



How Delaware May Be Dethroned and Why It Should Not

Posted by Charles M. Elson, University of Delaware, on Friday, March 31, 2017

Editor's note: [Charles M. Elson](#) is Edgar S. Woolard, Jr. Chair in Corporate Governance and Director of the John L. Weinberg Center for Corporate Governance at the University of Delaware. This post is based on his recent [paper](#) and is part of the [Delaware law series](#); links to other posts in the series are available [here](#).

Delaware's preeminent role in corporate regulation has endured for several important reasons. Most importantly, the state's entire approach to the corporate law has been centered on investor protection. Although through the years the ways by which it has tried to achieve this protection have changed, it is this animating principle that defines its laws. Investors are keenly aware of this fact and seek and respect the approach. Delaware's primary industry is corporate regulation, and to maintain its franchise, it must carry out its responsibilities fairly, intelligently and responsibly. Its corporate code is the most advanced in the country. Its judiciary has unusual expertise in the field and is highly respected in the resolution of corporate disputes.¹ In recent years, the state has maintained a delicate balance between upholding shareholder power and board prerogative. It is favored as the nation's finest and most balanced forum for corporate dispute resolution by both investors and managers as there are no real major local corporate interests as seen in other larger jurisdictions to affect its perceived neutrality. While other states, most notably Nevada and North Dakota, have attempted to usurp its franchise either through statutes that are seemingly more protective of management or shareholder friendly, none has succeeded largely because of the difficulty in creating an experienced and recognized corporate judiciary. Delaware possesses a powerful franchise that would be difficult for any other state to reproduce both judicially and, because of the potential influence in other jurisdictions of local corporate interests, practically.

However, Delaware's dominance is not assured and several recent developments may ultimately reduce its power and influence. First, while the chances of enactment of a federal corporate code are slim, federal intrusion into corporate governance regulation through the Sarbanes-Oxley and Dodd-Frank Acts has been harmful to the state. A significant portion of Delaware's influence in areas such as audit oversight and executive compensation has been superseded by federal regulation.² The benefit of a Delaware court's resolution of these types of issues is therefore diminished and the attractiveness of simply incorporating in a company's home state at lesser

¹ See Mark J. Roe, *Delaware's Competition*, 117 Harvard L.R. 588 (2003) (explaining that Delaware has a highly experienced, highly regarded judiciary which can operate without a jury, allowing for swift action to be taken and thorough discussion of reasoning behind decisions).

² See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); § 202, 116 Stat. at 772 (codified as amended at 15 U.S.C. § 78j-1 (2006) (Audit Committees). Also see Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); § 951, 124 Stat. at 1899 (codified as amended at 15 U.S.C. § 78n-1 (2006) (say on pay); § 971, 124 Stat. at 1915 (codified as amended at 15 U.S.C. § 78n (2006) (Proxy Access)).

cost is increased significantly. If one incorporates in Delaware for a sensible regulation of corporate issues and that regulation has shifted to the federal regime, there is little point in incorporating in Delaware. Any increased federal intervention in this area only heightens the potential for this shift. The argument for federal regulation has revolved around creating a progressive national regulatory standard. But because local federal district courts, with little corporate expertise and local corporate political pressures, will ultimately decide regulatory disputes, this may lead to the balkanization of corporate law. Delaware, oddly enough, offers a coherent national approach. Still today, Delaware regulates much corporate conduct and a shift to other states is far off, but not inconceivable.

The second major threat to Delaware's dominance may be self-inflicted. For years the process by which Delaware courts are constituted and corporate law has been made and has been considered above partisan politics and local interests. Any action that compromises its courts or the corporate law process due to local political considerations may diminish the state's reputation for neutrality and credibility and lead to incorporation elsewhere. An overly aggressive corporate franchise-related revenue collection effort by the state which has occurred in recent years, has not been reputationally productive and may alienate its clientele. Additionally, should the judiciary become politicized, which is entirely possible in a state that has now become overwhelmingly dominated by one political party, or the corporate regulatory process become subject to outside political manipulation, as has been evidenced in recent months involving a controversial corporate dissolution ruling by the Chancery Court, it will lose its critical reputation for neutrality and balance. This could pose the ultimate threat to its dominant position. The state's leaders must be continually vigilant to assure that this will never occur. The development of its corporate statute and judicial appointments must be above the local political fray. Should Delaware fall, we all will lose. Its continued dominance is vital to effective corporate function and, ultimately, a healthier national economy.

The complete paper is available for download [here](#).