use is also subject to ethical considerations relating to bias, transparency and accountability, a buyer should also confirm that the target company has implemented internal processes to address AI matters and to update the company's AI practices as the legal landscape continues to evolve.

Continued on next page

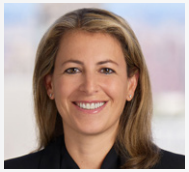
Cybersecurity and Customer/ Vendor Risk Allocation

AI models are susceptible to performance failures, data breaches and other cybersecurity incidents, and a buyer should determine whether a target company has taken appropriate measures to protect its software, systems and servers housing the AI model and all relevant data and output. A buyer's due diligence should include a review of the target company's security-related policies and practices and contracts and contractual provisions regarding the security of the AI model, training data and AI output. Relatedly, a buyer should evaluate the allocation of risk between the target company and third parties with respect to use of AI models, training data and output (e.g., express obligations, representations and warranties and indemnitees).

Litigation

While AI-related litigation is still in early stages and courts generally seem hesitant to find infringement where output cannot be tied to specific training data, a buyer should consider potential litigation risks to AI companies. Courts are currently evaluating allegations of copyright infringement with respect to unlicensed use of copyrighted training data and infringing AI output. We expect an increase in litigation in the coming years as AI technology continues to evolve.

Author



Caroline P. Geiger
Counsel

Continued on next page

Oil & Gas

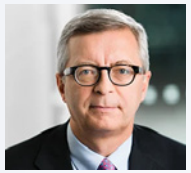
After the record-setting $234 billion in exploration and production (E&P) M&A announced in 2023,[1] the torrid pace of deal-making continued into 2024 with eight large transactions announced in the first half of the year, including two $10+ billion landmark deals—the merger of Chesapeake and Southwestern, and ConocoPhillips' acquisition of Marathon Oil. The industry's transaction appetite has continued to rest on three pillars: (1) management teams' desire to secure remaining premium undrilled well inventory against the background of increasingly drilled-out core shale acreage and an absence of large discoveries, (2) consolidation offering opportunities to capture meaningful corporate and field-level cost synergies and (3) stable crude pricing, with benchmark barrels recently trading in a relatively narrow $20/bbl corridor, putting buyers and sellers on the same page with respect to valuation assumptions. The industry's willingness to transact has been further buttressed by the Federal Trade Commission's decision not to challenge ExxonMobil's acquisition of Pioneer Natural Resources, implying the agency found that the deal did not raise competitive concerns or potentially harm consumers at either the basin or national level despite the combined company accounting for 15% of Permian crude production. The comparatively smaller Conoco/Marathon, Diamondback/Endeavor and Occidental/CrownRock transactions are presumably hoping for similar treatment from the FTC.

Looking ahead, we expect the pace of consolidation to cool somewhat. Most large capitalization public oil & gas producers have entered into multi-billion-dollar transactions over the past 18 months and will instead concentrate on integrating the recent additions into their legacy portfolios. Additionally, with the majority of the most logical large public targets having already been scooped up, acquirers are likely to shift their attention to private corporate and asset deals, which tend to require more cash as opposed to the all-stock modest premium transaction model that accounted for approximately two-thirds of announcements since the start of 2023. However, we do expect growth in transaction activity in the natural gas space thanks to a more constructive commodity price outlook due to growing liquified natural gas exports and rising power demand from AI and data centers. Lastly, European oil producers are highly likely to remain conspicuously absent from the ranks of buyers, due to a combination of discount valuation versus U.S. peers, absence of synergies with potential targets and stronger ESG headwinds.

1. U.S. ENERGY INFO. ADMIN., *M&A Activity in 2023 Furthers Consolidation of U.S. Crude Oil and Natural Gas Firms* (Mar. 19, 2024), https://www.eia.gov/todayinenergy/detail.php?id=61603.

See page 27 for Oil & Gas trends by value and volume since 2021.

Authors


Maurizio Levi-Minzi
Partner


Ilya Balabanovsky
Associate

BANKER'S CORNER

Delaware Court of Chancery Sends a Message on Financial Advisory Engagements

Delaware Supreme Court Holds *MFW* Inapplicable Based on Banker Conflict Disclosure Deficiencies

Delaware Court of Chancery Sends a Message on Financial Advisory Engagements

On May 31, 2024, the Delaware Court of Chancery, in a case involving the take-private of a company the controller of which had conflicting interests, declined to dismiss breach of fiduciary duty claims against the controller and the board and aiding-and-abetting claims against the financial advisors to the target and the special committee of its board. The court based its ruling on the aiding-and-abetting claim in large part on the incentives created by the advisors' engagement letters. The decision illustrates the need for advisors, in transactions involving conflicted fiduciaries, to consider carefully the structure of their fee arrangements and the incentives they create.

The case involved the sale of Foundation Building Materials.[1] Foundation was controlled by a PE fund that had a tax receivable agreement (TRA)[2] with the company that entitled the fund to a termination payment upon a change of control of the company. The court held that the change of control payment created a conflict between the controller and the public stockholders and that the transaction was subject to the entire fairness standard.

The aiding-and-abetting claim against the financial advisors required the plaintiff to demonstrate, among other things, the "knowing participation" of the advisors in the alleged breach of fiduciary duties by the controller and the board. The alleged breach stemmed from the conflicted decision of the controller to pursue a change of control transaction triggering the TRA payment. The court found evidence of knowing participation in the terms of the advisors' engagement letters—specifically the fact that their success fees were based on the sum of the deal price plus the TRA change of control payment. The court interpreted this fee construct to have aligned the interests of the advisors with those of the controller, including its interest in maximizing the TRA payment, rather than solely with those of the stockholders.

In addition, the court took issue with the success fee element of the special committee's advisor more generally. The special committee's role was to determine whether or not to sell the company, and the committee could be effective only if it had the power to say no. The compensation of its financial advisor, though, incentivized a decision to say yes. In the words of the court: "It is one thing to pay contingent compensation to the financial advisor charged with securing the best deal reasonably available.

1. *Firefighters' Pension System of the City of Kansas City, Missouri Trust v. Foundation Building Materials, Inc. et al.*, C.A. No. 2022-0466-JTL (Del. Ch. May 31, 2024).
2. For a more detailed overview of TRAs, please refer to our article, *Everything You Ever Wanted to Know About Up-Cs and TRAs But Were Afraid to Ask*. Part I of that article appears in the Spring 2024 edition of MarketCheck and Part II can be found earlier in this edition.

Continued on next page

BANKER'S CORNER (continued from page 21)

It is another thing to pay contingent compensation to the financial advisor who is supposed to be willing to tell the special committee that the deal should not happen. Because of that different role, a special committee's financial advisor should not receive contingent compensation." The court's concern about incentive fees in special committee engagements is not new. Nearly 20 years ago, in another case involving a conflicted take-private, the court stated that "the contingent compensation of the financial advisor of roughly $40 million creates a serious issue of material fact as to whether [the advisor] could provide independent advice to the Special Committee."[3]

The message from the court is that financial advisors should review carefully the financial incentives created by the terms of their engagement letters and seek to maximize, to the extent possible, alignment with the interests of their advisory clients. With respect to special committee engagements specifically, while clients are often reluctant to commit to paying large fees in the absence of any transaction, advisors should consider, on a case-by-case basis, the potential risks as well as the rewards of success fee arrangements.

3. *In re Tele-Commc'ns, Inc. S'holders Litig.*, 2005 WL 3642727 (Del. Ch. Dec. 21, 2006).

Delaware Supreme Court Holds *MFW* Inapplicable Based on Banker Conflict Disclosure Deficiencies

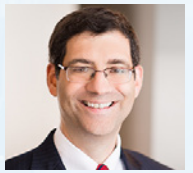
On May 1, 2024, following the Brookfield decision that was issued earlier this year, the Delaware Supreme Court handed down a second decision focused in good part on the sufficiency of proxy disclosures relating to bankers' conflicts. We discuss this *Inovalon*[1] decision in more detail in this Debevoise Debrief. From the banker's perspective, the two cases highlight the importance not only of good and thorough disclosure of conflicts to the board or special committee, but also, and perhaps more importantly, to the shareholders. Failure to properly disclose banker conflicts in the proxy statement could result in the banker's client losing the benefit of the *MFW* protections, thereby subjecting a conflicted deal to the "entire fairness" test, which is difficult to satisfy and almost always will survive a motion for summary judgment. It is not uncommon for bankers to limit conflict disclosure in the proxy statement, particularly as to the amount of fees received during the past two years, on the theory that the worst that can happen is that the SEC provides a comment, and the parties are required to bolster the disclosure in response. *Inovalon* is a reminder that worse than an SEC comment is shareholder litigation that could result in a successful challenge to the deal.

Both the *Inovalon* and *Brookfield* courts underscored in particular that the use of "may" may not be sufficient disclosure of a material relationship. Stating that the bank "may" trade in the securities of the buyer or target may be inadequate if the bank holds a material position. Stating that the bank "may" provide services to one of the principals when it is in fact currently engaged and doing work for that principal will likely not pass muster.

Our client update provides more color on these and other important matters addressed by the court.

1. *City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings*, C.A. No. 2022-0698 (Del. May 1, 2024).

Banker's Corner Authors



Andrew L. Bab
Partner

Gregory V. Gooding
Partner

Deal Nook

On April 2, 2024, in a transaction that seemed to spearhead a sustained rise in private equity activity across the spectrum, Endeavor Group Holdings, Inc. (Endeavor), a global sports and entertainment company, announced that it had entered into a definitive agreement to be taken private by Silver Lake after three years as a public company listed on the New York Stock Exchange. Silver Lake and its managing member, Egon Durban, currently hold approximately 73% of the voting power and 37% of the economics of Endeavor. Under the terms of the definitive agreement, Silver Lake, in partnership with the Endeavor management team and additional anchor investors, will acquire the remaining shares of Endeavor at a total equity value of approximately $13 billion and a combined total enterprise value of approximately $25 billion.

In connection with the transaction, Endeavor's capital structure, consisting of five authorized and three outstanding classes of common stock—including non-economic voting Classes X and Y held by Ari Emanuel (CEO), Patrick Whitesell (Executive Chairman), Silver Lake and others—will be simplified. Mr. Emanuel and Mr. Whitesell are among the stockholders rolling over equity and have each also entered into letter agreements covering matters ranging from go-forward employment-related terms to future liquidity rights.

The deal is a prominent example of increased sponsor activity across industries and forms, including take-privates. Tight financing and higher interest rates slowed traditional private equity deal flow starting about two years ago and that trend was exacerbated by increased regulatory scrutiny. Recently, however, financing markets have loosened up and deal volume has increased substantially.

As we wrote in our prior issue of Market Check, a going-private transaction is a defining event for a public company's board and senior management and, as the largest sponsor-backed take-private transaction in the last decade, this transaction is no exception.

Note: Debevoise represents Ari Emanuel, CEO of Endeavor, in this transaction.

Authors

Katherine Durnan Taylor
Partner

Jillian Mulroy Wright
Counsel

The Charts

Selected Change of Control Transactions Involving TRAs

Transaction Announcement Date	Target	Buyer	Approximate Equity Ownership of TRA Holder(s) in Target[1]	Treatment of TRA Upon Change of Control (Per Terms of TRA)	Actual TRA Treatment in Change of Control Transaction
June 7, 2024 (Transaction Pending)	PowerSchool Holdings, Inc.	Bain Capital, LLC	70.6%	Early termination payment equal to the present value, discounted at the lower of (i) LIBOR plus 100 basis points and (ii) 5.50%, of all Tax Benefit Payments, assuming that the target will have sufficient taxable income to utilize the tax benefits.	Terminated with no payment. Value of waived payments was approximately $450 million.
April 15, 2024	Snap One Holding Corp.	Resideo Technologies, Inc.	72.4%	Early termination payment equal to the present value, discounted at the lesser of (i) 6.5% per annum and (ii) LIBOR plus 200 basis points, of the Tax Benefit Payments, assuming that the target will have sufficient taxable income to utilize the tax benefits.	Terminated with no payment. Value of waived payments was approximately $13 million.
February 26, 2024	Agiliti, Inc.	Thomas H. Lee Partners, L.P.	Less than 5%	Early termination payment equal to the present value, discounted at a rate tied to the maturity yield of U.S. treasury securities with a constant maturity (starting with a 10-year yield and going as low as a two-year yield depending on when the TRA is terminated), of all Tax Benefit Payments, assuming that the target will have sufficient taxable income to utilize the tax benefits.	Undisclosed. Presumably the early termination payment was made to the TRA holders. Prior to the transaction, approximately $35.4 million had been paid under the TRA. In the most recent 10-Q filed prior to the consummation of the transaction, the target had accrued liabilities in respect of the TRA of approximately $11 million.
March 8, 2023	Diversey Holdings, Ltd.	Platinum Equity, LLC	73%	Early termination payment equal to the present value, discounted at a per annum rate of LIBOR plus 100 basis points, of all Tax Benefit Payments, assuming that the target will have sufficient taxable income to utilize the tax benefits.	Terminated with no payments to be made after January 1, 2023. The TRA holder estimated that the value of waived payments was approximately $76.7 million.

1. *Approximate ownership interests at the time of the change of control announcement.*

Continued on next page

Selected Change of Control Transactions Involving TRAs (continued)

Transaction Announcement Date	Target	Buyer	Approximate Equity Ownership of TRA Holder(s) in Target[1]	Treatment of TRA Upon Change of Control (Per Terms of TRA)	Actual TRA Treatment in Change of Control Transaction
February 27, 2023	Focus Financial Partners Inc.	Clayton, Dubilier & Rice, LLC	20.6% (held by the PE fund with the most significant equity interest in the target; other TRA holders owned less than a 5% interest in the target)	Early termination payment equal to the present value, discounted at a per annum rate of LIBOR plus 150 basis points, of all Tax Benefit Payments, assuming that the target will have sufficient taxable income to utilize the tax benefits.	The TRA holder with a 20.6% equity interest in the target and the named executive officers agreed to receive their early termination payments in the form of a promissory note instead of cash. The note will mature on September 30, 2028 and accrue interest at 8% per annum payable quarterly. 25% of the original principal amount is payable on each anniversary of the closing. All other TRA holders received their early termination payments in cash in connection with the closing of the transaction. The aggregate early termination payments owed under the TRA were estimated at approximately $300 million.
January 9, 2023	Paya Holdings Inc.	Nuvei Corporation	34.3%	Early termination payment equal to the present value, discounted at a rate equal to LIBOR plus 100 basis points (and in some circumstances, LIBOR plus 200 basis points), of all Tax Benefit Payments, assuming that the target will have sufficient taxable income to utilize the tax benefits.	Terminated at closing for the amount owed pursuant to the terms of the TRA (approximately $19.5 million).
October 24, 2022	Weber Inc.	BDT Capital Partners	67.1%	Early termination payment equal to the present value, discounted at the annual long-term rate published monthly by the IRS, of all Tax Benefit Payments, assuming that the target will have sufficient taxable income to utilize the tax benefits.	Terminated without payment. In the target's most recent 10-Q filed prior to the announcement of the transaction, it had recognized a liability of $9.2 million in respect of the TRA.

1. *Approximate ownership interests at the time of the change of control announcement.*

Continued on next page

Selected Change of Control Transactions Involving TRAs (continued)

Transaction Announcement Date	Target	Buyer	Approximate Equity Ownership of TRA Holder(s) in Target[1]	Treatment of TRA Upon Change of Control (Per Terms of TRA)	Actual TRA Treatment in Change of Control Transaction
September 5, 2022	Signify Health, Inc.	CVS Health Corporation	59.2%	Early termination payment equal to the present value, discounted at a rate equal to the lesser of (i) 6.5% per annum and (ii) LIBOR plus 150 basis points, of all Tax Benefit Payments, assuming that the target will have sufficient taxable income to utilize the tax benefits.	Terminated without payment except that all payments due and payable prior to the consummation of the transaction became due and payable no earlier than 185 days following the filing of the target's tax return for the taxable year. In the target's most recent 10-K filed prior to the consummation of the transaction, the target recognized a liability of $59.1 million in respect of the TRA.
August 1, 2022	EVO Payments, Inc.	Global Payments Inc.	46.9%	Early termination payment equal to the present value, discounted at a rate equal to the lesser of (x) LIBOR plus 100 basis points and (y) 6.5%, of all Tax Benefit Payments, assuming that the target will have sufficient taxable income to utilize the tax benefits.	Terminated for an agreed upon termination payment of $225 million. This payment constituted an approximate 30.1% discount to the estimated aggregate payment of $322 million that would have otherwise been payable per the terms of the TRA.
May 5, 2022	Switch, Inc.	DigitalBridge Group, Inc., IFM Investors Pty Ltd	28%	Early termination payment equal to the present value, discounted at a rate equal to LIBOR plus 100 basis points of all Tax Benefit Payments, assuming that the target will have sufficient taxable income to utilize the tax benefits.	Terminated for an agreed upon termination payment of approximately $75 million, representing an approximate 93.72% discount to the estimated aggregate payment of $1.196 million that would have otherwise been payable per the terms of the TRA.

1. *Approximate ownership interests at the time of the change of control announcement.*

Authors

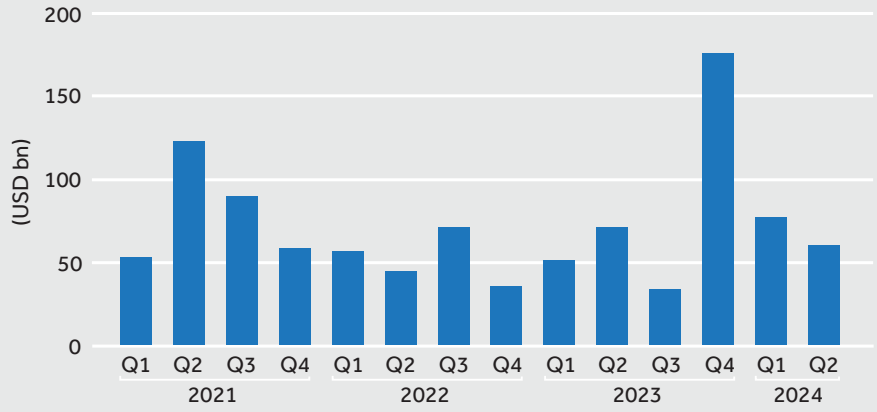
Andrew L. Bab
Partner

Caitlin Gibson
Counsel

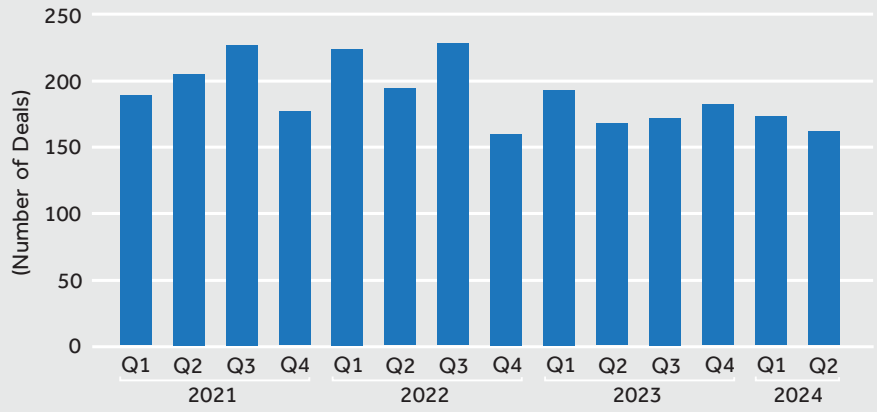
Rekha Korlipara
Associate

Continued on next page

Oil & Gas Deals by Value



Oil & Gas Deals by Volume



Criteria: *Target Industry: Oil & Gas* ***Date:*** *Announced/Rumoured* ***Source:*** *Merger Market*

Debevoise Quarter

Below are links to articles and publications of interest.

Special Committee Report, July 2024, Issue 8

Governance Round-Up Issue 13

Insider Trading & Disclosure Update—Volume 11

2024 Proxy Roundup: ESG Metrics in Incentive Compensation Plans

FCPA Update July 2024

Insurance Industry Corporate Governance Newsletter (July)

Insurance Industry Corporate Governance Newsletter (June)

Navigating Antitrust in the Age of AI: Global Regulatory Scrutiny and Implications

European Union Finally Adopts Corporate Sustainability Due Diligence Directive

GLI Mergers & Acquisitions 2024: Addressing ESG Considerations in the M&A Context

Federal Trade Commission Finalizes Updates to the Health Breach Notification Rule

IRS Narrows Spin-off Ruling Practice

Law360: Tiny Tweaks To Bank Merger Forms May Have Big Impact

Tougher Banking Agency Examination Guidelines—The Less Publicized Ramification of the 2023 Bank Failures

Special Committee Report, January 2024, Issue 7

Insurance Industry Corporate Governance Newsletter, April 2, 2024

100 Days of Cybersecurity Incident Reporting on Form 8-K: Lessons Learned, March 28, 2024

Comparison of Certain Delaware, Nevada and Texas Laws and Other Factors Relating to Corporate Governance and Takeovers

Subject	Delaware	Nevada	Texas
Duties of Directors—General	Fiduciary duties are not codified in the Delaware General Corporation Law (DGCL). Delaware case law provides that directors owe a duty of care and a duty of loyalty.	Fiduciary duties are prescribed by the Nevada Revised Statutes (NRS). Directors owe a duty of care and a duty of loyalty.	Fiduciary duties are not codified in Texas Business Organizations Code (TBOC). Texas case law provides that directors owe a duty of care and duty of loyalty. Directors also owe a duty of obedience, meaning that they are prohibited from taking action outside the scope of power enumerated to them in a corporation's governing documents or by Texas law. *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707 (5th Cir. 1984) (Gearhart).
Consideration of Interests When Exercising Fiduciary Duties	The interests of the stockholders are paramount. Directors may consider interests of other constituencies (as long as they are rationally related to stockholder interests), except when selling control.	Directors may consider all relevant facts, circumstances, contingencies or constituencies, including interests of the corporation's employees, suppliers, creditors or customers, societal interests and long and short-term interests of the corporation. NRS § 78.138	Directors may consider the long-term and short-term interests of the corporation and its shareholders, and any social purposes specified in the corporation's certificate of formation; if such a social purpose is not specified, officers and directors are not prohibited from considering, approving, or taking an action that promotes or has the effect of promoting a social, charitable, or environmental purpose. TBOC § 21.401.
Exculpation of Officers and Directors	Charter can eliminate personal liability of directors and officers[1] to the corporation or its stockholders for breach of the duty of care, but cannot limit liability for breach of duty of loyalty, acts or omissions in bad faith, unlawful payment of dividend or unlawful stock purchase or redemption, or an improper personal benefit. DGCL § 102(b)(7).[2]	Does not require the adoption of particular provisions in the articles of incorporation. "A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer" unless breach of fiduciary duties involved intentional misconduct, fraud or a knowing violation of law. NRS § 78.123.	The certificate of incorporation can eliminate personal liability of directors for money damages owed to the corporation or its stockholders for breach of the duty of care, but cannot limit liability for breaches of the directors' duty of loyalty, acts taken in bad faith, or acts or omissions for which liability is established by statute. TBOC§ 7.001. Texas does not appear to have a similar exculpation provision for officers.

1. The DGCL was amended in 2022 to include an officer exculpation provision similar to the one that was previously afforded only to directors.
2. Note that DGCL § 102(b)(7) does not protect officers from liability for claims brought by, or in the right of, the corporation.

Continued on next page

Comparison of Certain Delaware, Nevada and Texas Laws and Other Factors Relating to Corporate Governance and Takeovers (continued)

Subject	Delaware	Nevada	Texas
Business Judgment Rule	Presumes that in making a business decision the directors acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. *Aronson v. Lewis*, 473 A. 2d 805 (Del. 1984).	Codified by statute. Directors "in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS § 78.138.	Presumes that directors act on an informed basis, in good faith, and in the best interest of the corporation. *Sneed v. Webre*, 465 S.W.3d 169 (Tex. 2015).
Other Standards of Review	In certain circumstances, typically relating to takeovers, director decisions may be subject to enhanced scrutiny. In certain conflicted transactions (either a transaction with a controlling stockholder or a conflicted board), the presumed standard of review is entire fairness, Delaware's most exacting standard of review, which requires fiduciaries to prove that a transaction was both substantively fair and procedurally fair.	Business judgment rule is the presumed standard of review in all cases except for actions taken to impede a stockholder's right to vote for or remove directors in connection with a change or potential change in control of a corporation. In 2021, the Nevada Supreme Court explicitly rejected the notion of an inherent fairness standard similar to the one applied by Delaware in conflicted transactions. *Guzman v. Johnson* (Nev. 2021).	No heightened standards similar to Delaware's enhanced scrutiny or entire fairness.
Board Duties in Adopting Anti-Takeover Defensive Measures, including Poison Pills	*Unocal Corp. v. Mesa Petroleum Co.*, 493 A. 2d 946 (Del. 1985) (Unocal) requires enhanced scrutiny of board decisions to defend against a takeover meaning that: • the board must show it has reasonable grounds for believing that a threat to corporate policy or effectiveness existed, and • the action taken must be reasonable in relation to the threat posed. An action is reasonable if it is neither coercive nor preclusive and falls within a range of reasonableness. *Unitrin, Inc. v. American General Corp.*, 651 A. 2d 1361 (Del. 1995).	No specific anti-takeover defensive measures statute but see "Interference with Shareholder Voting" below.	Not specifically addressed by state case law. In a federal case, applying Texas law, the court found that directors did not breach their fiduciary duties by issuing equity in response to a hostile takeover, because (i) the actions, relating to the duty of care, were protected by the business judgment rule and (ii) the directors proved that the issuance was fair to the corporation (satisfying the duty of loyalty). *Gearhart*.

Continued on next page

Comparison of Certain Delaware, Nevada and Texas Laws and Other Factors Relating to Corporate Governance and Takeovers (continued)

Subject	Delaware	Nevada	Texas
Poison Pills	Board may approve issuances of rights. DGCL § 157. Case law upholds rights plans with provisions that invalidate rights held by certain shareholders. *Household Int'l, Inc.*, 500 A. 2d 1346 (Del. 1985). However, poison pills with extreme features ("dead hand"/"slow hand" pills and, in at least one case, a 5% trigger coupled with broad 'acting in concert' provision) have been ruled invalid under Unocal. Carmody v. Toll Bros., 723 A.2d 1180 (Del. Ch. 1998); *Quickturn Design Sys., Inc. v. Mentor Graphics Corp.*, 721 A.2d 1281 (Del. 1998); *Williams Cos. Stockholder Litig.*, 2021 WL 754593 (Del. Ch. Feb. 26, 2021), aff'd No. 139 (Del. 2021).	Expressly permits the implementation of poison pill defensive measures. NRS § 78.195.	Seemingly permissible. In one instance, a Texas district court found that a board did not violate their duty of loyalty by adopting a poison pill. The district court cited *Gearhart* to show that the action was fair and also cited to Delaware case law. *A. Copeland Enters, Inc. v. Guste*, 706 F. Supp. 1283 (W.D. Tex. 1989).
Board Duties on Change of Control	Directors have duty to seek the best price reasonably available. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (*Revlon*); *Paramount Commc'ns Inc. v. Time Inc.*, 1989 WL 79880 (Del. Ch. July 14, 1989), aff'd, 571 A. 2d 1140 (Del. 1990) (*Paramount*).	No additional duties, provided that the directors/officers do not take any action, in connection with a change of control, intended to impede stockholders' rights to vote for or remove directors.	Some federal courts in Texas have applied *Revlon* and *Paramount* in cases brought under Texas law. *A. Copeland Enterprises, Inc. v. Guste*, 706 F. Supp. 1283 (W.D. Tex. 1989); *Heller v. Am. Indus. Properties Reit*, 1998 WL 1782550 (W.D. Tex. Sept. 28, 1998).
Interference with Shareholder Voting	Board action that interferes with the shareholder franchise is subject to review under *Unocal* (the directors must show that they had reasonable grounds for believing that a threat existed and that the action was reasonable in light of the threat posed); with special sensitivity given the central importance of the franchise.[3]	If directors take action to resist a change or potential change in control of a corporation, which action impedes the exercise of the right of stockholders to vote for or remove directors: a) The directors must have reasonable grounds to believe that a threat to corporate policy and effectiveness exists; and (b) The action taken which impedes the exercise of the stockholders' rights must be reasonable in relation to that threat. N.R.S. 78.139.	No specific case law regarding special duties or heightened standards of reviewing in this instance.

3. In 2023, in *Coster v. UIP Cos., Inc.* (Del. June 28, 2023), the Delaware Supreme Court clarified that the test under *Blasius v. Atlas Industries, Inc.* (Del. Ch. July 25, 1988), which required boards to demonstrate a "compelling justification" for actions primarily intended to interfere with stockholder voting in election contests, was properly subsumed within an analysis under *Unocal Corp. v. Mesa Petroleum Co.* (Del. 1985), which evaluates whether the board reasonably perceived a threat and whether the response was reasonable in relation to that threat. For more on that decision, see this Debevoise Debrief.

Continued on next page

Comparison of Certain Delaware, Nevada and Texas Laws and Other Factors Relating to Corporate Governance and Takeovers (continued)

Subject	Delaware	Nevada	Texas
Interested Director/Officer Transactions	Not void or voidable solely by reason of conflict, if: • material facts are disclosed and transaction is approved by a majority of disinterested shareholders (even if less than a quorum), • material facts are disclosed and transaction is approved in good faith by the shareholders, or • the transaction is fair to the corporation when approved. DGCL § 144.	A contract or transaction with an interested director or officer is not void or voidable merely because of that interest if any of the following apply: (1) The conflict of interest is known to: • the board of directors and the directors (other than any interested directors) approve or ratify the contract or transaction in good faith; or • the stockholders, and stockholders holding a majority of the voting power approve or ratify the transaction in good faith. The votes of the interested directors or officers must be counted in this vote of stockholders. (2) The conflict of interest is not known to the applicable director or officer when the transaction is brought before the corporation's board of directors for action. (3) The transaction is fair to the corporation when it is authorized or approved. NRS § 78.140(2).	A contract or transaction with an interested director or officer is not automatically void if any one of the following conditions is satisfied: (1) the material facts as to the relationship or interest are disclosed to or known by: • corporation's board of directors, and the board in good faith authorizes the contract or transaction by the approval of the majority of the disinterested directors, regardless of whether the disinterested directors constitute a quorum; or • the shareholders entitled to vote on the authorization of the contract or transaction, and the contract or transaction is specifically approved in good faith by a vote of the shareholders; or (2) the contract or transaction is fair to the corporation when the contract or transaction is authorized, approved, or ratified by the board of directors, a committee of the board of directors, or the shareholders. Common or interested directors of a corporation may be included in determining the presence of a quorum at a meeting of the corporation's board of directors, or a committee of the board of directors, that authorizes the contract or transaction. TBOC § 21.418.

Continued on next page

Comparison of Certain Delaware, Nevada and Texas Laws and Other Factors Relating to Corporate Governance and Takeovers (continued)

Subject	Delaware	Nevada	Texas
Review of Conflicted Transactions	Transactions with a conflicted controlling shareholders are generally subject to test of entire fairness. *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994). However, the business judgment rule applies if (i) from the outset the controller conditions the transaction on the approval of both a special committee of the board and approval by a majority-of-the-minority vote of stockholders; (ii) the special committee is independent of the controller; (iii) the special committee is empowered to freely select its own legal and financial advisors and to definitively reject the controller's offer; (iv) the special committee meets its duty of care in negotiating a fair price for the minority; (v) the minority stockholders are fully informed; and (vi) the stockholder approval is uncoerced. *Kahn v. M&F Worldwide Corp.*, 88 A.3d 365 (Del. 2014).	In *Guzman v. Johnson* (Nev. 2021), the Nevada Supreme Court concluded that Nevada did not recognize an inherent fairness standard, even for conflicted transactions. Nevada will only apply a heightened standard in the limited circumstances described under "Interference with Shareholder Voting" above.	Absent a safe harbor, a fiduciary must show that "the transaction in question was fair and equitable" to the corporation. *Spethmann v. Anderson*, 171 S.W.3d 680 (Tex. App. 2005). At common law and under TBOC § 21.418, the burden is on the fiduciary to show the transaction is fair. I*n re Est. of Poe*, 648 S.W.3d 277 (Tex. 2022).
Duties of Controlling Stockholders	Controlling stockholders owe fiduciary duties to the corporation and its minority stockholders in certain circumstances, particularly when the controller transacts with corporation or receives a non-ratable benefit in a transaction involving the corporation. For more on the duties of controlling stockholders in Delaware, see the blurb titled "Delaware Addresses Fiduciary Duties for Controllers Exercising Stockholder-Level Voting Power" in the Spring 2024 edition of MarketCheck.	None codified by the NRS, but in *Guzman v. Johnson* (Nev. 2021), the Nevada Supreme Court acknowledged that controllers do owe fiduciary duties in the context of a merger. However, the *Guzman* decision does not provide any clear detail on what those fiduciary duties entail and makes clear that enforcing those duties would require a plaintiff to overcome the robust protections afforded by the business judgment rule and proving intentional wrongdoing.	In *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014), the Texas Supreme Court acknowledged that "Texas courts of appeals have determined on a case-by-case basis whether majority shareholders owe an informal fiduciary duty to minority shareholders of closely held corporations," which suggests that a majority stockholder does owe duties to the minority stockholders; *see, e.g.*, *Hoggett v. Brown*, 971 S.W.2d 472, 488 n.13 (Tex. App. 1997) ("[I]n certain limited circumstances, a majority shareholder who dominates control over the business may owe such a duty to the minority shareholder.").

Continued on next page

Comparison of Certain Delaware, Nevada and Texas Laws and Other Factors Relating to Corporate Governance and Takeovers (continued)

Subject	Delaware	Nevada	Texas
Access to Stockholder List and Other Records	Upon written demand stating a proper purpose, stockholders have the right to inspect and make copies of stock ledger, stockholder list and other books and records. DGCL § 220.	A stockholder must own at least 15 percent of all of the issued and outstanding shares of the stock of the corporation or be authorized in writing by the holders of at least 15 percent of all issued and outstanding shares, upon at least 5 days' written demand, including an affidavit to the corporation stating that the inspection, copies or audit is not desired for any purpose not related to his or her interest as a stockholder, is entitled to inspect in person or by agent or attorney, during normal business hours, the books of account and all financial records of the corporation, to make copies of records, and to conduct an audit of such records. Holders of voting trust certificates representing 15 percent of the issued and outstanding shares of the corporation are regarded as stockholders for this purpose. The right of stockholders to inspect the corporate records may not be limited in the articles or bylaws of any corporation. NRS § 78.257	On written demand stating a proper purpose, a holder of shares of a corporation for at least six months immediately preceding the holder's demand, or a holder of at least five percent of all of the outstanding shares of a corporation, is entitled to examine and copy, at a reasonable time at the corporation's principal place of business or other location approved by the corporation and the holder, the corporation's books, records of account, minutes, share transfer records, and other records, whether in written or other tangible form, if the record is reasonably related to and appropriate to examine and copy for that proper purpose. TBOC § 21.218.
Courts and Case Law	Delaware courts are very experienced in adjudicating corporate law questions, and Delaware has a well-developed body of case law in the corporate governance and takeover areas.	There is limited Nevada-specific case law. There are few Nevada Supreme Court cases directly interpreting the statutes described above.	The Texas Legislature created the Texas business courts in 2023, to open September 1, 2024. The goal was to create a specialty court with experience in corporate and other business issues, but, as currently conceived, the courts will also have broader jurisdiction than the Delaware Court of Chancery, including a broad range of commercial disputes. Since there is currently little written corporate-governance case law in Texas, the business courts will be required to issue written opinions, which over time should help flesh out Texas' corporate case law.

Author

Caitlin Gibson
Counsel

Crossword Puzzle

Across

3 Acquirer of National Amusements

6 Author of the Moelis opinion

7 Disney agitator

9 Consideration in some public company deals

11 An unsolicited offer that is hard to refuse

Down

1 Area with an increasing number of regimes requiring filings across the globe (abbrev.)

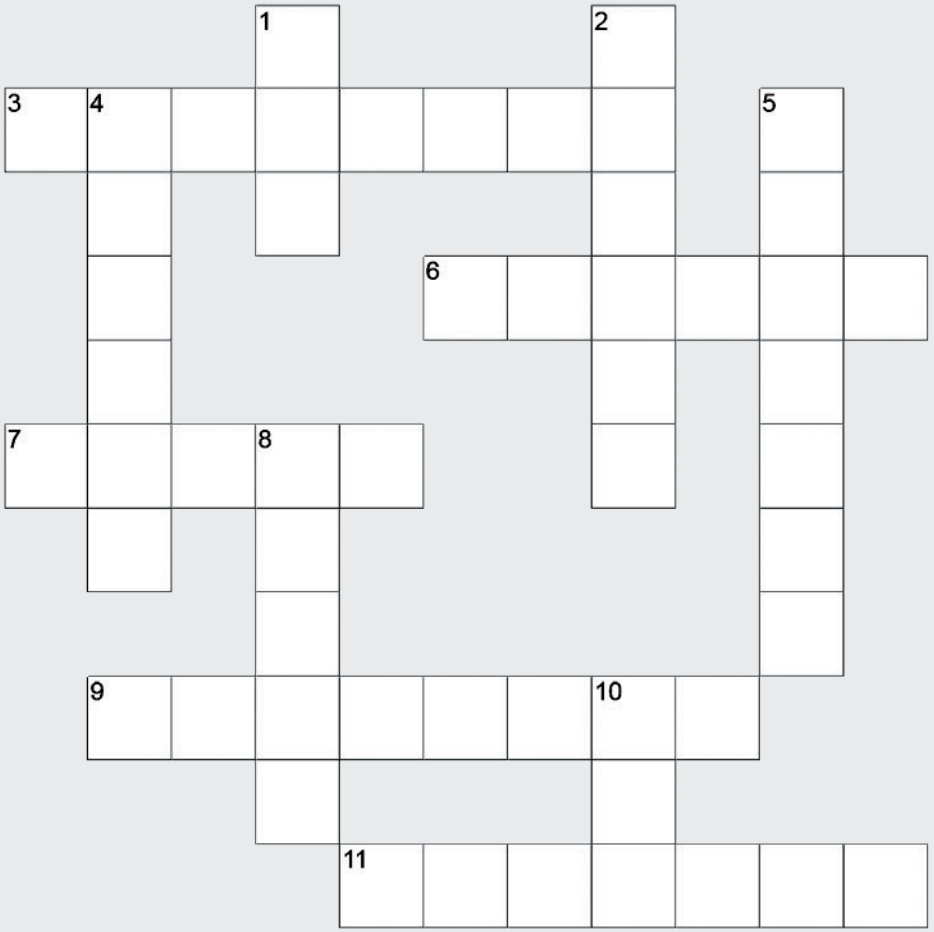
2 Huang that runs NVIDIA

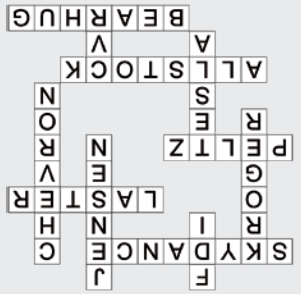
4 Would-be grocery shopper being challenged by the FTC

5 Oil company; overturned doctrine

8 Company planning to reincorporate in Texas

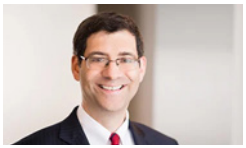
10 Tool to bridge value gap in a public deal (abbrev.)





M&A Partners

Christopher Anthony
New York
canthony@debevoise.com
+1 212 909 6031

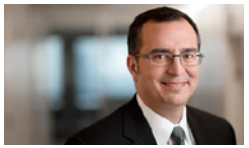


Andrew L. Bab
New York
albab@debevoise.com
+1 212 909 6323

E. Raman Bet-Mansour
London
rbetmansour@debevoise.com
+44 20 7786 5500

Paul S. Bird
New York
psbird@debevoise.com
+1 212 909 6435

Dominic Blaxill
London
dblaxill@debevoise.com
+44 20 7786 5497



Ezra Borut
New York
eborut@debevoise.com
+1 212 909 7271

Geoffrey P. Burgess
London
gpburgess@debevoise.com
+44 20 7786 9075

Jennifer L. Chu
New York
jlchu@debevoise.com
+1 212 909 6305

Michael Diz
San Francisco
madiz@debevoise.com
+1 415 738 5702

E. Drew Dutton
New York / Hong Kong
eddutton@debevoise.com
+1 212 909 6718 /
+852 2160 9800

Spencer K. Gilbert
New York
skgilbert@debevoise.com
+1 212 909 6265

Gregory V. Gooding
New York
ggooding@debevoise.com
+1 212 909 6870

David Grosgold
New York
dgrosgold@debevoise.com
+1 212 909 6203

Uri Herzberg
New York
uherzberg@debevoise.com
+1 212 909 6342

Emily F. Huang
New York
efhuang@debevoise.com
+1 212 909 6255

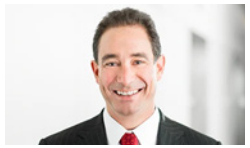
Andrew G. Jamieson
New York
agjamieson@debevoise.com
+1 212 909 6250

Alan Kartashkin
London
akartashkin@debevoise.com
+44 20 7786 9096
+44 20 7786 9000

Maurizio Levi-Minzi
New York
mleviminzi@debevoise.com
+1 212 909 6306

Jonathan E. Levitsky
New York
jelevitsky@debevoise.com
+1 212 909 6423

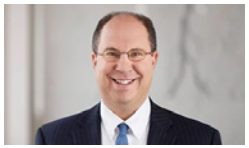
Nicholas F. Potter
New York
nfpotter@debevoise.com
+1 212 909 6459



William D. Regner
New York
wdregner@debevoise.com
+1 212 909 6698

Kevin Rinker
New York
karinker@debevoise.com
+1 212 909 6569

Jeffrey J. Rosen
New York
jrosen@debevoise.com
+1 212 909 6281



Paul D. Rubin
Washington, D.C.
pdrubin@debevoise.com
+1 202 383 8150

Kevin M. Schmidt
New York
kmschmidt@debevoise.com
+1 212 909 6178

Aly Love Simons
San Francisco
alsimons@debevoise.com
+1 415 738 5726

Katherine Durnan Taylor
New York
ketaylor@debevoise.com
+1 212 909 6426