Delisting in the United States

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The authors thank Caroline Gentile and Sean Griffith as well as participants of the 2023 Delisting Conference and a workshop at the University of Luxembourg (2024) for helpful comments. Errors remain our own.

Abstract

Delisting of securities significantly impacts firms and their shareholders. This chapter surveys the law governing delisting in the United States, looking both at the corporate and securities law aspects. Corporate law governs the going-private transaction that often precedes a delisting, which is typically a freezeout merger. Fiduciary duties governing such transactions have continued to evolve in the past ten years, as has the role of valuation. In recent years, the Delaware courts have become more deferential to valuation negotiated under market conditions. The securities law aspects of delisting are complex because firms typically not only seek to delist but also need to deregister to avoid the application of disclosure requirements. “Going dark,” which means deregistering while there are still public shareholders, is possible under some circumstances. Involuntary delisting is controlled by rules of the stock exchanges and the SEC, primarily those of the exchange, given that a delisting decision becomes effective without the SEC’s approval.

Keywords: securities regulation, corporate law, SEC, Delaware, delisting, freezeouts, fiduciary duties, deregistration, going private

JEL Classifications: G18, K22

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Delisting of Stock Corporations in Europe and Beyond (Rüdiger Veil & Vassilios Tountopoulos eds.)

Delisting in the United States

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I. Overview

The United States has the largest securities markets in the world, with thousands of publicly traded firms (issuers) whose composition constantly changes. Both voluntary and involuntary delisting are a natural part of this process. Involuntary delisting is a sanction used by the stock exchange and the Securities and Exchange Commission (SEC) against an issuer. The threat of a potential delisting is part of the arsenal of instruments that help to induce compliance.

Voluntary delisting can occur for multiple reasons, such as a merger or bankruptcy. A firm – usually with a controlling shareholder – might decide to "go private" to escape from the continuous disclosure and other requirements of the Securities Exchange Act of 1934 and to eliminate any minority ownership. A firm might also "go dark" by reducing the number of shareholders of record below the minimum number required for the Exchange Act's disclosure requirements to apply. To understand the delisting process and its consequences, it is necessary to understand the legal context more broadly, including the corporate and securities law framework. While corporate law mainly seeks to protect outside shareholders in the going private transactions, the Exchange Act provides for disclosure and other requirements.

Broadly speaking, and as explained below, the reporting requirements of the Securities Exchange Act of 1934 apply when an issuer has had an effective registration statement under the Securities Act, when its securities are traded on a national securities exchange, or when it exceeds certain quantitative thresholds regarding a firm's size and number of record security holders. To escape the disclosure requirements of the federal securities law, it therefore does not suffice to delist, but an issuer needs to take steps under the securities laws to deregister so that none of the three prerequisites continue to apply.

This chapter explores all of these legal questions. After briefly surveying the US securities market and securities law in section II, this chapter discusses voluntary delisting in section III. It discusses both the securities law framework as well as the going private process under corporate law, which will typically involve a freezeout merger. Section III explores involuntary delisting. Section IV summarizes and concludes.

II. Securities markets and the general legal framework

A. The US securities market

The United States has the largest securities market in the world. Today, there are slightly less than 4,000 publicly traded firms, down from a peak of about 7,000 in 1996.[1] Despite the declining number, market capitalization has risen relative to the US GDP, corresponding to about 150% or a dazzling figure of $38 trillion in 2022.[2] The reasons for the decline in a number of listed corporations are not entirely clear. Explanations include the consolidation of industries through M&A activity, reduced antitrust enforcement, "killer acquisitions," and an increased regulatory burden. Not all explanations are equally plausible or able to provide more than a partial explanation.[3] Most likely, a combination of economic factors has led to this reduction, which does not appear to indicate that the securities market is in decline.

However, there have been a number of remarkable changes to patterns of investment and stock ownership during the past decades. Berle and Means famous 1933 book "The Modern Corporation and Private Property" described a market characterized by a separation of ownership and control, where publicly traded firms had a highly dispersed shareholder base, leading to very powerful management.[4] This characterization was true throughout the second half of the 20th Century, maybe even more so than at the time of Berle and Means' study.[5] According to the traditional picture, a large proportion of stockholders were retail investors. During the last few decades, retail investors have been replaced partly by institutional investors, such as mutual funds, ETFs, and hedge funds.[6] Retail investors still hold much of the stock, although indirectly through mutual funds and index funds, the latter being characterized as "passive" investors because they just commit to holding stock corresponding to an index rather than managing a portfolio. Large firms now still tend to have a dispersed ownership structure. Still, they also often have "common ownership,"

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[1] Mark J. Roe & Charles C.Y. Wang, *Half the Firms, Double the Profits: Public Firms' Transformation, 1996-2022*, 8 (2024), at https://ssrn.com/abstract=4372070.

[2] Roe & Wang, *id.*, at 18.

[3] Kathleen M. Kahle & René M. Stulz, *Is the US Public Corporation in Trouble?* 31 J. ECON. PERSP. 67, 83-86 (2017); Roe & Wang, *id.*, at 16-32.

[4] ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933). See Robert Charles Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatise*, 94 HARV. L. REV. 561 (1981).

[5] *See* MARK J. ROE, STRONG MANAGERS WEAK OWNERS (1994).

[6] Kahle & Stulz, *supra* note 3, at 81.

meaning that some of the largest shareholders are funds belonging to the same families of fund advisors.[7]

A narrower but not less important phenomenon of recent years is that of firms permanently characterized by a controlling shareholder.[8] In the tech industry in particular, founders often hold shares giving them multiple voting rights (as long as they hold this stock).[9] Some of the largest firms are today thus controlled, which was not true 50 years ago.

Finally, a significant concern is that some companies are not publicly traded on large, registered exchanges such as the NYSE or NASDAQ, but instead are bought and sold by investors in the over-the-counter (OTC) market. Historically, the OTC market consisted of the "pink sheets" named after the papers on which prices were quoted daily.[10] Today, the OTC market has moved to electronic platforms.[11] The securities of a company that is delisted but still has public stockholders will be traded over the counter. Whether such securities will trigger disclosure requirements depends on whether the issuer has filed an effective registration statement under the Securities Act, or, alternatively, whether the issuer exceeds certain thresholds in terms of total assets and securities holders of record (see section III.A). If such an issuer falls below a certain threshold, it may deregister and escape disclosure even if it still has public shareholders (see section III.C.iv). Firms that "go dark" often fail to disclose information to investors.[12]

B. Corporate law and securities law

Publicly traded corporations in the United States are subject to two levels of legislation and case law: corporate law and securities law. Corporate law is state law, leaving it for the corporation to decide where to incorporate regardless of their place of business or location of headquarters. Two thirds of the Fortune 500 and half of all publicly traded corporations are incorporated in Delaware.[13]

Securities law in this context is largely federal law. The federal securities laws were first enacted during the Great Depression as part of President Roosevelt's New Deal. The Securities Act

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[7] Matthew Backus, Christopher Conlon & Michael Sinkinson, *Common Ownership in America: 1980-2017*, 13 AM. ECON. J.: MICROECON. 273 (2021).

[8] Bobby V. Reddy, *More than Meets the Eye: Reassessing the Empirical Evidence on U.S. Dual-Class Stock*, 23 U. PA. J. BUS. L. 955, 963-968 (2021) (summarizing data on tech IPOs); Aurelio Gurrea-Martínez, *Theory, Evidence, and Policy on Dual-Class Shares: A Country-Specific Response to a Global Debate,* 22 EUR. BUS. ORG. L. REV. 475, 479-480 (2021) (observing the increasing of dual-class firms in the US over time).

[9] *See* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 588-91 (2016) (interpreting dual-class stock as a way for entrepreneurs to protect their business plans vision from shareholder pressure).

[10] *E.g.*, Donald C. Langevoort & Robert B. Thompson, *Publicness in Contemporary Securities Regulation after the JOBS Act*, 101 GEO. L.J. 337, 348 (2013) (discussing the history of the OTC market).

[11] *See* Langevoort & Thompson, *id.*, at 349 (describing electronic OTC market platforms).

[12] *E.g.* Jesse M. Fried, *Firms Gone Dark*, 76 U. CHI. L. REV. 135, 150 (2009).

[13] *E.g.*, William J. Moon, *Delaware's Global Competitiveness*, 106 IOWA L. REV. 1683, 1693 (2021).

of 1933 established registration and disclosure requirements applying when an issuer offers securities to the public. The Securities Exchange Act of 1934 created the SEC (Securities and Exchange Commission) as a powerful regulator and added periodical disclosure requirements. The SEC has adopted numerous rules and regulations to implement and further specify the requirements of the two acts.[14] The federal nature of securities law also means that federal courts have subject matter jurisdiction over it, contrary to the state courts' competence to adjudicate on corporate law issues. There are also state securities laws, but these are of limited significance for the issues discussed here.

The first of the current federal securities statutes, the Securities Act of 1933, was largely devoted to requiring the registration of securities offered to the public. As discussed below, this '33 Act registration can have consequences for Exchange Act reporting. The key to the Exchange Act as originally enacted in 11934 was the registration of securities exchanges with the SEC, which was created by the Act, and their regulation.[15] The registration of exchanges was limited to a relatively small number, but other provisions of the Act had more far-reaching consequences. It was, and is, unlawful for brokers, dealers and exchange members to trade a security on an exchange unless that security has been registered under the Exchange Act registration.[16] The Act did not require companies to register their securities, presumably because of concerns about the limits of federal power at the time, but companies had to "voluntarily" register in order to preserve the liquidity that exchange trading provided. Once they registered securities under the Exchange Act, exchange-traded companies became subject to a sort of federal corporate law. They were required to prepare and file with the SEC such periodic reports as the SEC required.[17] The solicitation of proxies for Exchange Act registered securities was subjected to SEC regulation.[18] Finally, the officers, directors and principal shareholders of Exchange Act registered securities are required to report their trading of those securities and to disgorge their short-swing profits.

As originally enacted, the Exchange Act focused on exchange-traded securities and left the over-the-counter market to regulation by the SEC. In 1936, however, Congress added section 15(d) to the Act, requiring issuers with an effective registration statement under the *Securities Act* to file periodic reports as required by section 13, but did not subject them to the other provisions of the Exchange Act just discussed. The section 15(d) reporting requirement ceased any year after the first year in which the number of registered security holders fell below a certain number.

In 1964, section 12(g) was added to the Exchange Act to require companies with 500 or more shareholders of record and a certain amount of assets to register under section 12. The effect

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[14] *See* Franklin A. Gevurtz, *United States: The Protection of Minority Investors and Compensation of their Losses*, in GLOBAL SECURITIES LITIGATION AND ENFORCEMENT 109, 114-115 (Pierre-Henri Conac & Martin Gelter eds. 2019).

[15] Exchange Act § 6. Brokers, dealers and exchanges cannot use jurisdictional means to use an Exchange unless the Exchange is registered with the SEC. *Id.* § 5.

[16] Exchange Act § 12(a), (b).

[17] Exchange Act § 13(a). Over time section 13 has been amended to require reports of substantial investors.

[18] Exchange Act § 14(a). Over time section 14 has been amended to require reports to shareholders and to provide for SEC regulation of tender offers for Exchange Act registered securities.

of this registration was to subject the issuers to the reporting, proxy and short-swing trading rules of the Exchange Act. Thus larger issuers in the over-the-counter market were made subject to the Exchange Act's requirements for exchange-listed companies. In 2012 section 12(g) was amended to substantially increase the record-holder threshold.

Corporate law governs powers of directors and shareholders, including requirements for votes[19] (e.g., for merger transactions aimed at going private), but not explicit disclosure requirements relating to such votes, which are governed by securities law.[20] Directors' fiduciary duties, which are essential in determining what course of action they may take in going-private transactions, are governed by corporate law. In the following, this chapter will discuss federal securities laws and the corporate law of Delaware (where relevant).[21]

The stock exchanges have enacted rules on delisting; this chapter will refer exclusively to New York Stock Exchange (NYSE) rules, specifically Section 8 of the NYSE Listed Company Manual.

III. Voluntary Delisting

A. "Delisting," "deregistration," "going private," and "going dark"

We need to clarify some terminology before discussing voluntary delisting, defined as a removal from the stock exchange initiated by the issuer. In the United States, it is important to clearly distinguish between going private transactions, the process of "delisting," and "deregistration,"[22] which is sometimes described as "going dark."[23]

"Delisting" is the removal of a corporation's stock from a securities exchange (such as NYSE); "deregistration" refers to the removal of the securities from registration with the SEC, which is necessary to remove an issuer from the reach of securities law and to escape disclosure requirements. Registration under the Exchange Act is not automatically linked to being traded on the stock exchange. An issuer can become subject to the Securities Exchange Act's reporting requirements in several ways, namely (1) by listing a class of securities on a national stock exchange (Securities Exchange Act, § 12(b)), (2) by exceeding certain quantitative thresholds regarding shareholder ownership dispersion and total assets (§ 12(g))[24], and (3) by having filed an effective

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[19] In some cases, stock exchange rules establish additional voting requirements.

[20] State corporate legislation does not typically establish disclosure requirements. However, when analyzing the fiduciary duties of directors and controlling shareholders, courts are typically more deferential toward stockholder approval if the vote was, among other things, based on adequate disclosure of the relevant facts.

[21] The Securities Exchange Act is quoted by its original section numbers rather than by its location in the U.S. Code.

[22] *E.g.*, David Bakst, Thomas Kollar & Chirag Naidu, *Current Developments to the Process of Delisting and Deregistration of Securities from U.S. Exchanges,* PLI CURRENT, vol. 4, no. 3. (2020).

[23] *E.g.*, Christian Leuz, Alexander Triantis & Tracy Yue Wang, *Why do firms go dark? Causes and economic consequences of voluntary SEC deregistrations,* 181 J. ACCT. & ECON. 181, 182 (2008).

[24] In short, USD 10M and more than 2000 shareholders (or more than 500 shareholders) of record who are not accredited investors). For more details, *see* infra section III.C.iv.

registration statement under the Securities Act (§ 15(d)). Delisting only eliminates registration under § 12(b). The other two forms of registration, which are suspended while a company is exchange traded, reemerge, meaning that disclosure requirements persist.[25]

A voluntary delisting will typically be preceded by a going private transaction that eliminates minority shareholders from the firm. Ideally, a going private transaction (governed chiefly by corporate law), such as a freezeout merger, will bring the number of security holders under the thresholds established in the Securities Exchange Act[26] (see below section C.iv). If a firm does not eliminate all outside shareholders, its stock may continue to be traded in the over-the-counter market.[27] If then "goes dark" by falling under the thresholds of § 12(g) and § 15(d) and then deregisters, it may escape disclosure requirements even if there are significant numbers of beneficial securities holders (section C.iv). Typically, such companies will continue to trade in the OTC market, often with adverse effects for outside investors.[28]

Empirically, the number of voluntary delisting decisions is substantial. Min and Jin surveyed 8-K disclosures under Item 3.01 (which includes voluntary and involuntary delisting) in 2019, finding 112 delistings from the NYSE, 115 from NASDAQ, and 12 others. They note that these include outcomes of mergers as well as transfers to different exchanges.[29] Macey, O'Hara, and Pompillo report that there were between 77 and 225 voluntary delistings from NYSE each year between 1998 and 2004 and between 235 and 433 voluntary delistings on NASDAQ.[30]

The following sections, therefore, begin with going private transactions (section B), which logically precede delisting and deregistration (section B.v).

B. The going private transaction

i. The decision to delist

SEC rules explicitly require that "the issuer must comply with all applicable laws in effect in the state in which it is incorporated […] governing an issuer's voluntary withdrawal of a class of securities."[31] Rule 806.02 of the NYSE Listed Company Manual stipulates that an issuer may delist "after its board approves the action."[32] The DGCL (Delaware General Corporation Law) or other state laws do not require shareholder authorization for delisting. However, going private

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[25] Bakst et al, *supra* note 22.

[26] Securities Exchange Act, §§ 12(g) and 15(d).

[27] *E.g.* SEC No-action letter (Orbit International Corp.), November 13, 2014, 2014 SEC No-Act. LEXIS 394, *5 (describing how Orbit's common stock traded on the OTC Pink after its delisting from NASDAQ).

[28] Leuz et al, *supra* note 23, at 186.

[29] Geeyoung Min & Kwon-Yong Jin, *Relational Enforcement of Stock Exchange Rules*, 47 B.Y.U. L. REV. 149, 179 (2021).

[30] Jonathan Macey, Maurenn O'Hara & David Pompillo, *Down and Out in the Stock Market: The Law and Economics of the Delisting Process,* 51 J. L. & ECON. 683, 691 (2008).

[31] Rule 12d2-2(c)(2)(i).

[32] *See also* NASDAQ Rule Series 5000 (listing rules).

transactions (such as freezeout mergers) that allow delisting and deregistration will typically require approval. Formally, shareholders are not involved in the decision to delist.[33]

In the absence of specific corporate law rules governing delisting, general principles for such decisions apply. The quorum for a board resolution will usually be provided for in the corporation's certificate of incorporation or (more likely) its bylaws.[34] By default, the quorum in a Delaware corporation is a majority of the total number of directors. The certificate or bylaws can set a higher number; the certificate may authorize the bylaws to set a smaller number, which must be at least 1/3 of the total number of directors.[35] A decision is made with a majority of the directors present in the meeting unless the certificate or bylaws require a higher number.[36]

ii. Structuring the going private transaction

a) Freezeout merger

The corporate going private transaction is typically structured either as a one-step merger or a two-step transaction consisting of a tender offer followed by a merger.[37]

In the case of a one-step merger transaction, the target corporation (i.e., the entity going private) is merged with a wholly-owned subsidiary of the acquirer (i.e., of the controlling shareholder). Typically, the operating company going private (rather than the special-purpose entity) will survive the merger (reverse triangular merger).[38] Minority shareholders normally receive cash

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[33] *E.g.*, Fried, *supra* note 12, at 141.

[34] The certificate (or articles) of incorporation is the corporation's founding document and most be submitted to the secretary of state, where is a matter of public record. DGCL §§ 101(a), 102, 103. The bylaws are typically and longer, more technical document and can be amended more easily. DGCL § 109. On the amendment of the certificate, see DGCL § 242(a), on the amendment of bylaws § 109(a). See WILLIAM T. ALLEN, REINIER KRAAKMAN & VIKRAMADITYA S. KHANNA, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 104-105 (6th ed. 2021).

[35] DGCL § 141(b).

[36] DGCL § 141(b).

[37] *E.g.* Guhan Subramanian, *Freezeouts in Delaware and Around the World,* 24 U. PA. J. BUS. L. 803, 804 (2023). Wisconsin and California have enacted statutes specifically addressing going private transactions. Wis. Admin. Code DFI-Sec. §6.05; Cal. Corp. Code §1203. *See* SECURITIES PRACTICE PORTFOLIO SERIES, CORPORATE PRACTICE, PORTFOLIO 235: CORPORATE STOCK REPURCHASES & GOING PRIVATE II.D.7.b (2023). This discussion here focuses on Delaware.

[38] In a forward triangular merger, the single-purpose subsidiary survives. *See, e.g.,* ALLEN ET AL., *supra* note 34, at 514 (discussing the distinction between the two types of triangular mergers).

or acquirer stock as compensation for their shares.[39] The transaction must be initiated by a resolution of each board of the two corporations constituent to the merger.[40] Stockholders must (normally) vote on it,[41] with the required majority for approval being the majority of all outstanding stock.[42] No vote would be required if a parent company merges with a subsidiary pursuant to DGCL § 253, which requires 90% ownership.

In the case of a two-step tender offer, the acquirer would first offer to shareholders to purchase their stock and subsequently initiate a merger if the threshold is reached. Typically, the offer would be contingent on reaching the necessary percentage. DGCL § 251(h), which was introduced in 2013, permits a merger without a vote if the preceding tender offer fulfills specific requirements if the merger agreement provides for it. Pursuant to this section, the offer must be for all shares entitled to vote on a merger and may be contingent on reaching the necessary threshold for a merger vote. The offeror must promise to consummate the merger as soon as practicable after the tender offer, and the remaining minority shareholders must be paid out in the merger at the same price as those who accepted the tender offer. The effect of this provision is that the acceptance of the tender offer supplants the vote on the merger in cases where the acquirer does not have the voting power to approve the transaction unilaterally.[43]

b) Other methods

Another method is a reverse stock split, where many stockholders would receive only a fractional share.[44] A sale of all assets followed by dissolution is another method.[45] Both of these would require at least one shareholder majority vote in Delaware.[46] However, outside public shareholders are not needed for approval.[47]

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[39] Typically, the parent will have placed the merger consideration in the subsidiary. FRANKLIN A. GEVURTZ, CORPORATION LAW 672 n. 59 (3rd ed. 2021).

[40] DGCL § 251(b).

[41] DGCL § 251(f) provides for some exceptions when no vote is required by the stockholders of the surviving corporation. These will not apply here, however, because stockholders will have to trade in their shares for the merger consideration (cash or stock in the parent). § 251(f)(2).

[42] DGCL § 251(c). If there are multiple classes of stock and the merger agreement involves an amendment of the issuer's certificate that affects the rights of a specific class of stockholders, this class will need to approve the merger separately. FRANKLIN A. GEVURTZ & CHRISTINA M. SAUTTER, MERGERS AND ACQUISITIONS LAW 86 (2019); Dalton v. American Investment Co., 490 A.2d 574, 586 (Del. Ch.), aff'd, 501 A.2d 1238 (Del. 1985); DGCL § 242(b)(2).

[43] GEVURTZ & SAUTTER, *id.*, at 85-86.

[44] LAW JOURNAL PRESS, GOING PRIVATE §3.02(3) (2023).

[45] LAW JOURNAL PRESS, *id.* §3.02(4).

[46] A reverse stock split would require a vote because requires an amendment of the certificate, which records the number and denomination of stock. DGCL § 102(4), § 242. Both a sale of substantially all assets and a dissolution require a vote. DGCL §§ 271, 275.

[47] Fried, *supra* note 12, at 142.

A corporation with a small shareholder base might use a stock repurchase to get below the shareholder thresholds of § 12(g) and 15(d) to "go dark."[48] This is the one method where the corporation's capital matters. Under DGCL § 160(a)(1), a repurchase is not permissible when it is impaired or when the repurchase would impair the capital.[49] Moreover, § 160(a)(1) allows a repurchase (regardless of impairment of capital) also when the corresponding shares are retired and the capital is reduced accordingly pursuant to §§ 243, 244 (both of which require a board resolution, but not a shareholder vote).[50] A repurchase tender offer does not require a shareholder vote.[51] Not accepting the offer might be risky if a firm aims to deregister: if the repurchase brings the number of record holders below the required thresholds, the remaining holdouts may be stuck with an illiquid investment in a company not subject to any disclosure requirements.[52]

When making a self-tender offer to repurchase stock, an issuer must follow Rule 13e-4 and Schedule TO (which provides for the same disclosures as third-party offers). Rule 13e-4 stipulates some substantive conditions for the tender offer, including the offer must be open for 20 business days, that it must be non-discriminatory, and that each person tendering must be paid the highest price paid during the offer period.[53]

iii. Fiduciary duties and the significance of due process

Historically, freezeout mergers (as the primary method of going private) were not always as easy as today. Courts sometimes adjudicated that a freezeout transaction must have a colorable business purpose (besides eliminating the minority).[54] The "business purpose" requirement was abandoned in Delaware in *Weinberger v. UOP*.[55]

Today, a going private transaction in the form of a freezeout merger is typically negotiated between the acquirer and an independent committee negotiating on behalf of minority shareholders.[56] The reason is fiduciary duties, specifically the duty of loyalty. Given that the controlling shareholder has the power to push the transactions with its voting power, such a transaction is

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[48] SECURITIES PRACTICE PORTFOLIO SERIES, *supra* note 37, II.D; *see also* Rule 12g5-1 (definition of held of record).

[49] Note, however, that the published balance sheet based on GAAP is not necessarily determinative for whether a company's capital is impaired. *E.g.*, Klang v. Smith's Food & Drug Centers, Inc., 702 A.2d 150 (Del. 1997); *see also* BAYLESS MANNING & JAMES J. HANKS, LEGAL CAPITAL 194 (4th ed. 2013) (discussing how the Model Business Corporation Act allows the use of accounting principles "reasonable under the circumstances").

[50] DGCL § 244(b) prohibits a reduction of capital when the firm's assets after the reduction are not sufficient to pay the corporation's debt. In this situation, it is therefore not possible to retire shares (§ 243(c)), which means that the firm also cannot repurchase them. On the discussion, *see* DAVID A. DREXLER, LEWIS S. BLACK JR. & A. GILCHRIST SPARKS III, 1 DELAWARE CORPORATION LAW AND PRACTICE § 19.01 (2022).

[51] Fried, *supra* note 12, at 142.

[52] Fried, *id.*, at 143.

[53] Rule 13e-4(f)(1)(i), (3), (8).

[54] Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977) (ruling that a long-form merger is improper if its sole purpose is to freeze out minority shareholders).

[55] Weinberger v. UOP, Inc., 457 A.2d 701, 715 (Del. 1983).

[56] Subramanian, *supra* note 37, at 804.

inherently conflicted. By default, the Delaware courts would apply the "entire fairness" standard to such a transaction.[57] In this context, "fairness" means a combination of fair dealing and fair price.[58] The defendants (i.e., the directors and the controlling shareholder) have the burden of proof to show entire fairness.[59] Even with a controlling shareholder present, case law has held that approval by an independent committee (which must fulfill certain requirements) or informed approval by a majority of disinterested minority shareholders can shift the burden of proof.[60] In recent years, the courts have gone even further: In *Kahn v. MFW*, the Delaware Supreme Court found that approval of both an independent committee *and* the majority of minority shareholders can give the transaction the protection of the business judgment rule. To qualify, a certain number of conditions must be met. The business judgment rule applies "if, but 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 stockholders;

(ii) the Special Committee is independent;

(iii) the Special Committee is empowered to select its own advisors freely 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."[61]

This case is often understood as part of a broader trend in Delaware jurisprudence reducing substantive judicial scrutiny of transactions by permitting boards to structure the decision-making process pursuant to a process that facilitates arm's length negotiation and deference to market actors.[62] If a well-informed committee negotiates the transactions and well-informed stockholders approve it, it will receive the benefit of the business judgment rule, meaning that "the claims against

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[57] *E.g.*, Andrew R. Brownstein, Andrew J. Nussbaum et al., Going Private Guide (August 2022), in DOING DEALS 2023: THE ART OF M&A TRANSACTIONAL PRACTICE 359, 379 (Practicing Law Institute 2023).

[58] Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983); *e.g.*, Cede & Co. v. Technicolor, Inc. , 634 A.2d 345, 361 (Del. 1983), modified, 636 A.2d 956 (Del. 1994); Wiegand v. Berry Petroleum Co. , C.A. No. 9316 (Del. Ch. Mar. 27, 1991).

[59] *E.g.*, Citron v. E. I. duPont de Nemours & Co. , 584 A.2d 490, 499–500 (Del. Ch. 1990); Cinerama, Inc. v. Technicolor, Inc. , 663 A.2d 1156 (Del. 1995); Kumar v. Racing Corp. of Am., Inc. , C.A. No. 12039 (Del. Ch. Apr. 26, 1991); Sealy Mattress Co. of N. J. v. Sealy, Inc. , 532 A.2d 1324 (Del. Ch. 1987). In re MultiPlan Corp. S'holders Litig., 268 A.3d 784, 792 (Del. Ch. 2022); *see* R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 9.56 (4th ed. 2021).

[60] Kahn v. v. Lynch Commc'n Sys., Inc., 669 A.2d 79 (Del. 1995).

[61] Kahn v. M&F Worldwide Corp., 88 A.3d 635, 645 (Del. 2014). *But see* In re Dell Techs. Inc. Class V S'holders Litig, C.A. No. 2018-0816-JTL (Del. Ch. June 11, 2020) (finding that the special committee was not sufficiently empowered to negotiate because it was offered only two proposals while a third one was eliminated from consideration).

[62] *E.g.*, Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, 94 NYU L. REV. 263, 285 (2019).

the defendants must be dismissed unless no rational person could have believed that the merger was favorable to […] minority stockholders."[63]

iv. Appraisal as an alternative mechanism to review price

In addition to a lawsuit based on fiduciary duties, minority shareholders in a freezeout may also have the option of appraisal. Appraisal means that shareholders in a company constituent to a merger can have the compensation valued by the court and a corresponding amount of cash. The conditions governing the availability of appraisal rights are complex and hard to explain from a policy perspective. In Delaware, appraisal rights are, as a general rule, not available for shares of a publicly traded corporation.[64] However, an exception applies when stockholders are to receive compensation in a form other than shares of a surviving entity or (broadly speaking) of a publicly traded corporation.[65] Thus, in a going-private merger stockholders can request appraisal if they receive stock of a privately held parent corporation or cash. Stockholders cashed out in a short-form merger can request appraisal regardless of the form of compensation.[66] However, in Delaware, appraisal is not available for other transactions that might be used for going private, such as a reverse stock split, sale of all assets, or liquidation.[67]

The procedure to receive appraisal is cumbersome.[68] Stockholders must submit a written demand for appraisal before the shareholder meeting and then vote against the merger.[69] Only stockholders who follow this process will receive appraisal, which makes the instrument relatively toothless because the other minority shareholders will receive the compensation provided in the merger agreement. Unlike a class action based on fiduciary duty violations, appraisal does not have what Europeans would call an *erga omnes* effect.[70] Another disadvantage is that the fair value established by the court can occasionally be lower than the price set in the merger agreement (whereas in a fiduciary duty action, shareholders can only gain).[71] In the early and mid-2010s, appraisal rights still became commonly used by strategic investors who bought the stock of companies where a merger was announced ("appraisal arbitrage").[72] Part of the reason was the high

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[63] Kahn v. M&F Worldwide Corp., 88 A.3d 635, 654 (Del. 2014).

[64] DGCL § 262(b)(1).

[65] DGCL § 262(b)(2).

[66] DGCL § 262(b)(3). A short-form merger under § 253 allows a 90% controlling stockholder to merger with the subsidiary without requiring a stockholder vote.

[67] Hariton v. Arco Electronics, Inc., 188 A.2d 123 (Del. 1963) (declining to apply a "de facto merger" doctrine to apply appraisal rights in a sale of all assets).

[68] Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1560-1566 (2015) (summarizing critiques of appraisal).

[69] DGCL § 262(d)(1).

[70] Korsmo & Myers, *supra* note 68, at 1562 ('shareholders seeking judicial appraisal must "opt-in."').

[71] BALOTTI & FINKELSTEIN, *supra* note 59, § 9.62.

[72] Korsmo & Myers, *supra* note 68, at 1566-72.

interest rate (relative to low interest rates at the time) used to calculate the appraised amounts by compounding.[73]

In an appraisal procedure, the valuation is decided by the court. Under DGCL § 262(h), *"the Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors."* This means that going concern value is considered, but not normally synergies. The court is free to adopt valuations provided by the parties' expert witnesses. The Delaware courts famously abandoned the previous "Delaware block method" in *Weinberger* (1983) and instead required the use of methods accepted in the "financial community."[74]

In recent years, appraisal has become less attractive in part because of cases relating to valuation. While the Delaware Supreme Court stopped short of establishing a presumption in favor of a negotiated deal price, the court has stated that "economic principles suggest that the best evidence of fair value [is] the deal price, [if] it result[s] from an open process, informed by robust public information, and easy access to deeper, non-public information, in which many parties . . .had a chance to bid."[75] Other factors likewise play a role, including "the presence of competing bidders, the length of time accompanying the negotiations, the publicity surrounding the negotiations, [and] the restrictions of any deal protection provisions."[76]

v. The SEC's "going private" rule

Disclosure requirements preceding a voluntary delisting are governed by the SEC's "going private" rule (Rule 13e-3).[77] Rule 13e-3 applies to transactions or series of transactions involving (a) purchases of equity securities, (b) tender offers, and (c) proxy solicitation relating to certain types of transactions (such as mergers and reverse stock splits) by the issuer and its affiliates. These transactions must have a reasonable likelihood of an effect or purpose of causing the class of equity securities to be eligible for delisting or deregistration (among other things).[78]

The issuer must file a so-called Schedule 13E-3, which includes a comprehensive list of disclosures, including the identity and background of the issuer and affiliates initiating the transactions, terms of the transaction, contracts relating to the transaction, post-transactions plans, and the

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[73] JAMES D. COX & THOMAS LEE HAZEN, BUSINESS ORGANIZATIONS LAW (5th ed. 2020) 647.

[74] Weinberger v. UOP, Inc., 457 A.2d 701, 712–13 (Del. 1983). The Delaware Block Method employed a weighted average of discounted earnings, market value, and asset value.

[75] DFC Global Corporation v. Muirfield Value Partners, L.P., 172 A.3d 346, 349 (Del. 2017); see also Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., 177 A.3d 1, 21 (Del. 2017).

[76] COX & HAZEN, *supra* note 73, at 647.

[77] Rule 13e-3 is based on § 13(e) of the Securities Exchange Act, which makes it unlawful for issuers to purchase its own securities in contravention of rules and regulations issued by the SEC.

[78] Rule 13e-3(a)(3).

source of funds, and the purpose of the transaction, managers' belief about the fairness of the transaction.[79] While this is a mere disclosure provision that will not result in substantive scrutiny of the issuer's plans or the merits of the purpose of delisting, the provision is sanctioned with antifraud rules that could result in enforcement actions and civil and criminal liability. The timing of the disclosure depends on the type of the planned transaction; it may have to be made in conjunction with the planned tender offer or proxy solicitation but in no event later than 20 days in advance of, e.g., an open market purchase.[80]

Rule 13e-3(b) and (c) explicitly prohibit fraudulent, deceptive, and manipulative acts or practices in connection with a going private transaction subject to this rule by the issuer and its affiliates and to make untrue material statements or to omit a material fact to make the statement misleading.[81] These subsections parallel other antifraud rules under the Securities Exchange Act. The SEC has the authority to take enforcement actions against such violations and can impose a variety of sanctions. In a notable case involving Revlon, minority shareholders were offered preferred stock in place of their common stock, which would have allowed the company to reduce its debt to its controlling shareholder. The trustee of Revlon's 401(k) plan solicited an advisory opinion from a financial advisor that found that consideration was inadequate (which meant that beneficiaries of the plan could not tender their stock). The issuer took various measures to keep this information from its independent board members and minority shareholders. Revlon and the SEC settled these charges with a cease-and-desist order and a fine of USD 850,000.[82]

In addition, false and misleading disclosures can form the basis of a private lawsuit. The Court of Appeals for the 6th Circuit has recognized a private right of action under § 13(e) and Rule 13e-3, meaning that minority shareholders could bring a lawsuit (potentially a class action) on this basis.[83] In addition, the issuer may have concurrently violated Rule 10b-5 (false or misleading disclosures concerning the purchase and sale of a security) and Rule 14a-9 (false or misleading statements in a proxy statement), which would also entail a liability risk. As in 14a-9 cases, plaintiffs in a 13e-3 case sometimes do *not* have a remedy under securities law if they still have one under state corporate law.[84] This is because a misleading disclosure will (depending on the applicable state law) mean that plaintiffs have a fiduciary duty claim (as discussed above in section iii).

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[79] *See, e.g.*, THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 11:49 (June 2023). Rule 13e-3 also applies when a stock may subsequently be traded on a different exchange. Shamrock Associates v. Horizon Corp., 632 F. Supp. 566, 573.

[80] Rule 13e-3(f)(i).

[81] Subsection (b) applies to issuer subject to § 12 of the Securities Exchange Act, which subsection (c) refers to issuers governed by § 15(d).

[82] In the Matter of Revlon, Inc., June 13, 2013, 2013 SEC LEXIS 1693, 2013 WL 2641116; *see also* SEC Press Release 2013-110; *To Perelman's Failed Revlon Deal, Add Rebuke From S.E.C.*, N.Y. TIMES, June 13, 2013.

[83] Howing Co. v. Nationwide Corp., 826 F.2d 1470 (6th Cir. 1987).

[84] Howing Co. v. Nationwide Corp., 972 F.2d 700 (6th Cir. 1991) (finding that the plaintiffs had lost their appraisal remedy under Ohio law and therefore had a 13e-3 claim).

After all, the freezeout merger will still be assessed under the entire fairness test. Given that there is still a state law remedy, the violation of federal law lacks causation for an injury to plaintiffs.[85]

C. Delisting and deregistration under federal securities law

i. Legal basics

The securities law establishes procedures to remove securities from listing and for deregistration. Securities Exchange Act § 12(d), sentence 2, provides that "[a] security registered with a national securities exchange may be withdrawn or stricken from listing and registration in accordance with the rules of the exchange and, upon such terms as the Commission may deem necessary to impose for the protection of investors, upon application by the issuer or the exchange to the Commission." The SEC has adopted Rule 12d2-2, which governs "removal from listing and registration."[86] It requires that "the issuer must comply with all applicable laws in effect in the state in which it is incorporated and with the national securities exchange's rules governing an issuer's voluntary withdrawal of a class of securities."[87] Rule 806.02 of the NYSE Listed Company Manual stipulates that an issuer may delist "after its board approves the action." The issuer must furnish the Exchange with the board resolution authorizing the delisting and comply with the requirements of Rule 12d2-2(c).

ii. Disclosure and notification requirements

As a first step corresponding to what is known in Europe as an ad-hoc disclosure, the registrant must file a Form 8-K when the board of directors (or a committee or officers) "has taken definitive action to cause the listing of a class of its common equity to be withdrawn […]."[88] The firm has four business days to submit the filing.[89] In other words, the initial decision to trigger a going private process must be publicized.

The delisting process has two steps: first, written notice to the Exchange and information to the public, and second, it must file Form 25 to the SEC as an application to delist a class of securities. Under Rule 12d-2(c)(2)(ii), the issuer must "provide written notice" to the exchange "no fewer than 10 days" prior to filing the form. Contemporaneously, "the issuer must publish notice of its intention to withdraw along with its reasons for such withdrawal, via a press release and" must post the notice on its website.[90] This written notice must "set forth a description of the security involved, together with a statement of all material facts relating to the reasons for withdrawal from listing and/or registration." The issuer must concurrently provide Form 25 to NYSE.[91]

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[85] *See generally* Virginia Bankshares, Inc. v. Sandberg, 112 S. Ct. 39 (1991).

[86] 17 C.F.R. § 240.12d2-2.

[87] Rule 12d2-2(c)(2)(i).

[88] Form 8-K, Item 3.01(d). *See generally* Rule 13a-11 (establishing that issuers must file 8-K reports).

[89] Form 8-K, General Instructions, B.1.

[90] Rule 12d2-2(c)(2)(iii).

[91] Rule 806.02.

iii. Role of the SEC

The role of the SEC in the delisting process is relatively passive. During the 1970s, the SEC proposed a Rule 13e-2 governing going-private transactions that would have enabled it to prohibit a transaction that would be unfair to shareholders. In light of controversy about whether the SEC had the statutory authority to enact such a rule, the proposal was never enacted.[92] Rule 13e-3, enacted in 1979 (see above section B.v) only requires *disclosures*.

§ 12(d) delegates the authority to determine the process and conditions for delisting to the SEC, both in general and in individual cases. However, By default, delisting is effective ten days after filing Form 25.[93] The SEC may postpone the effectiveness "to determine whether the application on Form 25 to strike the security from registration under section 12(b) of the Act has been made in accordance with the rules of the exchange, or what terms should be imposed by the Commission for the protection of investors."[94] While the most important reporting requirements end with delisting, the registration of securities under section 12(b) remains effective for 90 days after filing.[95]

This reflects a change compared to how delisting worked in the past. Before 2005 amendments to Rule 12d2-2 came into force in 2006, the SEC needed to issue an order granting a delisting application.[96] Today, Form 25 becomes effective if the Commission remains passive. In principle, the SEC can impose additional conditions for the protection of investors.[97] Reportedly, the SEC rarely intervenes at this stage.[98]

iv. Deregistration and suspension of reporting requirements

As previously discussed, a public listing suspends the disclosure requirements for issuers registered under § 12(g) or required to file reports under § 15(d). While disclosure requirements under this section are dormant during a listing on a national securities exchange, they reemerge with delisting: Reporting requirements remain in place if the issuer has a 12(g) registration or if the firm would be required to register under § 12(g).[99]

Consequently, an issuer cannot escape disclosure requirements if it is above the thresholds of that provision. § 12(g) applies when the issuer has total assets of more than USD 10M and more

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[92] On the historical development, *see* HAZEN, *supra* note 79, § 11:51; Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L. J. 2, 9-10 (2005).

[93] Rule 12d2-2(d)(1).

[94] Rule 12d2-2(d)(3).

[95] Rule 12d2-2(d)(2).

[96] Securities and Exchange Commission, Removal From Listing and Registration of Securities Pursuant to Section 12(d) of the Securities Exchange Act of 1934, 70 FR 42456-57.

[97] *See* Cavanagh Cmtys. Corp. v. New York Stock Exch., 422 F. Supp. 382, 384 (S.D.N.Y. 1976) ("once the security is approved for listing, neither the exchange nor the issuer may delist the security without SEC approval").

[98] Bakst et al., *supra* note 22.

[99] Rule 12d2-2(d)(6).

than 2000 shareholders of record (or more than 500 shareholders of record who are not accredited investors). To deregister from section 12(g), an issuer can use Form 15 if it has fewer than 300 shareholders, or fewer than 500 shareholders and less than $10 million in assets.[100] According to the SEC, Form 15 can only be filed after Form 25 has become effective.[101] Form 15 is normally effective 90 days after filing;[102] however, disclosure requirements are suspended immediately. If deregistration is withdrawn or denied, the issuer has 60 days to file all reports that would have been required.[103]

If the issuer has registered securities under the Securities Act, it is subject to disclosure requirements under § 15(d) of the Exchange Act.[104] This requirement (which may apply in parallel to § 12(g)) can be avoided in two ways. First, it is automatically suspended if the registered class of securities has less than 300 shareholders of record (except in the year when the registration statement became effective).[105] To notify the SEC, the issuer must still file Form 15 within 30 days of the year when the suspension is effective.[106]

Second, an issuer can suspend the reporting requirements of § 15(d) pursuant to Rule 12h-3. There are slightly different requirements than under the statutory suspension. Most of all, under Rule 12h-3(b)(1)(i), what matters is the number of holders of record at any time (rather than at the beginning of the year). Alternatively, reporting can be suspended if there are fewer than 500 holders of record and the issuer's assets have not exceeded $10 million on the last day of the preceding three fiscal years.[107] Because these thresholds are higher, companies typically rely on Rule 12h-3.[108] Under both ways of suspending § 15(d) (the statutory method and Rule 12h-3), the § 15(d) registration is only suspended: it automatically reemerges if the firm exceeds the threshold[109] (given that the registration statement remains effective).

One difficulty with the thresholds based on ownership of securities is the definition of "held of record."[110] In 1964, when § 12(g) was added, looking at holding records was a reasonable way

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[100] Rule 12g-4(a)(1), (2). There are different thresholds for banks and savings and loans holding companies.

[101] SEC, Exchange Act Forms, at https://www.sec.gov/divisions/corpfin/guidance/exchangeactforms-interps.htm, Question 111.01 [September 30, 2008].

[102] Rule 12g-4(a).

[103] Rule 12g-4(b).

[104] Disclosure requirements under §15(d) are suspended as long as a security is registered under §12 (including § 12(g)). In other words, §15(d) is captures only forms that are neither traded on a national securities exchange nor exceed the thresholds of § 12(g), but have had an effective Securities Act registration statement.

[105] Securities Exchange Act, § 15(d)(1).

[106] Rule 15d-6.

[107] Rule 12h-3(b)(1)(ii). The thresholds are higher for banks, savings and loans holding companies, and bank holding companies.

[108] D. Mark McMillan (ed.), 1 SECURITIES PRACTICE GUIDE § 9.05 (2023).

[109] SEC, Exchange Act Forms, at https://www.sec.gov/divisions/corpfin/guidance/exchangeactforms-interps.htm, Question 153.02 [September 30, 2008]

[110] *See* Rule 12g5-1(a) ("securities shall be deemed to be 'held of record" by each person who is identified as the owner of such securities on records of security holders maintained by or on behalf of the issuer [..]"). While subsection (b)(3)

of gauging whether a class of securities had broad public ownership, but this is no longer true today.[111] Today, most securities are held by the Depositary Trust Company (DTC), a clearinghouse for securities transactions, on behalf of broker-dealers. The "street name" of the holder of record is thus not the beneficial owner (or investor) but the broker-dealer.[112] This is typically not an issue for growing startups that are at risk of exceeding the threshold and being required to register under § 12(g) because their investors and employee-stockholders will normally be "holders of record." However, for publicly traded firms seeking to delist, it results in an undercount of stockholders for the purpose of the numerical thresholds.[113] It is a significant concern that a firm may de facto have public ownership and be traded in the OTC market without being subject to disclosure requirements under the securities law any longer. Empirical research has found that going dark is associated with negative cumulative abnormal returns.[114] Given the growth of online platforms facilitating investment outside of traditional securities markets, we now have a situation comparable to the period before the introduction of § 12(g), where the disclosure of information is not always assured.[115] Revising the "held of record" definition is currently on the SEC's rulemaking agenda.[116]

Rule 12h-6 facilitates deregistration for foreign private issuers.[117] Before the Rule was enacted in 2007, it was difficult to escape registration under sections 12(g) and 15(d) because showing that they had fewer than 300 US shareholders of record was often difficult.[118] Under the new rule, a foreign private issuer qualifies for deregistration if the average daily trading volume in the US represents five percent or less of their worldwide trading volume over 12 months (irrespective of the number of US shareholders). However, such an issuer may still show that they have fewer than 300 US shareholders.

Under § 25(1) of the Securities Exchange Act, a "person aggrieved by a final order of the [SEC] may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business […] within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part." The SEC

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addresses circumvention intended to evade registration requirements under §§ 12(g) and 15(d), this does not capture the conventional holding of securities in the form of a "street name."

[111] Langevoort & Thompson, *supra* note 10, at 355-357.

[112] SECURITIES AND EXCHANGE COMMISSION, REPORT ON AUTHORITY TO ENFORCE EXCHANGE ACT RULE 12G5-1 AND SUBSECTION (B)(3) 8-10 (2012).

[113] Usha Rodrigues, *The Once and Future Irrelevancy of Section 12(g)*, 2015 U. ILL. L. REV. 1542 n.104.

[114] Leuz et al, *supra* note 23, at 198-199; *see also* Macey et al, *supra* note 30, at 700-701 (finding a reduced stock price associated with liquidity cost).

[115] Langevoort & Thompson, *supra* note 10, at 351.

[116] For an analysis of statutory constraints and recent reform attempts, see Alexander I. Platt, *Legal Guardrails for a Unicorn Crackdown*, 120 MICH. L. REV. ONLINE 89 (2022).

[117] *See* Langevoort & Thompson, *id.*, at 360.

[118] Alexa Belonick, *§ 4.01 Registration of Securities Under the Securities Exchange Act of 1934*, (3)(b)(vi), in MATTHEW BENDER FEDERAL SECURITIES EXCHANGE ACT OF 1934 (June 2024).

may also order a hearing to decide about deregistration applications (sometimes upon the insistence of shareholders).[119]

IV. Involuntary Delisting

A. Reasons for delisting

Delistings and suspensions of trading can be initiated by both the SEC and the stock exchange. § 12(d) of the Securities Exchange Act, among other things, provides that a "security registered with a national securities exchange may be […] stricken from listing and registration in accordance with the rules of the exchange and, upon such terms as the Commission may deem necessary to impose for the protection of investors, upon application by the issuer or the exchange to the Commission."

In addition, § 12(j) authorizes the SEC "to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security" if the SEC has found that "the issuer […] has failed to comply with any provision of [the Securities Exchange Act] or the rules and regulations thereunder." The SEC must notify the issuer and give it the opportunity for a hearing and may then issue an order to suspend or revoke the registration (and hence the listing) of a security. As commentators have pointed out, delisting is a harsh sanction and typically unnecessary, given that the SEC has other enforcement tools available.[120] Typically, orders under this section have led to compliance rather than delisting.[121]

Rule 12d2-1(a) permits the Exchange to suspend a security from trading "in accordance with its rules." The Exchange must "promptly notify the Commission of any such suspension, the effective date thereof, and the reasons therefor."[122] NYSE rules provide that securities *will be suspended or struck* from the list if they fall below specific quantitative and qualitative criteria.[123] These include the number of total stockholders, trading volume, public float, market capitalization, and stock price.[124]

The Exchange also has the *discretion* to evaluate the issuer's continued listing, among other things, in cases of reduced operating assets and the scope of operations.[125] The issuer's intention

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[119] *See* In the Matter of Bacardi Corporation, Exchange Act Release No. 34-27255 (Sept. 18, 1989) and Administrative Proceeding File No. 3-7019 (Feb. 15, 1990) (hearing before an administrative law judge upon the insistence of a shareholder had set up 238 trusts to keep Bacardi above the share ownership threshold); Order Granting an Application of BF Enterprises, Inc. under the Securities Exchange Act of 1934, Exchange Release No. 34-66541 (March 14, 2012) (granting an exemption from § 12(g) reporting because of the low number of beneficial owners).

[120] Loss & Seligman § 6.B.3.b.

[121] Loss & Seligman § 6.B.3.b.

[122] The SEC also the power to suspend trading for a period not exceeding 10 business days under Section 12(k) because of market emergencies.

[123] NYSE Rule 801.00.

[124] NYSE Rules 802.01A, 802.01B, 802.01C.

[125] NYSE Rule 802.01D.

to enter bankruptcy and liquidation gives NYSE the discretion to suspend and delist the issuer.[126] The same applies when the issuer violates the listing agreement with the NYSE.[127] Finally, the failure to file the financial reports under securities law (such as annual 10-K reports, quarterly 10-Q reports, both of which include financial statements) and severe problems with these reports as well as the auditor's report also set specific procedures in motion that can result in an issuers suspension or delisting.[128] This means that the Exchange, in cases of the violation of listing rules, does not necessarily have to delist the issuer. In many cases, the mere threat of delisting will coerce compliance.

B. Process

Under Rule 12d2-2(b), the Exchange may file an application on Form 25 to delist a class of securities in accordance with its rules. These must provide for notice of the issuer of the Exchange's decision to delist the securities, an opportunity for appeal to the Exchange's board of directors or to a committee designated by the board, and public notice of the final determination to delist the securities by a press release and posting notice on the Exchange's website. This notice must be "disseminated no fewer than ten days before the delisting becomes effective." The delisting is effective ten days after the filing of Form 25.[129] The Exchange must promptly deliver a copy of Form 25 to the issuer.[130] The issuer must file an 8-K report to notify public of such a delisting action.[131]

As mentioned above in section III.C.iii, a delisting application submitted on Form 25 will be automatically effective since the 2006 amendments to Rule 12d2-2. Before this change, the SEC had to issue an order of delisting. This is no longer true today. It may, however, decide to intervene. The SEC may postpone the effectiveness "to determine whether the application on Form 25 to strike the security from registration under section 12(b) of the Act has been made in accordance with the rules of the exchange, or what terms should be imposed by the Commission for the protection of investors."[132]

C. Recourse

A person aggrieved by the Exchange's delisting decision (such as an issuer) can petition the SEC to review the Exchange's decision.[133] However, as Min and Jin explain, "[u]pon such appeal, the SEC is to uphold the sanction if it finds that (1) the facts forming the basis for the sanction exist, (2) the sanction is in accordance with the rules of the exchange, and (3) such rules were

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[126] NYSE Rule 802.01D.

[127] NYSE Rule 802.01D.

[128] NYSE Rule 802.01E.

[129] Rule 12d2-2(d)(1).

[130] Rule 12d2-2(d)(2).

[131] Form 8-K, Item 3.01.

[132] Rule 12d2-2(d)(3).

[133] Securities Exchange Act, § 19(d). *See* Securities and Exchange Commission, Removal From Listing and Registration of Securities Pursuant to Section 12(d) of the Securities Exchange Act of 1934, 70 FR 42459.

applied in a manner consistent with the purposes of the Exchange Act."[134] Similarly, the federal courts (in some older cases) have found that the Exchange followed its own rules in making the delisting decision and whether additional terms should be imposed for the protection of investors.[135] Consequently, the SEC will not perform a substantive review of the Exchange's exercise of discretion, making an appeal unlikely to succeed. However, the SEC may overturn an exchange decision based on a finding that the (factual) record on which the Exchange based its delisting decision. For example, in a case involving a company called *Cleantech*, the SEC found that the record did not support the fact that the issuer had withheld material information from NASDAQ's staff that was considering its application to list its shares.[136]

As discussed above in section III.C.iv, the SEC's determination can be further reviewed by the U.S. Court of Appeals.[137] New York courts have, therefore, dismissed a company's suit against the NYSE's decision to delist it.[138] An involuntarily delisted firm's securities may continue to trade in the OTC market.

In summary, involuntary delisting (as well as the threat of it) is an essential sanction in the arsenal of the SEC and stock exchanges to enforce their rules. In their survey of 2019 8-K disclosures, Min and Jin found 26 instances of delistings from NYSE and 91 from NASDAQ.[139] In 84 cases, the reason was a violation of the Exchange's quantitative criteria, in 10 cases delinquency in filing periodic reports, in one case a persistent violation of corporate governance requirements,[140] and 22 times other violations such as failure to pay fees or bankruptcy.[141] Macey, O'Hara and Pompillo report between 18 and 65 involuntary delistings from NYSE each year between 1998 and 2004, and between 64 and 489 on NASDAQ.[142]

V. Conclusion

The overall picture of the law governing delisting in the United States is complex. Federal securities laws govern the delisting process, but going private transactions are largely controlled by state corporate law. In the going-private process, investors are reasonably well-protected by lawsuits based on fiduciary duties. While the Delaware courts have moved away from substantive

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[134] Min & Jin, *supra* note 29, at 163. See in detail Securities Exchange Act, § 19(e)(2), (f).

[135] Atlas Tack Corp. v. N.Y. Stock Exch., 246 F.2d 311 (1st Cir. 1957); Exch. Buffet Corp. v. N.Y. Stock Exch., 244 F.2d 507, 510 (2d Cir. 1957) (also pointing out that the SEC could have challenged unreasonable rules when they were enacted); Belonick, *supra* note 118, § 4.01.

[136] In Re Cleantech Innovations, Inc, 2013 SEC LEXIS 1998. The SEC subsequently approved NASDAQ's delisting of Cleantech successor firm. 6D Global Technologies, Inc, 2017 SEC LEXIS 2839.

[137] Securities Exchange Act § 25(1). *See also* Cavanagh Cmtys. Corp. v. N.Y. Stock Exch., 422 F. Supp. 382 (S.D.N.Y. 1976).

[138] Fifth Ave. Coach Lines, Inc. v. N.Y. Stock Exch., 26 A.D.2d 49, 270 N.Y.S.2d 852 (App. Div. 1st Dept. 1966).

[139] Min & Jin, *supra* note 29, at 179.

[140] This could include failure to constitute the board or required committees, failure to follow rules requiring shareholder approval.

[141] Min & Jin, *supra* note 29, at 180-181.

[142] Macey et al, *supra* note 30, at 691.

review as long as the decision-making process is sound, this has probably made planning easier while not undercutting the protection of minority shareholders too much. The fact that securities law still applies to delisted firms in many cases sets incentives to freeze out the minority against cash compensation.

Securities law adds an additional layer of complexity, with the distinction between delisting and deregistration as an extra step. It remains to be seen whether issue of firms with some public ownership "going dark" and avoiding the securities law entirely will be addressed by the SEC in the coming years.

Involuntary delisting is, to a large extent, subject to the discretion of the Exchange, given that Form 25 becomes automatically effective and given that the SEC reviews the delisting decision mainly for consistency but does not review the Exchange's exercise of discretion. Still, firms and investors seem to be adequately protected, given the possibility of review by the SEC and federal courts.

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