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CONTROLLERS UNBOUND

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In an attempt to protect its dominant position in the market for incorporations, Delaware recently relaxed the constraints on public company controllers. This article analyzes how the relaxation of controller constraints is expected to affect public investors and the economy. In particular, we show that this relaxation should be expected to:

(i) provide controllers with substantial private benefits through six channels that we identify and discuss;

(ii) impose even larger costs on public investors and thereby generate considerable efficiency costs and reductions in corporate value;

(iii) transform ownership patterns over time—leading both to an increase in the prevalence of controlled companies and to a decline in the ownership stakes held by controllers; and

(iv) lower the quality of investor protection in U.S. controlled companies to a level significantly below that observed in other advanced economies.

We also demonstrate that market forces and private ordering cannot be relied on to adequately address the above concerns. The looming risks we identify for both public investors and the broader economy raise serious concerns for anyone interested in investor protection and economic performance.

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I. INTRODUCTION

This Article analyzes the substantial risks to public investors and to the economy that are expected to be brought about by the relaxation of constraints on controlling shareholders, most notably from Delaware's Senate Bill 21 (SB 21) legislation. These risks, we show, raise serious concerns with respect to investor protection and economic performance in the U.S. capital markets.

The recent adoption of SB 21 has substantially weakened the constraints on controllers of public companies. Weak constraints exist in other states—notably Texas and Nevada—and Delaware's legislation appears intended, at least in part, to induce companies to avoid reincorporating in those jurisdictions.[1] In this Article, we conclude that these weaker constraints should be expected to produce large and detrimental effects for public investors and the broader economy.

Even among those who have expressed concern about, or criticism of, SB 21 and the loosening of controller constraints, we believe there is substantial underestimation of the expected harm. This underestimation, we contend, is also prevalent among institutional investors. We believe it is crucial for all those interested in protecting public investors and ensuring the efficient operation of corporate America to fully understand the looming risks, and we seek to contribute to that understanding. We hope our work will help educate investors and market participants about the significant dark clouds gathering over the U.S. capital markets.

Our analysis proceeds as follows. Part II focuses on the steady increase in the importance of controlled companies, especially dual-class companies, in the U.S. economy. Furthermore, we expect this increase to continue and even accelerate its pace. When the incidence and economic significance of controlled companies grow, so does the importance of protecting public investors in such companies.

Part III discusses the consequential weakening of controllers' constraints by SB 21. We explain that, in a vast number of conflicted (non-freezeout) settings, SB 21 will greatly facilitate controllers' ability to obtain the outcomes they desire, even when those outcomes do not serve the interests of public investors. Controllers will succeed in doing so as long as they can identify two individuals who are formally independent from the controller and willing to go along with the controller's desired

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[1] *See* Kevin LaCroix, *Delaware Bill Meant to Stem Corporate Departures Enacted*, D&O DIARY (Mar. 26, 2025), https://www.dandodiary.com/2025/03/articles/director-and-officer-liability/delaware-house-passes-bill-meant-to-stem-corporate-departures/; Jonathan Macey & Roberta Romano, *Texas is Disrupting Delaware's Dominance through Innovation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 7, 2025), https://corpgov.law.harvard.edu/2025/03/07/texas-is-disrupting-delawares-dominance-through-innovation/. *See generally* Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law* (ECGI Working Paper, 2025); Jonathan R. Macey, *From First-Best to Least-Worst: Emerging Threats to Delaware's Dominance that the Legislature Can't Fix* (Working Paper, 2025).

outcome—a task that, we explain, controllers will commonly be able to accomplish. Furthermore, even if the independent directors initially selected by the controller unexpectedly block the controller's desired outcome, the controller will be able to replace them with two new independent directors and try again.

Part IV identifies and analyzes key channels through which controllers should be expected to obtain large benefits at the expense of public investors. While SB 21 has been opposed by many, some key channels through which weaker constraints will benefit controllers have received little attention. Among other things, we explain, benefits will flow to controllers in the following ways: (i) controllers will generally be able to cash out as much of their equity capital as they like without weakening their lock on control; (ii) controllers will generally be able to get rid of any sunset provisions in their companies' charters and thereby fully perpetuate their lock on control; (iii) controllers will be able to obtain additional benefits through partial freezeouts and related party transactions; (iv) the compensation floodgates will open up and facilitate the payment of large compensation packages to controllers; and (v) controllers will be able to unilaterally reincorporate in states with lax constraints to the detriment of public investors. Overall, a sharp increase in controllers' wealth is on the horizon.

Part V discusses another important expected consequence of the relaxation of controller constraints: a transformation of U.S. ownership patterns. Whereas companies without a controller have long been dominant in the U.S., the incidence of controlled companies should be expected to grow substantially over time. This outcome should be expected both because controllers now have an increased incentive to retain control—due to the increased benefits associated with it—and because retaining the controller's lock on control no longer requires the controller to abstain from or limit cashing out some of their equity capital. Importantly, whereas the incidence of control blocks will rise, the fraction of equity capital held by controllers will considerably decline. As explained, this expected move to structures with small-minority controllers will produce substantial efficiency costs and thereby harm both public investors and the economy.

Part VI discusses the efficiency consequences more broadly. Whereas controllers are expected to gain significantly from the loosening of constraints, we show that these gains are expected to be substantially smaller than the large losses to public investors and to corporate value. Each of the channels through which private benefits will be obtained by controllers, we explain, will produce substantial distortions and deadweight efficiency costs. Due to these deadweight efficiency costs, the loss to public investors and corporate value should be expected to be considerably larger than the gains to controllers, with the excess being especially large in companies with small-minority controllers.

Part VII examines how the relaxation of controllers' constraints will affect the quality of investor protection in the U.S. compared with that of other countries.

This relaxation, we explain, will cause the quality of U.S. investor protection for controlled companies to decline substantially relative to the protection of controlled company investors in other advanced economies.

Some might question our conclusions on the grounds that, even if SB 21 were expected on its own to weaken investor protections, various mechanisms could provide substitute protections. Part VIII addresses such objections. In particular, Part VIII considers possible arguments that (i) charter amendments could be adopted to provide such protections; (ii) institutional investor oversight could provide such protections; (iii) controllers might be deterred from taking advantage of opportunities to benefit themselves at the expense of public investors by the prospect of a decline in the market value of the controllers' blocks; and/or (iv) controllers might be deterred from exploiting such opportunities by the prospect that doing so would impede or make more costly the raising of additional capital in the future. We explain that each of these four "mechanisms," whether individually or collectively, will fail to adequately address the weakening of controller constraints brought about by SB 21.

Part IX concludes. It is important that all institutional investors and all others who have an interest in good governance and good corporate performance recognize realistically the looming risks and insist on appropriate protection.

Before proceeding, we would like to offer three general comments about our analysis and how it differs from existing work. *First*, our aim in this Article is not to relitigate SB 21 and add to the extensive debate about it.[2] The pressures on Delaware that led to its relaxing controller constraints are not expected to abate,[3] and

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[2] For recent contributions to this debate, see, for example, Stephen M. Bainbridge, *Delaware Senate Bill 21: What It Does and What Questions Remain Open* (Working Paper, 2025); Jill E. Fisch & Steven Davidoff Solomon, *Control and Its Discontents*, 173 U. PA. L. REV. 641 (2025); Zohar Goshen, Assaf Hamdani & Dorothy S. Lund, *Fixing* MFW*: Fairness and Vision in Controller Self-Dealing* (Working Paper, 2025); Assaf Hamdani & Kobi Kastiel, *Courts, Legislation and Delaware Corporate Law,* J. CORP. L. (*forthcoming*, 2026); Christine Hurt, *Texas, Delaware, and the New Controller Primacy*, 67 ARIZ. L. REV. (forthcoming 2026); Marcel Kahan & Edward B. Rock, *The New Political Economy of Delaware Corporate Lawmaking,* J. CORP. L. (*forthcoming*, 2026); Dorothy Lund & Eric Talley, *Should Corporate Law Go Private?* (ECGI Working Paper, 2025); Jonathan R. Macey, *Delaware Law Mid-Century: Far From Perfect but Probably Not Leaving for Las Vegas*, 50 J. CORP. L. 1111 (2025); Fernan Restrepo & Guhan Subramanian, *Missing MOMs: Freezeouts in the New Doctrinal Regime and the MOOM Alternative* (Working Paper, 2025).

A recent contribution seeks to shed light on this debate by examining stock market reactions to the SB 21 legislation. It presents evidence supporting our conclusion in this Article that the relaxation of constraints is expected to harm public investors and reduce corporate value in controlled companies—particularly those with a dual-class structure. *See* Kenneth Khoo & Roberto Tallarita, *The Price of Delaware Corporate Law Reform* (Working Paper, 2025).

[3] *See, e.g.,* Lucian Bebchuk, Kobi Kastiel & Edward Rock, *Delaware and the Perils of Small Minority Controllers,* HARV. L. SCH. ON CORP. GOVERNANCE (Mar. 5, 2025)

U.S. state corporate law is not expected to tighten such constraints in the coming years.[4] Accepting the relaxation of constraints as given, we seek to provide institutional investors and all others interested in good corporate governance with a realistic assessment of the risks and challenges that should be expected to arise over time.[5]

Second, we would like to emphasize how our views differ from those of others who have expressed concerns about SB 21 and the problems it exposed regarding state competition for corporate law. Some prominent commentators have opined that SB 21 itself is unlikely to have significant detrimental consequences, and their primary concerns seem to be with the potential implications if the processes producing SB 21 continue to operate.[6] By contrast, and for the reasons explained in this Article, we claim that SB 21 is expected to generate considerable efficiency costs and reductions in corporate value that should concern anyone interested in investor protection and the performance of U.S. capital markets.

Third, we focus our discussion on Delaware law and the recently adopted lax constraints. Our policy analysis and conclusions, however, are also relevant to other jurisdictions that have adopted or are considering the adoption of similarly lax rules. For example, there have been debates in Europe and in Brazil about the extent to

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https://corpgov.law.harvard.edu/2025/03/05/delaware-and-the-perils-of-small-minoritycontrollers/; Kahan & Rock, *supra* note 2.

[4] There is currently significant writing, to which we do not seek to contribute in this Article, regarding the process that produced the SB 21 legislation. *See, e.g.*, Hamdani & Kastiel, *supra* note 2; Kahan & Rock, *supra* note 2; Lund & Talley, *supra* note 2; Greg Varallo et al., *Optimizing Delaware's Corporate Law Amendment Process: Ideas for the Next 20 Years* (working paper, June 2025), available at https://ssrn.com/abstract=5283642; Charles Whitehead, *Delaware's Agency Problem* (Working Paper, 2025), available at https://ssrn.com/abstract=5380168.

[5] While in this Article we take the relaxation of controller constraints post-SB21 as given and assess its consequences for investors and corporate value, in a companion Article we focus on the normative question—identifying which rules would be best for governing conflicted action in controlled companies. *See* Lucian A. Bebchuk & Kobi Kastiel, *How to Control Controller Conflicts,* 54 J. CORP. L. 1001 (2025).

[6] *See, e.g.,* Marcel Kahan & Edward Rock, *What Newly Amended DGCL §144 Says (and Does Note Say) about Controlling Stockholder Transactions*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (June 5, 2025), https://corpgov.law.harvard.edu/2025/06/05/what-newly-amended-dgcl-%c2%a7144-says-and-does-not-say-about-controlling-stockholder-transactions/ (stating that for "controlling stockholder transactions, [§144] does no more, and no less, than create a limited safe harbor"). For prominent commentators who view SB 21 as a beneficial statutory update, *see, e.g.,* Bainbridge, *supra* note 2; Macey, *supra* note 1.

which approval by independent directors can be sufficient to cleanse decisions involving controller conflicts.[7] Our analysis can, we hope, also contribute to informing such debates.

II. THE RISE OF CONTROLLED COMPANIES

This Article focuses on the protection of public investors in controlled companies, and the importance of this subject naturally depends on the presence of such companies in the economy. For a long time, the working premise of discussions concerning U.S. corporate governance was that the typical public company lacked a controlling (or even dominant) shareholder, with ownership widely divided among institutional and retail investors.[8] Consequently, U.S. governance debates in earlier decades focused primarily on widely held companies, and the governance of controlled companies attracted less attention.[9] As this Part explains below, however, the picture is markedly different at present. Controlled companies currently represent a substantial portion of the public company landscape, and their share is likely to grow.[10]

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[7] Luca Enriques, *Related Party Transactions: Policy Options and Real-World Challenges (With a Critique of the European Commission Proposal)*, 16 EUR. BUS. ORG. L. REV. 1 (2015) (provides a (partially) critical assessment of the measures put forth by the European Commission to harmonise rules on related-party transactions within the EU); Alessio M. Pacces, *Procedural and Substantive Review of Related Party Transactions (RPTs): The Case for Non-Controlling Shareholder-Dependent (NCS-Dependent) Directors*, in The Law and Finance of Related Party Transactions (Luca Enriques and Tobias Tröger eds., 2019) (arguing that related-party transactions in Europe should be considered fair when they are approved by independent directors); Jens Dammann, *Related Party Transactions and Intragroup Transactions*, in The Law and Finance of Related Party Transactions (Luca Enriques and Tobias Tröger eds., 2019), at 218 (surveying different approaches for policing intra-group transactions in different jurisdictions). *See* Adriana Pallis et al., *CVM Changes its Understanding of Conflicts of Interests*, Legal Intelligence: Machado Meyer Advogados (Sep. 26, 2022), https://www.machadomeyer.com.br/en/recent-publications/publications/capital-markets/cvm-changes-its-understanding-on-conflicts-of-interests (analyzing debate in Brazil).

[8] Ronald J. Gilson, *Corporate Governance and Economic Efficiency: When Do Institutions Matter?*, 4 WASH. U. L.Q. 327, 331 (1996) (observing that from the 1930s onward, "the intellectual mission of American corporate governance took the form of a search for the organizational Holy Grail, a technique that bridged the separation of ownership and control").

[9] *See* Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471, 471 (1999) (asserting that for "at least two generations" scholars had been fixed on the image of "widely held corporations in the United States, in which ownership of capital is dispersed among small shareholders").

[10] While we focus on the rules governing companies classified as controlled companies under SB 21, we do not discuss SB 21's revisions to the criteria for classifying companies as controlled. For recent discussions of the classification of companies as controlled, *see* J. Travis Laster, *How to Evaluate Non-Majority Control: What History and Statutes Tell Us—Part One*: *The Historical*

A. The Increase in Controlled Company Incidence

A review of large public companies readily identifies well-known companies, including some household names, that have a controlling shareholder. *Table 1* below lists examples of companies with market capitalizations exceeding $50 billion (as of December 31, 2025) and indicates their controllers.[11]

Table 1: Controlled Companies with $50B+ Market Cap and their Controllers

Company	Controller (s)
Airbnb, Inc.	Chesky, Blecharczyk & Gebbia
Alphabet (Google)	Larry Page & Sergey Brin
AppLovin Corp.	Adam Foroughi
Coinbase	Brian Armstrong
Comcast	Roberts family
DoorDash	Tony Xu
Meta Platforms (Facebook)	Mark Zuckerberg
Nike	Phil Knight and family
Oracle	Larry Ellison
Palantir Technologies	Peter Thiel & Alex Karp
Robinhood	Vlad Tenev & Baiju Bhatt
Roblox Corp.	David Baszucki
Walmart	Walton family

This list includes two of the "Magnificent Seven," the seven largest U.S. companies by market capitalization, along with other major players by size and economic influence. As of December 31, 2025, the aggregate market capitalization of controlled companies was almost $13.5 trillion—a figure that alone illustrates the

Dominance of Functionalism, 31 FORDHAM J. CORP. & FIN. L. 1 (2025). *See also* Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, 49 DEL. J. CORP. L. 525 (2025); Jill E. Fisch & Steven Davidoff Solomon, *Control and Its Discontents*, 173 U. PA. L. REV. 641 (2025); Jill E. Fisch and Steven Davidoff Solomon, *Contract Rights and Control,* U. PA. J. BUS. L. (*forthcoming*, 2026); Jonathan C. Lipson & Eli Alexander Evans, *Corporate Due Process* (Working Paper, 2025); Elizabeth Pollman & Lori E. Will, *The Lost History of Transaction-Specific Control*, 50 J. CORP. L. 1095 (2025).

[11] The market capitalization data of these companies was collected from Capital IQ and is current as of December 31, 2025.

economic weight of these companies.[12]

B. The Significance of Controlled Dual-Class Companies

A substantial factor in the rise of controlled companies has been the introduction and growing use of dual-class structures. Historically, the New York Stock Exchange rules required a one-share-one-vote structure.[13] About four decades ago, the NYSE—apparently concerned about losing listings to other exchanges—permitted the listing of dual-class structures.[14] The SEC subsequently attempted to prevent all U.S. exchanges from allowing dual-class structures,[15] but this attempt was blocked by the U.S. Court of Appeals for the D.C. Circuit.[16]

When public companies were prohibited from having a dual-class structure, it was difficult for any individual or family to hold a controlling block in a public company with a very large market capitalization.[17] However, opening the door to dual-class companies enabled controllers to control voting outcomes while holding only a minority—or even a small minority—of the equity capital. This made it possible to maintain concentrated control even in the largest public companies.[18]

As the graph below vividly illustrates, there has been a striking increase in dual-class IPOs in recent years, particularly among tech companies. Figure 1 below shows that, between 2015 and 2024, the use of dual-class shares in tech company

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[12] This figure represents the aggregate market capitalization of dual-class and single-class controlled firms. Dual-class controlled firms are first identified using the list compiled by the Council of Institutional Investors (CII). From this list, firms are retained only if they continued to maintain a dual-class share structure and had available market capitalization data as of December 31, 2025. Single-class controlled firms are then identified as firms not appearing on the CII list but exhibiting insider ownership greater than 33.33%, based on FactSet data. For both groups, market capitalization is obtained from Capital IQ as of December 31, 2025.

[13] Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 596 (2017); Louis Lowenstein, *Shareholder Voting Rights: A Response to SEC Rule 19c-4 and to Professor Gilson*, 89 COLUM. L. REV. 979, 979–85 (1989); Joel Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687, 693–707 (1986).

[14] *Id.*; NYSE's Proposed Rule Changes on Disparate Voting Rights, 18 Sec. Reg. & L. Rep. (BNA) No. 37, at 1389 (Sept. 19, 1986).

[15] Voting Rights Listing Standards; Disenfranchisement Rule, 53 Fed. Reg. 26,376 (July 12, 1988) (codified as amended at 17 C.F.R. § 240.19c-4 (2009)), invalidated by Bus. Roundtable v. SEC, 905 F.2d 406, 417 (D.C. Cir. 1990).

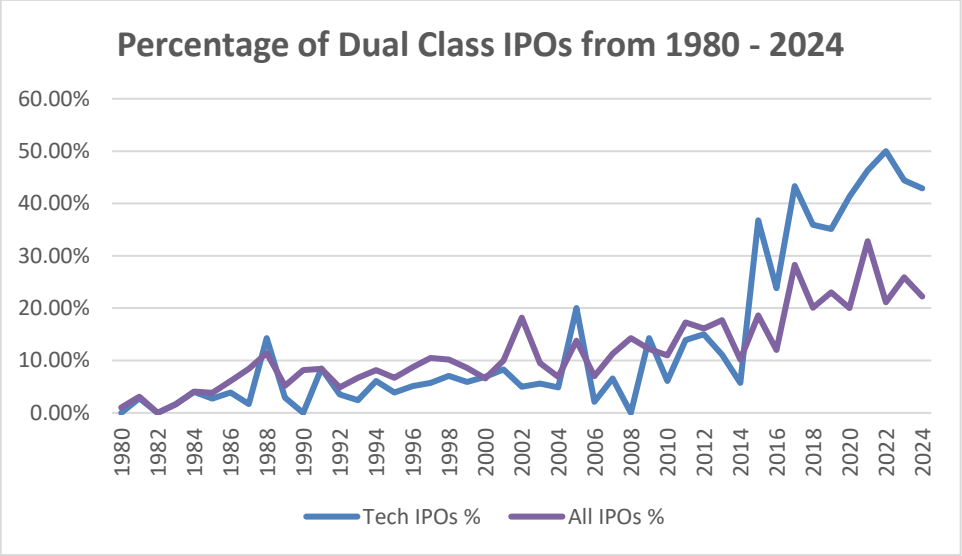
[16] *Bus. Roundtable*, 905 F.2d at 417.

[17] *See* Harold Demsetz & Kenneth Lehn, *The Structure of Corporate Ownership: Causes and Consequences*, 93 J. POL. ECON. 1155 (1985) (documenting the negative relation between firm size and ownership concentration among U.S. firms).

[18] *See, e.g.,* Dhruv Aggarwal et al., *The Rise of Dual-Class Stock IPOs*, 144 J. FIN. ECON. 122 (2022).

IPOs surged dramatically, with an average of 40% of IPOs adopting such structures—over six times the average for the rest of the sample period (1980–2014). In 2021, a record-high of 81 IPOs (33%) employed dual-class share structures, more than three times the historical average, with the incidence even higher among tech IPOs that year (46%).[19]

Figure 1: Percentage of Dual-Class IPOs from 1980 to 2024



Dual-class firms now play a major role in the landscape of controlled companies. Although dual-class companies make up only 27% of controlled firms, they account for 78% of the total market capitalization of controlled companies. As of December 31, 2025, 255 controlled public companies with dual-class structures had an aggregate market capitalization of almost $10.5 trillion, whereas 684 controlled single-class companies had a total market cap of $3 trillion.[20]

Importantly, in many dual-class companies, controllers hold only a minority—

[19] The data on dual-class IPOs was retrieved from Jay R. Ritter, *Initial Public Offerings: Dual Class Structure of IPOs Through 2025*, tbl. 23, https://site.warrington.ufl.edu/ritter/files/IPOs-Dual-Class.pdf (reporting annual counts of operating-company IPOs with dual-class shares, split into tech and non-tech).

[20] *See supra* note 7.

or sometimes even a small minority—of the equity capital and have distorted incentives that operate to considerably increase agency costs and governance risks.[21] Indeed, we conclude in Part VI that the increased private benefits controllers can extract under SB 21's weakened constraints will be far outweighed by the resulting losses to public investors and the broader economy. This is important to keep in mind when considering the stakes of the debate.

C. Controlled Companies Are Expected to Rise Further

The substantial current presence of controlled companies already signals the scale of the issue—but the stakes are even higher because this presence is set to grow. As recent academic work, including our own, has documented, the incidence of controlled companies has risen significantly in the past two decades.[22] Two key drivers explain this trend. First, dual-class structures make it far easier to maintain control, even when the controller does not have or does not expect to have sufficient wealth to own a majority of their company's equity capital.[23]

Second, such structures are especially common among high-tech IPOs led by influential founders, a category that has represented a large share of companies going public in recent years.[24] If these two factors persist—and there is good reason to expect they will—the number of companies subject to the law of controlled companies will grow further.

Moreover, our analysis shows that weakening constraints on controllers will itself accelerate this trend by: (1) providing substantial incentives for controllers to

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[21] Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453, 1456, 1466 (2019) (explaining the problem that small-minority controllers "own a small fraction of the company's equity capital and thus bear only a small (and sometimes extremely small) share of the losses that their actions may inflict on the company" so they can "tolerate underperformance by the company where their private incentives offset any cost to their small shareholdings").

[22] *See, e.g.,* Bebchuk & Kastiel, *supra* note 13, at 594–95; Aggarwal et al., *supra* note 18.

[23] Bebchuk & Kastiel, *supra* note 13, at 612–18 (explaining how dual-class structures incentivize retention of control with small economic stakes); Dorothy S. Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 STAN. L. REV. 687, 693 n.27 (2019) ("By issuing nonvoting stock, however, the founders can secure new capital without diluting their control. This allows founders to diversify their private wealth, as well as secure outside financing, without losing control of the company.").

[24] Aggarwal et al., *supra* note 20, at 124 (finding that "the data suggests that the increase in dual-class IPOs is in large part driven by founders' ability to dictate the governance of IPO firms," which arose in part within capitally efficient cloud computing companies); *see also* Jay R. Ritter, *Initial Public Offerings: Updated Statistics* (2025), https://site.warrington.ufl.edu/ritter/ipo-data/. For additional explanation to the recent rise in dual-class firms, *see* Sharon Hannes & Adi Libson, *The Dual-Class Stock Revolution* (Working Paper, 2025).

retain their lock on control at the IPO stage; (2) substantially strengthening controllers' ability to maintain their lock on control midstream through reclassifications, issuance of non-voting stock, and other means; and (3) substantially reducing the costs of maintaining such control by making Delaware law on controlling shareholders more attractive to controlling shareholders. Taken together, all of these factors should operate to bolster the rise in the incidence of controlled companies.

D. The Dominance of Delaware

Whereas Delaware is the domicile of a majority of public companies in general, Delaware incorporation plays an especially dominant role among controlled companies.[25] The overwhelming majority of these companies—particularly the largest among them—are incorporated in Delaware and now governed by the loosened constraints of Delaware's SB 21.

Of the 939 controlled companies listed on American stock exchanges, 714 (76 percent) are incorporated in Delaware. Furthermore, Delaware-incorporated controlled companies represent 92 percent of the market capitalization of all controlled firms.[26] Except at the margins, Delaware sets the governance standard for controlled companies, and most such companies will be directly affected by SB 21.

III. UNBINDING CONTROLLERS

A. The Deterioration in Investor Protections Post-SB 21

In March 2025, the Delaware legislature enacted a set of amendments to the DGCL which are commonly referred to as SB 21. SB 21 effectively overturned the Supreme Court's *Match Group* decision[27] and the law governing conflicted actions in controlled companies.[28] The amendment was initiated following Tesla's reincorporation outside of Delaware and the prospect of similar departures by other leading

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[25] *See, e.g.,* Lynn M. LoPucki, *Corporate Charter Competition*, 102 MINN. L. REV. 2101, 2102 (2019) ("Delaware's competitors have lagged so far behind that some scholars have declared the competition to be over and Delaware the winner"); Marcel Kahan, *Delaware's Peril*, 80 MD. L. REV. 59, 61 (2021) ("Delaware accounts for the bulk of incorporations."); Ofer Eldar & Lorenzo Magnolfi, Explain*ing Delaware's Dominance: Firm Heterogeneity and Demand for Legal Flexibility* (Working Paper, 2025) (explaining why Delaware has become the dominant jurisdiction for U.S. public firms).

[26] *See supra* note 7 for a detailed explanation of how controlled companies are identified. Information on firms' states of incorporation is obtained from FactSet, and market capitalization data are obtained from Capital IQ as of December 31, 2025.

[27] *In re Match Group, Inc. Derivative Litigation,* 315 A.3d 446 (Del. 2024).

[28] S. 21, 153d Gen. Assemb., 1st Reg. Sess. (Del. 2025) (enacted), https://legiscan.com/DE/bill/SB 21/2025.

public companies, and in an effort to induce controlled companies to remain in Delaware.[29]

SB 21 specified clear conditions that, if satisfied, would preclude judicial scrutiny of conflicted actions in controlled companies. Under SB 21, any conflicted action, other than a freezeout transaction, can be cleansed if it is approved by at least two independent directors who represent a majority of the independent directors on the board's committee reviewing the conflicted action.[30]

In assessing the extent to which SB 21 weakened constraints on conflicted corporate actions, seven aspects are worth highlighting:

First, SB 21 does not require that the cleansing approval be granted by a committee composed *entirely* of independent directors. To the contrary, SB 21 permits the inclusion of "dependent" directors on a transaction review committee, allowing them to participate in and influence the committee's deliberations.[31] Under pre–SB 21 law, by contrast, a committee was required to consist solely of independent directors, reflecting the recognition that the presence of dependent directors could distort the deliberations and have a "chilling effect" on the independent directors.[32]

Second, and relatedly, SB 21 does not require that a conflicted action be approved by all—or even a majority—of the independent directors on the board. SB 21 allows a conflicted action to be "cleansed" so long as a majority of the independent directors on the reviewing committee approve it.[33] For example, suppose a board of twelve directors includes seven independent directors, and only two of

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[29] Lora Kolodny, *Meta's Potential Exit from Delaware had Governor Worried Enough to Call Special Weekend Meetings*, CNBC (Mar. 19, 2025), https://www.cnbc.com/2025/03/19/meta-billions-of-dollars-at-stake-in-overhaul-delaware-corporate-law.html; Lora Kolodny, *After Elon Musk's Delaware Exit, State Lawmakers Weigh Bill to Overhaul Corporate Law*, CNBC (Mar. 15, 2025), https://www.cnbc.com/2025/03/15/after-elon-musk-delaware-exit-state-weighs-overhaul-of-corporate-law.htm

[30] *See* S. 21, 153rd Gen. Assemb. § 144(b)(1) (Del. 2025).

[31] *Id. See also* Debevoise, March 28, 2025, https://www.debevoise.com/insights/publications/2025/03/delaware-enacts-sweeping-changes-to-treatment-of#:~:text=Prior%20to%20S,discovery%20dismissal%20unlikely ("[W]hen determining whether the special committee consists of disinterested directors, S.B. 21 requires only that the board determine in good faith that the members of the special committee are disinterested such that the protections of the special committee safe harbor would not be lost merely because it later turns out that one or more of the committee members are, in fact, interested, as long as a majority of the disinterested directors approve the transaction").

[32] *See e.g., In re Match Group, Inc. Derivative Litigation*, 315 A.3d 446 (Del. 2024) (holding that all members of a special committee must be disinterested and independent to shift the burden or standard of review at the pleading stage").

[33] *Id. See* § 144(b)(1) (providing a litigation safe harbor safe where, among other things, a "[non-freezeout] controlling stockholder transaction is approved (or recommended for approval) in good faith and without gross negligence by a majority of the disinterested directors then serving on the committee; provided that the committee consists of 2 or more directors, each of whom the board of directors has determined to be a disinterested director with respect to the controlling stockholder transaction").

them are likely to approve the conflicted action. In this case, if these two independent directors are placed on the review committee (possibly along with another independent director), the conflicted action will be cleansed—even if one or two dependent directors also sit on the committee.

Third, the reviewing committee is not required to be involved from the outset in determining and negotiating the terms of the conflicted transaction; it is sufficient for the committee to review and approve the finalized terms after they have been set and presented to the committee.[34] By contrast, under pre-SB 21 law, the reviewing committee was expected to be involved from the outset in negotiating the terms and therefore was in a strong position to secure for public investors a portion of any surplus produced by the transaction.[35]

Fourth, under pre-SB 21 law, the committee approving a conflicted action was expected to retain and be advised by independent advisors whose services would not be influenced by their dependence on the controller. SB 21, by contrast, does not require the reviewing committee to retain independent advisors. When the committee relies on advisors dependent on the controller—such as company personnel—this naturally tends to pull the committee toward the outcome favored by the controller.[36]

Fifth, directors will be regarded as independent if they satisfy the independence requirements of the stock exchanges. By contrast, under pre–SB 21 law, challenges to director independence—and thus to the cleansing of conflicted actions—were not limited to compliance with exchange requirements.[37]

Sixth, SB 21 explicitly instructs courts not to intervene in any way if the conditions for approval by independent directors are satisfied.[38] By contrast, pre-SB

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[34] A special committee may be constituted after negotiations have begun since the strict "*ab initio*" requirement in MFW was not included in Section 144. *See* Gibson Dunn, March 27, 2025, https://www.gibsondunn.com/delaware-legislature-codifies-safe-harbors-for-controller-transactions-and-moderates-inspection-demands/.

[35] *Kahn v. M&F Worldwide Corp.*,88 A.3d 635, 645 (Del. 2014) ("MFW").

[36] *See* Gibson Dunn, March 27, 2025 ("The special committee need not be empowered to select and retain its own advisors."). Therefore, technically, a committee could rely on company management's inputs or a single set of advisors for both the company and committee without losing the statutory safe harbor. *Cf. Kahn v. M&F Worldwide Corp.*,88 A.3d 635, 645 (Del. 2014).

[37] *See id.* § 144(d)(2). Gibson Dunn, March 27, 2025 ("[A] director is presumed to be a disinterested director with respect to an act or transaction to which he or she is not a party if the board determined that such director satisfies applicable stock exchange criteria for independence from the company and, if applicable with respect to the act or transaction, the controlling stockholder. This presumption will be more difficult to rebut at the pleading stage, because rebuttal requires "substantial and particularized facts" of a "material interest" or a "material relationship," as defined in the amendments.").

[38] *See id.* § 144(c)(6) (limiting "the right of any person to seek equitable relief on the grounds that an act or transaction, including a controlling stockholder transaction, was not authorized or approved in compliance with the procedures set forth in [the amended Section 144]").

21SB 21, courts could take equitable considerations into account in examining the approval of a conflicted action.

Seventh, SB 21 also imposes strict limitations on any effort to inspect a company's book and records to determine whether circumstances warrant intervention.[39] Under pre-SB 21 law, inspection of company books and records, including electronic communications, was in many cases a valuable tool for obtaining information on which a complaint satisfying Delaware's pleading standards could be based.[40]

Given the foregoing, so long as a board includes two independent directors who can be expected to go along with the decision favored by the controller, the controller will effectively be able to obtain cleansing of that decision.[41] It might be argued, however, that fiduciary duties and norms, as well as reputational considerations, generally lead directors who are independent under the exchange requirements to oppose decisions that would adversely affect public investors. Whether this is in fact the case is the question to which we now turn.

B. Controller Ability to Select Independent Directors Who Will Go Along

In this Section, we explain why, despite fiduciary duties and norms, controllers should commonly be able to have in place at least two independent directors that tend to go along with decisions that are favorable to the controller but unfavorable to public investors.

We note that, for any controlled company, there is a large pool of individuals who would qualify as independent if placed on the board by the controller. Below, we first explain the incentives that many, or most, individuals in this pool would have to go along with the controller if appointed to the board of a controlled company. We then explain the critical role of the controller's power to replace independent directors whenever doing so would facilitate a decision favored by the controller. Given the size of this pool, controllers will generally be able to obtain desired outcomes so long as they can identify *some* individuals within it who are willing to go along.

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[39] *See id.* § 220(a) (limiting the documents that can be obtained via books and records requests to a defined set of materials).

[40] *See, e.g.,* Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, 42 CARDOZO L. REV. 1949 (2021).

[41] For the impact of lax judicial review on independent director behavior and decision making , see C.N.V. Krishnan, Steven Davidoff Solomon & Randall S. Thomas, *How Do Legal Standards Matter? An Empirical Study of Special Litigation Committees*, 60 J. CORP. FIN. 101543 (2020) (showing that in states with the weakest legal standards for Special Litigation Committees (SLCs) judicial review, SLC cases are more likely to be dismissed).

1. Independent Directors' Incentives to Go Along

An early article co-authored by one of us provides an analysis of the incentives of independent directors in controlled companies to make decisions that are favorable to the controller.[42] The key point is that, in a controlled company, the continued service of directors depends on the decisions of the controller.[43] Going along with the controller should therefore be expected to increase the odds that the controller will retain the director. Conversely, independent directors that do not go along with the controller should be expected to lose controller support and therefore be replaced either when their initial term ends or even before that time. Incentives aside, social norms often lead individuals who are placed in a position by a given individual to feel some sense of gratitude toward that individual.[44]

Moreover, in addition to retaining independent directors who go along with them, controllers are often able to provide such directors with additional benefits. For example, as was documented in a study by Professor Da Lin, controllers frequently appoint nominally independent directors to senior positions and directorships at other firms under their control.[45] Going along with the controller will increase the odds of receiving such positions.

Former Chief Justice Strine, who was an important supporter of SB 21, provided a vivid explanation of the situation facing independent directors in controlled companies:

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[42] *See* Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271 (2017). Our discussion below draws on Lucian A. Bebchuk & Kobi Kastiel, *How to Control Controller Conflicts,* 54 J. CORP. L., 1001 (2025), which overviews and restates the Bebchuk-Hamdani analysis when examining the questions of whether and when approval by independent directors, without a supplemental majority-of-the-minority approval, is sufficient to cleanse corporate actions involving a controller conflict.

[43] For an analysis of the limited incentives and ability of independent directors to control insiders, especially in jurisdictions where the main agency problem arises between controlling and minority shareholders, *see* María Gutiérrez Urtiaga & Maria Isabel Sáez Lacave, *Deconstructing Independent Directors* 13 J. CORP. L. STUD., 63 (2013).

[44] *See, e.g.,* LUCIAN A. BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 23–44 (2006) (discussing how having a sense of obligation and loyalty toward the CEO might contribute to a tendency to go along with CEO pay wishes); Julian Velasco, *Structural Bias and the Need for Substantive Review*, 82 WASH.. U. L. Q. 821, 858–60 (2004) (showing that friendship and collegiality among board members create a structural bias that may affect directors' ability to act in the interests of shareholders).

[45] *See generally* Da Lin, *supra* note 1. *See also* Jared A. Ellias, Ehud Kamar & Kobi Kastiel, *The Rise of Bankruptcy Directors*, 95 S. CAL. L. REV. 1083 (2022) (showing how a relatively small group of individuals serves repeatedly as repeat directors across multiple distressed firms, especially those controlled by private-equity sponsors).

> "[W]hen an 800-pound gorilla wants the rest of the bananas, little chimpanzees, like independent directors and minority stockholders, cannot be expected to stand in the way, even if the gorilla putatively gives them veto power. Lurking in the back of the directors' and stockholders' minds is the fear that the gorilla will be very angry if he does not get his way."[46]

Of course, it might be argued that this description, which was written in the context of freezeout decisions, does not fit non-freezeout settings. In earlier work, we compared independent directors' incentives to go along with the controller in freezeouts settings and in non-freezeouts settings.[47] This analysis concluded that these incentives are no weaker, and if anything might be stronger, in the latter settings.

For one thing, by contrast to freezeouts decisions, non-freezeout decisions are not end-game decisions in a company that is expected to cease to exist. Consequently, the argument might go, independent directors in an ongoing company may place greater weight on how their decisions will affect their chances of being retained by the controller when their term ends.[48]

Before concluding the discussion of incentives, we should consider whether independent directors in controlled companies will have some countervailing incentives to protect public investors. It might be argued that independent directors might be incentivized to protect public investors in order to improve or maintain their reputation among institutional investors. However, the reelection of independent directors in controlled companies depends on the controller rather than on institutional investors. Accordingly, when it comes to increasing the odds of future reelection, how an independent director is perceived by the controller is more important than how they are perceived by institutional investors.[49]

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[46] Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 509 (2002); *see also In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 436 (Del. Ch. 2002) (using same analogy).

[47] *See* Bebchuk & Kastiel, *How to Control Controller Conflicts, supra* note 42.

[48] *Id.*, at 15. *See also* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785 (2003) (discussing how a controlling shareholder may extract private benefits of control in various ways).

[49] To be sure, it might be argued that improving their reputation among institutional investors could increase their odds of being offered director positions in other companies without a controller. *See* Lawrence A. Hamermesh, Jack B. Jacobs & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 342–44 (2022) (explaining that in non-freezeout situations independent directors might be motivated to constrain the controller by reputational considerations); *cf. Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004) ("[T]he non-interested director would be more

In any event, the overall incentives of independent directors are to go along with the controller. It might nonetheless be argued that, despite these incentives, individuals serving as independent directors might disregard them and choose to resist the controller's preference for decisions that benefit the controller at the expense of public investors. Independent directors are moral agents and might elect "to do the right thing." We fully agree with this proposition. However, as we now explain, the constraint this places on controlling shareholders is far weaker than it may appear given controllers' power to select, and reselect as needed, the individuals who serve as independent directors on the board.

2. The Critical Power to Select and Reselect Directors

The independent directors on the board of any controlled company are not selected at random, nor are they otherwise a representative sample of the broader pool of individuals who would be qualified to serve as independent directors of that company. Accordingly, in assessing the opportunities that SB 21 will create for controllers, the critical question is not how individuals in this broader pool would likely act if placed on the company's board. Rather, the critical question is whether the independent directors whom the controller selects for the board will go along with the controller's preferred outcomes—and that is a very different inquiry.

Consider a controller who seeks to obtain a massive compensation award in the coming year. Suppose that granting such an award would be contrary to the interests of public investors, and that many individuals within the broader pool of potential directors might be unwilling to approve it. This does not imply, however, that the controller would be unable to identify within that pool at least two individuals who could be expected to go along.

Prior to selecting independent directors, the controller will presumably meet with potential candidates. During these discussions, the controller might inquire about the candidate's views on mega-compensation awards and might also gain a sense of how likely the candidate would be to support the controller more generally. On this basis, the controller might well be able to identify two individuals who could be expected to approve the mega-compensation package the controller desires.

Under SB21, it would be sufficient for the controller to identify two such individuals and have them placed on the committee that will review the massive compensation package. Once those two individuals are identified, the controller would be able to base the selection of the remaining directors on other considerations.

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willing to risk his or her reputation than risk the relationship with the interested director."). However, to the extent that this factor exists, it should be expected to be stronger in freezeout situations than in non-freezeouts settings.

Thus, even assuming that most potential independent directors would likely decline to go along with the compensation package, the controller would still be able to place on the board two individuals drawn from the (possibly small) subset of those who could be expected to go along. Identifying two such individuals would be all that it takes to obtain cleansing under SB21.

Importantly, in seeking individuals who would likely go along, the controller would be able to have two or more bites at the apple. Suppose that the two individuals initially selected by the controller unexpectedly decline to approve the compensation package submitted for review by the controller and the company. This would hardly be irreversible. Under SB21, the controller would still be able to replace those two independent directors with two others selected with the expectation that they would approve the desired package.

Furthermore, the prospect of reselection in this manner makes it more likely that the initially selected independent directors will go along with the desired compensation package. Consider two independent directors who recognize that their refusal to approve the compensation package will lead to their immediate replacement by two new independent directors who can be expected to approve it. In such a case, the prospect of replacement will discourage refusal for two reasons. First, as discussed earlier, the initial directors will have an incentive to avoid losing their positions. More importantly, they will realize that refusing to approve the package will not prevent it from being awarded; instead, it will likely result in its approval by new independent directors that the controller will put in place.

IV. CHANNELS OF OPPORTUNISM

This Part discusses six channels through which, following the adoption of SB 21, controllers could obtain substantial benefits at the expense of public investors. We do not attempt to provide an exhaustive list of such channels. Rather, the main purpose of this Part is to highlight the range and overall significance of the various mechanisms through which controllers may extract private benefits.

We would like to stress that the various channels for opportunism discussed in this Part are not hypothetical law school scenarios or remote possibilities imagined by two concerned law professors. Rather, each channel represents a type of conduct that can plausibly be expected to happen frequently—and with increasing regularity—over time. Indeed, following the relaxation of constraints on controllers, each of the channels described below can be expected to recur across many controlled companies, both single-class and dual-class.

A. Freedom to Radically Separate Votes and Cash Flows

In this Section, we focus on one key channel for benefiting controllers that has received little attention: the ability of controllers to freely unload as much of their

equity capital as they wish without losing—or even weakening—their lock on control.[50]

As explained below, this mechanism is likely to be widely used by controllers, often resulting in substantial reductions in their equity stakes. Many controllers, therefore, should be expected to end up with only a very small—or even tiny—equity stake while still maintaining a lock on control. Such reductions would severely distort their incentives, producing large and pernicious consequences for public investors and the broader economy.[51]

To understand how this instrument for benefitting controllers to the detriment of public investors and the economy works, consider a hypothetical company, CORP, securely controlled by shareholder C, who owns a majority of CORP's voting rights. CORP might have:

- A one-share-one-vote structure, with C holding slightly over 50% of the shares; or
- A dual-class structure in which public investors own 90% of the equity but hold only low-vote shares (1 vote each), while C owns 10% of the equity in high-vote shares (10 votes each), still amounting to majority voting control.

Suppose now that C wishes (as is often the case) to cash out a substantial portion of their equity stake to achieve diversification benefits and considerably reduce risk-bearing costs. Before SB 21, selling a significant number of high-vote shares would likely forfeit, or at least weaken, the controller's lock on control, deterring such sales.

Post-SB 21, controllers can "have their cake and eat it too" by cashing out any desired fraction of the equity capital they own without any weakening of their lock on control. In particular, with the relaxation on constraints regarding conflicted corporate actions, controllers could (i) amend the charter to authorize a large number of nonvoting shares and (ii) distribute them pro rata as a dividend to all shareholders.

For example, if each share—high- or low-vote—were paired with nine new nonvoting shares, the distribution of these new shares to the controllers and public investors would not change anyone's fraction of equity capital or voting rights. Afterward, however, the controller could sell as many nonvoting shares as desired without affecting control.

- In the single-class company scenario, a controller with slightly over 50% of the equity capital could sell nearly all their nonvoting shares,

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[50] *See* Bebchuk & Kastiel, *supra* note 15, at 1456 (discussing how holders of a small minority of a company's shares can exercise control using devices such as dual-class shares).

[51] *Id.* at 1466–68 (explaining the distortion to incentives from small-minority controller stakes)

ending up with only slightly above 5% of the company's equity while retaining majority voting power.

- In the dual-class scenario, a controller with 10% of the equity capital (and majority voting power) could cut its equity stake to 1% while still holding a lock on control.

A real-world parallel arose when Mark Zuckerberg attempted a similar move at Facebook (now Meta) in the pre-SB 21 era. In 2015, Zuckerberg expressed his interest to sell a large portion of his equity stake at that time for philanthropic purposes. Such a sale would have considerably weakened Zuckerberg's lock on control. Facebook's independent directors, however, agreed with Zuckerberg that a reclassification was desirable to maintain his lock on control to support long-term strategic focus and fully benefit from his talents and vision.[52] As result, the company pursued a charter amendment to authorize the issuance of a large number of nonvoting shares and planned to distribute them pro rata as a dividend to all shareholders.[53]

In the Meta pre-SB 21 case, shareholders brought a derivative suit that proceeded to trial.[54] On the eve of trial, Zuckerberg and Meta withdrew, and the board announced it would not proceed with the reclassification.[55] As a result, Zuckerberg still faces certain substantial limits on his ability to sell shares without losing control, and he has not since then significantly reduced his equity stake in Meta.[56]

It is worth recalling that Meta was among the companies reportedly considering reincorporating outside Delaware before SB 21 passed—a pressure point that helped spur the law's adoption.[57] Post-SB 21, the door will be open for such moves by Zuckerberg and other controllers. With the approval of two qualifying "independent" directors selected by Zuckerberg, he could arrange to have Meta issue and

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[52] *See* Facebook, Inc., Current Report (Form 8-K) (June 20, 2016); Facebook, Inc., Definitive Proxy Statement (Form DEF 14A) 37–40, 55–74 (June 2, 2016).

[53] *Id.*

[54] Ronald Barusch, *Dealpolitik: For Facebook and Zuckerberg, Avoiding Testimony in Share Case Could Cost $20 Million an Hour*, WALL ST. J. (Aug. 7, 2018).

[55] *Id.* In the interest of disclosure, we note that Lucian Bebchuk served as an expert and submitted an expert report in the above Facebook litigation and that Kobi Kastiel provided research services in connection with this expert report.

[56] Other controlled companies that sought to pursue similar reclassification moves have faced shareholder litigation or meaningful shareholder resistance. Most prominently, Google (now Alphabet) and Under Armour adopted non-voting stock reclassification plans that enabled their controllers to further separate voting rights from cash-flow rights; the two transactions were challenged by shareholder plaintiffs and ultimately resolved through settlements. IAC/InterActiveCorp proposed a reclassification plan but ultimately abandoned it following shareholder litigation. NRG Yield pursued a reclassification designed to preserve controller voting power while enabling equity sell-downs, but it had to submit the proposal to a shareholder vote in advance. For a discussion of these mid-stream reclassifications, *see* Bebchuk & Kastiel, *supra* note 21 at 1487–89.

[57] *See* Bebchuk, Kastiel & Rock, *supra* note 3.

distribute nonvoting shares, and he could do so without risk of litigation or judicial review. Once this was accomplished, Zuckerberg would be able to reduce his equity capital as much as desired, by selling nonvoting shares, without forgoing any votes and thus his lock on control. Given that most of Zuckerberg's wealth remains tied up in Meta stock, diversification benefits and reduced risk-bearing costs make it reasonable to expect that he might eventually pursue this path. As our prior work shows, such a drastic reduction in equity stake should be expected to substantially worsen incentives, harming public investors and company value.[58]

The key message of this Section, however, is not that Zuckerberg alone is likely to use this type of move to substantially reduce his equity stake in Meta without relinquishing his lock on control. The freedom to radically separate voting rights from cash flows should be expected to be valuable to many, if not most, controllers. Doing so enables them to obtain liquidity benefits—cashing out as much of their equity capital as desired—without bearing any cost in terms of giving up voting power. We should therefore expect similar midstream moves across many, if not most, controlled companies.

As Part V below will further detail, by opening the door to an easy separation of cash flow rights and voting rights, ownership patterns in U.S. public companies can be expected to be transformed. While there are already many controlled companies, we can anticipate an accelerated increase in their number, as existing controllers will be far less likely to relinquish control to cash out their investments. Moreover, among controlled companies, controllers will tend to hold substantially smaller stakes as they use this mechanism to sell shares without losing voting power. The future, therefore, is likely to bring more controllers and lower controller stakes, a transformation that would impose substantial losses on public investors and generate considerable efficiency costs.

B. The Death of Sunsets?

A sunset provision with a time limitation eliminates a dual-class structure after a fixed period of time following the IPO (such as ten or fifteen years) unless an extension is approved by the shareholders unaffiliated with the controller. When the clause is triggered, the shares with the superior voting rights automatically convert into ordinary shares, and the company's high-voting class is eliminated. Sunset provisions are aimed at addressing the distorted incentives of controllers who continue to retain dual-class structures even when those structures become substantially inefficient.

In an article published eight years ago, we put forward the case for sunsets and

[58] Bebchuk & Kastiel, *supra* note 21.

called on public officials and institutional investors to endorse the adoption of sunset provisions at the IPO stage.[59] Our earlier work provided a theoretical framework for subsequent empirical studies on the topic, which tested and confirmed our economic prediction that the costs of indefinite dual-class structures rise, and their benefits decline, the longer they extend past the IPO.[60] Subsequently, the Council of Institutional investors ("CII"), as well as leading investors such as BlackRock, endorsed the time-based sunsets for which we advocated.[61] CII and many large institutional investors have strongly objected to the use of dual-class structures without sunset provisions that prevent perpetual entrenchment. CII has also been collecting and reporting on its website which dual-class companies do and do not have a time-based sunset provision.[62]

Many dual-class companies adopted sunset provisions in their IPO charters in recent years.[63] The Council of Institutional Investors (CII) has been tracking

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[59] Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585 (2017). For a critique of the use of sunsets or of their necessity, *see* Jill Fisch & Steven Davidoff Solomon, *The Problem of Sunsets* 99 B.U. L. Rev. 1057 (2019); Yifat Aran, Brian Broughman & Elizabeth Pollman, *CEO Turnover at Dual-Class Firms* 1 (Working Paper, 2025).

[60] *See, e.g.,* Lindsay Baran, Arno Forst & M. Tony Via, Dual Class Share Structure and Innovation (Dec. 21, 2018) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183517; Martijn Cremers, Beni Lauterbach & Anete Pajuste, *The Life-Cycle of Dual Class Firm Valuation*, 13 REV. CORP. FIN. STUDIES (2024) (forthcoming); Hyunseob Kim & Roni Michaely, *Sticking Around Too Long? Dynamics of the Benefits of Dual-Class Voting* (Eur. Corp. Governance Inst., Working Paper No. 590, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3145209; Robert J. Jackson Jr., Comm'r, U.S. Sec. & Exch. Comm'n, Perpetual Dual-Class Stock: The Case Against Corporate Royalty (Feb. 15, 2018).

[61] For Blackrock's support of time-based sunsets, *see* Open Letter from Barbara Novick, Vice Chairman, BlackRock, Inc., to Baer Pettit, President, MSCI, Inc. (May 3, 2018), https://corpgov.law.harvard.edu/2018/05/03/open-letter-regarding-consultation-on-thetreatment-of-unequal-voting-structures-in-the-msci-equity-indexes/ ("[W]e believe that [dual-class] structures should have a specific and limited duration."). The 2018 version of the Commonsense Corporate Governance Principles, issued by a group of leading issuers and investors, also expressed support for sunsets. *See* Open Letter: Commonsense Principles of Corporate Governance (2018), http://www.governanceprinciples.org/wp-content/uploads/2018/10/2016-OpenLetter-Principles.pdf.

[62] *See* https://www.cii.org//Files/publications/dual-class/Time-based%20Sunsets%20Review%20(updated%2025-Sep-2025).pdf.

[63] *Id.* The Council of Institutional Investors data on dual-class companies with time-based sunset provisions excludes foreign private issuers (FPIs), special purpose acquisition companies (SPACs), and real estate investment trusts (REITs), and US-incorporated companies with less than $200 million in market capitalization. For a discussion of the increasing use of sunset provisions in recent years, *see* Jill E. Fisch, David Berger & Steven Davidoff Solomon, *Extending Dual Class Stock: A Proposal* (2024), at 28-29.

companies with sunsets, and its data indicates that, as of the end of 2025, 45 controlled dual-companies have sunset provisions,[64] with 41 of them incorporated in Delaware and 4 in Nevada.[65]

In these 41 Delaware companies with sunsets, post-SB 21, controllers will largely be able to eliminate the sunsets if and when they elect to do so and thus extend their control indefinitely, and public investors will thus largely lose the sunsets' protections. Whenever a controller is able to formally pass a sunset-eliminating charter amendment, the controller will face little risk of litigation and judicial scrutiny so long as the amendment is approved by two independent directors selected by the controller, possibly with obtaining such approval in mind.

Will controllers largely be able to get such charter amendments passed? The first question to examine is whether the charters of the relevant dual-class companies include provisions that require separate approval from a majority of the low-vote shareholders (an "MOM vote") to extend the sunset provision. Such a mechanism is the most natural way of ensuring that sunsets are not eliminated against the opposition of the low-vote shares that are supposed to be protected by the sunset. Our examination of the charters of these 41 Delaware-incorporated, dual-class companies with time-based sunsets indicates that 40 of these 41 companies *do not have* such a MOM vote requirement.

Without the protection of a MOM vote, the key question is whether the controller will be able to get the charter amendment passed with the required majority among all votes cast. Our review of the charters indicates that in 34 of the 40 companies (85%), the holders of super-voting shares held by themselves sufficient votes to unilaterally pass a sunset-eliminating charter amendment.[66] In five of the remaining six companies, the controller and other high-vote shareholders will have a dominant role in any vote on a charter amendment and will be able to eliminate a sunset provision against the opposition of a majority of the public investors.

Thus, for public investors who pre-SB 21 were seemingly protected from indefinite control—at least absent their approval—SB 21 exposes them to a new and

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[64] Our analysis relies on the list of dual-class companies with time-based sunset provisions compiled by the Council of Institutional Investors. *See supra* note 62. We have defined a company to be controlled where greater than one-third of the total vote is in the hands of high-vote shareholders. We eliminated four companies from our list that did not meet these criteria. For each company on our list, we reviewed the company's charter provisions governing amendments to the sunset clause and determined whether elimination of the sunset provision required approval by a majority of the unaffiliated public shareholders, or whether the controller could unilaterally, or together with other high-vote shares, effect such an amendment through its voting power.

[65] We identified the subset of companies incorporated in Delaware because they are directly affected by SB 21. However, even if we include Nevada companies our result will not change as none of these companies provide low-vote-shareholders with a MOM vote protection against a unilateral extension of a sunset provision.

[66] This percentage will increase to 86.3% if we include the four Nevada companies on our list.

considerable risk. The sunset provisions on which these investors have been relying will no longer safeguard their interests. Controllers will be able to eliminate these provisions at a time of their choosing, or, at minimum, will be expected to do so before the sunset provisions reach their triggering dates. The resulting ability to extend control indefinitely provides controllers with another channel for obtaining large private benefits at the expense of public investors.

C. Opening the Compensation Floodgates

In this Section, we explain that, following the relaxation of constraints on controller conflicts, the compensation floodgates should be expected to open in many controlled companies, especially those with a small-minority controller or a very-small-minority controller.

In 2018, Tesla and Elon Musk introduced—and drew widespread attention to—a founder-CEO compensation arrangement of unprecedented scale. The award, which the company justified on the grounds that it was necessary to incentivize Musk to remain at Tesla and to continue delivering extraordinary performance, ultimately provided Musk with compensation valued in the tens of billions of dollars.[67] While Musk's role and prominence may be unusual, there are likely to be many founder-CEOs in controlled companies who similarly view themselves as uniquely important to their firms and who therefore find the prospect of mega-compensation packages attractive.

Consistent with the discussion above, and even prior to SB 21, several controlled companies—particularly those with small-minority or very-small-minority controllers—have already provided their founder-CEOs with compensation packages of extreme magnitude. The key point, however, is not that pre-SB 21 litigation was always sufficient to block such arrangements; it was not.[68] Rather, the critical point is that, following SB 21, approving such compensation arrangements will become substantially easier. Controllers will commonly be able to obtain insulation from judicial scrutiny by satisfying SB 21's low procedural threshold, even when compensation awards transfer very large amounts of value to founder-CEOs with limited equity stakes.

To illustrate the magnitude of compensation packages that have already been approved in recent years at controlled companies, *Table 2* below presents a selected set of prominent examples since 2020. These examples are not intended to be exhaustive, but rather to illustrate the scale of awards that have been granted to

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[67] *See Tornetta v. Musk*, 2024 WL 380421 (Del. Ch. Jan. 30, 2024) and *Tesla, Inc. Deriv. Litig.*, No. 534, 2024 (Del. Dec. 19, 2025).

[68] *See, e.g.,* Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747 (2004) (providing evidence of the difficulty of pursuing derivative lawsuits).

founder-CEO controllers and the significant fraction of firm value such awards can represent.

Table 2: Recent Mega-Compensation Packages at Controlled Companies

Year	Company	Founder-CEO Controller	Award Value (USD)	% of Market Capitalization
2020	Palantir Technologies Inc.	Alexander Karp	$1.1 billion	3.2%
2020	Snap Inc.	Evan Spiegel	$637 million	5.0%
2021	The Trade Desk Inc.	Jeff Green	$835 million	2.5%
2021	Robinhood Markets Inc.	Vladimir Tenev	$796 million	6.0%

Notes: Award values reflect estimated grant-date values unless otherwise indicated. Percentages of market capitalization are calculated using firm market values at or near the time of grant. Data are drawn from companies' proxy statements, Form S-1 and Form 10-K filings, and contemporaneous financial press coverage.

There are two aspects of the above examples that are worth stressing. First, these are awards of massive value, and they are an order of magnitude significantly larger than average compensation in non-controlled public companies, measured not in millions of dollars but in hefty fractions of the company itself: Palantir (3.2% of company's market value);[69] Trade Desk (2.5%);[70] Robinhood (6.1%);[71] and Snap (5.3%).[72]

Second, these examples all involve founders of companies with a dual-class structure or a voting agreement who are small-minority controllers. In companies where the founder holds a small-minority or even very-small-minority stake of the company's equity but retains effective control through dual-class stock, that capital structure allows the founder to bear only a small fraction of the costs to shareholders produced by mega-compensation packages.

Post-SB 21, controllers will be able to obtain mega-compensation packages with very large monetary value and to capture in this way a considerable fraction

[69] Theo Francis, *For a Few CEOs, Pay Keeps Growing—By the Billions*, WALL ST. J. (Aug. 4, 2025).

[70] Theo Francis, *Biggest CEO Pay Package So Far? $835 Million to the Head of an Ad-Tech Firm*, WALL ST. J. (Apr. 19, 2022).

[71] Eliot Brown, *Today's Tech Founders Don't Just Own the Company. They're Also Getting Huge Pay Packages*, WALL ST. J. (Oct. 16, 2021).

[72] Tim Bradshaw, *Snapchat Creator Evan Spiegel's Pay Hits $638m*, FIN. TIMES (Feb. 22, 2018).

of company value by having the compensation approved by two independent directors selected (or re-selected) by them.[73] Controllers naturally will have strong incentives to receive such mega-compensation awards, and SB 21 will therefore open the compensation floodgates. Controllers, and especially small-minority controllers, should be expected to take substantial advantage to this opening, greatly expanding their ability to extract private benefits of control.

D. Partial Freezeouts?

In examining conflicted actions in controlled companies, Delaware courts have paid close attention to freezeouts. Indeed, the *MFW* framework was first established for such transactions. The introduction of this framework was accompanied by a concern that directors who are appointed by, and can readily be replaced by, the controller—even if formally independent—should not realistically be expected to be sufficiently insulated from controller pressure to block controller-favoring terms.[74]

The drafters of SB 21 accepted that controller-favoring freezeouts raise especially serious concerns, and SB 21 therefore retains strong limitations on such transactions. In particular, SB 21 codifies that approval by a majority of unaffiliated shareholders is necessary for cleansing a freezeout.[75]

As explained below, however, SB 21 leaves public investors vulnerable to controller-favoring "partial freezeouts" that raise serious concerns similar to those posed by full freezeouts. SB 21 provides an explicit definition of a "going private transaction" for which an approval of public investors is required for cleansing.[76]

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[73] Pre-SB 21, some attempts to obtain mega-compensation packages were the subject of legal challenge and shareholder litigation. This was the case with Musk compensation from Tesla, *see* Tornetta, supra note 67. It was also the case with Trade Desk (litigation blocked by only due to the demand requirement). *See* In re Trade Desk, Inc. Deriv. Litig., 2025 Del. Ch. LEXIS 40, at *77–78 (Del. Ch. Feb. 14, 2025). In the well-known case of EZCrop, the Delaware Chancery Court held the "entire fairness" standard of judicial review applies to challenged self-dealing transactions between a corporation and its controlling stockholder, even if approved by an independent committee, unless the process includes both independent director approval and a fully informed, non-coerced shareholder vote. *See* In re EZCORP Inc. Consulting Agreement Derivative Litig., No. 996, 2016 WL 301245, at *15 (Del. Ch. Jan. 25, 2016).

[74] See *infra* Section III.B.1.

[75] *See* S. 21, 153rd Gen. Assemb. § 144(c)(1) (Del. 2025).

[76] *Id.,* at § 144(e)(6) ("Going private transaction" means: "…. a "Rule 13e-3 transaction" (as defined in 17 CFR § 240.13e-3(a)(3) or any successor provision); and b. For any other corporation to which paragraph (e)(6)a. of this section does not apply, any controlling stockholder transaction, including a merger, recapitalization, share purchase, consolidation, amendment to the certificate of incorporation, tender or exchange offer, conversion, transfer, domestication or continuance, pursuant to which all or substantially all of the shares of the corporation's capital stock held by the disinterested stockholders (but not those of the controlling stockholder or control group) are cancelled, converted, purchased, or otherwise acquired or cease to be outstanding").

Under this definition, a sale of substantially all of the company's assets constitutes a going-private transaction, but a sale of significant assets does not, so long as it does not meet the threshold of "substantially all" of the assets.

Delaware case law makes clear that a controlled company can sell a substantial portion of its assets without crossing the above threshold. In the recent case of *Altieri v. Alexy*, the court stated that whether a sale of assets meets this threshold depends on both "the quantitative and qualitative importance of the transaction at issue."[77] In particular, the court must consider, among other things, the overall effect of the transaction on the corporation, as well as other data points such as the percentage of overall revenue and the contribution of the assets sold to company's future earnings potential.[78] Under the specific circumstances of *Altieri*, the court determined that the sale of a subsidiary, which represented 62% of the company's revenues and about half of its goodwill, for a significant amount of $1.2 billion, did not constitute a sale of all or substantially all of the company's assets.[79]

Thus, post-SB21, a controller will be able to arrange for a substantial portion of the company's assets to be sold to the controller or an affiliated entity without obtaining the approval of public investors and with little risk of litigation or judicial scrutiny. We refer to such a substantial sale of assets as a "partial freezeout," because it raises similar economic concerns to those posed by full freezeouts. In both cases, controller-favoring terms can transfer a substantial fraction of the company's economic value to the controller at the expense of public investors.

Applying a much more lenient standard of review to partial freezeouts than to full freezeouts is difficult to defend. *Ex post* approval by two independent directors cannot serve as an effective screening mechanism to protect against controller-favoring full freezeouts, and there is no reason to expect it to function as an effective mechanism for guarding against controller-favoring partial freezeouts. We therefore conclude that, post–SB 21, partial freezeouts will provide controllers with yet another channel for obtaining substantial private benefits.[80]

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[77] *See* Altieri v. Alexy, C.A. No. 2021-0946-KSJM (Del. Ch. May 22, 2023).

[78] *Id*. *See also* Gimbel v. Signal (Ct. Ch., 1974).

[79] Altieri, *id. See also* Hollinger v. Hollinger Intl. (Ct. Ch., 2004). (finding that a sale of crown jewel asset, representing about 57% of the company's total asset value, but less than half the company's revenues during the prior three years and a declining percentage of the company's EBITDA, did not meet the substantially-all test, noting that the sale did not strike a blow to the company's heart).

[80] Professors Steve Bainbridge and Eric Talley raise the question of whether it might be possible to structure a transaction that is economically equivalent to a full freeze-out but that, under SB 21, could be cleansed solely through the approval of two independent directors. They propose several creative, multi-step schemes that could arguably achieve this result. While it remains uncertain whether a controller will in fact be able to achieve outcomes economically equivalent to a *complete* freeze-out, we show in this Section that a *partial* freeze-out can be accomplished under SB 21 in a

E. Related-Party Transactions and Allocation of Opportunities

A partial freezeout is only one type of related-party transaction. There are also other types of related-party transactions that can be used to transfer substantial economic value to the controller. For example, the controlled company might borrow from or lend to the controller (or its affiliates), and it might sell or purchase goods and services to or from the controller (or its affiliates).[81] In addition, decisions regarding the allocation of business opportunities between the controlled company and the controller or its affiliates can likewise provide vehicles for conferring substantial private benefits on the controller.[82]

The potential for controller-favoring related-party transactions and allocation of opportunities is especially large and economically consequential when the controller has substantial business assets outside the controlled company. It might be useful to illustrate the range and richness of such opportunities by noting various events involving Tesla and business entities completely or substantially owned by Musk (putting aside whether Musk was a controller or merely a dominant CEO of Tesla). In particular, these events involve, among other things, (a) Musk's directing that some valuable artificial-intelligence (AI) chips to which Tesla was contractually entitled be sent instead to another entity owned by Musk,[83] (b) Musk's statements that how he would allocate AI investment opportunities between Tesla and other business entities he owns would depend on the fraction of Tesla shares granted to him,[84] and (c) Tesla's sending some of its engineers to work at Twitter immediately following the latter's acquisition by Musk.[85] In each of these cases,

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straightforward manner that would be difficult to challenge. Eric Talley, *[Call for Hypothetical Scenarios Evading SB 21]*, LINKEDIN (January 2025), https://www.linkedin.com/posts/eric-talley-808b52b_delaware-laws-biggest-overhaul-in-half-a-activity-7297720515752808448-i0Fv.

[81] *See, e.g.*, Vladimir Atanasov, Bernard Black & Conrad S. Ciccotello, *Law and Tunneling*, 37 J. CORP. L. 1 (2011).

[82] *See, e.g.*, *Quadrant Structured Prods. Co. v. Vertin,* 102 A.3d 155, 183–85 (Del. Ch. 2014) (controller benefited from decision to defer interest payments owed on its own notes); *In re MAXXAM, Inc.*, 659 A.2d 760 (Del. Ch. 1995) (controller obtained a loan from the corporation and later purchased corporate real estate on favorable terms).

[83] Lucian Bebchuk & Robert J. Jackson, Jr., *The Elephant in Tesla's Boardroom*, CLS BLUE SKY BLOG (June, 2024), https://clsbluesky.law.columbia.edu/2024/06/06/the-elephant-in-teslas-boardroom/ (mentioning that "Musk asked a key supplier to redirect scarce artificial-intelligence chips reserved for Tesla to his other companies" and highlighting "Musk's threat not to develop Tesla into an artificial-intelligence leader if he doesn't get a larger voting stake").

[84] *Id.* (explaining how Musk said that he was "uncomfortable growing Tesla to be a leader in AI … without having ~25% voting control").

[85] Lora Kolodny, *Elon Musk has pulled more than 50 Tesla employees into his Twitter takeover*, CNBC (Oct. 31, 2022), https://www.cnbc.com/2022/10/31/elon-musk-has-pulled-more-than-50-tesla-engineers-into-twitter.html ("Elon Musk has pulled more than 50 Tesla employees into his Twitter takeover.").

depending on the decisions made and the terms chosen, significant value could have been transferred from Tesla to other business entities owned by Musk.

To summarize, post SB 21, controllers will be able to cleanse related-party transactions and allocations of opportunities that benefit them, and do so with little risk of litigation or judicial scrutiny, by having such actions approved by two independent directors whom the controller can select (or reselect if the initially appointed directors do not go along) with this purpose in mind. Thus, controller-favoring decisions regarding related-party transactions and the allocation of corporate opportunities will provide yet another channel for obtaining significant private benefits.

F. Reincorporations

We have been discussing what controllers of Delaware companies will be able to do post-SB 21, given the relaxation of constraints under Delaware law. However, it is also worth noting that, to the extent a controller finds the corporate law of another state even more advantageous, SB 21 will enable the controller to have its controlled company reincorporate in that state and benefit from its even more relaxed constraints.

Under the Delaware General Corporation Law, a shareholder vote of approval is required for changes to the company's basic "rules of the game,"[86] such as charter amendments and reincorporations.[87] In controlled companies, however, the controlling shareholder commonly has the power to get such an approval vote formally passed. The more practically difficult question, then, is whether a decision to reincorporate should be subject to enhanced judicial scrutiny.

In *TripAdvisor*, the Chancery Court ruled that cleansing a decision to reincorporate from Delaware to Nevada requires an approval vote by the majority of disinterested shareholders following the *MFW* framework.[88] The Supreme Court reversed the decision on grounds that, without pending litigation or some other special aspect, the claim that the reincorporation would provide the controller with

[86] For an introduction and a detailed discussion of the concept of corporate "rules of the game," *see* Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).

[87] *See* DEL. CODE ANN. tit. 8, § 242 (2023) (charter amendments). Re-incorporations are generally technically affected through a merger and thus are governed by DEL. CODE ANN. tit. 8, § 251.

[88] Palkon v. Maffei, 311 A.3d 255, 261 (Del. Ch. 2024) (noting that "[t]he reduction in the unaffiliated stockholders' litigation rights inures to the benefit of the stockholder controller and the directors. That means the conversion confers a non-ratable benefit on the stockholder controller and the directors, triggering entire fairness. There are no protective devices that could lower the standard of review. Entire fairness governs")

a non-ratable private benefit was too hypothetical and speculative.[89] However, because the Supreme Court limited its decision to a judicial review of a reincorporation taking place "on a clear day," the Court left open the door to judicial scrutiny of reincorporation decisions in other circumstances.

SB 21 has closed this door. Going forward, SB21 will largely enable controllers to have their controlled company reincorporate from Delaware to any jurisdiction they elect. So long as they get the reincorporation approved by two independent directors they select (or re-select) with this purpose in mind, the reincorporation will face little risk of litigation and judicial scrutiny. Controllers' expansive freedom to reincorporate away from Delaware has significant implications for the future protection of public investors in controlled companies.

First, as long as this expansive freedom to reincorporate remains in place, the (currently weak) protection of public investors in Delaware controlled companies should not be expected to improve.[90] To begin, if Delaware were hypothetically to tighten controller constraints, then, as long as controllers retained the practical ability to reincorporate, controllers would be able to evade such tightening by reincorporating to Nevada or another state with lax constraints.

Second, given the ability of controllers to reincorporate, Delaware should not be expected to tighten controller constraints in the first place. The enactment of SB 21 was accompanied by statements from Delaware officials expressing a commitment to doing whatever it takes to keep controlled companies incorporated in Delaware.[91] Accordingly, so long as controllers control reincorporation decisions in Delaware companies, Delaware should not be expected to meaningfully tighten constraints on controllers. And if anything, Delaware might further relax them if doing so appears necessary to discourage DExit.

Third, controllers' ability to reincorporate also has implications for the relatively small number of controlled companies incorporated outside Delaware. Some non-Delaware states, such as Nevada and Texas, have controller constraints that are

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[89] Maffei v. Palkon, No. 125, 2024, 2025 WL 384054 (Del. Feb. 4, 2025), at *26 (stating that the plaintiffs did not allege that the reincorporation was intended "to avoid any existing or threatened SB litigation or that they were made in contemplation of any particular transaction").

[90] *See also* Kahan & Rock, *supra* note 2 (discussing the rise of dual-class controlled companies that can credibly threaten to reincorporate from Delaware and have governance demands that traditional corporate law doctrine cannot easily accommodate).

[91] *See, e.g.,* Katie Balevic, *Delaware governor tells BI things may 'need to change' as companies threaten to leave the state*, BUSINESS INSIDER (Feb. 2, 2025), https://www.businessinsider.com/delaware-governor-matt-meyer-corporate-law-elon-musk-bill-ackman-2025-2 (quoting the Governor telling the Business Insider: "[L]et's be clear: If any entity leaves Delaware, we're going to work to win them back… It's really important we get it right for Elon Musk or whoever the litigants are in Delaware courts… We're cognizant that there may be some things that need to change. We're going to work on them").

no tighter than the lax constraints that Delaware has adopted post-SB 21.[92] But what about controlled companies incorporated in states that have stricter rules, or that may adopt stricter rules in the future? So long as those states do not also eliminate controllers' ability to reincorporate, public investors in these controlled companies are unlikely to benefit from the tighter constraints. Post-SB 21, such controllers will be able to reincorporate in Delaware and subsequently make use of the full array of channels for obtaining private benefits discussed in this Part.

V. TRANSFORMATION OF OWNERSHIP PATTERNS

Thus far, the discussion has examined the rules governing controlled companies taking the existence and number of such companies as given. An important conclusion of our analysis, however, is that SB 21 will not only affect controlled companies as they currently exist, but it will also have *a major impact on the incidence and nature of control blocks*.

Much of the corporate governance literature proceeds from the premise that in the United States (as in the U.K., but unlike in continental Europe), most public companies do not have controlling shareholders.[93] Notably, for some commentators, this has been regarded as a positive feature of the U.S. corporate governance landscape.[94] This feature has been in place for a long time and was first systematically documented and highlighted by Berle and Means.[95] In Part II above, we showed that this landscape has already significantly changed, with controlled companies increasing both in incidence and in economic significance. As explained below, however, SB 21 should be expected to accelerate this trend substantially. Indeed, over time, it could transform the U.S. corporate governance landscape into one in which companies with controlling shareholders—and especially companies with small-minority controllers—constitute a dominant, or at least major, component of the U.S. capital markets.

The paradigmatic way in which numerous U.S. companies have developed not to have a controller is as follows. At the IPO stage, many companies do have a controlling shareholder or controlling coalition. Over time, however, the initial controllers' grip on control loosens or disappears for two main reasons. First, to raise capital for investment and growth, companies often issue additional shares, which dilutes the controller's stake. Second, to diversify or to generate cash for personal

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[92] Barzuza, *supra* note 1; Ofer Eldar, *Can Lax Corporate Law Increase Shareholder Value? Evidence from Nevada*, 61 J. L. & ECON. 555 (2018).

[93] *See, e.g.,* La Porta *et al.*, *supra* note 9, at 471.

[94] *Id.*

[95] ADOLF A BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932). *See also* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994).

or business needs, the initial controllers often sell shares gradually. Each of these channels results in an increase in the voting power of shareholders not affiliated with the controller and, individually or in combination, may transform the company into one without a controller.[96] As we explain below, however, SB 21 is expected to curtail substantially or altogether eliminate any post-IPO reduction in the controller's voting power.

There are two major—and mutually reinforcing—reasons for this conclusion. First, and less importantly, the relaxation of controller constraints should be expected to increase the value of control and the private benefits associated with it. As a result, controllers will have stronger incentives to retain their lock on control and to reduce their use of the two channels discussed above. That is, they will have an incentive, other things equal, to reduce the issuance of new voting shares to fund investments and/or the sale of voting shares held by the controller for diversification and other purposes.

Second, and more importantly, as Section IV.A explained, SB 21 will enable controllers to issue shares to fund investments and sell part of their equity capital without any reduction in their voting power. In particular, controllers will be able, with little risk of litigation and judicial scrutiny, to introduce a new class of non-voting shares. Subsequently, a controller wishing to raise additional capital without weakening its lock on control will be able to issue and sell new non-voting shares to public investors. Moreover, a controller wishing to reduce its ownership stake while preserving its voting power could arrange a pro-rata distribution of a large number of non-voting shares and then sell those non-voting shares to obtain liquidity.

What does this imply for the ownership landscape that should be expected to develop over time? Two aspects of this ownership landscape deserve emphasizing. First, companies that go public with a controller will tend to remain controlled companies over time even as they raise more capital and the controller liquidates part of its equity capital. As a result, the fraction of companies with a controlling shareholder will grow substantially over time, and the dominance of public companies without a controller will substantially decline. Down the road, we expect controlled companies will become an increasingly major aspect of the U.S. capital markets.

Second, controllers' use of non-voting shares to avoid any reduction in their voting power will bring about a substantial increase in the fraction of controlled companies that have a small-minority controller, a very-small-minority controller, or even a tiny-minority controller.[97] Even controlled companies that went public with a one-share-one-vote structure could well turn into a dual-class companies as

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[96] *See* Lucian Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA L. REV. 585, 607-09 (2017).

[97] S*ee* Bebchuk & Kastiel, *The Perils of Small-Minority Controllers*, *supra* note 21.

the controller will have incentives to introduce non-voting stock down the road to facilitate the raising of new capital or cashing out some of the controller's equity capital without weakening the controller's lock on control.

As to companies with a dual-class structure, they also will have incentives to introduce and use non-voting shares for these purposes. In standard dual-class structures without non-voting shares, there is a limit to how many new shares can be issued to fund company investments and/or what fraction of the controller's equity capital can be cashed out without forgoing the controller's lock on control.[98] In the new post-SB 21 regime, there will be no such limit; controllers will be able, without reducing their voting power, to decrease their equity stake to whatever level they desire for diversification or liquidity purposes.[99]

Importantly, for any given fraction of companies in the marketplace that have a controlling shareholder, a reduction in the size of the control stake will have substantially detrimental effects on economic performance and public investors. As we demonstrated in our earlier articles on long-standing dual-class structures and on small-minority controllers, agency problems and agency costs should be expected to increase—and indeed increase disproportionately—when the controller's equity stake declines.[100] And subsequent empirical work has reported evidence supporting the conclusions of this analysis.[101]

To be clear, we are not claiming that every company going public with a majority controller will remain controlled indefinitely. Rather, our analysis is intended to identify and highlight the strong economic incentives that would push toward (i) an increase in the fraction of controlled companies and (ii) a reduction in the size of these companies' control stakes. There is a strong basis for expecting ownership structures to develop in the directions we identify.

VI. COSTS TO PUBLIC INVESTORS AND THE ECONOMY

In Part IV, we examined the considerable private gains that controllers should

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[98] *See* Dhammika Dharmapala & Vikramaditya S. Khanna, *Controlling Externalities: Ownership Structure and Cross-Firm Externalities*, 23 J. CORP. L. STUD. 1 (2023) (providing evidence on controllers' wealth concentration and their inability to fully benefit from diversification).

[99] To illustrate, if post-SB 21 Mark Zuckerberg arranges to have Meta proceed with the introduction of non-voting shares that was attempted in 2016 but blocked by shareholder litigation, Zuckerberg will be able to reduce his fraction of equity capital to about 4% or possibly less and still retain a lock on control. *Id.* at 1456-57.

[100] *See, e.g.,* Bebchuk & Kastiel, *The Untenable Case for Perpetual Dual-Class Stock, supra* note 13; Bebchuk & Kastiel, *The Perils of Small-Minority Controllers*, *supra* note 21. The detailed analysis of these two articles, in turn, builds on an insight put forward in Lucian Arye Bebchuk, Reinier Kraakman & George G. Triantis, *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights*, in CONCENTRATED CORPORATE OWNERSHIP 295 (Randall K. Morck ed., 2000).

[101] *See* the sources in *infra* notes 106-116.

be able to obtain post-SB 21. In this Part, we turn to the effects on public investors and corporate value. The conclusion of our analysis below is that the costs to public investors and corporate value will not only be substantial but that they will also far exceed the gains to controllers. This divergence will result from the substantial distortions and efficiency costs produced by the choices that controllers should be expected to make in the post-SB 21 regime. As will be explained below, these distortions and efficiency costs will be especially large in companies controlled by small-minority controllers.

Section A discusses these distortions and efficiency costs while taking as given the size of the equity stakes held by controllers. We explain how distortions and inefficiencies are expected to arise in connection with each of the channels for obtaining private benefits. Building on our earlier work on the efficiency costs of small-minority controllers,[102] we also explain that the agency costs discussed are expected to be larger, indeed disproportionately larger, in controlled companies in which the controller's equity stake is small.

In Section B, we adjust the preceding analysis to take into account the conclusions of Part V regarding the effects that the relaxation of controller constraints is expected to have on ownership patterns. Part V showed that SB 21 should be expected to lead to a substantial increase in both the incidence of small-minority controllers and the size of their equity stakes. This increase will, in turn, exacerbate efficiency costs and the costs borne by public investors.

A. Effects Taking the Size of Control Blocks as Given

Let us first examine the consequences for public investors and corporate value taking as given the size of the control block in any controlled company. The key point is that in many cases (though of course not all) the relaxation of constraints will induce controllers to take actions that will be overall value-decreasing—that is, that the losses to public investors will exceed the gain to the controller. The efficiency costs involved in the extraction of private benefits is a premise of the standard model of controller benefits introduced by financial economists Burkhart, Gromb, and Panunzi.h[103]

Consider a controlled company in which the controller has a lock on control and owns a fraction α of the equity capital (cash flows) of the company. Suppose further that post SB 21, the controller will be able to have the company take a corporate action that will increase the controller's private benefits by ΔB and that will reduce the company's market capitalization by $\Delta B + \Delta E$.

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[102] *See supra* note 100.

[103] See, e.g., Mike Burkart, Denis Gromb and Fausto Panunzi, Why Higher Takeover Premia Protect Minority Shareholders, 106 Journal of Political Economy 172-204 (1998).

The problem is that, in such a situation, the controller might prefer to proceed with the action even if it would decrease the aggregate value of the company for both the controller and public investors, that is, even if $\Delta E > 0$. To be sure, part of the loss of corporate value, specifically a fraction of it equal to $\alpha(\Delta B + \Delta E)$, will be borne by the controller. But because the controller will not bear the loss $(\Delta B + \Delta E)$ in full, the controller's private calculus will differ from that of maximizing aggregate value.

Specifically, since the controller will bear only a fraction α of the loss $(\Delta B + \Delta E)$ of corporate value, the controller will be made better off by the corporate action if and only if

$$\Delta B - \alpha(\Delta B + \Delta E) > 0$$

The above can hold, even if $\Delta E > 0$, if and only if

$$\Delta E < \{(1 - \alpha)/\alpha\} \times \Delta B$$

The above equation defines the range of circumstances in which the controller's private interests will favor taking an inefficient action that will reduce aggregate value. The equation implies that this range of circumstances expands—and the expected severity of the distortion rises—when the controller's fraction of equity capital α is smaller.

More fully, as α declines, expected costs to the company and other shareholders increase in two ways. *First*, the smaller α is, the greater the likelihood that the controller will favor value-reducing choices. *Second*, when α is smaller, the expected reduction in value from such value-reducing choices will be greater. Thus, so long as actions that increase private benefits might produce efficiency costs and thereby decrease aggregate value, the concern is that such actions might be in the controller's private interest and therefore might be taken. This problem is expected to be especially costly when the controller's equity fraction is smaller.

Examining the array of channels through which SB 21 will enable controllers to obtain private benefits indicates that the use of each channel might, in many cases, involve efficiency costs and reduce aggregate value. In particular, consider the following:

- *The ability of controllers to introduce and distribute non-voting shares and to eliminate sunset provisions*: This ability will enable controllers to extend their control indefinitely and to continue (or have their heirs continue) leading the company. This "entrenchment" effect provides the controller with private benefits, but it will be overall value-reducing

whenever the controller is no longer the most fitting leader for the company;

- *The ability to obtain mega-compensation packages favorable to the controller:* While this ability will enable the controller to enhance its payoffs, it may result in compensation arrangements that do not generate efficient incentives;

- *The ability to arrange favorable related-party transactions (including partial freezeouts)*: Although such transactions will provide the controller with private benefits, these benefits may be outweighed by the costs to public investors, and aggregate value will decline when assets are allocated or trades are directed in inefficient ways;

- *The ability to allocate valuable opportunities to the controller*: While the controller may obtain private benefits from such allocations, the costs to public investors will be larger and aggregate value will decline whenever the company, rather than the controller, is the more efficient user of the opportunity; and

- *The ability to reincorporate in a jurisdiction with laxer rules favorable to the controller but value-reducing overall*: Although such reincorporations will provide controllers with private benefits, they will impose larger costs on public investors and thereby reduce aggregate value.

In sum, even taking the size of control blocks as given, the relaxation of controller constraints should be expected to generate substantial efficiency costs and declines in aggregate value and thus impose losses on public investors that exceed the benefits captured by controllers.[104] These effects are expected to be particularly severe in companies with small-minority controllers.

B. Effects from Increasing the Incidence of Small-Minority Controllers

Thus far we have examined the considerable costs to public investors and to aggregate value while taking as given the size of control blocks in controlled companies. However, as discussed in detail in Part V, SB 21 is expected to produce a

[104] For a discussion of additional negative externalities and social costs that may result from lax monitoring of controlling shareholders, *see* Kevin E. Davis & Mariana Pargendler, *Corruption and Controlling Shareholders,* 25 THEOR. INQUIRIES L. 107 (2024).

proliferation of small-minority controller structures and to reduce the size of controllers' equity stakes. These effects will exacerbate the costs to public investors and to aggregate value, as identified in Section A. In our earlier work on small-minority controllers, we showed that a reduction in the size of the control block is associated with an increase in agency problems and costs.[105] Indeed, our analysis demonstrates that these costs increase disproportionately—that is, more than linearly—relative to the reduction in the size of the control block. This point is further reinforced by the analysis in Section A, which shows that the agency costs and distortions resulting from relaxed controller constraints are expected to be higher when the controller's ownership fraction is smaller.

The conclusions arising from our analysis of controller incentives are also supported by a significant body of empirical work on the subject. This empirical work documents that a decrease in the fraction of equity capital held by a controller with a lock on voting power is associated with higher agency costs and lower company value. For example, a well-known study by Paul Gompers et al. using data from U.S. dual-class companies reports "strong evidence that firm value is increasing in insiders' cash-flow rights and decreasing in insider voting rights."[106] The study further explains that "[t]he strongest results come from the separation sample, where insiders have voting control but less than 50% of the cash-flow rights."[107]

Another study by Ronald Masulis et al. found that the widening of the divergence between insider voting rights and equity capital at dual-class companies generates various agency problems: "corporate cash holdings are worth less to outside shareholders, CEOs receive higher levels of compensation, managers make shareholder value-destroying acquisitions more often, and capital expenditures contribute less to shareholder value."[108] A third study on dual-class companies reported that "the credit ratings worsen, and the cost of debt and overall cost of capital increase in the separation between managerial voting rights and cash-flow rights."[109]

The economic costs of having control in the hands of a controller with a small fraction of equity capital are also supported by studies of dual-class companies outside the United States. An increase in the wedge between a controller's cash-flow

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[105] *See* Bebchuk & Kastiel, *The Perils of Small-Minority Controllers*, *supra* note 21.

[106] Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUD. 1051, 1052–55, 1067 (2010) (as measured by the standard valuation metric of industry-adjusted Tobin's Q).

[107] *Id*. at 1084–85.

[108] Ronald W. Masulis, Cong Wang & Fei Xie, *Agency Problems at Dual-Class Companies*, 64 J. FIN. 1697, 1697 (2009). They conclude, "[t]hese findings support the agency hypothesis that managers with greater excess control rights over cash flow rights are more prone to pursue private benefits at shareholders' expense, and help explain why firm value is decreasing in insider excess control rights." *Id.*, at 1716–17.

[109] Matthew T. Billett, Paul Hribar & Yixin Liu, *Shareholder-Manager Alignment and the Cost of Debt* (Jan. 2015) (Working Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=958991.

rights and voting rights, these studies found, is accompanied with a decline in company value;[110] a decrease in the likelihood of a takeover;[111] a reduction in the dividend payout ratio;[112] an increase in the cost of debt financing;[113] an increased likelihood of stock price crashes;[114] increased investment in projects with negative present value;[115] and a decrease in the flow of firm-specific information to the market.[116]

In sum, even taking the size of control blocks as given, the relaxation of controller constraints should be expected to generate substantial efficiency costs and declines in aggregate value, and thus to impose losses on public investors that exceed the benefits captured by controllers. These effects are expected to be particularly severe in companies with small-minority controllers.

VII. FALLING BEHIND OTHER ADVANCED ECONOMIES

In preceding Parts, we have examined directly how the relaxation of controller constraints will produce substantial efficiency costs. Before concluding, we would like to highlight the severity of the expected effects by explaining how this relaxation will cause the United States to fall considerably behind other advanced economies in terms of its protection of public investors in controlled companies.

There is a substantial literature on the importance of investor protection for the

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[110] Henrik Cronqvist & Mattias Nilsson, *Agency Costs of Controlling Minority Shareholders*, 38 J. FIN. & QUANTITATIVE ANALYSIS 695, 709 (2003) (reporting a "strong negative relation between controlling owner vote ownership and firm value" as measured by Tobin's *Q*).

[111] *Id.* at 697 (finding that "firms with family [controlling minority shareholders] are about 50% less likely to be taken over compared to other firms").

[112] Mikko Zerni, Juha-Pekka Kallunki & Henrik Nilsson, *The Entrenchment Problem, Corporate Governance Mechanisms, and Firm Value*, 27 CONTEMP. ACCT. RES. 1169, 1201 (2010) (using a sample of Swedish companies and finding that "both the stock market valuation of free cash flow and the dividend payout ratio of a firm increase with major shareholders and board members' ownership of cash-flow rights").

[113] Chen Lin et al., *Ownership Structure and the Cost of Corporate Borrowing*, 100 J. FIN. ECON. 1, 2, 10 (2011) (using a sample of East Asian and Western European companies and finding that an increase of one standard deviation in the wedge increased the average loan spread from 14% to 18%).

[114] Sabri Boubaker, Hatem Mansali & Hatem Rjiba, *Large Controlling Shareholders and Stock Price Synchronicity*, 40 J. BANKING & FIN. 80, 81, 88–89 (2014) (using a sample of French-listed companies and finding that a one-standard-deviation increase in the wedge is associated with a 3.14% increase in stock price crash risk).

[115] Zerni et al., *supra* note 112, at 1172 (reporting that, "when corporate insider incentives are better aligned with those of outside shareholders, the funds of a firm are more likely to be distributed as dividends to shareholders rather than (over)invested in projects with less-than-zero present value").

[116] Boubaker, *supra* note 114, at 93.

development of capital markets.[117] This literature suggests that effective protection of public investors substantially contributes to the development of stock markets and to enhancing the value of public companies.[118] Indeed, contributors to this literature have viewed the quality of investors protection in the United States as a major driver of the relative success of American capital markets over time.[119]

As one of us suggested in earlier work with Assaf Hamdani, in assessing the quality of a country's investor protection, one should examine separately investor protection for companies with a controlling shareholders and companies without a controlling shareholder.[120] This is because the rules that best protect public investors considerably differ between controlled and non-controlled companies. Because our focus in this Article is on controlled companies, below we consider how the recent relaxation of controller constraints is expected to affect the United States' relative standing in terms of investor protection in such companies.

In particular, to consider this issue, we use the well-known Anti-Self-Dealing Index (the "Index") put forward in a study by Djankov, La Porta, Lopez-de-Silanes and Shleifer.[121] This study introduces an index measuring the extent to which a jurisdiction protects public investors from controller abuse.

Specifically, the Index is based on assessing the quality of protection that a jurisdiction provides to public investors in cases that involve a potential conflict of interest between the controller and public investors. The researchers identified ten elements of protection (either *ex ante* or *ex post*), and they based the Index on the presence or absence of such protections. The Index ranges from 0 (weakest protection) to 1 (highest protection); a higher score indicates stronger investor protection for public investors in controlled firms.[122]

The study of Djankov et al. provided measures of the Anti-Self-Dealing Index

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[117] For well-known contributions to this literature, see, for example, Rafael La Porta, et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Ross Levine, *Law, Finance, and Economic Growth*, 8 J. FIN. INTERMEDIATION 36 (1999); Rafael La Porta, et al., *Investor Protection and Corporate Valuation*, 57 J. FIN. 1147 (2002); Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. FIN. 537 (2004).

[118] *Id.* The Anti-Self-Dealing Index was viewed by many as superior to the Antidirector Rights Index put forward earlier. For a critique of the latter, *see* Holger Spamann, *The "Antidirector Rights Index" Revisited*, 23 REV. FIN. STUD. 467 (2010).

[119] *See e.g.,* La Porta, et al., *Legal Determinants of External Finance, supra* note 118 ("[u]sing a sample of 49 countries, we show that countries with poorer investor protections, measured by both the character of legal rules and the quality of law enforcement, have smaller and narrower capital markets").

[120] Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PENN. L. REV. 1263 (2009).

[121] Simeon Djankov, et al., *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430 (2008). As of October 2025, the article has over 4,900 citations on Google Scholar. It also belongs to the JFE Hall of Fame of JFE articles that have attracted the most citations.

[122] *Id.* at 432-39.

for 72 jurisdictions, including 38 advanced economies currently included in the OECD and 34 countries with less advanced economies. As expected, advanced economies tended to rank more highly than non-OECD countries according to the Index, and the U.S. ranked relatively high in the group of advanced economies.[123]

The usefulness of this cross-country comparison was demonstrated by the Djankov et al. study as well as another well-known study by Dyck and Zingales.[124] The Djankov et al. study demonstrated that stronger protections against self-dealing, resulting in a higher level of the Index, are associated with higher values for the country's listed equity market and a higher level of IPO activity.[125] In addition, the study demonstrated that a higher level of the Index is associated with lower values of private benefits of control, estimated based on control premia paid when controlling blocks are sold.[126] The Dyck-Zingales study found that lower values of private benefits of control are associated with an increase in the ratio of the country's stock-market capitalization to Gross National Product (GNP). The associations identified by these two well-known studies were statistically significant and economically meaningful.[127]

Given the usefulness and widespread adoption of the Anti-Self-Dealing Index, it is worth examining how the recent relaxation of controller constraints has affected the U.S.'s score—or, more specifically, the score of Delaware corporate law, which governs a substantial majority of controlled companies—under this Index. As detailed in Appendix I, prior to SB 21, Delaware ranked highly according to the Anti-Self-Dealing Index, and its score could be conservatively estimated at 0.75 (out of 1) or as high as 0.9 (again, out of 1) under less conservative assumptions.

As to the state of affairs post–SB 21, we estimate that Delaware's score has substantially declined. Under conservative assumptions, Delaware's score has declined by at least 0.25 points (from 0.75 to 0.50), a reduction of 33.3%.[128] Under less conservative assumptions, the decline in the score is estimated to be 0.40 points (from 0.9 to 0.5), a reduction of 44.4%.[129]

The reduction in Delaware's score is caused by the removal of an important *ex-ante* investor protection against self-dealing: post-SB 21, disinterested-shareholder approval is no longer necessary for cleansing any conflicted actions in non-

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[123] When the authors complied their index, in 2008, the overall score of the United States in the Anti-Self-Dealing Index was 0.65 (out of 1). It was 6th among 38 OECD countries and ranked 13th out of 72 countries. The authors' data can be found at http://post.economics.harvard.edu/faculty/shleifer/data.html.

[124] *See supra* note Dyck & Zingales, *supra* note 118. This study had 4,568 citations on Google Scholar as of October 19, 2025.

[125] Djankov, *et al*., *supra* note 121, at 443-51.

[126] *Id.*

[127] Dyck & Zingales, *supra* note 118, 572-575.

[128] *See* Appendix I.

[129] *Id.*

freezeout settings.[130] SB 21 also weakened several *ex-post* investor protections, precluding courts from providing equitable relief if certain conditions are met and making it more difficult to hold the controller and the board liable.[131] SB 21 further limited the documents that can be obtained via books and records requests.[132]

The changes in Delaware's score likely produced a considerable deterioration in the standing of the United States relative to other advanced economies. We assume that all other advanced economies retain the scores recorded from them in Djankov et al.'s 2008 study. In this case, prior to SB 21, the U.S. was ranked 5th (under the most conservative assumption) or 3rd (under the less conservative assumption) among 38 OECD countries. But post-SB2,1 the U.S. is now ranked 10th among 38 OECD countries.

Using the estimates in Djankov et al., we assess the expected effects of the decline in the U.S.'s score expected to be brought about by SB 21. According to the results of that study, a 0.25-point drop in the Anti-Self-Dealing Index due to a 0.5 reduction in ex-ante protections—our most conservative estimate of SB 21's effect—is associated with a roughly 24% decline in the stock-market-capitalization-to-GDP ratio of affected public companies and a 5.5% increase in the median control premium.[133] Under our less conservative assumptions, an additional 0.15 decline in the Index due to a 0.3 reduction in ex post protections would be associated with a further 21% reduction in the ratio and an additional 6% increase in the median control premium.[134]

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[130] *See supra* Section III.A. Such relaxation reflects a 0.25 decline of the U.S. score in the anti-self-dealing index.

[131] *See* S. 21, 153rd Gen. Assemb. §144(c)(6) (Del. 2025); *see also id.* § 144(c)(6) (limiting "the right of any person to seek equitable relief on the grounds that an act or transaction, including a controlling stockholder transaction, was not authorized or approved in compliance with the procedures set forth in [the amended Section 144]").

[132] *See* S. 21, 153rd Gen. Assemb. § 220(a) (Del. 2025) (plaintiffs from using books and records requests to obtain emails, text messages, or informal board communications). While this limitation is not reflected in a reduced score in the Djankov *et al.* index (as none of the categories in the index, which largely captures the evidence available to plaintiffs after filing a complaint, is likely to capture this legal change), it is nevertheless likely to have an important practical effect on the ability to challenge controllers' conflicts in Delaware. Had the Section 220 provisions been accounted for in the original Anti-Self-Dealing Index, SB-21's changes to the law would require a deduction of those points to reflect the reduced pre-suit ability to identify misconduct.

[133] We based this estimation on the assumption that elimination of disinterested-shareholder approval for cleansing any conflicted actions would reflect a 0.5 reduction in ex-ante protection against self-dealing, which is equal to a 0.25 reduction in the Anti-Self-Dealing score (*see* Appendix I) and calculated the potential impact based on the regression results of Djankov et al., *supra* note 121, at 445.

[134] We based this estimation on the assumption that an additional 0.3 reduction in ex-post protection against self-dealing is equal to a 0.15 reduction in the Anti-Self-Dealing score (*see* Appendix I), and calculated the potential impact based on the regression results of Djankov et al. *See id.* In

To be sure, the estimates provided by the Djankov et al. and the Dyck-Zingales studies were based on a large sample of advanced and non-advanced economies and were derived at certain points in time. Accordingly, these estimates cannot provide a solid basis for making accurate predictions about the expected effects of the examined relaxation of controller constraints by SB 21. However, the magnitude of the detrimental effects that would result if the estimates from the above studies were directly applicable should ring alarm bells and flash warning signs for all those interested in investor protection. These estimates reinforce the message of our preceding analysis that the relaxation of controller constraints should be expected to have rather large pernicious effects.

In 2020, the World Bank used the Djankov et al. methodology to update the scores of countries' levels of protection of public investors in controlled companies. The revised World Bank index is based on three dimensions: disclosure of related-party transactions, liability of directors and controllers for self-dealing, and the procedural ease of bringing shareholder suits. In Appendix I, we also analyze in detail how SB 21 is expected to affect the ranking of the United States relative to other advanced economies under the World Bank Minority Investor Protection Index. That analysis similarly concludes that, under this alternative measure, the U.S.'s standing relative to other advanced economies will be substantially lower post-SB 21. Overall, investors and public officials should be concerned that, for controlled companies, SB 21 has lowered the quality of U.S. investor protection relative to other advanced economies.

VIII. SUBSTITUTE PROTECTIONS?

Some might question our conclusions on the grounds that, even if SB 21 were expected on its own to weaken investor protection, various mechanisms could step in and provide substitute protection. Part VIII considers possible arguments that:

(i) Controllers might be deterred from taking advantage of opportunities to benefit themselves at the expense of public investors by the prospect of a decline in the market value of the controller's block (Section A);

(ii) Controllers might be deterred from exploiting such opportunities by the prospect that doing so would impede or make costlier the raising of additional capital for the company in the future (Section B);

(iii) Controllers might be incentivized to introduce provisions into their companies' charters that will provide effective substitutes and effectively constrain themselves (Section C); and

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their regression analysis, Djankov et al. use the ex-ante protections and the ex-post protections against self-dealing as dependent variables, rather than the combined Anti-Self-Dealing Score. Each of these two dependent variables has a different effect on the reduction in the ratio of stock market capitalization to GDP and the increase of the median control premium.

(iv) Oversight and monitoring by institutional investors will provide effective protections and prevent controllers from taking advantage of opportunities opened up by the relaxation of standards (Section D).

We explain that each of these four "mechanisms," whether individually or collectively, will fail to adequately address the weakening of controller constraints brought about by SB 21.

A. Incentives from the Prospect of a Decline in Stock Price?

It might be argued that controllers might be at least partly deterred from taking advantage of the relaxation of controller constraints by the prospect that doing so will reduce the stock price of the company's shares and thus also the shares in their control block. Below we sketch why this factor should not be expected to provide a meaningful mechanism for protecting public investors:

Consider a controller that owns a fraction α of the company's cash flows. Consider further a corporate action that would increase the private benefits of the controller by ΔB. In the case of a "pure transfer," in which the reduction in the company's market capitalization equals the private benefit, the action would always be in the controller's interest, because the controller would bear only a fraction of the former while fully benefiting from the latter.

Therefore, the remaining question is when, due to efficiency costs, the reduction in stock market capitalization is higher than the private benefit. Assume that the reduction in market capitalization would be ΔB(1+e), with e being a non-negative variable that reflects the extent if any to which the extraction of private benefits involves efficiency losses. In this case, the controller would be made better off by the corporate action if and only if

$\Delta B - \alpha\Delta B(1+e) > 0$, which is if and only if:
$e < [(1- \alpha)/ \alpha]$

Consider the case of $\alpha = 0.5$ (i.e., where the controller owns half of the shares in a one-share-one-vote structure). In this case, the controller with a 50% stake will be deterred only if the reduction in cash flows is *more than twice* the extracted private benefit.

Consider now the case of $\alpha = 0.1$ (e.g., a dual-class structure in which the controller has a lock on control but only 10% of the equity capital). In this case, the controller will be deterred only if the reduction in cash flows is more than ten times(!) the extracted private benefit.

Thus, the prospect of a decline in stock price will fail to deter a wide range of actions that (i) will provide the controller with substantial private benefits and (ii) will impose substantially higher costs on public investors (up to twice the size of

the private benefits when α = 0.5 and up to ten times the private benefits when α = 0.1).

B. Incentives from the Prospect of Impeding Future Capital Raising?

What about the prospect that taking advantage of the opportunities to extract private benefits will make it more difficult to raise capital? Below we sketch why this factor should not be expected to provide a meaningful mechanism for protecting public investors:

Suppose that subsequent to a conflicted decision, cash in an amount of C will have to be raised to enable the company's projects. Denote the cash flow that the company will ultimately produce by F. In this case, if the corporate action takes place, the controller's fraction of the ultimate cash flow will be α[F - ΔB(1+e) - C]. In this case, the controller again will be made better off by the corporate action if and only if

ΔB - αΔB(1+e) > 0, which is again if and only if:
e < [(1- α)/ α]

Again, the controller will be discouraged only in the event that the conflicted action would be greatly inefficient: In the case of α = 0.5, a controller who owns half of the equity capital will be deterred only if the reduction in cash flows is more than twice the extracted private benefit.

And in the case of α = 0.1, a small-minority controller in a dual-class company who has 10% of the equity capital will be deterred only if the reduction in cash flows is more than ten times(!) the extracted private benefit.

Thus, the prospect that future fund raising to finance investments will be impeded will fail to deter a wide range of actions that (i) will provide the controller with substantial private benefits and that (ii) will impose substantially higher costs on public investors (up to twice the size of the private benefits when α = 0.5 and up to ten times the private benefits when α = 0.1).

C. Incentives to Include Adequate Protections via Private Ordering?

It might be argued that private ordering can substitute for the relaxation of controller constraints. On this view, whenever legal arrangements fail to provide adequate protection for public investors, such protection can instead be provided through the inclusion of appropriate provisions in corporate charters. Indeed, it might be further argued that founder-controllers will have incentives to include such provisions in IPO charters to attract investors.

Some corporate law scholars have expressed the view that private ordering can generally be relied upon to address any failure of corporate law rules to provide

adequate protection.[135] We (as well as many, if not most, corporate law scholars) do not share this general view. Discussing the problems with this view—which we address elsewhere—is beyond the scope of this Article, but we would like to briefly make the following points.

To begin, if this view were correct, then companies' corporate value would not be affected if they were incorporated in countries with weak protections (say, some emerging economies) because the companies would be able to, and would be expected to, make up effectively for these weak protections by adopting appropriate charter provisions. (And this is inconsistent with the substantial empirical evidence that such companies do trade at a discount to the value of companies incorporated in countries with adequate investor protections.)[136] For one thing, to the extent that the pre-SB 21 legal arrangements were superior, it would be difficult post-SB 21 to get courts to operate in the same way as they did pre-SB 21 by adopting a few charter provisions.

Note also that the view under consideration is based on the assumption that the IPO market accurately prices any charter provision insofar as that provision affects investor protection. If this were the case, it would be desirable to have no mandatory rules and to allow opt-outs from every legal rule, as any such opt-out would be value-increasing. Delaware law, including SB 21 itself, does not share this premise, as it makes various legal arrangements mandatory.

In any event, even those who believe that founders taking companies public will be able, and have powerful incentives, to provide adequate protection through appropriate charter provisions should recognize that such private ordering would, at most, address the relaxation of controller constraints with respect to companies that go public *in the future*. Thus, even those who hold the optimistic view of private ordering should have concerns about investor protection in controlled companies that went public in the past. In such companies, the mechanism under consideration would not be applicable, as controllers that already raised funding in a prior IPO would not be able to charge existing public investors "extra" for adding protective charter provisions. (Of course, adding such charter provisions could facilitate raising additional capital *in the future*, but as explained in Section B, this factor would fail to provide incentives to prevent various forms of extraction of private benefits that would be substantially value-decreasing.)

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[135] *See*, e.g., Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989); ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 1 (1993). *See also* Lund & Talley, *supra* note 2 (suggesting that Delaware corporations can craft their own privately generated common law, largely bypassing state courts for dispute resolution).

[136] *See* the sources in *supra* note 117.

Therefore, even those who hold the "optimistic" view of private ordering should be concerned about the controlled companies, with an aggregate market capitalization exceeding $10 trillion, that already exist as public companies. The detrimental effects that these companies and their public investors will bear as a result of the relaxation of controller constraints are, by themselves, a sufficient basis for substantial concern.

D. Institutional Investor Oversight?

It might be argued that controllers might be discouraged from taking advantage of the relaxation of controller constraints by pressure from institutional investors. On this view, institutional investors will monitor what controllers do and engage with them to discourage these investors from taking advantage of public investors.

Even if one holds the view that institutional investors stewardship is active and consequential, this cannot be the case for controlled companies. The influence that institutional investors can have on issuers arises from their voting power and their ability to exercise it. This voting power can provide institutional investors with significant influence: a company's leaders might want to accommodate the preferences of these investors to induce them to vote in ways that the leaders prefer (and not support activist investors when they engage with the company). By contrast, in a controlled company, the controller is not affected by the way institutional investors vote.

Disagreements over dual-class structures illustrate the limits on the ability of institutional investors to influence the behavior of controllers. Institutional investors generally favor the dismantling of dual-class structures and commonly vote for precatory shareholder proposals recommending such dismantling.[137] But controllers generally choose to ignore this institutional investor preference and elect to retain their dual-class structures no matter how strongly institutional investors support dismantling them.

IX. CONCLUSIONS

In this Article we have analyzed the expected detrimental effects of the recent relaxation of the constraints on controllers. Our analysis has concluded that the relaxation of constraints should be expected to:

(i) provide through an array of channels large gains to controllers at the expense of public investors;

(ii) bring about over time a transformation of U.S. ownership patterns, substantially increasing the fraction of companies that have a controller;

(iii) produce over time a substantial reduction in the size of the equity stakes of

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[137] *See, e.g.,* Bebchuk & Kastiel, *supra* note 13, at 597–99.

controllers, causing a proliferation of structures with small-minority controllers that produce substantial distortions;

(iv) impose on public investors and corporate value losses that would far exceed even the gains that controllers would obtain, thus bringing about substantial inefficiencies and value destruction; and

(v) pull down the quality of investor protection in controlled companies in the United States relative to the quality of such protection in other advanced economies.

We hope that our work will help promote recognition among investors—and all those interested in corporate governance and corporate value—regarding the looming risks SB 21 poses to public investors and corporate value. A realistic picture of these risks is important for all to have.

APPENDIX: U.S. VS. OTHER ADVANCED ECONOMIES

This Appendix provides a detailed calculation of how the recent relaxation of controller constraints under SB 21 affected the U.S. score for Delaware-incorporated companies in the 2008 Anti-Self-Dealing Index developed by Djankov et al. ("Anti–Self-Dealing Index") and the 2020 World Bank subindex of countries' regulation of conflicts of interest ("the World Bank Updated Subindex"), which relies on the methodology used by Djankov et al.

According to the most conservative estimate presented in this Appendix, the relaxation of controller constraints has reduced the U.S. score in the Anti-Self-Dealing Index by at least 0.25 points (a 33% decrease). Under less conservative assumptions, this reduction is as large as 0.40 points (a 44% decrease). Assuming all other countries in the Index have remained unchanged since Djankov et al.'s 2008 study, the U.S. is now ranked 10th among 38 OECD countries. This is a significant deterioration in the U.S.'s ranking, given that prior to SB 21 the U.S. was ranked 5th (under the most conservative assumptions) or 3rd (under less conservative assumptions) among 38 OECD countries.

Similarly, pre-SB 21, the U.S. score in the World Bank Updated Subindex was 25 out of 30. It was ranked 5th among 35 OECD countries. Post-SB 21, and assuming all other countries remained unchanged, the U.S. rank has dropped to 12th among OECD countries, with a score of 20 out of 30.

Taken together, these estimates demonstrate that the recent relaxation of controller constraints has caused the United States to fall considerably behind other advanced economies in the protection of public investors in controlled companies.

A. The Anti-Self-Dealing Index

When Djankov et al. compiled the Anti-Self-Dealing Index in 2008, the overall anti-self-dealing score of the United States was 0.65 (out of 1).[138] It ranked 6th among 38 OECD countries.[139] The Anti-Self-Dealing Index is a measure of the average of *ex ante* and *ex post* indices of the strength of a country's private regulation of conflicts of interest. At the time it was first created, Delaware law did not require shareholder approval of related-party transactions; therefore, the U.S. score for "ex ante private control of self-dealing" was low: 0.33.[140] Instead of relying on strong ex ante protections, the U.S. model emphasized *ex post* litigation to protect minority

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[138] The authors' data can be found at http://post.economics.harvard.edu/faculty/shleifer/data.html.

[139] At that time, the U.S. was also ranked 13th out of all 72 countries in the index.

[140] As Djankov et al. explain, the United States—unlike most common law countries—does not follow the U.K. model of regulating self-dealing, which requires the approval of disinterested shareholders for related-party transactions. Djankov, *et al*., *supra* note 121, at 437-38.

shareholders against self-dealing.[141] Consequently, the U.S. had near the maximum score for its "ex post private control of self-dealing": 0.98. Together, these components produced a combined U.S. index score of 0.65, as detailed in Table 1 below.[142]

Table A1: U.S. 2008 Score in the Anti-Self-Dealing Index

Ex-Ante Private Control of Self-Dealing	**Original Score**
Approval by Disinterested Shareholders	0.00
Disclosures by Buyer	1.00
Disclosures by Mr. James	1.00
Independent review	0.00
Ex ante disclosure	0.67
Ex ante private control of self-dealing	**0.33**
Ex-Post Private Control of Self-Dealing	
Disclosure in periodic filings	1.00
Standing to sue	1.00
Rescission	1.00
Ease of holding Mr. James liable	1.00
Ease of holding the approving body liable	1.00
Access to evidence	0.75
Ease in proving wrongdoing	0.95

[141] *Id. See generally* Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CALIF. L. REV. 393, 404-07 (2003); Zohar Goshen & Tomer S. Stein, *Leaving Delaware? The Essential Role of Specialized Corporate Courts*, 125 COLUM. L. REV. 2077 (2025).

[142] The combined score is calculated in the following way: (0.33+0.98)/2.

***Ex post* private control of self-dealing**	**0.98**
Private Enforcement: Anti-self-dealing index	**0.65**

B. Pre-SB 21 Score

As noted, Djankov et al. compiled their index in 2008. Subsequent Delaware cases, however, encouraged controlling shareholders to seek *ex ante* approval from unaffiliated shareholders to satisfy the *MFW* conditions by allowing them to obtain more lenient *ex post* judicial review.[143] Adjusting the U.S. score for ex ante protections to reflect subsequent changes in Delaware law merits raising the component "Approval by Disinterested Shareholders" from 0 to 1,[144] resulting in an overall increase in the U.S. *ex ante* protection index from 0.33 to 0.83. From there, the trade-off between *ex ante* and *ex post* regulation gives rise to two alternative ways to calculate the total U.S. score immediately prior to SB 21:

Option 1. After *MFW* and prior to the adoption of SB 21, Delaware courts continued to scrutinize how companies implemented the *MFW* framework and, when finding that its conditions were not met, applied the entire fairness standard of review.[145] Therefore, one could reasonably conclude that U.S. *ex post* investor protections through shareholder litigation remained unchanged even after *MFW*. Taking the *MFW* enhancement into account, while using the original U.S. *ex post* protection score (0.98), would raise the overall U.S. index score from 0.65 to 0.90 on the eve of SB 21.[146]

Option 2. It could be argued more conservatively, however, that Option 1 overstates the U.S.'s total score of investor protections. If a controlling shareholder subjects a conflicted transaction to the *MFW* conditions and seeks *ex ante* shareholder approval, then the transaction is, to a significant extent, insulated from judicial intervention and the *ex post* index must be adjusted downward. Accordingly, the

[143] *See Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014); In re Match Group, Inc. Derivative Litigation, 315 A.3d 446 (Del. 2024).

[144] Approval by disinterested Shareholders equals 1 if the transaction must be approved by disinterested shareholders, and zero otherwise.

[145] *See, e.g.,* Goshen et al., *supra* note 2; Restrepo & Subramanian, *supra* note 2.

[146] The combined score is calculated in the following way: (0.83+0.98)/2.

scores for three *ex post* components fall from 1 to 0—namely protections from "rescission",[147] "the ease of holding Mr. James liable",[148] and "the ease of holding the approving body liable"[149] are eliminated. This adjustment would decrease the U.S.'s *ex post* protections score from 0.98 to 0.65. Therefore, under Option 2, the overall U.S. Anti-Self-Dealing Index would have only increased from 0.65 to 0.75 under the *MFW* regime.[150]

In sum, prior to SB 21, Delaware offered robust investor protections against controller conflicted actions, and its score could be estimated as a 0.90 (out of 1) under the less-conservative assumption (as explained in Option 1), or 0.75 under the most conservative assumption (as explained in Option 2). Both estimates are detailed in Table 2 below.

Table A2: U.S. Score in the Anti-Self-Dealing Index Pre-SB 21

Ex-Ante Private Control of Self-Dealing	**Pre-SB 21: Option 1**	**Option 2**
Approval by disinterested Shareholders	1.00	1.00
Disclosures by Buyer	1.00	1.00
Disclosures by Mr. James	1.00	1.00
Independent review	0.00	0.00
Ex ante disclosure	0.67	0.67
Ex ante private control of self-dealing	0.83	0.83

[147] The index of the ease in rescinding the transaction ranges from 0 to 1. It equals 0 when rescission is unavailable or only available in case of bad faith, or when the transaction is unreasonable or causes disproportionate damage. It equals 1/2 when rescission is available when the transaction is oppressive or prejudicial. It equals 1 when rescission is available when the transaction is unfair or entails a conflict of interest.

[148] The index of the ease in holding Mr. James (the controller) liable for civil damages ranges from 0 to 1. It equals 0 when the interested director is either not liable or liable in case of bad faith, intent, or gross negligence. It equals 1/2 when the interested director is liable if he either influenced the approval or was negligent. It equals 1 if the interested director is liable if the transaction is unfair, oppressive, or prejudicial.

[149] The index of the ease in holding members of the approving body liable for civil damages ranges from 0 to 1. It equals 0 when members of the approving body are either not liable or liable in case of intent, bad faith, or gross negligence. It equals 1/2 when members of the approving body are liable if they acted negligently. It equals 1 if members of the approving body are liable if the transaction is unfair, oppressive, or prejudicial.

[150] The combined score is calculated in the following way: (0.83+0.65)/2.

Ex-Post Private Control of Self-Dealing		
Disclosure in periodic filings	1.00	1.00
Standing to sue	1.00	1.00
Rescission	1.00	0.00
Ease of holding Mr. James liable	1.00	0.00
Ease of holding the approving body liable	1.00	0.00
Access to evidence	0.75	0.75
Ease in proving wrongdoing	0.95	0.35
Ex post private control of self-dealing	0.98	0.68
Anti-self-dealing index	**0.90**	**0.75**

Based on the most conservative score (Option 2), the U.S. would have been 5th among 38 OECD countries pre-SB 21 (assuming all the other countries in the index remained unchanged). If the less-conservative estimate were chosen (Option 1), the U.S. would have been 3rd among OECD countries. Under either approach, the U.S. was ranked highly in the Anti-Self-Dealing Index prior to SB 21.[151]

C. Post-SB 21 Score

The relaxation of controller constraints following SB 21 reduced the U.S.'s score substantially. *First*, SB 21 removes a key *ex ante* investor protection against self-dealing: disinterested-shareholder approval is no longer required to cleanse conflicted actions in non-freezeout settings.[152] Adjusting the U.S.'s *ex ante* protection score to reflect this change requires negating the component "Approval by Disinterested Shareholders," reducing its score from 1 to 0. This lowers the overall post-SB 21 *ex ante* protections index from 0.83 to 0.33.

Second, SB 21 also weakened several *ex post* investor protections: it precludes plaintiffs from using books-and-records requests to obtain emails, text messages,

[151] The U.S. would also be ranked 11th (6th) out of 72 countries in the Anti-Self-Dealing Index under the most (less) conservative approach.

[152] *See supra* Section III.A.

or informal board communications;[153] it makes equitable relief unavailable if certain conditions are met; and it makes it more difficult to hold both the controller and the board liable.[154] To capture the laxer judicial review available post-SB 21, we scored the following components in the *ex post* protections index as "0": "rescission," "the ease of holding Mr. James liable," and "the ease of holding the approving body liable." *Table 3* below provides the estimated U.S. score post-SB 21.

Table A3: U.S. Score in the Anti-Self-Dealing Index Post-SB 21

Ex-Ante Private Control of Self-Dealing	**Post-SB 21**
Approval by disinterested Shareholders	0.00
Disclosures by Buyer	1.00
Disclosures by Mr. James	1.00
Independent review	0.00
Ex ante disclosure	0.67
***Ex ante* private control of self-dealing**	0.33
Ex Post Private Control of Self-Dealing	
Disclosure in periodic filings	1.00
Standing to sue	1.00
Rescission	0.00
Ease of holding Mr. James liable	0.00
Ease of holding the approving body liable	0.00

[153] *See* S. 21, 153rd Gen. Assemb. § 220(a) (Del. 2025) (limiting the documents that can be obtained via books and records requests to a defined set of materials).

[154] *See id*. § 144(c)(6) (limiting "the right of any person to seek equitable relief on the grounds that an act or transaction, including a controlling stockholder transaction, was not authorized or approved in compliance with the procedures set forth in [the amended Section 144]"). The relaxation of *ex post* protections could potentially result in an additional decline of 0.15 of the U.S.'s score in the anti-self-dealing index, but we did not bring this additional decline into account when calculating the potential economic effect of SB 21.

Access to evidence	0.75
Ease in proving wrongdoing	0.30
***Ex post* private control of self-dealing**	0.65
Anti-self-dealing index	**0.50**

In sum, we estimate that the relaxation of controller constraints produced by SB 21 reduced the U.S. score in the Anti-Self-Dealing Index by approximately 0.25-0.40 points (33%-44%), from 0.75-0.90 down to 0.50, with 0.25 being the most conservative estimate. Assuming all other countries in the index remain unchanged, the U.S. would then rank 10th among 38 OECD countries. This is a significant deterioration given that prior to SB 21 the U.S. was ranked 5th or 3rd (depending on the estimate) among those countries. As a result of SB 21, U.S. regulation has been overcome by numerous developed countries, including Australia, Belgium, Canada, Israel, Ireland, New Zealand, and the U.K.

D. Using the World Bank Updated Index

The World Bank has also developed an index that measures the protections of minority investors through a variety of subindexes. The most recent version of that index is based on 2020 questionnaires and thus reflects minority protections well after the adoption of *MFW* and related case law. Interestingly, we observe a similar pattern in the World Bank rankings.

In particular, one of the World Bank's indexes—the "extent of conflict of interest regulation" index—uses a methodology derived from the work of Djankov et al.[155] This World Bank Updated Subindex measures the protection of shareholders against directors' misuse of corporate assets for personal gain by distinguishing

[155] The World Bank data come from a questionnaire administered to corporate and securities lawyers and are based on securities regulations, company laws, civil procedure codes, and court rules of evidence. The ranking of economies on the strength of minority investor protections is determined by sorting their scores for protecting minority investors. For a detailed description of the World Bank methodology, *see* https://archive.doingbusiness.org/en/methodology/protecting-minority-investors. The index data is accessible at https://archive.doingbusiness.org/en/data/exploretopics/protecting-minority-investors. Our analysis focuses on the U.S.'s ranking among OECD countries. We placed less weight on the overall ranking because of the potential gap between the strong official rankings in the World Bank's Subindex and the reality on the ground in these jurisdictions. *See, e.g.,* Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complexity Revealed*, in THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 332 (Luca Enriques & Tobias H. Troger eds., 2019).

three regulatory dimensions that address conflicts of interest: transparency of related-party transactions ("extent of disclosure" index), shareholders' ability to sue and hold directors liable for self-dealing ("extent of director liability" index), and access to evidence plus allocation of legal expenses in shareholder litigation ("ease of shareholder suits" index). Each of these subindexes ranges from 0 to 10 (higher values indicating greater minority protections), for a total maximum of 30.

Pre-SB 21, in the World Bank's Updated Subindex, the U.S. was ranked 5th among 38 OECD countries (similarly to our conservative estimate of the US rank in the Anti-Self-Dealing Index).[156]

Table A4: U.S. Score in the Updated World Bank Subindex Pre-SB 21[157]

Extent of disclosure index (0-10)	**7.00**
Extent of director liability index (0-10)	**9.00**
Derivative suits are available for shareholders holding 10% (or less) of share capital	1.00
Assuming the transaction was duly approved and disclosed, in order to hold Mr. James [the controller] liable a plaintiff must prove that the transaction is unfair or prejudicial to shareholders (a score of 2) or that Mr. James influenced the approval (a score of 1)	2.00
To hold the other directors liable, a plaintiff must prove that the transaction is unfair or prejudicial to shareholders	2.00
If Mr. James is found liable, he must pay damages and is required to disgorge his profits	2.00
Mr. James can be disqualified upon a successful claim by the shareholder plaintiff	0.00
Rescission is available when the transaction is unfair	2.00
Ease of shareholder suits index (0-10)	**9.00**

[156] Overall, the U.S. was ranked 8th out of 213 countries, in the "extent of conflict of interest regulation" index.

[157] The original U.S. score in the Index appears to be an average of the scores for "United States Los Angeles" & "United States New York" scores. However, since most public corporations in the U.S. are incorporated in Delaware, it is likely that respondents presumed the hypothetical U.S. entity was incorporated in Delaware. The U.S. score on various items of the index indeed aligns with Delaware law.

The "extent of conflict of interest regulation" index	**25.00**

We now turn to examining the post-SB21 score using the Updated World Bank Index. SB 21 substantially limits courts' fairness review of controller conflicts. Therefore, as detailed in *Table 5*, we reduced the U.S.'s score in several parameters related to the "Extent of Director Liability" index. As a result, the relaxation of controller constraints is projected to reduce the U.S.'s score in the Updated World Bank Subindex by at least 5 points, to 20 out of 30.[158] Assuming all other countries remain unchanged, the U.S. rank drops to 12th among OECD countries (similar to our estimate of the U.S. rank in the Anti-Self-Dealing Index).[159]

Table A5: US Score in the Updated World Bank Subindex Pre-SB 21

Extent of disclosure index (0-10)	**7.00**
Extent of director liability index (0-10)	**4.00**
Derivative suits are available for shareholders holding 10% (or less) of share capital	1.00
Assuming the transaction was duly approved and disclosed, in order to hold Mr. James [the controller] liable a plaintiff must prove that the transaction is unfair to shareholders (a score of 2) or that Mr. James influenced the approval (a score of 1)	1.00
To hold the other directors liable, a plaintiff must prove that the transaction is unfair or prejudicial to shareholders	0.00
If Mr. James is found liable, he must pay damages and is required to disgorge his profits	2.00
Mr. James can be disqualified upon a successful claim by the shareholder plaintiff	0.00
Rescission is available when the transaction is unfair	0.00
Ease of shareholder suits index (0-10)	**9.00**

[158] We conservatively estimate that the U.S.'s rankings in the "Disclosure" index and the "Ease of Shareholder Suits" index remained unchanged at 7 and 9, respectively—and that the decline occurs only in the "Director-Liability" index.

[159] Also, post-SB 21, and assuming all other countries remained unchanged, the U.S.'s rank in the "extent of conflict of interest regulation" index would drop to 42nd out of 213 countries.

The "extent of conflict of interest regulation" index	**20.00**