

Expert Insights

DEXIT TO TEXAS

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TEXAS BAR CLE CHOICE, GOVERNANCE & ACQUISITION OF ENTITIES

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I. BACKGROUND

“**DEXIT**,”¹ in the context of entities formed under Delaware law redomiciling to another state, typically refers to a transaction in which a company exits Delaware as its state of formation by redomiciling in another state. The redomiciling is typically accomplished by either (i) a statutory “conversion”² from an entity formed and governed under the laws of Delaware to one formed and governed by the laws of another state by filing articles of conversion with applicable secretaries of state or (ii) a statutory “merger”³ of the entity into a newly formed entity in the destination state. In either case the result is that the company’s internal affairs are no longer governed by Delaware entity law and the entity has become governed by the laws of the destination state without any transfer of assets having occurred. Texas is often selected as the new domicile for the entity, particularly where the entity has significant operations in Texas.⁴

The underlying DEXIT transaction is commonly described in filings with the Securities and Exchange Commission (“**SEC**”) as a “reincorporation” or “redomiciling” from Delaware to Texas or another destination state. Companies typically will implement the move by filing articles of conversion or merger after the requisite governing jurisdiction law approvals by the entity’s directors and owners and filings with the secretaries of state of Texas and Delaware or by merging a Delaware corporation with or into a wholly-owned subsidiary formed under the Texas Business Organizations Code (the “**TBOC**”), with the surviving entity governed by the TBOC, often with a one-for-one share conversion and continuity of the business and its governing persons and employees.

Texas is a frequently considered DEXIT destination because it is considered to be a business-friendly state because of its new Business Court,⁵ recently amended TBOC and favorable state taxes.⁶ Recent amendments to the TBOC that are viewed as making Texas a desirable home were worked on by the Codification Committee of the Business Law Section of the State Bar of Texas and the Texas Business Law Foundation, a Texas nonprofit corporation (the “**TBLF**”) whose members are largely Texas entities. The TBOC amendments are often cited favorably in corporate DEXIT announcements.⁷ Amendments to the TBOC in 2025 make it more difficult to sue directors

¹ DEXIT is not a defined statutory term and is more of a media label. It is derived from Brexit which refers to Britain’s exit from the European Union.

² See TBOC §§ 10.101-10.151 and DGCL §266.

³ See TBOC §21.452 and DGCL §258.

⁴ See for example, ArcBest Corporation, Coinbase Global, Inc., Dillards, Inc., EquipmentShare.com Inc., Space Exploration Technologies Corp. (“**SpaceX**”), Tesla, Inc., Voyager Technologies, Inc. and Zion Oil & Gas, Inc. In addition, EXXON Mobil Corporation has redomiciled from New Jersey to Texas where it has substantial assets, customers and employees, Forward Industries, Inc. has redomiciled from New York to Texas and other companies have announced that they are in the process of redomiciling to Texas.

⁵ See Byron F. Egan, *Texas Business Court* (Essentials of Business Law, State Bar of Texas CLE, March 19, 2026) https://www.jw.com/wp-content/uploads/2026/02/Egan_48345715_3_TexasBusinessCourt_Essentials_BusinessLaw-19-Mar-26.pdf.

⁶ Jason Philaw, *Energy Giant Looks to Reincorporate in Texas* (TexasLawbook.net March 10, 2026).

⁷ See Daryl B. Robertson, *Business Law*, 88 Texas Bar Journal 605 (September 2005). While some of these legislative changes were applicable only to public corporations which file reports with the SEC, many others are applicable to all Texas entities which elect to be governed by them as authorized by TBOC §21.419.

of companies incorporated in Texas and make it more challenging for shareholders to file stockholder proposals against Texas companies.⁸

Redomiciling a company to Texas is critical to entity governance and owner rights, but may not be as significant to others as moving its headquarters or operations to Texas. While it brings prestige to the state, redomiciling a corporation does by itself not always bring significant economic benefits.

Texas is seeking to attract public company stock listings on the new Texas Stock Exchange in Dallas. Both Nasdaq and the New York Stock Exchange have recently launched Texas listing venues in Dallas.⁹

Shareholders' benefits of DEXIT to Texas cited in SEC filings include:¹⁰

(1) **Substantial operations in Texas.** Companies redomiciling to Texas often cite their significant operations in Texas while noting that they have only nominal operations in Delaware and the benefits of being incorporated in the state where governing laws are made and adjudicated.¹¹

(2) **New Texas Business Court.** Frustration with the Delaware Court of Chancery has led directors, executives and stockholders to decide to redomicile the company to Texas. In *Tornetta v. Musk*¹² the Delaware Chancery Court had voided Tesla, Inc.'s CEO Elon Musk's \$56 billion performance-based equity compensation package which has been approved by its shareholders, and whose performance milestone requirements had been fully satisfied. The rescission remedy decreed in the Chancery Court's initial decision was overturned two years later by the Delaware Supreme Court which found that the rescission remedy ordered by the Chancery Court could not restore the status quo ante because Musk would have worked six years without compensation and thus was not an appropriate remedy. The Supreme Court reduced the remedy to damages awarded of \$1 and the plaintiffs' attorneys' fees award from \$356 million to \$55 million because it found they had provided some benefit to Tesla and its stockholders.¹³ By then Tesla had redomiciled to Texas.

The Texas Legislature has capitalized on frustrations with the Delaware Chancery Court by establishing the new Texas Business Court to provide a venue for significant business and commercial disputes, which began hearing cases in 2024 and is staffed by judges appointed by the

⁸ TBOC §21.419 creates a TBOC presumption (for listed Texas corporations or those which in their governing documents includes a provision electing to be governed by TBOC §21.419) that its governing persons are presumed to act in good faith, on an informed basis and in furtherance of the interest of the corporation. See Byron F. Egan, *EGAN ON ENTITIES: Corporations, Partnerships and Limited Liability Companies in Texas* §2.6.2 (5th Ed. 2025) (“*EGAN ON ENTITIES*”).

⁹ See Corrie Driebusch and Alexander Osipovich, *Coinbase to Leave Delaware, Reincorporate in Texas*, Wall St. Journal, updated Nov. 12, 2025.

¹⁰ See note 4, *supra*.

¹¹ See note 4, *supra*.

¹² *Tornetta v. Musk*, 326 A.3d 1203 (Dec. 2, 2024).

¹³ *In re Tesla, Inc. Derivative Litig.* 2025 Del. LEXIS 2025 LX 574497 (Dec. 19, 2025).

Governor rather than elected with at least 10 years of relevant experience.¹⁴ In 2025 the TBOC was amended to allow Texas entities to include in their governing documents provisions providing that internal entity claims must be brought in the Texas Business Court¹⁵ if it has jurisdiction.

(3) Greater Certainty for Corporate Decision Making. Amendments made to the TBOC in 2025 strengthened Texas' already strong deference to the business judgment of independent directors by creating a statutory presumption that applies to Texas corporations whose securities are listed on a national securities exchange or include in their governing documents to be governed by TBOC § 21.401.¹⁶ The recent TBOC amendments and establishment of the new Texas Business Court are cited by DEXIT companies as reducing the risks and costs of frivolous litigation.

(4) Cost Savings for the Company. Delaware derives significant revenue from its franchise tax which for some companies is \$250,000 solely due to its being incorporated in Delaware and is in addition to Delaware income taxes based on its operations in Delaware, whereas Texas does not have a tax based on the entity's equity capitalization or have an income tax. Texas' margin tax is derived from the entity's revenues from its Texas operations.

¹⁴ A Business Court judge must be at least 35 years of age, a United States citizen and have been a resident of a county within the Division of the Business Court to which the judge is appointed for at least five years before appointment and must be a licensed attorney in Texas who has 10 or more years of experience in: (a) practicing complex civil business litigation; (b) practicing business transaction law; (c) serving as a judge of a court in Texas with civil jurisdiction; or (d) any combination of such experience. A Business Court judge may not have had his or her license to practice law revoked, suspended or subject to a probated suspension. *See Texas Government Code §25A.001 et seq.* and note 5, *supra*.

¹⁵ TBOC § 2.115.

¹⁶ *See* note 8, *supra*.

II. INTERNAL AFFAIRS DOCTRINE, CHOICE OF LAW AND FORUM SELECTION:

“The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation’s internal affairs.”¹⁷ Both Delaware and Texas subscribe to the internal affairs doctrine which provides that “the law of the state of organization of an entity governs its internal affairs, including the liability of an owner or governing person of the entity for actions taken in that capacity.”¹⁸

In Texas, a corporation, partnership and limited liability company (“*LLC*”) may include a provision in its governing documents (certificate of formation or company agreement) that chooses a Texas court as the exclusive forum and venue, and prospectively waives jury trials for internal entity claims that are enforceable even if not signed by the person to be bound thereby.¹⁹

In Delaware, a corporation may have a charter or bylaw forum selection clause in its governing documents, or a contract with one or more current or prospective record or beneficial owners of stock, so long as at least one Delaware state or federal court remains available as a forum, consistent with applicable jurisdictional requirements. A forum selection provision addressing non-internal corporate claims cannot prohibit claims from being brought in a court in Delaware “that has jurisdiction over such claims,”²⁰ provided that a Delaware corporation may enter into an employment or other contract with a current or prospective record or beneficial owner of its stock that designates a Delaware or non-Delaware court as the exclusive forum for the adjudication of fiduciary duties or other claims under or relating thereto.²¹ The Delaware Court of Chancery is a court of equity which does not have jury trials.

¹⁷ *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). “[U]nder the commerce clause a state has no interest in regulating the internal affairs of foreign corporations.” *McDermott, Inc. v. Lewis*, 531 A.2d 206, 217 (Del. 1987) (internal quotations omitted); Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. Corp. L. 33, 39 (Fall 2006).

¹⁸ *EGAN ON ENTITIES* § 2.6.2.; See *JUUL Labs, Inc. v. Grove*, C.A. No. 2020-0005-JTL (Del. Ch. Aug. 13, 2020); *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1115-1118 (Del. 2005); *Klinek v. LuxeYard, Inc.*, 596 S.W.3d 437, 446-48 (Tex. App. – Houston [14th Dist.], pet. filed April 27, 2020).

¹⁹ TBOC §§ 2.115 and 2.116.

²⁰ DGCL § 115.

²¹ DGCL § 122(18); *Masimo Corp. v. Kiani*, No. C.A. No. 2024-1086-NAC, 2026 BL 142645 (Del.Ch. Apr. 21, 2026).

III. SELECTED GOVERNANCE PRINCIPLES:

	Texas	Delaware
Fiduciary Duties	Texas has its own body of jurisprudence for fiduciary duties. In one of the seminal cases on director fiduciary duties under Texas law, the U.S. Court of Appeals for the Fifth Circuit criticized the parties' arguments based on Delaware cases and their failure to cite Texas law in briefing on director of fiduciary duties. Fiduciary duties are owed to the corporation. Directors may consider long term and short term interests of the corporation and shareholders, including whether those interests may be best served by the continued independence of the corporation. <i>See</i> EGAN ON ENTITIES, § 2.6.3 (citing and quoting <i>Gearhart Indus., Inc. v. Smith Int'l</i>, 741 F.2d 707, 719 n. 4 (5th Cir. 1984)). Under Texas law “[a] director’s fiduciary status creates three broad duties: duties of obedience, loyalty, and due care.” <i>In re Estate of Poe</i>, 648 S.W.3d 277, 290 (2022) (citing <i>Loy v. Harter</i>, 128 S.W.3d 397, 407 (Tex. App. – Texarkana 2004, pet denied) (citing <i>Gearhart</i>, 741 F.2d at 719-721 (5th Cir. 1984))). The <i>Gearhart</i> court commented that: (i) the duty of obedience requires a director to avoid committing <i>ultra vires</i> acts, i.e., acts beyond the scope of the authority of the corporation as defined by its articles of incorporation or the laws of the state of incorporation, (ii) the duty of loyalty dictates that a director must act in good faith and must not allow his personal interests to prevail over the interests of the corporation, and (iii) the duty of due care requires that a director must handle his corporate duties with such care as an ordinarily prudent man would use under similar circumstances. EGAN ON ENTITIES, § 2.6.3 (citing <i>Gearhart</i>, 741 F.2d at 719-721).	The principal fiduciary duties under Delaware law are (1) the duty of loyalty and (2) the duty of care. Fiduciary duties are owed to the corporation and its stockholders. EGAN ON ENTITIES § 2.6.4. In <i>Revlon, Inc. v. MacAndrews & Forbes, Inc.</i>, 506 A.2d 173 (Del. 1986) the Delaware Supreme Court held that directors have a duty to seek the highest value obtainable when a sale of the company becomes inevitable. EGAN ON ENTITIES § 2.6.13(b)(2)(ii).

	Texas	Delaware
	TBOC § 1.056 provides that managerial officials of a Texas corporation may, but are not required to, consider the laws, judicial decisions, or business practices of other states in exercising their powers and that a failure to consider or conform to such out-of-state authorities does not constitute or imply a breach of the TBOC or any duty under Texas law. TBOC § 1.057 provides that (i) directors and officers of a Texas corporation may, but are not required to, consider the laws, judicial decisions or business practices of other states in exercising their powers and that a failure to consider or conform to such out-of-state authorities does not constitute or imply a breach of the TBOC or any duty under Texas law and (ii) the provisions of the TBOC may not be supplanted, contravened or modified by the laws or judicial decisions of another state.	
Duty of Obedience	A breach of the duty of obedience occurs when directors commit “<i>ultra vires acts</i>, i.e., acts beyond the scope of the powers of the corporation as defined by its articles of incorporation and Texas law.” EGAN ON ENTITIES, § 2.6.3(e)(1) (citing <i>Gearhart</i>, 741 F.2d at 719.).	No separate and distinct fiduciary duty of obedience under Delaware law, but the concept is embedded elsewhere in the Delaware fiduciary duties. EGAN ON ENTITIES § 2.6.4.
Duty of Loyalty	The duty of loyalty in Texas is a duty that dictates that the director act in good faith and not allow his or her personal interest to prevail over that of the corporation. <i>Gearhart</i>, 741 F.2d at 719. “The duty of loyalty dictates that a corporate officer or director must act in good faith and must not allow his or her personal interest to prevail over the interest of the corporation. The duty of loyalty is described as requiring an extreme measure of candor, unselfishness, and good faith on the part of the officer or director.” <i>Loy v. Harter</i>, 128 S.W.3d 397, 407 (Tex. App. – Texarkana 2004, pet. denied) (citing <i>Holloway</i>, 368 S.W.2d at 577).	“[T]he duty of loyalty is transgressed when a corporate fiduciary, whether director, officer or controlling shareholder, uses his or her corporate office or, in the case of a controlling shareholder, control over corporate machinery, to promote, advance or effectuate a transaction between the corporation and such person (or an entity in which the fiduciary has a substantial economic interest, directly or indirectly) and that transaction is not substantively fair to the corporation. That is, breach of loyalty cases inevitably involve conflicting economic or other interests, even if only in the somewhat diluted form present in every “entrenchment” case.” <i>Solash v. Telex Corp.</i>, No. 9518, 9528, 9525, 1988 WL

	Texas	Delaware
	3587, at *7, 1988 Del. Ch. LEXIS 7, at *19-*20 (Del. Ch. Jan. 19, 1988). <u>Good Faith:</u> “Good faith” has been held to mean “[a] state of mind consisting in (1) honesty of belief or purpose, (2) faithfulness to one’s duty or obligation, . . . or (4) absence of intent to defraud or to seek unconscionable advantage.” <i>Johnson v. Jackson Walker, L.L.P.</i>, 247 S.W.3d 765, 772 (Tex. App. – Dallas 2008, pet. denied) (quoting BLACK’S LAW DICTIONARY 701 (7th ed. 1999)). <u>Interested Party Transactions:</u> A breach of the duty of loyalty under Texas law requires a showing that the applicable person was “interested” in the particular transaction. <i>See Gearhart</i>, 741 F.2d. at 719; <i>A. Copeland Enters., Inc. v. Guste</i>, 706 F. Supp. 1283, 1290 (W.D. Tex. 1989). Whether a director is considered interested in a transaction is a question of fact. <i>Int’l Bankers Life Ins. Co. v. Holloway</i>, 368 S.W.2d 567, 578 (Tex. 1963). “An officer or director is considered “interested” if he or she (1) makes a personal profit from a transaction by dealing with the corporation or usurps a corporate opportunity, (2) buys or sells assets of a corporation, (3) transacts business in his or her officer’s or director’s capacity with a second corporation of which he or she is also an officer or director or is significantly financially associated, or (4) transacts corporate business in his or her officer’s or director’s capacity with a family member.” <i>Loy v. Harter</i>, 128 S.W.3d 397, 407-08 (Tex. App. – Texarkana 2004, pet. denied) (citing <i>Gearhart</i>, 741 F. 2d at 719 and <i>Landon v. S & H Mktg. Grp., Inc.</i>, 82 S.W.3d 666, 681 (Tex. App.—Amarillo 2002, no pet.)). Conflicts of interest do not per se result in a breach of the duty of loyalty, rather	Under Delaware law, “the fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest”, rather it arises in the context of the failure to act in good faith. <i>See Stone v. Ritter</i>, 911 A.2d 362, 370 (Del. 2006). <u>Good Faith:</u> Under Delaware law, “the fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest”, rather it arises in the context of the failure to act in good faith. <i>See Stone v. Ritter</i>, 911 A.2d 362, 370 (Del. 2006). <u>Interested Party Transactions:</u> Under Delaware law, the duty of loyalty mandates “that there shall be no conflict between duty and self-interest”. <i>Guth v. Loft</i>, 5 A.2d 503, 510 (Del. 1939). The duty of loyalty “demands that the best interest of the corporation and its stockholders take precedence over any personal interest or bias of a director that is not shared by the stockholders generally.” EGAN ON ENTITIES, § 2.6.4(a)(1) (citing <i>Cede & Co. v. Technicolor, Inc.</i>, 634 A.2d 345, 361 (Del. 1993)).

	Texas	Delaware
	“the issue is the manner in which an interested director handles the conflict, the processes invoked to ensure fairness to the corporation and its shareholders and the materiality of the director’s personal interests and influences.” EGAN ON ENTITIES, §§ 2.6.3(a) and 2.6.3(c) (citing <i>Popperman v. Rest Haven Cemetery, Inc.</i>, 162 Tex. 255, 259, 345 S.W.2d 715, 717 (1961), <i>Tenison v. Patton</i>, 95 Tex. 284, 293-94, 67 S.W. 92, 95 (1902)), and <i>see W. Inn Corp. v. Heyl</i>, 452 S.W.2d 752, 758 (Tex. Civ. App. – Fort Worth 1970); <i>see also</i> TBOC § 21.418(b) regarding statutory safe harbor procedure for approving interested party transactions. Delaware is similar in that conflicts are not per se breaches, but that is viewed through the lens of Delaware precedent, including with respect to entire fairness and enhanced scrutiny (which are not concepts recognized in Texas cases or statutes). <u>Candor:</u> A fiduciary owes to its principal a duty of full disclosure of all material facts within the fiduciary’s knowledge respecting matters affecting the principal’s interests. <i>See Icom Systems, Inc. v. Davies</i>, 990 S.W.2d 408, 410 (Tex. App. – Texarkana 1999, no pet.).	<u>Candor:</u> With respect to the solicitation of stockholder action, Delaware law requires directors to “disclose fully and fairly all material information within the Board’s control.” <i>Stroud v. Grace</i>, 606 A.2d 75, 84 (Del. 1992); <i>In re Trulia, Inc. Stockholder Litigation</i>, 129 A.3d 884, 899 (Del. Ch. 2016). Delaware has adopted the federal securities law standard for materiality in that information is material “if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote” (<i>Rosenblatt v. Getty Oil Co.</i>, 493 A.2d 929, 944 (Del. 1985) (adopting materiality standard of <i>TSC Indus., Inc. v. Northway, Inc.</i>, 426 U.S. 438, 449 (1976)); <i>Trulia</i>, 129 A.3d at 899) or if there is a substantial likelihood that it “significantly alter[s] the ‘total mix’ of information made available.” (<i>Arnold v. Soc’y for Sav. Bancorp.</i>, 650 A.2d 1270, 1277 (Del. 1999); <i>Trulia</i>, 129 A.3d at 896).

	Texas	Delaware
Caremark Claims	Texas has not adopted the expansion of fiduciary duties in Delaware stemming from <i>Caremark</i> and, based on a body of Texas Supreme Court holdings articulating Texas deference to the business judgment of directors, would likely treat <i>Caremark</i> claims (such as the claims in <i>Marchand v. Barnhill</i> , 212 A. 3d 805 (Del. 2019)) as duty of care cases. See EGAN ON ENTITIES, § 2.6.4(a)(5); but see <i>FDIC v. Harrington</i> , 844 F. Supp. 300, 306 (N.D. Tex. 1994) (Federal District Court in a savings and loan case, while applying Texas law, held there is an absence of good faith when a board “abdicate[s] [its] responsibilities and fails to exercise any judgment.”) and <i>In re Life Partners Holdings, Inc.</i> , 2015 WL 85 23103 (W.D. Tex. 2015) (Federal District Court in a viatical settlement case).	Directors may be found to have violated the fiduciary duty of loyalty when they fail to act in the face of a known duty to act (i.e., they act in bad faith) which was first articulated by <i>In re Caremark International, Inc. Derivative Litigation</i> , 698 A. 2d 959 (Del. Ch. 1996). See <i>Marchand v. Barnhill</i> , 212 A3d 805 (Del. 2019). See EGAN ON ENTITIES, § 2.6.4(a)(5).
Duty of Care	“The duty of care in Texas requires the director to handle his duties with such care as an ordinarily prudent man would use under similar circumstances. In performing this obligation, the director must be diligent and informed and exercise honest and unbiased business judgment in pursuit of corporate interests.” EGAN ON ENTITIES, § 2.6.3(a) (citing <i>Gearhart</i> , 741 F.2d at 719; <i>McCollum v. Dollar</i> , 213 S.W. 259, 260 (Tex. Comm’n App. 1919, holding approved)).	Under Delaware law, the duty of care “requires a director to perform his duties with such care as an ordinarily prudent man would use in similar circumstances.” EGAN ON ENTITIES, § 2.6.4(b)(1).
Business Judgment Rule	The common law business judgment rule applies in all duty of care cases and Texas has a strong deference toward the business judgment of directors: “The business judgment rule in Texas generally protects corporate officers and directors, who owe fiduciary duties to the corporation, from liability for acts that are within the honest exercise of their business judgment and discretion.” <i>Sneed v. Webre</i> , 465 S.W.3d 169, 173 (Tex. 2015). In <i>Sneed</i> , the Texas Supreme Court, citing earlier Texas decisions, stated:	Delaware courts profess deference to business judgment of directors, but courts grade the level of information provided and the business judgment rule is not applicable when Board is conflicted. The Delaware business judgment rule “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” <i>Aronson v. Lewis</i> , 473 A.2d 805, 812 (Del. 1984), overruled on other grounds by <i>Brehm v. Eisner</i> , 746

	Texas	Delaware
	In Texas, the business judgment rule protects corporate officers and directors from being held liable to the corporation for alleged breach of duties based on actions that are negligent, unwise, inexpedient, or imprudent if the actions were “within the exercise of their discretion and judgment in the development or prosecution of the enterprise in which their interests are involved.” <i>Cates v. Sparkman</i>, 11 S.W. 846, 849 (Tex. 1889). “Directors, or those acting as directors, owe a fiduciary duty to the corporation in their directorial actions, and this duty ‘includes the dedication of [their] uncorrupted business judgment for the sole benefit of the corporation.’” <i>Ritchie v. Rupe</i>, 443 S.W.3d 856, 868 (Tex. 2014) (quoting <i>Int’l Bankers Life Ins. Co. v. Holloway</i>, 368 S.W.2d 567, 577 (Tex. 1963)). The business judgment rule also applies to protect the board of directors’ decision to pursue or forgo corporate causes of action. TBOC § 21.419 added in 2025 codifies a statutory version of the business judgment rule which applies (i) for corporations that have a class or series of voting shares listed on a national securities exchange or (ii) include in their governing documents a statement affirmatively electing to be governed by this section (opt in). The TBOC business judgment rule creates a statutory presumption that taking or declining to take any action on any matters of a corporation’s business, a director or officer is presumed to act: (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; and neither the corporation	A.2d 244, 253-54 (Del. 2000); see also <i>Brazen v. Bell Atl. Corp.</i>, 695 A.2d 43, 49 (Del. 1997). However, the business judgment rule under Delaware law is subject to numerous limitations, including that it is not applicable when the Board is conflicted. See EGAN ON ENTITIES, §§ 2.6.4(b) and 2.6.13. Additionally, Delaware law imposes an obligation on directors “to inform themselves of all material information reasonably available to them before making a business decision and, having so informed themselves, to act with the requisite care in making such decision.” EGAN ON ENTITIES, §§ 2.6.4(b)(1) (citing <i>see Cede & Co. v. Technicolor, Inc.</i>, 634 A.2d 345, 367 (Del. 1993); <i>Smith v. Van Gorkom</i>, 488 A.2d 858, 872 (Del. 1985)).

	Texas	Delaware
	nor any of its shareholders has a cause of action against a director or officer of the corporation as a result of any act or omission in the person's capacity as a director or officer <u>unless</u>: (1) the claimant rebuts one or more of these presumptions; and (2) it is proven by the claimant that: (A) the director's or officer's act or omission constituted a breach of one or more of the person's duties as a director or officer; and (B) the breach involved fraud, intentional misconduct, an ultra vires act, or a knowing violation of law.	
Interested Party Transaction Approvals	TBOC § 21.418 provides a statutory safe harbor for certain interested party transactions if any one of the following conditions is satisfied: (1) the material facts as to the applicable relationship or interest and as to the contract or transaction are disclosed to or known by: (A) the corporation's board of directors or a committee of the board of directors, and the board of directors or committee in good faith authorizes the contract or transaction by the approval of the majority of the disinterested directors or committee members, regardless of whether the disinterested directors or committee members constitute a quorum; or (B) the shareholders entitled to vote on the authorization of the contract or transaction, and the contract or transaction is specifically approved in good faith by a vote of the shareholders; or (2) the contract or transaction is fair to the corporation when the contract or transaction is	DGCL § 144(a) provides a statutory safe harbor for certain interested party transactions (other than transactions involving a controlling shareholder) if any of the following conditions are met: (1) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or (2) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders; or (3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or

	Texas	Delaware
	authorized, approved, or ratified by the board of directors, a committee of the board of directors, or the shareholders. TBOC § 21.418(e) expressly provides that if at least one of the above conditions is satisfied, neither the corporation nor any of the corporation's shareholders will have a cause of action against any of the corporation's directors or officers for breach of duty with respect to the making, authorization, or performance of the contract or transaction because the person had an applicable relationship or interest. "Section 21.418(b) thus sets forth three distinct conditions under which a self-dealing transaction is deemed valid and enforceable, and . . . not void or voidable." <i>In re Estate of Poe</i>, 648 S.W.3d 277, 290 (2022) (quoting TBOC § 21.418(b)). Under <i>Poe</i>, the burden of proving that a transaction falls within this safe harbor rests on the interested director. TBOC § 21.416 endorses the use of a special committee to review and approve transactions involving the corporation or any of its subsidiaries and a controlling shareholder, director, or officer. TBOC § 21.4161 provides a four-step process for a corporation to obtain a prospective court ruling that special committee members are sufficiently independent and disinterested to consider a particular transaction: <u>First</u>, the corporation must file a petition designating legal counsel to act on behalf of the corporation; <u>second</u>, the corporation must provide notice to shareholders that they have a right to participate in the proceedings (which can be accomplished through an SEC filing); <u>third</u>, at least 10 days after this notice, the court must hold a preliminary hearing to appoint legal counsel to represent the corporation (counsel for other shareholders may	ratified, by the board of directors, a committee or the stockholders. In <i>Fliegler v. Lawrence</i>, [361 A.2d 218, 222 (Del. 1976),] however, the Delaware Supreme Court held that where the votes of directors, qua stockholders, were necessary to garner stockholder approval of a transaction in which the directors were interested, the taint of director self-interest was not removed, and the transaction or contract may still be set aside and liability imposed on a director if the transaction is not fair to the corporation. EGAN ON ENTITIES, § 2.6.8(c). DGCL § 144 was amended in 2025 to provide certain safe harbors (not subject of equitable relief or give rise to an award of damages) from liability in controlling stockholder transactions if the transaction (other than a going private transaction) is by its terms conditioned at the outset on either (1) approval by an independent board committee consisting of at least two directors, or (2) approval or ratification by a majority of the votes cast by the corporation's disinterested stockholders. For going private transactions with controlling stockholders, both approvals are required for the safe harbor while eliminating requirement to precondition <i>ab initio</i> the approval of the transaction on both approvals. DGCL § 144(e) defines "controlling stockholder" as a person who (a) owns or controls a majority of voting stock entitled to vote in director elections, (b) has the right by contract or otherwise appoint directors with majority voting power, or (c) has equivalent control by holding at least one-third of the corporation's voting stock and managerial authority over the corporation. "Control group" is defined as two or more persons who, through an agreement or arrangement, collectively act as a controlling stockholder.

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	appear at this hearing and object to the corporation's proposed counsel); and <u>fourth</u> , once counsel is appointed, the court must "promptly" hold an evidentiary hearing to determine whether committee members are independent and disinterested with respect to the transactions. The court's determination is dispositive absent additional facts that were not presented to the court.	
Standards of Judicial Review	An interested party transaction is "subject to strict judicial scrutiny but [is] not voidable unless [it is] shown to be unfair to the corporation." <i>Gearhart</i>, 741 F.2d at 720; <i>see also Copeland</i>, 706 F. Supp. at 1291. "A director is a fiduciary. So is a dominant or controlling stockholder or group of stockholders. Their powers are powers in trust. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside." <i>Gearhart</i>, 741 F.2d at 723 (citations omitted) (quoting <i>Pepper v. Litton</i>, 308 U.S. 295, 306-07 (1939)). A "challenged transaction found to be unfair to the corporate enterprise may nonetheless be upheld if ratified by a majority of disinterested directors or the majority of the stockholders." <i>Gearhart</i>, 741 F.2d at 720. A transaction may be deemed to be "fair" if it is "characterized by honesty and justice" and "free from fraud, injustice, prejudice, or favoritism." <i>Twenty First Century Holdings, Inc. v.</i>	With respect to breach of fiduciary duty claims, in different contexts, Delaware will apply the following standards: (1) business judgment rule – for a decision to remain independent or to approve a transaction not involving a sale of control; (2) enhanced scrutiny – for a decision to adopt or employ defensive measures or to approve a transaction involving a sale of control; and (3) entire fairness – for a decision to approve a transaction involving management or a principal shareholder or for any transaction in which a plaintiff successfully rebuts the presumptions of the business judgment rule. See EGAN ON ENTITIES, § 2.6.13(b). Where entire fairness is the standard of review for a transaction involving management or a principal stockholder, the proponent has the burden of proving both (i) fair dealing (when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained) and (ii) fair price (the economic and financial considerations of the proposed transaction, including assets, market value, earnings, future prospects, and

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	<i>Precision Geothermal Drilling, Inc.</i>, No. 03-13-00081-CV, 2015 Tex. App. LEXIS 4046 (Tex. App. – Austin Apr. 23, 2015), vacated, app. dismissed, No. 03-13-00081-CV, 2015 Tex. App. LEXIS 9154 (Tex. App. – Austin Aug. 28, 2015). The TBOC respects actions approved by independent directors or a majority of the shareholders and does not recognize Delaware concepts of entire fairness or enhanced scrutiny. See TBOC §21.418(b).	any other elements that affect the intrinsic or inherent value of a company's stock). Under <i>Kahn v. M&F Worldwide Corp</i> (“MFW”), 88 A.3d 635 (Del. 2014), where the controller's proposed transaction is conditioned at the outset on both special committee approval and a favorable majority-of-the-minority stockholder vote, the business judgment standard of review will be applied <i>if and only if</i>: (i) the controller conditions the procession of the transaction on the approval of both a special committee of independent directors and a majority of the minority stockholders; (ii) the special committee is empowered to freely select its own advisors and to say no definitively; (iii) the special committee meets its duty of care in negotiating a fair price; (iv) the vote of the minority is informed; and (vi) there is no coercion of the minority stockholders.
Limitations on Director Liability	A Certificate of Formation under TBOC § 7.001 may eliminate or limit the liability of a director or officer to the corporation for certain actions other than: (1) a breach of the person's duty of loyalty, if any, to the organization or its owners, shareholders 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	A Certificate of Incorporation under DGCL § 102(b)(7) may eliminate or limit a director's or officer's liability to the corporation for certain actions other than eliminating or limiting the liability of: (1) A director or officer for any breach of the director's or officer's duty of loyalty to the corporation or its stockholders; (2) A director or officer for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (3) A director under DGCL § 174 (for unlawful dividends, stock purchases, or stock redemptions); (4) A director or officer for any transaction from which the director or officer derived an improper personal benefit;

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	(4) an act or omission for which the liability of a governing person is expressly provided by an applicable statute.	(5) An officer in any action by or in the right of the corporation; or (6) acts or omissions occurring before the effective time of the provision eliminating or limiting liability. DGCL § 144(d)(5) exculpates a controlling stockholder or control group for monetary damages for breaches of the duty of care other than for (a) a breach of the duty of loyalty to the corporation or the other stockholders; (b) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or (c) any transaction from which the person derived an improper personal benefit.
Ratification	The TBOC provides for shareholder and Board ratification of voidable or void acts, which will be effective in the absence of fraud in the ratification and will be retroactive to the date of the original action, except for the failure to file a required document with the Secretary of State. TBOC §§ 21.901-21.917. Similar to Delaware, but with Texas’ strong deference to business judgment and other factors of Texas jurisprudence discussed above.	DGCL § 204 provides a codified ratification process for defective corporate actions. However, DGCL ratification is likely to be interpreted through lens of Delaware law with different levels of scrutiny (i.e. entire fairness and enhanced scrutiny).

IV. SELECTED STATUTORY DIFFERENCES:

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Shareholder Books and Records Requests	A shareholder who has held shares for at least 6 months or who holds at least 5% of the outstanding shares may inspect the corporation’s books and records for a proper purpose upon written demand under TBOC § 21.218, but the types of records that a shareholder can obtain in a demand for books and records do not include e-mails, text messages or similar electronic communications unless such information effectuates an action by the corporation.	Any stockholder may inspect the corporation’s books and records for a proper purpose upon written demand. DGCL § 220. DGCL § 220 defines the materials that a stockholder may demand to inspect pursuant to a request for books and records of the corporation; “books and records” are defined to be certain core materials (e.g., board minutes). The Court of Chancery may order the

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	A shareholder books and records demand for a corporation with securities listed on a national exchange, or whose certificate of formation so provides, shall not be for a proper purpose if the corporation reasonably determines that the demand is in connection with either (1) an active or pending derivative proceeding that is or is expected to be instituted or maintained or (2) an active or pending civil lawsuit to which the corporation and the shareholder are or are expected to be adversarial named parties. TBOC § 21.218(b-2).	corporation to produce records beyond this definition only if and to the extent that (i) the stockholder met the requirements for a demand, (ii) the stockholder made a showing of a compelling need for an inspection of such records to further its proper purpose, and (iii) the stockholder demonstrated by clear and convincing evidence that the specific records are necessary and essential to further the purpose. DGCL § 220(b)(4) preserves whatever independent rights of inspection exist under the referenced sources and does not create any rights, either expressly or by implication. DGCL § 220(f) provides that if the corporation does not have specified books and records, including minutes of board and committee meetings, actions of board or any committee, financial statements and director and officer independence questionnaires, the Court of Chancery may order the production of additional corporate records necessary and essential for the stockholder's proper purpose.
Affiliated Business Combinations	Publicly held corporations are prohibited from engaging in any business combination with an affiliated shareholder (a beneficial owner of 20% or more of the outstanding voting shares) (or any affiliate or associate of the affiliated shareholder) for a period of 3 years following the date the shareholder became an affiliated shareholder, unless the business combination is: (1) is approved by the board before the affiliated shareholder's acquisition date; or (2) is approved by the affirmative vote of the holders of at least 2/3 of the outstanding voting shares of the issuing public corporation not beneficially owned by the affiliated	Publicly traded corporations are prohibited from engaging in any business combination with an interested stockholder (an owner of 15% or more of the outstanding voting stock) (or an affiliate or associate of the affiliated stockholder) for a period of 3 years following the date the stockholder became an interested stockholder, unless: (1) prior to such time the board of directors of the corporation approved either the business combination or the transaction which resulted in the stockholder becoming an interested stockholder; (2) upon consummation of the transaction which resulted in the stockholder becoming an

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	shareholder or an affiliate or associate of the affiliated shareholder, at a meeting of shareholders called for that purpose not less than six months after the affiliated shareholder's share acquisition date (the shareholder approval may not be by written consent). TBOC §§21.601 - 21.610.	interested stockholder, the interested stockholder owned at least 85% of the voting stock of the corporation outstanding at the time the transaction commenced, excluding for purposes of determining the voting stock outstanding (but not the outstanding voting stock owned by the interested stockholder) those shares owned (i) by persons who are directors and also officers and (ii) employee stock plans in which employee participants do not have the right to determine confidentially whether shares held subject to the plan will be tendered in a tender or exchange offer; or (3) at or subsequent to such time the business combination is approved by the board of directors and authorized at an annual or special meeting of stockholders, and not by written consent, by the affirmative vote of at least 66 2/3% of the outstanding voting stock which is not owned by the interested stockholder. DGCL § 203.
Appraisal Rights	In general, TBOC §§ 10.354-10.359 provide that a shareholder of a Texas corporation has the right to dissent from any of the following corporate actions: • a merger, • a statutory conversion; • a statutory share exchange; or • the sale of all or substantially all of the corporation's assets other than in the usual and regular course of business; <u>provided</u> that shareholder approval of the action is required and the shareholder holds shares entitled to vote on the action; and <u>provided, further,</u> that a shareholder does not have the right to dissent from a plan of merger or conversion in which	In general and subject to several exceptions, appraisal rights only apply with respect to a: • merger or consolidation in accordance with DGCL §§ 251 (other than § 251(g)), 252, 254, 255, 256, 257, 258, 263, or 264; • conversion in accordance with DGCL § 266; or a • transfer, domestication, or continuance in accordance with DGCL § 141; <u>provided</u> that (A) under DGCL § 2.62(c) Stockholders of a class or series of stock that is listed on a national securities exchange or that are held by more than 2,000 holders do not have appraisal rights with respect to a merger or consolidation unless the holders of such stock are required to accept anything

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	there is a single surviving entity or from a plan of exchange if: • The shares held by the shareholder are part of a class or series, shares of which are on the record date fixed to determine the shareholders entitled to vote on the plan of merger, conversion or exchange (the date the board of directors approves the plan): ○ listed on a national securities exchange; or ○ held of record by not less than 2,000 holders; • The shareholder is not required by the terms of the plan of merger, conversion or exchange to accept for the shareholder's shares any consideration that is different than the consideration (other than cash in lieu of fractional shares that the shareholder would otherwise be entitled to receive) to be provided to any other holder of shares of the same class or series of shares held by the shareholder; or • The shareholder is not required by the terms of the plan of merger, conversion, or exchange to accept for the shareholder's shares any consideration other than ○ shares of a corporation that, immediately after the effective time of the merger, conversion or exchange, will be part of a class or series, shares of which are listed, or authorized for listing upon official notice of issuance, on a national securities exchange, or held of record by not less than 2,000 holders;	other than: (i) shares of stock of the corporation surviving or resulting from such merger or consolidation, or of the converted entity or the entity resulting from a transfer, domestication or continuance; (ii) shares of stock of any other corporation if at the effective date of the merger, consolidation, conversion, transfer, domestication or continuance they will be either listed on a national securities exchange or held of record by more than 2,000 holders; (iii) cash in lieu of fractional shares or fractional depository receipts described in the foregoing; or (iv) any combination of the foregoing; (B) DGCL § 262(c) provides a corporation may provide in its certificate of incorporation that appraisal rights are available as a result of an amendment to its certificate of incorporation, any merger or consolidation in which the corporation is a constituent corporation, the sale of all or substantially all of the assets of the corporation or a conversion effected pursuant to § 266 or a transfer, domestication or continuance effected pursuant to § 390; (C) under DGCL § 261(a), a merger agreement may provide for a breach of its provisions prior to the effective time of the merger including failure to perform or comply with obligations thereunder or consummate the merger. DGCL § 261(a)(2) authorizes the appointment of a stockholder representative with authority to enforce the rights of the stockholders in a merger. DGCL § 268 provides that approval of a merger agreement does not need to include the certificate of incorporation of the surviving corporation or a disclosure schedule or disclosure letter unless expressly stated in the agreement.

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	○ cash in lieu of fractional shares otherwise entitled to be received; or ○ any combination of securities and cash in lieu of fractional shares. TBOC § 10.354(b).	
Vacant Directorships	Under TBOC §§ 21.410(b) and 21.410(c), a vacancy occurring in the board of directors (other than a director position that the certificate of formation entitles the holders of a class or series or group of classes or series to elect) may be filled for the unexpired term of the vacancy by: • election at an annual or special meeting of shareholders called for that purpose; or • the affirmative vote of the majority of the remaining directors, even if the remaining directors constitute less than a quorum of the board of directors; <u>provided</u> that under TBOC §21.410(d) a vacancy to be filled because of an increase in the number of directors may be filled by election at an annual or special meeting of shareholders called for that purpose or by the board of directors for a term of office continuing only until the next election of one or more directors by the shareholders, but during a period between two successive annual meetings of shareholders, the board of directors may not fill more than two vacancies created by an increase in the number of directors; and, <u>provided, further,</u> that under TBOC § 21.410(e), unless otherwise authorized by a corporation's certificate of formation, a vacancy or a newly created vacancy in a director position	Unless otherwise provided in the certificate of incorporation or bylaws: vacancies and newly created directorships resulting from any increase in the authorized number of directors to vote as may be filled by a majority of the directors then in office, although less than a quorum, or by a sole remaining director under DGCL § 223(a)(1); and under DGCL § 223(a)(2) whenever the holders of any class or classes of stock or series thereof are entitled to elect 1 or more directors by vacancies and newly created directorships of such class or classes or series may be filled by a majority of the directors elected by such class or classes or series thereof then in office, or by a sole remaining director so elected.

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	that the certificate of formation entitles the holders of a class or series of shares or group of classes or series of shares to elect may be filled only: • by the affirmative vote of the majority of the directors then in office elected by the class, series, or group; • by the sole remaining director elected in that manner; or • by the affirmative vote of the holders of the outstanding shares of the class, series, or group.	
Number of Directors	The number of directors shall be one or more and set by, or in the manner provided by, the certificate of formation or bylaws of the corporation, except that the number of directors on the initial board of directors must be set by the certificate of formation. The number of directors may be increased or decreased by amendment to, or as provided by, the certificate of formation or bylaws. If the certificate of formation or bylaws do not set the number constituting the board of directors or provide for the manner in which the number of directors must be determined, the number of directors is the same as the number constituting the initial board of directors as set by the certificate of formation. TBOC § 21.403.	The number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by amendment of the certificate. DGCL § 141(b)
Director and Shareholder Action by Written Consent	Unless otherwise provided by the certificate of formation or bylaws, a written consent stating the action taken and signed by all members of the board of directors is an act of the board of directors. TBOC §§ 21.415(b) and 6.201(b). Shareholders may act without a meeting with the written consent of: (1) all shareholders (TBOC § 6.201(b)); or	Unless otherwise restricted by the certificate of incorporation or bylaws, the board of directors may act without a meeting if all of the directors consent in writing. DGCL § 141(f). Unless otherwise provided in the certificate of incorporation, stockholders may act without a meeting, without prior notice and without a vote, with the written consent of the stockholders having not less than the minimum number of votes that would be

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	(2) if authorized by the certificate of formation, the shareholders having at least the minimum number of votes that would be necessary to take the action that is the subject of the consent at a meeting, in which each owner or member entitled to vote on the action is present and votes (TBOC § 6.202(b)).	necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. DGCL § 228(a) and (c).
Shareholder Right to Call Meeting	Shareholders holding at least 10% of the shares entitled to vote may call a special shareholders' meeting; <u>provided</u> that the certificate of formation can state a higher threshold up to 50%. TBOC § 21.352(a)(2).	Stockholders may only call a special meeting of stockholders if they are provided the authority to do so in the certificate of incorporation or bylaws. DGCL § 211(d).
Proxies and Proxy Advisory Services	A shareholder proxy is not valid after 11 months after the date the proxy is executed unless otherwise provided by the proxy. TBOC § 21.368. TBOC Chapter 6A requires proxy advisors to provide disclosures to shareholders of a publicly traded company and the company if the proxy advisor makes a recommendation or provides voting advice based on non-financial factors like ESG, DEI, sustainability or social credit scores; recommends a vote against the Board's position on shareholder proposals without a detailed financial analysis; prioritizes non-financial goals over the financial interests of shareholders; recommends voting against a company-backed director nominee; and if the firm provides conflicting advice. When these conditions apply, the proxy advisory firm must: notify each client receiving the conflicting advice and the company that is the subject of the proposal; disclose the reasoning behind each recommendation that is not solely based on shareholders' financial interests, including "sacrificing investment returns or undertaking additional investment risk to promote one or more nonfinancial factors;" and include a clear, publicly accessible statement on its website disclosing that its services	No stockholder proxy shall be voted or acted upon after 3 years from its date, unless the proxy provides for a longer period. DGCL § 212(b).

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	include advice that is not based solely on the financial interests of shareholders.	
Fundamental Business Transaction Approvals; Shareholder Proposals	In general, shareholders holding at least 2/3 of the outstanding shares must typically approve fundamental business transactions. TBOC § 21.457(a). The certificate of formation can provide for a different threshold of approval, but not less than a majority of the shares entitled to vote. TBOC §§ 21.365(a) and 21.457(a). Fundamental business transactions and TBOC §§ 1.002(32) and 21.451(2) include: • A merger. • An interest exchange. • A conversion. • A sale of all or substantially all of the corporation's assets. Under TBOC § 21.373 to submit a proposal to be voted on at a meeting of shareholders of a nationally listed entity, a shareholder or group must (i) hold \$1 million in market value or 3% of its voting stock; (ii) maintain such ownership for at least six months before and during the shareholder meeting; and (iii) solicit the holders of at least 67% of voting power on the proposal. TBOC § 3.106 authorizes approval of corporate documents (e.g., plan of merger) in final or substantially final form. Disclosure schedules are not part of the document unless expressly included. TBOC § 10.004(a)(3) permits a plan of merger to provide for the irrevocable appointment of representatives to enforce post-transaction rights.	In general, a majority of the stockholders generally must approve fundamental changes, such as: • A merger or consolidation (DGCL § 251(c)). • A sale, lease, or exchange of all or substantially all of the corporation's assets, except collateral securing a mortgage or pledge under specified circumstances described in DGCL § 272(b) and (d) (DGCL § 271(a)). • Dissolution (DGCL § 275(b)). • Conversion of a domestic corporation to other entities (DGCL § 266(b)). DGCL § 122(18) expressly authorizes a corporation to enter in contractual arrangements with one or more current or prospective stockholders or beneficial owners that may, among other things: (a) restrict or prohibit future specified corporate actions; (b) require special approval of specified corporate actions; and (c) covenant specified future actions of the corporation or certain persons or bodies (i.e., the board of directors, current or future directors, stockholders, etc.) will take or refrain from taking actions specified therein. This rule does not apply to any contractual provision that conflicts with the corporation's certificate of incorporation, the DGCL or the laws of Delaware other than DGCL § 115. A corporation may limit or restrict the default application of DGCL § 122(18) by expressly stating in its certificate of incorporation that the corporation lacks authority to enter into the contractual arrangements authorized by DGCL § 122(18). DGCL § 147 provides that whenever board of directors' approval of an agreement, instrument or document is

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		expressly required by the DGCL, such agreement, instrument or document may be approved in its final or substantially final form and allows a board of directors to ratify a previously approved agreement, instrument or document prior to any filing with the Delaware Secretary of State that may be required by the DGCL.
Amendment to Charter	In general, shareholders holding at least 2/3 of the outstanding shares must approve an amendment to the certificate of formation. TBOC § 21.364. The certificate of formation can provide a different threshold of shareholder approval, but not less than a majority of the shares entitled to vote. TBOC § 21.365(a).	In general, unless a higher threshold is provided for in the certificate of incorporation, shareholders holding a majority of the outstanding shares must approve an amendment to the certificate of incorporation. DGCL § 242.
Amendments to Bylaws	The board of directors may amend or repeal the bylaws or adopt new bylaws unless: (1) the certificate of formation or the TBOC wholly or partly reserves the power exclusively to the shareholders; or (2) in amending, repealing, or adopting a bylaw, the shareholders expressly provide that the board of directors may not amend, repeal, or readopt that bylaw. TBOC § 21.057. Unless the certificate of formation or a bylaw adopted by the shareholders provides otherwise as to all or a part of the bylaws, the shareholders may amend, repeal, or adopt the bylaws regardless of whether the bylaws may also be amended, repealed, or adopted by the board of directors. TBOC § 21.058.	The power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote. Notwithstanding the foregoing, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors; however, any such conferral of power does not divest or limit the stockholders of the power to adopt, amend or repeal bylaws. DGCL § 109(a).
Distributions and Dividends	“Distribution” means a transfer of property, including cash, or issuance of debt, by a corporation to its shareholders in the form of: (i) a dividend on any class or series of its outstanding shares; (ii) a purchase or redemption, directly or indirectly, of any of its own shares; or	Subject to any restrictions in its certificate of incorporation, a corporation may declare and pay dividends either: • Out of its surplus, as defined in and computed in accordance with DGCL §§ 154 and 244; or

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	(iii) a payment by the corporation in liquidation of all or a portion of its assets. TBOC § 21.002(6). A corporation may not make a distribution that violates the corporation's certificate of formation. TBOC § 21.303(a). Unless the distribution is made in connection with the winding up and termination of the corporation, a corporation may not make a distribution: • if the corporation would be insolvent after the distribution; or • that exceeds, depending upon the type of distribution, the net assets or surplus of the corporation. TBOC §§ 21.303(b); 21.301.	• In case there shall be no such surplus, out of its net profits for the fiscal year in which the dividend is declared and/or the preceding fiscal year. DGCL § 170(a).
Stock Redemption and Repurchase	As noted above, the redemption or repurchase of its own shares by a Texas corporation is a “distribution” under Texas law and as such must comply with the distribution requirements and restrictions under Texas law. TBOC §21.301.	A corporation may repurchase or redeem its own shares; <u>provided</u>, <u>however</u>, that a corporation shall not: • purchase or redeem its own shares for cash or other property when the capital of the corporation is impaired or when such purchase or redemption would cause any impairment of the capital of the corporation, except that a corporation may purchase or redeem any of its own shares which are entitled upon any distribution of its assets to a preference over another class or series of its stock, or, if no shares entitled to such a preference are outstanding, any of its own shares, if such shares will be retired upon their acquisition and the capital of the corporation reduced in accordance with DGCL §§ 243 and 244; • purchase, for more than the price at which they may then be redeemed, any of its shares

	Texas	Delaware
		which are redeemable at the option of the corporation; or • redeem any of its shares, unless their redemption is authorized by DGCL § 151(b) and then only in accordance with such section and the certificate of incorporation. DGCL § 160(a).
Mandatory Indemnification	Unless otherwise provided in the governing documents of the corporation, a corporation shall indemnify a director, officer, former director, or former officer against reasonable expenses actually incurred by the person in connection with a proceeding in which the person is a respondent because the person is or was a director if the person is <i>wholly</i> successful, on the merits or otherwise, in the defense of the proceeding. TBOC §§ 8.003; 8.051(a); 8.105. A director or officer must be wholly successful in their claim as Texas does not provide for mandatory partial indemnification. TBOC §§ 8.003; 8.051(a). Texas law also allows for permissive indemnification of directors, which is what corporations typically do and is contractual in nature. TBOC § 8.101. A corporation may indemnify and advance expenses to a person who is not a director, including an officer, employee, or agent, as provided by: • the corporations certificate of formation or bylaws; • general or specific action of the board of directors; • resolutions of the shareholders; • contract; or • common law. TBOC § 8.105(a). TBOC § 21.561(c) limits the ability of shareholders to recover attorneys' fees under the corporate-benefits doctrine: a	To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of DGCL § 145, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith. DGCL § 145(c)(1). Delaware allows for mandatory partial indemnification and does not require an applicable party to be wholly successful. A corporation may also indemnify any other person who is not a present or former director or officer of the corporation against expenses (including attorneys' fees) actually and reasonably incurred by such person to the extent he or she has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of DGCL § 145, or in defense of any claim, issue or matter therein. DGCL § 145(c)(2). DGCL § 102(f) and § 109(b) further limit a corporation's ability to adopt charter or bylaw provisions that impose attorneys' fees on stockholders in unsuccessful stockholder or derivative suits. The statutory prohibitions on fee shifting are now extended to any "claim that a stockholder, acting in its capacity as a stockholder or in the right of the corporation, has brought."

	Texas	Delaware
	substantial benefit to the corporation does not include additional or amended disclosures made to the shareholders, regardless of materiality, thereby eliminating the ability of shareholders to recover attorneys' fees for disclosure-only settlements.	
Pre-Suit Demand in Derivative Suits	A shareholder may not institute a derivative proceeding until the 91st day after the date a written demand is filed with the corporation stating with particularity the act, omission, or other matter that is the subject of the claim or challenge and requesting that the corporation take suitable action. The foregoing waiting period is not required or, if applicable, shall terminate if: (1) the shareholder has been notified that the demand has been rejected by the corporation; (2) the corporation is suffering irreparable injury; or (3) irreparable injury to the corporation would result by waiting for the expiration of the 90-day period. TBOC § 21.553. “Though much of the analysis done by the courts to evaluate potential ‘irreparable harm’ may be similar to the analysis required for demand futility claims in Delaware, the fact that the [TBOC] focus on the harm to the corporation, rather than the apparent futility of demand, presents a slightly different set of issues than are normally addressed in cases involving Delaware corporations.” EGAN ON ENTITIES, § 2.6.7(c)(1). TBOC § 21.552(a)(3) allows publicly traded corporations (and opt-ins with at least 500 shareholders) to include a provision in their governing documents imposing an ownership threshold for shareholders to institute derivative proceedings; <u>provided that</u> the threshold cannot exceed 3% of outstanding shares. To opt-in, corporation must make an	“‘In order for a stockholder to divest the directors of their authority to control the litigation asset and bring a derivative action on behalf of the corporation, the stockholder must’ (1) make a demand on the company’s board of directors or (2) show that demand would be futile.” <i>United Food and Commercial Workers Union and Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg</i>, 262 A.3d 1034, 1047 (Del. 2021) (quoting <i>Lenois v. Lawal</i>, No. CV 11963-VCMR, 2017 WL 5289611, at *9 (Del. Ch. Nov. 7, 2017)). Delaware employs a 3-question test regarding demand futility in derivative cases. If the answer to any of the following questions is “yes” for at least half of the members of the demand board, then demand is excused as futile: (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand; (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be 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.

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	affirmative election according to 21.419 (including a statement in its governing documents). TBOC § 21.554(c) allows a corporation to preemptively obtain a determination on the independence and disinterestedness of directors tasked with evaluating a shareholder demand. A corporation invokes this process by filing a petition, which triggers a 45-day deadline for the court to hold an evidentiary hearing and a 75-day deadline for the court to make a determination. The court's finding is dispositive in the absence of facts that were not presented to the court.	<i>United Food and Commercial Workers Union and Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg</i>, 262 A.3d 1034, 1047 (Del. 2021) (quoting <i>Lenois v. Lawal</i>, No. CV 11963-VCMR, 2017 WL 5289611, at *9 (Del. Ch. Nov. 7, 2017)).
Basic Income and Franchise Tax Calculation For a Corporation Domiciled in State	<u>Corporate Income Tax</u>: None. <u>Franchise Tax</u>: The basic calculation of the Texas franchise tax is (a) the sum of (1) a taxable entity's (or unitary group's) gross receipts reportable for federal income tax purposes; <i>minus</i> (2) the greatest of: (i) 30% of gross revenue; or (ii) \$1 million; or (iii) certain W-2 compensation; or (iv) cost of goods sold as defined in the Texas Tax Code; <i>multiplied by</i> (b) the result of the apportionment formula described below; <i>multiplied by</i> (c) .0075. In general, a corporation's exposure to Texas franchise tax is apportioned to Texas using the following formula: Texas gross receipts / Aggregate Gross Receipts.	<u>Corporate Income Tax</u>: 8.7% of federal taxable income allocated and apportioned to Delaware. <u>Franchise Tax</u>: Annual Franchise Tax assessment calculated using either the Authorized Shares method or the Assumed Par Value Capital Method. <i>Authorized Shares Method</i>: minimum tax of \$175.00 and maximum tax of \$200,000.00 or, for Large Corporate Filers, \$250,000.00. Generally calculated for a corporation with authorized shares in excess of 10,000 as an amount equal to result of the following formula: $\$250 + ((\text{number of authorized shares} - 10,000) / 10,000) \times 85$ DGCL § 312(g) adds, "If the filing of a certificate of validation under § 204 of this title relates to a time during which the corporation's certificate of incorporation had been forfeited or void, the annual reports and annual franchise taxes that would have been required to be filed and paid during the period in which the corporation's certificate of incorporation had been forfeited or void (including interest thereon) are required to be filed and paid at the time of the

	Texas	Delaware
		filing of such certificate of validation. (relating to the calculation of annual franchise taxes following the revival of a Delaware corporation’s charter after it has become void). <i>Assumed Par Value Capital Method:</i> minimum tax of \$400.00 and maximum tax of \$200,000.00 or, for Large Corporate Filers, \$250,000.00. Generally calculated by: (1) dividing the corporation’s total assets by the total issued shares (the result, carried to 6 decimal places, “assumed par”); (2) multiplying the assumed par by the number of authorized shares having a par value less than the assumed par; (3) multiplying the number of authorized shares with a par value greater than the assumed par by their respective par value; (4) adding the results of the foregoing (2) and (3) (the sum of which being the “assumed par value capital”); and (5) dividing the assumed par value capital, rounded to the next million, by 1,000,000; and (6) multiplying the result of the foregoing (5) by \$400.00.

V. TEXAS BUSINESS COURT OVERVIEW:

Overview:

- Texas has a new system of specialty trial courts (“**Business Court**”) that began in 2024 to hear significant business related disputes and a special intermediate court of appeals to hear appeals from Business Court.
- The Business Court divisions are initially in the major metropolitan areas around Austin, Dallas, Fort Worth, Houston and San Antonio, with the expectation that the Texas Legislature will ultimately create Business Court divisions for the rest of Texas.
- The Fifteenth Court of Appeals (“**15th Court of Appeals**”) was created to hear appeals from the Business Court.
- A party in an action pending in the Business Court has the right to a trial by jury “when required by the constitution” of Texas.

Jurisdiction:

- The Business Court will have civil jurisdiction concurrent with district courts in two different sets of specified actions in which the amount in controversy exceeds \$5,000,000 (in each case excluding interest, statutory damages, exemplary damages, penalties, attorneys' fees and court costs):
 - The first specified set of \$5,000,000 actions includes:
 - a derivative proceeding;
 - an action regarding the governance, governing documents or internal affairs of an organization;
 - an action in which a claim under a state or federal securities or trade regulation law is asserted against:
 - an organization;
 - a controlling person or managerial official of an organization for an act or omission by the organization or by the person in the person's capacity as such;
 - an underwriter of securities issued by the organization;
 - the auditor of an organization,
 - an action by an organization, or an owner of an organization, if the action is brought against an owner, controlling person or managerial official of the organization and alleges an act or omission by that person in the person's capacity as such;
 - an action alleging that an owner, controlling person or managerial official breached a duty owed to an organization or an owner of an organization, including breach of a duty of loyalty or good faith;
 - an action seeking to hold an owner or governing person of an organization liable for an obligation of the organization, other than on account of a written contract signed by that person in a capacity other than as an owner or governing person; and
 - an action arising out of the TBOC.

NOTE: the \$5,000,000 minimum for the amount in controversy does not apply if a party to the action an entity whose voting equity securities are listed on a national securities exchange registered with the United States Securities and Exchange Commission under Section 6 of the Securities Exchange Act of 1934 and any entity that is majority owned or controlled by such an entity.

- The second specified set of \$5,000,000 actions includes:
 - an action arising out of a "qualified transaction" which is defined to mean a transaction under which a party: (A) pays or receives, or is obligated to pay or is entitled to receive, consideration with an aggregate value of at least \$5 million; or (B) lends, advances, borrows, receives, is obligated to lend or advance, or is entitled to borrow or receive money or credit with an aggregate value of at least \$5 million, but excludes a transaction involving a loan or an advance of money or credit by a bank, credit union, or savings and loan institution;
 - an action that arises out of a contract or commercial transaction in which the parties to the contract or transaction agreed in the contract or a subsequent agreement that the Business Court has jurisdiction of the action, except an action that arises out of an insurance contract; and
 - an action that arises out of a violation of the Texas Finance Code or Texas Business & Commerce Code ("**TBCC**") by an organization or an officer or governing person acting on behalf of an organization, other than a bank, credit union or savings and loan association.

- The Business Court has supplemental jurisdiction over any other claim related to a case or controversy within the court's jurisdiction that forms part of the same case or controversy, provided such supplemental claims may proceed in the Business Court only on the agreement of all parties to the claim and a judge of the Business Court Division in which the action is pending. If the parties involved do not agree on the claim proceeding in the Business Court, the claim may proceed in a court of original jurisdiction concurrently with any related claims proceeding in the Business Court.
- The Business Court does not have jurisdiction over any of the following claims:
 - a health care liability claim;
 - a claim in which a party seeks recovery of monetary damages for bodily injury or death;
 - a claim of legal malpractice;
 - a claim relating to a consumer transaction; and
 - unless it falls within the Business Court's supplemental jurisdiction, any claim (i) involving a governmental entity, (ii) to foreclose on liens on real or personal property, (iii) involving a covenant not to compete, (iv) involving deceptive trade practices, (v) under the Texas Business and Commerce Code, the Estates Code or the Family Code, (vi) farm products, and (vii) an insurance policy.

Judges:

- The Business Court is staffed with judges appointed by the Governor, with the advice and consent of the Texas State Senate, who possess over 10 years of specialized knowledge and expertise in handling complex or business transactions or disputes.
- Business Court judges are appointed for a two year initial term (beginning on Sept. 1 of every even-numbered year) and may be reappointed by the Governor.
- The Governor is required to appoint two judges to each of the five initial Business Court Divisions.

Constitutionality of the Business Court:

- The Legislature's authority to create new courts and provide for the selection of their judges was upheld by the Texas Supreme Court in *Jordan v. Crudgington*, 149 Tex. 237 231 S.W. 2d 641 (Tex. 1950), but may be challenged again because Business Court judges are to be appointed rather than elected.
- If the appointment of judges by the Governor to the Business Court is held by the Texas Supreme Court to be unconstitutional, the Business Court will instead be staffed by retired or former judges or justices who are appointed by the Chief Justice of the Texas Supreme Court and not the Governor.