The Changing Landscape of Shareholder Rights in the United States

June 3, 2025

Agenda

- General Introduction and Overview of Regulatory Framework
  - State law and court decisions in Delaware
  - Federal requirements under Sections 13 and 16 of the Exchange Act
  - Potential action by other federal agencies/courts
  - Questions

New Legislation in Delaware:

A Threat to Stockholder Rights

Overview of SB 21

	Current Delaware Law		SB 21
Approvals	Conflicted transactions require approval of <u>both</u> independent directors and minority stockholders	→	Most conflicted transactions only require approval of independent directors
Director Independence	"flexible, fact-based approach to the determination of directorial independence."	→	Shareholder must present "substantial and particularized facts" to rebut presumption of independence
Books and Records	Books and records can include emails "if a company decides to conduct formal corporate business largely through informal electronic communications"	→	Books and records can include emails "only to the extent necessary and essential to fulfill the shareholder's proper purpose."

Controlling Stockholder Transactions

Delaware courts sometimes compare controlling stockholders to an “800-pound gorilla whose urgent hunger for the rest of the bananas” is likely to generate a “fear of retribution” if the gorilla does not get his way.

In re: Pure Resources Inc. Shareholder Litigation, 808 A.2d 421, 436 (Del. Ch. 2002).

Controlling Shareholder Abuses

Orchesrated Southern Peru/Minera Mexico merger

Attempted share reclassification

Orchestrated CBS/Viacom merger

Shari Redstone's Merger of CBS and Viacom

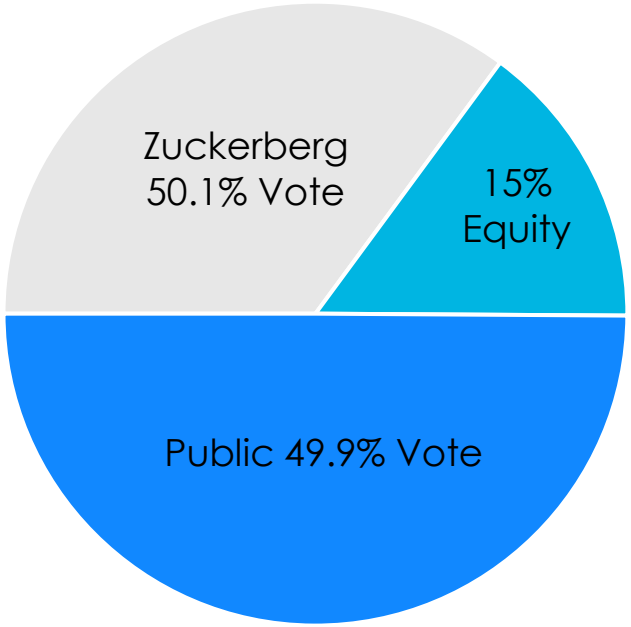
CBS + VIACOM

$167.5 Million Settlement

Mark Zuckerberg's Share Reclassification at Facebook

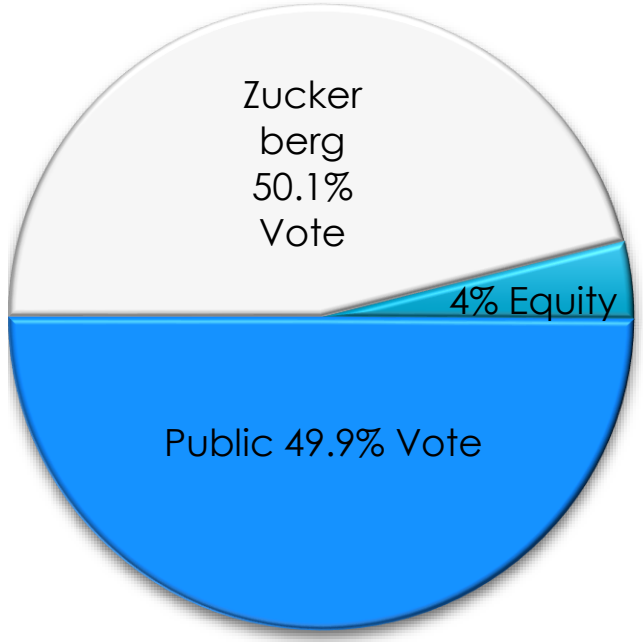
Pre-Reclassification

Zuckerberg controls with 15% equity



Post-Reclassification

Zuckerberg controls with 4% equity



Facebook Drops Stock Move That Would Have Solidified Zuckerberg's Control

By MIKE ISAAC SEPT. 22, 2017

$1.3 - $5.2 Billion Damages Avoided

German Larrea's Merger of Southern Peru with Minera Mexico

54%

Grupo Mexico

100%

Southern Peru

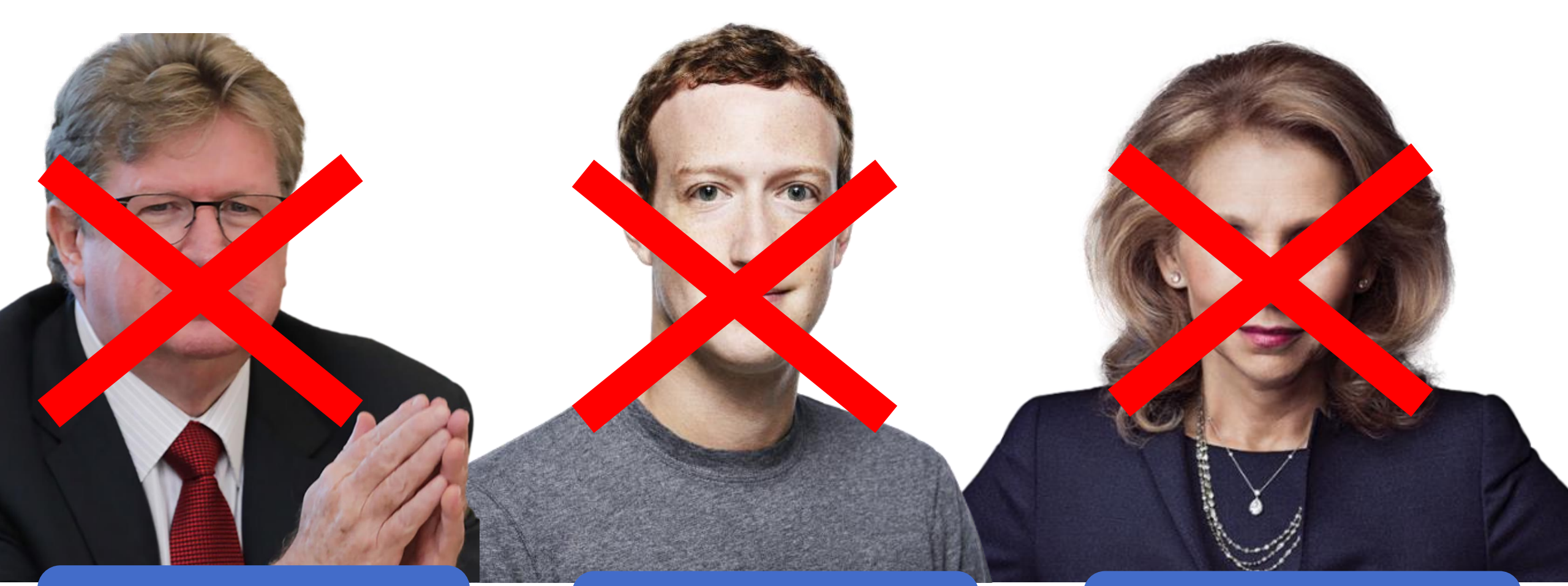
Minera Mexico

The New York Times

Grupo Mexico Is Hit With $1.26 Billion Judgment

$2 billion judgment

SB 21 Insulates Controllers from Liability



Orchestrated Southern Peru/Minera Mexico merger

Attempted share reclassification

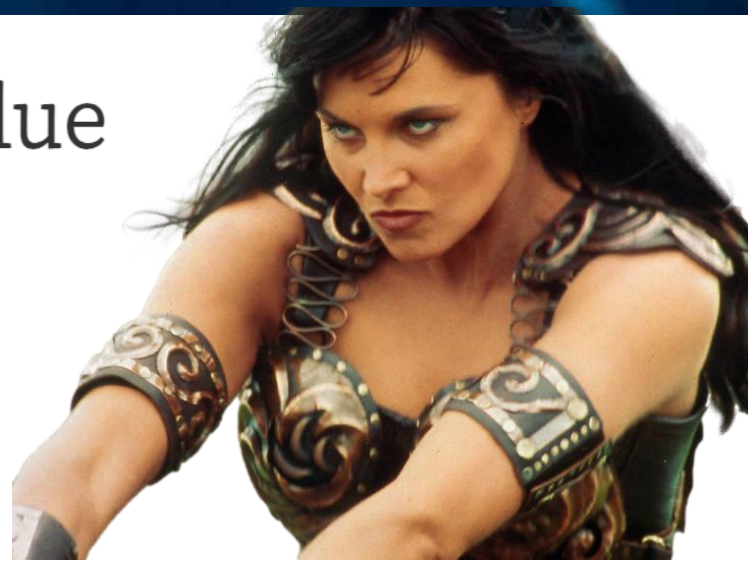
Orchestrated CBS/Viacom merger

Academics Criticize SB 21

Delaware Decides Delaware Law Has No Value

Ann Lipton
Tulane Law School

"The changes, if adopted, mean it will be ***laughably easy***, with a few incantations of ***magic words***, to create the ***appearance*** of procedural regularity, while shareholder ***plaintiffs will be denied access*** to the information necessary to establish any procedural ***irregularity***."



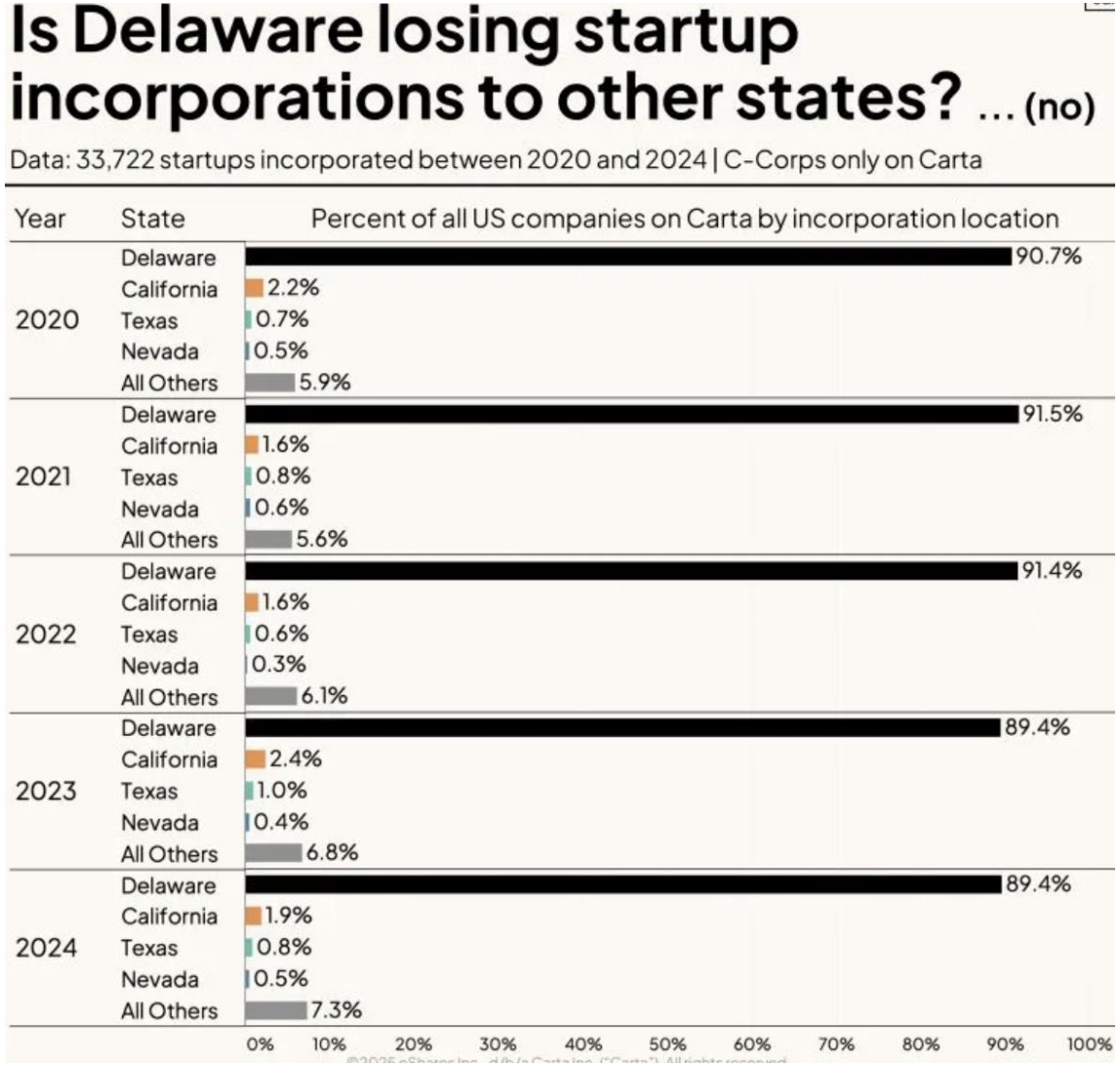
"What stands out for me is that Delaware could have proposed to ***eliminate shareholder litigation altogether***. It would have been simpler, and ***more honest***…."

How Did We Get Here?

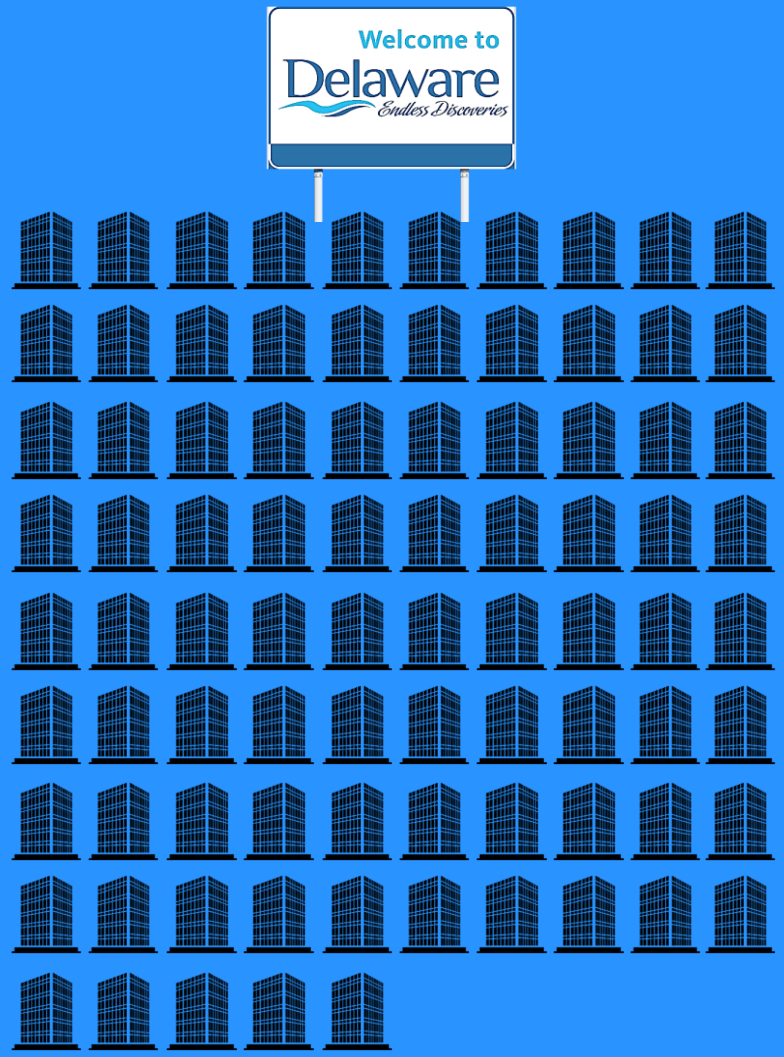
Proponents of new legislation say legislative amendments will:

- Prevent corporations from leaving Delaware and incorporating elsewhere

Corporations Aren’t Leaving Delaware



Corporations Aren’t Leaving Delaware



× $250,000

= $2,000,000 “lost”

$7 billion budget

How Did We Get Here?

Proponents of new legislation say legislative amendments will:

- “address problems of recent vintage”

Legislation Isn't Just Addressing Cases of "Recent Vintage"

OVERRULED

Case	Cite
Americas Mining Corp. v. Theriault	51 A.3d 1213 (Del. 2012)
Appel v. Berkman	180 A.3 55, 1064 (Del. 2018)
Basho Techs. v. G'town Basho Invs.	2018 WL (Del. Ch.)
Cent. Mortg. Co. v. Morgan Stanley	27 A.3d 531, 2011)
Corwin v. KKR Fin. Holdings LLC	125 A.3d 304 (D
Del. Cty. Employees v. Sanchez	124 A.3d 1017 (De
Emerald Partners v. Berlin	726 A.2d 1215 (Del. 1
Flood v. Synutra Int'l, Inc.	195 A.3d 754, 763 (Del. 2
In re Kraft Heinz Co. Deriv. Litig.	2021 WL 6012632, at *12 (De Ch.)
In re Match Group, Inc. Deriv. Litig.	315 A.3d 446 (Del. 2024
In re Match Group, Inc. Deriv. Litig.	315 A.3d 446 (Del. 2
In re Tesla Motors S'holder Litig.	298 A.3d 667 (De
Kahn v. M & F Worldwide Corp.	88 A.3d 635 ( )
Kahn v. Stern	183 A.3d 2018)
Kahn v. Tremont Corp.	694 A. el. 1997)
Levco Alt Fund Ltd. v. Reader's Dig., Inc.	803 A.2d 428 (Del. 2002)

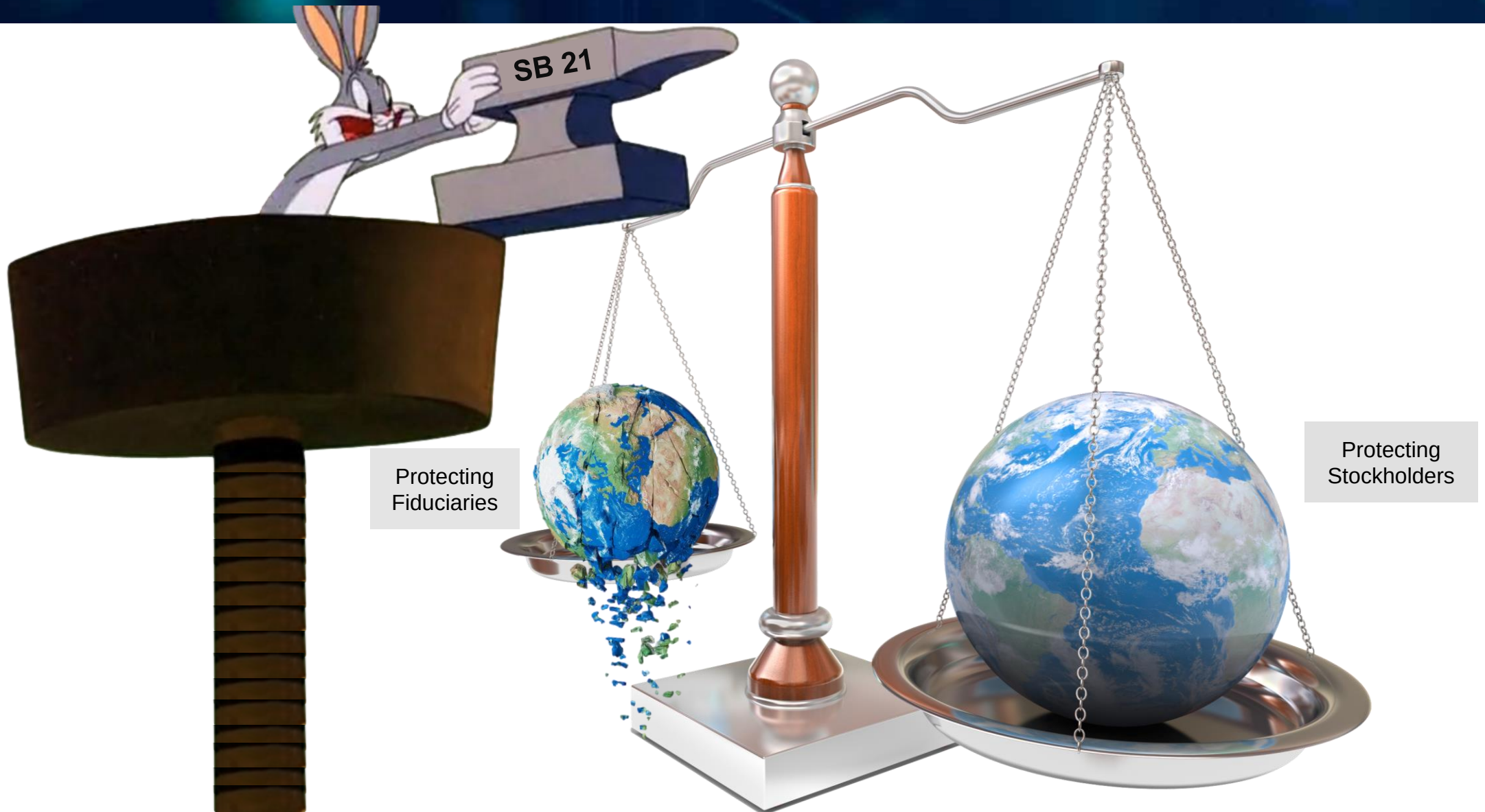
Case	Cite
Maffei v. Palkon	2025 WL 384054 (Del. Feb. 4, 2025)
Marchand v. Barnhill	212 A.3d 805, 818 (Del. 2019)
Mills Acquisition cmillan, Inc.	559 A.2d 1261, 1280, 1283 (Del. 1989)
Morrison v	191 A.3d 268, 275 (Del. 2018)
Olenik v ki	208 A.3d 704, 715 (Del. 2019)
Rose Getty Oil Co.	493 A.2d 929 (Del. 1985)
S incus	152 A.3d 124
v. Grace	606 A.2d 75 (Del.1992)
nley v. Schlecht	128 A.3d 992 (Del. 2015)
rger v. UOP, Inc.	457 A2d 701 (Del. 1983)
eBergen v. Lebanon Cnty. Empl.	243 A.3d 417 (Del. 2020)
KT4 C v. Palantir Techs. Inc.	203 A.3d 738 (Del. 2019)
NVIDIA stland Police & Fire	282 A.3d 1 (Del. 2022)
Saito v. McK C. Inc.	806 A.2d 113, 117 (Del. 2002)
Thomas & Betts iton Mfg. Co.	681 A.2d 1026 (Del. 1996)
Tiger v. Boast Appare	214 A.3d 933, 939 (Del. 2019)

How Did We Get Here?

Proponents of new legislation say legislative amendments will:

- “restore balance” to Delaware law

SB 21 Won’t “Restore Balance”



Proponents Leading a “Disinformation Campaign”

Cambridge U

U of Bristol

Cambridge U

“Delaware’s elected officials are being targeted by a disinformation campaign that may persuade them to endanger Delaware’s corporate law franchise and eliminate important investor rights with few benefits in return.”

Elon Musk and the Delaware Court of Chancery

January 2024

Elon Musk's Tesla Pay Package Is Voided by Judge

Elon Musk’s Sour Grapes

Elon Musk ✓ 𝕏
@elonmusk

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Never incorporate your company in the state of Delaware

5:14 PM · Jan 30, 2024 · **52.4M** Views

13K 17K 161K 3.4K

Elon Musk ✓ 𝕏
@elonmusk

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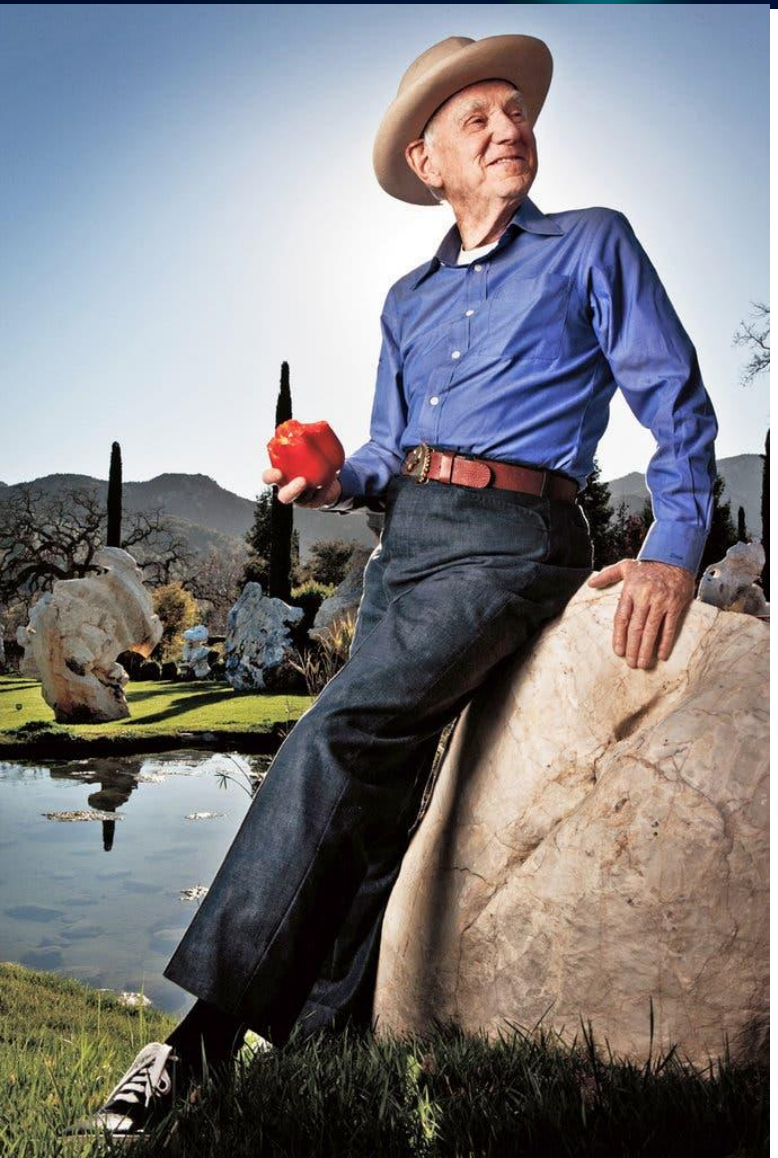
I recommend incorporating in Nevada or Texas if you prefer shareholders to decide matters

7:17 PM · Jan 30, 2024 · **25.7M** Views

5.4K 10K 107K 1.8K

Not the First Crybaby To Threaten To Leave Delaware



Dole Company Chief Executive Found Liable for $148 Million in Fraud

Dole pressures Delaware on corporate law changes

Jonathan Starkey The News Journal

Published 6:45 p.m. ET March 11, 2015 | **Updated 8:48 a.m. ET March 12, 2015**

Proposals to amend Delaware corporate law might fall short for one company that has pressed state lawmakers to prevent hedge funds from milking corporate takeovers.

Dole Food Co., the fruit producer and the Port of Wilmington's largest tenant, has urged lawmakers to limit shareholder lawsuits. Executives suggested in some conversations that they would consider moving business out of Delaware without legislative changes, lawmakers say.

"Dole, like other companies incorporated in Delaware, has been spending millions of dollars in defense costs due to appraisal litigation initiated by hedge funds," Dole President C. Michael Carter wrote to lawmakers in December.

Carter called the litigation "abusive," recommended changes and attached draft legislation.

Bill Ackman and Mark Zuckerberg Stoke the Fire

PERSHING SQUARE

Bill Ackman
@BillAckman

We are reincorporating our management company in Nevada for the same reason. Top law firms are recommending Nevada and Texas over Delaware.

THE WALL STREET JOURNAL.

Meta in Talks to Reincorporate in Texas or Another State, Exit Delaware

Musk’s Lawyers Draft the Bill

CNBC

TECH

Tesla's law firm drafts Delaware bill that could salvage Musk pay package

Delaware’s Governor Matt Meyer

Delaware’s Governor Matt Meyer

“It’s really important we get it right for Elon Musk…. We’re cognizant that there may be some things that need to change. We’re going to work on them.”

Shareholders Rush To Respond

ICGN
International Corporate Governance Network

"Senate Bill 21 will be detrimental to shareholder rights, with potentially significant negative implications for long-term returns for investors."

Council of Institutional Investors®
The voice of corporate governance

We share the concern of some commentators that the provisions of SB 21 are a "direct rebuke" to the Delaware Courts and the body of case law developed by those courts."

- Dozens of shareholders signed onto a letter to the Delaware Legislature
- Almost universal condemnation from the academic community
- Advertisements and mailers sent to voters in Delaware

Constitutional Challenge

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PLUMBERS & FITTERS LOCAL 295 PENSION FUND,

Plaintiff,

v.

DROPBOX, INC., ANDREW W. HOUSTON, DONALD W. BLAIR, LISA CAMPBELL, PAUL E. JACOBS, SARA MATHEW, ABHAY PARASNIS, KAREN PEACOCK, MICHAEL SEIBEL, and ANDREW MOORE,

Defendants.

C.A. No. 2025-0354-KSJM

PUBLIC VERSION

EFILED APRIL 8, 2025

VERIFIED CLASS ACTION COMPLAINT

- *Dupont v. Dupont*, 85 A.2d 724, 728-729 (Del. 1951)
- Article IV, Section 10 of the Delaware Constitution guarantees equitable remedies
- Legislative History:
  - "secures for the protection of the people an adequate judicial system and removes it from the vagaries of legislative whim."
- Delaware Constitution therefore prohibits the General Assembly from limiting the Court of Chancery's general equity jurisdiction
  - Unless the Legislature provides a complete, adequate and exclusive remedy at law in some other tribunal.

FEDERAL REQUIREMENTS UNDER

Sections 13 and 16 of the Exchange Act

Sections 13(d)/(g) and Section 16 obligations triggered by beneficial ownership of more than 5% or 10% of a class of voting equity securities registered under the 1934 Act

Securities issued by foreign private issuers (those filing on 20-F or 40-F) can be in scope for 13(d)/(g) but are out of scope for Section 16

Section 13 of the 1934 Act

- Forms 13D and 13G

Section 16 of the 1934 Act

- Forms 3, 4 and 5

Who is in scope

- Exempt Investors
  - Persons that have not made acquisitions above a certain threshold of securities of the relevant class since the class was registered under the 1934 Act (usually pre-IPO investors)
- Passive Investors
  - Those who have “not acquired the securities with any purpose, or with the effect, of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect” who beneficially own less than 20% of the relevant class
- Qualified Institutional Investors
  - Passive investors that are included on a list of regulated institutions adopted by the SEC and who acquired securities in the ordinary course of business
    - The list is set out in rule 13d-1(b) and includes SEC-registered investment advisers, among others
  - QIIs who hold the relevant securities for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business are exempt from Section 16

What has to be reported?

- 13G generally requires only identifying information about the reporting persons, number of shares and percentage beneficially owned by each reporting person
- 13D also requires:
  - Amount paid and source of funds
  - Plans/proposals with respect to the issuer
  - Relationship with the issuer
  - Disclosure of all transactions in the securities in the past 60 days
  - Disclosure about and filing of agreements with respect to the securities of the issuer

What are the filing deadlines for Schedule G?

Exempt Investors	Passive Investors	Qualified Institutional Investor
Initial filing due within 45 days of quarter end if a greater-than-5% beneficial owners as of the last day of the quarter Amendments triggered by any material change and also due within 45 days of quarter end for those changes	Initial filing due within 5 business days Amendments for less-than-10% owner due within 45 days of quarter end Amendments for greater-than-10% owners due (1) 2 business days after the 10% threshold is crossed and (2) 2 business days after any 5% increase or decrease in beneficial ownership	Initial filing for less-than-10% owner same as for Exempt Investors Initial filing for greater-than-10% owner due 5 business days after a month end at which the 10% threshold is crossed Amendments for less-than-10% owners same as for Exempt Investors Amendments for greater-than-10% owners same as for Passive Investors

What are the filing deadlines for Schedules 13D

- Schedule 13D filing deadlines:
  - Initial filing due 5 business days after triggering event
  - Amendments due 2 business days after triggering event

Staff Guidance on Schedule 13G – February 12, 2025

- The determination of whether a shareholder acquired or is holding the subject securities with a purpose or effect of "changing or influencing" control of the issuer is based on all the relevant facts and circumstances.
- In addition to the subject matter of the engagement, the context in which the engagement occurs is also highly relevant in determining whether the shareholder is holding the subject securities with a disqualifying purpose or effect of "influencing" control of the issuer. Generally, a shareholder who discusses with management its views on a particular topic and how its views may inform its voting decisions, without more, would not be disqualified from reporting on a Schedule 13G. A shareholder who goes beyond such a discussion, however, and exerts pressure on management to implement specific measures or changes to a policy may be "influencing" control over the issuer.
- For example, Schedule 13G may be unavailable to a shareholder who:
  - recommends that the issuer remove its staggered board, switch to a majority voting standard in uncontested director elections, eliminate its poison pill plan, change its executive compensation practices, or undertake specific actions on a social, environmental, or political policy and, as a means of pressuring the issuer to adopt the recommendation, explicitly or implicitly conditions its support of one or more of the issuer's director nominees at the next director election on the issuer's adoption of its recommendation; or
  - discusses with management its voting policy on a particular topic and how the issuer fails to meet the shareholder's expectations on such topic, and, to apply pressure on management, states or implies during any such discussions that it will not support one or more of the issuer's director nominees at the next director election unless management makes changes to align with the shareholder's expectations.

Commissioner Uyeda's May 19, 2025 Speech

- In my view, the wording of the CDI in fact broadens the scope of permissible activities while still remaining eligible for Schedule 13G, which is premised on not "influencing" control of the company. "Influencing" is not defined under the Securities Exchange Act and a common dictionary definition is "the act or power of producing an effect without apparent exertion of force or direct exercise of command."[16] By requiring that a shareholder needs to "exert pressure on management," the CDI indicates that there needs to be something more than the mere planting of an idea with management in order to lose Schedule 13G eligibility.

- This result reflects a commonsense interpretation of longstanding rules: if you are pressuring the board to undertake certain actions relating to the management or policies of an issuer, whether ESG-related or otherwise—coupled with voting threats, such actions are covered by existing rules and should be treated as such. As with the unfounded concerns that Regulation FD would cease all communications between companies and shareholders, I am confident that asset managers will be able to navigate the parameters of the applicable Exchange Act rules to have appropriate levels of engagement with boards and executives of public companies without losing eligibility to file on Schedule 13G—and if an asset manager chooses to exert pressure, then they can provide the disclosure and transparency surrounding such conversations as required by Schedule 13D.

Potential Action by Other Federal Agencies/Courts

- Federal Trade Commission (enforces US antitrust law):
  - Along with Department of Justice, filed brief supporting multi-state antitrust case against large asset managers that alleges managers engaged in anticompetitive conspiracy to drive down coal production as part of an industry-wide “Net Zero” ESG initiative.
  - In 2021, considered rules that would have required an investment manager to aggregate the holdings of every one of its clients to determine threshold for whether a transaction was subject to Hart-Scott-Rodino law notification requirements (even though each client has its own objectives, strategies and contractual relationships with the manager).
- Federal Deposit Insurance Corporation (protects bank depositors):
  - In 2024, proposed regulations that would result in the FDIC actively reviewing “fund complexes’” acquisition of bank shares. Policy concern was that fund complexes have acquired significant amounts of voting shares, which could result in influencing the bank’s management or increase the bank’s risk profile
- Federal Energy Regulatory Commission (regulates public utilities):
  - In applications for waivers from share ownership limits for public utilities, similar concerns raised regarding whether large fund complexes are “merely passive investors.”

Practical Considerations

Good practices for Engagement

- Training for stewardship/engagement teams
  - Compliance/legal chaperones?
- Oral and/or written disclaimers
- Recordkeeping

Consider:

- Proxy voting policies and guidelines
- Monitor ever-changing political/regulatory landscape

Bios

Darren Check
Partner
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dcheck@ktmc.com

Darren J. Check, a Partner of the Firm, manages Kessler Topaz's portfolio monitoring & claims filing service, *SecuritiesTracker*, and works closely with the Firm's litigators and new matter development department. He consults with institutional investors from around the world with regard to implementing systems to best identify, analyze, and monetize claims they have in shareholder litigation.

In addition, Darren assists Firm clients in evaluating opportunities to take an active role in shareholder litigation, arbitration, and other loss recovery methods. This includes U.S. based litigation and arbitration, as well as actions in an increasing number of jurisdictions around the globe. With an increasingly complex investment and legal landscape, Mr. Check has experience advising on traditional class actions, direct actions (opt-outs), non-U.S. opt-in actions, fiduciary actions, appraisal actions and arbitrations to name a few. Over the last twenty years Darren has become a trusted advisor to hedge funds, mutual fund managers, asset managers, insurance companies, sovereign wealth funds, central banks, and pension funds throughout North America, Europe, Asia, Australia, and the Middle East.

Darren regularly speaks on the subjects of shareholder litigation, corporate governance, investor activism, and recovery of investment losses at conferences around the world. He has also been actively involved in the precedent setting Shell and Fortis settlements in the Netherlands, the Olympus shareholder case in Japan, direct actions against Petrobras and Merck, and securities class actions against Bank of America, Lehman Brothers, Royal Bank of Scotland (U.K.), and Hewlett-Packard. Currently Mr. Check represents investors in numerous high profile actions in the United States, the Netherlands, Germany, France, Japan, and Australia.

Bios

Sara Crovitz
Co-Chair, Investment Management
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scrovitz@stradley.com

As a former deputy chief counsel and associate director of the Division of Investment Management of the U.S. Securities and Exchange Commission (SEC), Sara Crovitz has over 25 years of experience providing guidance under the Investment Company Act of 1940 and Investment Advisers Act of 1940 to the asset management industry and to other domestic and foreign regulators.

As co-chair of the firm's nationally recognized investment management practice, Sara also helps to oversee approximately 75 lawyers across the firm's offices.

Sara provides counsel on the most pressing issues impacting the markets, including those related to independent trustees, mutual funds, money market funds, closed-end funds and exchange-traded funds as well as stand-alone advisers. She also counsels funds and investment advisers in connection with SEC compliance examinations; SEC rulemaking comment letters; and seeking SEC exemptive, interpretive and no-action guidance.

During her more than two decades at the SEC, Sara supervised the provision of significant legal guidance to the investment management industry through no-action and interpretive letters, exemptive applications, guidance updates, and other written and oral means. For many years, Sara also led the Division of Investment Management's international efforts, including numerous International Organization of Securities Commissions and Financial Stability Board work streams.

Due to her unique perspective in both private practice and at the SEC, Sara is a frequent author and thought leader for prominent conferences and industry events.

Bios

Lee Rudy
Partner
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Lee D. Rudy, a partner of the Firm, practices in the area of corporate governance litigation, with a focus on transactional and derivative cases. Representing both institutional and individual shareholders in these actions, he has helped cause significant monetary and corporate governance improvements for those companies and their shareholders.

Many of Lee's notable successes have come after, or on the eve of, a high-profile bench or jury trial. In 2011, Lee served as co-lead trial counsel in the landmark case against Southern Peru Copper Corporation, which resulted in a $2 billion trial verdict against Southern Peru's majority stockholder, believed to be the largest trial verdict for stockholders in history. More recently, in 2023, Lee helped lead a jury trial against the Federal Housing Finance Agency (FHFA) for unfairly diverting the profits of Fannie Mae and Freddie Mac from stockholders to the U.S. Treasury Department. After a three-week trial, the jury awarded stockholders $612 million. Lee also recently served as co-lead counsel in an action challenging Shari Redstone's efforts to merge CBS and Viacom, which settled for $167.5 million shortly before trial. Lee served as co-lead trial counsel against Facebook and its founder Mark Zuckerberg challenging Facebook's plan to issue a new class of nonvoting stock to entrench Zuckerberg as the company's majority stockholder. Facebook abandoned its plan to issue the nonvoting stock just two days before trial. Lee also co-led a massive insider trading case against Pershing Square, its founder Bill Ackman, and Valeant Pharmaceuticals, relating to Pershing's buying nearly 10% of the stock of Allergan, Inc. from unsuspecting Allergan stockholders in advance of Valeant launching a tender offer to buy Allergan. The high-profile case settled for $250 million just weeks before trial. Lee previously served as lead counsel in dozens of high-profile derivative actions relating to the "backdating" of stock options.

Prior to civil practice, Mr. Rudy served for several years as an Assistant District Attorney in the Manhattan (NY) District Attorney's Office, and as an Assistant United States Attorney in the US Attorney's Office (DNJ), where he tried dozens of jury cases to verdict.