

March 18, 2025

General Assembly of the State of Delaware
Legislative Hall
400 Legislative Avenue
Dover, DE 19901

Re: Senate Bill 21 Proposed Opt-In Feature

Dear Members of the General Assembly:

We write as corporate law and governance professors from universities worldwide, united in our recognition of Delaware's pivotal role in shaping corporate law within the United States and beyond. The state's success in this arena is due not solely to its expert judiciary and developed case law, but also to its deeply rooted commitment to flexibility and contractarianism as reflected in the Delaware General Corporation Law (DGCL). This flexibility has long been Delaware's distinguishing foundational strength, permitting corporations to tailor their governance structures to their specific needs while maintaining a coherent and predictable legal framework.

As you consider Senate Bill 21 (SB21), we acknowledge the strong and divergent opinions about its merits. Proponents argue that swift passage is necessary to reaffirm Delaware's preeminence and to counter the perceived risk of companies reincorporating elsewhere. Critics contend that SB21 disrupts Delaware's careful balance of fiduciary principles and judicial oversight, imposing rigid statutory rules that undercut the very flexibility and expertise that makes Delaware attractive. Both perspectives have merit, and we do not purport to resolve the substantive debate in this letter.

Instead, we propose a pragmatic solution that simultaneously renders much of the debate moot and aligns with Delaware's longstanding commitment to contractarianism: an opt-in mechanism. Rather than mandating the changes proposed in SB21 for all Delaware corporations, a modest amendment could allow corporations to adopt these provisions voluntarily, through an explicit election in their corporate charters. This approach would be consistent with Delaware's enabling corporate law framework, which has successfully (and popularly) employed charter opt-in mechanisms for other fundamental corporate governance matters such as duty-of-care waivers, corporate opportunity waivers, dual-class capital structures, and scores of other governance provisions designed to accommodate the diverse needs of Delaware entities.

An opt-in provision for SB21 would yield several benefits:

1. **Preserving Flexibility and Market Choice** – Delaware's competitive strength lies in its ability to accommodate a range of governance preferences. That strength is part of what attracts highly heterogeneous companies to incorporate in the state. Granting corporations the ability to opt into the provisions of SB21—rather than imposing them immutably and mandatorily—ensures that each company can make an informed decision about its

governance structure while preserving Delaware’s reputation as the jurisdiction of choice for corporate flexibility.

2. **Mitigating the Risk of Reincorporation** – Providing corporations with an option to adopt SB21’s provisions circumvents the concerns over mass reincorporation out of Delaware, so-called “DExit.” Companies objecting to the common law regime will now have a ready alternative that obviates the need to explore alternatives in other states. Moreover, corporations that opt in would still benefit from the familiar substantive law of Delaware as to other corporate attributes—one superintended by an expert and nimble court applying a rich body of precedents. A corporation contemplating leaving Delaware could now get the model it wants without having to reincorporate. And, providing this flexibility alleviates critics’ concerns that a rigid statutory mandate will accelerate rather than dampen an incorporation exodus. Put simply, an opt-in model would demonstrate that Delaware remains responsive to corporate needs without forcing a one-size-fits-all approach on everyone.
3. **Avoiding Constitutional and Legal Challenges** – A voluntary opt-in framework would also be more robust to constitutional challenges than a broad, mandatory limitation on the Chancery Court’s vested equitable powers under Delaware’s constitution. Allowing opt-in would invite Delaware corporations (and not the General Assembly) to experiment with their governance structures, obviating thorny questions about separation of powers and legal validity that are commonplace with abrupt and mandatory statutory shifts such as the one SB21 proposes.
4. **Leveraging Market Forces to Settle the Debate** – The competing claims about SB21’s long-term impact—whether it strengthens or weakens Delaware’s franchise—could be field tested empirically by allowing corporations to choose for themselves. Those who find the new provisions attractive can adopt them, while those who prefer the status quo can maintain their current governance structures. Over time, Delaware’s corporate governance framework will evolve based on demonstrated market preferences rather than armchair speculation.

A straightforward amendment to SB21 could easily accomplish the objectives outlined above. To take just one example, a one-sentence addition to Section 102(b) of the DGCL could provide that Delaware corporations may, through an express charter provision, opt into the new rules on conflicted transactions and inspection rights contained in SB21. Under this approach, the current versions of Sections 144 and 220 would remain intact, and SB21’s key provisions would be codified into new DGCL Sections 144A and 220A that are turnkey ready for companies to embrace through charter provisions as they see fit. This minor textual revision involves minimal legislative alteration while upholding the core strengths of Delaware’s corporate law tradition.

By embracing an opt-in framework, Delaware can reaffirm its commitment to a corporate governance system that is enabling, adaptable, and responsive. This approach satisfies every legitimate concern of controlled companies with minimal risk to Delaware’s celebrated expert judicial system and rich body of precedent. Adding an opt-in would not only preserve Delaware’s status as the premier corporate law jurisdiction, but it would double down on the key principles that have made the state successful: choice, flexibility, and the wisdom of market-driven evolution.

We appreciate your attention to this important matter and urge you to consider this modest but meaningful adjustment to SB21. Thank you for your time and commitment to maintaining Delaware's leadership in corporate law.

Sincerely,

Prof. / Dean John Armour
University of Oxford Faculty of Law

Prof. Matthew Jennejohn
BYU Law School

Prof. Stephen Bainbridge
UCLA School of Law

Prof. Michael Klausner
Stanford Law School

Prof. Robert Bartlett
Stanford Law School

Prof. Dorothy Lund
Columbia Law School

Prof. Brian Broughman
Vanderbilt Law School

Prof. Curtis Milhaupt
Stanford Law School

Prof. Ryan Bubb
New York University Law School

Prof. Yaron Nili
Duke Law School

Prof. Albert Choi
University of Michigan Law School

Prof. Brian J.M. Quinn
Boston College Law School

Prof. John Coates
Harvard Law School

Prof. Gabriel Rauterberg
University of Michigan Law School

Prof. John Coffee, Jr.
Columbia Law School

Prof. Sarath Sanga
Yale Law School

Prof. Charles Elson
University of Delaware Law School

Prof. Holger Spamann
Harvard Law School

Prof. Jesse Fried
Harvard Law School

Prof. Guhan Subramanian
Harvard Law School & Business School

Prof. Jeffrey Gordon
Columbia Law School

Prof. Eric Talley
Columbia Law School

Prof. David Hoffman
University of Pennsylvania Law School

Prof. J.W. Verret
George Mason Law School

Prof. Alan Jagolinzer
University of Cambridge Business School

Prof. Andrew Verstein
UCLA School of Law

cc:

Hon. Matt Meyer
Governor, State of Delaware
Tatnall Building
150 Martin Luther King Jr. Blvd. S.
Dover, DE, 19901

Hon. Charuni Patibanda-Sanchez
Secretary of State, State of Delaware
John G. Townsend Building 401
Federal St., Suite 3
Dover, DE 19901