Disclosure, Board Duties and Remuneration

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Principles of Corporate Law

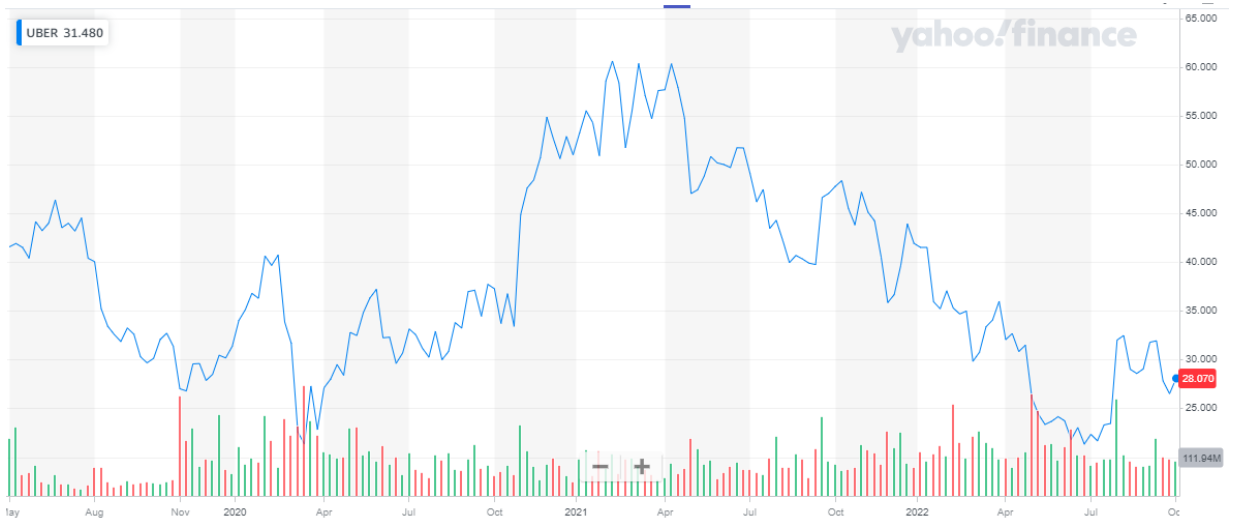
US – Primary Market Offerings

- Securities Act of 1933
  - Definition of securities → includes investment contracts
    1) Investment of money
    2) Common enterprise
    3) Expectation of profits
    4) Profit depending on the efforts of a promoter or third party
- **"Howey Test" (SEC v Howey, 1946)**
- Catch-all prospectus definition ("*any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security*")

Uber's IPO (2019)

« We have incurred significant losses since inception, including in the United States and other major markets. We expect our operating expenses to increase significantly in the foreseeable future, and we may not achieve profitability. » (Form S-1, Registration Statement with the SEC, sec.gov/edgar)

« We may experience significant fluctuations in our operating results. If we are unable to achieve or sustain profitability, our prospects would be adversely affected and investors may lose some or all of the value of their investment. » (Form S-1)



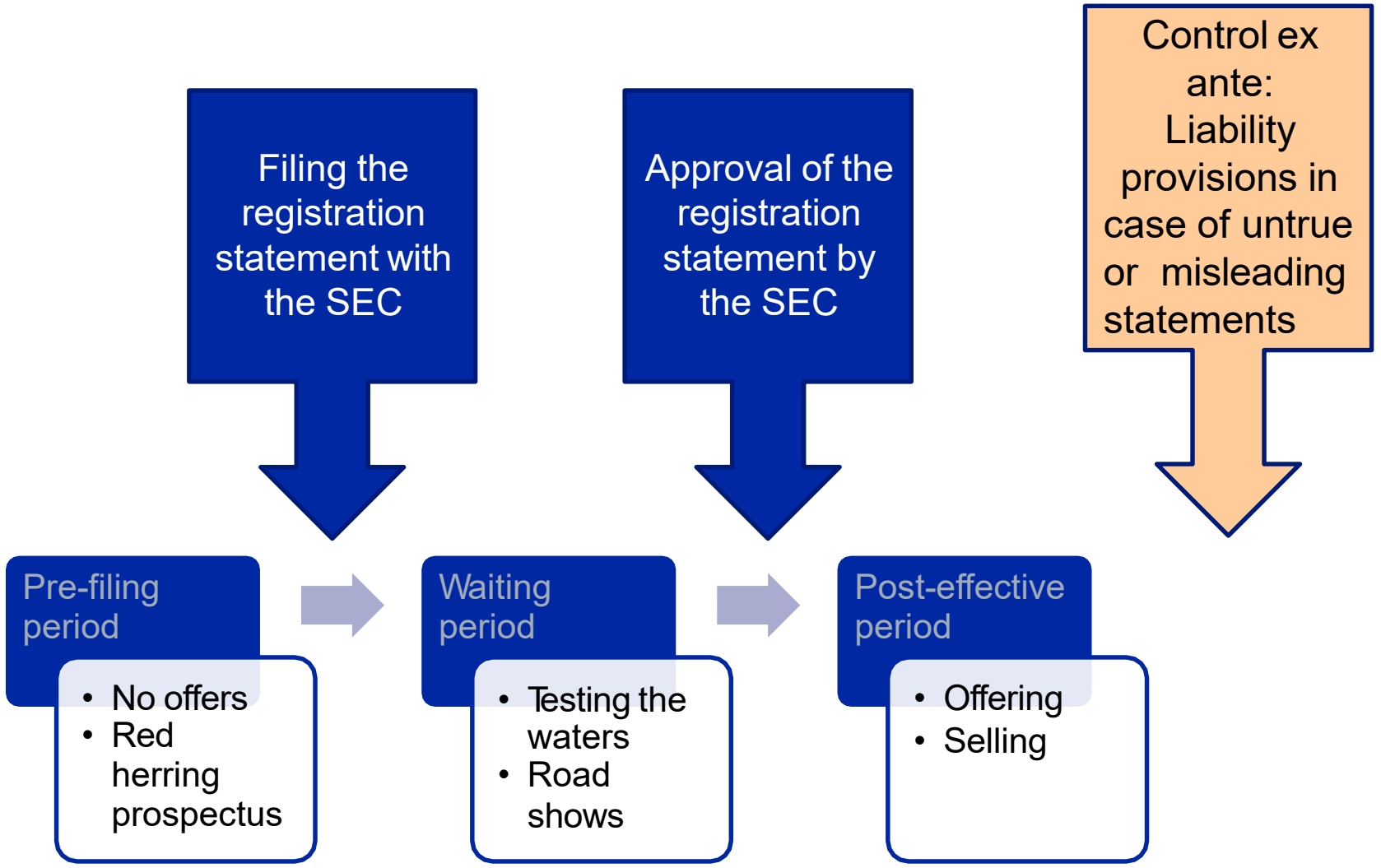
Source: Yahoofinance

Issue price: USD 45 per share on first day of trading, closed at USD 41.57 per share

EU Single Market – Passporting Mechanism

Granting a single passport to the issuer

US: Prospectus Requirement & Liability



Prospectus

- Primary market offerings
- **US:**
  - Formal requirements and catch-all prospectus definition ("*any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security")*
- **EU:**
  - Prospectus **Directive** applies to offerings and listings of securities (old regime). New Prospectus **Regulation** entered into force in 2017, rules applicable from 2019 (some exceptions)
  - Securities offered to the public or admitted to trading on a regulated market situated or operating within a Member State
- **CH:**
  - Issue prospectus: Art. 35 FIDLEG/FinSA (exceptions: Art 47 FIDLEG/FinSA)
  - Listing prospectus: SIX Swiss Exchange listing rules

Prospectus Liability

= Relating to untrue or misleading statements or omissions of material facts

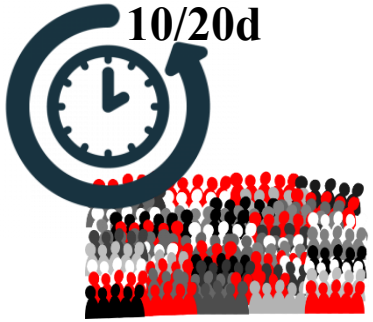
US

- Section 11 of the Securities Act of 1933
  = relating to the registration statement
- Section 12(a) of the Securities Act of 1933
  = relating to violations of procedural requirements or relating to statements in the prospectuses
- Section 10(b) of the Securities Exchange Act of 1934
  = anti-fraud provision

EU

- Civil liability regimes
- Liability for the content of a prospectus
- Art. 11 Prospectus Regulation
- Defendants (issuer etc.)
- Identification of the persons responsible for the prospectus
- Liability regimes at the level of the Member States
- Elements of liability

Switzerland – Prospectus Requirement and Liability



Issuer creates **prospectus**

submission to review body and **approval** within 10/20 days

Publication following approval (prior to listing/offer)

Liability for untrue or misleading representations (+omissions) (standard: negligence)

Review body appointed by FINMA
Currently (since 1 June 2020):
- **BX Swiss AG**
- **SIX Exchange Regulation**

Relevant provisions:
- FIDLEG/FinSA Arts 35ff
- Arts 109ff FinSO
- SIX Exchange listing rules
- Art 52 FIDLEG/FinSA
- Art 69 FIDLEG/FinSA

Applicable by 1 December 2020

PR: Art. 1
Subject matter, scope and exemptions

- Art. 1 (4): the obligation to publish a prospectus set out in Art. 3 (1) shall not apply to the following types of offers of securities to the public:
  - (a) an offer of securities addressed solely to qualified investors
  - (b) an offer of securities addressed to fewer than 150 natural or legal persons per MS, other than qualified investors
  - (c) an offer of securities whose denomination per unit amounts to at least EUR 100.000
  - See further exemptions in (d-j)
- Art. 1 (5): the obligation to publish a prospectus set out in Art. 3 (3) shall not apply to the admission to trading on a regulated market for
  - (a) new securities already admitted to trading on the same regulated market (over a period of 12 months, less than 20% of the number of securities already admitted on the same regulated market
  - (b) shares resulting from conversion of another securities (e.g. convertible bonds) (same 12 months and 20% rule apply)
  - See further exemptions in (c-j)

- Art.2 (e): **‘qualified investors’** means persons or entities that are listed in points (1) to (4) of Section I of Annex II to Directive 2014/65/EU, and persons or entities who are, on request, treated as professional clients in accordance with Section II of that Annex, or recognised as eligible counterparties in accordance with Article 30 of Directive 2014/65/ EU unless they have entered into an agreement to be treated as non-professional clients in accordance with the fourth paragraph of Section I of that Annex.
- Section I of Annex II of Directive 2014/65/EU
  - (1) Credit institutions, investment firms, etc;
  - (2) Large undertakings (e.g. balance sheet EUR 20m)
  - (3) national and regional governments
  - (4) Other institutional investors
- Section II: Elective Professional clients (detailed process to be followed)
- Article 30: Eligible counterparties

PR: Art. 15 – EU Growth prospectus

- Art. 15: “An EU Growth prospectus under the proportionate disclosure regime shall be a document of a standardised format, written in a simple language and which is easy for issuers to complete. It shall consist of a specific summary, specific registration document, specific securities note.”
- This applies particularly to SMEs (small-medium enterprises) (Art. 15 (1a)) to make it easier for them to raise capital
- Art. 15 (2), “The Commission shall, by 21 January 2019, adopt delegated acts in accordance with Article 44 to supplement this Regulation by specifying the reduced content and the standardised format and sequence for the EU Growth prospectus, as well as the reduced content and the standardised format of the specific summary.”

SEC Regulation D – exemption from registration & prospectus requirements

- Regulation D allows smaller companies to raise capital through private placements without registering with the SEC.
- Companies using Regulation D must file a Form D with the SEC after selling securities for the first time.
- Rule 504 lets companies sell up to $10 million in securities in a 12-month period without registration.
- Under Rule 506, a company can raise an unlimited amount of capital, but all non-accredited investors must be "sophisticated."
- While Regulation D eases fundraising, it requires compliance with federal and state securities laws.

New UK Listing Rules (2/2)

New UK Listing Rules (Effective 29 July 2024) – Changes in the Disclosure Regime:

—**Focus on Disclosure-Based Regulation**: Significant corporate transactions now require market announcements only, with more flexibility regarding the content and timing of disclosures

—**Enhanced Flexibility for Growth Companies**: IPO eligibility has ben eased, with fewer financial prerequisites, enabling growth-stage companies to list earlier without the same reporting burdens

—**New Obligations for controlling Shareholders**: While companies must maintain independence from controlling shareholders, the previous requirements for binding relationship agreements has been dropped

Objectives of the reform

—These reforms aim to reduce regulatory burdens, promote innovation and make the UK stock market more attractive to growth companies

—The UK regulator (the 'FCA') will review the effectiveness of these reforms in five years to assess their impact on the market

UK PISCES

- What PISCES does:
  - Creates a regulated multilateral trading venue for private company shares.
  - Uses auction-style trading to improve price discovery and transparency.
  - Introduces a “Private-plus” disclosure model with proportionate, standardised reporting.
  - Provides investor safeguards such as risk warnings, appropriateness checks, and a 24-hour cooling-off period.
  - Reduces trading frictions through Stamp Duty/SDRT exemptions and simplified compliance.

Initial Coin Offering (ICOs)

- A revolutionary tool for entrepreneurial finance
  - Facilitate and Accelarate the critical phase of capital formation
  - Involve sale of a stake in a project to raise funds at an early stage of development
  - Token (Security) & Cryptocurrence (Commodity)
- ICOs vs IPOs
  - Non regulated platforms
  - Tokens sold in the form of an organization's cryptocurrency
  - Tokens do not generally confer ownership rights, but
    - A discount on cryptocurrency before it hits the exchanges
    - A right to vote on future decisions
- ICOs vs crownfunding
  - They are not donations
  - A clear speculative purpose

ICOs Sequence

- Structural pattern
  - Pre-launch: announcement on cryptocurrency forums
    - Executive summary to present the project to investors
    - Whitepaper & Yellowpaper
    - Preliminary offer o selected investors
    - PR campaign targeting a broader segment of investors
  - Launch of the ICO and collection of funds
    - Generally one round of fund raising that may have a variable duration
  - Digital tokens listed on cryptocurrency exchanges for trading
    - Pre-ICO price: arbitrarily determined
    - Post-ICO price: market supply and demand
- Evolutions
  - Security Token Offering (STO), Initial Exchange Offering (IEO)

International Coin Offerings (ICOs)
Four Different Regulatory Approaches

Temporary ban on ICOs

Requirement of compliance with securities regulation (But new 2025 rules)

Requirement of compliance with securities regulation
→ But clarifying position as to how to fall outside the scope of securities regulation

Current lack of clear regulatory treatment

prudent ← → liberal

EU MiCA Regulation

- Comprehensive EU-wide regulation for all crypto-assets and service providers, harmonizing fragmented national laws.
- Covers all crypto-assets not regulated under MiFID II (utility tokens, stablecoins, and CASPs).
- Divides tokens into Asset-Referenced Tokens (ARTs)and E-Money Tokens (EMTs); mandates redemption, reserve, and no-yield obligations.
- Creates unified CASP licensing with EU passporting across all Member States.
- Mandatory white papers, clear disclosures, redemption rights, market-abuse protections, and custody safeguards.
- Broad crypto-market conduct and market-abuse regime; integrates AML and transparency standards.
- Supervised by ESMA, EBA, and national authorities across EU Member States.
- Entered into force 2023; stablecoin rules active mid-2024; full CASP implementation by end-2024; transition to mid-2026.
- Harmonized, risk-based, comprehensive framework for the crypto economy.

Switzerland’s DLT Act (2021) and FINMA guidance function as its MiCA-equivalent framework

Distributed Ledger Technology (DLT): Enables ledger-based securities in the Code of Obligations; adds a DLT trading facility category under FinMIA; clarifies insolvency treatment and custody of crypto-based assets.

Applies existing financial laws (banking, e-money, AML) to stablecoins case-by-case.

FINMA Stablecoin Guidance (2019, updated 2024 Supervisory Notice 06/2024) sets classification and reserve rules.

FINMA continues to refine accounting/custody treatment (e.g., 2025 guidance referencing crypto-based assets as custody assets), and has begun licensing DLT trading facilities under the new law.

AML/KYC, sanctions, and segregation duties flow from existing statutes; insolvency/custody clarified by DLT Act.

Note: The Swiss Federal Council is exploring potential frameworks for a CHF-denominated stablecoin, potentially to maintain competitiveness with the EU’s MiCA regime. *See* SBA 2025 Expert Report; FintechNews Switzerland, Oct 2025.

Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology (DLT Act), SR 220 et seq. and *FINMA Guidance 04/2019 on Stablecoins*.

To whom is he/she a fiduciary in corporate law?

- Board members (both executive and non-executive members)
- Duty to the company?
- Duty to shareholders?
- Or duty to both?
- Fiduciary duties help the shareholders to control divergent interests of managers and shareholders

Fiduciary Principle (narrow view)

- **Optimal fiduciary rules approximate the bargain that investors and managers would**
- **have reached if they could have bargained and could enforce their agreements at no cost**
- Easterbrook & Fischel:
  - The 'rules preserve the gains resulting from the separation of management from risk bearing,
  - while limiting the ability of managers to give priority to their own interests at the expense of the
  - firm'
- * **According to Easterbrook & Fischel,**

  two kinds of management practices:
  - Practices that harm investors' interests
  - Practices that benefit managers & investors
- **Fiduciary principles: rules for completing 'incomplete contracts'.** Overcome high costs of contracting
- **Fiduciary duties goal**:
  - overriding the high cost of expressly specifying things for all contingencies in a contract.
  - Detailed contracting to address all future contingencies after firm established is almost impossible (ie., raising capital & strategy)

Board Duties
Fiduciary Duties in Swiss Law

Art. 717 Swiss Code of Obligations (The Company Limited by Shares)

IV. Duty of care and loyalty

1 The members of the board of directors and third parties engaged in managing the company's business must perform their duties with all due diligence and safeguard the interests of the company in good faith.

2 They must afford the shareholders equal treatment in like circumstances.

See BGE 139 III 24 (Jurisprudence similar to the Business Judgment Rule)

- Shareholder claim for damage caused to the company due to unnecessary legal proceedings resulting in court and legal costs of about one million CHF
- The misuse of court proceedings can be seen as a breach of Art. 717 I OR (E. 3.3.)
- In the particular case were the court proceedings between the stock company and the minority shareholder not in the interest of the company, but in the mere interest of the majority share holder (E. 3.4,5)
- Breach of the duty of equal treatment (E. 3.4)
- General restraint of the Swiss Courts in the review of decisions of the board of directors

Liability in Swiss Law

Art. 754 Swiss Code of Obligations

III. Liability for administration, business management and liquidation

1 The members of the board of directors and all persons engaged in the business management or liquidation of the company are liable both to the company and to the individual shareholders and creditors for any losses or damage arising from any intentional or negligent breach of their duties.

2 A person who, as authorised, delegates the performance of a task to another governing officer is liable for any losses caused by such officer unless he can prove that he acted with all due diligence when selecting, instructing and supervising him.

See BGE 139 III 24

- Differentiation between «direct damage» caused directly to the shareholders and «indirect damage» caused directly to the Stock Company but indirectly to the share holders

BGE 139 III 24

Summary:	Board denied shareholders to register their shares. The shareholders sued the board in order to be registered.
Direct damage:	Damage the appellant had by the litigation.
Indirect damage:	Damage the board caused through their decision, which reduced the value of the appellants' shares.
Ruling:	The denial for registering the shares was not in the interest of the company and was in breach of the principle of equal treatment of the shareholders. Therefore, the board caused unnecessary costs for the company.

Fiduciary Duties: US Case Law

Duty	Test for Whether Duty is Met	Remedy
Loyalty	Fair Process (approval by noninterested directors) or else burden on directors to show **ENTIRE FAIRNESS**	Injuction or Damages
Care	**BUSINESS JUDGEMENT RULE**	None, except in very extreme cases.
Disclosure	Disclose all material information when seeking shareholder approval, or when a conflict of interest exists.	Corrective disclosure or damages
Extra Care When Selling Company	No Clear Test; careful scrutiny of decision process.	Injuction or Damages

“The business judgment rule is an acknowledgment of the managerial prerogatives of Delaware directors under Section 141(a). It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts. . . .

[However, the rule’s] protections can only be claimed by disinterested directors . . . .. From the standpoint of interest, this means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing . . . . See 8 Del.C. § 144(a)(1).

[Moreover], to invoke the rule's protection directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties. While the Delaware cases use a variety of terms to describe the applicable standard of care, our analysis satisfies us that under the business judgment rule director liability is predicated upon concepts of gross negligence."

Directors Duties: a Case Study

- Re Barings Plc (No 5)*
  - Collapse of the British bank Barings in February 1995 raised important issues regarding the scope and application of director's duties under the UK Company Directors Disqualification Act 1986 (CDDA)
  - The conduct alleged in the claim involved **lack of director supervision and monitoring of the dealings of a rogue trader**, whose switching business seemed to generate substantial proportion of the Barings group's profits. In fact the business incurred losses in the order of **£827 million**, which caused the collapse of the bank.
  - The court:
    - even when a director has delegated a function, he remains responsible for the delegated function and retains a residual duty of supervision and control.
    - The director's conduct involved serious incompetence in failing to understand and remain informed about the switching business.
    - The deputy group Chairman disqualified for 4 years: his conduct was described as «non- management».
    - Product manager of the trader disqualified for six years and found to have «failed to make any serious attempt to discharge his management responsibilities» & «culpable degree of inactivity»
- *Secretary of State for Trade and Industry v. Baker (No. 5) [1999] 1 BCLC 433

Controlling Shareholders

- Controlling Stockholder:
- controls a majority of the company's voting power:
- "[C]ontrol exists when a stockholder owns, directly or indirectly, more than half of a corporation's voting power." (Weinstein Enters – 2005) While courts typically frame majority holders as controlling stockholders, it is possible for even a majority holder not to be a controlling stockholder if that individual does not exercise control over a particular matter or the board (Williams v. Geier – 1996)
- exercises "a combination of potent voting power and management control such that the stockholder could be deemed to have effective control of the board without actually owning a majority of stock" (Corwin v KKR – 2015)

Consequences on Controlling Shareholders

- Imposition of fiduciary duties:
  - Duty of Loyalty: A controlling stockholder act in the best interests of the company and its stockholders, not in the controlling stockholder's self-interest to the detriment of the company or other stockholders.
  - Fiduciary duties of disclosure and care
    - *Lynch v. Vickers Energy Corp.* a controlling stockholder violated the duty to disclose material facts by not revealing asset value estimates despite initiating a tender offer for a price that undervalued the assets.
    - In general: the duty of care the duty to make informed business decisions.
- Enhanced Transaction Scrutiny
  - Entire Fairness as a standard review (rather than Business Judgement Rule):
    - fair price (economic and financial considerations)
    - Fair dealing (timing, structure, negotiations, disclosures, processes, and consents).

Richard J. Tornetta v.
Elon Musk

Judgement of the Court of Chancery of the State of Delaware from 30 January 2024 (see Download.aspx (delaware.gov):

In reaching its conclusion, the Court made four key legal determinations:

1) the Court determined that Musk was a “controller” of the Company, thus requiring the Court to review the Grant under the entire fairness standard—the highest of Delaware’s three levels of scrutiny applying to business decisions.

> If it survives appeal, the Court’s decision that Musk controls Tesla, Inc. ("Tesla" or the "Company") significantly expands the prospect that a stockholder owning as low as 20% of the voting power of a company will be deemed to be a controller, subject to rebuttal.
>
> ***=> Having found that Musk was a controller, the Court reviewed his equity compensation package (the “Grant”) under the standard of entire fairness:***

2) the Court determined that an affirmative stockholder vote did not shift the burden of proof away from Defendants to prove the Grant was fair because stockholders were not fully informed in their vote.

> While disinterested stockholders overwhelmingly approved the Grant, the Court required Defendants to prove the Grant was entirely fair because of material misrepresentations and omissions in the proxy disclosures about the negotiation of the Grant.

3) the Court determined that Defendants failed to prove the Grant was fair to stockholders under the heightened standard.

The Court concluded that Defendants failed to prove the Grant was entirely fair due both to conflicts in the negotiation process and the compensation package being inappropriate for achieving its stated ends given its size.

4) the Court determined that full rescission of the Grant was the appropriate remedy

The Court ordered rescission of the entire Grant, notwithstanding the substantial increase in Tesla's market capitalization after the Grant was adopted.

Overview of "The Grant":

-It provided 12 tranches of equity awards—each worth 1% of Tesla's outstanding shares—that Musk could unlock for each US$50 billion increase in the Company's market capitalization (along with EBITDA and revenue requirements).

-**The maximum amount of the Grant—worth US $ 55.8 billion**—would only be awarded if all 12 tranches were unlocked, corresponding with growth in Tesla's market capitalization from approximately US $ 50 billion to US $ 650 billion.

News since the Judgement

13 June 2024: Following the court ruling, Tesla shareholders on 13 June 2024 ratified Musk's 2018 pay package for a second time, again by an overwhelming margin (Tesla shareholders approve $46 billion pay package for CEO Elon Musk - CBS News).

26 June 2024: Tesla wants the Delaware Chancery Court to reconsider her prior ruling that quashed a record pay package for Chief Executive Elon Musk worth tens of billions of dollars (Tesla heads back to court still hoping to pay CEO Elon Musk billions | Legal Dive).

The losing party appealed to the Delaware Supreme Court.

22 July 2024: Delaware Chancery Court approves Amicus Brief

Delaware Chancery Court ruled that Charles Elson, a longtime corporate governance expert from the University of Delaware, will be allowed to participate as an amicus, the Delaware Chancery Court ruled (frankel-muskcompensation--mccormickonamici.pdf (thomsonreuters.com)).

The judge is weighing the impact of Tesla's shareholder vote last month to approve a pay package that the judge invalidated in January (After controversy, judge in Musk pay case allows Delaware prof to file disputed brief | Reuters).

Elson's newly approved amicus brief (2024-05-13 (as-filed) Exhibit A - Proposed Brief.pdf (thomsonreuters.com)), refutes Tesla's theory that fully informed shareholders "ratified" Musk's pay when they approved his package in June. The professor contends that Delaware law does not permit the company effectively to overturn McCormick's January ruling by holding a post-judgment shareholder vote.