Council of Institutional Investors®
The voice of corporate governance

Via-Email

March 6, 2025

The Honorable Matt Meyer
Governor of Delaware
Tatnall Building
150 Martin Luther King, Jr. Boulevard South
Dover, Delaware 19901

Dear Governor Meyer:

The Council of Institutional Investors (CII or Council) writes to respectfully express our opposition to the enactment of Delaware Senate Bill 21 in its current form (SB 21).[1]

CII is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately $5 trillion. CII members are major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than fifteen million participants – true "Main Street" investors through their pension funds. Our associate members include non-U.S. asset owners with about $4 trillion in assets, and a range of asset managers with approximately $58 trillion in assets under management.

CII is a leading voice for effective corporate governance, strong shareowner rights and sensible financial regulations that foster fair, vibrant capital markets. CII promotes policies that enhance long-term value for U.S. institutional asset owners and their beneficiaries.[2]

As long-term investors with a significant investment in Delaware corporations, CII members share the view that corporate governance structures and practices should protect and enhance a corporation's accountability to shareowners.[3] As we have indicated in the past, we believe that a hallmark of Delaware General Corporation Law is the careful and deliberate nature in which it is adopted and enforced, including the ways in which Delaware law balances boards' decision-

[1] *See* Del. S.B. 21, 153rd Gen. Assemb. (Del. 2025), *available at* https://legis.delaware.gov/BillDetail/141857.
[2] For more information about the Council of Institutional Investors (CII) please visit our website at www.cii.org.
[3] *See* Letter from Jeff Mahoney, General Counsel, CII to The Honorable Bryan Townsend 1 (June 13, 2014), 06_13_14_CII_letter_sen_townsend_SB_236.pdf ("As long-term investors with a significant investment in Delaware corporations, CII members share the view that corporate governance structures and practices should protect and enhance a corporation's accountability to shareowners."); *see* Policies on Corporate Governance, § 1.4 Accountability to Shareowners (last updated Sept. 14, 2024), https://www.cii.org/corp_gov_policies#:~:text=1.4%20Accountability%20to%20Shareowners%3A%20Corporate,to%20reduce%20accountability%20to%20shareowners ("Corporate governance structures and practices should protect and enhance a company's accountability to its shareowners, and ensure that they are treated equally [and] [a]n action should not be taken if its purpose is to reduce accountability to shareowners.").

making with accountability to shareholders.[4] And, in our view, consistent with the view of the State of Delaware, that balance benefits from the "Delaware Courts and the body of case law developed by those courts."[5]

We share the concern of some commentators that the provisions of SB 21 are a "direct rebuke" to the Delaware Courts and the body of case law developed by those courts.[6] More specifically, some have estimated that the provisions of SB 21 would overturn at least 34 Delaware Court decisions made by different judges over a more than 40 year period.[7] In addition, and also concerning, the provisions of SB 21 would limit the Delaware Court's discretion to provide equitable relief in future cases involving transactions between a company and its controller.[8] Finally, we believe the swift and atypical manner in which SB 21 was drafted and proposed is a stark deviation from the well-practiced, multi-stakeholder process Delaware is praised for and may therefore be viewed as reactive and unduly hasty, thereby lacking the benefit of the more typical deliberative approach.[9]

By overruling decades of Delaware precedent and limiting the Court's ability to grant equitable relief going forward, it appears to us that the enactment of SB 21 could make Delaware substantially *less* attractive to institutional investors' when evaluating where the corporations that they own should be incorporated. As one commentator has noted, "from the perspective of Delaware's interest in maintaining its leading position in the market for incorporations, in the long-run, this legislation could backfire and operate to undermine Delaware's position"[10] In

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[4] *See* Letter from Jeffrey P. Mahoney, General Counsel, CII to Kate Harmon, Esq., President, Delaware State Bar Association 4 (May 14, 2024), https://www.cii.org/files/issues_and_advocacy/correspondence/2024/Moelis_CII%20letter.pdf ("A hallmark of DGCL is the careful and deliberate nature in which it is adopted and enforced, as well as the ways in which Delaware law balances boards' decision-making with accountability to shareholders.").

[5] Delaware Corporate Law, Litigation in the Delaware Court of Chancery and the Delaware Supreme Court, Delaware.gov (last visited Mar. 6, 2025), https://corplaw.delaware.gov/delaware-court-chancery-supreme-court/.

[6] Eric Talley et al., Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?, CLS Blue Sky Blog (Feb. 18, 2025), https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/.

[7] *See* Del. Supreme Court Cases Overturned by SB21 (last visited Mar. 5, 2025), https://docs.google.com/spreadsheets/d/1WH_CaXRTInJb3IS-AY6RdXDPKb9MWrHJr9R7Nax1PLs/edit?pli=1&gid=0#gid=0; Lucian Bebchuk, Delaware: The Empire Strikes Back, Harv. L. Sch. F. on Corp. Governance (Mar. 4, 2025), https://corpgov.law.harvard.edu/2025/03/04/delaware-the-empire-strikes-back/.

[8] *See* Del. S.B. 21, 153rd Gen. Assemb., Sec.1 §144(b) ("A controlling stockholder transaction (other than any going private transaction) may not be the subject of equitable relief . . .."); Lucian Bebchuk, Delaware: The Empire Strikes Back, Harv. L. Sch. F. on Corp. Governance ("the legislation indicates that transactions between a company and its controller 'may not be the subject of equitable relief' regardless of whether the court would provide such relief if it were warranted by equity [and] [t]hus, for transactions between companies and controllers, the legislation would guide courts to abandon their long-praised 'unrivaled commitment' to providing equitable relief when equity warrants [and] [t]his effect will further contribute in the long term to eroding the perceived value of a Delaware incorporation, and thus possibly also to hurting Delaware in the market for incorporations").

[9] *See, e.g.,* Eric Talley et al., Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?, CLS Blue Sky Blog ("All at once, we're seeing a broad legislative package that cuts across foundational doctrines—controller conflicts of interest, derivative litigation, access to corporate records—and does so with a speed and scope that contrasts starkly with the state's long tradition of incremental, consensus-based reform.").

[10] Lucian Bebchuk, Delaware: The Empire Strikes Back, Harv. L. Sch. F. on Corp. Governance.

addition, moving toward a more uniform, legislative approach to resolving corporate disputes by limiting the application of the experience and precedence of the Chancery Court risks weakening the attractiveness of Delaware as place of incorporation for both companies and investors, and is more easily replicable by other states.

Among our substantive concerns with the provisions of SB 21 is the proposed presumption that a director deemed independent under stock exchange rules would be presumed disinterested unless strong, particularized evidence proves otherwise.[11] We believe the stock exchange rules for director independence are inadequate and do not contemplate the many potential situations where a director technically qualifies as "independent" yet may be subject to significant inherent bias.[12]

We observe that stock exchange independence standards are generally based on voluntary disclosure in director questionnaires, and as a result independence determinations can fail to account for undisclosed conflicts.[13] Given the importance of ensuring that decisions made at the board level are impartial and free from bias we believe consideration should be given to adopting a more exacting definition of what constituents an independent director consistent with CII's longstanding independent director definition.[14]

If Delaware is to remain a widely respected leader in corporate law, particularly from the perspective of long-term institutional investors, we believe it is imperative that SB 21 not be enacted in its current form. Thank you for your consideration of this request. Please do not hesitate to contact me if the Council can provide any additional information.

Sincerely yours,

Jeffrey P. Mahoney
General Counsel

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[11] *See* Del. S.B. 21, 153rd Gen. Assemb., Sec.1 §144(d)(2) ("Any director of a corporation that has a class of stock listed on a national securities exchange shall be presumed to be a disinterested director with respect to an act or transaction to which such director is not a party if the board of directors shall have determined that such director is an independent director or satisfies the relevant criteria for determining director independence under any rules promulgated by such exchange, which presumption shall be heightened and may only be rebutted by substantial and particularized facts that such director has a material interest in such act or transaction or has a material relationship with a person with a material interest in such act or transaction.").

[12] *See, e.g.,* Richard Mansouri, How Independent Are the "Independent" Directors of Public Companies?, Forbes (May 18, 2023), https://www.forbes.com/sites/richardmansouri/2023/05/18/how-independent-are-the-independent-directors-of-public-companies/ ("Unfortunately, this definition of an 'independent' director is inadequate and does not contemplate the many potential situations where a director technically qualifies as 'independent' yet may be subject to significant inherent bias.").

[13] *See* Lawrence Cunningham, Delaware Law Balances Certainty and Scrutiny: Legal Insight, Bloomberg L. (Feb. 24, 2025), https://news.bloomberglaw.com/us-law-week/delaware-aptly-balances-certainty-and-scrutiny-in-corporate-law ("Another concern about relying on stock exchange standards is that a board's independence determinations are based on director questionnaires [and] [w]hile generally reliable, these can fail to account for undisclosed conflicts.").

[14] *See* § 7. Independent Director Definition.

cc: Senator Bryan Townsend
Senator Raymond Seigfried
Senator David P. Sokola
Senator S. Elizabeth Lockman
Senator Gerald W. Hocker
Senator Brian G. Pettyjohn
Representative Krista Griffith
Representative Melissa Minor-Brown
Representative Kerri Evelyn Harris
Representative Edward S. Osienski
Representative Timothy D. Dukes
Representative Jeffrey N. Spiegelman