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2016 YEAR IN REVIEW: CORPORATE GOVERNANCE LITIGATION AND REGULATION

2016 saw many notable developments in corporate governance litigation and related regulatory developments. In this article, we discuss significant judicial and regulatory developments in the following areas:

- **Mergers and Acquisitions ("M&A")**: 2016 was a particularly significant year in M&A litigation. In Delaware, courts issued important decisions that impose enhanced scrutiny on disclosure-only M&A settlements; confirm the application of the business judgment rule to mergers approved by a fully informed, disinterested, non-coerced shareholder vote; inform the proper composition of special litigation committees; define financial advisors' liability for breaches of fiduciary duty by their clients; and offer additional guidance for calculating fair value in appraisal proceedings.
- **Controlling Shareholders**: Delaware courts issued important decisions clarifying when a person with less than majority stock ownership qualifies as a controller, when a shareholder may bring a quasi-appraisal action in a controlling shareholder going-private merger, and when the business judgment rule applies to controlling shareholder transactions. In New York, the Court of Appeals followed Delaware's guidance as to when the business judgment rule applies to a controlling shareholder squeeze-out merger.
- **Indemnification and Jurisdiction**: Delaware courts issued decisions clarifying which employees qualify as officers for the purpose of indemnification and articulating an updated standard for exercising jurisdiction in Delaware over actions based on conduct undertaken by foreign corporations outside of the state.
- **Shareholder Activism and Proxy Access**: Shareholder activists remained busy in 2016, including mounting successful campaigns to replace CEOs and board members at Chipotle and Hertz. Additionally, the SEC's new interpretation of Rule 14a-8 has limited the ability of management to exclude a shareholder proposal from a proxy statement on the grounds that it conflicts with a management proposal. Also, some companies have adopted "proxy rights" bylaws, which codify a shareholder's right to directly nominate board members.

I. M&A

A. Enhanced Scrutiny of Disclosure-Only Settlements

In January 2016, the Delaware Court of Chancery issued an important decision, *In re Trulia, Inc. Stockholder Litigation*,[1] making clear the court's renewed scrutiny of—and skepticism towards—so-called disclosure-only settlements of shareholder class actions. In *Trulia*, shareholders sought to block the merger of real estate websites Zillow and Trulia. After litigation was commenced, the parties agreed to a settlement in which Trulia would make additional disclosures in proxy materials seeking shareholder approval of the transaction in exchange for a broad release of present and future claims by the class and fees for plaintiffs' counsel.

Chancellor Bouchard rejected the proposed settlement and criticized disclosure-only settlements as generally unfair to shareholders. Chancellor Bouchard noted that the Court of Chancery had previously expressed concerns regarding the incentives of plaintiff counsel to settle class action claims in which broad releases were granted in exchange "for a peppercorn and a fee"—*i.e.*, for fees and immaterial disclosures that provided little benefit to shareholders.[2] According to the Court, "these settlements rarely yield genuine benefits for stockholders and threaten the loss of potentially valuable claims that have not been investigated with vigor."[3]

In connection with its assessment of the reasonableness of the "give" and the "get" of such settlements, the Court announced a new materiality standard, holding that supplemental disclosures must address a "plainly material" misrepresentation or omission.[4] Chancellor Bouchard explained that "plainly material" meant "that it should not be a close call" that the supplemental disclosures would be viewed as significantly altering the total mix of information made available to shareholders.[5] The Court cautioned that where supplemental disclosures do not contain "plainly material" information, the Court may appoint an *amicus curiae* to evaluate the alleged benefits of the disclosures, with the associated costs potentially "taxed to the parties."[6] Moreover, the Court held that even if the supplemental disclosures are "plainly material," the settlement will only be approved if the proposed releases are "narrowly circumscribed" to "encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently."[7] Chancellor Bouchard also expressed a preference that disclosure claims be resolved through stipulated dismissals based on mootness (not wide-ranging releases), which would preserve claims for the shareholder class.[8]

Trulia shaped subsequent discussion about disclosure-only settlements in 2016, both in Delaware and elsewhere. In the wake of *Trulia*, Delaware courts have routinely declined to approve class-wide releases in disclosure-only settlements and have instead approved narrower applications for attorney's fees based on mootness.[9] The case has also informed the evaluation of disclosure-only settlements in other jurisdictions. Most notably, Judge Posner embraced the *Trulia* standard in the Seventh Circuit.[10] Overturning the approval of a disclosure-only settlement agreement based on

Walgreen Co.'s acquisition of Swiss pharmaceutical company Alliance Boots Gmb, Judge Posner warned that (as in *Trulia*) "the misrepresentation or omission that the supplemental disclosures correct must be 'plainly material'" to be considered sufficient consideration for the shareholder class.[11] To discourage forum shopping, we expect federal and state courts around the country to follow Delaware's and the Seventh Circuit's lead. North Carolina, for example, has acknowledged the *Trulia* framework in evaluating disclosure-only settlements.[12]

Trulia and its progeny have perhaps been responsible, at least in part, for the sharp drop in M&A filings in 2016. In the first six months of 2016, 64% of M&A deals valued over $100 million were litigated, compared with 84% in 2015.[13] Also, the average number of lawsuits per deal declined to 2.9 in the first two quarters of 2016, from 4.1 in 2015.[14] Those shareholders who did file suit often opted against filing in Delaware. In the first half of 2016, the percent of suits filed in Delaware where the acquired company was incorporated in Delaware fell to 36% from 74% in 2015.[15]

B. Business Judgment Rule Applies to Merger After a Fully Informed, Uncoerced, Disinterested Shareholder Vote

In its 2015 decision *Corwin v. KKR Financial Holdings LLC*, the Delaware Supreme Court held that, where the entire fairness standard does not apply because there is no controlling shareholder, a fully informed, disinterested and uncoerced shareholder vote to approve a transaction will make the business judgment rule the "presumptively correct" standard for review.[16] In *Corwin*, KKR & Co. L.P. acquired KKR Financial Holdings LLC in a stock-for-stock merger. The LLC's shareholders filed suit alleging breach of fiduciary duty by its directors. The merger had been approved by both the independent board and an uncoerced, informed vote of the shareholders. On that basis, the Court held that the proper standard of review was the business judgment rule, not *Revlon*, and affirmed the lower court's dismissal of the suit.[17] Chief Justice Strine emphasized that "the long-standing policy of our law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested shareholders have had the free and informed chance to decide on the economic merits of a transaction for themselves."[18]

In 2016, Delaware courts applied the new standard set forth in *Corwin* to dismiss several shareholder suits. First, in *Singh v. Attenborough*,[19] the Delaware Supreme Court reiterated that, where there is an informed, uncoerced vote of the disinterested shareholders, the business judgment rule applies and is irrebuttable absent allegations of waste. *Singh* affirmed the Court of Chancery's dismissal of claims against Merrill Lynch, an advisor to Zale Corporation in its merger with Signet Jewelers Limited. Significantly, the Court explained that, when there is a fully informed, non-coerced vote, "dismissal is typically the result."[20] That is because the only remaining claims are for waste, a concept that has "little real-world relevance" since "stockholders would be unlikely to approve a transaction that is wasteful."[21]

The Court of Chancery also has applied *Corwin* in dismissing merger challenges. In *Miami v. Comstock*,[22] shareholders brought a post-closing challenge to the merger of C&J Energy Services, Inc. and a subsidiary of Nabors Industries Ltd. The Court found that the transaction had been approved by 97.6% of the voting shares in a fully informed, disinterested and non-coerced vote and granted defendant's motion to dismiss.[23] The Court of Chancery also extended *Corwin* to tender offers pursuant to a Section 251(h) merger. In *In re Volcano Corp. Stockholder Litigation*,[24] shareholders challenged a two-step merger where the majority of shares in Volcano Corp. were tendered in response to an offer by Philips Holding USA Inc. In dismissing the suit, the Court held that acceptance of a tender offer by a majority of the fully informed, disinterested and non-coerced shareholders had the same cleansing effect as a similar shareholder vote because "the first-step tender offer essentially replicates a statutorily required stockholder vote in favor of a merger in that both require approval."[25] The Court of Chancery reached the same result in *Larkin v. Shah*,[26] dismissing a shareholder challenge to the acquisition of Auspex Pharmaceuticals, Inc. by Teva, Inc. because 70% of the fully informed, disinterested and non-coerced shares had accepted Teva's tender offer.[27] In *In re Solera Holdings, Inc. Stockholder Litigation*,[28] Chancellor Bouchard dismissed a shareholder suit based on the 2015 merger of Solera Holdings, Inc., which sells risk asset management software, with a subsidiary of Vista Equity Partners. The transaction had been approved by the majority of disinterested Solera shareholders in a fully informed, non-coerced vote. Citing *Corwin*, Chancellor Bouchard concluded that plaintiff's six alleged disclosure defects were not adequate to sustain a claim of waste, and thus dismissed the complaint.[29] These decisions confirm that the fully informed, disinterested and non-coerced shareholder vote defense set forth in *Corwin* should remain a powerful defense to M&A litigation for the foreseeable future.

C. Delaware Supreme Court Clarifies Financial Advisor Duties in Sales Process

In *RBC Capital Markets, LLC v. Jervis*,[30] the Delaware Supreme Court firmly established that to financial advisors need to disclose potential conflicts of interest when accepting an advisory role during the sale of a corporation. The Court affirmed the Court of Chancery's finding that that financial advisor aided and abetted breaches of fiduciary duty by former directors of Rural/Metro Corporation in connection with the sale of Rural/Metro to Warburg Pincus LLC, a private equity firm.[31] The Court explained that the financial advisor knew it had a conflict of interest which it intentionally failed to disclose to Rural, and that it knew that Rural took actions during the sale process without adequate and full information.[32] The Court insisted, however, that its decision was "narrow"[33] and that the financial advisor had been found liable because it knew the board was breaching their duty of care and participated in the breach by "misleading the board or creating [an] informational vacuum."[34]

The Court of Chancery recognized the limits of *RBC Capital* in *In re Volcano Corporation Stockholder Litigation*. Goldman Sachs had advised the board of directors of Volcano Corporation during its merger with Phillips Holding USA, Inc. Shortly after the merger closed, Volcano shareholders filed suit alleging that the board breached its fiduciary duties by acting in an uninformed manner when approving the merger and that Goldman Sachs, allegedly "highly conflicted" because it supposedly profited from certain financial transactions at Volcano's expense upon consummation of the merger, aided and abetted those breaches by providing "flawed advice" to the board.[35] Plaintiffs further alleged that "Goldman hid its conflicts from the Board and Volcano's stockholders."[36] The Court granted Goldman Sachs's motion to dismiss, holding that, contrary to Plaintiffs' assertions, it did disclose its "conflicts" to the board—including its financial interest in the transaction—which was sufficient to render shareholders fully informed when they approved the merger.[37] In that regard, Goldman Sachs had made a presentation to Volcano's merger committee regarding its financial interest in the transaction.[38] In light of these decisions, financial advisors should act with caution when taking on advisory assignments for clients with whom they have potential conflicts of interest and should fully disclose any potential conflicts to their clients before moving forward with an advisory assignment.

D. Court of Chancery Provides Guidance on Appraisal Calculations

In 2016, the Court of Chancery issued several decisions clarifying the weight ascribed to deal price in calculating fair value in an appraisal action under DGCL § 262(h).

In *In re Appraisal of Dell Inc.*,[39] Vice Chancellor Laster concluded that the fair value of Dell Inc. was 28% higher than the deal price. The Court so held even though the offer from Michael Dell and Silver Lake Partners was approved by a majority of the unaffiliated shares after a lengthy, public and well-run arm's-length sale process. The Court observed that the transaction was a management buyout ("MBO"), which rendered the deal price resulting from the public auction less relevant, given that "[t]he limitations on efficient pricing in the market for corporate control 'are especially pronounced in the context of MBOs.'"[40] According to Vice Chancellor Laster, the deal price also undervalued Dell because there was a significant "valuation gap" between the long-term value of Dell and the market's short-term focus, and the agreed-upon price was the product of competition among like-minded financial bidders who were price-constrained by targeted internal rates of return in LBO pricing models.[41]

In *In re Appraisal of DFC Global Corp.*,[42] Chancellor Bouchard determined that the price Lone Star Fund VIII, LP paid to acquire DFC Global Partners should not be given full weight in assessing fair value. The Court held that the transaction was negotiated during a period of regulatory uncertainty that depressed the trading price of the company's shares. Giving equal weight to the deal price, the plaintiff's discounted cash flow model (with some inputs changed), and the respondents' expert analysis, Chancellor Bouchard determined a fair value of $10.21, a 7.5% premium over the acquisition price.[43] The Chancellor's decision is currently on appeal before the Delaware Supreme Court.[44]

In *Dunmire v. Farmers and Merchants Bancorp of Western Pennsylvania Inc.*,[45] Chancellor Bouchard again declined to rely exclusively on the deal price. F & M's stock-for-stock transaction to acquire community bank NexTier, Inc. was suspect, according to the Court, because of significant procedural shortcomings in the sales process. For example, there was no public participation in the sale, either in the form of an auction or the existence of outside bidders. Most troubling to the Court, there were controlling shareholders on both sides of the transaction who set the stock exchange ratio. Chancellor Bouchard relied on a discounted net income analysis (which derived value based on a single year of net earnings to project an earnings stream using a constant long-term growth rate) to set a fair value of $91.90, a nearly 11% premium over the deal price of $83.[46]

These decisions reflected a trend of calculating fair value at premiums over the deal price in transactions with flawed sales processes. In December 2016, however, Vice Chancellor Laster decided *Merion Capital LP et al. v. Lender Processing Services Inc.*,[47] which accorded full weight to the deal price arrived at through a properly run, public sale. In that case, Fidelity Capital acquired Lender Processing Services, Inc. (LPS) in exchange for cash and stock, and the transaction had been approved by the LPS board and an overwhelming majority of the voting shares. Vice Chancellor Laster emphasized that if a "merger giving rise to appraisal rights resulted from an arm's-length process between two independent parties, and if no structural impediments existed that might materially distort the crucible of objective market reality, then a reviewing court should give substantial evidentiary weight to the merger price as an indicator of fair value."[48]

E. Limited Liability Company Improperly Appointed Non-Director/ Non-Manager as Special Committee

In *Obeid v. Hogan*, the Court of Chancery rejected an attempt to appoint a single non-director and non-manager to serve as the special litigation committee evaluating derivative suits against directors in two related entities, Gemini Equity Partners LLC ("Equity LLC") and Gemini Real Estate Advisors LLC ("Real Estate LLC"), which manage hotels and commercial properties.[49] Equity LLC was governed by an LLC agreement that established a governance structure parallel to that of a corporation, with power vested in a board of directors. Real Estate LLC was governed by an LLC agreement that vested power in its managers, Messrs. Obeid, La Mack, and Massaro. After a dispute among the managers resulted in several lawsuits, the companies hired a law firm that suggested that a retired federal judge "should be hired to function as a special litigation committee for each entity to investigate, analyze and make a recommendation whether to pursue the derivative claims on behalf of [the entities]," including the claims asserted against La Mack and Massaro. La Mack and Massaro entered into an agreement with a retired judge, Judge Hogan, that appointed him a member of both entities and sole member of each entity's special litigation committee. Judge Hogan was neither a manager nor a director of either entity. Obeid filed suit in the Court of Chancery challenging the appointment.

The Court of Chancery granted Obeid's motion for summary judgment, holding that Judge Hogan could not be a special litigation committee member of either entity.[50] The Court reasoned that, although Equity LLC had the word "Partners" in its name, it had adopted a governance structure parallel to that of a corporation, and thus evidenced the members' desire to be governed by corporate law.[51] According to the Court, Judge Hogan could not serve as the sole member of a special litigation committee for that entity because, under Delaware Supreme Court precedent, only directors of Delaware corporations have managerial discretion to initiate litigation.[52] The Court also held that, under Real Estate LLC's LLC agreement, managers could only delegate core governance functions to other managers. Accordingly, Judge Hogan could not be the sole member of a special litigation committee for that entity because he was not a manager of the company. In so holding, the Court noted that LLCs are "creatures of contract"[53] and that "[v]irtually any management structure may be implemented through the [LLC's] governing instrument."[54]

II. Controlling Shareholders

A. 26% Stock Ownership May Be Sufficient for Controlling Shareholder Status

The Delaware Court of Chancery denied a motion to dismiss in *Calesa Associates, L.P. v. American Capital, Ltd.*,[55] holding that American Capital, a shareholder owning 26% of the outstanding common stock of Halt Medical, Inc., qualified as a controlling shareholder, and therefore owed fiduciary duties to shareholders. The Court again emphasized that stock ownership is not the only criterion for determining control. Under *Kahn v. Lynch Communication Sys. Inc.*, "a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation."[56] In addition to its stock ownership, American Capital had the right to select two members of the five-member board of directors and held significant debt in the form of direct loans to the company such that, according to the Court, it exercised sufficient influence over the board to constitute "actual control."[57] Therefore, plaintiff's breach of fiduciary duty claims against American Capital arising out of an issuance of equity that diluted the plaintiffs' interest in Halt survived dismissal.

B. Audit Committee Approval Not Sufficient in Controlling Shareholder Transaction

In *In re EZCORP Inc. Consulting Agreement Derivative Litigation*,[58] the Court of Chancery (Laster, V.C.) applied the entire fairness standard in evaluating a motion to dismiss a derivative suit challenging a series of transactions made pursuant to service agreements between EZCORP and Madison Park, LLC. EZCORP's controlling shareholder, Phillip Ean Cohen, also controlled Madison Park, LLC, and strongly opposed attempts to terminate the lucrative service agreements between the two companies. Even though the transactions at issue had been approved by the EZCORP board's audit committee, the Court determined that the involvement of a controlling shareholder on both sides of the transaction was akin to a squeeze-out merger, and accordingly applied the *MFW* standard: "When a transaction involving self-dealing by a controlling shareholder is challenged, unless the corporation deploys both an independent committee and a majority-of-the-minority vote, then the most that the use of the committee can achieve is a shift in the burden of proof."[59] The defendants' motion to dismiss the derivative challenge to the fairness of the service agreements was therefore denied.[60]

C. Quasi-Appraisal Denied in Challenge to Controlling Shareholder Going-Private Merger

The Delaware Court of Chancery rejected a minority shareholder's request for a quasi-appraisal remedy in *In re United Capital Corp. Stockholders Litigation*,[61] involving a going private transaction by United Capital Corp.'s Chairman, CEO, and 94% controlling shareholder. A special committee negotiated and agreed to a final deal price of $32 per share, $7 per share below the trading price on the day the merger was announced. Minority shareholders filed suit, alleging inadequate disclosures and seeking a quasi-appraisal remedy.

Generally, a minority shareholder is only entitled to a remedy of appraisal in a short-form merger (*i.e.*, a merger conducted by a controlling shareholder with over 90% of the company's shares), which does not require shareholder approval under DGCL § 253.[62] Delaware courts, however, have developed an exception to this rule: when "the material facts are not disclosed, the controlling stockholder forfeits the benefit of that limited review and exclusive remedy, and the minority shareholders become entitled to participate in a 'quasi-appraisal' class action."[63] Quasi-appraisal allows minority shareholders to opt in to an appraisal after the deal closes. Class members recover the difference between the company's fair value and the deal price, but there is no concomitant obligation to disgorge payment if the appraised price ends up being lower than the deal price.[64]

Vice Chancellor Montgomery-Reeves cited the eighty-page disclosure notice United Capital provided to the minority shareholders, and concluded that "none of Plaintiff's alleged omissions are material to the decision of whether to seek appraisal in light of the abundant disclosures already provided."[65] The Court dismissed the action because plaintiffs failed to plead that the disclosures were inadequate, and they were therefore not entitled to a quasi-appraisal.[66]

D. New York Court of Appeals Adopts Delaware's Approach to Controlling Shareholder Squeeze-Out Mergers

The New York Court of Appeals adopted Delaware's formulation for evaluating controlling shareholder squeeze-out mergers in *In re Kenneth Cole Productions, Inc.*[67] Kenneth Cole, the company's founder and owner of 89% of voting shares, attempted to re-acquire full ownership of Kenneth Cole Productions in 2012. The board established a special committee to evaluate the transaction, with two representatives elected by "Class A" shares (of which Cole held 46%) and two from "Class B" (of which Cole held 100%), and later held a vote where a majority of the minority shareholders voted to approve the transaction. The New York Court of Appeals upheld the deal under the business judgment rule, incorporating Delaware's *MFW* standard. Adopted by the Delaware Supreme Court in *Kahn v. M&F Worldwide*[68] for squeeze-out mergers, *MFW* applies the business judgment rule where certain independence criteria are present, including the establishment at the outset of the transaction that it is contingent on approval by both an independent special committee and a majority vote of minority shareholders. In particular, under the *MFW* standard:

> [I]n controller buyouts, the business judgment standard of review will be applied if and only if: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority shareholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.[69]

This standard now applies in New York.[70]

III. Indemnification and Jurisdiction

A. Court of Chancery Provides Guidance on Who May Receive Indemnification as a Corporate "Officer"

In *Aleynikov v. The Goldman Sachs Group, Inc.*,[71] the Delaware Court of Chancery found that the plaintiff, Sergey Aleynikov, a former Vice President of a Goldman Sachs subsidiary, was not entitled to indemnification and advancement of his legal fees from Goldman Sachs. *Aleynikov* concerned a provision in Goldman Sachs's bylaws, which stated that Goldman Sachs would provide indemnification and advancement to any "officer" of Goldman Sachs's subsidiaries. Under the bylaws, "when used with respect to a Subsidiary [of Goldman Sachs] or other enterprise that is not a corporation . . . , the term 'officer' shall include in addition to any officer of such entity, any person serving in a similar capacity or as the manager of such entity."[72] From 2007 to 2009, Aleynikov worked as a computer programmer at a Goldman Sachs subsidiary. Although he did not have any managerial or supervisory responsibilities, he held the title of Vice President. Between 2009 and 2012, Aleynikov was involved in a number of lawsuits arising from his employment at Goldman Sachs, including a criminal indictment for theft of trade secrets. Following his acquittal in that action, Aleynikov filed suit against Goldman Sachs in federal court in New Jersey seeking indemnification for his successful defense of the criminal proceeding as well as advancement of fees incurred to defend another criminal proceeding in state court. Aleynikov argued that he was entitled to indemnification and advancement because he qualified as an "officer" under the definition contained in Goldman Sachs's bylaws. The district court agreed, but the Third Circuit reversed, finding that (1) the definition of "officer" in the bylaws is ambiguous and (2) the doctrine of *contra proferentem*, which provides that any ambiguities in a contract should be construed against the drafting party, should not be used to construe the bylaws against Goldman Sachs.[73]

Following the Third Circuit's decision, Aleynikov filed a separate proceeding in the Delaware Court of Chancery to seek advancement of fees incurred to defend against Goldman Sachs's counterclaims in the federal suit. Delaware courts have generally favored indemnification and advancement of fees for corporate officers. However, Vice Chancellor Laster held that Aleynikov was not entitled to such payments.[74] Analyzing issue preclusion under New Jersey law, Vice Chancellor Laster determined that the Third Circuit's holding that the definition of officer is ambiguous and the doctrine of *contra proferentem* did not apply had preclusive effect.[75] Thus, looking only at extrinsic evidence, course of dealings, and industry practice, the Court determined that Aleynikov failed to establish that someone who held the title of Vice President but otherwise had the responsibilities of an employee qualified as an officer under the bylaws.[76] Vice Chancellor Laster, however, explained in dicta that he disagreed with the Third Circuit's decision and believed that *contra proferentem* should have applied in this case.[77] Thus, although Vice Chancellor Laster denied Aleynikov indemnification, his decision is a broad warning that indemnification by-laws should be drafted carefully and unambiguously, or else employees such as Aleynikov (who hold officer titles but do not perform traditional officer duties) may be entitled to indemnification.

B. Delaware Registration Statute Does Not Provide a Basis for Asserting General Jurisdiction Over Foreign Corporations

In *Genuine Parts Co. v. Cepec*,[78] the Delaware Supreme Court held that a DGCL provision which requires foreign businesses to appoint a registered agent to receive service of process in the state does not give Delaware courts general jurisdiction over non-resident corporations in connection with claims that have nothing to do with the company's activities in the state. The plaintiff brought tort actions for wrongful asbestos exposure against several manufacturers, including Genuine Parts, a Georgia corporation headquartered in Atlanta. The plaintiff, Cepec, was a former employee at Genuine's warehouse in Jacksonville, Florida. In ruling that Delaware courts lacked jurisdiction, the court overturned a 1988 precedent holding that the DGCL granted personal jurisdiction in such cases,[79] in light of intervening U.S. Supreme Court precedent. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[80] the Supreme Court dismissed claims brought against foreign subsidiaries of Goodyear in North Carolina relating to a bus crash that occurred in France, because the sale of a small number of tires that reached North Carolina through the stream of commerce did not constitute sufficient contacts with the forum state to give rise to personal jurisdiction over claims unconnected to the forum. Similarly, in *Daimler AG v. Bauman*,[81] the Supreme Court dismissed claims brought in the Northern District of California against a German corporation for alleged violations of two U.S. statutes, the Alien Tort Statute and the Torture Victims Protection Act, by its Argentinian subsidiary during the Argentinian "Dirty War." The Court held that due process did not permit the exercise of personal jurisdiction over a corporation based on conduct that occurred outside the state unless its business activities are "continuous and systematic" so as to render them "at home" in the forum state.[82] Considering these developments, the Delaware Supreme Court held that compliance with a registration statute was "not . . . a broad consent to personal jurisdiction in any cause of action, however unrelated to the foreign corporation's activities in Delaware."[83]

IV. Shareholder Activism and Proxy Access

A. Developments in Shareholder Activism

2016 was another busy year for shareholder activists. In 2016, although efforts to force the sale of the company occurred less frequently, actions aimed at influencing or restructuring a company's board of directors rose 5% from 2015.[84] Investment in activist hedge funds has grown almost three-fold, from $50 billion five years ago to $142 billion at the end of 2015, and did not slow down in 2016 despite worries that "increased competition, higher interest rates and greater corporate preparedness" would slow down activist shareholder campaigns.[85] A consulting report by Activist Insight and FTI Consulting found that the number of activist campaigns "for the first three quarters of 2016 has already surpassed the total number of such campaigns in 2015 by 20%."[86] Activist Insight also reported that the number companies subject to activist demands grew during the first half of 2016, climbing by 17% to 473 companies.[87] Although some metrics suggest the industry is shrinking, activism continues to find favor with investors, and there are indications that activists may be keeping a lower profile and "targeting smaller companies" by pursuing activist actions without acquiring the 5% stake or more that would require them to file a Schedule 13D.[88] Observers also expect to see activists go after "systematically important financial institutions," such as large banks or financial firms in the coming years.[89]

In 2016, some activist investors resorted to litigation to achieve their goals. For example, activist Lewis C. Pell disclosed a 7.12% stake in Cogentix Medical, Inc. and sought to nominate six people including himself for election to the Cogentix board. The board attempted to avoid a proxy contest by implementing a "board reduction plan."[90] Under the plan, the size of the board would temporarily be reduced by two seats prior to the next Cogentix annual meeting.[91] Pell filed suit against the board of directors in the Delaware Court of Chancery seeking to enjoin the board reduction plan. The Court of Chancery granted Pell's motion for a preliminary injunction because the Court deemed the plan to be preclusive to shareholders' voting rights.[92] The parties then entered into a settlement agreement in which Cogentix and its board agreed to support three of Mr. Pell's board nominees.[93] In another instance, shareholders of Omega Protein Corporation elected activist investor Wynnefield Capital Management LLC's two candidates for the board.[94] The vote came after Wynnefield, which reported a 7.9% stake in the company, obtained an order from a Nevada state court granting it access to the company's list of non-objecting beneficial owners (commonly known as a "NOBO" list).[95] Likewise, Hill International Inc. agreed to install Bulldog Investors LLC's three nominees to the board as part of a settlement agreement resolving a lawsuit brought by Hill in the Delaware Court of Chancery that attempted to cancel the company's annual meeting.[96] And after shareholder Michael Tofias filed suit to force a sale of Surge Components, Inc., Surge agreed to tender shares to Mr. Tofias and make changes to the board of directors in the resulting settlement agreement.[97]

Activist investors were also able to achieve substantial corporate governance changes without resorting to litigation or through settlement agreements. The below table lists several prominent examples from 2016.

Target	Activist(s) and Stake	Outcome
Hertz Corporation	Carl Icahn (33.8%)	Replacement of Hertz's CEO in December and the resignation of three of Hertz's longest-serving directors, effective January 2017.[98]
Chipotle Mexican Grill Inc.	Pershing Square Capital Management Inc. (9.9%)	Resignation of incumbent CEO in December and selection of successor with investor input; Pershing Square had reported its stake in September and stated its plans to engage in discussions about Chipotle's leadership.[99]
Pico Holdings	Central Square Management LLC	Resignation of the Chairman of the Board in December, declassification of the board, announcement that the entire board would be up for re-election in 2017, and reduction of the board to five members.[100]
Perceptron Inc.	Moab Partners LP (8.9%) and Harbert Discovery Fund LP (5.4%)	Replacement of CEO and CFO in November. The parties had previously entered into a settlement agreement in August which had resulted in the resignation of two incumbent directors and the expansion of the board. [101]
Covisint Corporation	Dialectic Capital Management LP (6.2%)	In August, Covisint added three members put forth by Dialectic to its board of directors and two incumbents resigned as a result of a proxy contest announced in June.[102]
The Brink's Company	Starboard Value LP (12.3%)	Retirement of CEO and appointment of three new members to the board of directors in January 2016.[103]
Sotheby's Inc.	Marcato Capital Management LP (9.5 % stake)	Sotheby's repurchased 2.05 million shares from Marcato, terminated its dividend program and increased share buybacks to maximize the return of capital to shareholders.[104]

Activist shareholders were not uniformly successful in 2016. For example, Ashford Hospitality Prime, Inc. ("Ashford Prime") successfully defended a proxy contest and related litigation launched by the New York-based hedge fund Sessa Capital.[105] On January 15, 2016, Sessa notified Ashford Prime that it intended to nominate five candidates for election to Ashford Prime's board. Ashford Prime's bylaws include advance notice provisions that require those seeking nomination to the board to disclose all information required by the federal securities laws, including "any plans or proposals" that would result in a sale or transfer of material assets of the company or any other material change to the corporate structure. In nomination materials submitted to Ashford Prime, however, the Sessa candidates claimed that they did not have any plans for Ashford Prime should they gained control of the company and refused to provide substantive responses to Ashford Prime's questions about their plans. After Ashford Prime rejected the candidates' applications as incomplete, Sessa and Ashford Prime filed dueling motions for preliminary injunctions. The U.S. District Court for the Northern District of Texas sided with Ashford Prime, holding that Maryland's business judgment rule protected the Ashford Prime board's decision not to allow the Sessa candidates to stand for election. The Court held that the board had reasonably determined that the Sessa candidates were ineligible due to their non-compliance with the advance notice provisions, because the board could reasonably expect that the Sessa candidates had a plan that they refused to disclose in their nomination materials. The Fifth Circuit dismissed Sessa's subsequent appeal of the court's order as moot in December 2016 because the annual meeting had been held on June 10, 2016.[106]

B. Proxy Access

In 2016, the SEC's Rule 14a-8(i)(9)[107] garnered attention due to a new SEC interpretation limiting the circumstances in which management may block shareholder proposals from the company's proxy statement. Rule 14a-8 requires that when a shareholder submits a proposal, the company must include the proposal in its proxy materials unless it violates one of the Rule's requirements or it falls within one of the Rule's substantive bases for exclusion.[108] Under the rule, a shareholder may seek to include a proposal in the company's proxy statement if the shareholder has continuously held a relatively small amount of a company's stock—at least $2,000 in market value or 1 % of securities entitled to vote—for one year prior to submitting a proposal.[109]

Notably, Rule 14a-8(i)(9) allows a company to exclude a proposal from its proxy materials "[i]f the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting."[110] Traditionally, this provision was interpreted broadly, and the SEC had endorsed the view that a company may exclude a shareholder proposal if including it would "present alternative and conflicting decisions for shareholders, and where submitting both proposal could provide inconsistent and ambiguous results."[111] In October 2015, however, the SEC issued a Staff Legal Bulletin updating their interpretation of Rule 14a-8(i)(9).[112] The revised guidance took a much narrower view, and determined that "any assessment of whether a proposal is excludable under this basis should focus on whether there is a direct conflict between the management and shareholder proposals" such that "a reasonable shareholder could not logically vote in favor of both proposals."[113]

Bulletin 14H's interpretation may be credited, at least in part, with increasing proxy access for shareholders in 2016. As of December 29, 2016, the Division of Corporate Finance issued responses to 288 no-action requests sought under 14a-8 in 2016, down from 304 in 2015,[114] which suggests that management sought to exclude fewer shareholder proposals despite increased interest in proxy participation.

C. Direct Board Nominations

In 2010, the SEC promulgated Rule 14a-11 requiring that a shareholder or group of up to 20 shareholders who collectively have owned 3% of a company's stock for three years must be allowed to nominate up to 20% of the company's board.[115] The rule was stayed before it went into effect, and was later vacated.[116] Shareholders, however, have taken the matter into their own hands by proposing bylaw amendments that provide proxy access for director nominations.

These nomination bylaws have been adopted widely. Institutional Shareholder Services, Inc. (ISS) reports that "[a]s of August 31, 2016, 39% of S&P 500 companies provide a proxy access right, and 264 U.S. companies in the Russell 3000 have adopted some form of proxy access" allowing director nominations, and projects that by summer 2017 "the majority of the companies in the S&P 500 may provide proxy access" allowing director nominations.[117] In 2016, S&P 500 companies saw 46 shareholder proposals for bylaw amendments allowing such proxy access; 21 proposals (46.7%) passed, while 24 (53.3%) failed.[118] In some cases, boards have acted proactively in adopting such access provisions.[119]

Although Rule 14a-11 was never implemented, the SEC has supported the expansion of proxy access for director nominations through other means. For example, in 2016, the SEC refused to provide no-action letters to H&R Block and Microsoft when management sought to block proxy proposals which would expand the direct nomination rights of shareholders in those companies. In the case of H&R Block, the company already had an access bylaw, but shareholders introduced a proposal to loosen its requirements by allowing loaned votes to count for the ownership total and eliminating a provision that barred re-nomination of shareholder nominees. H&R Block argued to the SEC that it had "substantially implemented" the proposal through the existing access bylaw, and therefore could exclude the proposal under 14a-8(i)(10). The SEC disagreed, declining to provide a no-action letter.[120] In September, the SEC rejected a similar no-action request from Microsoft on the same grounds.[121]

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[1] 129 A.3d 884 (Del. Ch. 2016).

[2] *Id*. at 891 (quoting S*olomon v. Pathe Commc'ns Corp*., 1995 WL 250374, at *4 (Del. Ch. Apr. 21, 1994) (Allen, C.)).

[3] *Id.* at 887.

[4] *Id.* at 898.

[5] *Id.*

[6] *Id*. at 898 n.47.

[7] *Id*. at 898.

[8] *Id.* at 897.

[9] *See, e.g.*, *In re Xoom Corp. S'holder Litig.*, No. CV 11263-VCG, 2016 WL 4146425 (Del. Ch. Aug. 4, 2016); *La. Mun. Police Emps.' Ret. Sys. v. Black*, No. CV 9410-VCN, 2016 WL 790898 (Del. Ch. Feb. 19, 2016).

[10] *In re Walgreen Co. S'holder Litig*., 832 F.3d 718 (7th Cir. 2016) (reversing approval for a disclosure-only settlement agreement).

[11] *Id.* at 725.

[12] *See, e.g.*, *In re Newbridge Bancorp S'holder Litig.*, No. 15 CVS 10047, 2016 WL 6885882, at *8 (N.C. Super. Nov. 22, 2016) (distinguishing *Trulia* to approve a shareholder settlement); *Corwin v. British Am. Tobacco PLC*, No. 14 CVS 8130, 2016 WL 635191, at *4 (N.C. Super. Feb. 17, 2016) (distinguishing *Trulia* to approve a shareholder settlement); *Strougo v. N. State Bancorp*, No. 15 CVS 14696, 2016 WL 615709, at *2 (N.C. Super. Feb. 16, 2016) (finding proposed settlement terms unreasonable); and *Raul ex rel. Swisher Hygiene Inc. v. Burke*, No. 15 CVS 16703, 2016 WL 382833, at *1 (N.C. Super. Jan. 28, 2016) (emphasizing that the court must balance the interests of the class representative against the interests of shareholders in evaluating a fee request).

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[15] *Id.* at 3.

[16] 125 A.3d 304 (Del. 2015).

[17] *Id.* at 304.

[18] *Id.* at 312-13.

[19] 137 A.3d 151 (Del. 2016) (en banc) (Strine, C.J.).

[20] *Id.* at 152, n. 3.

[21] *Id*.

[22] No. CV 9980-CB, 2016 WL 4464156, at *17 (Del. Ch. Aug. 24, 2016) (Bouchard, C.).

[23] *Id.*

[24] 143 A.3d 727, 744 (Del. Ch. 2016) (Montgomery-Reeves, V.C.).

[25] *Id.*

[26] C.A. No. 100918-VCS, 2016 WL 4485447 (Del. Ch. Aug. 25, 2016) (Slights, V.C.).

[27] *Id.* at *6.

[28] C.A. No. 11524-CB, 2017 WL 57839 (Del. Ch. Jan. 5, 2017) (Bouchard, C.).

[29] *Id*. at *13.

[30] *RBC Capital Markets, LL v. Jervis*, 129 A.3d 816 (Del. 2015).

[31] *Id.* at 822.

[32] *Id.* at 856.

[33] *Id.* at 865.

[34] *Id.* at 862.

[35] *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 736-37 (Del. Ch. 2016).

[36] *Id.*

[37] *Id.* at 750.

[38] *Id.* at 735.

[39] C.A. No. 9322–VCL, 2016 WL 3186538 (Del. Ch. May 31, 2016) (Laster, V.C.).

[40] *Id*. at *24 (citation omitted).

[41] *Id.* at *30.

[42] C.A. No. 10107–CB, 2016 WL 3753123 (Del. Ch. Jul. 8, 2016) (Bouchard, C.).

[43] *Id.* at *23.

[44] *DFC Global Corp. v. Muirfield Value Partners LP*, No. 518 (Del. 2016).

[45] C.A. No. 10589–CB, 2016 WL 6651411 (Del. Ch. Nov. 10, 2016) (Bouchard, C.).

[46] *Id.* at *16.

[47] C.A. No. 9320-VCL, 2016 WL 7324170 (Del. Ch. Dec. 16, 2016) (Laster, V.C.).

[48] *Id.* at *14.

[49] *Obeid v. Hogan*, C.A. No. 11900-VCL, 2016 WL 3356851 at *1-2 (Del. Ch. June 10, 2016) (Laster, V.C.).

[50] *Id.* at *1.

[51] *Id.*

[52] *Zapata v. Maldonodo*, 430 A.2d 779, 782 (Del. Ch. 1981).

[53] *Obeid*, 2016 WL 3356851 at *5.

[54] *Id.*

[55] C.A. No. 10557-VCG, 2016 WL 770251 (Del. Ch. Feb. 29, 2016) (Glasscock, V.C.).

[56] 638 A.2d 1110, 1113 (Del. 1994).

[57] *Calesa,* 2016 WL 770251 at *10.

[58] C.A. No. 9962–VCL, 2016 WL 301245 (Del. Ch. Jan. 25) (Laster, V.C.) *reconsideration granted in part*, C.A. No. 9962-VCL, 2016 WL 727771 (Del. Ch. Feb. 23, 2016).

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[60] *Id.* at *43.

[61] C.A. No. 11619-VCMR, 2017 WL 56890 (Del. Ch. Jan. 4, 2017) (Montgomery-Reeves, V.C.).

[62] *Glassman v. Unocal Exploration Corp.*, 777 A.3d 242, 242 (Del. 2001).

[63] *Berger v. Pubco Corp.*, 976 A.2d 132, 134 (Del. Ch. 2009).

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[66] *Id.* at *9.

[67] 27 N.Y.3d 268, (2016) (Stein, J.).

[68] 88 A.3d 635 (Del. 2014).

[69] *Id.* at 645.

[70] *Kenneth Cole*, 27 N.Y.3d at 278.

[71] C.A. No. 10636-VCL, 2016 WL 3763246 (Del. Ch. July 13, 2016).

[72] *Id*. at *1.

[73] *Aleynikov v. Goldman Sachs Grp.*, 765 F.3d 350, 367-68 (3d Cir. 2014).

[74] *Aleynikov*, 2016 WL 3763246, at *7.

[75] *Id.*

[76] *Id.* at *8.

[77] *Id.* at *6.

[78] 137 A.3d 123 (Del. 2016) (Strine, C.J.).

[79] *Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988).

[80] 564 U.S. 915 (2011).

[81] 134 S.Ct. 746 (2014).

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