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Webcast on Recent Developments in Delaware and Texas Corporate Law: What You Need to Know

GIBSON DUNN

Morris Nichols ARSHT & TUNNELL

Agenda

DELAWARE: HOW DID WE GET HERE?

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Delaware: How Did We Get Here?

Key Things to Know

Court Opinions. Recent caselaw created some uncertainty in the market, both regarding technical and fiduciary issues.

- Facial Challenges and Technical Invalidity: Receptivity to cases involving facial challenges, and in some cases holding longstanding market provisions and practices invalid.
- Books and Records Demands and Fiduciary Uncertainty: A judicial willingness to provide broad access to a corporation's books and records, including electronic materials, as a precursor to a fiduciary duty claim. When a breach of fiduciary duty case is brought, uncertainty regarding who is a controlling stockholder and the scope of controlling stockholder fiduciary duties, independence determinations regarding directors, and how to successfully use procedural protections to mitigate potential for litigation.

Business Reaction. This, in turn, led to an increase in the number of corporations leaving Delaware (e.g., Tesla, TripAdvisor, Dropbox), publicly considering leaving Delaware (e.g., Meta), or discussing the potential to leave Delaware with counsel (so-called "Dexit").

Legislative Intervention. In response, the General Assembly jumped into action, passing in consecutive years, and on a bipartisan basis, several consequential amendments to the Delaware General Corporation Law (the "DGCL") intended to provide certainty and clarity.

Delaware: How Did We Get Here?

Technical Challenges – Willingness to Entertain

The *Moelis* Litigation Case Study

- **IPO & Stockholder Agreement**: Moelis & Co. (the "Company") became a publicly traded company via an initial public offering ("IPO") in April 2014. Pre-IPO, the Company entered into a stockholder agreement (the "Stockholder Agreement") with Ken Moelis (founder, CEO and Chairman of the board) and certain of his affiliates.
  - The Stockholder Agreement granted Mr. Moelis extensive consent rights and board and committee-related composition rights, subject to meeting certain conditions (together, the "Challenged Provisions").
- **Lawsuit**: In March 2023, a Company stockholder filed suit asking the Court of Chancery to declare certain nomination and consent right provisions facially invalid under Section 141 of the DGCL, because they effectively remove from directors "in a very substantial way" their duty to use their own best judgment on matters of management.
- **Decisions**: The Court of Chancery issued two decisions in February 2024 determining: (1) that the challenge was not barred by laches, acquiescence or ripeness ("*Moelis I*") and (2) that many but not all of the challenged provisions in the Stockholder Agreement facially violated Section 141 ("*Moelis II*").

Delaware: How Did We Get Here?

Technical Challenges – Willingness to Entertain (cont.)

In *Moelis I*, the Court found that the plaintiff's facial validity challenge was not barred by laches or acquiescence and was ripe.

- **Equitable Defenses Unavailable**: If the challenged provisions in the Stockholder Agreement violate Section 141, then they are void; equitable defenses cannot validate void acts.
- **Laches Not a Defense, Even if Applicable**: The Court also found that, even if laches were applicable, it would not bar the facial challenge because (i) the illegality of a governance instrument is not a discrete event that occurs and becomes complete when adopted; instead, the wrong persists at all times until cured; and (ii) the Company failed to show prejudice from the delay.
- **Acquiescence Not a Defense, Even if Applicable**: Similarly, the Court held that even if acquiescence could validate a void act, the plaintiff's investment after notice of the terms of the Stockholder Agreement would not bar the claim, because disclosure of legally non-compliant conduct does not insulate that conduct from challenge.
- **Claims Ripe**: The Court also found that the claim was ripe because the plaintiff asserted that the Stockholder Agreement was facially invalid under any circumstances, reasoning that the potential for a future, as-applied challenge did not render a facial challenge unripe.

The Court has appeared willing to entertain other technical invalidity claims, which has led to an increase in demand letters and complaints, including those regarding: (i) irrevocable resignation requirements, (ii) scope of advance notice bylaws, (iii) scope of corporate opportunity waivers, and (iv) interpretive authority in rights plans and equity award plans.

Delaware: How Did We Get Here?

Technical Challenges – Substance

- **Stockholder Agreements**: In *Moelis II*, the Court of Chancery held that all of the consent rights and certain governance rights in the Stockholder Agreement violated DGCL 141(a). In *Wagner v. BRP Group, Inc.*, the Court of Chancery held that consent rights over officer changes violate Section 142 of the DGCL and consent rights over charter amendments violate Section 242 of the DGCL.
- **Merger Agreements**: In *Crispo v. Musk*, the Court of Chancery suggested in *dicta* that provisions designed by transaction planners to provide for benefit of the bargain damages payable to the target in pre-closing deal litigation are invalid.
- **Transaction Approval Requirements**: In *Sjunde AP-fonden v. Activision Blizzard, Inc.*, the Court of Chancery held that a board of directors must approve "an essentially complete" version of a merger agreement and suggested omissions of the merger consideration in the final version of agreement, and of disclosure schedules and the surviving company charter from the board package, raised sufficient technical issues to survive a motion to dismiss. The Court also suggested that the notice of the stockholder meeting was invalid because it either (i) failed to contain the full merger agreement because it omitted the surviving company charter or (ii) failed to contain a brief summary of the merger agreement, which was only in the accompanying proxy statement.
- **Incorporation By Reference**: In *Seavitt v. N-Able, Inc.*, the Court of Chancery held that a certificate of incorporation generally cannot incorporate provisions of other documents by reference.
- **In re: Irrevocable Resignation Bylaw Litigation**: Consolidating 14 of 26 lawsuits asserting facial challenges to irrevocable resignation bylaws (23 filed in less than a month). Decision pending.

Delaware: How Did We Get Here?

Books and Records Demands

- **Overview**: Section 220 of the DGCL generally allows stockholders to obtain books and records of a corporation for a "proper purpose."
- **General Standards**: When a stockholder seeks to inspect books and records for the purpose of investigating suspected wrongdoing, Delaware applies "the lowest possible burden of proof," precludes defendants from asserting a merits-based defense to the inspection, and allows the court, notwithstanding hearsay's perceived unreliability, to consider hearsay evidence to establish both a proper purpose and a credible basis for the inspection.
- **Expanding Breadth**: Recent years have seen an expansion of the scope of the ordered production to include personal emails (even after the voluntary production in one case of more than 530,000 pages of books and records), stockholders demanding inspection going back more than a decade, and the prospect of a Rule 30(b)(6) deposition to determine if an even broader scope of production should be ordered.

Delaware: How Did We Get Here?

Fiduciary Duty Caselaw

- **Controlling Stockholder Status**
  - *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024) - Holder of under 22% of stock is a controlling stockholder.
  - *FrontFour Cap. Grp. LLC v. Taube*, 2019 WL 1313408 (Del. Ch. Mar. 11, 2019) - Two brothers, who together owned less than 15% of the company, acted as a controlling stockholder with respect to the challenged transaction.
  - *In re Pattern Energy Grp. Inc. S'holders Litig.*, 2021 WL 1812674, at *40 (Del. Ch. May 6, 2021) - Suggesting that even persons who hold no stock could, individually, exercise effective control sufficient to render them a "controller" that owes fiduciary duties.
- **Fiduciary Duties of Controlling Stockholders** - *In re Sears Hometown & Outlet Stores, Inc. S'holder Litig.*, 309 A.3d 474 (Del. Ch. 2024).
  - Suggests controlling stockholders have fiduciary duties any time they act to change the status quo through a stockholder vote or stock sale. Could conceivably implicate fiduciary duties for commonplace, non-interested decisions.
  - These fiduciary duties would require only that the controlling stockholders not harm the corporation through intentional, knowing or reckless actions.

Delaware: How Did We Get Here?

Fiduciary Duty Caselaw (cont.)

- ***Kahn v. Lynch Communications Systems, Inc.***, 638 A.2d 1110 (Del. 1994) ("*Lynch*").
  - A cash-out merger effected by a controlling stockholder is subject to entire fairness review, regardless of whether: (i) the target board was composed of a majority of independent, disinterested directors, (ii) a special committee of directors negotiated and approved the merger, or (iii) the merger was conditioned on the approval of a majority of the minority stockholders.
- ***Kahn v. M & F Worldwide Corp.***, 88 A.3d 635 (Del. 2014) ("*MFW*").
  - Notwithstanding *Lynch*, an irrebuttable version of the business judgment rule applies if, prior to the start of substantive economic negotiations, the controlling stockholder irrevocably conditions the transaction on both: (i) the approval of a fully empowered special committee of independent and disinterested directors and (ii) the fully informed, uncoerced vote of the majority of shares outstanding and owned by minority stockholders.
  - The special committee must satisfy its duty of care in negotiating a fair price.

Delaware: How Did We Get Here?

Fiduciary Duty Caselaw (cont.)

- ***Salladay v. Lev***, 2020 WL 954032, at *9-12 (Del. Ch. Feb. 27, 2020).
  - Applies *MFW*'s *ab initio* requirement for unilateral committee approval of a transaction involving a majority interested board (but not conflicted controlling stockholder) to lower standard of review to business judgment rule.
- ***In re Match Group, Inc. Derivative Litigation***, 315 A.3d 446 (Del. 2024) ("*Match*").
  - Any transaction in which a controlling stockholder stands on both sides and receives a "non-ratable" benefit is subject to entire fairness review under *Lynch*, unless the procedural safeguards from *MFW* are followed.
    - Leaves open the possibility, in the context of a derivative claim triggering entire fairness review, of dismissal under Court of Chancery Rule 23.1 for failure to plead with particularity either that demand was wrongfully refused or excused.
  - A lack of independence of **even one** member of a special committee means that the *MFW* conditions are not satisfied.
- ***Tornetta v. Musk***, 326 A.3d 1203 (Del. 2024).
  - Declining to revise judgment based on stockholder ratification of rescinded compensation plan.

TEXAS: HOW DID WE GET HERE?

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Texas: How Did We Get Here?

Key Things to Know

Booming Economic Growth. Texas has grown into the eighth-largest economy in the world, with an estimated GDP of $2.7 trillion in 2024. And the rapid growth of the Texas economy shows no sign of slowing: In the fourth quarter of 2024, the Texas GDP grew at an annual rate of 3.5%, well ahead of the U.S. average of 2.4%. Texas's burgeoning population, which now exceeds 30 million residents, is a key driver of this economic expansion, providing a deep labor pool and fueling demand for goods and services across the state. The steady influx of new residents not only supports a vibrant workforce but also attracts businesses and investment, further reinforcing Texas's position as an economic powerhouse.

Pro-Business Government. The Governor of Texas, who is currently the second-longest serving governor in Texas history, is widely recognized for his business-friendly policies. Governor Abbott and the Texas Legislature have a track record of enacting pro-business legislation and have the power to continue to shape Texas policy to favor businesses.

Business Reaction. Due to its large and growing population, thriving economy and favorable regulatory environment, Texas gained more jobs than any other state in the past decade from businesses relocating from other parts of the country, with more than 25,000 establishments having relocated to Texas from 2010 to 2019. The list of businesses that have recently relocated to Texas includes major corporations. The high-profile relocation of major companies or their primary or secondary headquarters has generated significant media attention and further cemented Texas's reputation as a top choice for corporate investment.

Texas: How Did We Get Here?

Key Things to Know (cont.)

Legislative Process. Every odd-numbered year, the legislature gathers in its regular session to pass a two-year state budget and other laws for 140 days beginning in January. The governor can also call for special sessions for up to 30 days outside of regular sessions. During these special sessions, lawmakers can pass laws only on issues outlined by the governor. The governor can sign or veto bills. Lawmakers can override a veto with two-thirds votes of each chamber.

Legislative Action. There have been significant changes to improve the business landscape in recent years:

- **Amendments to Corporate Statute.** In May of 2025, the Governor of Texas signed into law significant amendments to the Texas Business Organizations Code (the "TBOC"). The new laws introduce consequential changes affecting governance, governing authority liability, shareholder rights, and internal management of companies organized under the TBOC.
- **Texas Business Courts.** In June of 2023, Texas created specialized business courts staffed by judges with significant experience in business law and expertise in handling the complex legal and financial issues often involved in business disputes.

Texas: How Did We Get Here?

Key Things to Know (cont.)

Stock Exchanges. The Texas government has actively promoted national stock exchange activity directly in the state.

- **The Texas Stock Exchange (TXSE)**:
  - Proposed new national securities exchange headquartered in Dallas
  - Announced in June 2024 and backed by institutional investors
  - Filed Form 1 registration with the SEC in early 2025 and review is pending (proposed listing rules publicly available)
  - If approval granted, per TXSE, intends to launch trading in early 2026 with listings by end of 2026
- **NYSE Texas.** NYSE Texas launched in March 2025 as a fully electronic equities exchange based in Dallas and has accepted dual listings. Per NYSE, Texas is the state with the largest number of NYSE listings.
- **Nasdaq.** In March 2025, Nasdaq opened a regional headquarters in Dallas to serve as a convening space for leaders, entrepreneurs and innovators in Texas to connect with each other and Nasdaq's global network. Per Nasdaq, over 200 Texas based companies are listed on Nasdaq.
- **Franchise Tax Exemption for Texas Stock Exchanges**. SB 1058, which was signed into law on May 13, 2025 and takes effect on January 1, 2026, creates a franchise tax exemption for stock exchanges operating in Texas for certain tax liabilities.

WHAT ARE THE RECENT CHANGES TO DELAWARE CORPORATE LAW?

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What Are the Recent Changes to Delaware Corporate Law?

Key Things to Know

Typical "Bottom-Up" Approach. The DGCL is fine-tuned on an almost annual basis. The vast majority of the time, legislation begins with feedback from corporations and their counsel. The Council ("Council") of the Corporation Law Section of the Delaware State Bar Association ("DSBA") takes that feedback and proposes legislation to the General Assembly, which typically adopts the proposed legislation without controversary.

2024 DGCL Amendments – Technical Certainty. The 2024 DGCL Amendments, which addressed technical uncertainty arising from *Moelis*, *Crispo*, and *Activision*, followed the typical "bottom-up" approach. However, the Council performed the same amount of work it would typically do on a shorter time-period, given the need for the amendments. The *Moelis* substantive opinion issued February 23; amendments were signed into law on July 17.

2025 DGCL Amendments – Fiduciary Duty Issues. The 2025 DGCL amendments (i) clarify the means by which disinterested directors or disinterested stockholders may approve conflict transactions; (ii) limit the liability of controlling stockholders to breaches of the duty of loyalty and actions taken in bad faith or involving improper self-interested actions; and (iii) set forth certain conditions that a stockholder must satisfy in order to demand inspection of a corporation's books and records, and limit the materials that a stockholder may obtain in such an inspection. These amendments followed a more "top-down" approach, initially introduced by a bipartisan coalition of all members of the leadership of the General Assembly, and then revised by Council.

What Are the Recent Changes to Delaware Corporate Law?

Typical Process

- **Composition of Council**: Composed of a diverse representation of 26 plaintiff- and defense-side lawyers, including litigators and transaction planners, as well as a representative of the Secretary of State's office.
- **Typical Process**: Corporations and their counsel report to local Delaware counsel their experience in using the corporate franchise. Delaware counsel, in turn, suggests consideration of amendments reflecting the feedback of the various stakeholders to the Council. The Council considers such amendments, often through the assistance of focused committees composing an even broader cross-section of the Delaware bar. Any proposed amendments are presented to the General Assembly if they are approved by the Corporation Law Section and the executive committee of the DSBA.
- **Examples**: Examples of "regular way" amendments over the past 15 years include those:
  - Facilitating mergers by tender offer, reverse stock splits (often necessary to maintain stock exchange listing), and corporate actions in connection with domestications (helpful during the SPAC boom of the last decade).
  - Authorizing the use of captive D&O liability insurance.
  - Offering procedures to ratify defective corporate acts that otherwise could result in uncertain capitalization structures.

2024 DGCL Amendments

Addressing Technical Issues

Highlights: In response to *Moelis, Crispo and Activision*, the DGCL was swiftly amended:

- **New § 122(18)**: a corporation has the power and authority, without a provision in the charter, to enter into agreements with current or prospective stockholders that have governance features (e.g., consent rights and other covenants) in exchange for consideration.
- **New § 147**: whenever the DGCL requires an agreement or document to be approved by a Board, the Board may approve the agreement or document in substantially final form.
- **Amended § 261**: a target corporation can contract with a buyer to seek damages based on the lost premium for stockholders and may keep such damages.
- **Amended § 261**: clarifies and confirms authority in private company deals for the appointment of stockholder representatives to oversee matters after a stockholder vote is obtained for the deal.
- **New § 268(b)**: provides that disclosure schedules qualifying the reps and warranties, covenants and conditions in the agreement are not deemed part of the agreement for any purpose of the DGCL.

2024 DGCL Amendments

Addressing Technical Issues (cont.)

- **New § 122(18)**: *Moelis*-related amendments address the following:
  - **Authority to enter into contracts**. The amendments added a new subsection (18) to Section 122 of the DGCL to provide that, whether or not set forth in a certificate of incorporation, assuming there is consideration (which can be non-financial), a corporation has the power to enter into contracts with current or prospective stockholders that contain the consent rights and other provisions addressed in *Moelis*. Specifically, the amendments added a nonexclusive list of provisions that may be included in such contracts, including those that:
    - restrict or prevent the corporation from taking actions specified in the contract, either generally or absent the consent of one or more persons or bodies (including one or more directors or stockholders); and/or
    - covenant that the corporation or one or more persons will take or refrain from taking actions specified in the contract (including one or more directors or stockholders).
  - **Limitation**. No provision of such a contract will be enforceable against the corporation if it is contrary to the charter; or would be contrary to Delaware law (other than Section 115 of the DGCL) if added to the charter.
  - **Fiduciary duties**. The amendments did not alter the fiduciary duties of directors, or existing standards of review, with respect to a decision to enter into such contracts or to breach such contracts.

2024 DGCL Amendments

Addressing Technical Issues (cont.)

- **Additional amendments addressed approval of M&A agreements (in response to the *Activision* case) and failed transactions and associated penalties and post-closing stockholder representation (in response to the *Crispo* case)**.
  - New Section 147 provides that, whenever the DGCL requires a board to approve or take other action with respect to any agreement, instrument or document, that agreement, instrument or document may be in either final form or substantially final form. To provide flexibility if questions exist as to whether an agreement is in substantially final form when approved, new Section 147 also includes the ability to adopt a resolution ratifying an agreement (such as a merger agreement) that is required to be filed with the Secretary of State or referenced in any certificate so filed (such as a certificate of merger), so long as such ratification occurs prior to the effectiveness of such filing.
  - Amended Section 261(a)(1) provides for pre-closing remedies (including benefit of the bargain damages recoverable by the target corporation) and amended Section 261(a)(2) provides for the appointment of a stockholders representative.
  - New Section 268(b) provides that, unless otherwise expressly provided by the relevant agreement, disclosure letters and schedules with respect to representations, warranties, covenants, or conditions contained in the agreement are not deemed part of the agreement for purposes of the DGCL. However, Section 268(b) does not alter fiduciary duties of directors. Accordingly, directors should be informed of any disclosure schedules material to the transaction.

2025 DGCL Amendments

Addressing Fiduciary Duty-Based Litigation

- **Section 144 of the DGCL** is not new, but historically was viewed as a means of abrogating the common law rule that interested directors could neither vote on, nor be counted for quorum purposes with respect to, interested transactions, such that, among other things, all transactions involving a majority-conflicted board were voidable.
- SB21 amended Section 144 to provide "**safe harbors**" for three categories of interested transactions:
  - Transactions involving interested directors or officers but no interested controlling stockholder or control group.
  - Transactions involving a conflicted controlling stockholder or control group other than going private transactions.
  - Going private transactions with a controlling stockholder or control group.

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2025 DGCL Amendments

Addressing Fiduciary Duty-Based Litigation (cont.)

- **Section 144 is "intended to provide a comprehensive liability exculpation scheme with respect to the fiduciary duties owed by stockholders**." Controlling stockholder and control group definitions contained in §§ 144(e)(1) and (2).
  - § 144(d)(4) provides that no person will be deemed a controlling stockholder, and no group of stockholders will be deemed a control group, if the definitions in §§ 144(e)(1) and (2) are not satisfied.
  - § 144 does not address exculpation or safe harbors for stockholders who are not controlling stockholders or part of a control group because those stockholders do not owe fiduciary duties.
- Sections 144(b) and (c) provide **safe harbors for controlling stockholder conflict transactions**.
- Section 144(d)(5) **eliminates the potential liability of a controlling stockholder** or member of a control group for breach of the duty of care in its capacity as such.
  - Although the language derives from the director and officer exculpation statute (§ 102(b)(7)), unlike that statute, controlling stockholder or control group exculpation need not be included in the certificate of incorporation and there is no option to opt out.

Amended § 144(a) – Majority Interested Board Safe Harbor

Category

- Majority Interested Board, No Conflicted Controlling Stockholder or Control Group – All Transactions

Common Law

- Transaction **either** (i) conditioned before start of substantive economic negotiations on approval of independent committee **or** (ii) approved by disinterested stockholders.

Amended § 144

- Transaction **either** (i) approved (or recommended for approval) by majority of disinterested directors serving on at least two-person committee, all of whose members were determined by board to be disinterested **or** (ii) approved or ratified by informed, uncoerced disinterested stockholder vote.

Key Differences

- If director safe harbor, need not be conditioned on such approval before start of substantive economic negotiations; however, minimum two-person committee and board must determine all members of committee are disinterested (even if ultimately one or more are determined not to be).
- If stockholder safe harbor, can either be approval of transaction or ratification after the fact, and vote requirement is "majority of votes cast."

Amended § 144(b) – Conflicted Controller / Not Going Private Safe Harbor

Category

- Conflicted Controlling Stockholder or Control Group – Transactions Other Than Going Private Transaction

Common Law

- Transaction must be irrevocably conditioned before start of relevant substantive economic negotiations on approval by **both** (i) a committee comprising solely independent directors **and** (ii) disinterested stockholders.

Amended § 144

- Transaction must be **either** (i) approved (or recommended for approval) by majority of disinterested directors serving on at least two-person committee, all of whose members were determined by board to be disinterested **or** (ii) be conditioned on informed, uncoerced disinterested stockholder approval or ratification before it is submitted to stockholders.

Key Differences

- Either (as opposed to both) disinterested director or disinterested stockholder approval required.
- Committee must be minimum two-person committee and board must determine all members of committee are disinterested (even if ultimately one or more are determined not to be).
- No express timing requirement on conditioning transaction on committee approval, and timing requirement for conditioning transaction on stockholder approval or ratification is before submission to stockholders.
- For stockholder safe harbor, denominator is “votes cast” standard instead of “outstanding” standard.

Amended § 144(c) – Conflicted Controller Going Private Safe Harbor

Category

- Conflicted Controlling Stockholder or Control Group – Going Private Transaction

Common Law

- Transaction must be irrevocably conditioned before start of substantive economic negotiations on approval by **both** (i) a committee comprising solely independent directors **and** (ii) disinterested stockholders.

Amended § 144

- Transaction must be **both** (i) approved (or recommended for approval) by majority of disinterested directors serving on at least two person committee, all of whose members were determined by board to be disinterested **and** (ii) conditioned on informed, uncoerced disinterested stockholder approval before it is submitted to stockholders.

Key Differences

- Committee must be minimum two-person committee and board must determine all members of committee are disinterested (even if ultimately one or more are determined not to be).
- No express timing requirement on conditioning transaction on committee approval, and timing requirement for conditioning transaction on stockholder approval is before submission to stockholders.
- For stockholder safe harbor, denominator is “votes cast” standard instead of “outstanding” standard.

2025 DGCL Amendments

Amended § 144(e) – Defining Disinterest

- Under §144(e)(4) and (5), a director or stockholder is "**disinterested**" if he, she or it:
  - Has no "**material interest**" in the act or transaction.
    - In the case of a director, he or she must also not be a party to the act or transaction.
  - Has no "**material relationship**" with anyone with a "material interest" in the act or transaction.
    - In the case of a stockholder, the stockholder must also have no "material relationship" with the controlling stockholder or other member of the control group.
- "**Material interest**" is defined in § 144(e)(7) as an actual or potential benefit, including the avoidance of a detriment, other than one which would devolve on the corporation or the stockholders generally.
- "**Material relationship**" is defined in § 144(e)(8) as a familial, financial, professional, employment, or other relationship.
- In either case, the relevant interest or relationship must:
  - **Directors**: Reasonably be expected to impair the objectivity of the director's judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue.
  - **Stockholders and Others**: Be material to such stockholder or such other person.

2025 DGCL Amendments

Amended § 144(d)(2) – Presumption of Director Independence

- For **public companies**, directors are presumed disinterested if they are not a party to the act or transaction and the board determines that the director satisfies applicable stock exchange criteria for independence with respect to the company.
  - In connection with a conflicted controller transaction, the board must also determine the director satisfies the relevant stock exchange rules for independence from the controlling stockholder or control group. For this purpose, the statute includes a translator for the relevant stock exchange determination to apply to the controlling stockholder or control group (in addition to the company).
- This presumption is "**heightened**" and may only be rebutted by **substantial and particularized** facts that a director has a material interest in the act or transaction or has a material relationship with a person with a material interest in the act or transaction.
  - Although the statute does not expressly state, presumably the "substantial and particularized facts" may be alleged for purposes of a motion to dismiss, and must be proven at trial.
- Under § 144(d)(3), for both private and public companies, the designation, nomination or vote in the election of a director to the board of directors by any person that has a material interest in an act or transaction is not, of itself, evidence that a director is not a disinterested director with respect to an act or transaction to which such director is not a party.

2025 DGCL Amendments

Amended § 144(e)(2) – Controlling Stockholder Definition

- "**Controlling Stockholder**" limited to a person that, together with such person's affiliates and associates (with "affiliates" and "associates" undefined in the statute):
  - Owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors or in the election of directors who have a majority in voting power of the votes of all directors on the board of directors (a "**Majority Stockholder**").
  - Has the right, by contract or otherwise, to cause the election of nominees who are selected at the discretion of such person and who constitute either a majority of the members of the board of directors or directors entitled to cast a majority in voting power of the votes of all directors on the board of directors.
  - Is not a Majority Stockholder but:
    - Has the power functionally equivalent to that of a Majority Stockholder by virtue of ownership or control of at least one-third in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors or in the election of directors who have a majority in voting power of the votes of all directors on the board of directors; and
    - Power to exercise managerial authority over the business and affairs of the corporation.

2025 DGCL Amendments

Amended § 144 – Other Controlling Stockholder-Related Definitions

- **Control group** [Section 144(e)(1)]
  - Two or more persons that are not controlling stockholders that, by virtue of an agreement, arrangement, or understanding between or among such persons, constitute a controlling stockholder.
- **Controlling stockholder transaction** [Section 144(e)(3)]
  - An act or transaction between the corporation (or its subsidiaries) and a controlling stockholder or control group; or
  - An act or transaction from which a controlling stockholder or a control group receives a financial or other benefit not shared with the corporation's stockholders generally.
- **Going private transaction** [Section 144(e)(6)]
  - **Public Companies**: A 13e-3 Transaction
  - **Private Companies**: Any controlling stockholder transaction pursuant to which all or substantially all the shares of the corporation's capital stock held by the disinterested stockholders (but not those of the controlling stockholder or control group) are cancelled, converted, purchased or otherwise acquired or cease to be outstanding.
    - **Note:** Does not include asset sales followed by liquidating distributions.

2025 DGCL Amendments

Amended § 144 – Committee Composition

- A committee must consist of a minimum of **two** members; and
- The board must determine **all** members of the committee are disinterested.
  - However, the safe harbor appears available if a Court ultimately disagrees with the board's independence determinations, so long as a majority of the disinterested directors on the committee approve the transaction.
  - This is consistent with the purpose of the statute, which is to facilitate using procedural protections, while eliminating foot faults if, at the pleading stage, enough facts are alleged to make it reasonably conceivable one of the members of the committee is not disinterested.

2025 DGCL Amendments

Amended § 144 – Director Action

- **Compliance with Fiduciary Duties**
  - Decisionmaker must act in good faith and without gross negligence.
    - The addition of "gross negligence" is intended, per the synopsis, only to "mak[e] clear that the statute does not displace the common law requirements regarding core fiduciary conduct."
    - As noted by the Supreme Court in *Flood v. Synutra*, 195 A.3d 754 (Del. 2018), challenging price and disagreeing on strategy are not sufficient to plead a due care violation.
      - Instead, a "plaintiff can plead a duty of care violation only by showing that the Special Committee acted with gross negligence, not by questioning the sufficiency of the price."
    - Moreover, "[f]or purposes of Delaware entity law, a showing of gross negligence requires conduct akin to recklessness." *In re McDonald's Corp. S'holder Deriv. Litig.*, 289 A.3d 343 (Del. Ch. 2023).

2025 DGCL Amendments

Amended § 144 – Backstops to the Safe Harbor Procedures

- **Entire Fairness**: Amended § 144 contemplates that, even if the safe harbor procedural protections are not utilized, the safe harbor would still apply if the transaction satisfies a fairness test.
  - This "is intended to be consistent with the entire fairness doctrine developed in the common law."
- **Common Law Protections**: Makes clear that the amendments "do not displace any safe harbor procedures or other protections available at common law, including processes and procedures that comply with the pre-amendment common law but do not conform to the § 144 safe harbors."
  - Thus, if, for example, § 144(c) is unavailable because the board only has one disinterested director, successful compliance with the *MFW* framework should still result in the application of an irrebuttable version of the business judgment rule.

2025 DGCL Amendments

Amended § 144 – Express Limitations

- Section 144(d)(6)(c) expressly states that the statute **does not** "**[l]imit or eliminate the right of any person to seek relief on the grounds that a stockholder or other person knowingly aided and abetted a breach of fiduciary duty by one or more of the directors of the corporation**." However, because the safe harbor contemplates disclosure of material facts to the board, it presumably would not have applied in a "fraud on the board" scenario regardless of this express limitation.
- Equitable relief remains available if the transaction was not authorized or approved in compliance with governing documents, or is in violation of any plan, agreement or order of any governmental authority to which the corporation is a party or subject.
- The statute does not limit judicial review for purposes of injunctive relief of protective devices, such as deal protection measures (such as provisions limiting a target board's right to change its recommendation or providing for a termination fee upon accepting a topping bid) and devices intended to preclude a change in control (such as poison pills).

2025 DGCL Amendments

Amended § 144(d)(7) – Tender Offers

- Section 144(d)(7) clarifies what many deal practitioners understood the law to be – that a tender of shares into a tender offer preceding a medium-form merger under § 251(h) is treated as a vote in favor of the transaction.
  - However, because the new safe harbors lower the stockholder safe harbor mechanism to a "votes cast" (as opposed to "majority of the outstanding") standard, and all shares not tendered are effectively deemed votes against, it is less likely a § 251(h) deal will be used to qualify for the safe harbor than a long-form merger.

2025 DGCL Amendments

Section 220

SB21 amendments to Section 220 narrow the scope of books and records available to stockholders and increase the burden on stockholders for obtaining such records in the following ways:

- **Scope of Books and Records**. Limits the definition of "books and records" to specified core corporate documents.
- **Relevant Period**. Restricts the period of time from which stockholders may obtain certain corporate documents to those within three years of the demand.
- **Demand Requirement**. To obtain inspection, a stockholder demand is required to describe its purpose and the records it seeks with "reasonable particularity."
- **Protections**. Codifies the court's practice of permitting a company to impose reasonable restrictions on confidentiality, use, and distribution, including redaction of content not specifically related to the stockholder's purpose.
- **Ability to Get Certain Other Records**. Prohibits the court from compelling production of materials outside the defined term with a few narrow exceptions.
  - If a company does not have certain corporate documents, the court is permitted to order production of additional records that are the "functional equivalent" of these materials but "only to the extent necessary and essential" to fulfill a proper purpose.
  - In addition, amended Section 220 permits the inspection of materials beyond those covered by the "books and records" definition if a stockholder demand (1) makes a showing of a compelling need for an inspection of such records to further the stockholder's proper purpose, and (2) demonstrates by clear and convincing evidence that such specific records are necessary and essential to further such purpose.

2025 DGCL Amendments

Section 220 (cont.)

- Section 220(b)(3) codifies caselaw precedent that:
  - A confidentiality agreement can provide that any production of books and records is deemed incorporated by reference into any stockholder complaint filed that relates to the demand's subject matter.
  - The corporation can redact portions of the production not specifically related to the purpose of the demand.
- Section 220(b)(4) makes clear that § 220 does not affect:
  - The right of stockholders to seek discovery in litigation with the corporation to the same extent as any other litigant; or
  - The power of a court to compel production of corporate records and impose reasonable restrictions on that inspection provided that, in the case of production pursuant to § 220(a)(1), the stockholder has met the requirements of § 220.

Legal Challenges to 2025 Amendments

- In *Rutledge v. Clearway Energy Group LLC*, the Court of Chancery certified the following questions to the Delaware Supreme Court:
  - Does Section 1 of Senate Bill 21, codified at 8 Del. C. § 144—eliminating the Court of Chancery's ability to award "equitable relief" or "damages" where the Safe Harbor Provisions are satisfied—violate the Delaware Constitution of 1897 by purporting to divest the Court of Chancery of its equitable jurisdiction?
  - Does Section 3 of Senate Bill 21—applying the Safe Harbor Provisions to plenary breach of fiduciary claims arising from acts or transactions that occurred before the date that Senate Bill 21 was enacted—violate the Delaware Constitution of 1897 by purporting to eliminate causes of action that had already accrued or vested?
- Other litigation has been stayed pending resolution of these Delaware constitutional law questions. *Plumbers & Fitters Local 295 Pension Fund v. Dropbox, Inc.*

WHAT ARE THE RECENT CHANGES TO TEXAS CORPORATE LAW?

04

What Are the Recent Changes to Texas Corporate Law?

Key Things to Know

Protections for Officers and Directors

- **Codification of the Business Judgment Rule.** The amended TBOC codifies the Business Judgment Rule (the "BJR Statute"). To take advantage of this presumption, a Texas corporation must be publicly traded or opt in to the BJR Statute in its certificate of formation or bylaws. The BJR Statute creates a presumption that the actions of directors and officers are taken in good faith, on an informed basis, in the best interests of the corporation, and in obedience to the law and the corporation's governing documents. To prevail in a cause of action claiming a breach of duty, the claimant must (a) rebut one or more of these presumptions and (b) prove (with particularity) (i) the act or omission was a breach of a duty *and* (ii) the breach involved fraud, intentional misconduct, ultra vires acts, or knowing violation of law.
- **Protection of Officers and Directors in Conflicts of Interest.** Directors and officers protected by the BJR Statute are shielded from any cause of action brought by shareholders for a breach of duty with respect to making, authorizing or performing a transaction because the director or officer had an interest in the transaction unless the alleged breach involved fraud, intentional misconduct, ultra vires acts or knowing violations of law.
- **Extension of Exculpation to Officers.** A Texas corporation may elect in its certificate of formation to limit or eliminate the liability of officers for monetary damages for an act or omission taken by the officer in his or her capacity as an officer. Exculpation cannot be provided for breaches of loyalty, intentional misconduct, transactions in which the officer received an improper benefit, or statutory violations.
- **Judicial Determination of Independence of Committees Reviewing Related Party Transactions.** Boards of Texas corporations that are either publicly traded or that opt in to the BJR Statute may petition the Texas Business Court (or any other district court with proper jurisdiction) to make a determination on the independence of the committee of directors formed to review and approve transactions involving directors, officers or controlling shareholders. After an evidentiary hearing, the court will render a dispositive determination (absent new facts) regarding the independence.

What Are the Recent Changes to Texas Corporate Law?

Key Things to Know (cont.)

Litigation Related Limitations

- **Minimum Share Ownership Requirements for Derivative Claims.** Texas corporations that (i) are publicly traded or (ii) have 500 or more shareholders and have elected to opt in to the BJR Statute may establish a requirement that shareholders must own up to 3% of the corporation's outstanding shares before they can initiate a derivative proceeding. The requirement can be set forth in the certificate of formation or the bylaws.
- **Waiver of Jury Trial.** Texas corporations may include in their bylaws or certificate of formation a waiver of the right to a jury trial for any internal entity claims. Internal entity claims include, for example, derivative claims that directors of a corporation breached their fiduciary duties. Such waivers are enforceable even if not individually signed by owners, officers or governing persons. A person is considered to have knowingly waived this right if they voted for or ratified the document containing the waiver, or, after the waiver was included in the governing documents, either purchased or continued to hold stock in the corporation.
- **Exclusive Forum.** Texas corporations may choose an exclusive Texas forum and Texas venue for all internal entity claims in the bylaws or certificate of formation.
- **Elimination of Plaintiff's Attorney's Fees for Disclosure Suits.** Upon termination of a derivative proceeding, the court may order that a Texas corporation pay the plaintiff's attorney's fees if the derivative action resulted in a "substantial benefit to the corporation." A substantial benefit to a corporation does not include additional or amended disclosures made to shareholders (*e.g.,* supplements to a proxy statement for a merger).

What Are the Recent Changes to Texas Corporate Law?

Key Things to Know (cont.)

Limitations on Shareholder Proposals and Books and Records Requests

- **Option to Set Requirement for Shareholder Proposals.** Any Texas corporation that is a "nationally listed corporation," and that elects to adopt these requirements by an amendment to the bylaws or certificate of formation, may require shareholders beneficially own shares equal to at least $1 million in market value or 3% of the corporation's outstanding voting shares before they may submit a shareholder proposal. In addition, the shareholders must solicit holders of shares representing at least 67% of the voting power of shares entitled to vote on the proposal. These provisions apply to any shareholder proposals, other than director nominations and procedural resolutions that are "ancillary to the conduct of the meeting."
- **Limitations on Corporate Records Inspection Rights.** Emails, text messages and social media communications are excluded from corporate records, unless they effectuate an action by the corporation. Furthermore, Texas corporations that are either publicly traded or that opt in to the BJR Statute may deny inspection demands from shareholders with ongoing or expected litigation involving the corporation or derivative proceedings.

Technical Transaction Execution Improvements

- **Clarity that Board Does Not Have to Approve Final and Complete Version of Agreements.** The board of directors of a corporation may approve corporate documents such as plans, agreements and instruments in the final or "substantially final form." Disclosure letters and other similar documents to be delivered in connection with a plan of merger are not considered a part of the plan of merger unless expressly stated.
- **Clarity that Agents Can Act for Entity.** A plan of merger may appoint representatives to act on behalf of owners, with the exclusive authority to enforce or settle post-transaction rights. The appointment may be made irrevocable and binding on the parties upon approval of the plan.
- **Conversions**: A plan of conversion can authorize any additional actions taken by the converted entity in connection with the plan of conversion without any additional approvals.

What Are the Recent Changes to Texas Corporate Law?

Key Things to Know (cont.)

Proxy Advisor Disclosure Requirements *[Pending Signature or Veto from the Texas Governor]*

- Covers “proxy advisors,” which are broadly defined as persons who are giving “proxy advice” (as defined) regarding proposals about a publicly-traded entity that (i) is organized in Texas, (ii) has its principal place of business in Texas or (iii) is a non-Texas entity that has made a proposal in its proxy statement to become a Texas entity. Proxy advisor is required to make certain public disclosures when (i) its recommendations are “not provided solely in the financial interest of the shareholders of a company” or (ii) the advisor provides advice that is defined as “materially different.”
- Advice is not in financial interest of shareholders when: it takes into account non-financial factors, including ESG, DEI, social credit or sustainability factor; recommendation is inconsistent with the recommendation of the board and fails to include a written economic analysis of financial impact on shareholders (as defined); itis not based solely on financial factors and subordinates shareholders’ financial interests to other objectives; or it recommends a vote against a company proposal to elect a governing person, unless the firm states that the recommendation is solely based on financial interests of shareholders.
- Statute allows for both public and private enforcement, remedies and injunctive relief.

Amendments to Texas Business Organizations Code: Summary of Key Changes

Provision	Key Changes	Application/Scope
Senate Bill 29 (Amendments Effective May 14, 2025)		
§ 21.419 – Business Judgment Rule (BJR)	Codifies BJR: acts of directors/officers are presumed (i) in good faith, (ii) informed, (iii) in the corporation's best interests, and (iv) lawful. Rebuttal requires proof of (a) breach of duty **and** (b) fraud, intentional misconduct, ultra vires acts, or knowing violations of law. Does not limit monetary liability-limiting provisions in governing documents.	Applies to (a) publicly traded corporations and (b) Texas corporations that affirmatively elect in governing documents to be governed by this section. Applies in addition to any presumption under common law or the TBOC.
§ 21.418(e) – Related Party Transaction Approval	Shields directors/officers from shareholder breach of duty claims regarding interested transactions, unless the cause of action is permitted under § 21.419.	Applies to (a) publicly traded corporations and (b) Texas corporations that opt in to § 21.419. Does not shield controlling stockholders.
§§ 21.416 & 21.4161 – Committees and Related Party Transactions	Allows corporations to petition Texas Business Court (or in certain cases a district court) to determine if committee members reviewing related party transactions are "independent and disinterested." The court's determination is binding unless new facts arise. Requires notice of the petition to shareholders.	Applies to (a) publicly traded corporations and (b) Texas corporations that opt in to § 21.419.
§ 21.552 – Limitations on Derivative Actions	Permits corporations to impose a minimum ownership threshold (up to 3% of outstanding shares) to bring derivative actions. Must be in certificate of formation or bylaws.	Applies to (a) publicly traded corporations and (b) Texas corporations with 500+ shareholders that opt in to § 21.419.
§§ 2.115 & 2.116 – Jury Trial Waivers and Forum Selection	May (i) include waivers of jury trial for internal entity claims in certificate of formation or bylaws; and (ii) select an exclusive Texas forum and venue for internal entity claims.	Applies to domestic entities. Includes derivative actions.

Amendments to Texas Business Organizations Code:
Summary of Key Changes (cont.)

Provision	Key Changes	Application/Scope
§ 21.218 – Inspection Rights	Clarifies and limits shareholder inspection rights. Excludes emails, texts, and social media unless they effectuate corporate action. Publicly traded corporations and Texas corporations that opt in to § 21.419 may deny inspection to shareholders involved in active/pending derivative proceedings or civil lawsuits. Discovery rights remain intact.	See "Key Changes" column.
Senate Bill 1057 (Amendments Effective September 1, 2025)		
§ 21.373 – Requirements for Shareholder Proposals	Sets thresholds: to submit a proposal, a shareholder/group must hold $1 million in market value or 3% of voting shares as of the date proposal is submitted, must have held the shares for at least six months and through the shareholder meeting, and must solicit at least 67% of voting power.	Applies to any "nationally listed corporation" that has its principal office in Texas or is listed on a Texas-based exchange approved by the Texas Securities Commissioner. Must be set out in certificate of formation or bylaws and disclosed in proxy, together with certain instructional information, prior to adoption.
Senate Bill 2411 (Amendments Effective September 1, 2025)		
§ 7.001 – Officer Exculpation	Permits exculpation of officers for monetary damages to same extent as statutorily permitted for directors. Exclusions: breaches of loyalty, intentional misconduct, improper benefit, statutory violations.	Entity must make affirmative election in certificate of formation.
§§ 3.106, 10.002, 10.004, 10.104 – Approval of Forms, Plan of Merger, and Additional Administrative Changes	Authorizes approval of corporate documents (e.g., plan of merger) in final or substantially final form. Disclosure schedules are not part of the plan unless expressly included. Permits irrevocable appointment of representatives to enforce post-transaction rights.	No provision-specific limitations.
[Pending Governor Action] Senate Bill 2337 (Amendments Effective September 1, 2025)		
(New Chapter) 6A.001, 6A.201-202 – Proxy Advisory Firm Regulation	Requires proxy advisors to provide certain disclosures to shareholders and the company if the proxy advisor makes recommendation or provides voting advice, where the advice/recommendation is based on non-financial factors or where the proxy advisor provides conflicting advice/recommendations to clients.	Any publicly traded entity that (i) is organized or created in Texas, (ii) has its principal place of business in Texas or (iii) has made a proposal in its proxy statement to become a Texas entity.

TEXAS CORPORATE LAW UPDATES – ADDITIONAL SUMMARIES

GIBSON DUNN

04A

SENATE BILL 29 (TBOC Amendments Effective May 14, 2025)

Codification of Business Judgment Rule (TBOC Section 21.419)

- **Eligibility**. Applies to (a) publicly traded corporations and (b) Texas corporations that have included in their governing documents a statement affirmatively electing to be governed by this section.
- **Codification of the Business Judgment Rule (BJR)**. Under the amendments, which codify the BJR, actions of directors and officers are presumed to be:
  - taken in good faith;
  - on an informed basis;
  - in the best interests of the corporation; and
  - in obedience to the law and governing documents.
- Presumption is in addition to any presumption under common law or the TBOC.
- **Overcoming the presumption**. To challenge this presumption, claimants must prove a breach of a duty and that the breach involved fraud, intentional misconduct, ultra vires acts, or knowing violations of law.
  - Party must "state with particularity the circumstances constituting" one of the four exceptions.
- Does not limit effectiveness of provisions in governing documents limiting monetary liability.
- **Side note**. In addition to having a similar codification of the BJR, the amendments clarify that LLCs and LPs may expand, restrict, or eliminate fiduciary duties and related liabilities (TBOC Sections 101.401 and 152.002).

Related Party Transaction Approval (TBOC Section 21.418)

- **Eligibility.** Applies to publicly traded corporations and Texas corporations that opt in to Section 21.419.
- **No cause of action for certain interested party transactions.** Neither the corporation nor its shareholders have a cause of action against any director or officer of the corporation for breach of duty with respect to the making, authorization, or performance of a contract or transaction because the director or officer had an interest in the transaction or took certain actions in connection with approving the transaction unless the cause of action is permitted by the BJR statute (Section 21.418(e)).
- The protection does not extend to controlling shareholders.

Committees and Related Party Transactions (TBOC Sections 21.416 and 21.4161, 21.554)

- **Eligibility**. Applies to publicly traded corporations and Texas corporations that opt in to Section 21.419.
- **Court determination of director independence**. These corporations may petition the appropriate business court (or district court, as applicable) to determine whether directors appointed to a committee to review and approve transactions involving controlling shareholders, directors, or officers are "independent and disinterested" with respect to any such transactions.
- **Venue**. Petition must be filed in the business court unless the corporation's principal place of business is located in a county not contained within an operating division of the business court, in which case the petition must be filed in a district court in the county where its principal place of business is located.
- **Binding determination**. The court's determination is dispositive unless new facts emerge which were not presented to the court.
- **Required disclosure**. Corporations utilizing this statute must provide notice to shareholders that a petition has been filed, along with other information (publicly traded companies may choose to provide this disclosure using Form 8-K).
- **Derivative Suits**. A similar procedure for determination of independence in connection with derivative proceedings is available as well.

Limitation on Derivative Actions (TBOC Section 21.552)

- **Eligibility.** Applies to (a) publicly traded corporations and (b) Texas corporations with 500+ shareholders that opt in to Section 21.419.
- **Minimum ownership threshold.** Corporations may set a minimum ownership threshold for shareholders to bring derivative actions.
  - Threshold may be up to a maximum of 3% of the outstanding shares of the corporation.
  - Threshold must be set out in the certificate of formation or the bylaws.

Jury Trial Waivers and Forum Selection (TBOC Sections 2.115 and 2.116)

- **Domestic entities may**:
  - Include a waiver in the certificate of formation or bylaws of the right to a jury trial for internal entity claims; and
  - Select an exclusive Texas forum and venue for internal entity claims.
- **Waiver**. Enforceable even if not individually signed by members, owners, officers or governing persons. A person is considered to have knowingly waived the right to a jury trial if the person voted for or ratified the document containing the waiver, acquired stock in the entity at, or continued to hold stock in an entity with a class of its equity securities listed on a national securities exchange after, a time in which the waiver was included in the governing documents.
- **Internal entity claims**. Includes claims of any nature that are based on (i) rights, powers, and duties of its governing authority, governing persons, officers, owners, and members; and (ii) matters relating to its membership or ownership interests.
  - Applies to derivative actions.

Inspection Rights (TBOC Section 21.218)

- **Corporate Records**. The amendments clarify and, in some cases, limit the rights of shareholders, members, and partners to inspect records.
  - Emails, text messages, and social media communications are excluded from entity records unless they effectuate a corporate action.
- **Denial of Shareholder Demand**. Publicly traded corporations and Texas corporations that opt in to Section 21.419, may deny inspection demands from shareholders involved in (1) an active or expected derivative proceeding or (2) an active or expected civil lawsuit.
  - Discovery rights remain intact.

SB 1057 (TBOC Amendments Effective September 1, 2025)

Requirements for Shareholder Proposals (TBOC Section 21.373)

- **Eligibility**. Applies to any "nationally listed corporation"; defined as a corporation with a class of equity securities registered under §12(b) of the Exchange Act, that is admitted to listing on a national securities exchange and that (1) has its principal office in Texas or (2) is admitted to listing on a stock exchange that has its principal office in Texas and has received approval by the Texas Securities Commissioner.
  - Provisions must be set out in its certificate of formation or bylaws.
  - The corporation must provide notice to its shareholders prior to adoption and must include in its proxy statement certain instructional information to shareholders prior to adoption.
- **Proposal Submission Requirements**. There are two main requirements to submit a proposal:
  - Shareholder or a group of shareholders must hold the number of shares equal to at least $1 million dollars in market value or 3% of the corporation's voting shares.
    - Ownership of the shares is determined as of the date the proposal is submitted. Shareholders must hold voting shares (i) for at least six months prior to the shareholder meeting and (ii) through the duration of the shareholder meeting.
  - Shareholders must solicit at least 67% of the voting power of the voting shares.
- **Voting shares**. Means shares that entitle the holders to vote on a proposal.
- **Exceptions**. Does not apply to director nominations and procedural resolutions that are "ancillary to the conduct of the meeting" (the scope of which is not defined).

SB 2411 (TBOC Amendments Effective September 1, 2025)

Exculpation of Officers (TBOC Section 7.001)

- **Exculpation**. Allows exculpation for officers to the same extent already permitted for directors under the TBOC.
  - Entities may limit or eliminate the liability of corporate officers for monetary damages for an act or omission taken by the officer in his or her capacity as an officer of the entity.
- **Limitations**. Exculpation cannot be provided for (1) breaches of loyalty, (2) acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of the law, (3) transactions in which the officer received an improper benefit or (4) statutory violations.
- **Adoption**. To adopt these exculpation provisions, an entity must make an affirmative election in their certificate of formation.

Approval of Forms, Plan of Merger, and Additional Administrative Changes (TBOC Sections 3.106, 10.002, 10.004 and 10.104)

- **Authorization of Plans**. Governing authorities can approve corporate documents (plans, agreements, instruments) in final or substantially final form.
  - Disclosure letters, schedules, and similar documents related to a plan of merger or exchange are not part of the plan unless expressly included.
- **Appointed Representatives**. Plans of merger or exchange may now appoint representatives of the owners or members of a party with exclusive authority to enforce or settle post-transaction rights.
  - Appointments can be made irrevocable and binding on the parties to the plan upon approval of the plan.
- **Plans of conversion**. Plans of conversion can authorize additional actions by the converted entity without further approvals beyond approval of the plan itself.

SB 2337 (TBOC Amendments Effective Sep. 1, 2025) (Currently Pending Governor Action)

Proxy Advisory Firm Regulation (Pending TBOC 6A.001; 6A.201-202)

- **Applicable entities**. Applies to any publicly traded entity that (i) is organized or created in Texas, (ii) has its principal place of business in Texas or (iii) has made a company proposal in a proxy statement to become a Texas entity.
- "**Proxy advisor**" means a person who, for compensation, provides a "proxy advisory service" to shareholders of a company or to other persons with authority to vote on behalf of shareholders.
- "**Proxy advisory service**" includes specified services such as voting advice/recommendation, proxy statement research or proposal analysis, a rating or research regarding corporate governance and the development of proxy voting recommendations and polices.
- **Disclosure**. Required of any proxy advisor when (i) its recommendations are "not provided solely in the financial interest of the shareholders of a company" or (ii) the advisor provides advice on how to vote on a proposal that is "materially different" ("Materially Different Advice") to clients who have not expressly requested services for a nonfinancial purpose.

SB 2337 (TBOC Amendments Effective Sep. 1, 2025) (Currently Pending Governor Action)

Proxy Advisory Firm Regulation (Pending TBOC 6A.001; 6A.201-202) (cont.)

- **A recommendation is not provided solely in the financial interests of shareholders**:
  - When it is wholly or partly based on, or otherwise takes into account, one or more non-financial factors, including a commitment, initiative, policy, or value-based standard based on: an environmental, social or governance (ESG) goal, factor or investment principle; diversity, equity or inclusion (DEI); a social credit or sustainability factor or score; or membership in or commitment to an organization that bases any of its evaluation of the company's value on nonfinancial factors;
  - When it involves a voting recommendation with respect to any shareholder-sponsored proposal that is inconsistent with the recommendation of the board of directors or a committee of a majority of independent directors and fails to include a written economic analysis of the financial impact of the proposal on the shareholders;
  - When it is not based solely on financial factors and subordinates shareholders' financial interests to other objectives; or
  - When it recommends a vote against a company proposal to elect a governing person, unless the firm affirmatively states that the firm's recommendation is made solely based on the financial interests of shareholders.
- Written economic analysis must include the short and long-term benefits and costs of implementing any shareholder-sponsored proposal, an analysis of whether the recommendation is consistent with the investment objectives and policies of the client, the projected quantifiable impact of adopting the proposal on the investment returns of the client, and an explanation of the methods and processes used to prepare the economic analysis.
- When the advice is based on non-financial factors the disclosure must (i) state it is not solely in the financial interest of shareholders, (ii) explain the nonfinancial basis and how it may subordinate the financial interests of shareholders, and (iii) be made publicly on the proxy advisor's website.

SB 2337 (TBOC Amendments Effective Sep. 1, 2025) (Currently Pending Governor Action)

Proxy Advisory Firm Regulation (Pending TBOC 6A.001; 6A.201-202) (cont.)

- **Conflicting Advice.** The statute provides that a proxy advisor gives Materially Different Advice when it simultaneously advises (i) one or more clients to vote for, and one or more clients to vote against, the same proposal, (ii) one or more clients to vote for, and one or more clients to vote against (or abstain), the same director nominee, or (iii) that one or more clients vote for or against a proposal in opposition to the recommendation of the company's management.
  - If the proxy advisor provides Materially Different Advice, the proxy advisor must, in addition to complying with the disclosure requirement listed on the prior slide, disclose which of the advice is provided based solely on the financial interests of shareholders and which is supported by any specific financial analysis. The proxy advisor is also required to disclose the conflicting advice to each shareholder receiving the advice, any entity receiving the advice on behalf of a shareholder, the company that is the subject of the proposal, and the Attorney General of Texas.

- **Enforcement.** TBOC Section 6A.201 provides that a violation is a deceptive trade practice under the Deceptive Trade Practices-Consumer Protection Act, which allows for broad-sweeping private and public rights of action. The statute also provides that the recipient of the proxy advisory services, the company subject to the proxy proposal, and any shareholder of the subject company can bring actions seeking injunctive relief or a declaratory judgment against the proxy advisor. The plaintiff is then required to give notice to the Attorney General, who may intervene in the action.

TEXAS LITIGATION UPDATES

GIBSON DUNN

04B

Texas Case Updates: *Keyes v. Weller* (June 2024)

- Texas Supreme Court: D&Os can be personally liable for their own fraudulent and tortious actions, even if committed in corporate capacity.
- Reminder that TBOC § 21.223 shields shareholder liability for matters related to **corporate contractual obligations.**
- Affirms common law rule that individuals can't hide behind their corporate roles to avoid personal liability for fraudulent acts.

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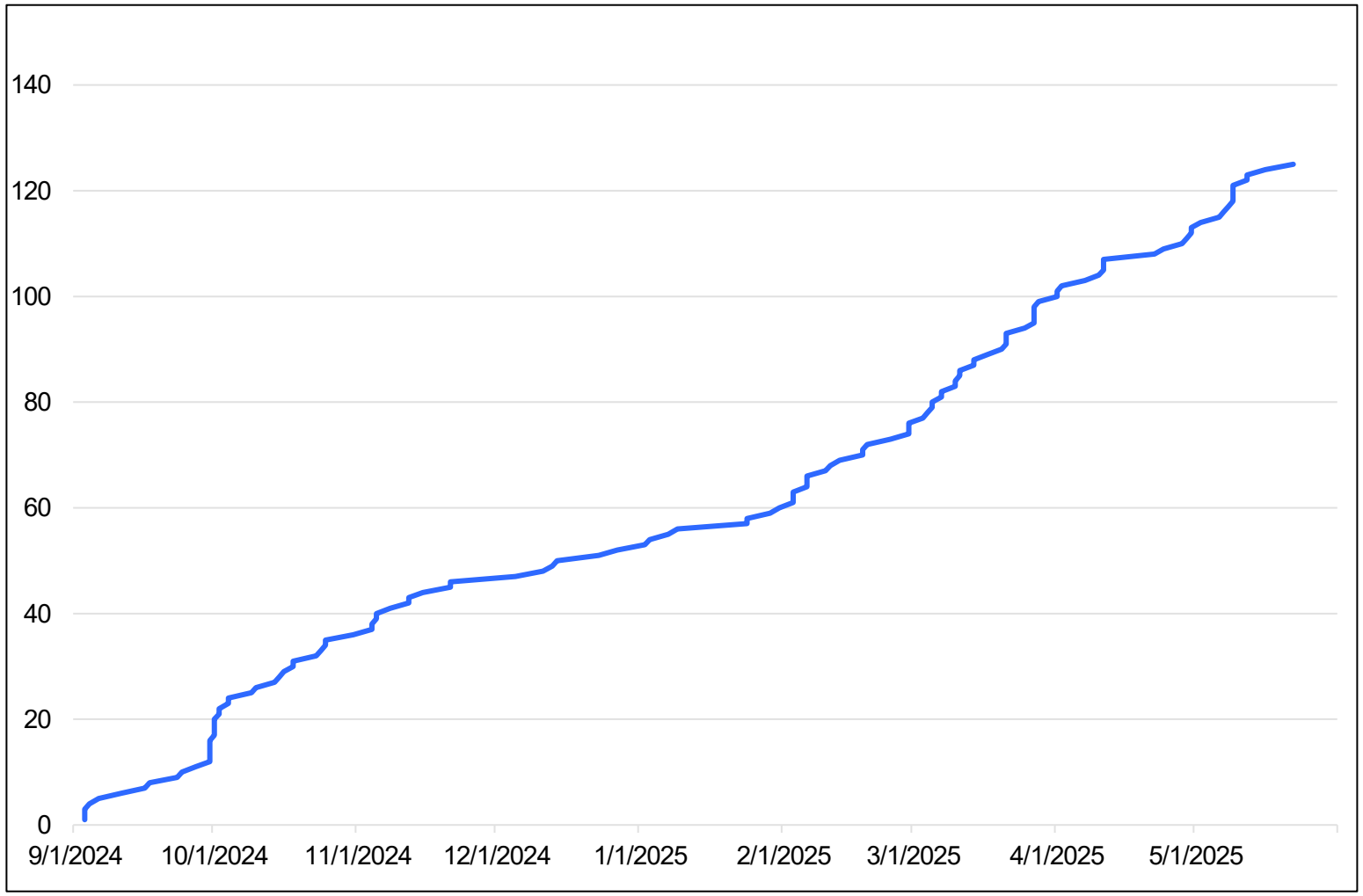
Texas Case Updates: *Bertucci v. Watkins* (April 2025)

- Limited partners don't owe each other fiduciary duties.
- Potential liability if their actions are outside the scope of their position as limited partners.
- Self-described "managing partner" does not automatically assume legal role of a managing partner.

GIBSON DUNN

Business Court Update: Case Statistics



*All data current to 05/31/2025

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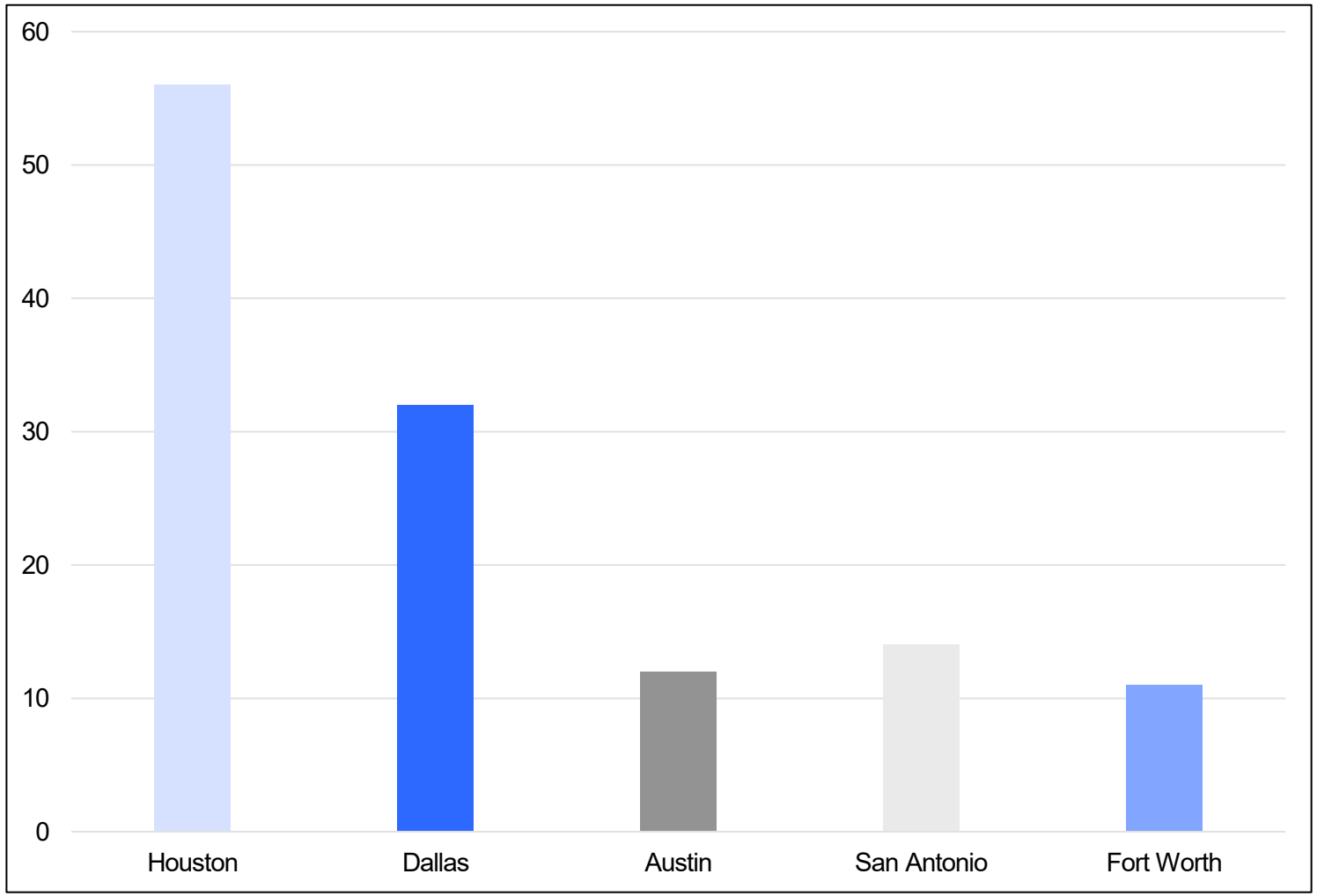
Business Court Update: Case Statistics (cont.)



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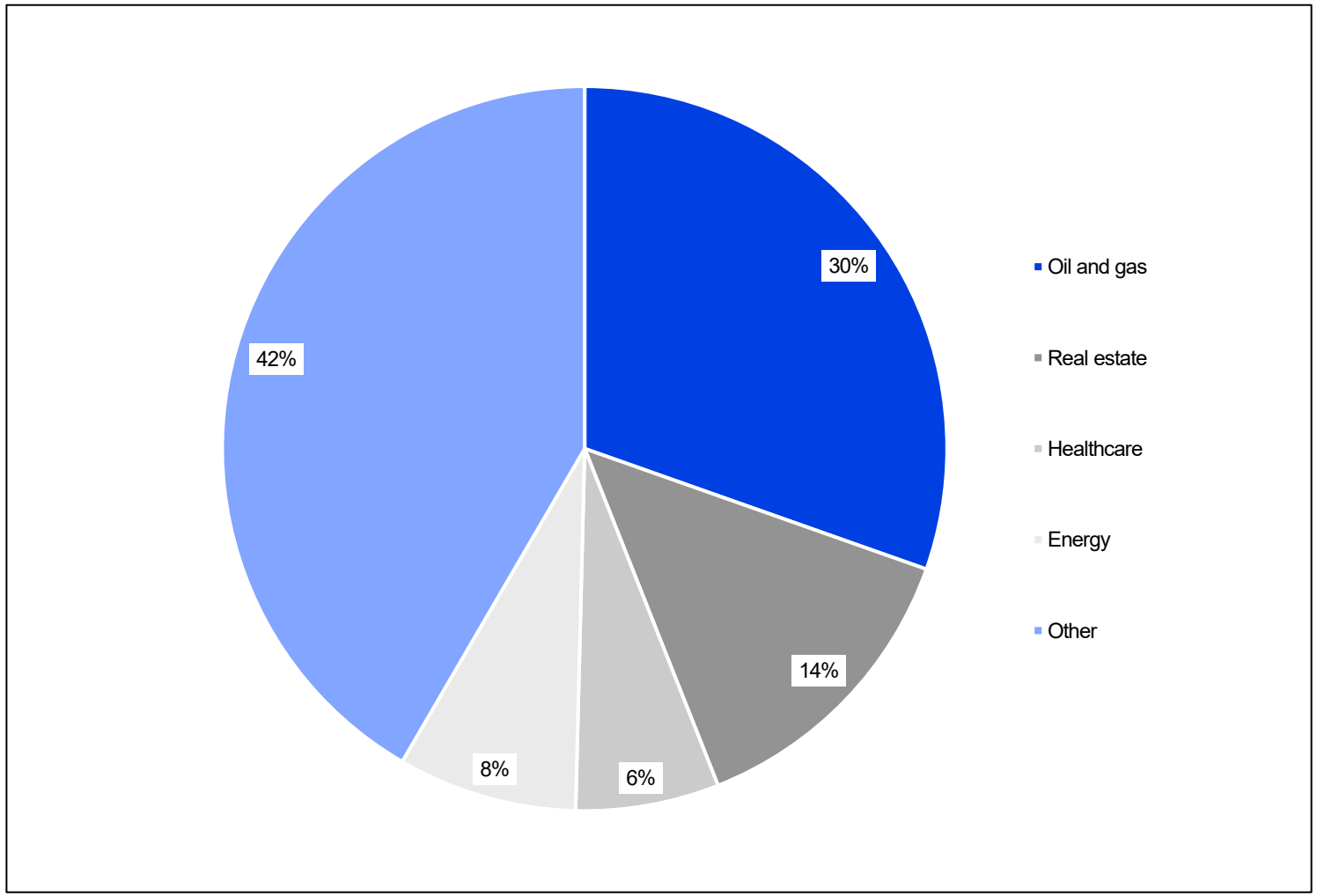
Business Court Update: Case Statistics (cont.)



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Business Court Update: Case Statistics (cont.)

High Amount in Controversy

Mean	$37,850,833.33
Median	$10,000,000.00

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Business Court Update: Case Statistics (cont.)

Written Opinions

- **30 written opinions so far**
  - Jurisdiction
  - Removal standards
  - Definition of a qualified transaction
  - Venue

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Business Court Update: New Local Rules

- Rule 4: Mandatory corporate disclosure statement
- Rule 6: “Mediation Wheel” and court-ordered mediation
  - Parties can still agree to use a mediator not on the “wheel”
- Rule 2: Judges may “exchange benches”
  - fewer case disruptions, less forum shopping, less predictability for litigants

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Business Court Update: Upcoming Legislation

- **On June 2, the Legislature passed H.B. 40, which if signed will impact the Business Court**.
  - Lowers jurisdictional amount-in-controversy requirement and value threshold for "qualified transactions" from $10 million to $5 million
  - Extends jurisdiction to include:
    - IP / trade secret disputes
    - Enforce arbitration agreements and confirm arbitration awards
  - Allows cases filed before Sept. 1, 2024, to be heard by the Business Court if all parties agree, subject to new procedural rules
  - No additional judges for Houston and Dallas
  - May implement other divisions (El Paso, RGV, Tyler, Beaumont, Amarillo, Midland/Odessa)

DELAWARE AND TEXAS:
OPEN QUESTIONS AND THINGS TO MONITOR

05

GIBSON DUNN Morris Nichols ARSHT & TUNNELL

Open Questions and Things to Monitor

Delaware

- **Challenges to 2025 Amendments**:
  - Outcome of constitutional questions.
- **Litigation Interpreting or Applying the 2024 and 2025 Amendments**: The 2024 amendments do not eliminate all technical questions, and the 2025 amendments are not intended and are unlikely to eliminate all stockholder litigation. Although the 2025 amendments likely require stronger pleadings to survive a motion to dismiss, they do not foreclose all controlling stockholder/conflicted transaction-related fiduciary duty-based lawsuits. Among other things, the courts will likely weigh in on the following over time:
  - Can all stockholder rights reside in stockholder agreements (back to pre-*Moelis)* or do some of these rights need to be in certificates of incorporation?
  - Regardless of placement, is a "fiduciary out" required for some or all of the rights and, if so, what kind of "fiduciary out"?
  - What type of allegations are necessary to show that a committee did not act in good faith or without gross negligence?
  - What allegations are sufficient regarding director or stockholder interest in a transaction, and particularly what allegations are necessary to overcome the statutory presumption of independence? Are current director independence vetting processes sufficient?
  - Will a market practice develop regarding requests for relevant information from controlling stockholders?
  - What does it mean to make a showing of a "compelling need" for an inspection of records beyond the specified records in the statute to further the stockholder's proper purpose and what "clear and convincing" evidence would suffice? Will the exception remain an exception or will it "swallow" the rule?
- **Ongoing Delaware court decisions, even outside of recent DGCL amendments**.

Open Questions and Things to Monitor

Texas

- **SB 2337: Proxy Advisory Firm Regulations**
  - Glass Lewis issued multiple letters against the new amendment arguing it prevents proxy advisors from providing customized recommendations and may expose large institutional shareholders to potential legal liability.
  - First Amendment considerations (e.g., "compelled speech" or "protected speech")? (see *Nat'l Ass'n of Manufacturers v. S.E.C.*, 800 F.3d 518 (D.C. Cir. 2015)).
    - Also considerations of broad language.

- **SB 29: Constitutionality of the Waiver of Jury Trials**
  - Texas Constitution provides for a broad guarantee of the right to trial by jury.
  - In civil cases, a party may demand a right to a trial by jury for any matter, and the Texas Constitution expressly states that the "right of trial by jury shall remain inviolate." (Tex. Constitution Article 1, Section 15)
  - The right to a jury trial shall apply upon a party's request "[i]n the trial of all causes." (*e.g.*, it applies to both equitable and legal proceedings) (Tex. Constitution Article 5, Section 10)
  - The Seventh Amendment, which guarantees the right to a trial by jury in civil cases where the claimant seeks monetary damages, allows parties to agree in advance to voluntary waivers of this right.

Open Questions and Things to Monitor

Texas (cont.)

- **SB 1057: Interplay of Requirements for Submission of Shareholder Proposals and Rule 14(a)(8)**
  - SB 1057 sets more stringent requirements for the submission of shareholder proposals than SEC Rule 14(a)(8). That is, there are shareholder proposals that could be included under Rule 14(a)(8) but not under SB 1057. Consider interaction of federal and state laws.

- **SB 1057: Ambiguities and Uncertainties**
  - In order to adopt minimum requirements, an entity must elect to be governed by the statute in its governing documents (i.e., bylaws or certificate) and must disclose the proposed amendment in any proxy statement sent to shareholders prior to amendment. The requirements for proxy statement timing is unclear, especially if the provisions are in the bylaws.
  - Under SB 1057, in order to submit a proposal on a matter for approval at a meeting of shareholders, a shareholder must solicit the holders of shares representing at least 67 percent of the voting power of shares entitled to vote on the proposal.
    - This requirement appears to create a circular problem (but might be solvable): Under the statutory base requirement, shareholders cannot formally submit a proposal until they have solicited a supermajority of other shareholders, but they cannot effectively solicit support for a proposal that has not yet been formally submitted or disclosed.
  - Statutory requirements are “subject to the corporation’s governing documents.” Seems to allow for advance notice bylaws, for instance. Query how much a corporation can modify the requirements.

Open Questions and Things to Monitor

Texas (cont.)

- **Other Questions for Companies to Consider / Developments to Monitor:**
  - Texas decisions applying recent Texas amendments – no need to worry about enhanced scrutiny ever again?
  - How advisory opinions regarding committee member independence in the context of transactions will play out in practice?
  - Will courts defer to independence determinations outside of advisory opinions? Are current independence processes sufficient?
  - How to think about choice of law provisions / subsidiary incorporations?
  - What could elimination of "disclosure only" fees mean in practice for litigation where such fees are otherwise common in other jurisdictions?
  - Impact of ownership thresholds/ no demand futility / independence-related advisory opinions on ability to dismiss fiduciary duty-related derivative claims – few derivate claims?
  - Interplay of ability to eliminate separate class vote & stockholder approvals – will certain stockholder approvals be easier to obtain?

Open Questions and Things to Monitor

Texas (cont.)

- **Redomestication**
  - Potential strategies to redomesticate to Texas?
    - Plan of Conversion (TBOC 10.102) – Adoption and approval of a plan of conversion from a foreign entity to a domestic entity.
    - Merger (TBOC 10.001) – Adoption and approval of a plan of merger into a Texas domestic subsidiary entity.
  - Consideration of SEC filings and market listings, dual listing v. single filing on market (TXSE or Texas NYSE).
- **Federal Jurisdiction**
  - **Potential Federal Questions**: Whether certain amendments such as TBOC Section 21.373 (shareholder proposal thresholds) will be preempted by SEC regulations.

CONSIDERATIONS REGARDING LITIGATION IN DELAWARE AND TEXAS

06

GIBSON DUNN

Delaware or Texas: Litigation Trade-offs

Delaware	Texas
Expert Chancery bench	New and unproven Business Courts
Judges serve 12-year terms	Judges serve 2-year terms
Vast precedent; predictability	Undeveloped case law
Fee shifting prohibited for internal entity claims	Fee shifting permitted
Bench trials; no juries	Jury rights preserved unless waived

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Delaware or Texas: *Primexx*

- **Early signal that Business Court will produce fast, business-friendly decisions in high-value cases**
- Drag-along sale upheld; court enforced partnership agreement "as written" – following a strict, textual approach
- Summary judgment within six months of filing

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Delaware or Texas: Procedural Safeguards and Risks

- **Delaware**: Demand-futility requirement; single-share okay for standing to bring derivative suit
- **Texas**: No demand-futility requirement; boards may adopt 3% threshold-requirement for standing to bring derivative suit

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Litigation Update: Key Takeaways

- SB 29 raises the bar for fiduciary and derivative suits
- Courts reaffirm personal liability for officer torts
- Business Courts are off to a fast start and are gaining traction, even as implementation and rules are evolving
- Delaware remains the gold-standard, but Texas is expected to close the gaps fast

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BOARD GUIDANCE:
PRACTICAL CONSIDERATIONS

07

GIBSON DUNN Morris Nichols ARSHT & TUNNELL

Practical Considerations for Boards of Delaware Incorporated Corps

- Focus on what is *right* for *your* company: there is no "one-size-fits-all" answer and there is no "easy" answer
  - Understand the reincorporation process, associated disclosures & pros/cons of doing so, both from a statute/caselaw perspective and in respect of other relevant considerations (e.g., impact on D&O insurance, choice of law provisions, etc.)
    - Among other things, where the company is headquartered, where the business and employees are located, the company's ownership structure and where the company is in its public company journey are all relevant considerations (e.g., companies that are looking to IPO vs. existing public companies)
  - Consider investor and proxy advisory firm reactions
- Keep abreast of developments in and outside of Delaware
  - Constitutional challenges to Delaware amendments
  - Litigation around reincorporations
  - Application and interpretation by courts of the 2024 and 2025 Delaware amendments
  - 2024 and 2025 Delaware amendments' impact on books & record demands/ other litigation, particularly related to controlling stockholders
  - Monitor market practice among large public companies / your peers

Practical Considerations for Boards of Texas Incorporated Corps

- Get educated with specialist Texas counsel and update board training as appropriate
- How to factor the defensive and cost-saving benefits of certain changes
- When considering a potential redomestication, balancing the advantages of the new Texas laws with the financial costs associated with redomesticating
- Be aware of what changes are automatic, what changes are elective but do not require shareholder approval, and what changes are elective and require shareholder vote
- How shareholders will react to various elective changes available under the amended TBOC
- How to properly convey the value of adopting each change to shareholders
- What positions proxy advisory firms will take on various elective changes available under the amended TBOC
- How to take advantage of the ability of Texas courts to issue binding advisory opinions regarding director independence without exposing sensitive business information
- Whether to review historic and expected proposals under new Chapter 6A regime and discuss expected impact with proxy advisory firms
- Put in controls to monitor developments

ATTORNEY PROFILES

08

GIBSON DUNN Morris Nichols ARSHT & TUNNELL

1201 North Market Street, 16th Floor Wilmington, DE 19899

+1 302.351.9169

ekwilensky@morrisnichols.com

Eric S. Klinger-Wilensky

Partner / Wilmington

Eric S. Klinger-Wilensky is a partner in the Wilmington, Delaware office of Morris Nichols Arsht & Tunnell. He advises corporations on a broad array of transactions, including mergers and acquisitions, spin-offs and split-offs, and capital raises. He has extensive experience representing special committees of independent directors in considering transactions involving potential conflicts of interest as well as transactions structured as tender offers followed by “medium-form” mergers.

Eric served as a lead drafter of legislation that ultimately became Section 251(h) of the Delaware General Corporation Law (DGCL) that facilitated and led to an increase in the use of such transactions. Eric also served as a lead drafter of Section 267 of the DGCL, that allows non-corporate entities to be the acquiring entities in “short-form” mergers. A former clerk to Chancellor Chandler and Vice Chancellor Noble on the Delaware Court of Chancery, Eric has been actively involved in the national and local legal community, as well as firm governance. He has also served as a Lecturer in Law at the University of Pennsylvania Law School, where he has taught classes on M&A contract drafting and venture capital, and served on the Board of Trustees of the University’s Institute for Law and Economics.

EDUCATION

University of Pennsylvania
Juris Doctor

Hofstra University
Bachelor of Arts

RECOGNIZED

Chambers TOP RANKED USA 2025 Eric S Klinger-Wilensky

Delaware Corporate Counsel
- The Legal 500 US

Delaware Attorney
- IFLR1000

Morris Nichols ARSHT & TUNNELL

200 Park Avenue, New York, NY 10166-0193

+1 212.351.2354

jlapitskaya@gibsondunn.com

Julia Lapitskaya

Partner / New York

Julia Lapitskaya is co-chair of Gibson Dunn's ESG: Risk, Litigation and Reporting Practice Group and a member of the firm's Securities Regulation and Corporate Governance Practice Group. Julia's practice focuses on SEC, NYSE/Nasdaq and Securities Exchange Act of 1934 compliance, securities and corporate governance disclosure issues, board and committee matters, corporate governance best practices, state corporate laws, the Dodd-Frank Act of 2010, SEC regulations, investor engagement and shareholder activism matters, proxy and annual meeting matters, sustainability and corporate responsibility matters, and executive compensation disclosure issues, including as part of initial public offerings and spin-off transactions.

Julia is a frequent author and speaker on securities law, Delaware law and sustainability issues and is a member of the Society for Corporate Governance. She contributed to chapters in the "Executive Compensation Disclosure Handbook: A Practical Guide to the SEC's Executive Compensation Disclosure Rules", "A Practical Guide to SEC Proxy and Compensation Rules" treatise as well as the PLI Treatise titled "Climate Change, Sustainable Investments, and Social Governance: Law and Compliance."

Julia earned her Juris Doctor in 2010 from the New York University School of Law, where she served as Developments Editor of the *Journal of International Law and Politics*. Prior to attending law school, she graduated *summa cum laude* from Fordham University with Bachelor of Arts degrees in Economics and Political Science and was elected to Phi Beta Kappa.

EDUCATION

New York University
Juris Doctor

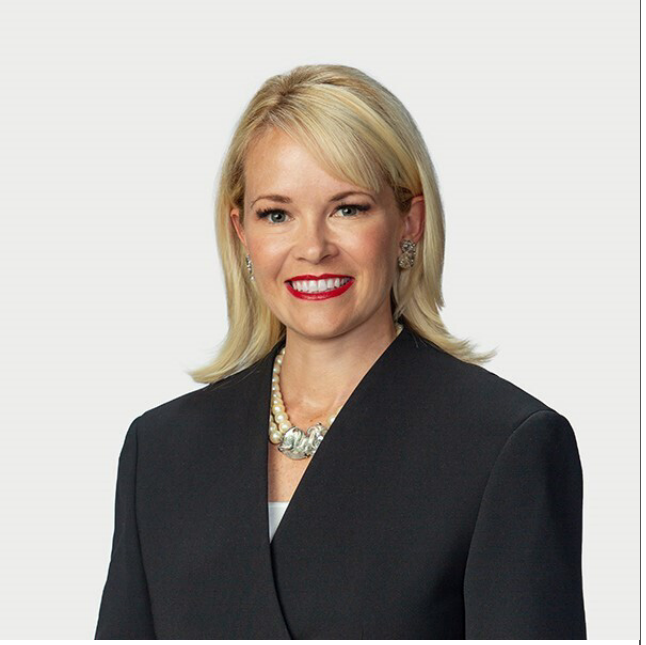
Fordham University
Bachelor of Arts

RECOGNIZED

Chambers RANKED IN USA 2025 Julia Lapitskaya

Rising Star: Corporate
- Expert Guides

Rising Star: Americas, Corporate Governance
- Euromoney



Hillary H. Holmes

Partner / Houston and Dallas

811 Main Street Suite 3000, Houston, TX 77002-6117

2001 Ross Avenue Suite 2100, Dallas, TX 75201-2923

+1 346.718.6602

hholmes@gibsondunn.com

Hillary Holmes is co-partner-in-charge of Gibson Dunn's Houston office, co-chair of the Capital Markets Practice Group, and a member of the firm's Executive Committee. She is also a member of the firm's Securities Regulation & Corporate Governance, Mergers & Acquisitions, and Energy & Infrastructure Practice Groups.

Hillary advises corporations, investment banks and institutional investors on long-term and strategic capital raising. She regularly counsels companies on matters related to federal securities laws and corporate governance. She guides boards of directors, special committees and financial advisors in M&A transactions, take privates and complex situations. She brings a deep expertise in the energy industry.

Chambers USA and *Chambers Global* consistently rank Hillary in the highest tier for both capital markets and energy transactions, as well as for corporate counseling. Named an Energy MVP by *Law 360* twice and one of the 25 Most Influential Women in Energy by *Oil & Gas Investor,* she has been recognized as a Capital Markets Trailblazer by *The National Law Journal,* a Legendary Dealmaker by *LawDragon 500,* a Most Effective Dealmaker by *Texas Lawyer,* a Woman Who Means Business by the *Houston Business Journal*, and Houston Corporate Lawyer of the Year by her peers through *Best Lawyers,* among many other accolades that attest to both her technical skill and her solutions-oriented creative advice.

Hillary serves on the Corporate Laws Committee of the American Bar Association, which is responsible for the Model Business Corporation Act. She also serves as a long-time officer of the Society for Corporate Governance, Houston Chapter, and on the Executive Council of the KBH Energy Center at the University of Texas and the Advisory Board of the Institute for Energy Law, among other organizations. She writes and speaks on issues related to U.S. capital markets, the energy industry and developments in Texas.

EDUCATION

University of Pennsylvania
Juris Doctor

Duke University
Bachelor of Arts

RECOGNIZED

Chambers TOP RANKED USA 2025 Hillary H. Holmes

Energy MVP
- Law360

Most Effective Dealmaker
- Texas Lawyer

GIBSON DUNN

811 Main Street Suite 3000, Houston, TX 77002-6117

+1 346.718.6604

ccox@gibsondunn.com

Collin J. Cox

Partner / Houston

Collin J. Cox is co-partner in charge of Gibson Dunn's Houston office, a partner in the Litigation Practice Group, and a member of the firm's Partnership Evaluation Committee. He is widely recognized for his successes in trying complex commercial disputes and has represented both plaintiffs and defendants in a variety of subject areas, including technology trade-secrets cases, actions related to the Bernard L. Madoff fraud, fraudulent-transfer cases, royalty disputes, patent litigation, and other business crisis situations.

He is among a handful of trial lawyers in Houston with a "Band One" recognition from Chambers USA, in which clients have praised him as "a great, strategic lawyer," who is "very well versed in the law and easy to work with." As Chambers USA put it, "Collin is very smart and extremely well credentialed. He is very polished, and a real trial lawyer." Collin also is listed by Thomson Reuters as one of the "Top 100 Super Lawyers in Texas," and has been listed as a "Super Lawyer" for more than a decade. In 2025, Collin and the Gibson Dunn team obtained a historic jury verdict for Energy Transfer LP and Dakota Access Pipeline in a three-week trial, a victory which earned him national recognition as AmLaw's "Litigator of the Week."

A fellow of the American College of Trial Lawyers and the International Society of Barristers, Collin currently serves as Vice President of the Houston Bar Association, as Past President of Houston Volunteer Lawyers, and as Chairman and President of Da Camera of Houston. Collin is the past Chairman of the Buffalo Bayou Partnership and the Texas Lyceum, the pre-eminent leadership organization for Texans younger than 45.

Collin maintains a close connection to Duke Law School, where he serves as Chair of the Board of Visitors. He also serves on Duke's Adjunct Faculty, teaching a class on Hearings Practice each of the last seven years. Collin was recently recognized by Benchmark Litigation as a "Litigation Star." He is named in The Best Lawyers in America® for Arbitration, Commercial and Intellectual Property Litigation, as one of the "Leading Litigators in America" by Lawdragon, and in H Magazine as a "Houston Top Lawyer." In 2012, he was recognized as the Woodrow B. Seals Outstanding Young Lawyer in Houston. In 2019, Collin was one of 59 Americans selected as a Presidential Leadership Scholar, completing a year-long leadership curriculum centered around four presidential administrations.

EDUCATION

Duke University
Juris Doctor

University of Cambridge
Master of Philosophy

Baylor University
Bachelor of Arts

RECOGNIZED

Chambers TOP RANKED USA 2025 Collin Cox

Top 100 Super Lawyers in Texas
- Thomson Reuters

Litigation Star
- Benchmark Litigation

GIBSON DUNN

811 Main Street Suite 3000, Houston, TX 77002-6117

+1 346.718.6888

gspedale@gibsondunn.com

Gerry Spedale

Partner / Houston

Gerry Spedale is a member of Gibson Dunn's Capital Markets, Mergers & Acquisitions, and Securities Regulation & Corporate Governance Practice Groups where he advises public and private companies, investment banks and private equity groups on mergers and acquisitions, joint ventures, capital markets transactions and corporate governance.

With over 30 years of experience covering a broad range of industries, Gerry focuses on the energy industry, including upstream, midstream, downstream, oilfield services, and utilities. Gerry serves on the State Bar of Texas Business Law Section TBOC Committee, which regularly reviews and proposes amendments to the TBOC.

Gerry earned his Juris Doctor *magna cum laude* in 1993 from Tulane University Law School, where he was elected to the Order of the Coif. He graduated *cum laude* in 1990 from Louisiana State University, where he received a Bachelor of Arts degree in Political Science.

EDUCATION

Tulane University
Juris Doctor

Louisiana State University
Bachelor of Arts

RECOGNIZED

Chambers RANKED IN USA 2025 Gerald Spedale

Securities & Corporate Finance
- Texas Super Lawyers

Leading Energy Lawyer
- Lawdragon

GIBSON DUNN

APPENDIX A – COMPARISON CHART OF DELAWARE VS. TEXAS AS STATES OF INCORPORATION

GIBSON DUNN Morris Nichols ARSHT & TUNNELL

Provision	Texas	Delaware
Formation Documents	• Certificate of formation filed with the Texas Secretary of State. (Tex. Bus. Orgs. Code Ann. § 3.001(a))	• Certificate of incorporation filed with the Delaware Division of Corporations. (DGCL § 101(a))
Amendment of Formation Document	• If the corporation has shares that are issued and outstanding, an amendment to certificate of formation requires approval by the board of directors and, subject to certain exceptions (name changes), the shareholders. (Tex. Bus. Orgs. Code Ann. §§ 21.052-055)	• After a corporation has received payment for its capital stock, an amendment to its certificate of incorporation requires approval by the board of directors and stockholders subject to certain limited exceptions where stockholder approval may not be required. (8 Del. C. § 242(a), (d))
Requirement for Bylaws	• Required. (Tex. Bus. Orgs. Code Ann. §§ 21.057, 21.704, 21.714)	• Required. (8 Del. C. § 109)
Amendment of Bylaws	• The directors may adopt, amend, or repeal bylaws unless the power is reserved to the shareholder. (Tex. Bus. Orgs. Code Ann. § 21.057(c)) • Unless provided otherwise by the certificate of formation or a shareholder-adopted bylaw, the shareholders may amend, repeal, or adopt bylaws even if the directors also have that power. (Tex. Bus. Orgs. Code Ann. § 21.058)	• The bylaws may be amended or repealed by: (i) the stockholders entitled to vote and (ii) the board of directors, if permitted by the certificate of incorporation. (DGCL § 109(a))
Authorized Shares	• The number of authorized shares can be increased by amending the certificate of formation with board and shareholder approval. (Tex. Bus. Orgs. Code Ann. §§ 21.052(a)-054) • Shareholder approval is not required for forward and reverse stock splits if certain conditions are met. (Tex. Bus. Orgs. Code Ann. § 21.053(r))	• The number of authorized shares can be increased by amending the certificate of incorporation, which requires board and stockholder approval. (8 Del. C. § 242(b)(1) – (2), (d)(2)) • Stockholder approval is not required for forward stock splits if certain conditions are met. (8 Del. C. § 242(d))
Classes and Series of Shares	• Multiple classes and series of shares with different rights and preferences are permitted. (Tex. Bus. Orgs. Code Ann. § 21.152)	• Multiple classes and series of shares with different rights and preferences are permitted. (8 Del. C. § 151)

Provision	Texas	Delaware
Preferred Shares	• Terms must be set out in either certificate of formation or a statement with the SOS containing the board resolution establishing the series of shares. (Tex. Bus. Orgs. Code Ann. §§ 21.153-156) • If permitted by the certificate of formation, the board may issue preferred stock and define the terms of such preferred stock (i.e., "blank check" preferred stock) without shareholder approval. (Tex. Bus. Orgs. Code Ann. § 21.155)	• Terms of preferred stock are typically set out in certificate of incorporation or, if permitted by certificate of incorporation, certificate of designation. (8 Del. C. §§ 102(a)(4), 151(g)) • If permitted by the certificate of incorporation, the board may issue preferred stock and define the terms of such preferred stock (i.e., "blank check" preferred stock) without stockholder approval. (8 Del. C. § 102(a)(4))
Shareholder Meetings	• A shareholder meeting must be held annually. (Tex. Bus. Orgs. Code Ann. § 21.351(a)) • On the application of a shareholder who has previously submitted a written request to the corporation that an annual meeting be held, a court in the county in which the principal executive office of the corporation is located may order a meeting to be held if the annual meeting is not held or written consent instead of the annual meeting is not executed within any 13-month period. (Tex. Bus. Orgs. Code Ann. § 21.351(b)) • Written notice of a meeting shall be given to each shareholder entitled to vote at the meeting not later than the 10th day and not earlier than the 60th day before the date of the meeting. (Tex. Bus. Orgs. Code Ann. § 21.35)	• A stockholder meeting must be held either within or without this State as may be designated by or in the manner provided in the certificate of incorporation or bylaws, or if not so designated, as determined by the board of directors to elect directors. (8 Del. C. § 211(a)) Unless directors are elected by written consent in lieu of an annual meeting as permitted by this subsection, an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws. (8 Del. C. § 211(b)) • If the annual meeting is not held within 13 months of the prior annual meeting or within 30 days of the date designated in the corporation's bylaws, any stockholder or director may petition the Court of Chancery to direct that a meeting be held. (8 Del. C. § 211(c)) • Notice of a meeting must be given not more than 60 and not less than 10 days before such meeting. (8 Del. C. § 213)

Provision	Texas	Delaware
Shareholder Rights to Call a Meeting / Written Consent / Shareholder Proposals	• Unless the certificate of formation states a different percentage (which cannot be more than 50%) shareholders holding at least 10% of shares entitled to vote may call a special shareholders' meeting. (Tex. Bus. Orgs. Code Ann. § 21.352(a)(2)) • Shareholders may act without a meeting with the written consent of all shareholders or, if authorized by the certificate of formation, shareholders having at least the minimum number of votes necessary to act at a meeting at which all shares entitled to vote on the action were present and voted. If acting by less than unanimous written consent, the corporation must promptly notify the non-consenting shareholders of the action taken. (Tex. Bus. Orgs. Code Ann. § 6.201-202)	• Stockholders may call a special meeting of stockholders only if authorized by the certificate of incorporation or bylaws. (8 Del. C. 211(d)). • Unless otherwise restricted by the certificate of incorporation, stockholders may act without a meeting with the consent of the stockholders having the minimum number of votes necessary to act at a meeting at which all shares entitled to vote on the action were present and voted. The consent must be in writing or in an electronic transmission, executed by stockholders of record as of the record date for such action. (8 Del. C. § 228(a), (c)). • The corporation must give prompt notice of any action taken by less than unanimous consent to all non-consenting stockholders entitled to notice of a meeting to vote on the action. (8 Del. C. § 228(e)) • DGCL does not contain any additional provisions specifically addressing Rule 14a-8 proposals, which are governed by the Securities Exchange Act of 1934, as amended.
Board of Directors	• The corporation is governed by a board of directors unless otherwise provided by the certificate of formation or a shareholders' agreement. (Tex. Bus. Orgs. Code Ann. § 21.401) • The shareholders may agree to limit the powers of or supplant the board of directors. (Tex. Bus. Orgs. Code Ann. §§ 21.101(a) (1-2) & 21.106(a))	• The corporation is governed by or under the direction of a board of directors unless otherwise provided by the certificate of incorporation. (8 Del. C. § 141(a)) • Certain restrictions on board power are possible pursuant to stockholder contracts. (8 Del. C. §122(18))

Provision	Texas	Delaware
Officers	• The board of directors must appoint a president and a secretary in the manner set forth in the bylaws, may appoint other officers according to the certificate of formation and bylaws. (Tex. Bus. Orgs. Code Ann. §§ 21.417 & 3.103(a)) • A person may hold more than one office unless prohibited by the TBOC, the certificate of formation, or bylaws. (Tex. Bus. Orgs. Code Ann. § 3.103(c))	• A corporation will have officers stated in bylaws or a resolution of the board of directors consistent with the by-laws. One officer must have the duty to record the minutes of meetings of the stockholders and board of directors. (8 Del. C. § 142(a)) • A person may hold more than one office unless the certificate of incorporation or bylaws provides otherwise. (8 Del C. 142(a))
Committees	• The board of directors may delegate certain decision-making to committees if authorized by the certificate of formation. (Tex. Bus. Orgs. Code Ann. § 21.416(a))	• The board of directors may delegate certain decision-making to committees. (8 Del. C. § 141(c))
Fiduciary Duties of the Board of Directors	• Duty of care, duty of loyalty and duty of obedience. The duty of obedience prohibits directors from committing acts beyond the scope of their enumerated powers (i.e., *ultra vires* acts) or behaving unlawfully. • Directors owe fiduciary duties to the corporation and the shareholders collectively. • [*Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984); *Somers ex rel EGL, Inc. v Crane*, 295 S.W.3d 5, 11 (Tex. App. Houston [1st Dist.] 2009); *Landon v. S & H Mktg. Grp., Inc.*, 82 S.W.3d 666, 672 (Tex. App. Eastland 2002); *Matter of Estate of Poe*, 648 S.W.3d 277 (Tex. 2022).]	• Duty of care and duty of loyalty. Includes duty to act in good faith, duty to obey the law, duty of oversight, duty of candor and disclosure. • Directors owe fiduciary duties to the corporation and to the stockholders. • Delaware law provides that directors may violate the duty of loyalty if they fail to conduct proper oversight. • [*Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *McRitchie v. Zuckerberg*, 315 A.3d 518, 526-29 (Del. Ch. 2024); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 539 (Del. 1996); *In re Caremark International, Inc. Derivative Litigation*, 698 A. 2d 959 (Del. Ch. 1996)]

Provision	Texas	Delaware
Business Judgment Rule	• By statute, actions of directors and officers are presumed to be taken (1) in good faith, (2) on an informed basis, (3) in furtherance of the interests of the corporation, and (4) in obedience to the law and the corporation's governing documents. • To prevail in a cause of action claiming a breach of duty, the claimant must rebut one or more of the presumptions listed above and prove (1) the act or omission was a breach of the person's duties and (2) the breach involved fraud, intentional misconduct, ultra vires acts, or knowing violations of law. (Tex. Bus. Orgs. Code Ann. § 21.419) • The presumptions created by § 21.419 are in addition to legal presumptions arising under common law or the code in favor of managerial officials (which include all officers of the corporation) and apply to publicly traded corporations or to corporations electing to be covered in their governing documents. • Under common law, a director action is presumed valid if no conflict exists and the action is not ultra vires or tainted by fraud [*Gearhart Indus., Inc. v. Smith Int'l, Inc*. 741 F.2d 707, 721 (5th Cir. 1984)] • Directors are generally protected from liability for actions within the honest exercise of their business judgment and discretion. [*Sneed v. Webre*, 465 S.W.3d 169, 173 (Tex. 2015); *Chapman v. Arfeen*, 2018 WL 4139001, (Tex. App.—Beaumont 2018, pet. denied)]	• By common law, director action is presumed valid if the director acted (1) on an informed basis (2) in good faith (3) in the honest belief that the action was in the corporation's best interest. [*Aronson v. Lewis*, 472 A.2d 805, 811-12 (Del. 1984)] • Standard of review is generally business judgment rule unless directors did not fulfill duty of care or duty of loyalty or there is conflict of interest with no Delaware safe harbor. When the business judgment rule applies, a court will not substitute its business judgment for the board's as long as there is any informed rational business purpose for the decision made.
Director Reliance	• Director can rely (unless director knows reliance is unwarranted) in good faith and with ordinary are on information, opinions, reports, including financial statements and other financial data, concerning a domestic entity or another person prepared or presented by: officers, employees, legal counsel, certified public accountants, investment bankers, a person reasonably believed to have professional expertise in the matter and board members of a committee of which the director is not a member. (Tex. Bus. Orgs. Code Ann. § 3.102)	• A director is fully protected in relying in good faith upon (1) the records of the corporation and (2) upon such information, opinions, reports or statements presented to the corporation by (i) any of the corporation's officers or employees, or (ii) committees of the board of directors, or (iii) by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation. (8 Del. C. § 141(e))

Provision	Texas	Delaware
Exculpation Exceptions	• Charter may include a provision eliminating or limiting the personal liability of a director to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director. Charter may also provide same exculpation for officers. • This does not authorize the elimination or limitation of the liability of a governing person to the extent the person is found liable under applicable law for: (1) a breach of the person's duty of loyalty, if any, to the organization or its owners or members; (2) an act or omission not in good faith that: (A) constitutes a breach of duty of the person to the organization; or (B) involves intentional misconduct or a knowing violation of law; (3) a transaction from which the person received an improper benefit, regardless of whether the benefit resulted from an action taken within the scope of the person's duties; or (4) an act or omission for which the liability of a governing person is expressly provided by an applicable statute. (Tex. Bus. Orgs. Code Ann. § 7.001(c)*)	• Organizational documents may include a provision eliminating or limiting the personal liability of a director or officer to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director or officer, provided that such provision shall not eliminate or limit the liability of: (i) a director or officer for any breach of the director's or officer's duty of loyalty to the corporation or its stockholders; (ii) a director or officer for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) a director under § 174 of the DGCL (dealing with unlawful dividends and stock repurchases); (iv) a director or officer for any transaction from which the director or officer derived an improper personal benefit; or (v) an officer in any action by or in the right of the corporation. (8 Del. C. § 102(b)(7)) • Controlling stockholders and members of a control group are exculpated from liability for duty of care violations. (8 Del. C. §144) • Corporation generally may indemnify directors and officers for expenses, judgments, fines and amounts paid in settlement in connection with direct claims if the director acted in good faith. Such permissive indemnification is limited to expenses in connection with derivative claims (and if the director or officer was adjudged liable, must have approval of court for indemnification of such expenses in derivative claims). Corporation must indemnify directors and certain officers who have been successful (on the merits or otherwise) in defending litigation. Corporations also may advance expenses to directors and officers in advance of a final judgment, subject to an obligation to repay if the director or officer is ultimately not indemnifiable, and may also obtain insurance for liability generally (including in connection with losses arising from derivative claims). DGCL recently amended to allow a company to insure using captive insurance, subject to certain statutory requirements.
Controlling Shareholder Duties	• Controlling shareholders owe fiduciary duties to the corporation but not to the minority shareholders. • While this has not been addressed directly, based on cases involving closely held corporations under Texas law, transactions with controlling shareholders are expected to be subject to business judgement rule deference, as Texas courts have not adopted the entire fairness doctrine for review of controlling shareholder transactions. • [*Ritchie v. Rupe*, 443 S.W.3d 856, 868 (Tex. 2014); *Hogget v. Brown*, 971 S.W.2d 472, 488 (Tex. App. 1997); *Flanary v. Mills*, 150 S.W.3d 785, 794 (Tex. App. 2004)]	• Subject to elimination of liability for duty of care violations in Section 144, controlling stockholders have fiduciary duties, albeit limited ones, when they exercise their controlling voting power to alter the corporation's "status quo." Examples of altering the status quo include changing the entity's governance or blocking the board's chosen course of action. • [*In re Sears Hometown & Outlet Stores, Inc. S'holder Litig.*, 309 A.3d 474 (Del. Ch. 2024); *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1114 (Del. 1994)]

* - Effective September 1, 2025

Provision	Texas	Delaware
Interested-Party Transaction Approvals	• Similar to Delaware except that it expressly provides that if at least one of the permissible conditions is satisfied (generally the same as Delaware prongs), shareholders do not have a cause of action against any director or officer for breach of duty with respect to the making, authorizing, or performance of the contract or transaction because the director or officer had a relationship of interest or took any of the actions authorized by the section. (Tex. Bus. Orgs. Code Ann. § 21.418) • The burden is on the interested party to establish the transaction was approved under the statutory procedure or the transaction was fair to the corporation at the time. [*Landon v. S & H Mktg. Grp.*, Inc., 82 S.W.3d 667 (Tex. App.—Amarillo 2002)] • Regardless of whether any of the permissible conditions is satisfied, shareholders do not have a cause of action against any director or officer for breach of duty with respect to the making, authorizing, or performance of the contract or transaction because the director or officer had a relationship of interest or took any of the actions authorized by the section, unless the cause of action is permitted by § 21.419. This subsection (f) only applies to publicly held corporations or corporations electing to be governed by Business Judgement Rule presumption codified in § 21.419. (Tex. Bus. Orgs. Code Ann. § 21.418(f)) • Applicable to publicly traded corporations and corporations electing to be governed by Business Judgement Rule presumption codified in § 21.419, the board may adopt resolutions that authorize the formation of a committee of independent and disinterested directors to review and approve transactions involving controlling shareholders, directors or officers, whether or not contemplated at the time of committee's formation. Board may petition a court with proper jurisdiction to make a determination on the independence of the committee of directors. The corporation must give notice to the shareholders that such a petition has been filed. After expedited proceedings to determine appropriate legal counsel to represent the corporation and its shareholders (other than any relevant controlling shareholder), the court will hold an evidentiary hearing and render a binding determination regarding the independence of the directors on the committee. The finding is "dispositive" absent facts not presented to the court. (Tex. Bus. Orgs. Code Ann. § 21.4161)	• By statute, Delaware provides safe harbors for interested party transactions. A "going-private" transaction (with a controlling stockholder) would fall into in the safe harbor if both approval from a committee comprised at least two disinterested directors and disinterested stockholder approval is obtained. All other related-party transactions with controlling stockholders will receive the benefit of a safe-harbor from liability if either disinterested director approval from a committee comprised of at least two disinterested directors or disinterested stockholder approval or ratification is obtained, as listed below. (8 Del. C. §144) ○ If there a majority interested board but no controlling stockholder then the transaction must be approved by a majority of disinterested directors or if less than majority, by a committee comprised of at least two disinterested directors, or approved or ratified by disinterested stockholders. • Provides statutory definitions for determining who qualifies as controlling stockholders, disinterested stockholders, and disinterested directors. There is a presumption of independence for a board member if the Board deems him or her independent under the rules of a national stock exchange. • A controlling stockholder is defined as the following: (i) a stockholder with majority voting power; or (ii) a stockholder with the right to cause the election of nominees that constitute • a majority of the board or a majority of the board's voting power; or (iii) otherwise, a stockholder with less than majority voting power is controlling if it has both (a) power functionally equivalent to majority voting power by virtue at least of one-third in voting power of the outstanding stock of the corporation entitled to vote (1) generally in the election of directors or (2) for the election of directors who have a majority in voting power of the votes of all directors on the board of directors, and (b) power to exercise managerial authority over the business and affairs of the corporation. (8 Del. C. § 144) • If these cleansing mechanisms are not put in place, fiduciaries may seek to prove that the act or transaction is entirely fair, or use common law procedural protections if, for example, there are not two disinterested directors.

Provision	Texas	Delaware
Fiduciary Duties in Context of Change of Control	• Texas law emphasizes that directors must act in good faith, with due care, and in the best interests of the corporation and its shareholders and the Revlon Duties are not among the fiduciary duties listed in *Gearhart*, which predates *Revlon*. *Gearhart* is the leading case stating the fiduciary duties for boards of directors in Texas. [*Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984)]	• Delaware law requires directors to act reasonably in connection with extraordinary transactions—and in approving a change in control transaction, the directors must act reasonably to maximize stockholder value (so-called "*Revlon*" duties). [*Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (1986); *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994); *Cede & Co. v. Technicolor, Inc.*, 637 A.2d 34 (Del. 1994)]
Voting for Change of Control	• Requires board approval and at least two-thirds of the outstanding shares of a class. Shareholders holding at least two-thirds of the corporation's outstanding shares must typically approve fundamental business transactions which include: ○ A merger ○ An interest exchange ○ A conversion ○ A sale of all or substantially all the corporation's assets. (Tex. Bus. Orgs. Code Ann. §§ 1.002(32); 21.451-459) • The certificate of formation may provide for a different threshold of approval, but not less than a majority of the shares entitled to vote. • Permits a merger to be effected without shareholder approval if the corporation is the sole surviving corporation, the shares of stock of the corporation are not changed as a result of the merger and the total number of shares of stock issued pursuant to the merger does not exceed 20% of the shares of the corporation outstanding immediately prior to the merger. (Tex. Bus. Orgs. Code Ann. § 21.459)	• Generally requires board approval and a approval of majority of the outstanding stock of the corporation entitled to vote thereon to a fundamental changes such as: ○ A merger or consolidation ○ A sale, lease, or exchange of all or substantially all the corporation's assets, except collateral securing a mortgage or pledged under specified circumstances. (8 Del. C. §§ 251-258; 271-72) • Permits a merger to be effected without stockholder approval if the corporation is the sole surviving corporation, the shares of stock of the corporation are not changed as a result of the merger and the total number of shares of stock issued pursuant to the merger does not exceed 20% of the shares of the corporation outstanding immediately prior to the merger. (8. Del. C. § 251(f)) • Also permits a merger to be effected without shareholder approval if the merger follows a tender offer and certain other specified conditions are satisfied.

Provision	Texas	Delaware

Appraisal Rights	• Provides appraisal rights in more types of transactions than Delaware, including:
	  ○ Plan of merger to which the domestic entity is a party if owner approval is required by TBOC and the owner owns in the domestic entity an ownership interest that was entitled to vote on the plan of merger;
	  ○ Sale of all or substantially all of the assets of the domestic entity if owner approval is required by TBOC and the owner owns in the domestic entity an ownership interest that was entitled to vote on the sale;
	  ○ Plan of exchange in which the ownership interest of the owner is to be acquired;
	  ○ Plan of conversion in which the domestic entity is the converting entity if owner approval is required by TBOC and the owner owns in the domestic entity an ownership interest that was entitled to vote on the plan of conversion;
	  ○ Merger effected under Section 10.006 in which: (i) the owner is entitled to vote on the merger; or (ii) the ownership interest of the owner is converted or exchanged;
	  ○ Merger effected under Section 21.459(c) in which the shares of the shareholders are converted or exchanged; or
	  ○ In certain circumstances, if the owner owns shares that were entitled to vote on the amendment, an amendment to a domestic for-profit corporation's certificate of formation to: (i) add the provisions required by Section 3.007(e) to elect to be a public benefit corporation; or (ii) delete the provisions required by Section 3.007(e), which in effect cancels the corporation's election to be a public benefit corporation. (Tex. Bus. Orgs. Code Ann. § 10.354)
	• An owner may not dissent from a plan of merger or conversion in which there is a single surviving or new domestic entity or non-code organization, or from a plan of exchange, if (among others):
	  ○ The ownership interest is listed on a national exchange or held by at least 2,000 owners
	  ○ The owner is not required by the terms of the plan of merger, conversion, or exchange to accept consideration that is different from the consideration provided to any other holder
	  ○ The owner is not required to accept any consideration other than shares listed on a national exchange or held by at least 2,000 owners (Tex. Bus. Orgs. Code Ann § 10.354(b))
	• An owner may not dissent from an amendment to the corporation's certificate of formation if the shares held by the owner are part of a class or series of shares listed on a national exchange or held by at least 2,000 owners. (Tex. Bus. Orgs. Code Ann § 10.354(d))
		• Under the DGCL, a stockholder is entitled to appraisal rights pursuant to which the stockholder may receive cash in the amount of the fair market value of the stockholder's shares as determined by a Delaware Court. Unless an exception is applicable, appraisal rights are available under DGCL for:
		  ○ Merger or consolidation of a domestic corporation (§ 251),
		  ○ Merger or consolidation of domestic and foreign corporation (§ 252),
		  ○ Short-form mergers where subsidiary not wholly owned (§§ 253, 267),
		  ○ Merger or consolidation of domestic corporations and joint-stock or other associations (§ 254),
		  ○ merger or consolidation of domestic nonstock corporations (§ 255),
		  ○ merger or consolidation of domestic and foreign nonstock corporation (§ 256),
		  ○ Merger or consolidation of domestic stock and nonstock corporations (§ 257),
		  ○ Merger or consolidation of domestic and foreign stock and nonstock corporations (§ 258),
		  ○ Merger or consolidation of domestic corporations and partnerships (§ 263), and
		  ○ Merger or consolidation of domestic corporations and limited liability companies (§ 264).
		• Appraisal rights not available for:
		  ○ The surviving company in mergers (not requiring stockholder approval under DGCL § 251(f)),
		  ○ Mergers with or into direct or indirect a wholly owned subsidiary of the constituent corporation under DGCL 251(g), which do not require vote of the stockholders of the constituent corporation,
		  ○ Mergers, consolidations, conversions, transfers, domestications, or continuances in which the stockholders hold stock that is either listed on a national securities exchange or held of record by more than 2,000 holders, and the stockholders are not cashed out in the merger (DGCL § 262(b)(1)),
		  ○ Mergers consolidations, conversions, transfers, domestications, or continuances involving corporations whose shares had been traded on a national securities exchange, if the value of the consideration received by the stockholders entitled to appraisal does not exceed $1 million or the total number of shares entitled to appraisal does not exceed 1% of the outstanding shares of the class or series of shares eligible for appraisal (DGCL § 262(g)), and
		  ○ Mergers, consolidations, conversions, transfers, domestications, or continuances of non-US entities that have converted or domesticated as Delaware corporations under either § 265 or § 388 of the DGCL. (8 Del. C. § 262)

Provision	Texas	Delaware
Business Combination Statutes	• A corporation cannot combine with an affiliated shareholder for 3 years after it became "affiliated" (i.e. held 20% voting power) without supermajority approval of disinterested shareholders on date at least 6 months after it became "affiliated." (Tex. Bus. Orgs. Code Ann. §§ 21.606-07)	• A corporation cannot combine with an interested stockholder for 3 years after it became "interested" (i.e. held 15% voting power) without board approval or approval of 66-2/3% vote of disinterested stockholders. Corporation can opt out in its charter. (8 Del. C. § 203)
Books and Records Inspection Rights	• A shareholder may, upon a written demand stating purpose at a reasonable time at the corporation's principal place of business, inspect a Texas corporation's (1) books (2) records of account (3) minutes (4) share transfer records (5) other records if record reasonably related to and appropriate to copy and examine for the stated purpose, subject to certain limitations, if such shareholder holds at least 5% of the outstanding shares of stock of the Texas corporation or has been a holder of shares for at least six months, however this does not impair power of court on presentation of proof of proper purpose by beneficial or record holder of shares to compel production regardless of time period or number of shares held. • Records do not include emails, text messages or similar electronic communications, or information from social media accounts unless the email, text message or information from social media effectuates an action by the corporation. • For corporations with voting shares listed on a national securities exchange or corporations that opt in to the Business Judgment Rule presumption described above, a demand is not for a proper purpose if the demand is in connection with: ○ an active or pending derivative proceeding that is expected to be instituted or maintained by the holder or the holder's affiliates, or ○ an active or pending civil lawsuit to which the corporation, or its affiliates, and the holder, or the holder's affiliate, are or are expected to be adversarial named parties. (Tex. Bus. Orgs. Code Ann. § 21.218) • Pre-Amendment case law: Texas courts generally consider any request proper so long as the information the shareholder requests is related to the protection of the shareholder's interest. [*Perry v. Perry Bros., 753 S.W.2d 773* (Tex. App. 1988); *Gaughan v. Nat'l Cutting Horse Ass'n*, 351 S.W.3d 408 (Tex. App. 2011); *Citizens Ass'n for Sound Energy (CASE) v. Boltz*, 886 S.W.2d 283 (Tex. App. 1994)]. Corporations may withhold documents containing trade secrets from a shareholder request for inspection. [*See Gaughan v. National Cutting Horse Ass'n*, 351 S.W.3d 408 (2011)]. • Allows would-be litigants to petition to take pre-suit discovery to investigate a potential claim or suit before filing litigation and without pleading a specific cause of action. (Tex. R. Civ. P. 202.1(b); *In re Doe*, 444 S.W.3d 603 (Tex. 2014))	• The holder of a single share (or even a fractional share) has the right to demand to inspect "books and records" of the corporation which is defined as the certificate of incorporation, bylaws, minutes and signed consents of stockholder meetings, formal communications to stockholders as a whole, board minutes and board resolutions, committee minutes and committee resolutions, materials provided to the board and committees and annual financial statements. Minutes of stockholder meetings, signed consents, communications to stockholders, and annual financial statements of the corporation are subject to a 3-year limitation. (8 Del. C. § 220(b)) • The stockholder must describe its purpose and the records it seeks with "reasonable particularity." (8 Del. C. § 220) • Proper purposes include: (1) investigating alleged mismanagement (however the stockholder needs a credible basis), (2) ascertaining the value of stockholder's shares, and (3) communicating with other stockholders about a tender offer. [*See Sec. First Corp. v. U.S. Die Casting and Dev. Co.*, 687 A.2d 563, 568)] • The corporation may impose reasonable restrictions on the confidentiality, use, or distribution of books and records and may require, as a condition to producing books and records to a stockholder under any demand under Section 220, that the stockholder agree that any information included in the corporation's books and records is deemed incorporated by reference in any complaint filed by or at the direction of the stockholder in relation to the subject matter referenced in the demand. The corporation may redact portions of any books and records produced to such stockholder under Section 220 to the extent the portions so redacted are not specifically related to the stockholder's purpose. (8 Del. C. § 220(b)(3))

Provision	Texas	Delaware

Derivative Actions	• Shareholder must make formal written demand on board and cannot bring suit until either demand is rejected or 90 days have passed, unless the shareholder can show irreparable injury.
	  ○ There is no demand futility option under Texas law.
	  ○ If the board decides to commence inquiry into allegations, then discovery is stayed while inquiry occurs, and if inquiry results in majority of independent and disinterested directors deciding that pursuing the claim is not in company's best interests, then the suit must be dismissed.
	• (a) Publicly traded corporations and (b) corporations that have 500 or more shareholders and have made an affirmative election to opt in to the statutory Business Judgment Rule presumption, may institute a minimum ownership threshold for shareholders to bring derivative actions - up to 3% of the outstanding shares.
	• Attorney's fees may be awarded to a plaintiff if the court finds the proceeding resulted in a substantial benefit to the corporation. Additional or amended disclosures made to shareholders are not considered to be substantial benefits, regardless of materiality. (Tex. Bus. Orgs. Code Ann. §§ 21.551-558)
	• Creditors may only bring derivative claims for breach of fiduciary duty (1) once the company is insolvent and (2) the company has ceased operations. [*Aurelius Capital Master, Ltd. v. Acosta*, 3:13-CV-1173-P, 2014 WL 10505127 (N.D. Tex. Jan. 28, 2014)]
	• Organizational documents may include waiver of jury trial for any internal entity claims, including derivative claims
	• Organizational documents may permit exclusive forum in Texas courts for internal entity claims.
		• Action allowed if stockholder meets demand or demand futility requirements. Demand will be deemed futile where at least half of the directors of a corporation:
		  ○ (1) "received a material personal benefit from the alleged misconduct that is the subject of the litigation demand";
		  ○ (2) faced "a substantial likelihood of liability on any of the claims that are the subject of the litigation demand"; or
		  ○ (3) are not independent of another director "who received a material personal benefit from the alleged misconduct that is the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand." (Del. Ch. Ct. R. 23.1) [*United Food and Commercial Workers Union and Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034 (Del. 2021); *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984); *Blasband v. Rales*, 634 A.2d 927 (Del. 1993)]
		• Creditors have standing to bring derivative claims against directors and officers for breaches of fiduciary duties once the corporation is insolvent. [*North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007)]
		• Organizational documents may permit exclusive forum in Delaware courts for internal entity claims. Forum selection provision for Securities Act claims are enforceable as well.

Provision	Texas	Delaware
Shareholder Liability (Piercing the Corporate Veil)	• Permits piercing the corporate veil only when a party can demonstrate the shareholder committed actual fraud for their direct personal benefit. Mere allegations of alter ego or claiming a sham-entity are insufficient. (Tex. Bus. Orgs. Code Ann.§ 21.223). [*Metroplex Mailing Servs. v. RR Donnelley & Sons Co.*, 410 S.W.3d 889 (Tex.App.—Dallas 2013, no pet.); *In re JNC Aviation, LLC*, 376 B.R. 500, 527 (Bankr. N.D. Tex. 2007)]	• It is a general principle of corporate law deeply ingrained in economic and legal systems that a stockholder is not liable for the acts of the corporation. "Delaware courts depart from this general rule only in exceptional circumstances." Piercing the corporate veil under the alter ego doctrine "requires that the corporate structure cause fraud or similar injustice." [*Cleveland-Cliffs Burns Harbor LLC v. Boomerang Tube, LLC*, 2023 WL 5788392, at *4 (Del. Ch. Sept. 5, 2023)] • Delaware law allows reverse veil-piercing as well for third-party creditors to recover assets from a parent company's subsidiaries. [*Manichaean Capital, LLC v. Exela Technologies, Inc.*, 251 A.3d 694 (2021)] Delaware law does not allow horizontal veil piercing or enterprise liability. [*Cleveland-Cliffs Burns Harbor LLC v. Boomerang Tube, LLC*, 2023 WL 5788392, at *7 (Del. Ch. Sept. 5, 2023)]
Control Share Acquisitions	• No control share acquisition statute.	• No control share acquisition statute.
Fair Price Statute	• None.	• None.
Limitations on Distributions	• Distributions must be proportion to share ownership within each class of shares (preferential distributions permitted for one class over another). (Tex. Bus. Orgs. Code Ann. §§ 21.152(c) & 21.154(a)(3)) • Distributions are not allowed if they will violate certificate of formation, make the corporation insolvent or exceed the distribution limit. (Tex. Bus. Orgs. Code Ann. § 21.303) • Share dividends cannot be made if (1) they will violate the certificate of formation, (2) the corporation's surplus is less than the amount the BOC requires to be transferred to stated capital, or (3) they will be made to shareholders of another class or series (unless permitted by certificate of formation or authorized by shareholders of the class or series in which the share dividend is being made). (Tex. Bus. Orgs. Code Ann. §§ 21.310-311)	• Dividends generally should be proportionate to stock ownership within each class of stock (preferential dividends permitted for one class over another). (8 Del. C. § 151) • Dividends must be paid out of either (1) surplus or (2) if no surplus then net profits for the current or preceding year. (8 Del. C. § 170(a))

Provision	Texas	Delaware
Director Liability for Unlawful Distributions	• Directors consenting to a prohibited distribution are jointly and severally liable for the amount of the distribution exceeding the permitted amount. A director is not jointly and severally liable if, in voting for or assenting to the distribution, the director: ○ (1) relies in good faith and with ordinary care on: (A) the statements, valuations, or information described by Section 21.314; or (B) other information, opinions, reports, or statements, including financial statements and other financial data, concerning the corporation or another person that are prepared or presented by: (i) one or more officers or employees of the corporation; (ii) a legal counsel, public accountant, investment banker, or other person relating to a matter the director reasonably believes is within the person's professional or expert competence; or (iii) a committee of the board of directors of which the director is not a member; ○ (2) acting in good faith and with ordinary care, considers the assets of the corporation to be valued at least at their book value; or ○ (3) in determining whether the corporation made adequate provision for payment, satisfaction, or discharge of all of the corporation's liabilities and obligations, as provided by Sections 11.053 and 11.356, relies in good faith and with ordinary care on financial statements of, or other information concerning, a person who was or became contractually obligated to pay, satisfy, or discharge some or all of the corporation's liabilities or obligations. (Tex. Bus. Orgs. Code Ann. § 21.316)	• A member of the board of directors, or a member of any committee shall be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of its officers or employees, or committees of the board of directors, or by any other person as to matters the director reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation, as to the value and amount of the assets, liabilities and/or net profits of the corporation or any other facts pertinent to the existence and amount of surplus or other funds from which dividends might properly be declared and paid, or with which the corporation's stock might properly be purchased or redeemed. (8 Del. C. § 172) • Directors willfully or negligently consenting to an unlawful distribution are jointly and severally liable for the full amount of the unlawful distribution (with interest). (8 Del. C. 174(a))
Taxes	• No corporate tax.	• 8.7% of federal taxable income allocated and apportioned to Delaware (which should generally be very limited). ○ Exceptions: (1) Corporation maintaining statutory corporate office but not engaging in business in Delaware and (2) Corporation's activities in Delaware are only maintaining or managing intangible assets. • https://revenue.delaware.gov/business-tax-forms/filing-corporate-income-tax/
Annual Franchise Tax	• Based on "Margin" allocated to Texas with no tax due below $2,470,000 (if revenue is $0, then Margin is $0) • Margin = (i) total revenue times 70%; (ii) total revenue minus COGS; (iii) total revenue minus compensation (W-2 wages paid, subject to a $450,000 per employee maximum for 2025); or (iv) total revenue minus $1,000,000. • Applies regardless of state of incorporation. • https://comptroller.texas.gov/taxes/publications/98-806.php	• Between $175 and $200,000 (maximum) unless corporation qualifies as a "larger corporate filer" which they would then pay $250,000. • (Based on Authorized Shares Method or Assumed Par Value Capital Method) • https://revenue.delaware.gov/business-tax-forms/franchise-taxes/

Thank You

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Morris Nichols
ARSHT & TUNNELL