



The trends were similar when looking only at the subset of deals in the dataset involving financial buyers. Of these deals, ~42% (eight of 19 deals) used both a special committee and a MoM vote in reliance on the full *MFW* framework. Financial buyer deals in the dataset also reflected the trend of the *MFW* adoption rate declining over the period reviewed. During the first half of the period covered, ~63% (five of eight deals) implemented the full *MFW* framework, but during the latter half of the period covered, this declined to ~27% (three of 11 deals).

Use of Protective Measures in Deals Involving Financial Buyers in the Dataset		
January 1, 2023 to September 30, 2024	January 1, 2023 to November 15, 2023	November 16, 2023 to September 30, 2024

These trends suggest that deal parties in controller transactions are indeed forgoing the possibility of obtaining business judgment review of the transaction, and are relying at an increasing rate on the burden-shifting benefits obtained through the use of a special committee alone. So, why is this happening?

**Background on *MFW***

Before we dive into that question, a little background on Delaware standards of review for fiduciary duty claims is needed. The default standard of review in Delaware is the business judgment rule, which presumes that directors make decisions on an informed and independent basis, with due care, in good faith and free of material conflicts of interest. Where business judgment review applies, the court will defer to the directors’ business judgment, often resulting in a pleadings-stage dismissal of the litigation.

When a controlling stockholder stands on both sides of a transaction and receives a non-ratable benefit, however, ty d(s)19.4(s)19.3 ( a)30

one protective measure. In other words, of the deals challenged by Delaware litigation, half implemented both prongs of the *MFW* framework and half utilized a special committee only. The trend is similar for the subset of financial deals in the data set; ~42% (eight of 19 deals) were challenged by stockholders in litigation alleging breach of fiduciary duty or appraisal litigation filed in Delaware. Of the eight financial deals facing litigation, four implemented both protective measures and four implemented only one protective measure. Therefore, it appears that stockholders are not significantly deterred from bringing Delaware litigation challenging the transaction based on whether the *MFW* framework or a special committee only was used.

Moreover, in the past 10 years since the Delaware Supreme Court's decision in *MFW*, such litigation has often survived beyond the pleadings stage. In another article, we determined that in this time, srw(19.4 (l).5 (W)JJ/TT0 1 Tf-i)-76.8 (l)hadned tc7 (w(1 (m)42.72

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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