Contract Rights and Control

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We thank Eric Drees, Penn Carey Law Class of 2026, for excellent research assistence.

Abstract

Delaware's definition of controlling shareholder is evolving. After a series of cases taking an expansive approach, on March 25, 2025, the Delaware legislature amended its statute in an effort both to restrict the scope of the concept and to provide greater predictability. These efforts have overlooked the impact of DGCL section 122(18), which broadened the permissible scope of control rights that can be conferred pursuant to a shareholder agreement. As written, the definition of controlling shareholder focuses exclusively on the power to elect a majority of the board, even though section 122(18) enables contracts that grant shareholders wide authority to displace the board's role and exercise direct managerial authority. This article corrects for this lapse. After summarizing the background to the recent amendments, the article explains the implications of contractual control rights for the definition of controlling shareholder and offers a principled solution for when contractual rights warrant treatment as a controlling shareholder.

Keywords: controlling shareholder, contractual control rights, corporate law, corporate governance, Delaware jurisprudence, fiduciary duties, shareholders, traditional fiduciary principles

JEL Classifications: G30, G34, K20, K22

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ABSTRACT

Delaware's definition of controlling shareholder is evolving. After a series of cases taking an expansive approach, on March 25, 2025, the Delaware legislature amended its statute in an effort both to restrict the scope of the concept and to provide greater predictability.

These efforts have overlooked the impact of DGCL section 122(18), which broadened the permissible scope of control rights that can be conferred pursuant to a shareholder agreement. As written, the definition of controlling shareholder focuses exclusively on the power to elect a majority of the board, even though section 122(18) enables contracts that grant shareholders wide authority to displace the board's role and exercise direct managerial authority.

This article corrects for this lapse. After summarizing the background to the recent amendments, the article explains the implications of contractual control rights for the definition of controlling shareholder and offers a principled solution for when contractual rights warrant treatment as a controlling shareholder.

Introduction

In the intricate fabric of Delaware corporate law, DGCL section 122(18) (hereafter section 122(18)[1] which Delaware adopted on July

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[1] Del. Code Ann. tit. 8, § 122(18) (2024).

17, 2024,[2] represents a new and evolving thread, empowering corporations to grant shareholders the power to take corporate action that traditionally resided within the domain of board discretion. While the statute provides corporations with increased flexibility and contractual certainty, some assert that it usurps conventional principles of corporate governance and board-centered control.[3]

The full impact of section 122(18), however, depends upon another judicial doctrine, namely, whether and to what extent contracts entered into with shareholders under section 122(18) transform such shareholders into controlling shareholders under Delaware jurisprudence, thereby subjecting their actions to fiduciary obligations and heighted judicial oversight.The recent amendments to the DGCL contained in SB 21 complicate this analysis by providing, for the first time, a statutory definition of controlling shareholder.[4] The amendments largely set forth bright line rules on when someone can be deemed a controlling shareholder for fiduciary duty purposes and predicate such status on a minimum level of voting power to elect directors, primarily through equity ownership.[5] Nonethless, the amendments explicitly address the potential that being party to a shareholder agreement could warrant treatment as a controlling shareholder. They include, within the statutory definition a shareholder who "[h]as the right, by contract or otherwise, to cause the election of nominees who are selected at the discretion of such person and who constitute either a majority of the members of the board of directors or directors entitled to cast a majority in voting power of the votes of all directors on the board of directors."[6]

While we support the dual legislative objectives of including contractual arrangements as a measure of control and increaing the

[2] Philip C. Babler, Nicholas O'Keefe & Douglass D. Lightfoot, Delaware Enacts Controversial Market Practice Amendments to its General Corporation Law, Foley & Lardner LLP (July 18, 2024), https://www.foley.com/insights/publications/2024/07/delaware-market-practice-amendments-general-corporation-law/. Section 122(18) was part of S.B. 313, 152nd Gen. Assemb. (Del. 2024).

[3] See, e.g., Marcel Kahan & Edward Rock, Proposed DGCL § 122(18), Long-term Investors, and the Hollowing Out of DGCL § 141(a), Harv. Law Sch. For. on Corp. Gov. May 21, 2024, https://corpgov.law.harvard.edu/2024/05/21/proposed-dgcl-%C2%A7-12218-long-term-investors-and-the-hollowing-out-of-dgcl-%C2%A7-141a/ ("Delaware is on the verge of gutting DGCL § 141(a)'s iconic principle of board-centricity").

[4] S.B. 21, An Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law, 153rd Gen. Ass. (2025). The applicable provisions enacted as DGCL §144 (e) (2). file:///C:/Users/jfisch/Downloads/SS1forSB21%20(1).pdf.

[5] Id.

[6] Id.

predictability of controlling shareholder status for purposes of the application of fiduciary duties, we worry that predicating controlling shareholder status on a narrow view of contractual control – that is, control over the composition of the board of directors -- ignores the full impact of section 122(18) in expanding contractual mechanisms for shareholders to exercise control even beyond the control exercised by a traditional majority shareholder. The breadth of section 122(18) affirmatively authorizes sshareholder agreements that enble a contracting party to displace board authority entirely. As a result, SB 21's definition of control creates the risk that courts will be limited in their ability to subject holders of this type of contractual control to fiduciary obligations, in appropriate circumstances, as contemplated by the drafters of 122(18).

This Article explores the relationship between section 122(18) and SB 21's definition of controlling shareholder. It makes two points. First, an expansive approach to contractual power requires the concept of controlling shareholder to take that power into account. We support the fact that SB 21 does so. Second, not all contractual power is the same. Consequently, this Article offers a basis for identifying when contractual rights warrant treating shareholder signatories as controllers and fiduciaries. We identify two types of provisions. The first are those addressed by the amendments that give a minority shareholder control over the composition of the board that would otherwise require majority voting power. The second are provisions that effectively enable a shareholder to displace board authority with respect to the action being scrutinized.

Absent those characteristics, shareholders who exercise rights pursuant to a shareholder agreement should not, as a result of their contractual rights, be characterized as controllers and subject to enhanced scrutiny. We view these principles as consistent with the point we have made elsewhere, that shareholders who do not act as controllers have the right to pursue their individual objectives rather than being treated as fiduciaries.[7]

We ground our analysis, in part, in key principles we identify as motivating both section 122(18) and SB 21. The first is the flexibility associated with a contractual approach to Delaware corporate law. The second is the elimination of board primacy as a statutory constraint on such contractual freedom. The third privileges predictability in ascertaining controller status over the highly fact and context-specific

[7] See Jill E. Fisch & Steven Davidoff Solomon, *Control and Its Discontents*, 173 U. Pa. L. Rev. 641 (2025).

case favored by recent Delaware cases. The fourth explicitly endorses traditional fiduciary principles applicable to controlling shareholders as a constraint against the potential for abuse arising from the use of shareholder agreements to restructure corporate decisionmaking power. Namely, fiduciary duties should apply when controlling shareholders receive a quantifiable benefit at the expense of other shareholders outside the traditional exercise of their shareholder rights. Fifth, when a shareholder's actions are subject to and constrained by traditional board authority, their actions should be subject to the business judgment rule and any decision instead scrutinized at the board level under traditional fiduciary duty doctrine.[8]

Our analysis in this article and the key principles we annunciate provide a basis for addressing gaps in the fiduciary constraints contemplated by the drafers of section 122(18). They do by subjecting shareholders who exercise certain controlling rights to the obligations of controllers under traditional Delaware law. Our analysis similarly offers a tool for predictable, ex ante line-drawing by delineating the situations in which contractual control rights should not trigger the application of fiduciary principles.

Our proposal is pragmatic. It reconciles the flexibility afforded by section 122(18) with the purpose of controlling shareholder fiduciary duties -- to impose appropriate accountability on a shareholder who effectively acts on behalf of the corporation. Our analysis also preserves the traditional role of the board under Delaware law by transforming shareholders into controllers only when they displace and act under that traditional authority. Otherwise, shareholders are subject to the freedom of traditional shareholders in the exercise of their shareholder rights, even when exercising corporate powers pursuant to contract.

We proceed as follows. In Part I, we provide a brief background to the adoption of section 122(18). In Part II we discuss the controlling shareholder concepts that gave rise to SB 21, including the extension of fiduciary duties in situations involving soft control, potential control and transaction-specific control. Part III describes the legislative response and identifies the reasons why the current approach relies too heavily on the narrow contractual equivalency of majority equity ownership to the ability to control board composition. Part IV offers our proposed solution, based on key principles

[8] See id., at 699 ("Directors, not shareholders, are responsible for addressing unfairness in corporate actions.").

underlying section 122(18) and the amendments, to incorporating contractual control into the statute as well as Delaware law broadly.

I. Background to Section 122(18)

Shareholder agreements are a longstanding feature of corporate governance.[9] In venture capital and private equity funded corporations, shareholder agreements are ubiquitous.[10] Similarly, shareholder agreements are frequently used to allocate control rights in publicly-traded corporations. An empirical investigation conducted by Gabe Rauterberg, for example, found such agreements in 15% of newly public corporations.[11]

The scope of the rights these shareholder agreements may grant shareholders varies. One common right is the ability to appoint directors despite owning equity positions that would be insufficient to enable shareholders to elect those directors through their voting power alone. They may similarly give shareholders contractual governance rights such as the power to effect or block amendments to the charter and bylaws. Shareholder agreements may also give shareholders direct control rights – the power to require the corporation to take or abstain from certain actions, even if those actions would normally be the subject of board authority.[12]

In *West Palm Beach Firefighters' Pension Fund v. Moelis & Co*.,[13] the Delaware Chancery Court invalidated one such shareholder agreement for improperly constraining the board's authority. Immediately prior to taking Moelis & Company (the bank) public, Ken Moelis (Moelis), the bank's founder, entered into a shareholder

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[9] See generally Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 Wash. Univ. L. Rev. 913 (2021) (describing role of shareholder agreements in corporate governance; Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 Yale J. Reg. 1124 (2021) (same); Gladriel Shobe & Jarrod Shobe, *The Dual-Class Spectrum*, 39 Yale J. Reg. 1343, 1345-46 (2022) (describing allocation of contractual control rights as a substitute for dual class voting structures).

[10] Rauterberg, supra note 9, at 11 34 ("in venture capital and private equity financing, shareholder agreements are pervasively used, typically in combination with class-specific charter arrangements, to facilitate the sharing of control among distinct investors.").

[11] Id. at 1129 ("about fifteen percent of companies that go public over the last six years do so subject to a shareholder agreement"). The use of shareholder agreements in private companies is likely higher. See Fisch, supra note 9.

[12] See, e.g., Luis Gosálbez, Veto rights in shareholder agreements – how does it work?, Metricson, May 4, 2023, https://metricson.com/en/veto-shareholder-agreements/ (discussing use of veto rights in shareholder agreements)/.

[13] 311 A.3d 809 (Del. Ch. 2024).

agreement with the bank.[14] The shareholder agreement granted Moelis a variety of powers including the requirement that the board obtain Moelis's consent prior to undertaking eighteen categories of board actions including entering into mergers and initiating litigation.[15] As the court explained, although Delaware law embraces a freedom of contract approach, it "does not permit actions or agreements by stockholders which would take all power from the board to handle matters of substantial management policy."[16]

Moelis was not the only decision, however, to invalidate a shareholder agreement containing contractual control rights. In the wake of the *Moelis* decision, the Chancery Court issued several other decisions reaching similar results.[17] For example, in *Seavitt v. N-Able*,[18] the court invalidated several provisions in a shareholder agreement including those that gave the shareholder parties preapproval rights with respect to a variety of transactions and provisions that gave them power over the size and composition of the board.[19] In particular, the agreement effectively gave the two lead investors the right to name six members of the eight person board so long as the shareholder parties each held 20% of the outstanding shares, and four members of the board if their ownership dropped to 10% each.[20] Litigation challenges were also brought against activism

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[14] Id. at 824 ("On April 15, 2014, one day before the Class A shares began trading, the Company, Moelis, Holdings, and two other Moelis affiliates executed the Stockholder Agreement.").

[15] The agreement also gave Moelis the power to designate a minimum number of directors even if his voting power fell below a majority and required the board to recommend that shareholders vote for Moelis's designees. Id. at 826-27. At the time of the IPO, Moelis had an approximate 6.5% equity position in the company and controlled 40% of the voting power. Mike Leonard, Moelis Ruling Sharpens Focus on Private Equity Veto Agreements, Bloomberg, Mar. 5, 2024, https://news.bloomberglaw.com/esg/moelis-veto-ruling-sharpens-focus-on-private-equity-veto-pacts.

[16] Moelis, 311 A.3d 809, 833, quoting Abercrombie v. Davies, 123 A.2d 893, 898 (1956).

[17] See, e.g., Wagner v. BRP Gp., 316 A.3d 826 (Del. Ch. 2024); Seavitt v. N-Able, Inc, 321 A.3d 516 (2024).

[18] 321 A.3d 516 (Del. Ch. 2024).

[19] Id. at 559. At the time the complaint was filed, it alleged that the two lead investors collectively owned approximately 62% of the company's stock. Id. at 525.

[20] Id. at 528-29.

settlement agreements providing activists with board representation or other governance rights.[21] Other cases raised similar challenges.[22]

The *Moelis* decision and its progeny generated substantial debate among the corporate bar and academia. Some critics argued that the *Moelis* agreement was an "outlier"[23] and "an extreme departure from both the law and conventional wisdom . . ."[24] In support of this argument, subsequent empirical research by Gladriel Shobe, Jarrod Shobe and William Clayton reported that the "all-encompassing" provisions in the Moelis shareholder agreement were rare and tended to be phased out quickly, suggesting that the *Moelis* decision would have affected relatively few companies.[25] However, others maintained that the court's decision was inconsistent with widespread market practices and reflected a developing trend in Delaware chancery toward skepticism of controlling shareholders.[26] In this regard, these critics noted that the scope of *Moelis* and its progeny appeared to circumscribe shareholders agreements of any type which circumscribed board authority.[27]

[21] See, e.g. Leslie Pappas, *Elliott Waives BioMarin Board Deal, Moots Del. Suit* , Law360, Apr. 17, 2024, (describing lawsuit filed against BioMarin challenging its agreement to give activist investor Elliott 3 board seats to settle a threatened proxy contest); https://corpgov.law.harvard.edu/2024/03/26/from-moelis-to-miller-how-to-settle-with-activists/ (describing Theodore B. Miller, Jr., et al. v. P. Robert Bartolo, et al. C.A. No. 2024-0176-JTL) Notably, the Delaware courts had previously held that voting agreements pursuant to such settlements were enforceable. See, e.g., Texas Pacific Land Corp. v. Horizon Kinetics LLC, 306 A.3d 530, 537 (Del. Ch. 2023) (applying voting agreement to deem charter amendment approved).

[22] See, e.g., Baker Botts, Delaware Chancery Court Upends Stockholders' Agreements' Market Practice; Red, Yellow and Green Lights for Practitioners, n. iii, March 28, 2024, https://www.bakerbotts.com/thought-leadership/publications/2024/march/delaware-chancery-court-upends-stockholders-agreements-market-practice-red-yellow-and-green-lights ("As of March 26, 2024, there were at least eight other cases pending before the Delaware Court of Chancery in which the plaintiffs seek to invalidate stockholders' or similar agreements' provisions based on DCGL Section 141(a)").

[23] Gladriel Shobe, Jarrod Shobe & William W. Clayton, *Moelis and Private Equity in the Public Market*, _ Yale J. on Reg. __ (forthcoming) ("Opponents of the legislation argued that the Moelis stockholder agreement was an outlier and not representative of market practice"). To be fair, the data on shareholder agreements in this article came from agreements in publicly-traded corporations. Market practice in privately-held corporations might differ. See Fisch, supra note 9, at 916 (observing that startups depart from traditional tools of corporate governance through greater reliance on shareholder agreements).

[24] Mark Lebovitch, *Soap Opera Summer: Five Predictions About DGCL 122(18)'s Effect on Delaware Law and Practice* (August 18, 2024). https://ssrn.com/abstract=4929402.

[25] Id.

[26] Shobe, et al., supra note 23.

[27] See, e.g., Philip O. Brandes, et al., *Delaware Chancery Court Invalidates Common Stockholder Agreement Provisions*, Mayer Brown, Mar. 25, 2024,

Despite the heated controversy, the Delaware legislature responded rapidly, and, in July 2024, it adopted DGCL section122(18), which the Governor promptly signed into law. Under section 122(18), corporations have the power to enter into contracts, including shareholder agreements, that grant specific control rights to shareholders.

Section 122(18) explicitly provides that corporations may enter into agreements with current and prospective shareholders even if those agreements constrain the board's managerial discretion, overruling that component of the *Moelis* decision. The legislation, however, specifically states that the extent and application of these provisions is limited by the fiduciary duties of directors, officers and shareholders of the company.[28] As a result, the statute leaves it to the courts to determine the applicable fiduciary principles that apply to a corporation's decision to enter into a shareholder agreement as well as circumstances under which a shareholder's exercise of its right pursuant to such an agreement might constitute a breach of fiduciary duty. At the same time, the statute broadly countenances flexibility in the manner in which corporations allocate control, substituting contractual freedom for a baseline of director primacy.[29] As such, the statute expands Delaware's embrace of private ordering in corporate law in place of mandatory restrictions.[30]

II. Delaware and Controlling Shareholders

At the same time that section 122(18) expressly authorized corporations to allocate broad managerial power to shareholders by

https://www.mayerbrown.com/en/insights/publications/2024/03/delaware-chancery-court-invalidates-common-stockholder-agreement-provisions.

> In our experience, the provisions of the Stockholder Agreement that the Delaware Court of Chancery objected to are commonly found in stockholder agreements governing affairs of many private and some public companies. Stockholders relying on these agreements to maintain control over the companies in which they invest should consider whether the agreements remain enforceable.

[29] Cf. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U. L. Rev. 547, 605 (2003) (explaining that corporate law is based on "the centralized decisionmaking authority possessed by the board of directors").

[29] Cf. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U. L. Rev. 547, 605 (2003) (explaining that corporate law is based on "the centralized decisionmaking authority possessed by the board of directors").

[30] See, e.g., New Enter. Assocs. 14 v. Rich, 295 A.3d 520, 566 (Del. Ch. 2023) ("Delaware's embrace of contractarianism extends to the corporate form, where it manifests as the concept of private ordering").

contract, the Delaware courts, in several decisions, expanded the circumstances under which a shareholder would be deemed controlling, as well as the implications of being classified as a controller.

These decisions expanded the scope of controlling shareholder regulation in three distinct ways. First, the courts took an increasingly flexible and context-specific approach to the definition of control as opposed to a bright-line test of 50% ownership. Second, the courts expanded the scope of review for controller transactions beyond the freeze-out context to a wide array of transactions involving a controlling shareholder, holding that fiduciary duties applied any time that a shareholder received a non-ratable benefit. Third, the Delaware courts expanded the scope of *MFW*, holding that its procedural requirements were required to avoid entire fairness review for any controlling shareholder transaction subject to fiduciary duty analysis.[31]

In the first category of expansion, perhaps the best known of the recent decisions concerning the scope of the definition of a controlling shareholder was *Tornetta v. Musk*.[32] In *Tornetta*, Chancellor McCormack held that Elon Musk who, at the time owned 21.9% of Tesla's voting stock but who was also what the Chancellor termed a super-star CEO, should be classified as a controlling shareholder with respect to the negotiation of his $55.8 billion pay package.[33] In so doing, the Chancellor drew on a variety of features of what it means for a shareholder to exercise control, including the fact that multiple sources of corporate power can contribute to control in addition to equity ownership, the concept of transaction-specific control, and the role of potential control as well as actual domination.[34]

The *Tornetta* decision was not alone in employing a highly factual and context-specific analysis to determine controlling shareholder status. The court's analysis relied, for example, on *Cysive*, in which the court concluded that the purported controlling shareholder had, by

[31] *MFW* refers to the procedures articulated in Kahn v. M&F Worldwide Corp. (MFW), 88 A.3d 635 (Del. 2014).
[32] 310 A.3d 430 (Del. Ch. 2024).
[33] Id. at 502.
[34] Id. at 500 ("Both general control and transaction-specific control call for a holistic evaluation of sources of influence"). In contrast, however, the chancery court concluded, after trial, that Larry Ellison was not a controlling shareholder of Oracle, finding that, although Ellison, who owned almost 30% of Oracle had "clout", he "did not exercise general control." On appeal, the Supreme Court reasoned that the determination of controlling shareholder status was a factual one and deferred to the trial court's analysis. In re Oracle Corp. Derivative Litig., 2025 Del. LEXIS 19 *36-37

virtue of his voting power as well as being “involved in all aspects of the company's business, was the company's creator, and has been its inspirational force”, the ability “to be the dominant force in any contested Cysive election.”[35] The court concluded that this power presented the threat of “inherent coercion” that warranted entire fairness review.[36] Similarly in *Basho*, the court listed eight sources of influence or control that could lead to characterization as a controlling shareholder.[37]

This flexibility had negative consequences. It created ex ante uncertainty as to whether a particular shareholder would be classified as controlling, with a potential impact on the type of procedural mechanisms that would be required in connection with many operational decisions. That uncertainty translated into litigation risk – because the determination of control was context-specific, corporations could not readily avoid litigation through a motion to dismiss.[38] Similarly fact-specific inquiries could produce seemingly inconsistent results, as when the court in Oracle concluded after trial that Larry Ellison, despite his substantial equity stake and influence at Oracle, was not a controlling shareholder in connection with Oracle’s acquisition of NetSuite.[39]

Other decisions appeared to extend the consequences of controlling shareholder status. Perhaps most significant was the Delaware Supreme Court’s decision in *In Re Match Group, Inc*. Prior to Match, the caselaw reflected some ambiguity as to the circumstances in which entire fairness scrutiny would apply to decisions at controlled companies. In *Match*, the Delaware Supreme Court concluded that the former reflected existing Supreme Court precedent and held that the entire fairness standard of review applied to all corporate decisions in which a controlling shareholder stood “on both sides of a transaction with the controlled corporation and received a non-ratable benefit.” Applying this reasoning, the Delaware chancery court held in *Tornetta* that entire fairness was the applicable standard of review for a

[35] In re Cysive, Inc., S'holder Litig., 836 A.2d 531 (Del. Ch. 2003).
[36] Id. at 552.
[37] Basho Techs. Holdco B, LLC v. Georgetown Basho Inv’rs, LLC, 2018 Del. Ch. LEXIS 222, *61-62 (Del. Ch. July 6, 2018)
[38] See, e.g., In re Oracle Corp. Derivative Litig., 2023 Del. Ch. LEXIS 114, *63 (Del. Ch. May 12, 2023) (observing that cases alleging control frequently survive a motion to dismiss “with the benefit of plaintiff-friendly inferences”).
[39] See In re Oracle Corp. Derivative Litig., 2023 Del. Ch. LEXIS 114 (Del. Ch. May 12, 2023) (finding that, although Ellison held “roughly a quarter of the voting equity” and was “a force” at Oracle, “the evidence demonstrates that he did not control Oracle”). The Supreme Court affirmed, deferring to the trial court’s factual analysis. In re Oracle Corp. Derivative Litig., 2025 Del. LEXIS 19, *36-37 (Del., Jan. 21, 2025).

controlling shareholder's executive compensation package and, applying that standard, invalidated Elon Musk's $55 billion pay package.[40] Similarly, the chancery court held that TripAdvisor's decision to reincorporate from Delaware to Nevada should be analyzed under entire fairness, although the Delaware Supreme court reversed that holding in a narrowly written decision.[41]

Indeed, in seeming contrast to the idea that even a controlling shareholder has the right to act selfishly when acting in his individual capacity, the chancery court in *in re Sears Hometown and Outlet Stores, Inc. Stockholder Litigation*, the chancery court held that a controlling shareholder could be viewed as a fiduciary when he exercised his voting rights as a shareholder.[42] The court further explained that the shareholder's duties, in that situation included both a duty of loyalty and a duty of care.[43] The court therefore applied heightened scrutiny (although not entire fairness) to the exercise of those voting rights.

The result of these decisions was to apply a heightened standard to a broad array of controller transactions broadly defined. This raised the third category of expansion – so-called "MFW creep."[44] In *MFW*, the Delaware Supreme Court provided a procedural mechanism by which transactions at controlled companies engaging in freeze-out transactions could avoid entire fairness review. Commentators have described MFW compliance as a six-factor test.[45] Although avoiding entire fairness review is appealing, many transaction planners forgo

[40] Tornetta v. Musk, 326 A. 3d 1203 (Del. Ch. 2024).
[41] Maffei v. Palkon, 2025 Del. LEXIS 51 (Del. February 4, 2025) (reversing trial court decision and holding that the business judgment rule was the applicable standard of review).
[42] 309 A.3d 474 (Del. Ch. 2024).
[43] Id. at ("[W]hen exercising voting power affirmatively to change the status quo, a controlling stockholder owes a fiduciary duty of loyalty which requires that the controller not intentionally harm the corporation or its minority stockholders, plus a fiduciary duty of care that requires that the controller not harm the corporation or its minority stockholders through grossly negligent action.").
[44] See, e.g., Patrick O'Neal, 'Unnecessary Peril': MFW Creep, the MFW Tax, and the Future of Entire Fairness Review in Conflicted Controller Transactions (May 15, 2023), https://ssrn.com/abstract=4522546 (defining MFW creep as the Delaware courts' "extension of MFW's dual process approach to all conflicted controller transactions").
[45] *See, e.g.*, Christopher B. Chuff, Joanna J. Cline & Matthew M. Greenberg, *MFW Pitfalls: Bypassing the Special Committee and Pursuing Detrimental Alternatives*, Harv. L. Sch. For. On Corp. Gov. (June 30, 2020), https://corpgov.law.harvard.edu/2020/06/30/mfw-pitfalls-bypassing-the-special-committee-and-pursuing-detrimental-alternatives.

attempting to comply with the requirements of MFW because of its procedural complexity.[46]

Despite this complexity and difficulties in compliance with the *MFW* standard, the Delaware Chancery Court in a series of cases starting with *EZCorp* in 2016 expanded the requirement that corporate participants use MFW to escape entire fairness in business transactions.[47] This doctrine culminated in the *Match* case discussed above. Prior to *Match* commentators had disputed the scope of *MFW* as a heightened procedural cleansing requirements of *MFW*.[48] One line argued for a broad application of the *MFW* requirements to all transactions in which a controller received a non-ratable benefit.[49] The other termed this analysis "*MFW* creep" and argued that *MFW*'s distinctive requirements should be limited to the freeze-out context.[50] The court in *Match* decided in favor of a broad application of *MFW,* holding it applicable to any controller transaction subject to entire fairness review.

The requirement is complicated by the fact that, even where transaction planners have attempted to follow the *MFW* procedures, the courts have frequently rejected such attempts as inadequate.[51] One challenge is the requirement that the corporation implement the *MFW* procedures ab initio. In *Olenik*, for example, the Delaware Supreme Court held that *MFW* was not satisfied because the *MFW* requirements "were not put in place early and before substantive economic

[46] See, e.g., Meredith Kotler, Ethan Klingsberg & Marques Tracy, Maybe Entire Fairness Review Isn't So Bad After All: Lessons from BGC Partners and Other Recent Controlling Shareholder Transactions, FRESHFIELDS (Sept. 9, 2022), https://blog.freshfields.us/post/102hwqh/maybe-entire-fairness-review-isnt-so-bad-after-all-lessons-from-bgc-partners-a (explaining that corporations may fear execution risk or want to retain greater flexibility in their negotiations).
[47] In re EZCORP Inc. Consulting Agreement Derivative Litigation, C.A. No. 9962-VCL, 2016WL 301245, at *12-15 (Del Ch. Jan. 25, 2016).
[48] Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014).
[49] See Amicus Curiae Brief of Academics in Support of Appellants at 10-11, *In re* Match Grp., Inc., Derivative Litig., 315 A.3d 446 (Del. 2024) (C.A. No. 2020-0505-MTZ), ID No. 70770232 (arguing that it is too easy to evade a rule that limits two step cleansing to freeze-out limits).
[50] See, e.g., *ee* Alex Lindsey, Note, *Expanding MFW: Delaware Law Should Offer a Business Judgment Rule Safe Harbor for All Conflicted Controller Transactions*, 29 Ford. J. Corp. & Fin. L. 339, 343, 356-58 (describing three categories of "MFW creep").
[51] See, e.g., Nathaniel J. Stuhlmiller & Brian T.M. Mammarella, 'MFW' Just Turned 10, but Is It Worth the Candle?, Del. Bus. Court Insider, July 3, 2024 (reporting that "during MFW's 10-year history, MFW defenses succeeded in 10 of 26 cases for an aggregate success rate of 38.5%.").

negotiation took place."[52] A second is the requirement that the shareholder vote be fully informed. Multiple recent cases involve successful showings that the disclosure to the shareholders was inadequate.[53] A third issue is the requirement that the entire special committee be independent. In *Match*, for example, the court's finding that one of the committee members was not independent invalidated the effort to obtain business judgment rule review.[54]

III. SB 21 and the Definition of Controlling Shareholder

These doctrinal developments drew extensive criticism from the corporate bar.[55] A number of academic articles also called into question the doctrinal and theoretical basis of these developments.[56] Although the cases described above drew on prior precedents,[57] some commentators described Delaware law as undergoing a "doctrinal shift" with respect to both the scope of controlling shareholder status and its consequences.[58] Stephen Bainbridge, for example, characterized Delaware law as reflecting increased skepticism of controlling shareholders and called for a "course correction."[59] Wilson Sonsini published a high profile client alert explaining why some shareholders were "reconsidering incorporation

[52] Olenik v. Lodzinski, 208 A.3d 704 (Del. Apr. 5, 2019), quoting Flood v. Synutra Int'l, Inc., 195 A.3d 754, 764 (Del. 2018).
[53] See, e.g., *City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings, Inc*., 319 A.3d 271 (Del. 2023); City of Dearborn Police & Fire Revised Ret Sys. (Chapter 23) v. Brookfield Asset Mgmt., 314 A.3d 1108 (Del. 2024).
[54] Match, 315 A.3d at 473.
[55] See, e.g., Mark E. McDonald, Roger A. Cooper & Peter Carzis, *Delaware's Rocky Year–What Lies Ahead?* Cleary Gottlieb, Jan. 16, 2025, https://www.clearygottlieb.com/news-and-insights/publication-listing/delawares-rocky-year-what-lies-ahead (describing "the Delaware courts' recent perceived hostility towards controlling stockholders."): Amy Simmerman, et al., Delaware's Status as the Favored Corporate Home: Reflections and Considerations , Wilson Sonsini Client Advisories, Apr. 23, 2024), https://www.wsgr.com/en/insights/delawares-status-as-the-favored-corporate-home-reflections-and-considerations.html (noting "The challenges that the case law can pose for companies with influential founders or significant stockholder").
[56] We were among the critics. See Fisch & Davidoff Solomon, supra note 7.
[57] See, e.g., Ben Potts, Andrew Blumberg & Tom James, Delaware Corporate Law Myth-Busting: The "Expanding Definition" of Controlling Stockholder, Harv. L. Sch. For. on Corp. Gov., Feb. 21, 2025, https://corpgov.law.harvard.edu/2025/02/21/delaware-corporate-law-myth-busting-the-expanding-definition-of-controlling-stockholder/ (analyzing precedential basis for the decisions).
[58] See, e.g., Note, *Controller Confusion: Realigning Controlling Stockholders and Controlled Boards*, 133 Harv. L. Rev. 1706 (2020).
[59] Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, __ Del. J. Corp. L. (forthcoming 2025).

in Delaware."[60] And several corporations with controlling shareholders reincorporated to Texas or Nevada, explaining their actions, in part, by recent court decisions.[61]

In an effort to address these concerns, the Delaware legislature adopted SB 21 in March 2025.[62] Although the Council of the Corporation Law Section of the Delaware State Bar (the "CCL") usually proposes amendments to the Delaware statute, SB 21 was drafted independently of the CCL.[63] Delaware Senator Brian Townsend introduced the amendments in February 2024.[64] Only then were they submitted to the CCL for input. Some commentators, including many academics, criticized the amendments as dangerous with respect to the rights of investors and ordinary Americans.[65] Commentators also questioned whether the amendments were necessary, asking, for example, "the question whether the defense bar is overreacting to a crisis that has been ginned up by Elon Musk in a

[60] Simmerman, et al., supra note 55 ("many of our clients have asked us whether they should remain in Delaware or choose Delaware as the state of incorporation for their new ventures").

[61] See, e.g., Emily Glazer, Berber Jin & Meghan Bobrowsky, *Meta in Talks to Reincorporate in Texas or Another State, Exit Delaware*, Wall St. J., Jan. 31, 2025, https://www.wsj.com/tech/meta-incorporation-texas-delware-f06e8bab (reporting that TradeDesk and DropBox had moved their incorporation from Delaware due, in part, to "frustration . . . over recent court decisions"); Kevin LaCroix, Critics Launch Campaign Opposing Delaware SB 21, The D&O Diary, Feb. 25, 2025, https://www.dandodiary.com/2025/02/articles/director-and-officer-liability/critics-launch-campaign-opposing-delaware-sb-21/ ("Much of the current Delaware redomestication debate derives from Delaware court decisions involving transactions at controlled company's (that is, corporations, like, for example. Tesla, where there is a controlling shareholder)." Perhaps best known was Elon Musk's January 2024 post on X: "Never incorporate your company in the state of Delaware." https://www.newsweek.com/elon-musk-criticism-delaware-governor-matt-meyer-2043364. One of the co-authors of this article – Steven Solomon – advised the board of The Trade Desk, Inc. and Dropbox, Inc. in connection with their reincorporation to Nevada.

[62] Jacob Owens & Karl Baker, Landmark Delaware corporate law changes aim to stem exits, Spotlight Delaware, Feb. 19, 2025, https://spotlightdelaware.org/2025/02/19/delaware-corporate-law-change-sb-21/.

[63] See Nicholas O'Keefe, Eric G. Pearson, Saige G. Gallop & Sarina S. Rogers, SB21: Delaware Responds In The DExit Battle, Foley Corporate Governance Update, Mar. 6, 2025, https://www.foley.com/insights/publications/2025/03/sb21-delaware-responds-dexit-battle/ (describing the amendments as "rushed through to the Delaware Senate in mid-February").

[64] Eric Talley, Sarath Sanga & Gabriel V. Rauterberg, Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling? The CLS Blue Sky Blog, Feb. 18, 2025, https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/

[65] LaCroix, supra note 61.

fit of pique."[66] In response, a group of law professors proposed that SB 21 be made an opt-in statute in order to provide companies a choice of which regime was preferable.[67] The criticism had little impact, however, and after the CCL made certain changes, the amendments were enacted into law largely in the form initially proposed.

SB 21 addressed a broad range of issues, many of which are beyond the scope of this article.[68] It responds directly, however, to the developments described in Part II above in several ways. SB 21 both brings controlling shareholder transactions into the liability safe harbor provided by DGCL 144 and simplifies the procedures required to obtain that safe harbor.[69] SB 21 eliminated controlling shareholder liability for the duty of care, overruling the *Sears Homeland* decision.[70] And perhaps most importantly, the statute provides a statutory definition of controlling shareholder as a substitute for the traditional case-by-case analysis. It defines a controlling shareholder as a person that

> (i) owns or controls a majority in voting power of outstanding voting stock of the corporation entitled to vote in the election of directors,
> (ii) has the contractual or other right to cause the election of nominees constituting a majority of members of the board, or
> (iii) has the power functionally equivalent to such a majority owner, and holds at least one-third in voting power of outstanding voting stock of the corporation.[71]

Notably, the inclusion of contractual arrangements as meeting the definition of controlling shareholder was not in the original draft of SB 21; it was added by the CCL revisions.[72] As drafted, the scope of the language covering contractual arrangements largely mirrors the scope of the sections of the definition addressed to equity ownership by a shareholder.

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[66] Id.
[67] Professors' Letter on SB 21, available at https://docs.google.com/forms/d/e/1FAIpQLSeS6931votFRaXuG6PSKpQV32o0_HQlAVA_ItoC-CT7ehzZqg/viewform
[68] Those issues include the scope of the safe harbor applicable to self-dealing transactions, the definition of director independence, and the scope of statutory inspection rights. See SB 21.
[69] Section 144(a) (as amended).
[70] Section 144(d)(5) (as amended).
[71] DGCL § 144(e)(2).
[72] Senate Substitute 1 for Senate Bill 21, March 12, 2025, https://legis.delaware.gov/BillDetail/141930.

In prior work we have criticized the case-by-case approach to the definition of controlling shareholder as largely unworkable.[73] The statute brings needed clarity to the concept. Although the one-third minimum threshold may or may not draw an appropriate baseline,[74] there is clearly value in renewing the principle that, as a general matter, controlling shareholder status should be predicated on substantial equity ownership.[75]

The statute also appropriately incorporates shareholder agreements into its definition of controlling shareholder, recognizing that controller statute can be based on contractual rights not just equity ownership.[76] Where the statute falls short, however, is in understanding the potential scope of contractual control rights in light of section 122(18). Under section 122(18), shareholders need not exercise control over corporate decisions exclusively through their power to appoint directors but may, instead, exercise decisional authority directly. In this next part, we explain the implications of 122(18) for the definition of controlling shareholder and offer a proposal for addressing these implications based on our annunciated principles.

IV. Situating Controlling Shareholder Status

To understand the potential impact of section 122(18), it is important to understand the nature of the new powers it enables corporations to grant to parties to a shareholder agreement. Prior to the statute's adoption, Delaware caselaw provided that shareholders could not take actions that interfered with or limited board discretion.[77]

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[73] Fisch & Davidoff Solomon, supra note 7.

[74] Delaware law has long recognized that controlling shareholder status does not require that a shareholder own an absolute majority of a corporation's voting power. Early cases, however, required that a shareholder own a near-majority of that power. See Fisch & Davidoff Solomon, supra note 7, at 658-59 ("early cases used the terminology of "majority shareholder" rather than "controlling shareholder" and focused on situations in which shareholders owned a majority or near majority of the corporation's voting stock.").

[75] See id. at 679 (warning that the principles articulated in recent cases could enable courts to apply controlling shareholder status "even to those who own no stock at all").

[76] In important work, Shobe and Shobe document how contractual control rights can be used as an alternative to dual class stock. Shobe & Shobe, supra note 9.

[77] See, e.g., Abercrombie v. Davies, 123 A.2d 893, 898 (Del. Ch. 1956) ("our corporation law does not permit actions or agreements by stockholders which would take all power from the board to handle matters of substantial management policy"); Quickturn Design Sys. v. Shapiro, 721 A.2d 1281, 1291 (Del. 1998) (invalidating "Delayed Redemption Provision" on the basis that it would "impermissibly deprive any newly elected board of both its statutory authority to manage the corporation"); Carmody v. Toll Brothers Inc., 723 A.2d

Similarly, Delaware statutory law sets forth the voting standards for the election of directors, the amendment of the charter, approval of mergers and various other corporate actions.[78] Although the statutes allow variation – such as by enabling a corporation to specify a higher threshold for approval[79] – they neither allow boards to avoid their statutory approval obligations nor authorize the board to divest shareholders of their voting power with respect to a particular decision by contractually agreeing to give that power to some subset of shareholders.

Section 122(18) changes these restrictions. First, the statute explicitly sets out a variety of contractual provisions that, henceforth, are valid, including provisions that allow a shareholder to compel or restrict the board of directors from taking certain actions. Second, the statute provides that such provisions are permissible notwithstanding the extent to which they arguably interfere with or constrain the board's authority under section 141(a). The scope of this constraint is uncertain since section 122(18) cabins these rights by stating that it is subject to the limitations of board fiduciary duties in the synopsis of the statute.

The exact scope of contractual allegations permitted by section 122(18) has yet to be judicially tested, but the contractual rights which shareholders can now potentially exercise are quite broad. Based on the statutory language, permissible contractual provisions include those that allow a shareholder to

- Compel the appointment of designated individuals to the board;
- Provide the ability to nominate designated individuals to the board as board recommended nominees;
- Remove and replace existing directors;
- Maintain appointment authority for board committees;
- Appoint or removed specified corporate officers;
- Veto or compel major corporate actions, such as mergers, acquisitions, asset sales, or strategic initiatives;

1180, 1192 (Del. Ch. (1998) (rejecting motion to dismiss claim that a "continuing director" provision in a poison pill was statutorily invalid on the basis that it interfered with the directors' authority to run the corporation).

[78] See DGCL §§ 216 (election of directors); 242 (amendment of charter); 251 (approval of merger).

[79] See, e.g., DGCL § 216 (authorizing corporation to specify the votes necessary to take action through a charter or bylaw provision).

- Veto or compel decisions related to capital expenditures, borrowing, or distributions of dividends can indicate significant influence;
- Veto or compel governance changes such as amendments to the certificate of incorporation, bylaws, or other fundamental governance documents; and
- Veto or compel corporate dividends or share repurchases.[80]

As this non-comprehensive list shows, the powers a shareholder can now be potentially provided contractually can be quite broad and usurp many of the traditional roles of the board (as well as the ability of other shareholders to exercise their traditional rights). The question then becomes when and what rights should be considered as bestowing controller shareholder status on such an arrangement? We think that a sound approach is to draw upon the principles articulated in prior cases as well as the rationale for conferring fiduciary status on a shareholder, we identify two guiding principles to when contractual rights should confer controlling shareholder status.

First, a shareholder should be categorized as controlling when its contractual rights give it the power to control a majority of the board of directors, either directly through appointment power or indirectly through removal rights.[81] In large part this is the point addressed by SB 21. We note, however, that the language of SB 21, even with respect to this issue is vague and perhaps inapt. Control, under SB 21, is based on a shareholder's ability to "cause the election" of its director nominees. Shareholder agreements are not generally framed in these terms.[82] A shareholder may have the contractual right to nominate director candidates, but the power to nominate does not cause the election of those director candidates unless they are elected by a majority of the shareholders. Moreover, given that all shareholders generally have the power to nominate director candidates, it is unclear

[80] See generally Shobe, et al., supra note 23 (discussing language found in their empirical study of shareholder agreements).
[81] We note that when controlling shareholder status is based on contractual control rights, SB 21 does not condition such status on the size of a shareholder's equity stake. We agree with this analysis, Thus a small minority shareholder (or even a prospective shareholder), who has the power to appoint a majority of the board or otherwise exercise board-level power should be viewed as controlling. At the same time, a shareholder with a sizeable stake – as much as 20-30% -- should not be categorized as controlling if that shareholder's voting power is enhanced through contractual provisions that confer shareholder level rights such as the ability to nominate directors, the ability to appoint a minority of directors, or the ability to veto shareholder action such as the approval of a merger or charter amendment.
[82] See, e.g., Shobe, et al., supra note 23 ("These rights generally do not allow the stockholder to unilaterally place a director on the board but instead allow them to place their preferred candidates on the slate of directors available for stockholders to vote on.").

what additional power is conferred by such a provision. Indeed, even in the absence of 122(18), the *Moelis* court recognized that a right to nominate director candidates did not run afoul of section 141(a).[83] The same is arguably true if contract provides both that the shareholder has the power to nominate and the board agrees to recommend that shareholders elect those nominees. To be sure, if a shareholder has the contractual right to nominate director candidates, and the board does not nominate an opposing slate, the shareholder has the practical ability, in most cases, to determine the composition of the board.[84] Unless the shareholder controls a majority of the voting power, however, that ability is checked by the voting power of the other shareholders.[85]

Concededly, some shareholder agreements go further and use terms like designate or appoint director candidates. It is unclear whether, at least in the public company setting, those provisions have the effect of eliminating a shareholder vote. If not, however, and the signatory to an agreement lacks majority voting power, it is unclear how a contractual provision could give the shareholder the power to cause the election of its nominees.

Putting aside these ambiguities with respect to the first component of control, we believe that the power to cause the election of directors, however that term is understood, is too narrow. We think there is a second category where a shareholder should be treated as controlling. That category is when the contract authorizes the shareholder to take an action that otherwise would be within the exclusive authority of the board of directors, contractual provisions that arguably would have run afoul of the principle delineated in *Abercrombie* prior to the adoption of section 122(18). In particular, we believe that contractual rights such as the power to designate officers, direct the composition of board committees, and compel structural changes such as charter amendments and mergers, warrant treating a shareholder as controlling.

[83] Moelis at 875 ("a company can agree to nominate candidates that a stockholder proposes without violating Section 141(a).").

[84] Shobe, et al., supra note 23 ("Because these candidates usually run unopposed with the support of the board, the right to designate or nominate a member of the board of directors typically guarantees that an insider's chosen designees or nominees will have a seat on the board of directors.").

[85] We note that, in the startup context, a shareholder's power to nominate directors may be equivalent to the power to appoint those nominees if a majority of the shareholders are obligated to vote in favor of the shareholder's nominees pursuant to a voting agreement. See National Venture Capital Association Model Voting Agreement (Updated October 2024) https://nvca.org/document/voting-agreement-updated-october-2024/.

We reach this conclusion by observing that the traditional controlling shareholder could exercise board powers, albeit only indirectly, through its ability to determine who served on the board. With the advent of full-throated contractual control rights, the ability to designate a majority of the directors is no longer a prerequisite to this control; subject to an appropriate shareholder agreement, a shareholder can exercise board power directly. The exercise of such board power, we argue, is equivalent to the ability to designate a majority of the directors and justifies similar legal treatment.

The scope of controller status based on the contractual right to exercise board level power remains. We argue that contractual provisions giving a shareholder the ability to exercise board-level powers should not give rise to a general finding of controller status but should only apply to decisions within the scope of those contractual control rights. The concept can be understood as a type of power-specific control. If a shareholder has the contractual power to initiate a merger, for example, that shareholder would be a controlling shareholder in the context of a legal challenge to a self-dealing merger, but not with respect to a decision on executive compensation. Notably, our power-specific control enables a shareholder readily to identify, ex ante, the situations in which fiduciary duties will apply.[86]

Some contractual powers are broader. The ability to select the CEO or approve his or her compensation, or the ability to dictate the board's agenda might constitute general control, akin to the power to appoint a majority of the board. Similarly, some contractual rights are narrower. We disagree, for example, with cases such as *Basho* that treat negative control rights such as blocking rights as indicia of control.[87] We view negative control rights, which only enable a shareholder to prevent a corporation from taking a particular action as categorically different from affirmative control rights which compel the corporation to follow the shareholder's mandate. We draw upon the court's analysis in *Superior Vision Services, Inc. v. ReliaStar Life Insurance Co.*,[88] in which the court upheld a shareholder's exercise of

[86] The ability to ascertain the application of controlling shareholder status ex ante distinguishes our approach from the judicial development of transaction-specific control, a concept that has been criticized. See, e.g., Elizabeth Pollman & Lori W. Will, *The Lost History of Transaction-Specific Control*, 50 J. Corp. L. (forthcoming 2025).
[87] Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC, 2018 Del. Ch. LEXIS 222, *61 (Del. Ch. July 6, 2018) (citing, as an example of the type of influence that could lead to a finding of control, "the exercise of contractual rights to channel the corporation into a particular outcome by blocking or restricting other paths").
[88] 2006 Del. Ch. LEXIS 160.

its contractual right to block the corporation from paying a dividend.[89] As the court explained: "a significant shareholder, who exercises a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take, does not become, without more, a 'controlling shareholder' for that particular purpose."[90] Although concededly a shareholder could use negative control rights to prevent the board from taking any action other than the shareholder's preferred action, we believe such cases can be adequately addressed through contract law and, in particular, the implied covenant of good faith and fair dealing.[91]

Ultimately, limiting controlling shareholder status to these cases is consistent with the principles we identify above. Our proposal preserves contractual flexibility and tailors the definition of controlling shareholder to the scope of a shareholder's contractual power. This affirms the contractual approach which Delaware has taken while allowing for the potential that shareholder agreements pursuant to section 122(18) will be used to displace traditional board primacy. Moreover, our approach follows the intent of SB 21 by creating bright line rules in applying fiduciary duties to shareholders with contractual power.

In this vein, controlling shareholder status is limited, in our proposal, to situations in which the shareholder has the power to substitute its objectives for those of the board, either indirectly through the power to appoint and remove directors, or directly, through the power to take board-type action. In either case, the traditional corporate governance mechanism by which the board acts as a constraint on shareholder action has been displaced. This, in turn, warrants extending what would otherwise be board-level fiduciary obligations, to the shareholder.[92] And otherwise, the application of the business judgment rule remains as it would for board-level conduct of this type and nature.

Conclusion

[89] Id.

[90] Id. at *19-20.

[91] See id. at *21-23 (finding that implied covenant did not require shareholder to waive its contractual rights); Halpin v. Riverstone Nat'l, Inc., 2015 Del. Ch. LEXIS 49, *37 (explaining that implied covenant can provide recourse "where one party is attempting to take advantage of a situation that was unanticipated or unforeseeable at the time of contracting.").

[92] See Fisch & Davidoff Solomon, supra note 7, at 696-97 (observing that "shareholder agreements may give shareholders the authority to exercise traditional board powers, and we argue that, where they do so, such shareholders should be treated as fiduciaries").

The Delaware legislature has adopted amendments that promise heightened clarity in the definition of controlling shareholder. In doing so, however, it has overlooked a crucial consequence of its prior adoption of section 122(18). Because, subsequent to section 122(18)'s adoption, shareholders can exercise broad board-level powers directly pursuant to a shareholder agreement, the definition of controlling shareholder should incorporate the potential to do so. We offer modest recommendations for the extension of the definition of controlling shareholder in SB 21 to incorporate that prospect.

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