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# Delaware Developments

# FREEZEOUT MERGER REGULATION: AN SEC RULE JOINS STATE EFFORTS

In a corporate freezeout transaction[1] controlling parties exclude minority shareholders from further equity participation in the enterprise by utilizing one of several statutorily authorized methods.[2] The inherently

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[1] This note will use the term "freezeout" to refer to corporate transactions in which controlling shareholders of a publicly held corporation forcibly deprive minority shareholders of future equity participation in the firm. Other terms such as going private, take-out, squeeze-out and cash-out also refer to such transactions although such words occasionally have more restricted meanings. *See, e.g.*, Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354, 1365-70 (1978) [hereinafter cited as Brudney & Chirelstein].

[2] *See* M. LIPTON & E. STEINBERGER, 1 TAKEOVERS AND FREEZEOUTS § 9.1, at 419 (1978) [hereinafter cited as M. LIPTON & E. STEINBERGER]. Controlling shareholders may seek to freeze out minority shareholders for a variety of reasons. Some freezeouts are actually the planned second step of a merger between previously unrelated firms. *See* text accompanying notes 162-64 *infra*. Other freezeouts are corporate efforts to withdraw a security from the public market. *See, e.g.*, Tanzer v. International Gen'l Indus. Inc., 402 A.2d 382, 392-93 (Del. Ch. 1979). By ending public trading, the company may realize financial savings by suspending shareholder relation and public reporting activities. Additionally, ending public trading will lessen scrutiny by the SEC and other government agencies. Other reasons for going private include tax benefits and greater managerial flexibility in dealing with affiliates and subsidiaries. *See* Securities Exchange Act Release No. 34-14185, 42 Fed. Reg. 60,900 (1977), *reprinted in* [1977] 429 SEC. REG. & L. REP. (BNA) E-1 [hereinafter cited as 1977 Release]. Depressed stock market conditions during recent recessions have made going private transactions financially advantageous. *See Id.* at E-2; Brudney, *A Note on Going Private*, 61 VA. L. REV. 1019, 1019 (1975) [hereinafter cited as Brudney]. Companies repurchasing stock during these recessions typically had gone public during the stock market boom in the mid and late 1960's. *See, e.g.*, Securities & Exch. Comm'n v. Parklane Hosiery Co., 558 F.2d 1083, 1085 (2d Cir. 1977) (company went public at $9.00 per share in 1968 and sought to freeze out the minority in 1974 at $2.00 per share).

The means of effecting a freezeout depend on the controlling shareholder's degree of control and applicable state corporation laws. *See* M. LIPTON & E. STEINBERGER, *supra* § 9.2 at 422-24. Under one common method, the controlling majority organizes a new, wholly owned corporation and then merges the target company into the new corporation. *See, e.g.*, Singer v. Magnavox, 380 A.2d 969, 971 (Del. 1977). In some states the majority may freeze out the minority by a reverse stock split in which each outstanding share of the target company is converted into a small fraction of a share. Under many states' law each minority shareholder must then accept cash for the fractional share. *See, e.g.*, Teschner v. Chicago Title & Trust Co., 59 Ill. 2d 452, 322 N.E.2d 54 (1979) *appeal dismissed*, 422 U.S. 1002 (1975). Another method of eliminating minority shareholders is dissolution of the firm either by distribution of assets to the shareholders or by a sale of assets and distribution of the proceeds to the shareholders. *See, e.g.*, Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941), *cert. denied*, 316 U.S. 675 (1942).

While minority shareholders have no choice but to accept a freezeout, *see* note 3 *infra*, the transaction may actually benefit some minority shareholders. The offered price usually exceeds current market price for the stock. Additionally, because a small group of shareholders controls the bulk of the stock, the market for the stock may be thin or virtually nonexistent. Thus a freezeout may allow the minority shareholder an opportunity to extricate

coercive nature of freezeout transactions[3] has attracted significant attention from courts,[4] commentators,[5] and the Securities and Exchange Commission.[6] Delaware courts recently have considered the appropriate bounds for judicial scrutiny of freezeouts.[7] Meanwhile, the SEC has promulgated rules requiring extensive disclosure of information in freezeouts.[8] The recent developments raise questions concerning the respective rights of controlling and minority shareholders in a corporation.[9] The initial intervention of federal rulemaking into freezeouts raises the possibility of conflict between federal and state regulation.[10]

### A. *Delaware Developments*

In Delaware, present standards for scrutiny of freezeout transactions derive from the 1977 Delaware Supreme Court decision in *Singer v. Magnavox*.[11] In that landmark case, the court sought to eliminate transactions in which corporate majorities took advantage of their controlling position and of favorable market prices to freeze out the minority.[12] The court, relying on equity precedents, held that full compliance with statutory provisions, including the long form merger statute,[13] does not absolve

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himself from an undesirable investment. *See "Going Private" Transactions Defended at SEC Beneficial Ownership Hearings*, [1974] 280 SEC. REG. & L. REP. (BNA) A-8, A-8 to 9; Letter from ABA Comm. on Fed. Reg. of Sec. to SEC, at 15-16 (Feb. 24, 1978) (SEC File No. 57-729) [hereinafter cited as 1978 ABA Comment Letter].

[3] Corporate freezeouts usually leave targeted minority shareholders with no option but to surrender stock at the majority's price, even though the controlling majority follows statutorily mandated procedures. *See* Brudney & Chirelstein, *supra* note 1, at 1356-57; Note, *An Appraisal of Authority for the Fairness Standard Contained in the SEC's Proposed "Going-Private" Regulations*, 28 EMORY L.J. 111, 115 (1979) [hereinafter cited as *Appraisal of Authority*]. In most freezeouts requiring stockholder approval, the surviving majority controls sufficient votes to guarantee approval regardless of the vote of the frozen out minority. *See* note 2 *supra*; text accompanying notes 106-18 *infra*. In other going private transactions, such as short form mergers, see note 27 *infra*, and reverse stock splits the majority does not need stockholder approval. Thus the parties effecting the freezeout can control both the terms offered shareholders, and the means of completing the transaction.

[4] *See, e.g.*, Sante Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Roland Int'l Corp. v. Najjar, 407 A.2d 1032 (Del. 1979); Berkowitz v. Power/Mate Corp., 135 N.J. Super. 36, 342 A.2d 566 (Ch. Div. 1975); Gabhart v. Gabhart, 370 N.E.2d 345 (Ind. 1977).

[5] *See, e.g.*, Borden, *Going Private—Old Tort, New Tort or No Tort*, 49 N.Y.U. L. REV. 987, 989-1000 (1974); Brudney & Chirelstein, *supra* note 1 at 1354-76; Goldman & Wolfe, *In Response to A Statement of Corporate Freezeouts*, 36 WASH. & LEE L. REV. 683, 683-98 (1979) [hereinafter cited as Goldman & Wolfe].

[6] *See* text accompanying notes 133-84 *infra*.

[7] *See* text accompanying notes 21-132 *infra*.

[8] Securities Exchange Act Release No. 34-16075, 44 Fed. Reg. 46736 (1979), *reprinted in* [1979] 515 SEC. REG. & L. REP. E-1 (to be codified as 17 C.F.R. § 240.13e-3) [hereinafter cited as 1979 Release]; *see* text accompanying notes 153-84 *infra*.

[9] *See* text accompanying notes 128-30 *infra*.

[10] *See* text accompanying notes 201-05 *infra*.

[11] 380 A.2d 969 (Del. 1977).

[12] *See* note 2 *supra*.

[13] *See* DEL. CODE tit. 8, § 251 (1974 & Cum. Supp. 1978). Under the long form merger

a corporate majority of fiduciary duties owed to the minority.[14] Further, the court did not permit the majority to dispense with the interests of dissenting minority shareholders by use of appraisal[15] proceedings.[16] A controlling majority, under the *Singer* doctrine, must demonstrate that the merger has a valid business purpose.[17] Additionally, the terms of the transaction must be entirely fair to the excluded minority.[18]

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statute, the board of directors of each merger partner, and the stockholders of each company whose certificate of incorporation or the form of stockholder's equity will be changed or eliminated as a result of the merger, must approve the merger. *Id.*

[14] 380 A.2d at 972; *see* Schell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) (inequitable yet legal action not permissible); Guth v. Loft, Inc., 23 Del. Ch. 255, ___, 5 A.2d 503, 511 (Del. Sup. 1939) (question at issue decided upon broad considerations of corporate duty and loyalty rather than on narrow or technical grounds). *Singer* cited several cases that broadly applied fiduciary duties of controlling shareholders. 380 A.2d at 976-77; *see, e.g.*, Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, ___, 93 A.2d 107, 109-10 (Del. Sup. 1952) (majority owes minority obligation of honesty, loyalty, good faith and fairness).

[15] *See* DEL. CODE tit. 8, § 262 (Cum. Supp. 1978). In an appraisal proceeding, a court seeks to establish the true current value of stock belonging to a dissenting shareholder in a long form merger, *see* note 13 *supra*, or a frozen out shareholder in a short form merger, *see* note 27 *infra*. DEL. CODE, tit. 8, § 262; *see generally* Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 HARV. L. REV. 1453 (1966) [hereinafter cited as *Valuation of Stock*]. Notwithstanding the intent of appraisal proceedings to aid minority shareholders, a judicial appraisal is often lengthy and costly. *See* Vorenberg, *Exclusiveness of Dissenting Shareholder's Appraisal Rights*, 77 HARV. L. REV. 1189, 1201-03 (1964) [hereinafter cited as Vorenberg]. Further, an appraising court usually does not, or cannot, account for a frozen out stockholder's costs in seeking an alternate investment or for the effect of capital gains tax liability on the stockholder. *See* Brudney, *supra* note 2, at 1021; Vorenberg, *supra* at 1203-04.

[16] 380 A.2d at 977-78. *Contra* CONN. GEN. STAT. REV. § 33-373(f) (1961); PA. STAT. ANN. tit. 15 § 1515(k) (1967) (appraisal statutes are dissenting shareholders' exclusive remedy). *See also* Vorenberg, *supra* note 15, at 1207-08. The *Singer* court noted that appraisal proceedings look only at the value and not the form of the shareholder's investment. *Id.* The court indicated that appraisal proceedings therefore do not consider the entire fairness of the transaction to minority shareholders. *See* Tanzer v. International Gen'l Indus., Inc., 379 A.2d 1121, 1125 (Del. 1977) (considering fairness only in terms of offered price is too restrictive); *but see* M. LIPTON & E. STEINBERGER, *supra* note 2, § 9.3.2.2, at 441-42 (appraisal affords adequate remedy in freezeouts).

[17] 380 A.2d at 976-80. The *Singer* court did not expressly endorse the approach of other states, which have required a demonstration of valid business purpose in freezeouts. *Id.* at 976-77. *See, e.g.*, Bryan v. Brock & Blevins Co., 490 F.2d 563, 570-71 (5th Cir. 1974); Tanzer Econ. Assoc. v. Universal Food Specialties, Inc., 87 Misc. 2d 167, ___, 383 N.Y.S.2d 472, 479-80 (Sup. Ct. 1979). The *Singer* court, noting the difficulties in determining what constitutes a valid business purpose, 380 A.2d at 975-76, simply held that a merger with the sole purpose of freezing out minority shareholders violates the corporate majority's fiduciary duties. *Id.* at 979-80. The *Singer* court's approach to valid business purpose stems partially from the traditional notion that forced deprivation of a stockholder's right to continuing equity participation in the firm is a deprivation of property. *See* 380 A.2d at 977-78. *Singer* did not fully resurrect the property right concept since controlling shareholders still may freeze out minority shareholders if a valid business purpose exists. *See* Tanzer v. International Gen'l Indus., Inc., 379 A.2d 1121, 1125 (1977); text accompanying notes 62-63 *infra*. *See also* Richards, *Protection of Majority Interests*, 4 DEL. J. CORP. L. 728, 728 (1979) [hereinafter cited as Richards] (*Singer's* business purpose requirement inhibits freezeouts).

[18] 380 A.2d at 980. *See* McBride, *Delaware Corporate Law: Judicial Scrutiny of Merg-*

Shortly after deciding *Singer*, the Delaware Supreme Court gave some guidance concerning the business purpose requirement. The court ruled that a majority stockholder meets the business purpose requirement even if only the stockholder, rather than the corporation, possesses a valid purpose for the transaction.[19] The court reserved judgment, however, as to whether the *Singer* doctrine extends to freezeouts effected under the short form merger statute.[20] Additionally, the court offered little guidance concerning the scope of a judicial inquiry for entire fairness or the possibility of structuring freezeouts that would escape *Singer* scrutiny.

In recent developments, the Delaware Supreme Court has concluded that the judicial scrutiny of business purpose and entire fairness extends to all freezeout mergers.[21] Chancery courts, meanwhile, have provided only limited examination of entire fairness[22] while exempting certain freezeouts from the *Singer* doctrine.[23] The chancery decisions provide corporate majorities with a chance for lessening judicial intervention into a freezeout.[24] The Delaware Supreme Court, however, likely will disapprove of measures that narrow the focus of *Singer*.[25]

The Delaware Supreme Court extended the *Singer* doctrine to all freezeout mergers in *Roland International Corp. v. Najjar*.[26] In *Roland*, Hyatt Corporation and several individuals controlling 97.6% of Roland's stock sought to exclude the remaining 329 stockholders by effecting a short form merger.[27] The minority shareholders, by the terms of the merger proposal, could either accept $5.25 in cash per share or seek judi-

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*ers—The Aftermath of* Singer v. The Magnavox Company, 33 BUS. LAW. 2231, 2237 (1978) [hereinafter cited as McBride]. *See also* note 16 *supra*.

[19] *See* Tanzer v. International Gen'l Indus., Inc., 379 A.2d 1121, 1124; *see* McBride, *supra* note 18, at 2238-45. The *Singer* decision specifically reserved the question of whether a majority with its own valid purpose could comply with the business purpose requirement of *Singer*. 380 A.2d at 980 n.11. In *Tanzer*, the court cited several Delaware cases holding that a majority stockholder has the right to protect his own interests so long as he violates no duty to fellow shareholders. *See* 379 A.2d at 1123-24, *citing, e.g.*, Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, ___, 53 A.2d 441, 447 (Del. Sup. 1947). The *Tanzer* defendant claimed that the merger would facilitate long term debt financing by the parent company and the court held the purpose to be valid. 379 A.2d at 1124-25. *See generally* M. LIPTON & E. STEINBERGER, *supra* note 2, § 9.3.3.2 at 448-49; McBride, *supra* note 13, at 2238-39.

[20] 380 A.2d at 980; *see* Kemp v. Angel, 381 A.2d 241, 244 (Del. Ch. 1977).

[21] *See* text accompanying notes 26-48 *infra*.

[22] *See* text accompanying notes 49-98 *infra*.

[23] *See* text accompanying notes 101-29 *infra*.

[24] *See* Brudney & Chirelstein, *supra* note 1, at 1355 (concluding that under *Singer*, freezeouts are impossible to complete without judicial scrutiny).

[25] *See* text accompanying notes 133-34 *infra*.

[26] 407 A.2d 1032 (Del. 1979).

[27] *Id.* at 1033; *see* DEL. CODE tit. 8, § 253 (1974 & Cum. Supp. 1978). Under a short form merger, a corporation holding 90% or more of the stock of another corporation may merge the corporations without stockholder approval. The surviving corporation must notify the minority frozen out shareholders within ten days after the merger becomes effective. The frozen out shareholders have the option of seeking a judicial appraisal within twenty days of receiving notice from the majority. *Id.; see* note 15 *supra*.

cial appraisal of share value.[28] Ignoring the appraisal remedy,[29] a group of dissenting shareholders filed suit in chancery court claiming the offered price was grossly inadequate and unfair to shareholders.[30] The defendants answered that the plaintiffs had failed to state a cause of action since the validity of the business purpose and the fairness of the terms in a short form merger are immune from judicial scrutiny.[31] The chancery court, relying on *Singer* and subsequent cases,[32] concluded that a cause of action always exists when the frozen out minority alleges exclusion from the corporation as the sole purpose of a merger and thus denied defendant's motion.[33]

The supreme court subsequently affirmed the chancellor's decision.[34] The supreme court emphasized that *Singer* focused on fiduciary duty of the majority to the minority[35] rather than formalistic statutory adherence.[36] The court disagreed with the controlling shareholders who argued that short form mergers give rise to a presumption of valid business purpose.[37] The court reiterated that demonstration of valid business purpose

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[28] 407 A.2d at 1033.

[29] *See* note 15 *supra*. The *Roland* minority shareholders filed suit several months after the deadline for seeking the appraisal remedy had passed. 380 A.2d at 1039 (Quillen, J., dissenting). The *Roland* dissent suggested that appraisal proceedings would have been more appropriate in this case and that the *Singer* rule should not apply where the minority seeks nothing more than higher compensation for their holdings. *Id.*

[30] *Id.* at 1037. The minority shareholders in *Roland* did not seek to enjoin the merger. They only claimed unfair consideration. *Id.* at 1039 (Quillen, J., dissenting).

[31] 407 A.2d at 1034.

[32] Najjar v. Roland Int'l Corp., 387 A.2d 709, 712-13 (Del. Ch. 1978).

[33] *Id.* at 713. In the chancery court, the *Roland* defendants sought to distinguish the *Singer* tests by claiming that the existence of both long form and short form merger statutes evidences a legislative purpose to distinguish the types of mergers both substantively and procedurally. *Id.* at 711. Because long form mergers allow shareholders to prevent the merger whereas short form mergers do not, the *Roland* defendants inferred a legislative determination that the business purpose in short form mergers presumptively was proper. *Id.* The chancery court disagreed, noting that *Singer* extends to both the business purpose and the fairness of the transaction. *Id.* at 712. Thus, even if exclusion of minority shareholders would constitute a valid purpose in short form mergers, unfair treatment of the minority would violate the majority's fiduciary obligations.

[34] 407 A.2d at 1037.

[35] *Id.* at 1034. *See* text accompanying note 14 *supra*. The *Roland* court noted a corporate majority controls the corporation despite the presence of the minority's interest. 407 A.2d at 1034.

[36] 407 A.2d at 1034. The *Roland* court emphasized that a majority does not discharge its fiduciary duty by leaving frozen out shareholders with an appraisal proceeding. *Id.* The court implied that a corporate majority would time a freezeout to take advantage of a low market price and that an appraising court would use the depressed market as the principal valuation factor. *Id. See* note 15 *supra*.

[37] 407 A.2d at 1035-36. In finding no difference between fiduciary standards for short form and long form mergers, the *Roland* court repeated that the fiduciary standard of *Singer* arose from common law, not statutory principles. *Id.* at 1036; *see* text accompanying notes 17-18 *supra*. The *Roland* court saw no basis for distinguishing levels of fiduciary duty on whether the majority owns more or less than 90% of the outstanding stock. 407 A.2d at 1036; *see* note 27 *supra*.

alone does not obviate judicial scrutiny of the entire fairness of the transaction.[38] The court also rejected the majority's position that short form mergers, by definition, eliminate minority challenges to the merger's validity.[39]

The *Roland* court not only rejected exemption of short form mergers from *Singer* scrutiny, but in dicta stated that the relationship between majority shareholders and the company cannot automatically exempt a merger from scrutiny under the *Singer* doctrine.[40] The court thus disagreed with commentators who have advocated classifying freezeouts so that some would be automatically exempt from the *Singer* tests.[41] Automatic exemptions would assist corporations in the orderly planning of freezeout transactions.[42] Nevertheless, the *Roland* court rejected formalistic classifications as contrary to the *Singer* position that fiduciary duty is an aspect of all freezeout mergers.[43] Thus, apparently every freezeout merger in Delaware is now susceptible to judicial scrutiny. Because the corporate majority has the burden under *Singer* of demonstrating business purpose and entire fairness,[44] the dissenting shareholders apparently need only make allegations of impropriety to activate judicial scrutiny of

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[38] 407 A.2d at 1034-35; *see* Tanzer v. International Gen'l Indus., Inc., 379 A.2d 1121, 1125 (Del. 1977); text accompanying notes 58-60 *infra*.

[39] 407 A.2d at 1036. *Roland* overruled Stauffer v. Standard Brands, 41 Del. Ch. 7, 187 A.2d 78 (1962). 407 A.2d at 1036. *Stauffer* held that, absent evidence of deceit or fraud by the majority, the frozen out shareholder's exclusive remedy in a short form merger was an appraisal proceeding. 41 Del. Ch. at ___, 187 A.2d at 79. *See also* Singer v. Magnavox Co., 380 A.2d 969, 980 (Del. 1977) (holding *Stauffer* inapplicable to long form mergers). The conclusion in *Roland* and *Singer* that fairness transcends appraisal rights leaves the limits and content of a fairness evaluation undefined. *See* note 49 *infra*.

[40] 407 A.2d at 1034 n.4.

[41] *See, e.g.*, Brudney & Chirelstein, *supra* note 1, at 1357-76; Note, Singer v. Magnavox *and Cash Take-Out Mergers*, 64 VA. L. REV. 1101, 1113-21 (1978) [hereinafter cited as *Cash Take-Out Mergers*]. Brudney & Chirelstein classify freezeouts into three distinct categories. One group includes those freezeouts which are actually the second step of a merger between previously unaffiliated companies. *See* note 2 *supra*; text accompanying notes 162-64 *infra*. These freezeouts would be exempt from judicial intervention because of the unlikelihood of self-dealing by the majority. Brudney & Chirelstein, *supra* note 1, at 1359-65. A second category includes transactions in which a private company which had become publicly held seeks to return to private ownership. Brudney & Chirelstein would prohibit all such transactions as inherently unfair to minority shareholders. *Id.* at 1365-70. The final category includes mergers between long-time affiliates. Brudney and Chirelstein advocate a case-by-case approach to fairness in such transactions. *Id.* at 1370-75. *But see* Tanzer v. International Gen'l Indus., Inc., 402 A.2d 382, 389 (Del. Ch. 1979) (classified by Brudney & Chirelstein as merger of affiliates but also has aspects of company returning to private ownership). *See also* Deutsch, *Correspondence*, 88 YALE L.J. 235, 236 (1978) [hereinafter cited as Deutsch] (heuristic value of Brudney & Chirelstein thesis questioned); Goldman & Wolfe, *supra* note 5, at 688-98.

[42] *See* 407 A.2d at 1034 n.4; Brudney & Chirelstein, *supra* note 1, at 1357-59.

[43] 407 A.2d at 1034 n.4; *see* text accompanying note 13 *supra*. *But see* 407 A.2d at 1038-39 (Quillen, J., dissenting) (*Roland* dissent criticizing majority for mandating fairness inquiry because such mandating is a legislative or administrative responsibility).

[44] *See* text accompanying notes 15-17 *supra*.

the merger.[45] A court presented with allegations of majority overreaching has the option of enjoining the merger[46] or allowing the merger to proceed but with a hearing on fairness.[47] In either instance, the additional costs and possible delay to a proposed freezeout are considerable. Such costs for freezeouts have led some chancellors to carve out exemptions from *Singer* for certain mergers.[48] The Delaware Supreme Court has yet to respond to such exemptions.

A principal question left from *Singer* is the content and effect of a judicial inquiry into fairness.[49] In *Tanzer v. International General Industries, Inc.*,[50] a chancellor implied that if the offered cash price for shares considerably exceeds current market price, the majority has met the burden of demonstrating entire fairness.[51] In *Tanzer*, defendant IGI, which had long held a majority interest in the Kliklok Corp., sought to obtain the balance of Kliklok's stock through a long form merger.[52] IGI offered Kliklok minority shareholders $11.00 per share, the same price recommended by an investment banking firm which had a potential conflict of interest.[53] This price, nearly thirty percent higher than the current market price, exceeded Kliklok's selling price at any time in the previous three years.[54] Minority shareholders overwhelmingly approved the proposal.[55] Dissenting shareholders filed suit to seek greater compensation.[56] The chancellor dismissed the action holding that the complaint failed to

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[45] *But see* Weinberger v. UOP, Inc., 409 A.2d 382, 389 (Del. Ch. 1979) (complaint mirroring *Singer* held not sufficient for cause of action under *Singer*); text accompanying notes 98-99 *infra*.

[46] *See, e.g.*, Kemp v. Angel, 381 A.2d 241, 245 (Del. Ch. 1977) (injunction against freezeout granted to allow full judicial scrutiny).

[47] *See, e.g.*, Tanzer v. International Gen'l Indus., Inc., 379 A.2d 1121, 1124-25 (Del. 1977).

[48] *See* text accompanying notes 49-127 *infra*.

[49] The *Singer* court stated that if a defendant demonstrates a valid business purpose, the court still must consider the entire fairness of the transaction. 380 A.2d at 980. As the basis for entire fairness, the *Singer* court cited Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 93 A.2d 107 (Del. Sup. 1952). 380 A.2d at 980. In *Sterling* the court stated that because the defendant controlled both companies' boards of directors, the defendant bore the burden of establishing entire fairness. 33 Del. Ch. at ___, 93 A.2d at 110. The court stated that judicial consideration of entire fairness extends to all relevant factors. *Id.* at ___, 93 A.2d at 115.

[50] 402 A.2d 382 (Del. Ch. 1979).

[51] *See* text accompanying notes 91-93 *infra*.

[52] 402 A.2d at 389. *See* note 13 *supra*. In 1961, a predecessor of IGI acquired all of the stock in Kliklok Corp. In 1965, IGI offered approximately 18% of the stock in Kliklok to the public at $11.00 per share. Then in 1975, the IGI board of directors, acting on the advice of investment bankers involved in refinancing IGI, sought to repurchase the publicly held Kliklok stock. *Id.*.

[53] *Id.*

[54] *Id.* IGI's offer to minority shareholders represented approximately 95% of book value and was nine times the average earnings per share over the previous four years. *Id.*

[55] *Id.* at 390; *see* text accompanying notes 110-16 *infra*.

[56] *See* Tanzer v. International Gen'l Indus., Inc., 379 A.2d 1121, 1122 (Del. 1977).

state a cause of action.[57] The Delaware Supreme Court, in an opinion issued three weeks after *Singer*, held that the merger met the valid business requirement of *Singer* because IGI itself possessed a valid reason for effecting the merger.[58] The court did not consider whether the merger was valid for Kliklok.[59] The court thus refused to enjoin the merger, but remanded the case for a "fairness hearing" to determine whether the transaction was entirely fair to the minority.[60]

On remand, the chancery court admitted not knowing the criteria or procedure for a fairness hearing.[61] The court, however, concluded that a fairness hearing did not require a full trial.[62] Rather, the chancellor determined fairness on the basis of motions for summary judgment and concluded that the defendant had supplied ample uncontradicted evidence to demonstrate the entire fairness of the transaction.[63] The court scrutinized eight factors in arriving at a finding of entire fairness.[64] The factors fell into general categories concerning the structure of the transaction,[65] compliance with statutory provisions,[66] and the nature of the terms.[67]

The *Tanzer* court, in scrutinizing the structure of the transaction, considered the merger's purpose, alternatives to cashing out shareholders, and the majority's financing methods. The chancellor decided that because the supreme court had found the merger's purpose to be valid, the purpose was not unfair to the minority.[68] In assessing alternatives to a freezeout, the chancellor admitted that the majority could have offered equity stock in the surviving corporation instead of cash.[69] The court, however, was unwilling to find such a possibility evidence of unfairness.[70]

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[57] *Id.*

[58] *Id.* at 1123-25.

[59] *Id.; see* text accompanying note 19 *supra.*

[60] 379 A.2d at 1125. The Supreme Court in *Tanzer* noted that the chancery court had originally discussed the fairness of the transaction only in terms of the price offered for the stock. *Id.* The court said discussion of price alone was too restrictive in light of the focus on entire fairness of *Singer* and *Sterling. Id.; see* note 54 *supra.*

[61] 402 A.2d at 385; *see* text accompanying note 49 *supra.*

[62] 402 A.2d at 385; *see* text accompanying notes 98-99 *infra.*

[63] 402 A.2d at 385.

[64] *Id.* at 390-95. The *Tanzer* defendant and plaintiff suggested the eight fairness factors considered by the court. *Id.* at 399.

[65] *See* text accompanying notes 68-71 *infra.*

[66] *See* text accompanying notes 72-75 *infra.*

[67] *See* text accompanying notes 76-81 *infra.*

[68] 402 A.2d at 390; *see* text accompanying note 62 *supra.*

[69] 402 A.2d at 390-91.

[70] *Id.* The *Tanzer* plaintiffs noted that by receiving stock in IGI instead of cash, the shareholders would not have incurred tax liability for capital gains. *Id.* at 390. The shareholders also could have participated in the merged company through an exchange of stock, and taken advantage of the merger's benefits. *Id.* The plaintiffs noted that stockholders also would have avoided tax liability through a sale of corporate assets followed by a distribution of the proceeds. *Id.* The chancellor concluded, however, that an exchange of stock or a sale of corporate assets would have deprived the shareholders of appraisal rights and that stockholders might not wish to participate in the merged enterprise because some mergers fail.

The court also found no unfairness in IGI's financing the transaction by using Kliklok's credit.[71]

In evaluating the effect of applicable Delaware merger statutes on fairness, the chancellor considered the availability of appraisal rights[72] and IGI's compliance with stockholder notice requirements.[73] The chancellor recognized that full statutory compliance does not alone insure fairness to minority stockholders.[74] Nevertheless, the chancellor concluded that statutory compliance is an indicator of overall fairness.[75]

Finally, the chancellor considered three factors concerning the terms of the transaction. The court restricted the permissible bounds of inquiry into the proposed terms by analogizing the fairness hearing to an appraisal proceeding.[76] As a result, the chancellor found no unfairness in the lack of an appraisal by an independent expert[77] because such an appraisal is not required as a matter of law.[78] Further, the court refused to consider the relevance to fairness of the ten year earlier going public price because appraisal proceedings only consider recent market prices.[79] Finally, the

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*Id.* at 390-91. The court admitted that drafters of future merger agreements might consider giving frozen out shareholders the option of receiving stock in the surviving corporation. *Id.; cf.* CAL. CORP. CODE §§ 1101-1101.1 (West Cum. Supp. 1979) (requiring that in most freezeouts corporations offer to convert shares in old corporation to shares in new corporation).

[71] 402 A.2d at 393. The *Tanzer* court noted that the frozen out minority shareholders would have no interest in Kliklok after the merger. *Id.* The court thus reasoned that Kliklok's obligation to repay a loan after the merger did not harm the minority. *Id.*

[72] *Id.*

[73] *Id.* at 392.

[74] *Id.* at 393; *see* text accompanying note 36 *supra.*

[75] 402 A.2d at 392-93.

[76] *See* text accompanying notes 86-90 *infra.*

[77] *Id.* at 391. *See* text accompanying note 53 *supra.* The *Tanzer* court confronted a potential conflict of interest by IGI's outside appraiser. The appraiser's fee depended on successful completion of long term corporate refinancing, including the merger. 402 A.2d at 391. Retaining a truly independent appraiser, however, would have delayed the proceedings as the new appraiser familiarized himself with the company. *See* Richards, *supra* note 17, at 729-30. The court's expedient solution overlooked possible unfairness to minority shareholders.

[78] 402 A.2d at 391. Delaware statutory merger law does not require that outside groups appraise the fairness of the transaction to the minority. *See* DEL. CODE, tit. 8, §§ 251, 253, 262 (1974 & Cum. Supp. 1978); *but cf.* SEC Release No. 34-11231, 40 Fed. Reg. 7947 (Feb. 6, 1975), *reprinted in* [1975] 289 FED. SEC. L. REP. (BNA) E-1 [hereinafter cited as 1975 Release] (federal freezeout rules originally required two independent appraisals of fairness). Additionally, good faith reliance on experts will not excuse the board of directors from liability to stockholders for unfairness. *See* David J. Greene & Co. v. Dunhill Int'l, Inc., 249 A.2d 427, 431 (Del. Ch. 1968). Expert opinion, however, enhances the majority's credibility in fairness proceedings. *See* Bell v. Kirby Lumber Co., 413 A.2d 137, 147 (Del. 1980) (investment banker's testimony utilized in judging fairness); Richards, *supra* note 17, at 728-31.

[79] 402 A.2d at 392-93; *see, e.g.,* Levin v. Midland-Ross Corp., 41 Del. Ch. 276, 281, 194 A.2d 50, 53-54 (1963) (using average market price on day before tender offer). In appraisal proceedings market price is one indicator of current perceptions of the stock's value. *See In re* Delaware Racing Ass'n, 42 Del. Ch. 406, 419, 213 A.2d 203, 211 (Del. Sup. 1965). In the *Tanzer* fairness proceeding, however, the plaintiff asked the court to consider the earlier

court rejected the plaintiff's contention that the frozen out minority should share the financial savings and benefits of the merger.[80] The court noted that appraisal proceedings do not award financial benefits from a merger to frozen out shareholders.[81]

The *Tanzer* court's evaluation of factors in three different areas affecting fairness appears, at first impression, to fulfill the Delaware Supreme Court's command to consider the entire fairness of the transaction to the minority.[82] The factors cover a range of possible abuses of minority interests by a corporate majority.[83] Because the parties selected the factors as appropriate to this particular transaction,[84] a complete consideration of fairness required inquiry into this transaction's relevant facts. The court, however, made no such factual inquiry into the merger and instead decided the case on the basis of motions for summary judgment.[85]

Because a court may render summary judgment only on the basis of questions of law,[86] the *Tanzer* court faced a dilemma. The court had little law on which to base a decision because virtually no precedent exists regarding the criteria for entire fairness.[87] The court instead established fairness law by drawing analogies to statutory appraisal proceedings.[88] However, analogizing a fairness hearing to an appraisal proceeding was inappropriate. Since an appraisal proceeding does not fully protect frozen out minority shareholders,[89] a fairness hearing should go beyond both the

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offering price of the stock as evidence of the fairness of the controlling shareholder's activities, not of the stock's value. 402 A.2d at 392. Thus by ignoring the offering price, the court was ignoring the plaintiff's allegations that IGI had benefitted from current market conditions at the expense of minority shareholders. *See* note 2 *supra*; text accompanying notes 87-90 *infra*.

[80] 402 A.2d at 393-95. *But see* Mills v. Electric Auto-Lite, 552 F.2d 1239 (7th Cir.), *cert. denied*, 434 U.S. 922 (1977) (portion of merger's financial benefits allocated to shareholders); Brudney & Chirelstein, *Fair Shares in Corporate Mergers & Takeovers*, 88 HARV. L. REV. 277, 310-15 (1974) [hereinafter cited as Brudney & Chirelstein, *Fair Shares*] (frozen out shareholders should share in a synergistic benefits of merger).

[81] 402 A.2d at 394-95; *see* DEL. CODE, tit. 8, § 262(f) (Cum. Supp. 1978). *See also* text accompanying notes 88-90 *infra*. The *Tanzer* chancery concluded that if synergism was a factor in a fairness hearing, the 29% premium over market price offered for the shares covered any possible synergistic effect. 402 A.2d at 494. *See* text accompanying notes 87-90 *infra*.

[82] *See* text accompanying note 18 *supra*.

[83] 402 A.2d at 390-95.

[84] *Id.* at 390. The *Tanzer* court admitted that commentators have suggested other factors for judging fairness but that such factors were not appropriate in this case. *Id.* at 395. *See, e.g., Delaware Chills Freeze-outs: A Critical Brief of* Singer v. The Magnavox Company *and* Tanzer v. International General Industries, Inc., 3 DEL. J. CORP. L. 426, 438-39 (1978) [hereinafter cited as *Critical Brief*].

[85] 402 A.2d at 385-86.

[86] *Id.* at 385.

[87] *See* note 49 *supra*. The *Tanzer* decision is the only reported Delaware fairness hearing involving a freezeout merger. *Cf.* Lynch v. Vickers, 402 A.2d 5, 10 (Del. Ch. 1979) (fairness hearing in context of tender offer).

[88] *See* text accompanying notes 76-81 *supra*.

[89] *See* text accompanying notes 15-16 *supra*.

substantive and procedural contexts of an appraisal hearing. The court should consider any factor bearing on the fairness of the transaction.[90] Only an unconstrained fairness inquiry can protect shareholders in a formalistically proper yet ultimately inequitable merger.

The *Tanzer* chancellor partly refused to inquire into the facts of the transaction because he concluded the plaintiffs would not benefit from such inquiry.[91] The chancellor presumed that any benefits from factual inquiry were already a part of the premium above market price offered for the stock.[92] This presumption is premised on the market price accurately reflecting corporate value with the premium merely representing a bonus to minority stockholders. The Delaware Supreme Court, however, has rejected market price as a universally dependable indicator of freeze-out value.[93] Thus, no basis exists for the court's presumption. In order to consider properly the plaintiff's allegations of unfairness the court should have denied the defendant's motion for summary judgment. Only at trial could the court have fuly examined the plaintiff's allegations.[94]

The chancery court's *Tanzer* decision, if upheld by the Delaware Supreme Court,[95] will aid corporate majorities in future freezeouts. The court's analogies to appraisal proceedings will limit the extent of future inquiries into the terms of a transaction.[96] Under the *Tanzer* precedent, a court would only consider the unfairness of a freezeout if an appraisal proceeding would consider the question.[97] Additionally, the court's granting the defendant's summary judgment motion[98] indicates that future plaintiffs will need to present prima facie evidence of unfairness, rather than general allegations, in order to prevent summary judgment.[99] Finally, the court's presumption that a larger premium relieves the need for detailed judicial scrutiny will aid corporate majorities in supporting sum-

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[90] *See* note 49 *supra.*

[91] The *Tanzer* court cited the existence of a premium over market price in considering the relevance of the stock's price history and in deciding whether the frozen out shareholders deserved a share of merger generated benefits. 402 A.2d at 393, 395; *see* text accompanying notes 79-81 *supra.*

[92] 402 A.2d at 395; *see* Rothschild, *Going Private,* Singer, *and Rule 13e-3 What Are the Standards for Fiduciaries?,* 7 SEC. REG. L.J. 195, 211-12 (1979) [hereinafter cited as Rothschild].

[93] *See, e.g., In re* Delaware Racing Ass'n, 42 Del. Ch. 406, ___, 213 A.2d 203, 211 (Del. Sup. 1965) (market price not sole element in stock appraisal).

[94] *See* Kemp v. Angel, 381 A.2d 241 (Del. Ch. 1977). The *Kemp* court, in granting a preliminary motion to enjoin a freezeout, concluded that only at trial can a court carefully scrutinize the testimony on entire fairness of a transaction. *Id.* at 245. *See also* Lynch v. Vickers, 402 A.2d 5, 10 (Del. Ch. 1979) (ten day trial offered ample opportunity for fairness hearing).

[95] The *Tanzer* plaintiff has appealed the case. *See* Roland Int'l Corp. v. Najjar, 407 A.2d 1032, 1038 n.6 (Quillen, J., dissenting).

[96] *See* text accompanying notes 76-81 *supra.*

[97] *See* text accompanying notes 88-89 *supra.*

[98] *See* 402 A.2d at 385-86.

[99] *Cf.* Kemp v. Angel, 381 A.2d 241, 245 (Del. Ch. 1977) (trial necessary to fully consider fairness).

mary judgment motions.[100] Plaintiffs will have to counter such a presumption with evidence that the defendant's unfairness is so gross as to exceed the amount of the premium.

A recent chancery decision has gone even further than did *Tanzer*[101] in alleviating the threat of shareholder lawsuits and judicial intervention in a freezeout. In *Weinberger v. UOP, Inc.*,[102] a chancery court held that a properly structured freezeout causes the burden of proof during judicial scrutiny to shift from the majority to the minority.[103] The chancellor's decision conflicts with the Delaware Supreme Court's broad use of equity to protect all freezeout victims.[104]

In *Weinberger*, defendant Signal Companies, which owned 51% of UOP, sought to acquire all of UOP's stock through a long form merger.[105] Signal structured the merger so that approval was contingent on a favorable vote by a majority of the voted minority shares.[106] Furthermore, the minority vote in favor of the merger plus the Signal shares needed to aggregate two-thirds of all outstanding shares.[107] The voting minority shareholders approved the merger by a twelve to one margin, easily meeting both requirements.[108]

Plaintiff Weinberger, a dissenting minority shareholder, filed a class action suit against Signal.[109] The plaintiff alleged that the merger's sole purpose was to eliminate outside shareholders and that, therefore, the merger lacked a valid business purpose.[110] Further, the plaintiff alleged that the terms of the merger, including the offered price, were unfair.[111] The chancellor dismissed the compalint for failure to state a cause of action under *Singer* even though the complaint mirrored the *Singer* complaint.[112] The *Weinberger* court read *Singer* to state that the majority's fiduciary duty arises only from the majority's ability to control the minor-

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[100] *See* text accompanying notes 91-93 *supra; cf.* Temple v. Combined Properties Corp., 410 A.2d 1375, 1378-80 (Del. Ch. 1979) (discouraging summary judgment motions for plaintiffs in freezeouts).

[101] *See* text accompanying notes 95-100 *supra.*

[102] 409 A.2d 1262 (Del. Ch. 1979); *see generally* Ward & Welch, *Majority's Ability to Structure Mergers Improved by Weinberger Case*, Nat'l L.J., Jan. 14, 1980, at 22, col. 1.

[103] 409 A.2d at 1267-68; *see* text accompanying notes 17-18 *supra.*

[104] *See* Roland Int'l Corp. v. Najjar, 407 A.2d 1032, 1033-34 (Del. 1979); Singer v. Magnavox Co., 380 A.2d 969, 976-80 (Del. 1977); text accompanying notes 122-26 *infra.*

[105] 409 A.2d at 1264. Signal offered minority shareholders $21.00 per share, a price that Lehman Brothers, an investment banking firm, thought fair. *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* at 1265.

[109] *Id.* at 1263. The chancery court initially found that only minority shareholders who dissented in the vote belonged to the eligible class of plaintiffs. Weinberger v. UOP, Inc., No. 5642, slip op. at 13 (Del. Ch., Apr. 5, 1979) (class action certification proceeding); *cf.* DEL. CODE, tit. 8, § 262(b) (Cum. Supp. 1978) (only dissenting shareholders may participate in appraisal proceeding).

[110] 409 A.2d at 1265.

[111] *Id.*

[112] *Id.* at 1264, 1267.

ity's property.[113] The court thus reasoned that since the majority no longer controlled the destiny of the merger, the majority could not exercise its power in abuse of the minority.[114] The majority thus had no fiduciary duty to the minority and no obligation to demonstrate the *Singer* requirements of business purpose and fairness.[115] The court admitted that a freezeout merger contingent on approval by a majority of the minority was not immune from judicial scrutiny.[116] Rather, unlike *Singer* where the corporate majority had an initial burden of demonstrating fairness and business purpose, the dissenting minority now had the initial burden of proving fraud or deception.[117]

The *Weinberger* facts contained little evidence of actual majority overreaching or unfairness to the minority.[118] The court, however, elected not to decide the case on the merits and consequently rule as a matter of law that Signal had fulfilled the *Singer* tests of business purpose and fairness.[119] Rather, the court stated broadly that any freezeout contingent on approval by a majority of the minority renders *Singer* inapplicable.[120] Ap-

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[113] *Id.* at 1265.

[114] *Id.* at 1265-66. *See* text accompanying notes 124-25 *infra.*

[115] 409 A.2d at 1266. The *Weinberger* court admitted that the plaintiff's complaint also alleged a violation of fiduciary duty based on Signal's voting its shares in favor of the merger. *Id.* The court noted, however, that Signal's vote would have been insufficient to force the merger because of the minority vote requirement. Thus, even though Signal could have stopped the merger, Signal had no fiduciary obligation to do so because the minority was not vulnerable to the majority's whims. *Id.*

[116] *Id.* at 1267. Only *Weinberger* type mergers involving fraud or deception are subject to judicial scrutiny. *See* text accompanying notes 122-24 *infra.*

[117] *Id.* at 1267-68. By requiring the objecting stockholder to demonstrate fraud by the controlling majority, the *Weinberger* court adopted the business judgment rule. *See* FOLK, THE DELAWARE GENERAL CORPORATION LAW, 75-81 (1972) [hereinafter cited as FOLK]. In mergers with little chance for self-dealing by the surviving company, the business judgment rule is the standard for reviewing the defendant's actions. *See id.* at 335. The business judgment rule places an almost impossible burden on the objecting shareholders to prove corporate impropriety. *See id.* at 336. The *Singer* court, in recognizing the inherent self-dealing in a freezeout merger, required the corporate majority to prove the fairness of its actions. 380 A.2d at 980; *see* Tanzer v. International Gen'l Indus., 402 A.2d 382, 386-87 (Del. Ch. 1979).

[118] In *Weinberger,* relatively little chance of fiduciary breach existed. While Signal controlled both boards of directors, Signal owned barely half of UOP's stock indicating that an ample public market existed for the stock. *See* text accompanying note 107 *supra.* Additionally, the minority stockholder's approval vote was by a sizable 12-1 margin. 409 A.2d at 1265. Finally, the original stockholder's complaint failed to make specific allegations of unfair actions or fiduciary breaches. *Id.* at 1267. In an amended complaint following discovery, the *Weinberger* plaintiff made several allegations concerning specific fiduciary breaches by the corporate majority. 409 A.2d at 1267. The court did not answer whether such alleged breaches are specific enough to cause judicial scrutiny of the transaction. Rather, the court ignored the allegations because they did not appear in the original complaint. *Id.*

[119] *See* text accompanying notes 17-18 *supra.*

[120] 409 A.2d at 1268; *see* note 117 *supra.* The *Weinberger* decision conflicts with two earlier chancery decisions holding that minority approval does not alter judicial scrutiny. In neither earlier decision, however, was the merger's success contingent on the minority vote. *See* David J. Greene & Co. v. Dunhill Int'l, Inc., 249 A.2d 427, 431 (Del. Ch. 1968); Stryker & Brown v. Bon Ami Co., No. 1945, slip op. at 4 (Del. Ch., March 16, 1964). *See also* Bas-

proval of the merger by the minority would certainly be one indicator of a merger's fairness. Because eliminated minority shareholders are most affected by a freezeout, their approval indicates at least tacit acceptance of the merger proposal.[121] Nevertheless, the chancellor's presumption that minority approval automatically renders *Singer* inapplicable ignores the Delaware Supreme Court's position that the inherent coerciveness of all freezeouts necessitates special judicial scrutiny.[122] This special scrutiny includes consideration of a merger's entire fairness not just evidence of fraud or deceptiveness by the majority.[123] Yet, without fraud or deceptiveness, dissenting shareholders in a *Weinberger* freezeout have only statutory appraisal as a remedy.[124] *Singer* concluded that appraisal proceedings are insufficient protection for frozen out shareholders.[125] If the Delaware Supreme Court is to continue emphasizing the inherently coercive nature of freezeouts and the resultant necessity of close judicial scrutiny, the court should overturn *Weinberger*.[126] If the court upholds *Weinberger*, parties seeking to effect freezeouts will have a method of significantly reducing the risk of judicial intervention in a freezeout.[127]

*Roland, Tanzer* and *Weinberger* are all judicial efforts to apply the broad equitable principles of *Singer* to particular freezeout mergers. The chancery decisions in *Weinberger* and *Tanzer* add certainty to this area of corporate law by establishing means of precluding judicial scrutiny for controlling shareholders effecting freezeout mergers.[128] Delaware courts previously have held that the existence of merger statutes evidences a legislative intention that courts should tolerate and even encourage mergers.[129] *Singer* and *Roland* tempered that encouragement by emphasizing

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tian v. Bourns, Inc., 256 A.2d 680, 682 (Del. Ch. 1968), *aff'd per curiam*, 278 A.2d 467 (Del. 1970); FOLK, *supra* note 117, at 338-39; Richards, *supra* note 17, at 731-33. When the merger is not contingent on the minority vote, minority shareholders have less incentive to vote because the majority's dominant voting position guarantees aproval of the merger. *See* Richards, *supra* note 17, at 733.

Courts judging self-dealing corporate transactions other than mergers have held that ratification of the transaction by a majority of the minority shareholders shifts the burden of proving impropriety to the dissenting minority. *See* Richards, *supra* note 17, at 731; *see, e.g.*, Michelson v. Duncan, 407 A.2d 211, 224-25 (Del. 1979) (ratification by majority of minority shareholders of stock option plan benefitting corporate officers shifted burden of proving impropriety to objecting shareholder); Schiff v. RKO Pictures Corp., 34 Del. Ch. 329, ___, 104 A.2d 267, 271-72 (1954) (approval of sale of assets by majority of minority shifted burden to dissenting minority).

[121] *See* David J. Greene & Co. v. Dunhill Int'l Inc., 249 A.2d 427, 431 (Del. Ch. 1968) (approval by majority of minority entitled to consideration in evaluating fairness but does not shift burden of proof).

[122] *See* text accompanying notes 11-18 *supra*. *See also* text accompanying note 3 *supra*.

[123] *See* text accompanying notes 17-18 *supra*.

[124] *See* note 15 *supra*.

[125] *See* text accompanying notes 15-16 *supra*.

[126] The Supreme Court could affirm *Weinberger* on its facts. *See* note 119 *supra*.

[127] *See* text accompanying notes 128-32 *infra*.

[128] *See* text accompanying notes 114-18 & 91-93 *supra*.

[129] *See, e.g.*, Bastian v. Bourns, Inc., 256 A.2d 680, 684 (Del. Ch. 1969), *aff'd per*

that full compliance with proscribed procedures does not lessen the extent of judicial scrutiny of freezeout mergers.[130] The tendency in *Weinberger* and *Tanzer* to revive proscribed procedures for mergers conflicts with the equitable shareholder protections emphasized in *Singer*.[131] Until corporate majorities are able to make strong equitable arguments to protect majority interests, the Delaware Supreme Court will limit the availability of *Weinberger* and *Tanzer* for future freezeouts.[132]

### B. *Federal Regulation*

The Securities and Exchange Commission recently adopted Rule 13e-3[133] requiring disclosure of certain information by companies proposing to freeze out minority shareholders.[134] The adopted rule, however, does not include a previously proposed requirement that freezeouts be fair to minority shareholders.[135] The absence of a substantive fairness requirement has eliminated much of the rule's effectiveness in protecting minority shareholders.[136] Adoption of the rule nevertheless exposes freezeout transactions to both federal and state scrutiny and control.[137]

The SEC has considered regulating freezeouts for several years[138] pursuant principally to authority in section 13(e)[139] of the 1934 Securities Exchange Act ('34 Act).[140] In 1975 the SEC proposed two versions of Rule

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*curiam*, 278 A.2d 467 (Del. 1970); MacFarlane v. North Am. Cement Corp., 16 Del. Ch. 172, 178, 157 A. 396, 398 (1928). *See also* FOLK, *supra* note 117, at 331-33.

[130] *See* text accompanying notes 14-16 & 36-39 *supra*. *See also* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439-40 (1971) (granting injunction to delay annual meeting even though plaintiffs did not meet strict time limits).

[131] *See* text accompanying notes 14-18 *supra*. *See also* Deutsch, *supra* note 43, at 621-22 (arguing that formalistic rules in corporate law are too inflexible to deal with intricacies of corporate law and that such rules invite abuse and circumvention).

[132] *See* Richards, *supra* note 17, at 728.

[133] 17 C.F.R. § 240.13e-3 (1980).

[134] 1979 Release, *supra* note 8, at E-1.

[135] *See* text accompanying notes 144-52 *infra*.

[136] *See* text accompanying note 186 *infra*.

[137] *See* text accompanying notes 189-94 *infra*.

[138] *See* SEC Release No. 33-5526, 39 Fed. Reg. 33,835, as amended by 39 Fed. Reg. 41,222 (Sept. 9, 1974), *reprinted in* [1974] 268 SEC. REG. L. REP. (BNA) D-1, D-3 (first SEC proposal concerning freezeout regulation). *See also* Address by A. A. Sommer, Jr. at Notre Dame Law School, November, 1974, *reprinted in* [1974] 278 SEC. REG. L. REP. (BNA) D-1, D-2 to 3 (suggestion by SEC Commissioner of need to regulate freezeouts).

[139] 15 U.S.C. § 78m(e) (1976).

[140] Pub. L. No. 73-291, 48 Stat. 881 (1934) (current version at 15 U.S.C. §§ 78a-78lll (1976 & Supp. II 1978)). Section 13(e) was added to the '34 Act as part of the Williams Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454. *See generally* Brown, *The Scope of the Williams Act and its 1970 Amendments*, 26 BUS. LAW. 1637 (1971). Under § 13(e), the SEC has the power both to define fraudulent, deceptive or manipulative acts and to prescribe means reasonably designed to prevent such acts involving repurchase of registered securities by issuers. 15 U.S.C. § 78m(e)(1) (1976). The Act specifically permits the SEC to order repurchasing issuers to disseminate any information which the SEC deems material to a shareholder's decision of whether to sell the security. *Id.* Congress originally extended the requirements of § 13(e)(1) to all purchases by affiliates of issuers, but in 1970 amended the

13e-3.[141] Both versions required extensive disclosure by companies proposing freezeouts.[142] One version also required that a company proposing a freezeout have a valid purpose for the transaction and that the terms of the transaction be fair to the minority.[143] In 1977 the SEC issued a revised proposal requiring both disclosure and substantive fairness, but not a valid business purpose.[144] The SEC asserted that statutory authority existed for substantive regulation of freezeouts even though most federal securities regulations cover only disclosure of information.[145] The Commission distinguished the Supreme Court's decision in *Santa Fe Industries, Inc. v. Green*[146] which found that manipulation or deception by the controlling majority is a necessary element of a federal cause of action for unfairness in a freezeout.[147] The SEC noted that the Supreme Court had decided *Green* under Section 10(b) of the '34 Act[148] and not Section 13(e).[149] Section 13(e), in additin to prohibiting manipulation and deception, forbids frauds in securities transactions.[150] Implying that unfair merger terms are also fraudulent, the SEC concluded that its statutory authority included the power to regulate fairness.[151] Numerous commentators, however, disagreed with the SEC's broad interpretation of what constitutes fraud.[152]

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provision to give the SEC discretion in exempting certain purchases by affiliates of the security issuer. 15 U.S.C. § 78m(e)(2) (1976).

The SEC also promulgated Rule 13e-3 under the authority in other sections of the '34 Act. *See* 15 U.S.C. §§ 78c(b) (SEC power to define terminology), 78j(b) (prohibiting manipulative or deceptive devices in security transactions), 78n(a) (governing proxy solicitation), 78n(c) (disclosure in proxy solicitation), 78w(a) (general rule making procedures) (1976).

[141] 1975 Release, *supra* note 78, at E-1.

[142] *See id.* at E-2 to 3.

[143] *See id.* at E-6. *But see* Letter from ABA Committee on Federal Regulation of Securities to SEC, at 3 (July 18, 1975), *reprinted in* J. FLOM, M. LIPTON & E. STEINBERGER, 2 TAKEOVERS AND TAKEOUTS—TENDER OFFERS AND GOING PRIVATE, at 113, 115 (1976) (criticizing 1975 proposal as inappropriate and vague).

[144] *See* 1977 Release, *supra* note 2, at E-1 to 17.

[145] *Id.* at E-5 to 8.

[146] 430 U.S. 462 (1977).

[147] 1977 Release, *supra* note 2, at E-7; *see* 430 U.S. at 474-78. *See generally* Sherrard, *Federal Judicial & Regulatory Response to* Santa Fe Indus., Inc. v. Green, 35 WASH. & LEE L. REV. 695 (1978) [hereinafter cited as Sherrard].

[148] 15 U.S.C. § 78j(b) (Supp. II 1978).

[149] 1977 Release, *supra* note 2, at E-7. *See* Note, *Fairness In "Going Private" Transactions: Federal Authorization Of Substantive Regulation*, 58 B.U.L. REV. 792, 808-09 (1978) [hereinafter cited as *Federal Authorization*]. The Supreme Court in *Santa Fe* took notice of the SEC's 1975 proposal for Rule 13e-3, *see* text accompanying notes 143-45 *supra*, but declined to consider whether the SEC had authority to promulgate going private rules under sections of the Securities Exchange Act other than § 10(b). 430 U.S. at 473 n.12.

[150] *See* 15 U.S.C. § 78m(e) (1976); 1977 Release, *supra* note 2, at E-7.

[151] *See id.* at E-6 to 7; *Appriasal of Authority, supra* note 3, at 142.

[152] *See* 1979 Release, *supra* note 8, at E-1. *See, e.g.*, Sherrard, *supra* note 147, at 724; Note, *SEC Proposed "Going Private" Rule*, 4 DEL. J. CORP. L. 184, 213-15 (1978) [hereinafter cited as *Proposed Rule*]; *Appraisal of Authority, supra* note 3, at 142; 1978 ABA Comment Letter, *supra* note 2, at 7-8. *But see* Federal Authorization, *supra* note 148, at 810-14

The adopted version of Rule 13e-3 covers transactions by a security issuer[153] or affiliate[154] designed to terminate public trading in the security.[155] The existence of fewer than 300 public shareholders and the delisting of the stock from all security exchanges are indicators of an end to public trading.[156] Listed means of ending public trading include large repurchases of stock,[157] and tender offers.[158] The rule also covers proxy solicitations and information dissemination in connection with a statutory merger or consolidation.[159]

The rule exempts certain transactions where the minority is less likely to suffer unfairness or where other federal laws regulate the transaction.[160] A principal exception is for two-step mergers.[161] In a two-step

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(arguing Congress intended broad meaning of "fraud" and thus unfairness is within definition of fraud).

[153] *See* 15 U.S.C. § 78c(8) (1976). Rule 13e-3 applies both to securities registered under § 12 of the '34 Act, 15 U.S.C. § 78l (1976), and securities subject to § 15(d) of the '34 Act, 15 U.S.C. § 78o(d) (1976). 17 C.F.R. §§ 240.13e-3(b), (c) (1980).

[154] Rule 13e-3(a)(1) defines an affiliate as a person, including a corporation, who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the security issuer. 17 C.F.R. § 240.13e-3(a)(1) (1980). Delaware courts have not said whether Delaware freezeout protections extend to transactions effected by a controlling but not majority shareholder. *See* Rothschild, *supra* note 92, at 225.

[155] 1979 Release, *supra* note 8, at E-2.

[156] 17 C.F.R. § 240.13e-3(a)(4)(ii) (1980). In response to public suggestions, the SEC changed the effects characterizing transactions subject to Rule 13e-3 from the 1977 Proposal. *See* 1979 Release, *supra* note 8, at E-2. The original proposal would have scrutinized those transactions which would delist a stock from a national security exchange even if an over-the-counter market for the stock still existed. *Id.* The SEC, however, did not alter language in the 1977 Proposal stating that the rule covers transactions which have a "reasonable likelihood or a purpose of producing" the end of public trading or reporting requirements. *Id. See* 17 C.F.R. § 240.13e-3(a)(1)(4) (1980). The SEC disagreed with commentators that the requirement of finding either "a reasonable likelihood" or "a purpose" that the transaction would cause the end of public trading was overly subjective. 1979 Release, *supra* note 8, at E-2. The Commission concluded that more objective standards would invite circumvention of the rules. *Id.*

[157] 17 C.F.R. § 240.13e-3(a)(4)(i)(A) (1980).

[158] *Id.* § 240.13e-3(a)(4)(i)(B).

[159] *Id.* § 240.13e-3(a)(4)(i)(C).

[160] *Id.* § 240.13e-3(g) (1980).

[161] *Id.* § 240.13e-3(g)(2). The Rule 13e-3 exception for two-step mergers covers those transactions in which the person effecting the transaction became an affiliate of the security issuer, *see* note 154 *supra*, through a tender offer in the previous year. 17 C.F.R. § 240.13e-3(g)(2) (1980). Further, the original tender offer must have disclosed the offeror's intention of eventually merging the companies. *Id.* Also, the present transaction has to occur in a substantially similar manner to the method disclosed. *Id.* As a final protection for stockholders frozen out in exempted two-step transactions, Rule 13e-3 requires that frozen out stockholders receive at least as much compensation as did stockholders during the tender offer. *Id.*

While a purchaser taking the two-step merger exemption does not have to file a potentially burdensome disclosure statement, the exemption may prove troublesome for the purchaser. If a targeted stockholder knows in advance that the purchaser will offer at least as much compensation in a final freezeout as in the original tender offer, the stockholder will have less incentive to accept the original tender offer. Further, while § 14d(7) of the '34 Act

merger, a previously unaffiliated company buys a significant stake in the target company through voluntary sales of stock by stockholders. The acquiring company then freezes out the remaining shareholders.[162] Commentators have compared two-step mergers to arms length mergers between unaffiliated companies where self-dealing is less likely than in true freezeouts.[163] Rule 13e-3 also exempts transactions where the shareholder may continue equity participation in the surviving corporation rather than accept cash for his shares.[164] Allowing the stockholder to continue ownership in the surviving corporation lessens the coerciveness of the transaction.[165] The rule also exempts transactions which are part of bankruptcy proceedings,[166] transactions described in the terms of the security,[167] and transactions involving public utility holding companies.[168]

The principal requirement for complying with Rule 13e-3 is the preparation of a Schedule 13E-3 transaction statement.[169] The person proposing the transaction must file the statement with the SEC and disseminate pertinent information to stockholders.[170] Schedule 13E-3 resembles other SEC disclosure statements required in most transactions affecting corpo-

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protects early tendering stockholders from later increases in tender price, the protections extend only so long as the tender offer has not expired. 15 U.S.C. § 78n(d)(7) (1976). Thus if an acquiring company might give greater compensation in a freezeout than in the original tender offer, the stockholder has even less incentive to accept the original tender offer. *See* Brudney & Chirelstein, *Fair Shares, supra* note 80, at 337.

[162] *See, e.g.*, Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977).

[163] *See, e.g.*, Brudney & Chirelstein, *supra* note 1, at 1359-65; *Cash Take-Out Mergers, supra* note 41, at 1113-15. Commentators in favor of exempting two-step mergers from state and federal freezeout regulation argue that the acquiring company is, in essence, an outsider throughout the transaction. *See* Brudney & Chirelstein, *supra* note 1, at 1361. As an outsider, the acquiring company owes no traditional fiduciary duty to the other shareholders. *Id. But see* Goldman & Wolfe, *supra* note 5, at 692-94 (state fairness protection needed in two-step mergers because little other protection for stockholders). *See also* Roland Int'l Corp. v. Najjar, 407 A.2d 1032, 1034 n.4 (Del. 1979) (rejecting exemption of two-step mergers from judicial scrutiny for freezeouts); text accompanying notes 40-43 *supra*; note 192 *infra*.

[164] 17 C.F.R. § 240.13e-3(g)(2) (1980). Rule 13e-3 requires that the replacement security be either common stock or stock with substantialy the same voting, dividend, redemption, liquidation and other rights as the original security. *Id.* § 240.13e-3(g)(2)(i). Further, the replacement security will be subject to SEC registration and reporting requirement unless an exemption applies. *Id.* § 240.13e-3(g)(2)(ii).

[165] *See* note 3 *supra*. The SEC stated that transactions in which the stockholder receives a new equity security are beyond the scope of the rule. In such transactions stockholders may maintain an equivalent or enhanced equity interest in the firm. 1979 Release, *supra* note 8, at E-3; *see* note 3 *supra*.

[166] 17 C.F.R. § 240.13e-3(g)(5) (1980). Chapter 11 of the Bankruptcy Act governs reorganizations and solicitations of stockholder votes during reorganizations. *See* 11 U.S.C. §§ 1101-1174 (Supp. II 1978).

[167] 17 C.F.R. § 240.13e-3(g)(4) (1980).

[168] 17 C.F.R. § 240.13e-3(g)(3). The Public Utility Holding Company Act of 1935 governs transactions involving certain public utilities. *See* 15 U.S.C. §§ 79 to 79z-6 (1976).

[169] 17 C.F.R. § 240.13e-3(d) (1980). *See id.* § 240.13e-100.

[170] *Id.* §§ 240.13e-3(d), (e), (f).

rate control.[171] Most of the schedule consists of objective data on the terms and nature of the proposed transaction.[172] The issuer or affiliate must disclose, for instance, recent contracts involving the security,[173] financial data on the issuer,[174] and the outcome of pertinent votes by the board of directors on the proposal.[175]

Three items in Schedule 13E-3, however, attempt to give the solicited shareholder a perspective on the substantive fairness of the transaction.[176] The issuer or affiliate must reveal the existence and contents of any outside appraisal of the transaction's fairness.[177] Also, the issuer or affiliate must disclose the purposes, alternatives and effects of the transaction.[178] Finally, the issuer or affiliate must comment on the fairness of the transaction to the minority.[179] The fairness comment must include information on the value of the company,[180] the security's price history[181] and the contingency of the transaction upon approval by a majority of the minority shareholders.[182]

In addition to disclosure requirements, Rule 13e-3 imposes a 20 day waiting period on freezeouts to allow dissemination of information and full consideration of the proposal by targeted shareholders.[183] The rule's

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[171] *See id.* §§ 240.13d-1 to 102 (disclosure of purchasers of more than 5% of equity stock in company); *id.* §§ 240.13e-4, 101 (disclosure in tender offers by securities issuers); *id.* §§ 240.14a-1 to 102 (disclosure in solicitation of proxies); *id.* §§ 240.14c-1 to 101 (disclosure in distribution of information in advance of corporate votes); *id.* §§ 240.14d-1 to 101 (disclosure in solicitation of tender offers by outsiders); Rothschild, *supra* note 92, at 219.

[172] *See* 17 C.F.R. § 240.13e-100 (1980).

[173] *Id.* § 240.13e-100, Item 11.

[174] *Id.*, Item 14.

[175] *Id.*, Item 12.

[176] *See id.*, Items 7, 8, 9. Rule 13e-3 requires that the purchaser list the three fairness items separately from the other disclosed information in a prominent Special Factors section of the disclosure document. 17 C.F.R. § 240.13e-3(e)(3)(i) (1980). The SEC thus is stressing the importance of the information on fairness in shareholder decisions. *See* text accompanying notes 176-77 *infra*. *See* 1979 Release, *supra* note 8, at E-4.

[177] 17 C.F.R. § 240.13e-100, Item 9 (1980). The disclosure statement must include information on the appraiser, the appraiser's method, and the contents of the appraisal. *Id.* Further, the rule requires the appraisal must be available for inspection. *Id.*

[178] *Id.* Item 7.

[179] *Id.* Item 8. The requirement of an extensive discussion of the factors affecting fairness is the principal addition to Schedule 13E-3 from the 1977 proposal. 1979 Release, *supra* note 8, at E-5. Rule 13e-3 requires the acquiring party to reveal the extent to which each of the fairness factors affected the transaction proposal. 17 C.F.R. § 240.13e-100, Item 8(b) (1980).

[180] 17 C.F.R. § 240.13e-100, Item 8(b) (1980).

[181] *Id.*

[182] *Id.*, Item 8(c). *See* Weinberger v. UOP, Inc., 409 A.2d 1262, 1268 (Del. Ch. 1979) (freezeouts contingent on approval of majority of minority shareholders exempt from judicial scrutiny); text accompanying notes 101-29 *supra*. The party proposing the transaction must also disclose whether a majority of the issuer's unaffiliated directors approved the transaction and whether the unaffiliated directors retained outside counsel to represent the frozen out shareholders. 17 C.F.R. § 240.13e-100, Items 8(d), (e).

[183] 17 C.F.R. § 240.13e-3(f)(i) (1980). *See* 1979 Release, *supra* note 8, at E-4 to 5. The waiting period does not apply to tender offers because other SEC rules govern disclosure in

other protection for minority shareholders is a general prohibition of fraudulent, deceptive or manipulative acts or practices in connection with most freezeout transactions.[184]

While the adoption of Rule 13e-3 represents a specific SEC effort to address the problems of frozen out shareholders, the regulation actually provides little new protection to shareholders. Other SEC rules and federal securities laws already regulate many of the transactions under the scope of Rule 13e-3.[185] Further, disclosure alone provides little protection to shareholders.[186] Many shareholders lack the time or knowledge or digest the information in a disclosure statement, and the influence or resources to organize opposition to management proposals. Protection is further hindered because the SEC may enjoin an unfair freezeout only if the disclosure statement is false or incomplete.[187] Also, the burden of enforcement apparently falls entirely on the SEC staff because of recent Supreme Court decisions which have severely restricted private causes of action under federal securities laws.[188]

Recent trends in state scrutiny of freezeouts also limit the effectiveness and necessity of Rule 13e-3.[189] The SEC proposed regulating freezeouts before many state courts demonstrated an interest in protecting frozen out minority shareholders.[190] Subsequent state litigation has established and expanded minority protections, so that today state regu-

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tender offers. *See id. See also*, 17 C.F.R. § 240.13e-4(e) (1980) (tender offers by issuers); *id.* § 240.14d-1 (tender offers by other than issuers).

[184] 17 C.F.R. § 240.13e-3(b)(1) (1980). Rule 13e-3's prohibition of fraudulent, deceptive or manipulative acts or practices does not apply to securities registered under § 15(d) of the '34 Act, 15 U.S.C. § 78o(d) (1976). 17 C.F.R. § 240.13e-3(c) (1980); *see* text accompanying note 197 *infra*. *See generally* 11 A, Part 1 *Business Organizations*, E. GADSBY, FEDERAL SECURITIES EXCHANGE ACT OF 1934 § 4.02 at 4-59.

[185] *See* Rothschild, *supra* note 92, at 218; 1978 ABA Comment Letter, *supra* note 2, at 4; text accompanying note 171 *supra*.

[186] The SEC recognized that without regulation of fairness the 1977 proposed rules would not prevent injustice to frozen out shareholders. 1977 Release, *supra* note 1, at E-3. The degree of knowledge of the transaction possessed by the minority is largely irrelevant in stopping the merger because corporate majorities usually can guarantee approval. *See* Brudney & Chirelstein, *supra* note 1, at 1369 n.28 (disclosure may help dilute majority vote but will not abort insider controlled merger); *Proposed Rule, supra* note 154, at 195 (Rule 13e-3 will accomplish little if based on disclosure alone); *cf.* 1978 ABA Comment Letter, *supra* note 3, at 4 (disclosure requirements of Rule 13e-3 so burdensome as to suggest real purpose is to defer freezeouts); *but cf.* 1979 Release, *supra* note 8, at E-6 (SEC concluded disclosure costs for securities issuers far outweighed by benefits to security holders).

[187] *See* Rothschild, *supra* note 92, at 218-19 (questioning SEC's authority to take action for false disclosure where disclosure was immaterial to success of transaction).

[188] *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S.Ct. 242, 245-47 (1979). *See also* Note, *Section 17(a) of the '33 Act: Defining the Scope of Antifraud Protection*, 37 WASH. & LEE L. REV. 859, 866-76 (1980); text accompanying note 196 *infra*.

[189] *See* Note, *Assuring Fairness in Corporate Mergers: Recent State Trends*, 35 WASH. & LEE L. REV. 927, 933-47 (1978).

[190] The Delaware Supreme Court decided *Singer v. Magnavox Co.* in 1977, two years after the SEC first proposed freezeout rules. *See* text accompanying notes 11-12 *supra*.

lation is often broader than the new federal protection.[191] Not only do state standards regulate the substantive fairness of freezeouts, but the state protections apply to more transactions. For instance, Rule 13e-3 exempts two-step mergers while the Delaware Supreme Court has specifically included such transactions in Delaware standards.[192] The federal rule governs only transactions involving certain registered securities while state protections presumably extend to all companies incorporated in the state.[193] Furthermore, the Delaware Supreme Court has stated that fairness involves all aspects of the transaction, while the federal rules specify only certain factors that bear on fairness.[194]

The SEC has proposed to Congress two measures that would expand the scope of Rule 13e-3.[195] One proposal allows private enforcement of certain sections of the '34 Act including section 13(e).[196] The second proposal gives the SEC rulemaking authority to prevent frauds or deceptions involving certain securities not presently within the Commission's authority.[197] While both proposals would expand federal regulation of freezeouts, neither proposal addresses the fundamental issue of whether the SEC possesses statutory authority to regulate the substantive fairness of freezeout transactions.[198] Commentators have been vehement and nearly unanimous in declaring that the SEC presently lacks authority to regulate fairness.[199] Any commission rulemaking on fairness would likely fail judicial scrutiny based on a lack of statutory authority.[200]

Congressional approval of expanded SEC authority which would cover substantive freezeout regulation is politically unlikely. Freezeout protections fall within the scope of fiduciary relationships which state governments traditionally have regulated.[201] Some commentators have advocated increased federal regulation of corporate behavior.[202] Many

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[191] *See* Rothschild, *supra* note 92, at 222-23; text accompanying notes 192-94 *infra*. While numerous state courts have considered the equities of freezeout mergers, only Wisconsin has adopted statutes governing going private transactions. *See* 11 WIS. ADMIN. CODE § SEC 6.05 (1977) (provision for disclosure of certain information about transaction and regulation of substantive fairness of transaction); *Appraisal of Authority, supra* note 3, at 126-28.

[192] *See* text accompanying notes 40-43 & 161-63 *supra*.

[193] *See* 17 C.F.R. §§ 240.13e-3(b), (c) (1980).

[194] *See* text accompanying notes 18 & 179-82 *supra*.

[195] *See Proposed Amendments to Williams Act*, [1980] 542 SEC. REG. L. REP. 1, 19-20 (Special Supplement) [hereinafter cited as *Proposed Amendments*].

[196] *Id.* at 20-21. *See* text accompanying note 188 *supra*.

[197] The SEC has proposed regulation of fraudulent, deceptive or manipulative acts or practices by security issuers registered under § 15(d) of the 1934 Act. *See Proposed Amendments, supra* note 195, at 17-18. *See* note 184 *supra*.

[198] *See* text accompanying notes 146-54 *supra*.

[199] *See* text accompanying note 154 *supra*.

[200] *See* Sherrard, *supra* note 149, at 724.

[201] *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479 (1976); Cort v. Ash, 422 U.S. 66, 84 (1975).

[202] *See, e.g.*, R. NADER, M. GREEN & J. SELIGMAN, CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS 415 (1976) [herein-

disagree, however, arguing that because corporations are created by state law, states should regulate corporate behavior.[203] The Delaware Supreme Court's protection of frozen out shareholders in *Singer* and subsequent cases contradicts the traditional argument that the federal government must intervene in substantive corporate law because states have failed to protect shareholders.[204] Adoption of freezeout standards alone would represent an undesirable piecemeal approach to the fundamental issue of the proper roles of federal and state security regulation. Thus, short of a major shift in state law, freezeout regulation will remain in its current bifurcated condition with mandatory disclosure under federal rules and substantive regulation through state equity precedents.[205]

SAMUEL A. FLAX

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after cited as NADER, GREEN] (listing reasons for federal chartering of large corporation); Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 701-03 (1976) [hereinafter cited as Cary] (advocating setting of federal minimum standards for corporate behavior). *See generally The Airlie House Symposium: An In-Depth Analysis of the Federal & State Roles in Regulating Corporate Management*, 31 BUS. LAW. 863 (1976).

[203] *See, e.g.*, Arsht, *Reply to Professor Cary*, 31 BUS. LAW. 1113 (1976). *Compare* Letter from John T. Hull, Acting Director Corporation & Securities Bureau, State of Michigan to SEC, (Jan. 30, 1978) SEC File No. S7-729 (opposing federal intervention) *with* Letter from Eugene G. Olson, Securities Administrator, State of Washington to SEC, (Jan. 24, 1978) SEC File No. S7-729 (supporting federal regulation as model for state regulation).

[204] *See* 1978 ABA Comment Letter, *supra* note 2, at 18-20; text accompanying notes 11-18 *supra*. In a widely quoted article written before the *Singer* decision, Professor Cary charged the Delaware courts aligned with management in most proxy contests and take-over attempts. Cary, *supra* note 202, at 673. Cary concluded this alignment was part of a public policy in Delaware to create a favorable climate for corporate management. *Id.* at 670; *see* NADER, GREEN, *supra* note 202, at 51-70 (tracing development of pro-management attitude in Delaware corporate law).

[205] The SEC has indicated that future federal freezeout regulation efforts will depend on state law developments. *See* 1979 Release, *supra* note 8, at E-2.