REASSESSING SELF-DEALING: BETWEEN NO CONFLICT AND FAIRNESS

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Scholars have long disagreed on which of two rules is more effective when a fiduciary engages in self-dealing. Some defend the "strict" no-conflict rule, which categorically bans self-dealing. Others prefer the "flexible" and "pragmatic" fairness rule, which allows self-dealing if it is fair to beneficiaries. The centrality of this debate cannot be overstated: corporate law as a field is fundamentally concerned with self-dealing by fiduciaries. Yet a lack of firm data means that this debate has dragged on for decades, with no end in sight.

This Article makes a simple but powerful point: the entire debate is somewhat misguided because, in operation, the difference between the two regimes is not as important as scholars generally assume. This is best seen by comparing the operation of the United Kingdom—which continues to employ the traditional no-conflict rule—with the United States, which adopted the fairness rule. The no-conflict and fairness rules share a common structure: they require strict loyalty but provide exceptions or cleansing devices that save fiduciaries from liability. Only the no-conflict rule allows companies to adopt their own exceptions. Based on this analysis, neither rule is self-evidently stricter or more pragmatic. In fact, examining the fiduciary rules in operation, including the exceptions that companies actually adopt and directors actually use, reveals that they are quite similar in operation. Both task neutral directors with policing directorial self-dealing.

This finding underscores the need for scholars and policymakers alike to focus not on the choice between no conflict and fairness but rather on the

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best use of exceptions or cleansing devices. The availability of proof of fairness as a cleansing device in the United States occasionally matters—but far less than commentators have claimed. It is often irrelevant because of its severity, rather than relevant because of its leniency. More attractive exceptions are usually available to self-dealing directors. This finding also complicates the dominant narrative holding that U.S. law significantly weakened as it evolved from no conflict to fairness; far from rejecting a stricter U.K. law, U.S. law came more closely to resemble U.K. law in operation.

INTRODUCTION

Corporate law is fundamentally concerned with self-dealing—the expropriation of corporate wealth by fiduciaries.[1] Self-dealing can involve a

1. *See* Simeon Djankov et al., *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430, 430 (2008) ("[T]hose who control a corporation, whether they are managers, controlling shareholders, or both, can use their power to divert corporate wealth to themselves rather than

favorably priced loan or exchange of property, the payment of excessive compensation, or the outright theft of corporate assets.[2] In fact, any transaction between directors or officers and their corporation constitutes self-dealing since it pits fiduciaries against the corporation they are obligated to serve.[3]

Scholars have long disagreed over which of two fiduciary rules is more effective for addressing self-dealing. Some scholars defend the "strict" no-conflict rule, which categorically bans self-dealing by directors.[4] Others prefer the "flexible" and "pragmatic" fairness rule, which allows self-dealing if it is fair to the corporation and its shareholders.[5] Proponents of this approach claim that the pragmatic fairness rule better distinguishes between beneficial and harmful self-dealing.[6] The debate has dragged on for decades, beyond corporate law and across the common law world.[7]

This Article challenges a central assumption underlying the debate: that the rules operate differently. In practice, the difference between these rules

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sharing it with the other investors."); Simon Johnson et al., *Tunneling*, 90 AM. ECON. REV. 22, 22 (2000).

2. *See* Luca Enriques et al., *Related-Party Transactions*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 145, 145 (Reinier Kraakman et al. eds., 3d ed. 2017) ("Self-dealing typically refers to purchases or sales of assets, goods, or services by related parties . . . ."); Andrei Shleifer & Robert Vishny, *A Survey of Corporate Governance*, 72 J. FIN. 737, 752 (1997) (referring to "managerial self-dealing, such as outright theft from the firm, excessive compensation, or issues of additional securities . . . to the management and its relatives"); *see also* Djankov, *supra* note 1, at 430–31 (listing forms of self-dealing). This Article focuses on self-dealing by directors, including those with significant voting power but not on nondirector controlling shareholders.

3. Fiduciary doctrine focuses on transactions directly between a corporation and its directors as well as those with a corporation in which directors "are in any way interested, whether because they benefit personally however indirectly, or because they are subject to a conflicting duty." L. C. B. GOWER, THE PRINCIPLES OF MODERN COMPANY LAW 479 (2d ed. 1957).

4. *See, e.g.*, Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1410 (1985); Evan Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 999 (2017); Harold Marsh, Jr., *Are Directors Trustees?: Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 35–48 (1966). For a more detailed discussion of the literature, see *infra* Part I.B. For statements as to the apparent rigor and strictness of the no-conflict rule, see ANDREW STAFFORD & STUART RITCHIE, FIDUCIARY DUTIES: DIRECTORS AND EMPLOYEES 45–51 (2d ed. 2015).

5. *See infra* Part I.A.

6. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 15 (1991); Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1114–16 (1988); John H. Langbein, *Questioning the Trust-Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 958–60 (2005). For a more detailed discussion of the literature, see *infra* Part I.B.

7. *See, e.g.*, John H. Farrar & Susan Watson, *Self-Dealing, Fair Dealing and Related Party Transactions—History, Policy and Reform*, 11 J. CORP. L. STUD. 495, 495 (2011) (comparing self-dealing law in several common law jurisdictions); Fischel & Langbein, *supra* note 6 (examining trusts and corporate law); Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CALIF. L. REV. 393, 429–38 (2003) (comparing self-dealing law for controlling shareholders in multiple jurisdictions); Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541, 555–62 (2005) (examining trusts and corporate law).

is not as important as scholars believe. Today, this is best seen by comparing the United Kingdom—which continues to employ the traditional no-conflict rule—to the United States, which adopted the fairness rule.

The key is to understand the structure of the rules and their usual operation. First, in structure the rules are remarkably similar: they require strict loyalty but provide exceptions or cleansing devices that protect transactions or fiduciaries from liability.[8] Each rule has multiple cleansing devices. Under the U.K. no-conflict rule, companies may even craft their own exceptions, a permissive approach that the U.S. fairness rule denies.[9] Comparing the substantive content of each rule, including their full range of exceptions, reveals that neither rule is logically or necessarily stricter, more flexible, or better calibrated to deter harmful self-dealing.[10]

To be sure, courts articulate the rules differently. The no-conflict rule bans self-dealing transactions whether they are fair or not, while the fairness rule saves them if they are fair. The no-conflict rule is usually formulated as a loyalty rule, while the fairness rule is often formulated in terms of its signature cleansing device—proof of fairness.[11] One rule seems strict, the other more flexible.

But this is an apples-to-oranges comparison.[12] Both fiduciary rules require strict loyalty, imposing liability for self-dealing, but provide multiple exceptions. Evaluating each rule therefore requires a comparison of its full range of exceptions, including under the no-conflict rule those exceptions that companies have crafted themselves. Comparing the rules in this way reveals that neither rule self-evidently dominates the other in its rigor, pragmatism, or ability to differentiate between harmful and nonharmful conflicts.[13]

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8. In the self-dealing context, exceptions are rules or standards that exclude the operation of a given loyalty rule by protecting a fiduciary or transaction from the remedial consequences that would otherwise arise under that loyalty rule. *See infra* Part III.A. Exceptions specify what must be done to protect an interested fiduciary or transaction from a given loyalty rule. Exceptions are similar to altering rules, which "tell private parties the necessary and sufficient conditions for contracting around a default." *See* Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 6 (2006); *see also* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 122–23 (1989) (conceiving of altering rules as "contracting around" default rules); Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 383 (2007) (defining altering rules as "prescrib[ing] what a corporation must do to legally opt out of a given default rule"). This Article conceives of exceptions broadly. They include noncontractual rules such as rules protecting transactions or fiduciaries from liability if they get beneficiaries' informed approval for a transaction or prove a transaction's fairness. *See infra* Part III. Exceptions also include rules that parties craft themselves that have the effect of excluding the operation of the loyalty rule. For further discussion of exceptions, see *infra* Part II.A.

9. *See infra* Part II.C.

10. *See infra* Part II.

11. See *infra* Parts I.A and I.B for doctrinal formulations of the rules.

12. As an example of such a comparison, see Fischel & Langbein, *supra* note 6, at 1115–16. Under the fairness rule, in contrast to the no-conflict rule, "self-dealing is not prohibited. Rather, [self-dealing] transactions are permitted, but subject to greater judicial scrutiny." *Id.*

13. *See infra* Part II.

The second step is to examine the fiduciary rules in operation, including the exceptions that companies actually adopt and directors actually use. They operate quite similarly. Under the no-conflict rule, companies commonly crafted an exception requiring directors to get some form of approval from their fellow directors for a self-dealing transaction.[14] A similar exception developed under the fairness rule. Under both regimes, we would expect rational fiduciaries faced with a strict loyalty rule and multiple exceptions to gravitate to the exception they find most attractive, bearing in mind the share of any bargaining surplus that the exception produces and the cost of using the exception.[15] In fact, under both regimes, interested directors do so, routinely using an exception that is remarkably similar: approval by neutral or disinterested directors.[16] In the United States, securities laws also strongly encourage fiduciaries to use this exception.[17] In operation, both regimes task neutral directors with policing self-dealing, enabling nuanced, commercially sensitive responses to self-dealing.

Of course, the U.S. regime does offer an exception (proof of fairness) that the United Kingdom does not. But the availability of this cleansing device is unlikely to influence directors' conduct, even that of opportunistic directors, so strict are its requirements. Other doctrinal differences between the rules even suggest that the fairness rule operates more strictly than the no-conflict rule.[18]

This Article's analysis has implications for scholarly debates and regulatory policy. First, it shifts the debate from the false choice between no conflict and fairness, showing that policymakers and scholars alike ought to focus instead on exceptions or cleansing devices—on their substantive content and practical use. Second, in corporate comparative law debates, accounting for the distinct functions and operations of loyalty rules and exceptions exposes the incompleteness of claims about either rule's superiority on any important dimension. In corporate law, the U.K. no-conflict rule often operates anything but strictly, and the U.S. fairness rule is generally no more effective in distinguishing between beneficiary-benefiting and beneficiary-harming self-dealing. Neither fiduciary rule is friendlier to management or better attends to the needs of commerce. In their operations, the rules closely mirror one another: they enlist neutral directors to patrol self-dealing, a commercially sensitive response. If anything, the U.S. rule is more severe.

Third, this analysis sheds light on historical narratives in U.S. corporate law. According to a widely accepted narrative, until the late nineteenth century, corporate fiduciaries were subject to the no-conflict rule,[19] a rule

14. *See infra* Part II.C.
15. *See infra* notes 192–229 and accompanying text.
16. *See infra* Parts III.A–B.
17. *See infra* notes 221–31 and accompanying text.
18. *See infra* Part III.D.
19. *See generally* Marsh, *supra* note 4 (examining the evolution of U.S. self-dealing law). Marsh's view has attracted widespread support; for discussion of the extent of that support (and criticism of Marsh's account), see David Kershaw, *The Path of Corporate Fiduciary*

believed to have been imported from the United Kingdom.[20] But the strict no-conflict rule evolved "from condemnation, to toleration, to encouragement of conflict of interest."[21] In its current state, the no-conflict rule has become the fairness rule. Traditionalists see in the fairness rule the weakening of fiduciary law; they lament its apparent decline.[22] Progressives embrace the change, regarding this development as a model for other fields of fiduciary law.[23] But if the no-conflict and fairness rules operate similarly, this common narrative is incomplete, if not mistaken. Either the early U.S. no-conflict rule did not significantly weaken in the manner claimed as it evolved into the fairness rule, or it did not closely mirror its U.K. counterpart, or perhaps both. Although the analysis here does not resolve the historical debate, it suggests that we ought to consider each rule's full range of exceptions and their practical operations. An initial examination suggests that the early U.S. no-conflict rule was never as strict as is often claimed; it included exceptions, a "weakness" present from the start. The big change in U.S. law occurred when courts expressly acknowledged that disinterested directors could approve self-dealing.[24] In adopting this exception, U.S. law came more closely to resemble the U.K. law in operation, which had already achieved the same flexibility by enlisting neutral directors to monitor self-dealing. Far from rejecting a stricter U.K. law, as many believe, U.S. law followed the United Kingdom's lead.

Finally, the analysis invites us to reconsider comparisons between corporate law's fairness rule and the no-conflict rule in other fields. In trust law, for example, parties may authorize or consent to conflict transactions, excluding the strict requirement for loyalty.[25] An analysis of the relative rigor of these rules also requires us to examine the extent to which fiduciaries avail themselves of these exceptions.

This Article proceeds in Part I by examining the two fiduciary regimes and scholarly accounts comparing them. To better understand the effects of the fairness rule, it focuses on Delaware law, as Delaware is the most common U.S. state for incorporation.[26] To evaluate the U.K. no-conflict rule, it examines English law, the law generally chosen for international comparison.[27] Part II examines the structure of each fiduciary regime,

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Law, 8 N.Y.U. J.L. & BUS. 395, 439–40 (2012). *See also infra* Part I.B (surveying literature that accepts this narrative).

20. As to the law's U.K. origins, see *infra* note 53 and accompanying text.

21. Marsh, *supra* note 4, at 57.

22. *See infra* notes 58–62 and accompanying text.

23. For example, John Langbein regards the success of the fairness rule in U.S. corporate law as "highly instructive for trust law." Langbein, *supra* note 6, at 962.

24. *See infra* Part IV.C.

25. *See* RESTATEMENT (SECOND) OF TRUSTS § 170(1) cmt. t (AM. LAW INST. 1959) (terms of trust may permit certain self-dealing by trustee); *id.* § 216(1) (informed beneficiary consent may protect trustee from liability for breach of trust).

26. *See, e.g.*, STEPHEN M. BAINBRIDGE, CORPORATE LAW 10 (3d ed. 2015).

27. *See, e.g.*, Paul L. Davies, *Related Party Transactions: U.K. Model* (European Corp. Gov. Inst., Working Paper No. 387/2018, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126996 [https://perma.cc/Q4V7-BRQU]. In this comparative study, Davies considers the law of England and Wales as representative of U.K. law. *Id.*

distinguishing between its underlying loyalty rule and exceptions. Part III examines the rules in operation, focusing on the exceptions that companies craft and fiduciaries invoke. This Article examines the implications of this analysis and its generalizability to other settings in Part IV.

I. JUDICIAL FORMULATIONS AND SCHOLARLY DEBATES

This Part considers how courts have articulated the no-conflict and fairness rules and the scholarly literature that has comparatively examined the rules.

A. The No-Conflict and Fairness Rules

The no-conflict rule bans fiduciaries from occupying positions of "conflict."[28] In corporate law, Lord Cranworth in *Aberdeen Railway Co. v. Blaikie Bros.*[29] provides its classic formulation: "[n]o one, having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect."[30] As a rule of equity, the rule is formulated in general terms, and its precise contours have been variously stated.[31]

Where it operates, the no-conflict rule admits no inquiry into the merits of a self-dealing transaction.[32] Directors cannot save a transaction by showing that it is fair to the company. According to Lord Cranworth in *Aberdeen*, "[s]o strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."[33] Even if a transaction is "as good as" or "better" than any alternative transaction available to the company, it is voidable under the rule.[34] Because the rule forbids transactions that benefit a director, whether or not they also benefit the company, the rule effectively requires directors to act in the principal's sole interests and is therefore also known as the sole-interest rule.[35]

28. The no-conflict rule applied in England prior to 1844, when companies operated as unincorporated joint-stock companies in which directors were trustees in whom companies' property was vested. GOWER, *supra* note 3, at 471. In 1844, under the Joint Stock Companies Act, companies were permitted to incorporate by registration. *See* Joint Stock Companies Act 1844, 7 & 8 Vict. c. 110 (Eng.). As directors later became a sui generis category of fiduciary, the no-conflict rule continued applying to them. Courts drew analogies to the duties of trustees. *See, e.g.*, Re Forest of Dean Coal Mining Co. [1878] 10 Ch D 450 (Eng.). Some courts also developed the no-conflict rule by analogy to agents' duties. *See, e.g.*, Aberdeen Ry. Co. v. Blaikie Bros. (1854) 1 Macq. 461 (appeal taken from Scot.); *see also* Ferguson v. Wilson [1866] 2 Ch App. 77 (Eng.).

29. (1854) 1 Macq. 461 (appeal taken from Scot.).

30. *Id.* at 471.

31. P. D. Finn observes that the rule "can be cast only in large and general terms" and that "there is no generally accepted formulation." P. D. FINN, FIDUCIARY OBLIGATIONS 199 (1977).

32. *Aberdeen*, 1 Macq. at 472 ("[N]o inquiry on that subject [the merits of the conflicted transaction] is permitted.").

33. *Id.* at 471; *see also* Bray v. Ford [1896] AC 44 (HL) at 51–52 (describing the duty as "an inflexible rule of the Court of Equity").

34. *Aberdeen*, 1 Macq. at 472.

35. *See* Langbein, *supra* note 6, at 931. The rule is also often referred to as the "no further inquiry rule." *Id.*

In 2006, the U.K. Parliament embedded corporate fiduciary duties in legislation, making statute the source of directors' duties.[36] In doing so, it did not substantially alter directors' fiduciary obligations relevant to self-dealing but instead reproduced the practical effect of the common law no-conflict rule.[37] Indeed, the statutory duties are "based on" rules and principles under the common law.[38] This Article focuses on the common law position until codification, because it has featured in relevant scholarly debates, but also briefly examines the (largely identical) statutory requirements.[39]

The fairness rule applies in U.S. corporate law. In that field, the United States is said to have adopted the U.K. common law no-conflict rule before "rapidly diverg[ing]" from it.[40] By the mid-twentieth century, U.S. corporate law had evolved into the fairness rule, which protects self-dealing transactions if they are fair to the corporation.[41] Under one judicial formulation, "[w]hen directors of a . . . corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain."[42] Under another formulation, "[d]irectors . . . on both sides of a transaction have the burden of establishing its entire fairness."[43] Melvin Eisenberg explains that a director "must act or deal fairly."[44] Directors who carry this burden are protected from liability for fiduciary breach.

Courts and scholars grapple with the meaning of fairness. It is a range rather than a point.[45] It roughly equates with what parties would negotiate in

36. *See generally* Companies Act 2006, c. 46 (Eng.).

37. *See* PALMER'S COMPANY LAW ¶ 8.3104 (Geoffrey Morse ed., 2017); *see also infra* notes 269–79 and accompanying text. The no-conflict rule applies not only to self-dealing but also to the appropriation of corporate opportunities and use of corporate property. *See infra* notes 329–30 and accompanying text.

38. *See* Companies Act 2006, c. 46, § 170(3) (Eng.).

39. The common law position until codification is considered in Parts I, II, and III.A–D. The contemporary statutory position that largely codifies directors' duties is considered in Part III.E.

40. *See* Kershaw, *supra* note 19, at 400 ("[U.K. and U.S.] laws rapidly diverged to provide starkly different fiduciary standards for directors.").

41. The starting point for analysis under U.S. law is often the business judgment rule, "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." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). Plaintiffs can rebut the presumption by generally alleging self-dealing, which then subjects the challenged transaction to review under the fairness rule. *See generally id.* For a more detailed explanation of the business judgment rule and how shareholders may rebut it, see *infra* notes 121–23 and accompanying text.

42. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983). The fairness rule also applies to corporate officers. This Article confines its analysis to directors to ensure equivalence with U.K. law, under which the no-conflict rule may not apply to officers.

43. Valeant Pharm. Int'l v. Jerney, 921 A.2d 732, 732 (Del. Ch. 2007) (quoting *Weinberger*, 457 A.2d at 710).

44. Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 450 (1993).

45. *Id.*

arm's-length dealings.[46] Requiring "entire fairness," contemporary courts look not only to fairness of price—an inquiry into the agreed financial terms—but also to fairness of dealing. With respect to dealing, courts examine "when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how approvals of the directors and the stockholders were obtained."[47] The question is whether the process substitutes for arm's-length bargaining.[48] Though courts assess transactions on both dimensions of fairness (price and dealing), they treat the test as a singular assessment of entire fairness.[49]

B. Scholarly Divide

A voluminous literature assesses the relative merits of the no-conflict and fairness rules. When scholars study the fairness rule, they study the rule imposed on directors under contemporary U.S. corporate law, usually Delaware law. Scholars compare the fairness rule to its counterpart in U.K. corporate law, the no-conflict rule.[50] Scholars also measure the fairness rule against its direct predecessor—the early U.S. no-conflict rule.[51] For other scholars, the basis of comparison is the no-conflict rule in trust law.[52] Scholars generally assert equivalence among the no-conflict rules in these various areas—that the early U.S. corporate no-conflict rule "began with the

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46. Gottlieb v. Heyden Chem. Corp., 90 A.2d 660, 663 (Del. Ch. 1952) (specifying that fairness requires that "the bargain had in fact been at least as favorable to the corporation as [directors] would have required if the deal had been made with strangers").

47. *Weinberger*, 457 A.2d at 711.

48. *See Valeant*, 921 A.2d at 736 ("The process pursued by the directors was deeply flawed with self-interest and no way substituted for arm's-length bargaining.").

49. *Weinberger*, 457 A.2d at 711 ("[T]he test for fairness is not a bifurcated one as between fair dealing and fair price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.").

50. *See, e.g.*, Deborah A. DeMott, *The Figure in the Landscape: A Comparative Sketch of Directors' Self-Interested Transactions*, 62 LAW & CONTEMP. PROBS. 243, 244 (1999); Farrar & Watson, *supra* note 7, at 520–21; David W. Giattino, *Curbing Rent-Seeking by Activist Shareholders: The British Approach*, 25 TEMP. INT'L & COMP. L.J. 103, 130–31 (2011); Kershaw, *supra* note 19, at 400.

51. *See, e.g.*, Marsh, *supra* note 4, at 40–41; *see also* Norwood P. Beveridge, Jr., *The Corporate Director's Fiduciary Duty of Loyalty: Understanding the Self-Interested Director Transaction*, 41 DEPAUL L. REV. 655, 659 (1992); Julian Velasco, *The Diminishing Duty of Loyalty*, 75 WASH. & LEE L. REV. 1035, 1041–42 (2018).

52. *See, e.g.*, Langbein, *supra* note 6, at 958–61; Edward B. Rock & Michael L. Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 651 (2002).

same legal proposition about self-dealing" as U.K. law[53] and was a "straightforward borrowing" of trust law's no-conflict rule.[54]

A basic assumption of this scholarship is that the no-conflict and fairness rules operate differently, to different effect. For example, Harold Marsh, Jr. famously defended the no-conflict rule, regarding its evolution toward fairness as an "abject failure."[55] The fairness rule, Marsh asserted, did "little or nothing to inhibit conflicts of interest."[56] Victor Brudney describes this change as an undesirable weakening of fiduciary law.[57] To Brudney, courts "substantially eroded" fiduciary law during the twentieth century, allowing corporate management "substantial discretion . . . to divert corporate assets to its own benefit at investors' expense."[58] Also citing Marsh, Lawrence Cunningham says, "[t]he traditional strength of [fiduciary law] decayed during the twentieth century."[59] Evan Criddle regards the evolution in Delaware law toward fairness as an instance of courts "dismantl[ing] traditional fiduciary rules and remedies."[60] To Amir Licht, the fairness rule has had a "pernicious" effect "that necessarily leads to subpar compliance . . . by design."[61]

On this traditional view, the no-conflict rule is stricter toward self-dealing than the fairness rule because the former bans transactions that the latter

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53. Kershaw, *supra* note 19, at 395; *see also* Ahmed Bulbulia & Arthur R. Pinto, *Statutory Responses to Interested Directors' Transactions: A Watering Down of Fiduciary Standards*, 53 NOTRE DAME L. REV. 201, 202 (1977) ("Early American courts followed the traditional English rule and held such [self-dealing] contracts or transactions to be voidable at the option of the corporation." (footnotes omitted)); Kershaw, *supra* note 19, at 400 ("Self-dealing law in both the United Kingdom and the United States began by adopting the same fiduciary principles from English trust law . . . and for a brief period they both looked to the same U.K. case as the leading case.").

54. ROBERT C. CLARK, CORPORATE LAW 164 (1986) (referring to the early U.S. corporate no-conflict rule as "a result of the court's straightforward borrowing of an existing rule from trust law"); *see also* Rock & Wachter, *supra* note 52, at 668 (describing the early U.S. corporate no-conflict rule as "the pure trust law duty of loyalty").

55. Marsh, *supra* note 4, at 54.

56. *Id.* at 73 (speaking of the then-contemporary rules governing self-dealing).

57. Brudney, *supra* note 4, at 1434.

58. *Id.* at 1410.

59. Lawrence A. Cunningham, *Choosing Gatekeepers: The Financial Statement Insurance Alternative to Auditor Liability*, 52 UCLA L. REV. 413, 414 n.1 (2004); *see also* Bulbulia & Pinto, *supra* note 53, at 203 (referring to the change of law as "[a] weakening of the early inflexible rule"); Julian Velasco, *A Defense of the Corporate Law Duty of Care*, 40 J. CORP. L. 647, 688 (2015) ("The deterioration of the rigor of the duty of loyalty has continued such that, by now, the duty of loyalty is only weakly enforced.").

60. *See* Criddle, *supra* note 4, at 999, 1019.

61. Amir N. Licht, *Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review* 14 (European Corp. Governance Inst., Working Paper No. 439/2019, 2019), https://ssrn.com/abstract=3331097 [https://perma.cc/5ESE-NHHD]; *see also id.* at 57 ("The substantive fairness review prong of Delaware's entire fairness doctrine is perhaps the single most prominent example for a core issue on which Delaware's corporate law and U.K. fiduciary (including company) law diverge. While seeming sensible when examined in isolation, substantive fairness review is inconsistent with fundamental tenets of fiduciary law . . . . [T]his contradiction and its deplorable consequences for companies and shareholders have been pointed out by [Harold] Marsh.").

would permit.[62] Its approach of prohibiting self-dealing outright also saves adjudication costs associated with resolving complex questions about fairness, which would be required under the fairness rule.[63] The rationale is that these cost savings more than offset losses from the rule's overbreadth.[64] There is also a moral footing to the rule: the unforgiving approach toward disloyalty that is suggested by its common formulation aligns with judicial rhetoric that emphasizes the distinctive character of fiduciary duties and the high standard of conduct they require.[65]

Other scholars favor the fairness rule.[66] While accepting Marsh's claims that the "strict" no-conflict rule succumbed to the "more flexible" fairness rule,[67] they prefer the fairness rule because it better distinguishes between harmful and beneficial (or fair) conflicts than does the no-conflict rule.[68] As John Langbein explains, the no-conflict rule mistakenly treats all conflicts as harmful, without allowing for the possibility that self-dealing may at times be in the best interests of beneficiaries.[69] What the rule really does in banning conflicts without further inquiry "is to identify some conceivable but conjectural evil and then conclusively presume that this farfetched plot actually transpired, by refusing to let the putative evildoer prove that no such thing happened."[70] The no-conflict rule therefore may deter future fiduciaries from beneficiary-regarding conduct—it overdeters conflicts.[71]

From these progressive scholars' perspectives, a better rule would allow the fiduciary to prove that self-dealing benefited the beneficiary. They point

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62. *See* Giattino, *supra* note 50, at 130–31 ("Delaware relies on fairness to review conflicts of interests and loyalty . . . . This approach is more forgiving than the British approach, which is an affirmative duty to avoid conflicts of interests."); Leslie, *supra* note 7, at 565 (asserting that the fairness rule "would allow a large number of self-dealing transactions to pass undetected" and that adopting the fairness rule would "eliminate the few disincentives to self-dealing that trustees *do* face"); *see also* Farrar & Watson, *supra* note 7, at 520–21 (a fair transaction may fall short of the best transaction available); Leslie, *supra* note 7, at 565–66 (describing the risk of fiduciary liability under the fairness rule as "remote").

63. *See generally* Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 41 (Evan J. Criddle et al. eds., 2019).

64. *See* Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565, 573–74 (2003) ("[T]hese deals are so frequently undesirable that the costs of extirpating the entire class of transactions (a *rule*) are less than the costs of case-by-case adjudication (the fairness *standard*).").

65. For the quintessence of such rhetoric by U.S. courts, see *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928).

66. Scholars often refer to the fairness rule as a best-interest rule in opposition to the no-conflict rule, which they regard as a sole-interest rule. *See generally* Langbein, *supra* note 6.

67. *See, e.g.*, Rock & Wachter, *supra* note 52, at 670 (referring to the original no-conflict rule, based on trust law, as "strict [and] uncompromising" and the fairness rule as "more flexible").

68. The position is described well by Langbein, *supra* note 6.

69. *Id.* at 951–52.

70. *Id.* at 953 (asserting this for self-dealing arising in auction sales).

71. *Id.* ("More important for present purposes, the [no-conflict] rule also overdeters. By penalizing trustees in cases in which the interest of the trust beneficiary was unharmed or advanced, the rule deters future trustees from similar, beneficiary-regarding conduct."). Langbein also acknowledges that a no-conflict rule might underdeter if not all instances of wrongdoing are detected. *Id.* at 951.

to the fairness rule as such a rule.[72] According to Langbein, this rule "recognize[s] that some conflicts benefit the corporation."[73] The evolution from no conflict to fairness is "a successful experience" and "highly instructive for trust law," which still applies the no-conflict rule.[74] Similarly, Frank Easterbrook and Daniel Fischel regard the fairness rule as an optimal governance structure, reflecting realities of competitive business and enabling corporations to maximize shareholder welfare.[75] These progressive scholars agree with the traditionalists on one point: these rules operate differently, to different effect.

II. SUBSTANTIVE CONTENT: LOYALTY RULES AND EXCEPTIONS

As this Part shows, the rules—in their substantive requirements—share a common structure. They require strict loyalty subject to exceptions or cleansing devices. Neither rule is logically or necessarily stricter, more flexible, or better calibrated to deter harmful self-dealing.

A. Defining Terms

In the self-dealing context, exceptions operate in reference to a loyalty rule, a rule that requires fiduciaries to act loyally toward a beneficiary or principal. Exceptions exclude the operation of a given loyalty rule by protecting a fiduciary or transaction from the remedial consequences that would otherwise arise under that loyalty rule.[76] Exceptions can be thought of as cleansing self-dealing or waiving a loyalty rule. They specify what must be done to protect a person or transaction from liability. For example, if a fiduciary obtains her principal's informed consent to certain disloyal conduct, she will avoid the liability that she would otherwise have faced by reason of her disloyalty.[77]

Exceptions vary along multiple dimensions. They may be the product of judge-made law, statute, or private ordering.[78] Some exceptions operate only with shareholder approval; one (proof of fairness) requires a judicial finding.

72. EASTERBROOK & FISCHEL, *supra* note 6, at 15 (treating directors' fiduciary duties as conforming to the terms that venturers would have negotiated were the costs of negotiating "sufficiently low"); *id*. at 92 (preferring the fairness rule to the no-conflict rule because the former rule distinguishes between "managerial practices that harm investors' interests and [those] practices that simultaneously benefit managers and investors"); Fischel & Langbein, *supra* note 6, at 1114–16; Langbein, *supra* note 6, at 954.

73. Langbein, *supra* note 6, at 962 ("Corporate law, recognizing that some conflicts benefit the corporation, has replaced prohibition with regulation.").

74. *Id.*

75. *See* EASTERBROOK & FISCHEL, *supra* note 6, at 4–15 (focusing on fiduciary rules); *id.* at 103–05 (focusing on the fairness rule).

76. *See supra* note 8 and accompanying text.

77. *See* RESTATEMENT (THIRD) OF AGENCY § 8.06(1) (AM. LAW INST. 2006) ("Conduct by an agent that would otherwise constitute a breach of duty . . . does not constitute a breach of duty if the principal consents to the conduct . . . .").

78. As to private ordering, U.K. companies often prescribe exceptions in their charters. *See infra* Part III.A. The legal doctrine that allows corporate constituencies to define exceptions in corporate charters may be thought of as meta rules, or background rules, governing the creation of exceptions, rather than as exceptions themselves.

Distinguishing between loyalty rules and exceptions is essential for comparing the no-conflict and fairness rules because the rules are commonly articulated in ways that hinder comparison. Courts and scholars have formulated the fairness rule in terms of its signature exception or cleansing device, as a regime requiring fairness.[79] This can obscure its loyalty rule. Meanwhile, courts and scholars often formulate the no-conflict rule in terms of its loyalty rule, as a regime banning self-dealing.[80] This can obscure its exceptions.

B. The Fairness Rule: In Search of Loyalty

Of course, courts do not refer to the loyalty rule or to its exceptions as such when formulating the fairness rule. Rather, they often state the rule in terms of its signature exception or cleansing device, in language suggesting that the rule requires fairness by directors.[81] But courts have occasionally also articulated the rule to reveal its underlying loyalty requirement. For example, in *In re Cox Communications, Inc. Shareholders Litigation*,[82] then-Vice Chancellor Leo. E. Strine, Jr. stated the rule this way: self-dealing transactions are "presumed voidable absent a demonstration, by the interested party, that the transaction is fair."[83] This formulation can be disaggregated into its functional components, revealing a loyalty rule and an exception.[84] The loyalty rule invalidates self-dealing transactions, rendering them voidable, or otherwise imposes liability. The exception requires proof of fairness.

Fully stated, the fairness rule in fact provides multiple exceptions. Identifying them as well as the loyalty rule usefully begins with an examination of section 144(a) of the Delaware General Corporate Law,[85] a provision that states three conditions. Under section 144(a), no self-dealing transaction, as defined, shall be "void or voidable" because of self-dealing if any of these conditions are satisfied.[86] Judicial and scholarly views diverge on the effect of satisfying the conditions,[87] and these competing views are considered below.[88] However, the most common interpretation treats the

79. *See supra* notes 42–44 and accompanying text.

80. *See supra* note 30 and accompanying text.

81. *See, e.g.*, *supra* notes 41–42 and accompanying text.

82. 879 A.2d 604 (Del. Ch. 2005).

83. *Id.* at 614.

84. Brett McDonnell lends support to this view under U.S. law. In self-dealing law, he regards the default position as a "prohibition on conflict transactions" and treats the conditions in section 144(a) as rules that "alter" that position. *See* McDonnell, *supra* note 8, at 414–16.

85. DEL. CODE ANN. tit. 8, § 144(a)(1) (2019).

86. Section 144 applies to certain defined self-dealing transactions, including those between a corporation and one or more of its directors and those between the corporation and a firm in which a director has a financial interest. *Id.* Self-dealing transactions beyond the reach of section 144 may nevertheless benefit from exceptions or safe harbors provided by common law. The provision also applies to officers. This Article examines directors' liability only to ease comparison with U.K. law, which regulates directors differently from officers.

87. *See, e.g.*, Cumming v. Edens, No. 13007-VCS, 2018 Del. Ch. LEXIS 54, at * 46 (Del. Ch. Nov. 21, 2017) ("Our case law interpreting Section 144(a)(1) is murky at best.").

88. *See infra* notes 263–67 and accompanying text.

three conditions as alternative exceptions.[89] Commentators and courts also refer to them as "safe harbors."[90]

To see why these conditions in section 144(a) are exceptions and to identify the loyalty rule, it is useful to consider the consequences for a self-dealing transaction when none of the conditions are satisfied. To be sure, section 144(a) does not specify the consequences, and it neither requires loyalty nor imposes liability. Rather, the common law provides the consequences of satisfying none of the conditions by imposing a loyalty rule—the backdrop against which the statutory conditions function. Courts do occasionally state the loyalty rule—as in *Cox Communications*.[91] More often, though, they allude to it when they explain the protection section 144(a) offers (when any of its conditions are satisfied). For example, in *Benihana of Tokyo, Inc. v. Benihana, Inc.*,[92] Vice Chancellor Donald F. Parsons, Jr. explained, "[s]atisfying the requirements of [section] 144 only means that the [challenged] [t]ransaction is not void or voidable solely because of the conflict of interest."[93] In *Cede & Co. v. Technicolor, Inc.*,[94] the Delaware Supreme Court described section 144 as providing a "safe harbor for corporate boards to prevent director conflicts of interest from voiding corporate action."[95] In *Cox Communications*, Vice Chancellor Strine described section 144 as "addressing only the common law principle that interested transactions were entirely invalid and providing a road map for transactional planners to avoid that fate."[96] These statements suggest a strict common law loyalty rule that invalidates self-dealing transactions, a rule equivalent to a requirement for directors either to avoid such transactions or to act with undivided loyalty toward the corporation.[97] The conditions in

89. *See infra* Table 1.

90. *See, e.g*, *infra* note 95 and accompanying text.

91. *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 614 (Del. Ch. 2005); *see supra* note 82 and accompanying text.

92. 891 A.2d 150 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006).

93. *Id.* at 185. The court's use of "solely" makes clear that the statute offers shelter for invalidity arising from self-dealing but not from other grounds, such as illegality. *See id.* at 177 ("Because a majority of the disinterested and independent directors approved the BFC Transaction, the interested nature of that transaction does not render it either void or voidable solely for that reason, provided the material facts as to Abdo's and any other director's or officer's interest were disclosed or known to the Benihana Board."); *see also* Fliegler v. Lawrence, 361 A.2d 218, 222 (Del. 1976) (Section 144 "provides against invalidation of an agreement 'solely' because such a director or officer is involved.").

94. 634 A.2d 345 (Del. 1993).

95. *Id.* at 365.

96. *Cox Commc'ns*, 879 A.2d at 614–15; *see also In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 756 n.464 (Del. Ch. 2005) ("[W]here the evidence shows that a majority of the independent directors were aware of the conflict and all material facts . . . but acted to reward a colleague rather than for the benefit of the shareholders, the Court will find that the directors failed to act in good faith and, thus, that the transaction is voidable."); Nebenzahl v. Miller, C.A. No. 13206, 1996 Del. Ch. LEXIS 113, at *11 (Del. Ch. Aug. 26, 1996) ("A plaintiff who alleges and then ultimately proves a transaction to be unfair may deprive a director defendant of Section 144's statutory safe harbor and make the director's action voidable . . . .").

97. Case authorities do not formulate the U.S. loyalty rule consistently, leaving the precise contours of self-dealing unsettled. Some authorities suggest that invalidation occurs for self-dealing when interested directors vote to authorize a self-dealing transaction for the company.

section 144(a) operate as exceptions because they shelter self-dealing transactions from this loyalty rule, excluding the loyalty rule's operation.

The common law is sometimes said to have rendered self-dealing transactions *automatically* voidable.[98] However, at least by the time of section 144's adoption in 1967, Delaware courts applying the common law considered multiple factors, including fairness, before invalidating self-dealing transactions[99] and were therefore not automatically invalidating self-dealing transactions. Those factors are believed to have become the conditions—or exceptions—expressed in section 144(a)[100] that shield self-dealing transactions from invalidity under the loyalty rule.

On a narrow view, the provision protects a self-dealing transaction from invalidation but not from "entire fairness" review.[101] On this view, even if section 144(a) protects a self-dealing transaction, the transaction may attract liability for fiduciary breach. On a broad view, section 144(a) protects a self-dealing transaction not only from invalidation but also from distinct, additional fairness review.[102] Under this latter approach, satisfying section 144 may be thought to doubly protect self-dealing, from invalidation as well as further fairness review. On either interpretation of its effect, section

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See EDWARD P. WELCH ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW 296 (2011 ed.) ("The Delaware Supreme Court has emphasized, however, that it overstates the common-law rule to conclude that relationship, alone, was the controlling factor in such interested transactions."); S. Samuel Arsht & Walter K. Stapleton, *Delaware's New General Corporation Law: Substantive Changes*, 23 BUS. LAW. 75, 81 (1967) (Section 144 "specifies three situations in which the fact that an interested officer or director participated in authorizing the transaction will not affect the transaction's validity."); *see also* Blake Rohrbacher et al., *Finding Safe Harbor: Clarifying the Limited Application of Section 144*, 33 DEL. J. CORP. L. 719, 722–24 (2008) (collecting sources); Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231, 1242–43 (2010) (examining what constitutes self-dealing under the fairness rule).

98. *See infra* note 301 and accompanying text; *see also* CLARK, *supra* note 54, at 169 (referring to "Section 144 as shielding self-dealing against charges of automatic voidability").

99. *See, e.g.*, Marciano v. Nakash, 535 A.2d 400, 404 (Del. 1987) (referring to factors under the common law that prevented a transaction being rendered void or voidable); *see also* Beard v. Elster, 160 A.2d 731, 737 (Del. 1960) (treating self-dealing transactions as invalid unless directors "prove[d] that the bargain had in fact been at least as favorable to the corporation as [directors] would have required if the deal had been made with strangers"); Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 58 (Del. 1952).

100. *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 365 (Del. 1993) ("Enacted in 1967, Section 144(a) codified judicially acknowledged principles of corporate governance to provide a limited safe harbor for corporate boards to prevent director conflicts of interest from voiding corporate action."); *Marciano*, 535 A.2d at 404 (describing the common law factors that could shield a self-dealing transaction from invalidity as "now crystallized in the ratification criteria of section 144(a)"). Nevertheless, some courts regard section 144 as having ameliorated a "per se" voidability rule under the common law.

101. CLARK, *supra* note 54, at 169 (rejecting the proposition under Delaware law that a section 144–approved transaction "is completely shielded from shareholder attack and that a court is *precluded* by the statute from examining the fairness of the transaction and possibly invalidating it"); Rohrbacher et al., *supra* note 97, at 719–22; *see also Cox Commc'ns*, 879 A.2d at 615 ("Mere compliance with § 144 did not necessarily suffice" to answer the "somewhat different question of when an interested transaction might give rise to a claim for breach of fiduciary duty.").

102. *See* Rohrbacher et al., *supra* note 97, at 720.

144(a) performs the limited role of shielding self-dealing transactions from invalidation. It does not itself render them valid.[103]

Applying the loyalty rule, courts have indeed invalidated self-dealing transactions that failed to gain protection from section 144(a). For example, in *Valeant Pharmaceuticals International v. Jerney*,[104] directors engaged in self-dealing by awarding themselves large cash bonuses. With no exception invoked, the transaction was "voidable as between the parties to the transaction."[105] More recently, in *Reddy v. MBKS Co.*,[106] the Delaware Supreme Court invalidated transactions between companies because a director "stood on both sides of [each of them]."[107]

Courts exercise broad discretion in awarding remedies for self-dealing.[108] They may grant rescissory damages.[109] That would occur, for example, if rescission were impractical, such as when a company has affirmed a self-dealing contract or the parties cannot be restored to their original positions.[110] Vice Chancellor Strine has described the remedies for self-dealing as the disgorgement of profits or payment of "whatever damages are necessary to make the corporation whole."[111] Recently, courts and commentators have asserted that distinct legal bases exist for rescission and the award of damages when self-dealing occurs.[112] While such a remedial approach complicates an assessment of how strictly the U.S. loyalty rule operates, the analysis suggests that the rule is similar in stringency to the corresponding loyalty rule

103. For further discussion, see *infra* notes 263–67 and accompanying text.

104. 921 A.2d 732 (Del. Ch. 2007).

105. *Id.* at 752.

106. 945 A.2d 1080 (Del. 2008).

107. *Id.* at 1087 n.15. The court also observed that the director had failed to satisfy his burden of showing that the transactions were fair. *Id.* The court gave other reasons that independently invalidated the transactions. *Id.*

108. *See* Cede & Co. v. Technicolor, Inc., 542 A.2d 1182, 1187 (Del. 1988) ("[A] fraud action asserting fair dealing and fair price claims affords an expansive remedy and is brought against the alleged wrongdoers to provide whatever relief the facts of a particular case may require."); *see also* Int'l Telecharge, Inc., v. Bomarko, Inc., 766 A.2d 437, 440 (Del. 2000) ("In determining damages, the powers of the Court of Chancery are very broad in fashioning equitable and monetary relief under the entire fairness standard as may be appropriate, including rescissory damages.").

109. Oberly v. Kirby, 592 A.2d 445, 466 (Del. 1991) ("If a transaction is found to be unfair to the corporation, the stockholders may then demand rescission of the transaction or, if that is impractical, the payment of rescissory damages. If, however, the directors meet their burden of proving entire fairness, the transaction is protected from stockholder challenge." (internal citation omitted)); Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983) ("Under such circumstances, the Chancellor's powers are complete to fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages. Since it is apparent that this long completed transaction is too involved to undo, and in view of the Chancellor's discretion, the award, if any, should be in the form of monetary damages based upon entire fairness standards, i.e., fair dealing and fair price.").

110. *See, e.g.*, *Kirby*, 592 A.2d at 466.

111. Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 677 (2005).

112. *See In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 614–15 (Del. Ch. 2005); Rohrbacher, *supra* note 97, at 719–22; *see also infra* notes 263–68 and accompanying text.

under U.K. law, discussed below. For comparative purposes, this is enough to shift our attention to each jurisdiction's exceptions.

As Table 1 shows, section 144(a) provides three exceptions. They are alternatives.[113] The most notable is proof of fairness.[114] Stated in section 144(a)(3), proof of fairness gives the U.S. fiduciary regime its name, usually overshadowing the related loyalty rule. But nothing requires fiduciaries to prove the fairness of a challenged transaction—or to invoke any other exception. The burden to prove fairness rests on interested directors: if they fail to adduce evidence to carry their burden, a court has no license to do the work for them by examining a transaction's fairness to avoid the loyalty rule's remedial consequences.[115] As courts emphasize, the fiduciary rule does not invalidate self-dealing transactions if they are unfair; rather, it invalidates them *unless* interested directors prove they are fair.[116]

Table 1: Structure of the Fairness Rule

	U.S. Fairness Rule
Loyalty Rule	Requires undivided loyalty
Exceptions	1. Disclose self-dealing to board/committee of directors and obtain disinterested approval (§ 144(a)(1)) 2. Disclose self-dealing to shareholders and obtain their approval (§ 144(a)(2)) 3. Prove entire fairness (§ 144(a)(3) or common law)

Two other exceptions appear in section 144(a)(1) and (2). According to these provisions, no self-dealing transaction is invalid solely because of self-dealing if the transaction is approved by, respectively, a majority of the disinterested directors or a majority of the shareholders entitled to vote on

113. *See infra* Table 1.

114. Proof of fairness as an exception is also independently grounded in the common law. *See* BAINBRIDGE, *supra* note 26, at 166 ("[Section] 144 is not the only means of validating conflicted interest transactions under Delaware law. If the director proves the transaction was fair to the corporation, no liability will result."). Proof of fairness may operate more narrowly under section 144(a)(3) than the common law because that provision requires that a transaction be "authorized, approved or ratified." DEL. CODE ANN. tit. 8, § 144(a)(3) (2019).

115. *See* Velasco, *supra* note 97, at 1243 ("[Under the fairness rule], the shareholders do not have to prove any actual wrongdoing, but only a cognizable conflict of interest, and then the directors must prove that they have done nothing wrong."). At the motion to dismiss stage, a shareholder "must allege some facts that tend to show the transaction was not fair," but the pleading burden is low and satisfied with "some facts" implying lack of entire fairness. Stein v. Blankfein, C.A. No. 2017-0354-SG, 2019 Del. Ch. LEXIS 199, at *19 (Del. Ch. May 31, 2019) (quoting Solomon v. Pathe Commc'ns Corp., C.A. No. 12563, 1995 Del. Ch. LEXIS 46, at *5 (Del. Ch. Apr. 21, 1995)). A determination that the entire fairness standard applies "normally will preclude dismissal of a complaint on a Rule 12(b)(6) motion to dismiss." Orman v. Cullman, 794 A.2d 5, 20 n.36 (Del. Ch. 2002).

116. Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993); *see also* Strine, *supra* note 111, at 677 ("In the absence of such proof [of fairness], the fiduciary interested in the transaction . . . must disgorge any profits or pay whatever damages are necessary to make the corporation whole.").

the matter.[117] These exceptions require good faith and informed decisions by each of these constituencies.

Illustrating the complexity of the U.S. regime, the exceptions provided by section 144(a)(1) and (2) operate somewhat differently from proof of fairness. First, they require approval from directors or shareholders, respectively. Second, they offer, conceptually at least, somewhat weaker protection than proof of fairness.[118] Again, there is some dispute on this question,[119] although a common interpretation of these provisions holds that each provides business judgment protection to directors' self-dealing.[120] A product of the business judgment rule (BJR), business judgment protection offers a powerful shield against the loyalty rule. It requires courts to presume 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 interest of the company."[121] Plaintiffs may rebut the BJR if they allege sufficient facts with particularity establishing, or if the record otherwise demonstrates, that the directors' decision was not made in accordance with the BJR's presumptions.[122] Though evidence of self-

117. DEL. CODE ANN. tit. 8, § 144(a)(1)–(2) (2019). Courts have understood section 144(a)(2) to require approval by disinterested shareholders. *See* Fliegler v. Lawrence, 361 A.2d 218, 221–22 (Del. 1976).

118. For other interpretations of the protection these exceptions provide, see *infra* notes 263–67 and accompanying text.

119. *See infra* notes 263–67 and accompanying text.

120. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 366 n.34 (Del. 1993) ("[A]pproval of an interested transaction by either a fully-informed disinterested board of directors, 8 *Del.C.* § 144(a)(1), or the disinterested shareholders, 8 *Del.C.* § 144(a)(2), provides business judgment protection."); Oberly v. Kirby, 592 A.2d 445, 467 (Del. 1991) ("Under 8 *Del.C.* § 144, a transaction will be sheltered from shareholder challenge if approved by either a committee of independent directors, the shareholders, or the courts."); Marciano v. Nakash, 535 A.2d 400, 405 n.3 (Del. 1987) ("[A]pproval by fully-informed disinterested directors under section 144(a)(1), or disinterested stockholders under section 144(a)(2), permits invocation of the business judgment rule and limits judicial review to issues of gift or waste with the burden of proof upon the party attacking the transaction."); Toedtman v. Turnpoint Med. Devices, Inc., No. N17C-08-210-RRC, 2019 Del. Super. LEXIS 46, at *24 (Del. Super. Ct. Jan. 23, 2019) ("Upon approval by disinterested directors under § 144(a)(1), or approval by disinterested shareholders under § 144(a)(2), the Court will review the interested transaction under the business judgment rule."); *see also* BAINBRIDGE, *supra* note 26, at 162–65 (concluding that approval under section 144(a)(1) or (2) provides business judgment protection); Strine, *supra* note 111, at 678 ("Delaware tries to respect the business judgment of disinterested directors and stockholders. How? By invoking the protection of the business judgment rule if an interested transaction is approved by a majority of the independent directors or by a majority of the disinterested stockholders, after full disclosure."). Importantly, an alternative interpretation of section 144(a)(1) gives it more limited effect. As to this interpretation, see *infra* notes 263–67 and accompanying text. The analysis proceeds under the broader interpretation of section 144(a)(1) since that is perhaps the prevailing interpretation and is more likely to support common claims that treat the no-conflict rule as stricter. Under a narrower interpretation of the fairness regime's exceptions, the opposite may be closer to the truth.

121. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

122. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1279 (Del. 1988) ("[W]hen a court reviews a board action, challenged as a breach of duty, it should decline to evaluate the wisdom and merits of a business decision unless sufficient facts are alleged with

dealing generally can rebut the BJR,[123] section 144(a) thwarts this possibility by cleansing the self-dealing, shielding it from the loyalty rule. Nevertheless, in theory, on grounds other than self-dealing, challenging shareholders could rebut the BJR, but it is hard to imagine plausible scenarios when this would occur. Authorities suggest that the BJR would not protect a transaction that amounted to "waste," but waste rarely arises.[124] Accordingly, under a common view of the statute, the approval of either disinterested directors or shareholders under section 144(a)(1) or (2), respectively, affords business judgment protection, a strong shield that plaintiffs are unlikely to overcome.[125]

Finally, if interested directors have de jure or de facto voting control, courts interpret the exceptions differently.[126] The exceptions under section 144(a)(1) and (2) have more limited effect in these circumstances, protecting directors and transactions from liability unless challenging shareholders prove that the self-dealing transaction was unfair.[127] That is, they are only partial or limited exceptions in a setting where interested directors have heightened voting power.

In sum, the fairness regime requires undivided loyalty from corporate directors but provides exceptions. Proof of fairness protects interested directors and self-dealing transactions from liability. Under a common interpretation, two other exceptions—approval by majorities of either

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particularity, or the record otherwise demonstrates, that the decision was not the product of an informed, disinterested, and independent board.").

123. *See* Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156 (Del. 1995); HMG/Courtland Props., Inc. v. Gray, 749 A.2d 94, 114 (Del. Ch. 1999) ("[P]roof of such *undisclosed self-dealing* [involving undisclosed, buy-side interest in a transaction] in itself, is sufficient to rebut the presumption of the business judgment rule and invoke entire fairness review."); *see also* WELCH ET AL., *supra* note 97, at 297 (asserting that, "[a]mong other things, the presumption may be rebutted by a showing that a majority of the directors were 'interested'").

124. Brehm v. Eisner, 746 A.2d 244, 263 n.63 (Del. 2000) (referring to "waste" as constituting "an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade"). Waste has been regarded as "an extreme test, very rarely satisfied by a shareholder plaintiff." Zupnick v. Goizueta, 698 A.2d 384, 387 (Del. Ch. 1997).

125. *See* Unitrin, Inc. v. Am. Gen. Corp. (*In re* Unitrin, Inc. S'holders Litig.), 651 A.2d 1361, 1371 n.7 (Del. 1995) ("Because the effect of the proper invocation of the business judgment rule is so powerful and the standard of entire fairness so exacting, the determination of the appropriate standard of judicial review frequently is determinative of the outcome of [the] litigation."); *see also* Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 602 (2008) ("Under DGCL section 144(a), approval by a majority of fully informed and disinterested directors effectively immunizes a related-party transaction from meaningful judicial review."); Claire Hill & Brett McDonnell, *Sanitizing Interested Transactions*, 36 DEL. J. CORP. L. 903, 913 (2011) ("This burden [under the BJR] is extremely hard for plaintiffs to overcome; they rarely succeed in cases decided under the business judgment rule.").

126. *See, e.g.*, Cooke v. Oolie, No. Civ. A. 11134, 2000 WL 710199, at *13 n.41 (Del. Ch. May 24, 2000).

127. *Id.* Vice Chancellor William B. Chandler III gave business judgment protection to transactions approved under section 144(a). Since the interested directors "neither maintained voting control [of the company] . . . nor dominated or controlled the disinterested directors, the business judgment rule constitutes the appropriate standard of review for the [self-dealing] transaction" under section 144. *Id.*

disinterested directors or shareholders—confer business judgment protection on self-dealing transactions. These two exceptions operate less generously to interested directors that have voting control.

C. The No-Conflict Rule: In Search of Exceptions

English courts formulate the no-conflict rule as a strict loyalty rule that renders self-dealing transactions voidable.[128] Recall from *Aberdeen Railway Co. v. Blaikie Bros.*[129] that the no-conflict rule is "[s]o strictly . . . adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."[130]

However, this loyalty rule is subject to exceptions, as shown in Table 2.[131] First, self-dealing transactions are protected by the approval of a majority of shareholders.[132] Second, such transactions may be protected by provisions in corporate charters.[133]

Table 2: Structure of the No-Conflict Rule

	U.K. No-Conflict Rule[134]
Loyalty Rule	Requires undivided loyalty
Exceptions	1. Disclose self-dealing to shareholders and obtain their approval 2. Satisfy conditions, if any, specified in charter

128. Recognizing that the rule invalidated self-dealing transactions, one court described the rule as expressing a "disability" on the part of directors rather than a "duty" to refrain from certain conduct. *See* Movitex Ltd. v. Bulfield [1988] BCLC 104 (Ch D) (Eng.). The analysis here focuses on the common law no-conflict rule; it examines the recently adopted (and equivalent) statutory regime in Part III.E.

129. Aberdeen Ry. Co. v. Blaikie Bros. (1854) 1 Macq. 461 (appeal taken from Scot.).

130. *Id.* at 471.

131. In the United Kingdom, neither courts nor scholars generally use the terms "exception," "cleansing device," or "safe harbor" in describing the no-conflict rule. However, they clearly recognize the existence of rules that exclude the operation of a given loyalty rule, that is, of rules that operate as exceptions. For a discussion of exceptions, without using that term, see Joshua Getzler, *Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 39, 52–62 (Andrew S. Gold & Paul B. Miller eds., 2014).

132. Strictly speaking, such approval prevents breach of the rule, relieving directors of the consequences that would otherwise arise. *See* Movitex Ltd. v. Bulfield [1988] BCLC 104 (Ch D) 118 (Eng.) (arguing that informed approval by shareholders "protects the director not because it operates to release him or absolve him from the consequences of a breach of the self-dealing rule but because, to the extent that the company in general meeting gives its informed consent to the transaction there is no breach, the conflict of duty and interest is avoided").

133. Meta, or background, rules permit the creation of these exceptions. *See supra* note 78 and accompanying text.

134. Table 2 reflects the self-dealing regime under the common law until codification as well as the contemporary self-dealing regime under the Companies Act 2006. As to the Companies Act 2006, see *infra* Part III.E.

The former exception operates to exclude the operation of the loyalty rule if shareholders approve a self-dealing transaction, either before or after it occurs. Such approval requires directors to fully disclose their conflicts to shareholders and face the uncertainty of shareholders' responses. In applying this exception, courts distinguish between directors' conduct qua directors and their conduct qua shareholders. Directors' fiduciary responsibilities arise in the former capacity only, freeing them to vote in shareholder meetings as their self-interest dictates. The remarkable result under the common law is that directors can approve their own self-dealing, that is, vote as shareholders to absolve themselves of liability as directors for self-dealing.[135] Directors' freedom here is limited if their conduct amounts to misappropriation of corporate property or dishonesty, but this protective doctrine generally fails to prevent directors with de jure or de facto control from voting their shares to approve their own self-dealing.[136]

The second category of exception is key. It reflects the capacity under the no-conflict rule of corporate charters to vary fiduciary duties.[137] U.K. companies in their charters may specify what must be done to protect an interested fiduciary or transaction from liability. Charter terms may thus

135. *See, e.g.*, North-West Transp. Co. v. Beatty (1887) 12 App. Cas. 589 (PC) (appeal taken from Can.); Baird v. J. Baird & Co. (Falkirk) Ltd. (1949) SLT 368 (Scot.).

136. PAUL L. DAVIES, GOWER'S PRINCIPLES OF MODERN COMPANY LAW 656–57 (6th ed. 1997). Under the contemporary statutory position, votes cast by interested directors to retrospectively approve (or ratify), but not to prospectively approve (or authorize), their own conduct are disregarded, a change from the common law position. *See infra* Part III.E.

137. The ability of companies to contract around the duty of loyalty, through terms in their corporate charters, was recognized in *Liquidators of the Imperial Mercantile Credit Ass'n v. Coleman* [1873] 6 LRE & I App. 189 (HL) (Eng.). Under the common law, corporate charters cannot exclude liability for fraudulent fiduciary breaches. *See In re* City Equitable Fire Ins. Co. [1925] Ch 407 (Eng.). Otherwise, the power is broad: a charter term "could, if worded sufficiently widely, relieve [directors] of any obligation not to place themselves in a position where their personal interests could conflict with their duty." L. C. B. GOWER ET AL., THE PRINCIPLES OF MODERN COMPANY LAW 601 (4th ed. 1979). Not all agree that fiduciary duties should be excludable by contract. *See, e.g.*, Amir N. Licht, *Motivation, Information, Negotiation: Why Fiduciary Accountability Cannot Be Negotiable*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 159, 173–79 (D. Gordon Smith & Andrew S. Gold eds., 2018). This ability to contract around fiduciary duties existed despite a provision in the Companies Act that purported to prevent charter terms from waiving the loyalty rule. Courts read down that provision or overlooked its existence when giving effect to charter terms that excluded the operation of the loyalty rule. For example, section 310 of the Companies Act 1985 rendered void any charter term that exempted an officer from, or indemnified him against, any "liability" that would otherwise attach to him for "any negligence, default, breach of duty or breach of trust." Companies Act 1985, c. 6, § 310 (Eng.). Courts gave broad effect to exceptions in charters, typically with no consideration of this provision. One court resolved the uncertainty created by section 310 by interpreting the no-conflict rule as "an over-riding principle" or a "disabilit[y]" under which directors operated, rather than as a "duty" to refrain within the terms of section 310. *See* Movitex Ltd. v. Bulfield [1988] BCLC 104 (Ch D) 120 (Eng.). In *Gwembe Valley Development Co. v. Koshy* [2003] EWCA (Civ) 1048 [108] (Eng.), the Court of Appeal rejected the distinction between disabilities and duties in *Movitex* as "an unnecessary complication" without offering an alternative explanation for the narrow effect given to section 310. Uncertainty remained as to how section 310 and equivalent provisions in earlier corporations legislation could be reconciled with the judicial practice of allowing charter terms to conditionally exclude the loyalty rule. As to the position under the Companies Act 2006, see *infra* note 275.

conditionally exclude the loyalty rule, creating exceptions not otherwise available to the parties. The effect of allowing the parties to craft their own exception is that the exception may be broader than those available under judge-made law or statute. This latitude sets the United Kingdom apart from the Delaware position. Delaware law allows companies to adopt charter terms to eliminate or limit directors' liability for fiduciary breach, provided they do not do so for breaches of the duty of loyalty.[138] Under Delaware law, the duty of loyalty is mandatory,[139] which is understood to prevent parties from crafting their own exceptions to limit liability for breach of the duty of loyalty.[140]

D. Initial Comparisons

The no-conflict and fairness regimes are similarly structured. Both rules impose liability for self-dealing transactions, effectively requiring undivided loyalty from directors. The no-conflict regime may appear to impose such a loyalty requirement, since courts formulate it that way.[141] But the fairness rule imposes much the same underlying requirement. Though often formulated in terms of one of its exceptions, it also prohibits self-dealing unless an exception operates—a prohibition as "categorical" as that under the no-conflict regime.[142]

Some might point to remedial differences to suggest that the liability rules in fact differ between these two regimes. Focusing on the remedial consequences of these loyalty rules unexpectedly complicates matters. Under the no-conflict regime, self-dealing transactions are voidable. Though it is often suggested that fiduciaries must also account for their profits, leading treatises suggest that the canonical rule is that rescission is the only remedy and "if rescission is no longer possible . . . then the court will not intervene."[143] While not free from doubt, this point about the no-conflict rule

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138. DEL. CODE ANN. tit. 8, § 102(b)(7) (2017).

139. *See, e.g.*, Lucian Arye Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489, 496 n.16 (2002) (The duty of loyalty is "regulated in a mandatory fashion."); McDonnell, *supra* note 8, at 414 ("[Corporations] may not opt out in advance from the prohibition as applied to any and all conflicts—this is the sense in which the duty of loyalty is a mandatory rule."); *see also* Jens C. Dammann, *Indeterminacy in Corporate Law: A Theoretical and Comparative Analysis*, 49 STAN. J. INT'L L. 54, 64 (2013) ("[T]here is widespread agreement that the parties cannot eliminate the corporate duty of loyalty.").

140. Interestingly, scholars suggest that charter provisions may *add* additional safeguards for self-dealing transactions, that is, that they may require fiduciaries to do more than that specified in the exceptions in section 144. *See, e.g.*, Dammann, *supra* note 139, at 64. Companies may opt out of the corporate opportunities rule under recently adopted legislative reform. *See* DEL. CODE ANN. tit. 8, § 122(7) (2017). (But this freedom does not extend to self-dealing.).

141. *See supra* note 80 and accompanying text.

142. *See supra* Part II.A.

143. PALMER'S COMPANY LAW, *supra* note 37, ¶ 8.3114 ("On orthodox principles, rescission is the *only* remedy (unless the director has also infringed some other rule that will deliver an alternative)."); *id.* ¶ 8.3319 ("Orthodox rules suggest that an account of profits is *not* available where the impugned transaction is with the company; then the remedy is simply rescission at the election of the company."); *id.* ¶ 8.3320 ("If the company is party to a transaction which is in breach of the director's fiduciary duty, then the transaction is prima

undermines claims that its remedies are more stringent than those under the fairness rule.

Under the fairness regime, courts may also strike down self-dealing transactions. For example, in *Valeant Pharmaceuticals International v. Jerney*, the Delaware Court of Chancery rescinded a self-dealing transaction where an interested director had failed to prove fairness or establish another exception.[144] The director had "no right to retain" the value he received under the transaction and was "requir[ed] to disgorge the full amount."[145]

When rescission is impossible, U.S. law provides other remedies. In *Oberly v. Kirby*,[146] the Delaware Supreme Court observed that shareholders "may . . . demand rescission" of self-dealing transactions and "if that is impractical, [demand] the payment of rescissory damages."[147] Authorities emphasize courts' discretion in granting monetary remedies, including rescissory damages, even when rescission is impossible, such as when the parties cannot be restored to their original position.[148]

To be sure, U.S. courts have allowed fairness-based damages for self-dealing, raising the possibility that the U.S. loyalty rule is not properly characterized as strict. However, scholars making this claim about the award of fairness-based damages tend to cite merger transactions that implicate self-dealing *by* controlling shareholders, rather than directors.[149] These are deals that cannot be unwound and that justify different treatment of self-dealing because courts "have long worried about a controller's potential ability to take retributive action against outside directors if they did not support the controller's chosen transaction."[150] Nevertheless, even in controlling-

facie voidable at the election of the company . . . . [T]he company cannot generally both affirm the contract and also claim an accounting of the profits made by the director in breach of his fiduciary duty."); Len Sealy, *The Statutory Statement of Directors' Duties: The Devil Is in the Detail*, CO. L. NEWSL. (Sweet & Maxwell, London), 2008, at 1, 3 (stating that the only remedy for self-dealing "is avoidance of the contract (and if that right has been lost . . . there is none)"); *see also* PAUL L. DAVIES & SARAH WORTHINGTON, GOWER: PRINCIPLES OF MODERN COMPANY LAW 522 (10th ed. 2016) ("On orthodox principles avoidance (i.e., rescission) is the *only* remedy, . . . [a]nd if rescission is no longer possible for any reason, then the court will decline to intervene." (citations omitted)).

144. *See generally* 921 A.2d 732 (Del. Ch. 2007).

145. *Id.* at 752; *see also supra* note 111 and accompanying text.

146. 592 A.2d 445 (Del. 1991).

147. *Id.* at 466; *see supra* note 107 and accompanying text.

148. Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983) ("Under such circumstances, the Chancellor's powers are complete to fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages. Since it is apparent that this long completed transaction is too involved to undo, and in view of the Chancellor's discretion, the award, if any, should be in the form of monetary damages based upon entire fairness standards, i.e., fair dealing and fair price.).

149. *See, e.g.*, Criddle, *supra* note 4, at 1020 n.137 (citing two cases involving mergers by controlling shareholders in support of the proposition that courts award fairness-based damages for breaches of the fairness rule).

150. *In re* EZCORP Inc. Consulting Agreement Derivative Litig., No. 9962, 2016 WL 301245, at *86 (Del. Ch. Jan. 25, 2016). In light of these concerns, courts impose heightened requirements to cleanse self-dealing. *See, e.g.*, Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014) (examining the cleansing effect of certain procedural safeguards in controlling shareholder transactions).

shareholder mergers, courts applying the fairness rule have broad discretion to fashion relief, including by awarding rescissory damages.[151]

Both U.S. and U.K. fiduciary regimes impose similar loyalty rules. These rules require undivided loyalty, imposing similar remedial consequences.[152] Under both regimes, self-dealing transactions may be voidable.[153] An account of profits is allowed under the fairness rule and arguably also under the no-conflict rule. The U.S. regime may permit a wider range of remedies. Still, each regime provides a roughly equivalent backdrop to the operation of exceptions.

By acknowledging their similar loyalty rules, we see that the regimes' major differences, at least in their textual formulations, lie in their exceptions. Under both regimes, shareholder approval protects a self-dealing transaction. The United States also provides exceptions based on proof of fairness and the approval of disinterested directors, while the United Kingdom allows companies to craft exceptions in their corporate charters.[154] Without analyzing how U.K. companies use their capacity to craft exceptions and then examining how interested directors under each regime use or invoke exceptions, one cannot tell which rule, or whether either rule, is stricter, more pragmatic, or better calibrated to deter self-dealing. At this stage, therefore, without considering the rules' operations, neither is self-evidently superior on any important dimension, contrary to often-expressed views.

III. RULES IN OPERATION

How does each rule tend to operate? This Part first examines the charter provisions U.K. companies adopt in order to identify the full range of exceptions available to interested directors. It then examines under each regime the incentives these exceptions create for interested directors and which, if any, they tend to invoke.

A. Range of Exceptions

Recall that the U.K. common law allows companies to craft their own exceptions.[155] As early as 1873, companies adopted exceptions in their charters protecting interested directors and transactions from liability under the loyalty rule in circumstances specified in the relevant provisions.[156] Under these provisions, interested directors simply had to disclose their self-dealing to disinterested directors. In *Liquidators of the Imperial Mercantile Credit Ass'n v. Coleman*,[157] the House of Lords examined the effectiveness

151. *See, e.g.*, *In re* Dole Food Co. Stockholder Litig., Consolidated C.A. No. 8703-VCL, 2015 WL 5052214, at *56 (Del. Ch. Aug. 27, 2015) (citing Bomarko, Inc. v. Int'l Telecharge, Inc., 794 A.2d 1161, 1177 (Del. Ch. 1999), *aff'd*, 766 A.2d 437, 440 (Del. 2000)).

152. *See supra* Tables 1–2.

153. *Compare* Aberdeen Ry. Co. v. Blaikie Bros. (1854) 1 Macq. 461 (appeal taken from Scot.), *with In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 614 (Del. Ch. 2005).

154. *See supra* note 137 and accompanying text.

155. *See supra* Part II.

156. *See supra* note 137 and accompanying text.

157. [1873] 6 LRE & I App. 189 (HL) (Eng.).

of such a provision. A director had entered into a financial transaction with the company under which it would "place" the securities of another entity; the company earned a 1.5 percent commission for doing so, while the director, through his own stockbroking partnership, received a 3.5 percent commission on the transaction.[158] The court assumed that a charter term could shelter the interested director from liability for self-dealing if the conditions in the charter term were satisfied,[159] and it therefore focused on whether the director had disclosed the nature, and not simply the existence, of his interest in the transaction to fellow directors, as required by the charter term. Since he had not, the provision failed to shelter him from liability under the no-conflict rule,[160] although the reasoning is clear that it would have done so had he satisfied the provision.

Companies seem to have generally adopted this form of exception. In an 1877 book of corporate law forms and precedents, Sir Francis Palmer provided an example of such a charter provision, observing that its adoption "has now become very common."[161] Using a random sample of companies formed in 1892, Timothy Guinnane and his coauthors found that over 90 percent conditionally excluded the loyalty rule through charter terms.[162] They found similar percentages for companies formed in 1912 and 1927, the other years they investigated.[163] They observed, "[i]n most (though not all) cases, the [charters] specified that directors had to disclose any conflict of interest to the board and refrain from voting on matters in which they were interested."[164] It seems that the great majority of companies adopted such

158. *Id.* at 200.

159. Lord Cairns assumed, without deciding, that the charter term "impliedly sanctioned the retaining of his interest by a director if he declared it." *Id.* at 205.

160. For another early example, see Transvaal Lands Co. v. New Belg. (Transvaal) Land & Dev. Co. [1914] 2 Ch 488 (Eng.).

161. FRANCIS BEAUFORT PALMER, CONVEYANCING AND OTHER FORMS AND PRECEDENTS RELATING TO COMPANIES INCORPORATED UNDER THE COMPANIES ACT 1862 AND 1867, at 271 (London, Stevens & Sons 1877) ("But a company may unquestionably waive the benefit of the [no-conflict] rule . . . . [A]nd it has now become very common to do so, and to insert clauses to the effect of the above." (citations omitted)). Palmer gave the following precedent: "The company may make contracts with any of the directors upon such terms as the directors shall think fit; and a director shall not . . . be accountable for any profit made by him in respect of any such contract . . . provided that the fact of his being so interested therein, and the nature of his interest be fully and fairly disclosed . . . ." *Id.* at 270–71. I am indebted to Paul Davies for drawing my attention to this source. *See* Davies, *supra* note 27, at n.24.

162. *See* Timothy W. Guinnane et al., *Contractual Freedom and Corporate Governance in Britain in the Late Nineteenth and Early Twentieth Centuries*, 91 BUS. HIST. REV. 227, 269 (2017). The authors randomly drew two samples in which 90.5 percent and 95.9 percent of companies formed in 1892 (or soon before) "allowed directors to contract with the company." *Id.* at 246. The study examines whether companies adopted a provision from the U.K. model articles of association that expressed the loyalty rule or crafted their own provision, effectively rejecting the model provision. *See generally id.* The percentages reflect those companies that crafted their own provisions that altered the loyalty rule.

163. *Id.* at 268 tbl.9 (showing that 96 percent and 90 percent of sampled companies formed in 1912 and 1927, respectively, altered the loyalty rule).

164. *Id.* at 246. The reference to voting is ambiguous but appears to apply to voting by directors as directors rather than as shareholders.

exceptions in their charters when they were formed.[165] This was true for companies large and small, public and private, and apparently without distinction based on the self-dealing risk they posed.[166]

By 1928, such charter exceptions were in such frequent use that Parliament intervened. It required directors to disclose their interest in any self-dealing transaction to their fellow directors and imposed a fine for failing to disclose.[167] Rather than restricting companies' capacities to adopt charter exceptions, the statute imposed a mandatory disclosure obligation on interested directors.[168] The statute thus independently mandated what charter exceptions themselves required as a condition for exempting the loyalty rule, prescribing a minimum standard of conduct by interested directors.[169] Importantly, the statutory duty had no effect on the operation of the no-conflict rule[170]: it coexisted with the no-conflict rule. The statutory duty was reenacted in the Companies Act 1929 and similarly reenacted in substantially the same form in successive iterations of the Act.[171] With the disclosure of self-dealing thereby mandated, companies crafted their charter exceptions around this requirement. Charters were written to provide protection if directors complied with the statutory duty, requiring much as they had before Parliament's intervention.[172]

Through the mid- to late twentieth century, companies continued widely adopting such charter terms that conditionally excluded the loyalty rule. In the 1950s, a prominent scholar, L. C. B. Gower, observed that these charter exceptions were "common form in the articles of registered companies."[173] With certain exceptions, and "provided that the directors act bona fide and remember to disclose their personal interests," Gower asserted that "there is, today, little effective restraint on [directors'] power to enter into contracts with the company."[174] Writing two decades later, Gower observed that the no-conflict rule "should not weigh too heavily upon [directors], especially as it is likely to be waived in the company's articles in so far as it relates to

165. *Id.* at 229 (reporting on the decisions of "incorporators" to adopt particular charter terms).

166. *Id.* at 239–40, 246–57. Public companies were significantly less likely than private companies to adopt charter terms to escape the loyalty rule, but around 86 percent of public companies still did so. *Id.* at 254.

167. *See* Companies Act 1928, 18 & 19 Geo. 5 c. 45, § 81 (Eng.). It initially applied to self-dealing "contracts" and later to self-dealing "transaction[s and] arrangement[s]." *See* Companies Act 1980, c. 22, § 60 (Eng.).

168. Companies Act 1928, 18 & 19 Geo. 5 c. 45, § 88 (Eng.).

169. *Id.*

170. The statute provided that "[n]othing in this section shall be taken to prejudice the operation of any rule of law restricting directors of a company from having any interest in contracts with the company." *See* Companies Act 1948, 11 & 12 Geo. 6, c. 38, § 199(5) (Eng.); *see also* Companies Act 1985, c. 6, § 317(9) (Eng.).

171. The provision was substantially reenacted as section 149 of the Companies Act 1929, as section 199 of the Companies Act 1948, and as section 317 of the Companies Act 1985. As to Companies Act 2006, see *infra* Part III.E.

172. *See, e.g.*, Hely-Hutchinson v. Brayhead Ltd. [1968] 1 QB 549 (Eng.).

173. GOWER, *supra* note 3, at 481.

174. *Id.* at 484–85.

contracts with the company."[175] By 1985, table A of the Companies Act included a charter term along similar lines—exempting the loyalty rule if interested directors disclosed their interests in a self-dealing transaction to their fellow directors.[176] Table A set out model articles of association that applied by default to companies that had not registered their own articles or whose articles failed to address a particular matter.[177] Reporting in 1999, the English and Scottish law commissions observed that corporate charters "frequently" included such charter terms.[178] The law commissions cited a "commonly" adopted charter term—similar to that in table A—under which, subject to informing disinterested directors of one's self-dealing, "a Director may contract with and participate in the profits of any contract or arrangement with the Company."[179] In 2006, Parliament amended the Companies Act to make changes that were thought to mirror the practical effect of the common law, taking account of the widespread use of these charter terms.[180]

In sum, since at least the late nineteenth century, U.K. companies adopted charter exceptions that excluded the operation of the loyalty rule if interested directors informed their fellow directors of the nature of their self-dealing. If interested directors provided the requisite disclosure, the exception excluded the operation of the loyalty rule, protecting the transaction from invalidation under the loyalty rule. If interested directors did not, the company could invalidate the transaction under the loyalty rule. Separately, as shown in Table 2, interested directors could protect the transaction from invalidation by getting the informed approval of shareholders on an ad hoc basis.

Reflecting these market practices, Table 3 shows the full range of exceptions commonly available to interested directors under the fairness and no-conflict regimes.[181] Of course, only the fairness regime provides an exception based on proof of fairness. Otherwise, the fiduciary regimes are

175. GOWER ET AL., *supra* note 137, at 613.

176. *See* The Companies (Tables A to F) Regulations 1985, SI 1985/805, art. 85 ("Subject to the provisions of the Act, and provided that he has disclosed to the directors the nature and extent of any material interest of his, a director notwithstanding his office—(a) may be a party to, or otherwise interested in, any transaction or arrangement with the company or in which the company is otherwise interested; (b) may be a director or other officer of, or employed by, or a party to any transaction or arrangement with, or otherwise interested in, any body corporate promoted by the company or in which the company is otherwise interested; and (c) shall not [account for any profit from such office or employment] and no such transaction or arrangement shall be liable to be avoided . . . .").

177. *Id.*

178. LAW COMM'N & SCOTTISH LAW COMM'N, COMPANY DIRECTORS: REGULATING CONFLICTS OF INTERESTS AND FORMULATING A STATEMENT OF DUTIES 77 (1998), https://www.scotlawcom.gov.uk/files/1112/7892/5856/dp105_reg_conflicts.pdf [https://perma.cc/TJN8-K7H2] ("Under the general law a director cannot . . . receive any benefit without the informed consent of shareholders. This informed consent is frequently given in the articles of association, but contingent on disclosure [by directors of their interest to their fellow directors].").

179. *Id.*

180. The statute includes an express exception along the lines of the exception commonly adopted in corporate charters. *See infra* Part III.C.

181. *See infra* Table 3.

broadly similar, but with some noteworthy differences. Both regimes provide an exception based on the informed approval of shareholders, although the U.K. exception is more lenient. That exception is interpreted to allow interested directors to vote their shares qua shareholders to approve self-dealing, even if their votes are determinative;[182] U.S. law instead requires approval by disinterested shareholders.[183] Moreover, U.S. law imposes heightened requirements for interested directors with significant voting power[184] (as for controlling shareholders generally), while U.K. law does not regard controlling shareholders as fiduciaries, does not forbid controlling shareholders from voting to approve their self-dealing, and relies instead on statutory provisions to regulate controlling shareholder transactions—provisions that "do[] not . . . deal effectively with [self-dealing transactions] with controlling shareholders."[185]

Table 3: Structure of No-Conflict and Fairness Rules in Operation

	U.S. Fairness Rule	**U.K. No-Conflict Rule**
Loyalty Rule	Requires undivided loyalty	Requires undivided loyalty
Exceptions	1. Disclose self-dealing to board/committee of directors and obtain disinterested approval 2. Disclose self-dealing to shareholders and obtain their approval 3. Prove entire fairness	1. Disclose self-dealing to fellow directors 2. Disclose self-dealing to shareholders and obtain their approval

Under both fiduciary regimes, neutral director approval protects a self-dealing transaction from the loyalty rule. Under the fairness rule, this exception requires the informed approval of disinterested directors.[186] Under the no-conflict rule, this exception, the product of the corporate charter, requires disclosure (to fellow directors) by interested directors of their interests in a transaction.[187] Informed of their colleagues' conflicts and cognizant of their own fiduciary duties, fellow directors under the no-conflict rule must in effect give a weak form of approval of self-dealing.[188] Thus, the

182. This was the position under the common law whether interested directors sought ex ante shareholder approval or ex post shareholder ratification. The contemporary statutory regime forbids directors from voting to approve a transaction (but not from voting to ratify a transaction), tightening the common law position somewhat. *See supra* notes 135–36 and accompanying text.

183. *See supra* note 117.

184. *See supra* notes 126–27 and accompanying text.

185. *See* Davies, *supra* note 27, at n.64.

186. *See supra* Table 3.

187. *See supra* Table 3.

188. Enriques et al., *supra* note 2, at 153 (Rules requiring or encouraging board approval of self-dealing have stronger "prophylactic potential" than rules requiring that a board be

two regimes protect self-dealing under similar conditions: under the fairness rule, if fellow directors approve a transaction; and under the no-conflict rule, if disinterested directors are informed of it by interested directors. To the extent a difference exists, the no-conflict rule is again probably more lenient because of the weaker form of neutral director approval it involves.

It is worth briefly considering whether the fact that shareholders under the no-conflict rule need to approve these charter exceptions means that they, the exceptions, maximize value for shareholders. Shareholders approve these exceptions either implicitly when they subscribe for shares in a company with such a provision or explicitly when they hold shares in a company without such a provision that later adopts one.[189] Given shareholders' approval, one could argue that these provisions are value-maximizing since shareholders would not otherwise have agreed to them. But that view is contestable[190] because we cannot be sure that shareholders only approve value-maximizing charter provisions. In any case, this Article's inquiry is comparative. What matters here is that a broadly similar exception based on neutral director approval exists under both fiduciary regimes. The fact that one requires shareholder approval simply underscores the point that a comparison of the rules' substantive content shows that neither rule is self-evidently superior in any respect (given the impossibility of knowing what rules shareholders would approve and how robustly they would review them). The inquiry here considers their practical operation at the point in time that a self-dealing transaction occurs.

In sum, the no-conflict regime has long offered dual exceptions—ad hoc shareholder approval and disclosure to fellow directors. Although the common law permits companies to adopt other, perhaps more lenient, exceptions in their charters,[191] there is no evidence that companies

informed of self-dealing, with the latter "amount[ing] to implicitly subjecting them to a weak form of board authorization or ratification.").

189. Midstream charter amendments required the approval of 75 percent of voting shareholders. Companies Act 2006, c. 46, §§ 21, 283 (Eng.); Companies Act 1985, c. 6, §§ 9, 378 (Eng.). Whenever shareholders gave approval, they did so in advance of any self-dealing and without information about any particular instance of self-dealing; they gave generalized advance approval.

190. The question of the efficiency of charter terms attracts vigorous debate. *Compare* Lucian A. Bebchuk, *Foreword: The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989), *with* Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989). That debate centers on the process by which companies adopt charter terms, whether they do so at the outset, in the initial charter, or later, in "midstream" charter amendments. *See* Bebchuk, *supra*, at 1399–1408 (explaining the need to determine the stage at which charter terms are adopted). At the initial charter stage, when U.K. companies seem to have adopted the relevant terms (conditionally excluding the loyalty rule), the question turns on whether companies' stock prices reflected or incorporated the content of these charter terms and thereby assured the terms' efficiency; that question in turn focuses attention on the existence of externalities, information asymmetries and cognitive biases, and the role of actors like underwriters in pricing securities. *See id.* at 1405–08; Brudney, *supra* note 4, at 1418 n.35; John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1677 (1989); Melvin A. Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1516–17 (1989).

191. *See supra* note 137 and accompanying text.

commonly adopt them. The fairness rule provides broadly similar exceptions, with the addition of proof of fairness.

B. Use of Exceptions

In examining how interested directors use these exceptions, that is, which ones (if any) they invoke, one would ideally want systematic empirical evidence. Studying litigation about alleged self-dealing would be helpful, and yet one could not know the extent to which practices revealed in litigation were representative of wider deal practices.[192] To examine how the fiduciary regimes in fact operate, therefore, this analysis considers the incentives the regimes create and the directorial behaviors one would expect in response. It then considers other sources of data on how directors respond.

We can expect self-dealing fiduciaries to gravitate toward those exceptions that benefit them most. These fiduciaries select the exception that they expect to give them the greatest share of any bargaining surplus arising from a self-dealing transaction, bearing in mind the expected cost of using that exception.[193] The bargaining surplus represents the difference between the value of a self-dealing transaction to shareholders and to the interested directors. For example, assume that two directors propose to buy an asset from the company that they value more highly than do the company's shareholders. Say the directors value it at $10, while shareholders value it at $6, giving a surplus of $4.[194] The interested directors would use the exception that would allow them the greatest share of that surplus, also taking into account the expense of invoking the exception.

Consider the U.S. fairness regime first. In a two-way comparison of shareholder approval and proof of fairness, which exception would interested directors prefer? Zohar Goshen asks this question in a controlling shareholder setting and suggests that proof of fairness would give interested directors a greater share of any surplus than would shareholder approval.[195] Under the latter rule, shareholders might refuse to approve the transaction, holding out until they received a significant share of the surplus.[196] Realizing this, interested directors would prefer to prove the fairness of their transaction by offering a price that is just fair enough to carry their burden of proof in order to protect it from the loyalty rule.

192. *See* Geeyoung Min, *The SEC and the Courts' Cooperative Policing of Related Party Transactions*, 3 COLUM. BUS. L. REV. 663, 697 (2014) (explaining why breach of duty of loyalty cases are unlikely to provide reliable data on self-dealing transactions).

193. Another way to think of this claim is that interested directors will choose the exception under which the underlying loyalty rule is least "sticky," to use Brett McDonnell's term. *See generally* McDonnell, *supra* note 8. The harder an underlying rule to alter, the stickier it is.

194. *See* Goshen, *supra* note 7, at 411–12 (giving a similar example).

195. *Id.* Goshen examined these rules in the controlling shareholder setting. Although he does not refer to the rules as exceptions, he examines which rule would give controlling shareholders a larger share of the surplus. The analysis assumes that neither exception—shareholder approval or proof of fairness—will be satisfied unless the transaction benefits the company.

196. *Id.* at 412 ("The liability-rule approach gives an advantage to the majority, while the property-rule approach gives the minority more bargaining power.").

The directorial self-dealing setting is less straightforward than that simplified analysis suggests. Interested directors may choose among a greater range of exceptions because they have the added alternative of disinterested director approval. Moreover, in theory at least, the selection of one exception does not necessarily rule out the use of another; interested directors might employ exceptions sequentially, first attempting shareholder approval and, if that fails, relying on proof of fairness.[197] And the institutional setting for shareholders makes it difficult to predict how shareholders will respond when asked to approve a self-dealing transaction. On the one hand, institutional investors hold increasing proportions of the stock of public companies,[198] increasing their capacity to vigorously represent the interests of those for whom they invest. On the other hand, passive institutional investors such as index funds have incentives to underinvest in monitoring and to defer excessively to corporate management, casting doubt on the vigor with which they represent their beneficiaries' interests.[199] Of course, proxy advisors and other mechanisms help coordinate the activities of institutional investors, but there is still considerable doubt about the rigor with which shareholders monitor directorial self-dealing.

In a more realistic three-way setting, obtaining shareholder approval will often prove more attractive to interested directors than proving fairness. Interested directors have greater incentives to seek approval from shareholders that are large in number and widely dispersed than from smaller numbers of large shareholders, as the latter tend to be better organized and more engaged.[200] But even large institutional investors face collective action problems and may lack the incentives and capacity to negotiate robustly with interested directors and so may accept terms not because they are the best that could be obtained but because they are better than any presently existing alternative.[201] Randall Thomas and his coauthors provide data showing that

197. While this is true, Delaware courts express reluctance to second-guess the decisions of neutral decision-making bodies, meaning that they may refuse to treat a self-dealing transaction as entirely fair if either disinterested directors or shareholders have disapproved the transaction. *See infra* note 253 and accompanying text.

198. As to the increased holdings of institutional investors, see Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 725–30 (2019) and Andrew F. Tuch, *Proxy Advisor Influence in a Comparative Light*, 99 B.U. L. REV. 1459, 1508–09 (2019).

199. *See* Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy* (European Corp. Governance Inst., Working Paper No. 433/2018, 2018), https://ssrn.com/abstract=3282794 [https://perma.cc/R5BL-FXR6]. For other contributions examining implications of the rise of index funds, see Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493 (2018) and Edward Rock & Marcel Kahan, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders* (NYU Law & Econ. Research Paper Series, Working Paper No. 18-39, 2019), https://ssrn.com/abstract=3295098 [https://perma.cc/F6GU-LQED].

200. *See* Deborah A. DeMott, *The Figure in the Landscape: A Comparative Sketch of Directors' Self-Interested Transactions*, 62 LAW & CONTEMP. PROBS. 243, 255 (1999) (discussing how shareholding patterns may influence self-dealing).

201. The conduct of shareholders in mergers is instructive. *See In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 450–51 (Del. Ch. 2012) (referring to the risk of shareholders accepting

in the merger context shareholders rarely vote against transactions and explain this finding as shareholders either blindly supporting deals or simply preferring the deal proposed over no deal at all.[202] Thomas and his coauthors also demonstrate that the role of merger arbitrageurs—investors with short-term investment horizons that become shareholders after mergers are announced—exacerbates concerns about the rigor with which shareholders review merger transactions, underscoring concerns about the agency costs of institutional investing.[203] A primary concern is the practice of companies bundling merger approvals with approvals of potential director misconduct in those transactions, a practice that can distort shareholders' decisions.[204] Important though these concerns are for mergers, they are less warranted for routine self-dealing transactions, the transactions to which the doctrinal analysis above applies.[205] Such deals typically occur outside the merger context. They involve transactions between the company and an individual director, or an entity associated with an individual director, rather than the entire board.[206] Still, these concerns illustrate institutional investors' suboptimal incentives when voting, giving us reason to question the rigor they apply in approving directorial self-dealing.

Weighed against these considerations is that entire fairness is tough to establish. As described below, the doctrine strongly discourages self-dealing by rational and opportunistic directors alike.[207] Relying on proof of fairness subjects interested directors to the risk of error—the risk that interested directors will mistakenly offer more than fair value or that judges will mistakenly find the value offered is not fair.[208] Proving fairness can be expensive: if interested directors fail, they "are likely to end up paying for the litigation out of their own pockets."[209] In line with these considerations, Langbein asserts that interested directors would seek shareholder approval, rather than try to prove fairness, because it "will almost always be more

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"deals that, while 'good' . . . are not 'as good' as they could have been" in the merger context); *id.* at 450 (suggesting that shareholders display "reluctance to ever turn down a premium-generating deal when that is presented").

202. Randall S. Thomas et al., *Understanding the (Ir)Relevance of Shareholder Votes on M&A Deals* 8–9 (Vanderbilt Law Research Paper Series, No. 19-06, 2019), https://ssrn.com/abstract=3333241 [https://perma.cc/9BCU-6BCL].

203. *Id.* at 46–65.

204. *Id.*

205. *See supra* Part III.B.

206. BAINBRIDGE, *supra* note 26, at 157 ("Self-dealing transactions rarely implicate the entire board. To the contrary, they often involve misconduct by a single director.").

207. *See infra* Parts III.C–D; *see also* Thomas et al., *supra* note 202, at 66 ("The breadth of . . . [the] fairness inquiry when coupled with the conflicted party having the burden of proof is daunting, and all the more so if there is also fear this inquiry may be plagued by hindsight bias.").

208. Another complicating factor is the presence of a third exception—disinterested director review. Knowing that interested directors could seek to invoke this rule might reduce shareholders' incentives to hold out for a better deal from interested directors. Shareholders might be less likely to drive a hard bargain with interested directors than if the only alternative exception were proof of fairness.

209. This is because "loyalty violations are usually excluded from directors' indemnification." Min, *supra* note 192, at 696.

attractive than a retrospective determination in which liability will attach if the court disagrees with the [fiduciary's] view."[210]

Goshen and Langbein both raise good points. Their differing positions reflect the difficulty in the abstract of determining which of these two exceptions—proof of fairness or shareholder approval—interested directors would be more likely to use. In companies with a widely dispersed and fragmented shareholder base, shareholder approval would seem more appealing, especially given courts' hard line on fairness review. Still, neither exception is particularly appealing to interested directors.

It is, however, clear which exception interested directors would find most appealing to satisfy under the fairness regime: disinterested directors' approval. To be sure, disinterested directors may be better positioned to bargain than shareholders in general meeting because they face weaker collective action problems.[211] Disinterested directors may also have better access to information about proposed self-dealing than shareholders, who depend on managers for information.[212] Nevertheless, commentators have long expressed concern about the capacity and willingness of directors to monitor and discipline self-dealing or other misconduct by their fellow directors.[213] The Supreme Court of Delaware has questioned whether the requirement for independence of directors will "sufficient[ly] safeguard against abuse, perhaps subconscious abuse."[214] In deciding whether to approve self-dealing, disinterested directors may be influenced by feelings of subtle ties including collegiality or an expectation that interested directors will reciprocate if they, the disinterested directors, seek future self-dealing opportunities.[215] In fact, "many courts and commentators have voiced

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210. Langbein, *supra* note 6, at 985.

211. *See* Thomas et al., *supra* note 202, at 65–69.

212. *Id.*

213. *See, e.g.*, CLARK, *supra* note 54, at 183 ("[Director approval of self-dealing] fails because, under conventional (although perhaps alterable) arrangements, the independent directors may not really be independent, or may not have adequate resources and incentives for doing a good job of review."); *id.* at 184 ("[T]he director approval procedure for basic self-dealing suffers . . . from the time, information, and budget constraints on directors; and from the fact that the cost of getting them into the position of being truly competent to pass judgment on the business wisdom of a self-dealing transaction presented by insiders is considerable but often unproductive for the corporation."); J. Robert Brown, Jr., *Disloyalty Without Limits: "Independent" Directors and the Elimination of the Duty of Loyalty*, 95 KY. L.J. 53, 101, 105 (2006) (arguing that boards exercise weak control over self-dealing transactions).

214. Zapata Corp. v. Maldonado, 430 A.2d 779, 787 (Del. 1981); *see also id.* (When directors "pass judgment" on their colleagues, "[t]he question naturally arises whether a 'there but for the grace of God go I' empathy might not play a role.").

215. John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 66 (2014) ("[Directors] face more genteel pressures of camaraderie and community between themselves and officers, which may have a subtly corrosive effect on their ability to monitor and exert oversight."); *see also* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 31–34 (2004) (discussing social and psychological factors leading directors to favor senior managers); James D. Cox & Harry L. Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 LAW & CONTEMP. PROBS. 83, 85–108 (1985) (arguing that psychological mechanisms generate powerful biases on the part

skepticism over the capacity of board members to be totally objective when called upon to pass judgment on transactions involving their peers."[216] As Paul Davies and Sarah Worthington explain,

> It is not difficult to envisage a board culture in which the steps taken [in response to news of a fellow director's self-dealing] are minimal, especially if all the directors from time to time make such disclosures and trust that their disclosure will be readily accepted if they readily accept disclosures by others.[217]

Compared with the alternatives of shareholder approval and proving fairness, disinterested director approval is timely and inexpensive for self-dealing directors, who need not wait for a shareholder meeting to gain approval or make their case publicly in such a meeting or before a court. Decisions made by shareholders and courts, for or against interested directors, occur in the public domain, subjecting interested directors to public scrutiny and potential embarrassment whereas disapproval by disinterested directors will rarely get disclosed unless the self-dealing transaction occurs anyway.[218] That disinterested directors can bargain with their fellow directors until approval is given, whereas shareholders make their decisions on an up or down basis without the same scope for bargaining, weighs in favor of interested directors seeking the approval of their colleagues rather than shareholders. These various considerations suggest that disinterested director approval would allow interested directors to capture a greater share of any surplus than under other exceptions[219] and that interested directors would therefore prefer to invoke that exception over seeking shareholder approval or proving fairness.[220]

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of independent directors, impairing their ability to "perceive and represent corporate interests" (in assessing shareholder litigation)).

216. Kenneth B. Davis, Jr., *Approval by Disinterested Directors*, 20 J. CORP. L. 215, 216 (1995).

217. DAVIES & WORTHINGTON, *supra* note 143, at 519.

218. *See infra* notes 221–23 and accompanying text.

219. Disinterested directors have other incentives. This Article argues that they are subject to distinct forces that make them more likely to approve a given self-dealing transaction than disinterested shareholders or courts.

220. Enriques et al., *supra* note 2, at 154 ("Although U.S. jurisdictions stop short of mandating board approval of managerial self-dealing, they strongly encourage it. . . . State law creates incentives for interested managers to seek board approval by according transactions that are authorized (or ratified) by the board business judgement rule protection."). In the context of corporate fiduciaries, Amir Licht argues that, presented with the option of business judgment review under *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014), deal planners prefer to simultaneously use independent director approval and majority-of-the-minority shareholder approval in order to gain such protection rather than face entire fairness review. *See* Licht, *supra* note 61, at 44–45. This view is consistent with the analysis above, suggesting that deal planners prefer procedural exceptions or cleansing devices to proving fairness. Professor Licht interprets the dual procedural protections as a "strict, novel yet classic mechanism of fully-informed consent." *Id.* at 44. However, Licht regards fairness review as "pernicious," *id.* at 14, as "a doctrine that effectively benefits corporate insiders," *id.* at 23, an interpretation that is in tension with deal planners' preference for using the dual procedural protections over proof of fairness.

U.S. federal securities laws reinforce self-dealing directors' incentives to seek cleansing from disinterested directors rather than to use other exceptions. Under Item 404(a) of Regulation S-K, the Securities and Exchange Commission (SEC) requires companies to disclose transactions valued above $120,000 in which a director or officer "had or will have a direct or indirect material interest."[221] Although corporations enjoy discretion to decide whether a director or officer's interest is "material," and therefore requires disclosure,[222] the provision broadly captures self-dealing transactions, subject to certain de minimis exceptions.[223] Importantly, Item 404(b) of Regulation S-K requires companies to describe their policies for reviewing, adopting, or ratifying any transaction disclosed under Item 404(a).

Overwhelmingly, Delaware-incorporated public companies adopt policies requiring interested directors to disclose self-dealing transactions to corporate boards or committees of directors and tasking those boards or committees with determining whether to approve those transactions. A review of the disclosures in response to Item 404 by one hundred Delaware-incorporated public companies, randomly selected, is illustrative.[224] Of these companies, ninety-three required the board or a board committee, typically the audit committee, to review all self-dealing transactions above certain dollar thresholds, usually $120,000, and to approve those transactions or not.[225] Although section 144(a)(1) does not prevent interested directors from attending, participating in, or voting at a meeting to approve a self-dealing transaction in order to have cleansing effect (rather, it requires approval by a majority of the disinterested directors), forty-eight companies in the sample did impose such a restriction on interested directors, virtually assuring that any board or committee approval would be by disinterested directors.[226] Other companies in the sample might have imposed similar restrictions, but this could not be verified because many such companies simply described their related party policy, as required by Regulation S-K, without disclosing

221. 17 C.F.R. § 229.404(a) (2019). This disclosure requirement extends beyond directors and officers to "related persons" generally. This Article focuses on directors only.

222. *See* Min, *supra* note 192, at 717 (identifying the materiality standard in Item 404(a) as suffering from "definitional uncertainty" and as an area for "potential abuse of discretion").

223. Certain transactions are deemed not to give rise to an indirect material interest, including transactions involving a counterparty (and the relevant public company) in which the related party has a limited financial interest in the counterparty or in which the related party's only interest in the counterparty is as a director. 17 C.F.R. § 229.404(a) (2019) (Instruction 6 to Item 404(a)).

224. In July 2018, using the S&P Capital IQ database, companies were identified using the following screening criteria: (1) Market Capitalization; (2) Exchanges (all listings); and (3) State of Incorporation: Delaware. From the resulting data, entities (typically trusts) listed on the NYSE Arca and on Pink Sheets LLC were excluded. The remaining entities were listed on either the New York Stock Exchange or Nasdaq Global Capital Market. The search identified 2623 entities. A sample of one hundred companies was randomly selected and their most SEC filings, typically their Form 14A proxy statements, were reviewed. Where possible, their underlying related party and related policies, often available on companies' websites, were also reviewed. *See infra* Appendix A.

225. The policies often exempted certain "pre-approved" transactions not considered to create material conflicts.

226. See Appendix A for further findings.

the policy itself. In any case, even without such a restriction ensuring that any board or committee approval would be by disinterested directors, the near-universal requirement for interested directors to seek board or committee approval of their self-dealing transactions will usually assure that disinterested directors consider whether to approve these transactions if, as some claim, these transactions typically involve a single interested director.[227] These results are consistent with other empirical evidence.[228] Appendix A summarizes the companies' related party policies and Appendix B lists the companies in the sample.

For example, Bank of America Corporation's related party policy encompasses self-dealing transactions as defined by Item 404. It provides that "our Corporate Governance Committee must approve or ratify any related person transactions," and when doing so, consider various factors, including the interested directors' interests and the availability of arm's-length bids or market terms.[229] The company's corporate governance guidelines forbid committee members from participating in deliberations or voting when they are interested in a transaction under consideration.[230]

The related party policies under Item 404 generally required interested directors to seek advance director approval for their material self-dealing transactions. We cannot know whether the approval obtained would satisfy section 144(a)(1) or assure business judgment protection for the transaction, since the review process is opaque, leaving open questions as to whether approval was in good faith and fully informed, as required by the Delaware statute. Nevertheless, the evidence suggests that a significant proportion of companies would have assured that any approval be by disinterested directors, assuming compliance with their related party policies. Given the requirements of these policies and the approval infrastructure readily available, directors likely have strong incentives to invoke the exception requiring disinterested director approval when they seek to engage in self-dealing.

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227. *See, e.g.*, BAINBRIDGE, *supra* note 26, at 157 ("Self-dealing transactions rarely implicate the entire board. To the contrary, they often involve misconduct by a single director."). This claim is consistent with a general review of related party transactions disclosed by the sample companies.

228. Geeyoung Min studied 2012 data for Fortune 500 companies, finding that "most [self-dealing] transactions get approval from an approving committee consisting of 'disinterested' directors, thereby satisfying the first of the three conditions under DGCL Section 144." Min, *supra* note 192, at 731. In other words, of all self-dealing transactions, Min finds that a majority received disinterested director approval. The proportion of such transactions for which disinterested directors' approval was sought must have been higher, unless disinterested directors approved every transaction they were asked to review. Min does not comment on this proportion.

229. Bank of Am. Corp., Definitive Proxy Statement (Schedule 14A) 31 (Mar. 12, 2018), https://www.sec.gov/Archives/edgar/data/70858/000119312518078695/d501004ddef14a.htm [https://perma.cc/2ANS-NBZJ]. The policy provides for pre-approval of certain transactions not considered to create or involve a material conflict of interest. *Id.*

230. *See Corporate Governance Guidelines*, BANK AM. CORP. (Oct. 25, 2017), http://investor.bankofamerica.com/static-files/652e9258-edfd-45b4-ae45-62fc54e4d2fc [https://perma.cc/LS7T-7EBL].

Under the U.K. no-conflict regime, interested directors can look to either of two exceptions: ad hoc shareholder approval or disclosure of interests to fellow directors. In light of the analysis under the fairness rule, the former exception would seem more difficult to satisfy, offering interested directors less of any surplus generated by the transaction. Shareholders may be a less forgiving audience than one's fellow directors as they would make their decision under public scrutiny, on an up-or-down basis with little scope for bargaining, and a negative vote may damage interested directors' reputations and embarrass them. In the U.K. context, institutional investors can be sensitive to the risk of reputational harm that can occur if they are regarded as exercising weak oversight, making this exception unappealing.[231]

In the United Kingdom, it is difficult to get a picture of directors' actual practices because of more limited public corporate disclosures. Nevertheless, some empirical texture is provided by directors' conduct in management buyouts (MBOs), which suggests that directors act in accord with the incentives created by these exceptions.[232] MBOs represent classic self-dealing because fiduciaries who manage the corporation participate in some fashion in a consortium buying the corporation. These transactions have occurred frequently in the United Kingdom and United States,[233] where major financial firms exist precisely to do these deals, operating on the premise that these self-dealing transactions can and will occur without significant legal obstacles.[234] In both the United Kingdom and United States, committees of disinterested directors perform central roles. In fact, it is virtually taken for granted in these transactions that an MBO process will be managed by a committee of disinterested or independent directors.[235] Though shareholder approval may be required under other rules, transaction

231. I thank David Kershaw for suggesting this reason in the U.K. context.

232. While Delaware courts have not explicitly characterized MBOs as self-dealing transactions, scholars tend to regard them as such. *See* Guhan Subramaniam, *Deal Process Design in Management Buyouts*, 130 HARV. L. REV. 590, 650–53 (2016) (discussing the scholarly view that cases decided under section 144 provide the framework for MBOs).

233. *See, e.g.*, *Getting a Take Private off the Ground in the UK*, GIBSON DUNN (Dec. 18, 2018), https://www.gibsondunn.com/getting-a-take-private-off-the-ground-in-the-uk/ [https://perma.cc/FK9V-W3A3] (referring to the "gather[ing] pace" of take-privates in the United Kingdom).

234. Private equity firms often instigate MBOs by approaching incumbent management, seeking to have them participate in a deal to buy the company. Major law firms have practice areas devoted to advising the managers, companies, and private equity firms that participate in these transactions.

235. As to the United States, see generally Matthew D. Cain & Steven M. Davidoff, *Form over Substance: The Value of Corporate Process and Management Buy-Outs*, 36 DEL. J. CORP. L. 849 (2011) and Lawrence Lederman & Barry A. Bryer, *Representing a Public Company in a Leveraged Buyout Transaction*, *in* LEVERAGED MANAGEMENT BUYOUTS: CAUSES AND CONSEQUENCES 111 (Yakov Amihud ed., 1989). *See also* Subramaniam, *supra* note 232, at 650–53 (2016). As to the United Kingdom, see Graham Gibb & Charles Martin, *Public-to-Privates*, *in* PRIVATE EQUITY: A TRANSACTIONAL ANALYSIS 221, 232 (Chris Hale ed., 3d ed. 2015) ("[O]ne of the first steps in any management buy-out is for the target board to constitute an independent committee of directors.").

planning puts heavy reliance on disinterested director approval to address concerns about directorial self-dealing.[236]

Given these choices, the latter exception—disclosure to fellow directors—would be more appealing to satisfy than the alternative. It would offer interested directors a greater share of any surplus a self-dealing transaction generates, and we would expect interested directors to gravitate toward using it.

Table 4 suggests a ranking of exceptions, in order of decreasing attractiveness for interested directors, showing under each regime the appeal of disinterested director approval by disinterested or fellow directors.

Table 4: Exceptions Ranked in Order of Decreasing Attractiveness for Fiduciaries to Satisfy

U.S. Fairness Rule	**U.K. No-Conflict Rule**[237]
1. Disclose self-dealing to board/committee of directors and obtain disinterested approval 2. Disclose self-dealing to shareholders and obtain their approval 3. Prove entire fairness	1. Disclose self-dealing to fellow directors[238] 2. Disclose self-dealing to shareholders and obtain their approval

In sum, in the United States, interested directors would tend to seek disinterested director approval to protect against the loyalty rule, while in the United Kingdom they would tend to disclose their interest to fellow directors. If interested directors act on these incentives, the U.K. and U.S. fiduciary regimes would operate similarly, despite differences in their substantive formulations. These regimes create incentives for interested directors to use exceptions that put unconflicted or neutral directors in the position of policing self-dealing.

C. Relevance of Fairness

Given these incentives, what real-world relevance does proof of fairness hold for interested directors? This exception may matter, but far less than commentators have generally assumed, because interested directors have

236. Other rules, common law, statutory, and regulatory, will apply to MBOs and these rules' effects on deal process design are difficult to disentangle. For example, directors may also owe fiduciary duties requiring them to maximize their sale price, under so-called *Revlon* duties in the United States and equivalent duties in the United Kingdom.

237. Under the no-conflict rule, companies have broad freedom to adopt exceptions in their corporate charters—other than those shown in this table—although there appears to have been no widespread practice of them doing or having done so.

238. Under the common law regime, this exception very frequently appeared in corporate charters. *See supra* notes 157–80 and accompanying text (explaining the widespread usage of these exceptions). Under contemporary statutory law, this exception is embedded in section 177. *See infra* Part III.E.

weak incentives to use it and because its existence is unlikely to influence the conduct of the various actors involved, including interested directors.

Under the fairness regime, a director always has the opportunity to protect a self-dealing transaction by proving that it was fair. The question is how this unique exception affects the comparison of regimes, since the no-conflict regime does not include a corresponding exception.

To begin, one might think that by offering fairness review, only the U.S. regime provides an ex post means of legal absolution, that is, an exception available after self-dealing has occurred. But in the United Kingdom (as in the United States), shareholders can ratify self-dealing transactions ex post. In the abstract, it is not evident which of these exceptions—proof of fairness or shareholder approval—would pose the greater barrier for an interested director. Neither exception is particularly appealing for directors. In the United Kingdom, the board might refuse to put the matter to shareholders; shareholder meetings are costly, especially for major public companies[239] and even proposing the resolution might cast the board in a negative light. Even if shareholders did have the opportunity to vote on the issue, the outcome would be uncertain. In the United States, proving fairness is expensive for interested directors and, again, the result is uncertain. Under both regimes, the better the transaction for the company, the better the prospects for interested directors. But interested directors nevertheless have powerful incentives to invoke exceptions before the transaction occurs by informing their disinterested directors and, in the United States, also seeking their approval.

This does not mean that the regimes will always operate identically.[240] In some cases the only available cleansing device in the United States may be fairness. Consider, for example, the family-owned and directed company that transacts with a related family company having the same individuals as directors; no disinterested directors or disinterested shareholders may exist to cleanse the self-dealing.[241] In the United Kingdom, shareholder approval may be available under the common law on these facts since it imposes no requirement that such approval be by disinterested shareholders, in contrast to the U.S. position.[242]

Consider next the opportunistic director who fails to get director or shareholder approval before engaging in self-dealing. In the United Kingdom, directors would be unlikely to put the transaction to a shareholder vote, and informed-shareholder approval would seem remote in any case. In

239. *See* LAW COMM'N & SCOTTISH LAW COMM'N, *supra* note 178, at 44 ("There are substantial costs to approval and ratification, in particular in the case of large listed companies.").

240. *Cf.* Brown, *supra* note 213, at 54 (arguing that giving effect to director approval of self-dealing transactions has "rendered fairness irrelevant").

241. For a similar fact pattern, see, for example, Lewis v. S. L. & E., Inc., 629 F.2d 764 (2d Cir. 1980). My thanks to Randall Thomas for this insight.

242. As to the U.K. common law, see *supra* notes 135–36 and accompanying text; as to the contemporary statutory position, see *infra* note 277 and accompanying text. As to the U.S. position, see *supra* note 117.

the United States, might proof of fairness save her and the transaction? It is in this scenario that the regimes may differ in operation. She would have to rely on so thoroughly satisfying the price prong of the fairness test that a court would allow the transaction to pass muster despite her opportunism.[243] She may be vindicated; there are cases where proof of fairness has operated in this way in which a transaction tainted by unfair dealing was nevertheless entirely fair.[244] But such fact patterns are exceptional. Only in rare instances have pricing terms rendered a transaction entirely fair, despite interested directors' unfair dealings.[245]

In general, although the question is incapable of direct proof, it seems doubtful that directors would be more likely to engage in self-dealing or in more aggressive forms of self-dealing than they would in the absence of the fairness exception. U.S. court judgments offer little hope to opportunistic or rule-evading directors who later seek relief for self-dealing by appealing to fairness.[246] Judicial reluctance to offer relief for these directors is understandable, given the equitable jurisdiction courts exercise in actions alleging fiduciary breach. Courts of equity, like the Delaware Court of Chancery, began as "courts of conscience," placing high value in propriety.[247] Indeed, courts express reluctance to save self-dealing transactions if they are the product of unfair dealing.[248] Courts have ruled that unfair dealing can "infect" a transaction's price, compromising its fairness.[249] Unfair dealing can make "the burden of persuading the court of the fairness of the terms . . . exceptionally difficult."[250] Moreover, "[m]erely

243. Even when an unfair process is used, "it is possible that the pricing terms [are] so fair as to render the transaction entirely fair." Valeant Pharm. Int'l v. Jerney, 921 A.2d 732, 748 (Del. Ch. 2007).

244. One circumstance where the no-conflict and fairness regimes would operate differently is where "all of the directors are interested in the transaction (so that [disinterested director approval] is unavailable), but where seeking shareholder approval . . . would be cumbersome, expensive, and not really meaningful." *See* CLARK, *supra* note 54, at 169.

245. *See generally* Marciano v. Nakash, 535 A.2d 400 (Del. 1987); ACP Master, Ltd. v. Sprint Corp., C.A. No. 8508-VCL, 2017 WL 3421142 (Del. Ch. July 21, 2017); *In re* Trados Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. 2013); Kahn v. Lynch Commc'n Sys., Inc., Civ. A. No. 8748, 1995 WL 301403 (Del. Ch. Apr. 17, 1995), *aff'd*, 669 A.2d 79 (Del. 1995).

246. It is also unlikely that interested directors would bargain significantly differently when seeking disinterested director or shareholder approval based on the availability of proof of fairness. This is because courts are unlikely to upset the good faith decision of neutral decision-making bodies. *See infra* note 253 and accompanying text.

247. Equitable courts' regard for propriety found expression in maxims insisting that "those who seek equity must do equity" and "those who come into equity must come with clean hands." *See* J. D. HEYDON ET AL., MEAGHER, GUMMOW & LEHANE'S EQUITY DOCTRINES AND REMEDIES 74–84 (5th ed. 2015).

248. *See, e.g.*, *In re* Nine Sys. Corp. S'holders Litig., Consol. C.A. No. 3940-VCN, 2014 WL 4383127, at *47 (Del. Ch. Sept. 4, 2014) (Vice Chancellor John W. Noble was "reluctant to conclude that the [conflicted transaction], even if it was conducted at a fair price, was an entirely fair transaction because of the grossly inadequate process employed by the Defendants.").

249. Bomarko, Inc. v. Int'l Telecharge, Inc., 794 A.2d 1161, 1183 (Del. Ch. 1999) ("[T]he unfairness of the process also infects the fairness of the price.").

250. Valeant Pharm. Int'l v. Jerney, 921 A.2d 732, 748 (Del. Ch. 2007) ("[W]here the pricing terms of a transaction that is the product of an unfair process cannot be justified by

showing that the . . . price was in the range of fairness . . . does not necessarily satisfy the entire fairness burden when fiduciaries stand on both sides of a transaction and manipulate the . . . process."[251] Courts also treat the fairness inquiry as highly contextual, which means that any would-be self-dealer will be unsure of his chances of prevailing in litigation. In particular, judges identify no single fact pattern or definable circumstance in which they will regard as entirely fair a transaction reached through unfair dealing and so reinforce directors' doubt as to whether any fact pattern will pass muster.[252] In short, the proof of fairness exception does not create strong incentives for opportunistic behavior by interested directors. It should not lead the fairness regime to operate significantly differently than the no-conflict rule.

Some might think that the fairness exception will affect the comparison of regimes by influencing the conduct of *disinterested* directors. Facing the risk of judicial second-guessing to determine fairness, so the argument might go, disinterested directors asked to approve a transaction may be more willing to approve a transaction and give interested directors more of any surplus that a transaction produces than they would without that risk. In turn, interested directors could engage in more, or more aggressive, self-dealing than they would under a regime without a fairness exception. Stated differently, because they make decisions in the shadow of fairness review, disinterested directors may be more permissive than they would be otherwise.

We do indeed suspect that disinterested directors asked to approve self-dealing transactions are lenient to the benefit of their fellow directors. But, while the matter is also not susceptible to direct proof, it is doubtful that the availability of fairness review significantly influences disinterested directors' conduct. For interested directors, proof of fairness is, in general, a less appealing means of protecting a transaction; it involves significant expense, uncertainty of result, and public exposure. Moreover, courts respect the decisions of neutral corporate decision makers and are unlikely to second-guess the informed, good-faith judgment of disinterested directors who have refused to approve a self-dealing transaction.[253] Disinterested directors have

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reference to reliable markets or by comparison to substantial and dependable precedent transactions, the burden of persuading the court of the fairness of the terms will be exceptionally difficult.").

251. William Penn P'ship v. Saliba, 13 A.3d 749, 758 (Del. 2011); *see also* Kahn v. Tremont Corp., 694 A.2d 422, 432 (Del. 1997) ("[H]ere, the process is so intertwined with price that under *Weinberger*'s unitary standard a finding that the price negotiated by the Special Committee might have been fair does not save the result."); HMG/Courtland Props., Inc. v. Gray, 749 A.2d 94, 116 (Del. Ch. 1999) (stating that prices "within the low end of the range of possible prices that might have been paid in negotiated arm's-length deals" were "fair" in a "narrow sense" but not entirely fair when the "process was . . . anything but fair").

252. For a hypothetical fact pattern, in obiter dictum, that "conceivably could" be entirely fair, despite unfair dealing, see *In re Dole Food Co. Stockholder Litigation*, Consolidated C.A. No. 8703-VCL, 2015 WL 5052214, at *34 n.26 (Del. Ch. Aug. 27, 2015). The fact pattern involves "an altruistic controller" that wishes to eliminate minority shareholders "[f]or idiosyncratic reasons." *Id.*

253. *See, e.g.*, J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1448 (2014) (referring to "a natural reluctance to substitute

little reason to fear that a court would protect a self-dealing transaction by finding it fair when they have already refused to approve it (the same goes for shareholders in deciding whether to approve a transaction, in light of courts' respect for decisions of neutral bodies). It would therefore seem doubtful that fairness review influences disinterested directors' conduct by making them more permissive than they would be in the absence of the fairness exception.

The two regimes may well operate differently under exceptional circumstances. Still, even if the availability of the fairness exception influences the conduct of directors, countervailing considerations, based on other differences between the regimes, must be considered to identify differences in how the regimes operate. As explained next, seeking neutral directors' approval may be more costly to invoke and more limited in effect under the fairness regime than the no-conflict regime.[254]

Finally, there is no reason to think U.S. interested directors are less likely to face challenge or that their self-dealing is less likely to face detection—at least none based on the fiduciary rules themselves. Rather, given U.S. litigiousness and the incentives of plaintiffs' counsel,[255] the opposite is more likely, although these considerations are outside the focus of this Article. The upshot is that the U.S. and U.K. exceptions create similar incentives for rational and opportunistic interested directors alike.

D. Rigor in Fairness Review

Certain features of the fairness regime suggest that it may operate more strictly than does the no-conflict rule and more strongly deter self-dealing than the latter regime. First, U.S. courts searchingly scrutinize the disinterestedness of directors approving a transaction, leading some scholars to regard the requirement as one of independence.[256] The counterpart U.K. provision, by contrast, requires an interested director to inform "the other directors" of his interest,[257] without a disinterestedness condition or a requirement for approval. Because "other directors" themselves owe their own fiduciary duties, they must decide how to respond to the disclosure, amounting to a form of approval if they fail to object, and yet less may be required of them and of interested directors relative to the fairness regime. Second, the fairness rule both requires that shareholder approval be by

judicial judgment for business persons' decision making"); *see also* Bainbridge et al., *supra* note 125, at 602 ("[E]ven in cases implicating loyalty claims, Delaware corporate law places great emphasis on deference to director decisions.").

254. *See infra* Part III.D.

255. *See, e.g.*, Martin Gelter & Geneviève Helleringer, *Corporate Opportunities in the U.S. and in the U.K.: How Differences in Enforcement Explain Differences in Substantive Fiduciary Duties*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW, *supra* note 137, at 331.

256. *See* MELVIN ARON EISENBERG & JAMES D. COX, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS 523 (10th ed. 2011) ("Even in Delaware, it may be necessary to show that the directors who approved the transaction were not only disinterested, but independent . . . .").

257. Companies Act 2006, c. 46, § 177(1) (Eng.).

disinterested shareholders and operates more strictly than otherwise on directors who have voting control, while the common law no-conflict rule neither prevents interested directors from voting their shares nor imposes heightened requirements on directors with significant voting power.[258]

Finally, the fairness regime may operate more strictly than suggested above because its exceptions may be more limited than those under the no-conflict rule. For a time, courts suggested that the exceptions under section 144(a)(1) and (2) were less generous than suggested above.[259] Rather than giving BJR protection, these exceptions left self-dealing transactions vulnerable to invalidation for unfairness.[260] On this view, which prevails outside Delaware,[261] the fairness regime only permits transactions that are fair to the corporation, even if they have been approved by disinterested directors or shareholders. However, in Delaware this narrow view of the effects of section 144(a)(1) and (2) seems confined to self-dealing transactions involving interested directors with de jure or de facto voting control.[262]

Even if the section 144(a)(1) or (2) exceptions provide business judgment protection, recent cases suggest that transactions approved by disinterested directors may satisfy section 144(a) and yet remain subject to review to answer "[t]he somewhat different question of when an interested transaction might give rise to a claim for breach of fiduciary duty—i.e., to a claim in equity."[263] Determining that question requires resort to "the common law of

258. *See supra* notes 182–85 and accompanying text. Under the contemporary statutory position, votes cast by interested directors to retrospectively approve (or ratify) their own conduct are disregarded, a change from the common law position. *See infra* Part III.E. This difference between the regimes is diminished under the common law to the extent that U.K. companies adopted charter provisions limiting directors from voting as shareholders to approve their own self-dealing. I am aware of no widespread practice of companies adopting provisions to this effect.

259. *See supra* Part II.B.

260. On this view the exceptions saved interested directors from having to prove fairness to escape the loyalty rule. *See* Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1154 (Del. Ch. 1994) ("[C]ompliance with the terms of Section 144 does not restore to the board the presumption of the business judgment rule; it simply shifts the burden to plaintiff to prove unfairness."). Oddly, as authority, the court cited *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110, 1154 (Del. 1994), a case involving an interested merger by a controlling shareholder transaction, rather than a classic self-dealing transaction and to which section 144 was not directly applicable (nor cited in the decision). *See also* CLARK, *supra* note 54, at 169 (rejecting the proposition under Delaware law that a section 144–approved transaction "is completely shielded from shareholder attack and that a court is *precluded* by the statute from examining the fairness of the transaction and possibly invalidating it"); Davies, *supra* note 27, at n.48 ("Delaware has a general scrutiny mechanism in place in the shape of court review of substantive fairness of the transaction, even if it has been approved by the board.").

261. EISENBERG & COX, *supra* note 256, at 523 ("It is widely believed . . . at least outside Delaware approval by disinterested directors will not prevent a court from reviewing self-interested transactions for obvious unfairness.").

262. *See supra* note 127 and accompanying text.

263. *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 615 (Del. Ch. 2005); *see also* Cumming v. Edens, C.A. No. 13007-VCS, 2018 Del. Ch. LEXIS 54, at *46 (Del. Ch. Feb. 20, 2018) ("I am satisfied that compliance with Section 144(a)(1) does not necessarily invoke business judgment review of an interested transaction."). For a more detailed

corporations."[264] That law "looked much like that codified in Section 144,"[265] but not exactly, with the result that a transaction might gain section 144 protection but give rise to fiduciary liability. Under this approach, courts consider the questions of invalidity and fiduciary breach separately; for each question, distinct (though similar) exceptions apply. On this reasoning, disinterested director approval operates more strictly than its U.K. counterpart because "[c]ompliance with Section 144(a)(1) does not necessarily invoke business judgment review of an interested transaction."[266] Under some circumstances, therefore, the fairness regime may operate more strictly than does the no-conflict regime.[267]

E. U.K. Codification

Recall that the Companies Act 2006 largely codified the substantive content of directors' fiduciary duties, imposing general duties on directors that are "based on" rules and principles under the general law.[268] For self-dealing transactions, section 177 of the statute requires interested directors to disclose the nature and extent of their interest in a proposed transaction or arrangement with the company to their fellow board members.[269] The consequences of breaching section 177 "are the same as would apply if the corresponding common law rule or equitable principle applied"[270]—an apparent reference to the consequences of breaching the common law no-conflict rule, rather than the former statutory disclosure duty (first introduced

explanation of this view, see Rohrbacher et al., *supra* note 97, at 719–22 (arguing that analysis under section 144 is distinct from that to determine fiduciary breach).

264. *Cox Commc'ns*, 879 A.2d at 615.

265. *Id.*

266. *Cumming*, 2018 Del. Ch. LEXIS 54, at *49.

267. Another potential difference is the scope of the transactions to which the fiduciary regimes apply. Some sources suggest that the U.S. fairness regime applies somewhat narrowly, only to those self-dealing transactions for which interested directors vote. *See supra* note 97. The U.K. loyalty rule also imposes restrictions: it applies to the "real [and] sensible possibility of conflict," a requirement that may minimize any difference in the range of self-dealing transactions to which the regimes apply. *See Hosp Prods Ltd v US Surgical Corp* (1984) 156 CLR 41, 103 (Austl.) (requiring a "real or substantial possibility of a conflict"); Boardman v. Phipps [1967] 2 AC 46 (HL) 124 (Lord Upjohn, dissenting) (Eng.) (requiring "real sensible possibility of conflict"). This qualification reduces the ambit of the no-conflict rule. It may even introduce flexibility into the U.K. loyalty rule. David Kershaw, *Lost in Translation: Corporate Opportunities in Comparative Perspective*, 25 OXFORD J. LEGAL STUD. 603, 623–24 (2005).

268. Companies Act 2006, c. 46, § 170(3) (Eng.).

269. *Id.* § 177(1); *see* PALMER'S COMPANY LAW, *supra* note 37, ¶ 8.3104 (asserting that section 177 of the Companies Act 2006 "abolishes the application of the equitable no-conflict and no-profit rules"). While the no-conflict rule is eliminated for self-dealing transactions, under section 175 it survives in other settings, "in particular" those involving the exploitation of corporate property, information, and opportunities. *See* Companies Act 2006, c. 46, § 175(2). The surviving no-conflict rule is expressed *not* to apply to self-dealing transactions. *Id.* § 175(3).

270. Companies Act 2006, c. 46, § 178(1) (Eng.).

in 1928).[271] Correspondingly, compliance with section 177 saves a self-dealing transaction from the remedial consequences of breaching the no-conflict rule, most notably rescission.[272] To be sure, the statute requires interested directors to disclose the nature and extent of their self-dealing[273] and does not expressly forbid self-dealing. In function, however, the disclosure duty encompasses both a loyalty rule and an exception: it invalidates self-dealing transactions (imposing "the same" consequences as under the common law), unless interested directors disclose their interests to their board colleagues.[274]

The statute creates other exceptions. First, companies may change the operation of section 177 through their charters. Under section 180(4)(b), where a "company's articles contain provisions dealing with conflicts of interest, [the general duties] are not infringed by anything done (or omitted) by the directors, or any of them, in accordance with these provisions."[275] Second, shareholders may give approval for conduct that would otherwise amount to fiduciary breach, before or after the conduct.[276] In the case of retrospective approval (ratification) but not prospective approval (authorization), the statute disregards votes cast by interested directors to approve their own conduct, a notable change from the common law.[277]

In practical effect, the regime largely mirrors the common law. It imposes a strict loyalty rule and creates exceptions. The regime renders self-dealing transactions voidable, requiring undivided loyalty. But it relieves interested directors of liability if they disclose their interests to fellow directors (as required by the statutory duty), obtain ad hoc shareholder approval for the transaction, or satisfy an exception that the company has provided in its

271. *Id.* As to the statutory duty, see *supra* notes 167–71 and accompanying text. But this interpretation regarding what is the "corresponding" rule or principle is somewhat contested. *See* STAFFORD & RITCHIE, *supra* note 4, at 43–44.

272. The statute provides that the transaction or arrangement "is not liable to be set aside by virtue of any common law or equitable principle requiring the consent or approval of [shareholders]" if section 177 is observed. Companies Act 2006, c. 46, § 180(1) (Eng.).

273. *See supra* note 269 and accompanying text.

274. Another provision requires directors to disclose their interests in *existing* transactions with the company, unless their interests have already been disclosed as required by section 177. Companies Act 2006, c. 46, § 182 (Eng.). In contrast to the position under section 177, breach of section 182 attracts a fine but not the remedies available under common law or equity for breach of the no-conflict rule. *See id.* § 183(1).

275. *Id.* § 180(4)(b). As under the common law regime, uncertainty exists as to how to reconcile charter exceptions with statutory provisions that render void the terms that exempt a director from liability for breach of duty or breach of trust. As to the common law position, see *supra* note 137. Under the Companies Act 2006, section 232 includes a similar voiding provision to previous legislation but ensures that charter exceptions may be adopted to the extent they could under the common law. It provides that "[n]othing in this section prevents a company's articles from making such provision as has previously been lawful for dealing with conflicts of interest." Companies Act 2006, c. 46, § 232(1), (4) (Eng.).

276. Companies Act 2006, c. 46, § 180(4)(a) (Eng.).

277. *See id.* § 239(4). The reasons for this differential treatment of prospective and retrospective shareholder approval are unclear. They stem from use of the word "ratification" but not "authorization" in section 239.

charter.[278] The basic difference is that, although the common law allowed interested directors to escape the loyalty rule via disclosure to disinterested directors where the company's charter included an exception to that effect, the new regime expressly provides that exception, even when a corporate charter omits it.

Today, the statute provides an exception that parties previously had to craft for themselves, and often did.[279] There is no reason to think that the statutory regime operates significantly differently from the common law considered above.

IV. IMPLICATIONS

A. Comparative Corporate Law Scholarship

The conclusions above undermine commonly expressed views about the no-conflict and fairness rules.[280] Claims of the no-conflict rule's strictness overlook the availability and widespread use of exceptions that relieve interested directors of the loyalty rule's remedial consequences as well as the power of interested directors to vote their shares to approve their own self-dealing. This is not to say that the U.K. regime is actually lenient. It effectively tasks neutral directors with policing self-dealing, a mechanism under which fiduciary rules can discriminate between beneficial and harmful deals more deftly than no conflict's critics acknowledge.[281] In its operation, the regime has proven nuanced, management friendly, and attuned to the inevitability of self-dealing.

Similarly, while scholars often point to proof of fairness as the primary feature that distinguishes U.K. and U.S. fiduciary law,[282] the exception is unlikely to materially shift directors' incentives. In the United States, directors have powerful incentives—on which they act—to obtain disinterested director approval for their self-dealing. The fairness rule has operated similarly to the no-conflict rule, with interested directors usually seeking their disinterested colleagues' approval for self-dealing. Accordingly, traditional characterizations of these rules—of the fairness rule as more pragmatic, better calibrated to deter self-dealing, and attuned to the needs of commerce, or of the no-conflict rule as more rigorous—are incomplete and generally mistaken. For similar reasons, claims that the exception for fairness has diminished the force of fiduciary law or had pernicious effects[283] overlook the availability of other exceptions, disregard

278. Under section 180(5) of Companies Act 2006, section 177 has effect "except as otherwise provided or the context otherwise requires." *Id.* § 180(5).

279. But parties may still privately craft exceptions in their charters, as they could under the common law regime (but rarely did, it seems).

280. *See supra* Part II.D (surveying the scholarly views).

281. *See supra* note 68 and accompanying text.

282. *See* Davies, *supra* note 27, at nn.30–31 (referring to "the development of a substantive fairness assessment in the US and its absence in the UK" as "the crucial divergence between US and English law").

283. *See supra* notes 60–61 and accompanying text.

the regime's usual operation, and have in mind an idealized version of the no-conflict rule as the basis for comparison.

Why has this long-standing scholarly debate failed to consider the practical operation of the no-conflict and fairness rules? One must look at the actual operation of the regimes to recognize their common loyalty rule and their full range of exceptions and the similar incentives associated with their exceptions. In the United Kingdom in particular, under the common law, one must examine whether companies adopt charter terms to escape the loyalty rule and, if so, on what terms. A couple of explanations are apparent.

First, cases examine a specific company's governance practices, rather than market-wide corporate practices and are often the subject of scholarly focus, but it is market-wide practices that matter for comparative evaluation. Second, self-dealing decisions that articulated the contours of the no-conflict rule predated the widespread use of charter exceptions and focused on the strict loyalty rule, stating that rule in emphatic terms. For instance, courts and scholars alike continue to cite *Aberdeen Railway Co. v. Blaikie Bros.*, the mid-nineteenth-century case involving a company without a charter-altering term. To the extent scholars cite this case and rely on its statements of principle, they fail to appreciate that corporate practices had so changed to routinely escape the loyalty rule, a market shift that significantly diminished the influence of the loyalty rule relative to exceptions.

A similar bias may infect scholarly attention to U.S. court decisions. Just as loyalty has not defined the no-conflict regime's operation, proof of fairness has not defined the U.S. regime's operation. Indeed, to comply with securities laws, public companies generally require interested directors to disclose their self-dealing to a committee of their disinterested colleagues. Yet scholarly focus on U.S. case law can obscure this conclusion. Celebrated cases focus on the requirements for fairness and the rigor of courts' scrutiny when they undertake fairness review.

B. The False Choice Between No Conflict and Fairness

More broadly, the study of the no-conflict and fairness rules in corporate law should lead us to reject the false choice between no conflict and fairness and to focus instead on the structure and operation of the rules and therefore, in many fiduciary settings, on the availability and use of exceptions.[284] In

284. Of course, there is nothing inevitable about the conclusion that the no-conflict and fairness rules will operate similarly as they do under U.S. and U.K. corporate law or that any differences will exist in their available cleansing devices. My thanks to Holger Spamann for this insight. U.K. companies might have adopted altogether different cleansing devices in their corporate charters or none at all. Similarly, it was not inevitable that Delaware would have made the duty of loyalty for self-dealing mandatory, preventing parties from adopting more relaxed cleansing devices than those already available. Indeed, parties forming limited liability companies have significant ability to craft their own cleansing devices and even to alter the loyalty rule itself—flexibility that they often use. *See generally* Suren Gomstian, *Contractual Mechanisms of Investor Protection in Non-listed Limited Liability Companies*, 60 VILL. L. REV. 955 (2016); Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs*, 37 J. CORP. L. 555

comparisons of trust law's no-conflict rule with corporate law's fairness rule, for example, this analytical approach would require us to examine the full range of exceptions under both rules. In trust law, these include the ability of settlors and beneficiaries to authorize or consent to conflict transactions and thereby exclude the strict requirement for loyalty.[285] Although many regard trust law's approach toward self-dealing as stricter than the approach under corporate law, one must examine the operation of exceptions before concluding that either rule dominates the other in its rigor, pragmatism, or ability to differentiate between harmful and nonharmful conflicts. Indeed, parties do invoke these exceptions in trust law, just as they do in corporate law, excluding the otherwise strict operation of the fiduciary loyalty regime.[286]

A consequence of this focus on the availability and use of exceptions may lead us to question fiduciary scholars' focus on loyalty. In fiduciary doctrine, loyalty is the "distinguishing obligation," "defining concept," and "overriding duty."[287] The doctrinal requirement for loyalty reflects the concern that fiduciaries will prefer their own interests over those of their beneficiaries, a concern that "echoed down the centuries"[288] and found expression originally in the no-conflict rule. Scholarship reflects this

(2012); Peter Molk, *How Do LLC Owners Contract Around Default Statutory Protections?*, 42 J. CORP. L. 503 (2017).

285. *See* RESTATEMENT (SECOND) OF TRUSTS § 170(1) cmt. t (AM. LAW INST. 1959); *id.* § 216(1).

286. In debating the merits of the no-conflict (or sole-interest) and fairness (or best-interest) rules, Langbein and Leslie acknowledge that settlors and beneficiaries can and sometimes do approve conflicts. Langbein, *supra* note 6, at 963–65; Leslie, *supra* note 7, at 565. However, they draw differing conclusions; to Langbein, such approval shows that some conflicts produce no harm, Langbein, *supra* note 6, at 938–39, 963–65; to Leslie, such approval is evidence that the no-conflict rule is more "efficient," Leslie, *supra* note 7, at 565. Neither claims, however, that the extent to which settlors and beneficiaries in fact approve conflicts, thereby exempting the underlying loyalty rule, determines how similarly or differently the rules operate in practice. Moreover, Langbein suggests that exemptions to the sole-interest rule result in that rule operating akin to a best-interest rule, Langbein, *supra* note 6, at 963–68, but still regards the former rule as overdeterring relative to the latter. Langbein, *supra* note 6, at 951–52, 958–62.

287. Mothew v. Bristol & W. Bldg. Soc'y [1996] 75 P & CR 241 at 254 (Eng.) (The "distinguishing obligation of a fiduciary is the obligation of loyalty."); *Australian Sec & Invs Comm'n v Citigroup Glob Mkts Austl Pty Ltd [No. 4]* (2007) 160 FCR 35, 78 (Austl.) ("The distinguishing or over-riding duty of a fiduciary is the obligation of undivided loyalty . . . ."); MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 1 (2010) ("The concept of loyalty is now well established as the core—indeed the defining—concept of fiduciary doctrine.").

288. FINN, *supra* note 31, at 200.

concern: scholars debate the functions[289] and content[290] that duties of loyalty perform and how these duties would apply in new settings.[291]

However, if fiduciaries routinely use exceptions, they avoid the operation of loyalty rules. They free themselves to act in ways that would *otherwise* amount to fiduciary breach even though they remain fiduciaries. This description seems to characterize the U.K. and U.S. corporate experiences, though for different reasons. In the United Kingdom, corporate fiduciary law was amenable to alteration by corporate charters, whereas Delaware fiduciary law evolved to permit generous exceptions that were later enshrined in statute. Although celebrated U.K. cases illustrate the apparent strictness and inflexibility of the no-conflict rule, the relevant companies were probably outliers in having failed to include exceptions in their charters. In general, there has been little pretense that self-dealing transactions actually were banned or even that shareholder approval was needed under fiduciary law; the United Kingdom's thriving MBO market illustrates the point. The no-conflict rule has rarely been a serious bulwark against self-dealing because fiduciaries have typically invoked exceptions. The U.S. fairness rule has operated similarly, not because interested directors have proved the fairness of their self-dealing but because they sought disinterested director approval, an exception roughly mirroring the widely available U.K. exception.

When parties routinely invoke exceptions, we would expect those rules, rather than the underlying loyalty rule, to shape fiduciaries' conduct.[292] Corporate law and trust law are not the only areas where this occurs. Major financial conglomerates routinely rely on exceptions to conduct their business; given the fiduciary duties they owe across their varied business activities, they probably could not otherwise conduct the range of businesses they do.[293] But what conduct do exceptions require of fiduciaries before permitting self-dealing? Before giving their informed approval, for example, what do disinterested directors or shareholders require? To understand the

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289. For example, Matthew Conaglen regards fiduciary duties as performing the particular prophylactic role of ensuring that nonfiduciary duties are more likely to be performed. CONAGLEN, *supra* note 287, at 61.

290. *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 6, at 103–05; Andrew S. Gold, *The Loyalties of Fiduciary Law*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 131, at 176, 178–88.

291. *See, e.g.*, Christine Sgarlata Chung, *Municipal Securities: The Crisis of State and Local Government Indebtedness, Systemic Costs of Low Default Rates, and Opportunities for Reform*, 34 CARDOZO L. REV. 1455, 1519–36 (2013) (examining whether advisors owe fiduciary duties to municipalities issuing securities); Angela C. Walch, *Call Blockchain Developers What They Are: Fiduciaries*, AM. BANKER (Aug. 9, 2016), https://www.americanbanker.com/opinion/call-blockchain-developers-what-they-are-fiduciaries [https://perma.cc/YLB5-DJSA] (arguing that developers of public blockchains owe fiduciary duties).

292. *See* Getzler, *supra* note 131, at 61–62.

293. *See generally* Andrew F. Tuch, *The Weakening of Fiduciary Law*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW, *supra* note 137, at 354 (examining the tangled web of conflicting duties and interests that large financial conglomerates owe and the measures they adopt, including exceptions, to prevent fiduciary breach).

practical force of fiduciary law, scholars may do better to focus more on exceptions and how they shape fiduciaries' behavior than on the default requirement of loyalty.

None of this is to suggest fiduciary doctrine operates suboptimally. Self-dealing may benefit or harm corporations. Few scholars would categorically ban self-dealing (permitting no exceptions), and for good reason, given the breadth of what constitutes self-dealing.[294] The question is not whether we should have exceptions but how we should craft them to protect and promote beneficiaries' interests. One interesting feature of the U.K. experience is that under the common law shareholders approved an exception that gave neutral directors power to police self-dealing, despite the associated risks. Their approval may reflect their preferences for such a rule and be evidence of the rule's efficiency, although the question of efficiency depends on the integrity of various market mechanisms.[295] U.S. courts, in adopting a similar exception, may have adopted a rule that is value-maximizing. And, at a more granular level of analysis, certain differences between the regimes would need to be accounted for in determining optimality. These include the probability that a plaintiff will challenge a self-dealing transaction, levels of institutional investor oversight, and constraints imposed by reputation and the market for corporation control—all issues beyond the scope of this Article's analysis.

C. The Arc of Fiduciary Law

These insights complicate other inquiries in corporate law scholarship. Scholars have claimed both that the early U.S. no-conflict rule reflected the U.K. no-conflict rule[296] and that, as the U.S. rule evolved toward the fairness rule, it became less strict, permitting self-dealing that it previously prohibited.[297] But the conclusion in this Article—that the U.S. fairness and U.K. no-conflict rules operate similarly in fundamental respects—casts doubt on either or both of these historical claims. How could U.S. law both have imported the U.K. no-conflict rule and have significantly weakened as it evolved toward fairness?

Distinguishing between loyalty rules and exceptions helps illuminate weaknesses in these claims and direct future research. First, the early U.S. no-conflict rule was probably less strict than many suggest. Often citing Harold Marsh, Jr., scholars refer to that rule as a blanket restriction on conflicts.[298] For his part, Marsh regarded this rule as "absolutely inhibiting

294. *See supra* note 86 and accompanying text.

295. For a discussion of the considerations, see *supra* note 190 and accompanying text.

296. *See supra* note 53 and accompanying text.

297. *See supra* notes 58–60 and accompanying text. David Kershaw refers to "the contemporary article of faith that [U.S.] fiduciary standards have progressively declined since the introduction of general incorporation." Kershaw, *supra* note 19, at 440.

298. *See, e.g.*, Hill & McDonnell, *supra* note 125, at 909 ("[A]t traditional common law, interested transactions were void and could not be remedied."); Celia R. Taylor, *The Inadequacy of Fiduciary Duty Doctrine: Why Corporate Managers Have Little to Fear and What Might Be Done About It*, 85 OR. L. REV. 993, 1009 (2017) ("To encourage appropriate

contracts between a corporation and its directors."[299] But even he admitted the early U.S. no-conflict rule was subject to exceptions or cleansing devices.[300] Later, in an influential paper, referring to nineteenth-century cases that applied the early U.S. no-conflict rule, he observed:

> One factor which we have not yet mentioned is the effect under any of the rules discussed above of shareholder ratification of the transaction, after full disclosure, *even though it might otherwise have been automatically voidable* because it did not meet the standards required for director action. All of the cases seem to hold that such ratification will suffice to validate the transaction with an interested director, at least in the absence of fraud or unfairness.[301]

In other words, Marsh recognized that the very no-conflict rule he considered absolute was in fact subject to exceptions.

Second, Marsh identified another important feature of the early U.S. no-conflict rule regarding exceptions. In describing the availability of shareholder approval, he claimed that U.S. law permitted interested directors to vote their shares qua shareholders to approve their own self-dealing: "the stock of the interested director or directors may be voted on the question of ratification, and *as shareholders* they may cast the deciding votes."[302] Citing English authorities for this U.S. legal proposition, he suggested that early U.S. law mirrored U.K. law in this critical respect, but his legal analysis failed to account for this proposition. Accordingly, he did not see that the early U.S. no-conflict rule, as he formulated it, offered weak constraints on self-dealing by interested directors with significant voting power, significantly weaker constraints than those under the contemporary fairness rule.[303]

Third, Marsh failed to consider whether early U.S. law also allowed U.K.-style charter terms to exempt the loyalty rule and, if so, whether they were used. Put differently, how completely did U.S. law reflect the corresponding U.K. rule? Strangely, Marsh only considered the position under mid-twentieth-century law, explaining that the U.S. no-conflict rule

> is qualified by the fact that the particular corporation may have a provision in its articles of incorporation or by-laws permitting such transactions. It is common knowledge that this is a standard provision inserted in corporate

fiduciary behavior, the [duty of loyalty] originally imposed a blanket prohibition on self-interested transactions . . . . It made no difference if disinterested directors or shareholders approved the transaction nor if the director or officer could prove that it was fair. The law was inflexible in its application . . . ."); Julian Velasco, *A Defense of the Corporate Law Duty of Care*, 40 J. CORP. L. 647, 687 (2015) ("Long ago, the duty of loyalty was much more robust: conflicts were essentially prohibited."); Velasco, *supra* note 97, at 1240 ("Taken to its logical conclusion, the duty of loyalty could require that directors never have any conflicts of interest. Essentially, that was once the state of the law.").

299. Marsh, *supra* note 4, at 39.

300. *Id.* at 48.

301. *Id.* (emphasis added).

302. *Id.* at 48–49 (citing, among other authorities, leading English authority, *North-West Transportation Co. v. Beatty* (1887) 12 App. Cas. 589 (PC) (appeal taken from Can.)).

303. As to which, see generally Marsh, *supra* note 4.

> articles by all corporate law firms. And the courts have held that such provisions are effective at least to negative any automatic voidability of the transactions covered.[304]

Kenneth Davis considers the U.S. position even earlier than Marsh. He observes that, by the 1930s, U.S. corporate charters and bylaws "frequently included" provisions allowing self-dealing by directors and that "such provisions were regularly upheld by the courts."[305] David Kershaw addresses the position earlier still, examining whether such charter terms, which he calls "opt outs," were part of the U.S. no-conflict rule. Focusing on New Jersey law, then the most important corporate law jurisdiction, he observes, "it appears that New Jersey corporations and shareholders may have adopted contractual opt-outs from the strict rule in their constitutional documents, [but] it is unclear at what point in time this practice commenced."[306] If such contractual terms existed, "it seems highly unlikely that the earlier cases would have been receptive to contracting out of the voidability principle."[307] He bases this view on U.S. courts' "understanding" of the corporation "as a product of legislative action," which suggests that limits be placed on parties' capacity to change corporate rules.[308]

This still leaves open the questions of whether such terms in fact existed in corporate charters and, if so, whether directors and shareholders operated as if they had effect—questions that cannot be resolved by considering judicial opinions. Did these terms exclude the operation of the loyalty rule or adopt the more tailored U.K. approach of conditionally excluding the loyalty rule, that is, of adopting an exception that prevented the rule from operating if interested directors disclosed their self-dealing to their fellow directors? Even if courts would have rejected charter terms excluding the loyalty rule, would they have permitted these more tailored terms? These questions are fundamental to how we regard the U.S. no-conflict rule and, therefore, how we characterize the evolution of U.S. fiduciary law. They deserve further inquiry. Instead, much of the scholarship has focused on whether early U.S. law admitted fairness review,[309] but the real question for understanding the arc of fiduciary law is whether early U.S. law in fact reflected the U.K. position, including all its exceptions—a question Marsh does not seem to have considered other than by acknowledging the role of shareholder approval. At a minimum, Marsh's characterization of U.S. self-dealing law from the late nineteenth century on—as having "progressed from

304. *Id.* at 45.

305. Davis, *supra* note 216, at 222 (citing cases). Davis observes that these charter and bylaw provisions "authoriz[ed] contracts with directors." *Id.*

306. *See* Kershaw, *supra* note 19, at 457.

307. *Id.* at 458; *see also id.* at 457 ("It is also important to distinguish [the terms'] adoption from their effectiveness.").

308. *See id.* at 404–05. Kershaw regards the noncontractibilty of the loyalty rule as a "settled legal principle" but acknowledges early cases in which the loyalty rule was contractually altered in "limited" respects. *See id.* at 458 n.206.

309. *See, e.g.*, Beveridge, *supra* note 51.

condemnation, to toleration, to encouragement of conflict of interest"[310]—seems significantly overstated given the analysis he offers.

A related issue concerns when and why U.S. courts began prohibiting companies from excluding the loyalty rule in their charters. Recall that contemporary Delaware law treats the fairness rule, and therefore its loyalty rule, as mandatory,[311] a change from earlier law as described by Marsh and Davis.[312] Scholars arguing that fiduciary law has weakened in the stages that Marsh describes must also contend with the mandatory nature of the loyalty rule for self-dealing in Delaware.

It is nevertheless apparent that the evolution has been toward convergence with U.K. fiduciary law, not divergence, in a fundamental respect. The big change in U.S. law occurred when courts expressly acknowledged that disinterested directors could approve self-dealing. According to Marsh, by 1910, a "general rule" protected self-dealing transactions from invalidity if they were approved by a disinterested majority of directors and were neither unfair nor fraudulent.[313] Later, some states, including Delaware (in section 144), adopted statutes protecting self-dealing transactions if they received disinterested director approval.[314] In adopting this exception, U.S. law came more closely to resemble the U.K. law's operation, which had already achieved significant flexibility by tasking neutral directors with policing self-dealing. Far from rejecting a stricter U.K. law, U.S. law followed the United Kingdom's lead.

David Kershaw has recently offered a competing account of the development of U.S. self-dealing law, rejecting Marsh's analysis.[315] The United Kingdom and United States had identical starting points—a strict rule that prohibited self-dealing by directors in the absence of informed shareholder approval. However, the laws "rapidly diverged."[316] Facing commercial pressure, U.K. courts gave effect to provisions in corporate constitutions that permitted self-dealing that the strict no-conflict rule would otherwise prohibit; such provisions became common, easing the severity of the strict rule. Although U.S. courts faced similar pressure, they responded differently, initially in New Jersey and New York and later in Delaware, by drawing on fairness principles. Kershaw's analysis is insightful, showing,

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310. Marsh, *supra* note 4, at 57.

311. Under Delaware law, corporations may alter doctrine that forbids directors taking corporate opportunities. *See* DEL. CODE ANN. tit. 8, § 122(17) (2019). For an empirical study of the extent to which companies have used the rule, see Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075 (2017).

312. *See supra* notes 304–05 and accompanying text.

313. Marsh, *supra* note 4, at 40.

314. *Id.* at 48. Marsh does not date these statutes. By way of reference, the Delaware provision (section 144(a)) was adopted in 1967. Although citing statutes that permitted self-dealing that received disinterested director approval, Marsh summarizes the law as permitting self-dealing "subject only to possible invalidation for unfairness." *Id.*

315. DAVID KERSHAW, THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW 285–368 (2018).

316. *Id.* at 285.

among other things, how U.S. fiduciary law responded differently to commercial pressures, locating that response in fairness principles. But the analysis in this Article suggests instead that proof of fairness does not reflect a flexible approach similar to that adopted in the United Kingdom; the development of disinterested director approval and the relative severity of fairness review brought the United States into alignment with the United Kingdom.

D. Explaining Differences and Similarities

Accepting Marsh's characterization of the evolution of fiduciary law, scholars often ask why the law changed as it did. Robert C. Clark suggests that the evolution in U.S. fiduciary law may be due to "judicial enlightenment" or legal learning: after courts observed "a greater number and variety of self-dealing transactions," they realized that "certain self-dealing transactions might be not only normal and virtually unpreventable but also positively better than comparable other-dealing, or market, transactions."[317] On this view, courts "adopted more selective rules in order to allow the nonabusive self-dealing transactions to occur."[318] But legal learning might have occurred through another mechanism. U.S. judges may have been aware of the commercially friendly U.K. approach toward self-dealing and became more willing to permit self-dealing transactions (if that is what they did) as a result. Critically, such learning might have left U.S. judges more willing to give disinterested directors a central role in policing self-dealing (which they certainly did). It is possible that, in adapting the law to give disinterested directors a vital governance role in limiting self-dealing, U.S. judges did little more than follow the lead of English fiduciary law. In fact, this is precisely what U.S. judges did, whether they know it or not.

It is unsurprising that self-dealing law operates similarly in both jurisdictions. Courts face significant institutional and market forces to render commercially workable decisions. Both systems are centers of significant economic activity, which may influence and be influenced by courts' willingness to craft practical legal rules. Both jurisdictions fall within the same legal family, as distinct from civil law jurisdictions, suggesting that they may resolve common problems similarly.[319]

Still, the convergence is not total. U.K. law permits greater private alteration of fiduciary duties than does U.S. law, a theme that reappears in

317. CLARK, *supra* note 54, at 164.

318. *Id.* Clark suggests two alternative explanations for the perceived weakening of U.S. self-dealing law. These theories posit that managers and lawyers, respectively, convinced courts to reshape self-dealing rules to permit greater self-dealing (benefiting managers) and adopt more expensive legal rules (benefiting lawyers). *Id.* at 162–63. Clark gives most credence to the judicial enlightenment theory.

319. *See* KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW 63–73 (Tony Weir trans., 3d ed. 1998); Gerrit De Geest, *Understanding French, German and Civil Law More Generally*, *in* LIBER AMICORUM BOUDEWIJN BOUCKAERT: VRANK EN VRIJ 3, 4–12 (J. De Mot ed., 2012).

other fields of fiduciary law.[320] By preventing private ordering, U.S. courts have taken a more active role in setting directors' standards of conduct than have U.K. courts, which have tended to leave standard setting to other actors. Under the common law, U.K. courts respected company decisions to craft exceptions to the fiduciary requirement for undivided loyalty in their charters. Under contemporary law, they apply similar exceptions enshrined in statute. This difference in judges' willingness to articulate rules may reflect varying perceptions among judges about their roles, with Delaware judges, trained in the legal-realist tradition, more comfortable with an explicitly lawmaking role.[321] This difference may also reflect Delaware judges' greater familiarity with "model" or "best" business practices or greater confidence in their ability to identify those practices. It may also reflect U.S. judges' concerns about the ability of shareholders to protect their own interests when asked to adopt exceptions in their charters, concerns that are, or at least were, less salient in the United Kingdom given institutional investors' historically stronger influence over corporate managers.[322]

E. Interactions with Statute

This Article's analysis illustrates the importance of statute and other regulation for governing self-dealing. In the 1920s, so undemanding had the no-conflict rule become in the United Kingdom that Parliament imposed a mandatory disclosure rule on interested directors.[323] In the 1980s, the British Parliament adopted ad hoc legislative reforms, plugging some of the gaps still left by the no-conflict rule. These rules did not impose duties on directors. They generally required disclosure, with shareholder approval, for particular types of self-dealing transactions, including the payment of compensation, loans, and some "substantial" property transactions.[324] Parliament also gave courts broad discretion to award remedies protecting minority shareholders from "unfairly prejudicial" conduct by controlling shareholders.[325] In the 2006 reforms, the Companies Act carried over these statutory provisions.[326] U.K. stock exchange listing rules also impose limits, requiring disinterested shareholder approval of "related party" transactions by listed companies, other than those in the ordinary course of business or

320. *See* Tuch, *supra* note 293, at 354 (arguing that U.K. courts have been more willing than U.S. courts, in a range of areas, to allow financial institutions to contractually alter or disclaim their fiduciary duties).

321. For a fuller discussion of how American legal realism may influence corporate law judicial opinion writing and decision-making, see Edward B. Rock, *Corporate Law Doctrine and the Legacy of American Legal Realism*, 163 U. PA. L. REV. 2019, 2029–52 (2015).

322. *See* John Armour et al., *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 219, 265–66 (2011); Tuch, *supra* note 198, at 1489–96.

323. *See supra* notes 167–71 and accompanying text.

324. *See* Companies Act 1985, c. 6, §§ 320–322 (Eng.).

325. Companies Act 1980, c. 22, § 75 (Eng.).

326. *See* Companies Act 2006, c. 46, §§ 188–225 (Eng.) (transactions involving directors); *id.* §§ 994–996 (unfairly prejudicial conduct).

beneath certain size thresholds.[327] These rules lend rigor to the regulation of many self-dealing transactions, but they do not change the preceding analysis of fiduciary law.[328]

In the United Kingdom, the no-conflict rule also regulates conflicts other than self-dealing. In particular, it applies to the exploitation of property, information, and opportunity.[329] Although the no-conflict rule continues to govern these types of conflicts, in 2006, Parliament added a new exception permitting directors to give advance approval to conflicts.[330] Much as it does when considering self-dealing transactions, the law turns to neutral directors to police conflicts of interest, creating an exception that is likely to be widely used.

CONCLUSION

Scholars have long disagreed on whether the no-conflict or fairness rule more effectively governs self-dealing. What they have agreed on is that the rules operate differently, to different effect. However, in corporate law these fiduciary rules are remarkably similar in operation, and neither is self-evidently stricter, more pragmatic, or better calibrated to distinguish between beneficial and harmful self-dealing. Both require strict loyalty, and both are subject to exceptions allowing corporate fiduciaries to opt out of this requirement. Directors under both regimes may invoke similar exceptions—and have routinely done so. By tasking neutral directors with policing self-dealing, both regimes enable nuanced, commercially sensitive responses to self-dealing. This finding sheds light on the historical understanding of U.S. corporate law, significantly complicating the view that the availability of fairness as a cleansing device has eroded the rigor of corporate fiduciary law or undermined its deterrence force. It suggests that proof of fairness matters far less than commentators have generally assumed, precisely because of its rigor, making it less appealing to interested directors than other cleansing devices. Scholars and policymakers alike ought to focus not on the false choice between no conflict and fairness but rather on the best use of exceptions, on what they require, and how fiduciaries use them.

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327. *See* FIN. CONDUCT AUTH., LISTING RULES, at LR 11, https://www.handbook.fca.org.uk/handbook/LR.pdf [https://perma.cc/2Q67-RMG6]. As to the definition of "related party," see *id.* at LR 11.1.4–11.1.5.

328. For a fuller comparative analysis of nonfiduciary rules applying to self-dealing transactions, see Luca Enriques, *The Law of Company Directors' Self-Dealing: A Comparative Analysis*, 2 INT'L & COMP. CORP. L.J. 297 (2000).

329. Companies Act 2006, c. 46, § 175(1)–(2) (Eng.). This rule is expressed not to apply to self-dealing transactions. *Id.* § 175(3).

330. The no-conflict rule "is not infringed . . . if the matter has been authorized by the directors." *Id.* § 175(4)(b), (5). This exception applies to private companies unless they opt out and to public companies if they opt in, generally speaking. *See id.* § 175(5). The exception does not encompass ratification, which in the United Kingdom occurs after, rather than before, self-dealing has occurred.

APPENDIX A

Approvals of Related Party Transactions

Approval Required by	**Number**
Board of directors only	4
Audit committee only	60
Audit committee and/or a majority of the independent and disinterested members of the board only	13
Both the nominating and corporate governance committee and audit committee only	1
Independence committee only	1
Corporate governance committee only	5
Corporate governance and nominating committee only	7
Corporate governance and public policy committee only	1
Conflicts committee only	1
Total	93

APPENDIX B

Companies in Sample

1. Acceleron Pharma Inc. (NasdaqGM:XLRN)
2. Amgen Inc. (NasdaqGS:AMGN)
3. Amyris, Inc. (NasdaqGS:AMRS)
4. Arsanis, Inc. (NasdaqGM:ASNS)
5. Aspen Technology, Inc. (NasdaqGS:AZPN)
6. Assembly Biosciences, Inc. (NasdaqCM:ASMB)
7. Autoliv, Inc. (NYSE:ALV)
8. Baker Hughes, a GE company (NYSE:BHGE)
9. Bank of America Corporation (NYSE:BAC)
10. BankUnited, Inc. (NYSE:BKU)
11. BG Staffing, Inc. (AMEX:BGSF)
12. BioLife Solutions, Inc. (NasdaqCM:BLFS)
13. Blueprint Medicines Corporation (NasdaqGS:BPMC)
14. Bruker Corporation (NasdaqGS:BRKR)
15. Cambrex Corporation (NYSE:CBM)
16. Care.com, Inc. (NYSE:CRCM)
17. Central Garden & Pet Company (NasdaqGS:CENT)
18. CF Industries Holdings, Inc. (NYSE:CF)
19. Ciena Corporation (NYSE:CIEN)
20. Cocrystal Pharma, Inc. (NasdaqCM:COCP)
21. Conformis, Inc. (NasdaqGS:CFMS)
22. Cytosorbents Corporation (NasdaqCM:CTSO)
23. Devon Energy Corporation (NYSE:DVN)
24. DexCom, Inc. (NasdaqGS:DXCM)
25. Dicerna Pharmaceuticals, Inc. (NasdaqGS:DRNA)
26. Digi International Inc. (NasdaqGS:DGII)
27. E*TRADE Financial Corporation (NasdaqGS:ETFC)
28. Entergy Corporation (NYSE:ETR)
29. Fortive Corporation (NYSE:FTV)
30. Fox Factory Holding Corp. (NasdaqGS:FOXF)
31. FTD Companies, Inc. (NasdaqGS:FTD)
32. GCP Applied Technologies Inc. (NYSE:GCP)
33. General Finance Corporation (NasdaqGM:GFN)
34. Hamilton Beach Brands Holding Company (NYSE:HBB)
35. HealthEquity, Inc. (NasdaqGS:HQY)
36. Hemispherx Biopharma, Inc. (AMEX:HEB)
37. Immersion Corporation (NasdaqGS:IMMR)
38. Imperva, Inc. (NasdaqGS:IMPV)
39. Infrastructure and Energy Alternatives, Inc. (NasdaqCM:IEA)

40. Inphi Corporation (NYSE:IPHI)
41. Invuity, Inc. (NasdaqGM:IVTY)
42. Iron Mountain Incorporated (NYSE:IRM)
43. J. C. Penney Company, Inc. (NYSE:JCP)
44. K2M Group Holdings, Inc. (NasdaqGS:KTWO)
45. Kala Pharmaceuticals, Inc. (NasdaqGS:KALA)
46. LCI Industries (NYSE:LCII)
47. LeMaitre Vascular, Inc. (NasdaqGM:LMAT)
48. Liberty Expedia Holdings, Inc. (NasdaqGS:LEXE.A)
49. Loews Corporation (NYSE:L)
50. Loxo Oncology, Inc. (NasdaqGM:LOXO)
51. Malibu Boats, Inc. (NasdaqGM:MBUU)
52. Moleculin Biotech, Inc. (NasdaqCM:MBRX)
53. MongoDB, Inc. (NasdaqGM:MDB)
54. Office Depot, Inc. (NasdaqGS:ODP)
55. Oncobiologics, Inc. (NasdaqCM:ONS)
56. Oracle Corporation (NYSE:ORCL)
57. Parsley Energy, Inc. (NYSE:PE)
58. Party City Holdco Inc. (NYSE:PRTY)
59. PetIQ, Inc. (NasdaqGS:PETQ)
60. Pinnacle Foods Inc. (NYSE:PF)
61. Pitney Bowes Inc. (NYSE:PBI)
62. PriceSmart, Inc. (NasdaqGS:PSMT)
63. Pure Storage, Inc. (NYSE:PSTG)
64. Rapid7, Inc. (NasdaqGM:RPD)
65. Resonant Inc. (NasdaqCM:RESN)
66. Revolution Lighting Technologies, Inc. (NasdaqCM:RVLT)
67. Roadrunner Transportation Systems, Inc. (NYSE:RRTS)
68. Rocket Pharmaceuticals, Inc. (NasdaqGM:RCKT)
69. Salem Media Group, Inc. (NasdaqGM:SALM)
70. SELLAS Life Sciences Group, Inc. (NasdaqCM:SLS)
71. SemGroup Corporation (NYSE:SEMG)
72. SendGrid, Inc. (NYSE:SEND)
73. Senomyx, Inc. (NasdaqGM:SNMX)
74. Seres Therapeutics, Inc. (NasdaqGS:MCRB)
75. SharpSpring, Inc. (NasdaqCM:SHSP)
76. SJW Group (NYSE:SJW)
77. Social Reality, Inc. (NasdaqCM:SRAX)
78. Soleno Therapeutics, Inc. (NasdaqCM:SLNO)
79. SP Plus Corporation (NasdaqGS:SP)
80. Spectrum Pharmaceuticals, Inc. (NasdaqGS:SPPI)
81. SPX Corporation (NYSE:SPXC)
82. Summer Infant, Inc. (NasdaqCM:SUMR)

83. Synaptics Incorporated (NasdaqGS:SYNA)
84. Synopsys, Inc. (NasdaqGS:SNPS)
85. T2 Biosystems, Inc. (NasdaqGM:TTOO)
86. Targa Resources Corp. (NYSE:TRGP)
87. TCP Capital Corp. (NasdaqGS:TCPC)
88. The Walt Disney Company (NYSE:DIS)
89. TSR, Inc. (NasdaqCM:TSRI)
90. Ubiquiti Networks, Inc. (NasdaqGS:UBNT)
91. United States Steel Corporation (NYSE:X)
92. Valeritas Holdings, Inc. (NasdaqCM:VLRX)
93. Viad Corp (NYSE:VVI)
94. VirnetX Holding Corp (AMEX:VHC)
95. Voyager Therapeutics, Inc. (NasdaqGS:VYGR)
96. Waste Management, Inc. (NYSE:WM)
97. Welltower Inc. (NYSE:WELL)
98. Xilinx, Inc. (NasdaqGS:XLNX)
99. Xtant Medical Holdings, Inc. (AMEX:XTNT)
100. Zayo Group Holdings, Inc. (NYSE:ZAYO)