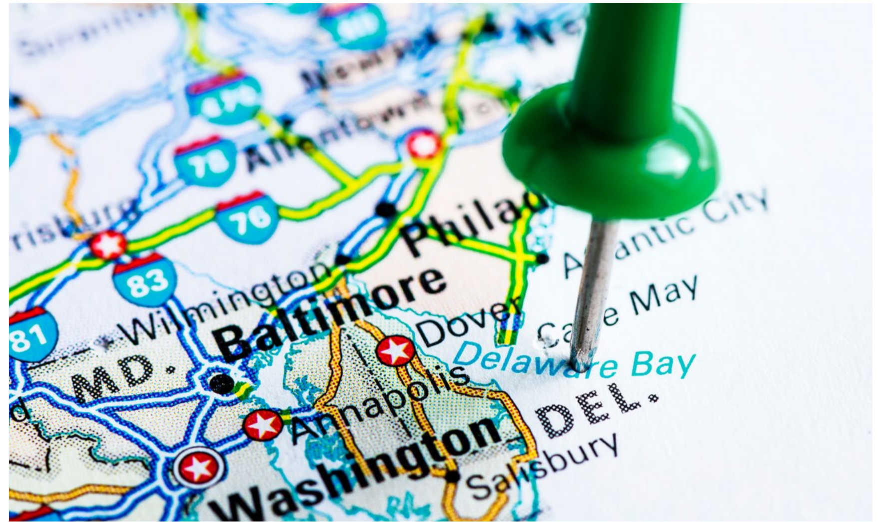
FOLEY HOAG

CHOOSING YOUR STATE OF INCORPORATION

In the wake of headline-grabbing redomiciles many executives are reevaluating whether to form or maintain their companies in Delaware or to look instead to other jurisdictions such as Nevada and Texas. In this piece, we break down the key features of Delaware, Texas, and Nevada corporate law that early-stage entities should consider when choosing their state of incorporation.

DELAWARE



With carefully crafted corporate law, a robust court system, and a responsive legislature, Delaware has long been the gold standard for incorporation. Delaware General Corporation Law (the "DGCL") balances, in a nuanced fashion, the sometimes competing interests of directors and officers on the one hand and stockholders on the other. For example, the DGCL permits a high degree of director and officer discretion while providing certain stockholder inspection rights (unless waived). In addition, Delaware law imposes "Revlon duties" on directors, which require them to prioritize the maximization of stockholder value in the event of a sale or change of control (and provides for the removal of such duties in the public benefit corporation context; more on this below). The DGCL's tailored and comprehensive nature, in addition to Delaware's substantial body of case law on business matters, gives both companies and stockholders clear expectations and procedures to follow in various situations. This predictability and protection of both stockholders' rights and managerial discretion makes Delaware a jurisdiction of choice for venture capitalists and can thus provide companies incorporated there an advantage when raising capital.

Delaware's Court of Chancery is well equipped to handle litigation when disputes arise. The court's dedication to business disputes and the expertise of its judges, who are appointed for terms of 12 years, facilitate the handling of complex corporate law matters and insulate the parties from political pressures. In addition, the Court of Chancery is known for its speed, quickly resolving complex disputes thanks to tight scheduling and the absence of a right to a jury trial. Furthermore, Delaware's state legislature has long prioritized passing business-friendly laws and is responsive to the needs of businesses as they evolve. Comparatively low incorporation fees and court filing fees as well as rapid, favorable amendments to corporate law by the Delaware legislature demonstrate Delaware's commitment to maintaining its status as the most favorable state of incorporation for businesses.

Following the high-profile exits of Dropbox, TripAdvisor, Tesla and SpaceX from Delaware, other prominent companies such as Meta have begun to explore the possibility of leaving Delaware for Texas or Nevada. This shift is a reaction to recent cases that have cast doubt on the predictability of Delaware corporate law. For example, in January 2024, the Delaware Court of Chancery deemed Elon Musk to be a "controlling stockholder" (despite owning less than 30% of Tesla's stock) on the basis that his superstar status at the company made the board unduly deferential to him in approving his $56 billion incentive pay package. Moreover, other cases have imposed heightened duties on controlling stockholders in certain transactions, exposing both companies and stockholders to more litigation. These rulings fueled concerns that Delaware corporate law was becoming less predictable and more litigious, thus increasing risk for both management and stockholders.

In response to fears of further corporate departures from Delaware, the state enacted Senate Bill 21 on March 25, 2025, which introduced a series of landmark amendments to the DGCL. Broadly speaking, these amendments reinforced the DGCL's business-friendly approach by clarifying key statutes and enhancing procedural protections for directors, officers, and controlling stockholders. Notably, the new legislation:

- clarifies that "controlling stockholders" and "control groups" can include individuals, entities, or groups on the sole basis that such stockholder or group of stockholders hold at least one-third of the company's voting power and the power to exercise managerial authority over the business;
- defines "disinterested director" as a director who is neither a party to the act or transaction nor has a material relationship with a person who has a material interest in the act or transaction;
- strengthens statutory "safe harbors" that enable companies to avoid costly litigation when engaging in transactions with interested/controlling directors and officers; and
- reduces the risk of Section 220 "books and records" requests by simultaneously raising the bar that stockholders must meet to make such requests and limiting the scope of what is delivered, by requiring any requested book or record to be "necessary and essential" to the purpose of the investigation.

Retroactively applicable to all new matters other than those for which a Section 220 demand was initiated before February 18, 2025, Senate Bill 21 exemplifies Delaware's responsiveness to the evolving needs of the business community. By reducing uncertainty, these amendments illustrate Delaware's commitment to maintaining a balanced, efficient, and investor-friendly legal environment. While some debate remains about the long-term impact of recent court decisions, Delaware's swift legislative action demonstrates its ability to adapt and preserve the clarity and predictability that have long made it the jurisdiction of choice for entity incorporation. As a result, the core advantages of Delaware corporate law—including its deep body of precedent, robust judiciary, and flexible statutory framework—remain firmly intact.

The flexibility of Delaware's law governing public benefit corporations (PBCs) also reflects the state's commitment to supporting businesses. Take, for instance, the ease of obtaining and maintaining PBC status. To become a PBC, an entity needs to (1) file a certificate of incorporation stating the entity is a public benefit corporation and (2) identify at least one public benefit that it will promote. After meeting the basic requirements for incorporation, PBCs encounter few roadblocks to maintain their status, as the promotion of the public interest need not be the primary focus of the entity's operations because the board is required to balance any public benefits with the financial interests of the shareholders. As such, Delaware law creates a flexible avenue through which PBCs can operate.

Beyond the ease of obtaining and maintaining PBC status, Delaware also has flexible conversion laws that permit existing entities to alter their PBC status with the approval of only a simple majority of stockholders. Although Delaware PBCs are required to provide biennial statements to stockholders evaluating how the corporation has balanced its various interests, the general flexibility afforded to such entities further demonstrates Delaware's commitment to promoting the interests of the corporate world.

TEXAS

Texas corporate law is heavily influenced by the DGCL but lacks the extensive precedent and expertise that gives Delaware its predictability. There also are material differences, such as Texas's absence of specific Revlon duties imposed on directors in change-of-control transactions. Accordingly, unlike Delaware, Texas boards do not have strict duties to maximize stockholders' returns. Texas directors may consider the long-term and short-term interests of the corporation and its stockholders. Texas does have some desirable laws that Delaware does not, such as those permitting bylaws that force unsuccessful stockholder plaintiffs to pay a company's legal fees and higher court filing fees.

In its attempts to woo businesses, Texas recently established a dedicated business court modeled on Delaware's Court of Chancery to handle commercial disputes. A key difference between this court and the Court of Chancery, however, is the requirement for jury trials in Texas, which many may view as decreasing predictability and increasing risk. Moreover, shorter tenures for judges and the Texas Business Court's broader jurisdiction may prevent judges from gaining expertise comparable to that of their peers in Delaware. Texas's corporate law, therefore, remains in a developmental stage with its business court lacking the pedigree of Delaware's Court of Chancery.

Finally, it is more difficult for Texas PBCs to alter their entity status, as such an action requires approval from a supermajority (two-thirds) of the corporation's stockholders rather than the simple majority that the DGCL requires. Otherwise, the law governing PBCs largely mirrors the DGCL, with shareholder statements required at least once every two years.

NEVADA

Nevada is another state that has been suggested as a potential alternative to Delaware. It offers some attractive features for companies, especially in the realms of management protection, privacy, and cost of incorporation. Unlike Delaware, where corporate law is driven by case law, Nevada's laws are highly statute-based. This model could provide more certainty and less reliance on judicial interpretation. For example, Nevada's exculpation statute grants extensive protection for directors and officers, even for breaches of the duty of loyalty, absent intentional misconduct, fraud, or a knowing violation of law by an applicable director or officer. This law reduces the potential for stockholder lawsuits and increases protection for directors and officers, but perhaps creates more risk for stockholders, as described below. Additionally, unlike Delaware, Nevada does not expressly impose Revlon duties on directors in change-of-control transactions, potentially giving them more discretion and flexibility.

Nevada also has strong privacy protections for corporate records by requiring stockholders to own at least 15% of outstanding shares (or be authorized by such holders) to inspect financial records, and to own at least 5% of outstanding shares (or six months' ownership) to access the stock ledger. Importantly, unlike in Delaware, Nevada does not provide a mechanism for stockholders to waive such information and inspection rights.

Nevada's corporate law is less developed and sophisticated, lacking the nuance and flexibility provided by Delaware's case law. The courts in Nevada are also less experienced in handling corporate disputes and may not offer the same speed and efficiency as Delaware's Court of Chancery. Furthermore, although the fees imposed by the state are low compared to Delaware's, the related cost savings remain a marginal benefit for most companies and thus generally are not a material factor in state-of-incorporation decisions.

Investors and venture capitalists may favor the predictability and accountability of Delaware's corporate law, especially for earlier stage companies. Because Nevada's management-friendly policies can come at the expense of stockholder rights, its laws can limit investors' abilities to challenge or monitor management decisions. Consequently, potential investors may view a company's decision to incorporate in Nevada with suspicion and scrutiny, which may reduce the chances of attracting investment.

While Nevada offers some appealing features for companies, such as cost savings, privacy benefits, and management protection, these features generally are not enough to outweigh the disadvantages of Nevada's corporate law. Nevada's lack of development, sophistication and flexibility, its less experienced and specialized courts, and its potential negative impact on stockholder rights and investor confidence are things to carefully consider before incorporating in the state.

Nevada law governing public benefit corporations is also more demanding than both the DGCL and Texas's Business Organizations Code. Nevada benefit corporations, like Texas PBCs, must obtain the approval of two-thirds of shareholders to convert or terminate the benefit corporation. Furthermore, while Delaware and Texas require PBCs to deliver benefit reports to stockholders on a biennial basis, Nevada benefit corporations must deliver such reports annually. In addition, Nevada benefit corporations assume a higher risk of uncertainty given the requirement that they measure the creation of public benefits against a "third party standard," such as criteria developed by independent external organizations.

CONCLUSION

Although Texas and Nevada offer some potential benefits, such as lower fees, decreased risk of losses in litigation for management, and more privacy in certain scenarios, Delaware's deep body of precedent, robust judiciary, and continued commitment to the business world suggest that it remains, for most early-stage entities, the best state in which to incorporate.

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Important differences in incorporating in the three states are highlighted below.

	DELAWARE	NEVADA	TEXAS
LEGAL ENVIRONMENT	• Known for business-friendly laws and well-established, predictable case law • Court of Chancery has long-tenured judges who specialize in corporate disputes • Procedural rules permit quick resolution of disputes • Prohibits fee-shifting bylaws for unsuccessful stockholder suits • Advanced corporate statutes: DGCL is one of the most advanced in the US, allowing for maximum flexibility in corporate structure and governance • DE Division of Corporations offers efficient and reliable services with expedited options for processing corporate filings	• Strong asset protection laws and privacy (no disclosure of stockholders) • Exculpation from liability: NV laws provide extensive exculpation, even for breaches of the duty of loyalty, unless there is intentional misconduct, fraud or a knowing violation of law • NV corporate law is more statute-based, offering a more determinate legal environment with less reliance on judicial interpretation. • Statutes provide guidelines that limit the scope of fiduciary duties, reducing the potential for stockholder lawsuits	• Less developed corporate law than DE and NV • New Texas Business Court lacks proven expertise • Jury trials required in business cases, which have led to judgments against businesses and can lead to slower, inconsistent results • Permits fee-shifting bylaws in unsuccessful stockholder suits

	DELAWARE	NEVADA	TEXAS
PRIVACY	• Stockholders' names are not required to be disclosed • DE requires disclosure of the names of the natural persons who serve as directors through the incorporation process and disclosure of their names and addresses on its annual franchise tax report • All such filings with the Delaware Division of Corporations are public records	• Stockholders' names are not required to be disclosed • Directors' names must be disclosed in the articles of incorporation, and names of officers and directors must be disclosed yearly in the annual list as required by NRS 78.150	• Stockholders' names are not required to be disclosed • All directors' and officers' names must be disclosed
INVESTOR PREFERENCE	• Preferred by venture capitalists and investors due to predictable laws, stockholder inspection rights, and management accountability	• Less common for startups seeking venture capital • Management-friendly policies come at the expense of stockholder rights, as high threshold for director and officer liability, weaker inspection rights, and heightened pleading standards limit ability to challenge management decisions	• Less common for startups seeking venture capital • There is a growing community of Texas investors looking to invest in Texas businesses
STOCKHOLDER INSPECTION RIGHTS AND WAIVER	• After the enactment of Senate Bill 21, stockholders must have a proper purpose reasonably related to the person's interest as a stockholder to inspect and copy relevant corporate books and records • Case law indicates that stockholders can waive their	• NV has stricter privacy for corporate records than DE - Need 15% ownership or permission to access financial records - Need six-month or 5% ownership or permission to access stock ledger, articles and bylaws • NRS 78.257(1) prevents the right	• Stockholders may inspect and copy the corporation's books, records of account, minutes, share transfer records, and other records for any proper business purpose - Stockholder must be either (1) a stockholder for at least six months immediately

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	statutory rights of inspection so long as the waiver is clearly and affirmatively expressed in the relevant documents	of stockholders to inspect the books of a corporation from being limited in the articles or bylaws of a corporation • No statutory right to waive inspection rights • No relevant case law that indicates stockholders may waive their inspection rights	preceding the holder's demand or (2) a holder of at least 5% of stock • No statutory right to waive inspection rights; no indication from case law that stockholders may waive this right
ONGOING COMPLIANCE	• Annual report and franchise tax required	• Annual list and business license renewal required	• Annual franchise tax report required
REGISTERED AGENT	• Corporations must maintain a registered agent with a physical address in DE	• Corporations must maintain a registered agent with a physical address in NV	• Corporations must maintain a registered agent with a physical address in TX
REPUTATION	• Gold standard for incorporation, especially for startups seeking funding • Recent cases reexamining director independence and controlling stockholder liability have caused controversy	• Known for privacy advantages, but less well understood by investors	• Neutral reputation but slightly more director friendly and not as specialized as DE or NV • Business Court values due process for corporations but requires juries for all trials
REVLON DUTIES	• Revlon duties apply: Directors must prioritize maximizing stockholder value in the event of a sale or change of control • Well-defined case law provides clarity for directors and stockholders	• No explicit Revlon duties, but directors must act in good faith and in the best interests of the corporation • Much less established case law compared to DE	• No explicit Revlon duties, but all director actions must comply with fiduciary duties • Much less established case law compared to DE

	DELAWARE	NEVADA	TEXAS
PUBLIC BENEFIT CORPORATIONS	• Allows for the creation of PBCs • Can alter PBC status with the approval of only a simple majority of shareholders • Biennial stockholder statement	• Allows for the formation of benefit corporations • Requires the approval of two-thirds of shareholders to alter benefit corporation status • Annual stockholder report to measure creation of public benefits against a third-party standard	• Allows for the creation of PBCs • Requires the approval of two-thirds of shareholders to alter PBC status • Biennial stockholder statement