

# Why Delaware Citizens Should Care About Delaware's Corporate Brand

BY LAWRENCE A. HAMERMESH

HERE ARE SOME NUMBERS every Delaware citizen should care about:

- Of the approximately \$4.3 billion in budgeted expenditures for the State in fiscal year 2019, revenues from corporation franchise taxes and other entity formation taxes and fees accounted for about \$1.2 billion, or about 28%.
- Together with funds from abandoned property (a large portion of which depends on incorporation in Delaware) and personal income taxes from the lawyers, legal staff, and other service providers whose jobs depend on Delaware business formation, that 28% figure swells to well over 40%.

In other words, every citizen of our State depends on the health of the brand that attracts the formation of businesses under the laws of our State.

And it is indeed a brand, and a powerful one at that. It's sort of like the reputation of Swiss watches: people know a Swiss watch is a superior product, but they don't necessarily know why. Although the foundations of our Delaware brand aren't a secret, they aren't all that well known to the public.

Some people think Delaware is so successful in attracting business formation because of favorable tax laws. But that's not the reason: Delaware corporations pay federal taxes just like businesses formed in any other state, and pay taxes in Delaware on income earned here, just as they would if formed in any other state. In fact, Delaware's franchise tax on corporations is substantially higher than in any other state.

Some people think Delaware is so successful in attracting business formation because of secrecy of corporate ownership. Again, that's not the reason (and we don't want it to be). All Delaware corporations are required every year to report who their directors are, and the largest payers of Delaware franchise taxes – the thousands of publicly traded Delaware companies – regularly disclose who their largest stockholders are.

So where does the Delaware brand come from? Answer: from a unique mix of lucky historical accidents, key government and private institutions, and a culture of steadfast stewardship of that brand. The components of that mix are well documented, perhaps best so by my former partner Lewis S. Black, Jr., in his essay "Why Corporations Choose Delaware."<sup>1</sup>

In a sense, the foundational component of the Delaware brand is our business entity statutes, including the world-famous Delaware General Corporation Law. Those statutes have led the way in providing a flexible structure that accommodates the widely variable ownership and management configurations of modern businesses. Our statutes are easily copied by other states; but what hasn't been, and can't easily be, copied is our system that keeps our statutes current and responsive to evolving business needs.

The starting point in that system is the Council of the Corporation Law Section of the Delaware State Bar Association (DSBA): the Section, which has around 400 members, elects a governing Council that meets nearly every month to prepare and review proposed amendments to the business statutes. The members of the DSBA Council are experienced corporate lawyers and litigators who are professionally connected to hundreds or even thousands of lawyers from around the country and the world, and who therefore become quickly familiar with new problems and issues that might warrant statutory changes.

But the DSBA Council of course can't enact those changes by itself. Our system also depends on the trust and partnership between the Council and our General Assembly, which has for decades come to respect the expertise underlying the proposals submitted by the Council, and to recognize the interest of the Council's members in protecting the long term value – to themselves and the State – of a healthy Delaware brand. Conversely, the DSBA Council respects the integrity of the General Assembly: the Council's recommendations are constrained by an acute awareness that a Council proposal that fundamentally disrupted the balance of investor and manager interests would severely undermine the Delaware brand and the symbiotic relationship with the General Assembly.





The executive branch of State government also plays a key role. Through the Secretary of State and its Division of Corporations, the State supplies a modern, efficient, technologically advanced system for administering business formation and ongoing management. Other states lack the same incentive to provide such a system, and while many of them do a creditable job, they're no match for the careful stewardship supplied by Delaware's administrative system.

Perhaps most important, however, is the judicial branch of our State government – particularly Delaware's unique Court of Chancery. That court is the venue of first resort for resolution of internal business disputes within Delaware business entities. Its judges (chancellors) are respected throughout the world for their expertise in business law. Because cases in the Court of Chancery are resolved by its judges rather than by juries, and do not permit awards of punitive damages, the court is widely viewed as a forum for neutral, sophisticated, and fair resolutions of business disputes. That reputation in turn encourages businesses to form under Delaware law, knowing that Delaware incorporation will enable them, their managers and their investors to come to the Court of Chancery to resolve their disputes.

In sum, Delaware's business lawyers are part of a mutually beneficial partnership with all three branches of Delaware government. All of us in that

partnership are highly motivated to support and preserve the tradition of care, balance, fairness and sophistication that underlie the Delaware brand, leading one business law professor to comment: "We already have a national corporation law. It's called the Delaware corporation law."<sup>2</sup>

And that law, and the system that nurtures it, yields enormous benefits to the citizens of our State. We should all care about it and support it. ■

1 [https://corpfiles.delaware.gov/whycorporations\\_web.pdf](https://corpfiles.delaware.gov/whycorporations_web.pdf)

2 *Black*, p.2



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