Influence Without Control: Private Funds, Shareholder Engagement, and the New Law of Control

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Abstract

Delaware Senate Bill 21 (“SB 21”) has been widely framed as a politically motivated response to corporate flight, billionaire backlash, and perceived judicial overreach in controlling-shareholder doctrine. This Article argues that those accounts miss one of SB 21’s most consequential legal developments: its redefinition of the boundary between shareholder influence and corporate control. By replacing Delaware’s open-ended “actual control” doctrine with a statutory framework anchored in ownership thresholds and board-level authority, SB 21 transforms control from an ex post judicial determination into an ex-ante design choice. Through doctrinal analysis and original qualitative interviews with leading corporate advisors, this Article shows how SB 21 stabilizes transaction planning while formally insulating traditional forms of minority shareholder engagement—persuasion, voting, proxy contests, and limited board representation—from fiduciary status below a one-third ownership threshold. The statute’s effects extend well beyond founder-led firms, reshaping the governance strategies of private equity sponsors, venture capital funds, and activist investors. Finally, this Article underscores how SB 21 simultaneously blesses increasingly aggressive minority-stake engagement while leaving unresolved—and in some cases exacerbating—new forms of contractual and economic control. Ultimately, SB 21 does not merely respond to recent cases; it recasts the law of corporate control itself, with lasting consequences for shareholder activism, private ordering, and the future of fiduciary accountability in Delaware corporate law.

Keywords: SB21, hedge funds, Private Equity, Controling shareholders

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Delaware Senate Bill 21 ("SB 21") has been widely framed as a politically motivated response to corporate flight, billionaire backlash, and perceived judicial overreach in controlling-shareholder doctrine. This Article argues that those accounts miss one of SB 21's most consequential legal developments: its redefinition of the boundary between shareholder influence and corporate control. By replacing Delaware's open-ended *"actual control" doctrine with a statutory framework anchored in ownership thresholds and board-level authority, SB 21 transforms control from an ex post judicial determination into an ex-ante design choice.*

Through doctrinal analysis and original qualitative interviews with leading corporate advisors, this Article shows how SB 21 stabilizes transaction planning while formally insulating traditional forms of minority shareholder engagement—persuasion, voting, proxy contests, and limited board representation—from fiduciary status below a one-third ownership threshold. The statute's effects extend well beyond founder-led *firms, reshaping the governance strategies of private equity sponsors, venture capital funds, and activist investors. Finally, this Article underscores how SB 21 simultaneously blesses increasingly aggressive minority-stake engagement while leaving unresolved—and in some cases exacerbating—new forms of contractual and economic control. Ultimately, SB 21 does not merely respond to recent cases; it recasts the law of corporate control itself, with lasting consequences for shareholder activism, private ordering, and the future of fiduciary accountability in Delaware corporate law.*

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INTRODUCTION

Pershing Square quietly amassed a 14.2% stake in Canadian Pacific Railway over the course of three months in late 2011.[1] The activist hedge fund had identified what it viewed as an ideal target: a mature company whose operating performance had deteriorated under complacent management.[2] Pershing Square pressed its case aggressively—privately lobbying directors, publicly criticizing management, and ultimately mounting a proxy campaign to install an experienced railroad executive as CEO.[3] The board resisted. But by the company's annual meeting in May 2012, the incumbent CEO and five directors had stepped aside, and Pershing Square's vision for the company prevailed.[4]

Was Pershing Square a controlling stockholder during this campaign? It never owned more than a minority of the company's shares and lacked any contractual right to control the board. Yet under Delaware law, as it stood at the time, that might not have ended the inquiry. Through an evolving common law doctrine of "actual control," Delaware courts permitted ex post determinations that influential minority shareholders—particularly those able to shape corporate outcomes—owed fiduciary duties ordinarily reserved for controllers.

Whether Pershing Square controlled Canadian Pacific Railway is not merely an academic question. Interviews we conducted with leading corporate advisors and litigators reveal that uncertainty over when influence might be recharacterized as control has become a concrete and growing market concern over the past decade.[5] Practitioners described a steady expansion of "controller risk" for minority investors—particularly private equity sponsors, venture capital funds, and activists—whose strategies rely on persuasion, board representation, and economic leverage rather than formal authority. This uncertainty, they explained, increasingly complicated transaction planning and chilled aggressive—but conventional—forms of shareholder engagement.

Concerns about the expanding reach of control doctrine, substantiated by a growing line of minority-control judicial decisions, expose a deep and controversial fault line in Delaware corporate law: how

[1] Yvan Allaire & François Duphin, *Pershing Square, Ackman and CP Rail: A Case of Successful "Activisim"?*, INST. FOR GOVERNANCE (Nov. 2016), at 2 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2879033.
[2] *Id.* at 3, 6.
[3] *Id.*
[4] *Id.* at *7*.
[5] *Infra* Part V.

much power is too much power for a shareholder who never formally takes the reins? Or, in the language of equity, where along the spectrum of influence does shareholder engagement cross into control, triggering fiduciary duties?

This fault line has not remained confined to academic debate or incremental case law. It exploded into full view after a series of high-profile decisions—culminating in *Tornetta v. Musk*[6]—in which the Court of Chancery subjected transactions involving influential, but non-majority, shareholders to the most exacting form of judicial scrutiny. In *Tornetta*, the court invalidated Elon Musk's unprecedented Tesla compensation package after concluding that Musk exercised transaction-specific control despite owning far less than a majority of the company's stock. The ruling sparked sharp debates through boardrooms, founder communities, and the corporate bar. Musk responded not only with a brief and an appeal, but also by exiting: Tesla reincorporated in Texas, and Musk publicly urged other companies to abandon Delaware.[7]

What followed was legislative brinkmanship. Facing mounting warnings of a "DExit"—the purportedly genuine concern that corporations would leave Delaware en masse to reincorporate in more business-friendly jurisdictions—intense lobbying by corporate advisors and investment interests, and allegations that Delaware's flexible control doctrine had become unmoored from ownership and formal authority, lawmakers moved swiftly.[8] The result was Delaware Senate Bill 21 ("SB 21" or the "bill")—a sweeping statutory intervention designed to redraw the boundary between influence and control, curb what critics derided as "controller creep,"[9] and reassert Delaware's commitment to predictable, ex ante corporate law rules, notwithstanding the unusual manner in which it arose.

Yet the vociferous debate over SB 21, dubbed the "Billionaires' Bill," overlooks one of its most significant doctrinal and market effects: its impact on, and its implications for, the strategies of sophisticated financial players—such as private equity firms, venture capital firms, and, in some cases, activist hedge funds—who typically own minority stakes in firms but nevertheless exercise meaningful influence.

The bill, an expansive and controversial reform of the state's corporate law, has been criticized as an effort to appease large corporations

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[6] *Tornetta v. Musk*, 310 A.3d 430, 445 (Del. Ch. 2024), *rev'd sub nom. In re Tesla, Inc. Derivative Litig.*, No. 10, 2025, 2025 WL 3689114 (Del. Dec. 19, 2025).
[7] Tom Hals, *In Tesla's Wake, More Big Companies Propose Voting 'Dexit' to Depart Delaware*, REUTERS (May 14, 2025), https://www.reuters.com/business/autos-transportation/teslas-wake-more-big-companies-propose-voting-dexit-to-depart-delaware-2025-05-14/.
[8] *See* 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.html.
[9] *See e.g.*, Gregory V. Varallo, et al., *A Critical Analysis of 'Fair Price' in Entire Fairness Law in Delaware*, 49 DEL. J. CORP. L. 603, 608 (2025).

and their influential founders to keep corporate taxes and incorporation fees in Delaware's coffers. Indeed, Delaware lawmakers have acknowledged that SB 21 was intended to entice companies to remain incorporated in the state.[10] And proponents of the bill argue that it was a necessary legislative intervention in response to the looming threat of a "DExit."[11]

Thus, the principal debate has centered on whether the bill primarily benefits a small subset of powerful corporate insiders—at the expense of retail investors, principles of sound corporate governance, and effective judicial oversight[12]—or if the bill was necessary to maintain Delaware's dominance in the incorporation market. In other words, the genesis of the bill and the ensuing commentary both frame it as an attempt to solve problems officers, directors, and controlling shareholders have with Delaware's doctrine of control. This framing, while important, overlooks the bill's significant collateral consequences, and we set it aside for the duration of this Article.

Delaware corporate law has long distinguished between shareholders who merely influence corporate decision-making and those who exercise full control over it. In recent years, however, the contours of that distinction have meaningfully evolved. Through an expanded and highly fact-specific doctrine of "actual control," Delaware courts exposed large minority shareholders—influential managers, private equity and venture capital funds, and possibly activist investors—to growing litigation risk, blurring the line between influence and fiduciary power.

This Article underscores a previously overlooked feature of the legislative reform and argues that SB 21[13] represents a forcible course correction. By codifying a definition of controlling stockholder tied to ownership thresholds and board-level authority, SB 21 clarifies that influence alone does not amount to control. The statute provides ex ante clarity for minority-stake private funds including private equity sponsors, venture capital investors, and activists, while attempting to preserve

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[10] Gov. Matt Meyer, Governor Meyer Signs SB 21 Strengthening Delaware Corporate Law, Governor Matt Meyer (Mar. 26, 2025), https://news.delaware.gov/2025/03/26/governor-meyer-signs-SB21-strengthening-delaware-corporate-law/ (stating that the bill is "aimed at ensuring the state remains the premier home for U.S. and global businesses" by establishing "clarity and predictability, balancing the interests of stockholders and corporate boards").

[11] Eric Talley, *A Contractarian Path Forward for Delaware: A Modest Proposal for SB 21*, COLUM. L. SCH. BLUE SKY BLOG (Mar. 7, 2025), https://clsbluesky.law.columbia.edu/2025/03/07/a-contractarian-path-forward-for-delaware-a-modest-proposal-for-sb21/.

[12] *See* Karl Baker & Jacob Owens, *Meyer Signs Controversial Senate Bill Into Law After Bitter House Debate*, SPOTLIGHT DELAWARE (Mar. 26, 2025) (quoting Joel Fleming, Partner of Equity Litigation Group, "[Proponents] are li(stening to a small handful of lawyers that represent a particular subset of Silicon Valley founders who are controlling shareholders; that is a small fraction of Delaware's customers and maybe 10% of publicly traded companies. They just sent a message to the other 90% that Delaware can't be trusted").

[13] S.B. 21, 85 Del. Laws Ch. 6 (2025).

fiduciary constraints where genuine control exists. Whether and how the lines drawn by the rule are underinclusive or overinclusive remains to be seen. This Article examines competing interpretations of SB 21, its interaction with recent doctrinal developments, and its practical implications for shareholder engagement and governance design. In doing so, it situates SB 21 as part of a legislative effort to codify the law of corporate control rather than to simply insulate powerful insiders.

Prior to SB 21, Delaware courts used a flexible standard to determine whether a shareholder had actual control of a corporation, which triggers fiduciary duties and enhanced judicial scrutiny. Under this flexible standard, minority shareholders—including private funds with large minority positions—operated under the constant risk that a reviewing court would deem them controlling shareholders in a later lawsuit. The possibility that a minority stockholder would be deemed a controller ex post increased deal uncertainty and forced transaction planners to make difficult assessments about the likely outcome of future lawsuits .

SB 21 replaced this flexible standard with the bright line rule that any shareholder, along with its affiliates and associates, who owns or controls less than one-third in voting power of a corporation's stock is not a controller, at least for purposes of the statute, unless it has a contractual right to cause the election of a majority of the corporation's directors or directors with majority voting power. Absent that legal right, a Delaware court cannot find that an owner of thirty-three percent or less of a firm's voting shares is a controller regardless of any practical control it exercises over the affairs of the corporation. Because this bright line test for control protects all investors—including private funds with large minority stakes who previously were exposed to control-related liability—the "Billionaire's Bill" might in fact be a boon for transactional planners and any who benefit from increased dealmaking certainty.

Thus, this Article argues that SB 21 has the potential to stabilize the law of corporate control across the corporate law landscape and improve the conditions for private funds. By codifying a definition of controlling stockholder, SB 21 formalizes the long-standing but increasingly controversial distinction between shareholder influence and corporate control. Whether the statute's definition of corporate controller applies narrowly and exclusively to conflicted transactions or entirely supplants Delaware's common law test for "actual control," SB 21 confirms that activist investors, who seek to influence corporate behavior through persuasion, ballot contests, and occasional board representation, do not exercise the kind of managerial authority that constitutes corporate control and triggers fiduciary duties.

This Article also highlights that SB 21 does more than simply formalize the distinction between influence and control; it meaningfully alters the legal landscape for other investors whose strategies involve varying degrees of managerial control—namely minority-stake private equity sponsors, venture capital firms, and influential managers—by making control an ex ante design choice. SB 21 augments Delaware's control scheme by confirming activist investors' status as influencers rather than controllers and providing other investors the ability to anticipate and incorporate the costs of control when designing a transaction or engagement.[14] This clarification should relieve private equity sponsors, venture capital firms, and activist investors from worrying they will accidentally wander into "control" territory, freeing them to use maximally efficient—and aggressive—strategies to improve their target corporations. Ultimately, SB 21 may yield positive effects in the capital markets, at least as to certain market participants.

In Part I, we begin by examining control jurisprudence pre-SB 21 and surveying the evolution of Delaware's common law doctrine of control and its implications. This survey of the case law highlights an underappreciated development: Delaware courts have been increasingly willing to find minority shareholders are actual controllers. SB 21's bright line control threshold has the potential to arrest this trend. In Part II, we consider SB 21's impact on control jurisprudence, recognizing that there are two competing interpretations on the scope of the statute's controlling stockholder definition. In Part III, we examine SB 21's impact on the private funds that often hold significant minority positions in companies—including private equity investors, venture capital firms, and activists—and argue that SB 21 signals that minority investors do not become controllers merely by engaging in traditional forms of shareholder influence, so long as they remain below the statutorily established ownership threshold. In Part IV, we compare our theoretical insights with input we received from conducting interviews with ten leading members of the corporate bar. In Part V, we conclude.

I. PRE-SB 21: COMMON LAW STANDARDS AND LITIGATION RISK

"Control" is a central concept in corporate law. State statutes grant the board of directors the power to control the corporation by making the board the firm's primary decision-making body[15] and granting it essentially unfettered authority to direct all aspects of the firm's strategy and operations.[16] Due to its ability to control the affairs of the corporation, Delaware law imposes fiduciary duties—namely, the duties of care and loyalty[17]—on the board of directors to ensure its actions advance

[14] SB 21, *An Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law*, 153rd Gen. Ass. (Del. 2025).
[15] Del. Code Ann. tit. 8, § 141(a) (2023).
[16] Del. Code Ann. tit. 8, § 141 (2023).
[17] Carpenter Wellington PLLC, *Delaware Business Law: An Explanation of Fiduciary Duties*, LEXOLOGY (Nov. 26, 2021), https://www.lexology.com/library/detail.aspx?g=f57aaed6-3031-45cc-a15e-433b29e18185.

shareholder interests. While directors have broad authority to manage the firm, they serve as agents to the shareholders, who are the principals and owners of the corporation.

Shareholders, conversely, do not generally control the firm or owe fiduciary duties to other shareholders or the corporation.[18] However, in some circumstances, one shareholder, or a subset of shareholders, obtains control of a corporation.[19] In that case, the *controlling* shareholder (or "controller") owes fiduciary duties to the firm and the other shareholders. Therefore, the tests determining whether a shareholder controls a corporation are profoundly significant for corporate governance and transaction planning. Control doctrine, which articulates these tests, is especially relevant for engaged shareholders—namely minority shareholders who seek to influence corporate policy while avoiding the liability associated with formal control.

Controllers not only face daunting fiduciary duties in general contexts, but are also confronted by meaningful limitations on their ability to contract with the company they control. Specifically, absent other cleansing measures, any conflicted transaction in which a controlling shareholder stands on each side of the deal (for example, when Corporation A, of which Shareholder X is a controlling shareholder, merges with Corporation B, of which Shareholder X owns one hundred percent of the outstanding voting shares) is subject to an entire fairness review.[20] Under the entire fairness standard of review, the court requires both fair price and fair dealing,[21] a high bar to clear, and one typically not resolvable at the motion to dismiss stage. The prospect of enduring a lengthy and difficult legal battle makes entire fairness an effective prophylactic measure against self-interested transactions by corporate controllers.

The significance of control extends beyond the transaction level: the doctrine is also essential to the functioning of modern capital markets.[22]

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[18] *See* Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, 49 DEL. J. CORP. L. 525, 530 n.5 (2025) (gathering cases to support this proposition).

[19] *See, e.g.*, *Harris v. Carter*, 582 A.2d 222, 234 (Del. Ch. 1990) ("[W]hen a shareholder presumes to exercise control over a corporation, to direct its actions, that shareholder assumes a fiduciary duty of the same kind as that owed by a director to the corporation." (citing *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 109–10 (Del. 1952)); *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989) (holding that a stockholder who has actual control of the corporation's activities has fiduciary duties to the corporation).

[20] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983); *Maffei v. Palkon*, 339 A.3d 705, 728 (Del. 2025).

[21] *Weinberger*, 457 A.2d at 711; *Oberly v. Kirby*, 592 A.2d 445, 467 (Del. 1991), *quoted in Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1170 (Del. 1995).

[22] Securities Exchange Act of 1934 §§ 13(d), 13(g), 15 U.S.C. §§ 78m(d), 78m(g) (2018) (requiring disclosure of beneficial ownership exceeding five percent of any class of registered equity securities); Scott Levi, et al., *SEC Adopts Rule Amendments to Modernize Beneficial Ownership Reporting*, WHITE & CASE (Oct. 27, 2023) (describing that the disclosure requirements provide "companies and markets visibility into the ownership of

Because controlling shareholders have the power to direct the firm's actions, one may reasonably worry that they have the power to engage in behavior that actively harms the non-controlling minority shareholders of the firm.[23] In the most extreme case, controlling shareholders can commit asset stripping—directing assets out of the organization into an entity that is unowned by the other shareholders—stealing value out of one corporation for the controller's benefit. More commonly, transactions with minority shareholders may not be entirely in the firm's best interest or may not occur on the most economically competitive financial terms. Without constraints on controlling shareholder behavior, capital markets would suffer a drag on efficiency, robustness, and fairness. If a controller could lawfully and intentionally pursue a course of action that benefited itself at the expense of minority shareholders, firms would have difficulty attracting minority investors.[24] Therefore, corporate law rationally and reasonably imposes fiduciary duties on controllers, protecting minority shareholders' invested capital and facilitating capital markets.

The duties associated with being a controller are crucial to capital markets and to shareholders who invest in corporations. Determining who is a controller is, however, entirely dependent on state law. In Delaware, state law of control is largely developed within the jurisprudence of the Chancery Court and its holdings.

A. Delaware's Control Jurisprudence

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shares of public companies" and enable investors to assess potential changes in corporate control that could affect their investment decisions); *Kahn v. Lynch Commc'n Sys., Inc*., 638 A.2d 1110, 1113–15 (Del. 1994) (establishing that controlling shareholders owe fiduciary duties to minority shareholders and must demonstrate entire fairness in interested transactions, thereby creating legal frameworks that protect minority investors and maintain confidence in capital markets by ensuring that controlling shareholders cannot exploit their position to the detriment of other market participants); Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565, 566–67 (2003) (arguing that market efficiency depends on legal frameworks that minimize agency costs and provide reliable information to investors about corporate control arrangements).

[23] *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 (Del. 1994) ("When a majority of a corporation's voting shares are acquired by a single person or entity, or by a cohesive group acting together, there is a significant diminution in the voting power of those who thereby become minority stockholders...[S]tockholder votes are likely to become mere formalities where there is a majority stockholder").

[24] Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1131 (1997) (demonstrating empirically 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", supporting the foundational principle that inadequate protection of minority shareholders directly correlates with reduced capital market development and investor participation); Aurelio Gurrea-Martinez, *Theory, Evidence, and Policy on Dual-Class Shares: A Country-Specific Response to a Global Debate*, 22 EUR. BUS. ORG. L. REV. 475, 482 (2021) (explaining that "if minority investors are not adequately protected, they may abandon the market" and warning that "this decision will also reduce the ability of companies to raise capital, making the market less attractive for founders seeking to take their companies public", demonstrating how unfair treatment by controllers directly impairs firms' ability to attract minority investment).

Control jurisprudence in Delaware has grown increasingly complex in the last few decades, with courts considering an expanding number of factors when evaluating whether a shareholder is a controller. The most straightforward test simply asks whether the individual shareholder or group of affiliated shareholders owns a majority of the corporation's voting stock (if so, the majority shareholder or group has "hard control").[25] Significant corporate actions generally must be authorized by a majority vote of the shareholders[26] and/or a majority vote of the directors. In either case, a shareholder that owns a majority of a company's voting shares may, by definition, approve major corporate actions put to a shareholder vote and elect a majority of directors, making the company likely to pursue that shareholder's agenda.[27] Furthermore, the Delaware General Corporation Law authorizes stockholders to act by written consent, enabling a majority stockholder to remove and replace directors unilaterally.[28] Therefore, a majority stockholder "has the ability to exercise affirmative control" by either unilaterally determining the outcome of a stockholder vote or by written consent.[29]

However, hard control is not the only common law test for control. Delaware courts have also developed the common law doctrine of "actual control" whereby any minority stockholder who "exercises control over the business affairs of the corporation" is deemed a controller.[30] To be sure, "[a] shareholder who owns less than 50% of a corporation's outstanding stocks does not, without more, become a controlling shareholder of that corporation, with a concomitant fiduciary status[.]"[31] But what constitutes "more" depends on the context. A minority stockholder can have two types of actual control: either "general control" over the business and affairs of the corporation , or "transaction-specific" control.[32] If the minority stockholder has general control, it always owes fiduciary duties to the other stockholders. If the minority stockholder has transactional control, it owes

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[25] *Kahn*, 638 A.2d at 1113 (stating that a stockholder becomes a fiduciary if it "owns a majority interest in or exercises control over the business affairs of the corporation" (citation omitted)).
[26] *Voigt v. Metcalf*, 2020 WL 614999, at *17 (Del. Ch. Feb. 10, 2020) (citing 8 Del. C. §§ 242(b)(1), 251(c), 275(b)).
[27] Del. Code Ann. tit. 8, §§ 211(b), 141(k) (2005).
[28] *Voigt*, 2020 WL 614999, at *17 (citing 8 Del. C. §§ 141(k), 211(b), 216(2)).
[29] *Paramount*, 637 A.2d at 42 ("In the absence of devices protecting the minority stockholders, stockholder votes are likely to become mere formalities where there is a majority stockholder").
[30] *Kahn*, 638 A.2d at 1113–14 (quoting *Ivanhoe P'rs v. Newmont Mining Corp.,* 535 A.2d 1334 (Del. 1987)).
[31] *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989) (holding that a stockholder who has actual control of the corporation's activities has fiduciary duties to the corporation).
[32] *Voigt*, 2020 WL 614999, at *11–12; *Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, at *25 (Del. Ch. July 6, 2018) ("The requisite degree of control can be shown to exist generally or with regard to the particular transaction that is being challenged." (quoting *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 659 (Del. Ch. 2013)).

fiduciary duties to the other stockholders only in the context of the relevant transaction.

To determine whether a minority stockholder has general control, courts examine whether it "exercised sufficient influence 'that [it], as a practical matter, [is] no differently situated than if [it] had majority voting control.'"[33] This influence is "a combination of stock voting power and managerial authority" empowering the stockholder to dictate corporate actions[34] and can manifest as influence over other stockholders, directors, or the firm's operations. Specifically, "indicia of effective control" include inter alia:

> ownership of a significant equity stake (albeit less than a majority), the right to designate directors (albeit less than a majority), decisional rules in governing documents that enhance the power of a minority stockholder or board-level position, and the ability to exercise outsized influence in the board room, such as through high-status roles like CEO, Chairman, or founder.[35]

In other words, to satisfy the test for actual control of corporate conduct, a minority stockholder must have a "combination of potent voting power and management control such that the stockholder could be deemed to have effective control of the board without actually owning a majority of stock."[36] Indications a non-majority stockholder has actual control include, for example, that management is "cowed or overawed" by the stockholder,[37] like in the case of Elon Musk at Tesla.[38] Determining whether a minority stockholder exerts this level of control is "a judicial conclusion that is reached after a fact-specific analysis"[39] and "[d]ifferent sources of influence that would not support an inference of control if held in isolation may, in the aggregate, support an inference of control."[40] Although many legal tests require an extensive examination of the facts and circumstances, "the question of whether a large block holder is so powerful as to have obtained

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[33] *Basho*, 2018 WL 3326693, at *25 (quoting *In re PNB Hldg. Co. S'holders Litig.*, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006)).
[34] *Id.* (quoting *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 553 (Del. Ch. 2003)).
[35] *Id.* at *27 (citations omitted).
[36] *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304, 307 (Del. 2015).
[37] *In re Oracle Corp. Der. Litig.*, 2023 WL 3408772, at *20.
[38] *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024), rev'd sub nom. *In re Tesla, Inc. Derivative Litig.*, No. 10, 2025, 2025 WL 3689114 (Del. Dec. 19, 2025) (deeming Musk a "Superstar CEO," at 446).
[39] *Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499, 506–07 (Del. 2005); *see also In re Zhongpin Inc. S'holders Litig.*, 2014 WL 6735457, at *8 ("[T]he Court does not take an unduly restrictive view of the avenues through which a controller obtains corporate influence").
[40] *Voigt v. Metcalf*, 2020 WL 614999, at *13 (Del. Ch. Feb. 10, 2020).

the status of a 'controlling stockholder' is *intensely* factual."[41] Courts rarely find that a minority shareholder exerts sufficient dominance over the business of the firm to have actual control.[42] When they do, it is due to extraordinary extenuating circumstances.[43]

Even if a minority stockholder does not have general control over a corporation, it could still have control over an individual transaction. The test for transaction-specific control examines whether the stockholder "exercise[d] actual control over the board of directors during the course of a particular transaction[.][44] Delaware courts focus on the stockholder's relationships "with key managers or advisors who play a critical role in presenting options, providing information, and making recommendations," "the exercise of contractual rights to channel the corporation into a particular outcome by blocking or restricting other paths," and "commercial relationships."[45] These criteria are ambiguous at best. The Delaware Court of Chancery has acknowledged that "[i]t is impossible to identify or foresee all the possible sources of influence that could contribute to a finding of actual control over a particular decision."[46] The open-ended nature of the

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[41] *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 550–51 (Del. Ch. 2003) (emphasis added).
[42] *In re PNB Hldg. Co. S'holders Litig.*, 2006 WL 2403999, at *9 (Del. Ch. 2006).
[43] Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1269 ("when a shareholder has a less than majority stake, courts tend to engage in cautious, detailed factual analysis of whether that particular shareholder, individually or together with associates, owns enough shares to give the shareholder clear voting power to replace the board of directors"). *See, e.g.*, *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53 (Del. 1989); *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334 (Del. 1987); *Weinstein Enters. Inc. v. Orloff*, 870 A.2d 499 (Del. Ch. 2005).
[44] *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *20 (Del. Ch. May 22, 2000) (citation omitted). *See e.g.* Anabtawi & Stout, *supra* note 43, at 1296–97 (arguing that minority shareholders should be subject to fiduciary duties when they are the but-for cause of a specific corporate action, rather than when they have sufficient influence to generally control corporate action, highlighting the importance of a holistic evaluation of the stockholder's general or transaction-specific influence) ("It is a mistake to view the idea of shareholder control as an all-or-nothing inquiry (either a shareholder has complete "control" or it has none). Shareholder power and influence can depend on context. At one extreme lies the sole shareholder who holds 100% of a firm's outstanding voting stock and enjoys virtually complete authority over every decision made by the firm's board of directors. At the other extreme is the rationally apathetic, atomized individual investor who has no influence over anything and indeed cannot be bothered to return a proxy by mail. Between these two extremes lies a vast range of possible allocations of power between individual shareholders and directors").
[45] *Basho*, 2018 WL 3326693, at *26.
[46] *Id*. *See e.g.* Anabtawi & Stout, *supra* note 43, at 1297 (arguing that "The inquiry into whether or not a shareholder has control for purposes of activating the latent duty of loyalty is, accordingly, best framed as an inquiry into whether a particular shareholder can, formally or informally, influence corporate behavior with respect to a particular issue. The relationship between shareholder and board need not be as close as that of "puppeteer" and "puppet." Any attempt to exercise influence that produces the desired result--put differently, any shareholder act that is a "but for" cause of some corporate transaction or strategy--is an exercise of *de facto* shareholder control").

test for minority control and the severity of the concomitant fiduciary duties causes significant uncertainty for a variety of corporate actors including private funds—such as private equity firms, venture capital investors, and shareholder activists—with large minority stakes in the firm. This uncertainty has only grown in recent years.

B. “The control creep”

Although Delaware case law articulates a high bar for finding that a minority shareholder is a controller, before SB 21 took effect, Delaware courts descriptively demonstrated an increasing willingness over time to label a minority shareholder a controller across an expanding range of circumstances.[47]

To illustrate Delaware’s “control creep” trend, we provide a representative list of cases where a Delaware court found that a minority stockholder had control. The list provides evidence that post hoc minority control findings have increased over time. As the table depicts, prior to 2014, Delaware courts only found that a minority shareholder had, or conceivably had, actual control in seven cases. However, in the ensuing ten years, from 2014–2024, Delaware courts concluded that a minority shareholder had, or likely had, actual control in sixteen cases. In each of those sixteen cases, extenuating circumstances proved the shareholder’s percentage of stock ownership inadequately reflected its actual power over the company’s affairs.

Date	**Case Name**	**Ownership %**	**Procedural Posture**
1948	Rosenthal[48]	11%	Motion to Dismiss
1994	Kahn v. Lynch[49]	43.3%	Post-Trial
1999	O’Reilly v. Transworld[50]	49%	Motion to Dismiss

[47] *See e.g.*, Jill E. Fisch & Steven Davidoff Solomon, *Contract Rights and Control* 27 U. PA. J. BUS. L. 101, 109–10 (2025) (describing that several court decisions have “expanded the circumstances under which a shareholder would be deemed controlling” through taking “an increasingly flexible and context-specific approach to the definition of control as opposed to a bright-line test of 50% ownership.” The authors list *Tornetta v. Musk*, 310 A.3d 430, as an example, in which the court considered “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.” As another example, the authors discuss *Cysive*, 836 A.2d 531, in which the court applied entire fairness review to a founder-led buyout transaction where founder owned 35% of the company’s stock, “was involved in all aspects of the company’s business, was the company’s creator, and has been its inspirational force”).

[48] *Rosenthal v. Burry Biscuit Corp.*, 60 A.2d 106, 110–11 (Del. Ch. 1948).

[49] *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113 (Del. 1994).

[50] *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902 (Del. Ch. 1999).

2003	In re Cysive[51]	35%	Post-Trial
2006	In re Primedia[52]	40%	Motion to Dismiss
2006	Williamson[53]	17.1%	Motion to Dismiss
2008	In re Loral Space[54]	35.9%	Post-Trial
2014	In re Zhongpin[55]	17.3%	Motion to Dismiss
2014	Hamilton Partners[56]	48%	Motion to Dismiss
2014	In re Crimson[57]	33.7%	Motion to Dismiss
2016	Calesa Associates, L.P.[58]	26%	Motion to Dismiss
2019	FrontFour Capital[59]	13.3%	Post-Trial
2019	Olenik[60]	41.1%	Post-Trial
2019	Basho Techs. Holdco B, LLC[61]	Blocking rights pursuant to preferred stock	Post Trial
2019	Garfield[62]	46.1%	Motion to Dismiss
2019	Reith[63]	35.6%	Motion to Dismiss
2020	Voigt[64]	34.8%	Motion to Dismiss

[51] *In re Cysive, Inc. S'holders Litig.,* 836 A.2d 531 (Del. Ch. 2003).
[52] *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248 (Del. Ch. 2006).
[53] *Williamson v. Cox Commc'ns, Inc.*, 2006 WL 1586375 (Del. Ch. June 5, 2006).
[54] *In re Loral Space & Commc'ns Inc.*, 2008 WL 4293781 (Del. Ch. Sep. 19, 2008).
[55] *In re Zhongpin Inc. S'holder Litig.*, No. 7393-VCN, 2014 WL 6735457, (Del. Ch. Nov. 26, 2014) *rev'd on other grounds sub nom*.
[56] *Hamilton Partners, L.P. v. Highland Cap. Mgmt., L.P.*, 2014 WL 1813340 (Del. Ch. May 7, 2014).
[57] *In re Crimson Expl. Inc. S'holder Litig.*, No. 8541-VCP, 2014 WL 5449419 (Del. Ch. Oct. 24, 2014).
[58] *Calesa Associates, L.P. v. Am. Capital, Ltd.*, 2016 WL 770251 (Del. Ch. Feb. 29, 2016).
[59] *FrontFour Cap. Grp. LLC v. Taube*, 2019 WL 1313408 (Del. Ch. Mar. 11, 2019).
[60] *Olenik v. Lodzinski*, 208 A.3d 704 (Del. 2019).
[61] *Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs*, LLC, 2018 WL 3326693 (Del. Ch. July 6, 2018), *aff'd sub nom. Davenport v. Basho Techs. Holdco B, LLC*, 221 A.3d 100 (Del. 2019).
[62] *Garfield v. BlackRock Mortgage Ventures, LLC*, 2019 WL 7168004 (Del. Ch. Dec. 20, 2019).
[63] *Reith v. Lichtenstein*, 2019 WL 2714065(Del. Ch. June 28, 2019).
[64] *Voigt v. Metcalf*, 2020 WL 614999, at *13 (Del. Ch. Feb. 10, 2020).

2020	Skye Mineral Inv’rs, LLC[65]	28.07%	Motion to Dismiss
2021	In re Patterns Energy Grp. Inc.[66]	“Slightly more than 10%”	Motion to Dismiss
2022	In re Tesla[67]	22%	Post-Trial
2022	In re MPM Holdings Inc.[68]	40%	Motion to Dismiss
2024	In re Cornerstone[69]	49%	Motion to Dismiss
2024	Tornetta[70]	21.9%	Motion to Dismiss

In addition to taking a more flexible approach to the definition of control and finding control at lower percentages of voting stock ownership, Delaware courts have also expanded the range of transactions that can give rise to transaction-specific control, and therefore to a minority shareholder having fiduciary duties.[71] After a period of ambiguity where it appeared that only freeze-out transactions at controlled firms triggered entire fairness review, the Delaware Supreme Court ruled in *In re Match Group* that all corporate actions where a controlling shareholder was involved “on both sides of a transaction with the controlled corporation and received a non-ratable benefit” are subject to entire fairness review.[72]

To further convolute the implications of control creep, Delaware courts have recently held that controlling shareholders can occasionally pull a conflicted transaction out of entire fairness review and into the much more favorable business judgment rule standard of review. Under deferential business judgment rule standard, the reviewing court does not consider the merits of the transaction—with the exception of waste—so long as transaction planners put in place certain cleansing mechanisms. The “cleansing procedures” required to make such a move developed over a

[65] *Skye Mineral Inv'rs, LLC v. DXS Capital (U.S.) Ltd.*, 2020 WL 881544 (Del. Ch. Feb. 24, 2020).
[66] *In re Pattern Energy Grp. Inc. S’holders Litig.*, 2021 WL 1812674 (Del. Ch. May 6, 2021).
[67] *In re Tesla Motors, Inc. S’holder Litig.*, No. 12711-VCS, 2022 WL 1237185 (Del. Ch. Apr. 27, 2022).
[68] *In re MPM Holdings Inc. Appraisal and S'holder Litig.*, C.A. No. 2019-0519-JTL (Del. Ch. Jan. 13, 2022).
[69] *In re Cornerstone Building Brands, Inc. S'holder Litig.*, C.A. No. 2023-0092-JTL (Del. Ch. Jan. 10, 2024).
[70] *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024).
[71] *See* Fisch & Solomon, *supra* note 47, at 110.
[72] *In re Match Grp., Inc. Derivative Litig.*, 315 A.3d 446, 460 (Del. 2024). *See* Fisch & Solomon, *supra* note 47, at 111 (analyzing *Tornetta*, *Maffei v. Palkon*, 2025 Del. LEXIS 51 (Del. February 4, 2025), and *In re Sears Hometown and Outlet Stores, Inc. S’holder Litig.*, 309 A.3d 474 (Del Ch. 2024) as examples of recent Delaware cases where the court applied a heightened standard of review to non-freeze out controller transactions).

series of cases. In 2010, the landmark case *In re CNX* established that so long as a controlling stockholder freeze-out conforms to certain cleansing procedures, the court reviews the freeze-out under the business judgment standard rather than under the entire fairness standard.[73] This case effectively provided controlling shareholders a checklist to follow to avoid entire fairness review. Four years later in *Kahn v. M&F Worldwide*, the Delaware Supreme Court refined and crystallized Delaware law by holding that business judgment review applied to controlling shareholder buyout transactions if (i) both a special committee and a majority of the minority stockholders approved the transaction, (ii) the special committee was independent, (iii) the special committee had the authority to select its own advisors and reject the transaction, (iv) the special committee fulfilled its duty of care by negotiating a fair price, (v) the minority shareholders were informed before voting, and (vi) the minority was not coerced.[74] In 2024, by prescribing this elevated "*MFW"* cleansing procedure for a wide breadth of transactions—namely to any controller transaction in which the controlling shareholder receives a non-ratable benefit rather than just to controlling shareholder buyouts—*In re Match Group* effectively added costs and litigation risks for large minority shareholders who exercised meaningful influence and possible control.

Ultimately, this evolution of tests for control led some prominent commentators to conclude that Delaware courts harbored a "reflexive suspicion" of transactions with controlling shareholders.[75] Influential minority shareholders bore the brunt of these developments. As it stood, the common law created ex ante uncertainty for parties seeking to ascertain whether a specific shareholder would be deemed a controller. Without ex ante clarity, parties were forced to choose between undertaking costly cleansing mechanisms that might not be necessary, assuming meaningful litigation risk, or drastically decreasing ownership and influence mechanisms before entering a transaction, thereby ensuring there was no conflict but risking the transaction itself. The common law status quo had influential minority shareholders in somewhat of a bind.

II. SB 21's Statutory Intervention

The expanded scope of situations where Delaware courts were willing to find that a shareholder was a controller, and the enhanced consequences of that designation, triggered widespread debate among both

[73] *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397 (Del. Ch. 2010).
[74] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 639 (Del. 2014).
[75] Bainbridge, *supra* note 18, at 534.

scholars and practitioners.[76] Because Delaware has long been the leading jurisdiction for incorporation—due to expert judges on the Court of Chancery, its robust legal ecosystem of corporate lawyers, and well-established corporate case law—this doctrinal trend had a meaningful impact on many important companies and market participants. The rise of dual-class share systems and the prominence of founder-led public companies created further pressure on the doctrine of control.[77]

The straw that broke the proverbial camel's back was the Chancery Court's decision in *Tornetta v. Musk*, in which the court invalidated Elon Musk's Tesla compensation package after finding that he exerted actual control during its approval process,[78] while only holding approximately twenty-two percent of its voting securities.[79] The Tesla board granted Musk an equity compensation package valued at $2.6b at the date of grant, and $55.8b maximum value determined at the time of trial. In a post-trial opinion, Chancellor McCormick held that the grant did not meet the entire-fairness standard of review that applies to controller transactions.[80] The grant was rescinded after the court found that stockholders who voted in favor were not fully informed and that the award was not at a fair price.[81]

Tesla's initial response came via Tweet: "The Court's decision is wrong and we're going to appeal."[82] Tesla and Musk then began a vigorous

[76] *See e.g.*, Jill E. Fisch & Steven Davidoff Solomon, *Control and its Discontents*, 173 U. PA. L. REV. 641, 647–48 (2025) (arguing that the emerging Delaware control doctrines were becoming untenable because of the "line-drawing" problems the laws create; published before SB 21 was enacted); Angela N. Aneiros, *Reincorporation: The Trojan Horse of Self-Dealing*, 77 BAYLOR L. REV. 67, 117–120 (2025) (arguing that Delaware's control jurisprudene provided superior protections for shareholders thanks to the elevated standard of review applied to controlling shareholders as utilized in *Tornetta v. Musk*, 310 A.3d 430; published prior to the enactment of SB 21); Itai Fiegenbaum, *The Controlling Shareholder Enforcement Gap*, 58 AM. BUS. L. J. 583, 643–44 (2019) (arguing that Delaware law for corporate controllers is ineffective in adequately protecting minority shareholders for many self-dealing transactions unrelated to freezeouts; published prior to *In Re Match Group* and SB 21).

[77] See, e.g., David T. White, *Delaware's Role in Handling the Rise of Dual-, Multi-, and Zero-Class Voting Structures*, 45 DEL. J. CORP. L. 141 (2020).

[78] *See e.g.*, 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-launchcampaign-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)").

[79] Sarah Petrowich, *Delaware Lawmakers Propose Corporate Law Changes Amid Ongoing Departure Threats and Musk Litigation*, DEL. PUB. MEDIA (Feb. 18, 2025, 6:42 PM), https://www.delawarepublic.org/politics-government/2025-02-18/del-lawmakers-propose-corporate-law-changes-amid-ongoing-departure-threats-and-musk-litigation.

[80] *Tornetta v. Musk*, 310 A.3d 430, 526–27 (Del. Ch. 2024), *rev'd sub nom. In re Tesla, Inc. Derivative Litig.*, No. 10, 2025, 2025 WL 3689114 (Del. Dec. 19, 2025).

[81] *Id.* at 533, 544. The Delaware Supreme Court later upheld all of the findings of fact made by the Chancery Court, reversing only on the remedy (and the associated attorneys' fee).

[82] Tesla (@Tesla), X (Dec. 2, 2024, at 6:42 PM), https://x.com/Tesla/status/1863730393930735634?lang=en.

anti-Delaware campaign, reincorporating the company in Texas while aggressively advocating for other corporate leaders to follow suit.[83] Musk's call to arms found a receptive audience among a relatively small number of business leaders.[84] "DExit," as it was called in the popular media, saw Coinbase, Dropbox, A16Z, and several others leave Delaware for Texas or Nevada, and the fear became that if "DExit" spread widely, Delaware might lose not only its reputation as the mecca for corporate organization, but also lose significant revenue from corporate income taxes, which some claimed could fall by ten percent.[85] Accordingly, government officials in Delaware took action.[86] The result was a movement to pass SB 21.

In 2024, Delaware Governor Matt Meyer assembled a panel of certain corporate law experts to draft SB 21. The panel included attorneys from prominent corporate defense firms that have represented Musk and Zuckerberg.[87] Understandably, news reports suggested that Musk and Zuckerberg,[88] along with other corporate leaders, influenced the legislative process to shape the bill in their favor.[89] Lobbyists for private equity interests also advocated for the legislation but garnered less media coverage. Specifically, several lobbyists hired by the American Investment Council, an entity funded by private equity firms including Blackstone Inc. and KKR & Co., encouraged lawmakers to pass the bill.[90]

The bipartisan SB21 was drafted quickly by the state legislature. The Delaware House Speaker called the bill a response to "an unprecedent amount of discontent that had been building for a while" and was brought

[83] Mike Leonard, *As Musk Calls for Exodus, Value of Delaware Law Proves Elusive*, BLOOMBERG L. (Dec. 23, 2024), https://news.bloomberglaw.com/esg/as-musk-calls-for-exodus-value-of-delaware-law-proves-elusive. Musk notoriously posted on X in January 2024: "Never incorporate your company in the state of Delaware." *See* Theo Burman, *Elon Musk Fires Back After Insult From Delaware Governor*, NEWSWEEK (Mar. 12, 2025), https://www.newsweek.com/elon-musk-criticism-delaware-governor-matt-meyer-2043364.

[84] *Elon Musk Told Corporations to Leave Delaware. Here's What Happened Next.*, MORE PERFECT UNION (Mar. 19, 2025), https://substack.perfectunion.us/p/elon-musk-told-corporations-to-leave.

[85] Petrowich, *supra* note 79.

[86] MORE PERFECT UNION, *supra* note 84 ("'The effort to say this isn't about Musk is almost laughably false," Richardson told More Perfect Union. "It is absolutely a reaction to what Elon Musk has been saying and the fear campaign he seems to want to wage against Delaware and its courts").

[87] Jennifer Kay, *Corporate Capital Delaware's Business Law Overhaul: Explained*, BLOOMBERG L. (Mar. 26, 2025), https://news.bloomberglaw.com/litigation/corporate-capital-delawares-business-law-overhaul-explained.

[88] Emily Glazer et al., *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.

[89] Karl Baker, *Lobbying on Corporate Law Change SB 21 Enters Final Stretch*, SPOTLIGHT DELAWARE (Mar. 21, 2025), https://spotlightdelaware.org/2025/03/21/sb21-final-stretch/.

[90] Sabrina Willmer, *Musk's War on Delaware Spurs Law Pushed by Private Equity (3)*, BLOOMBERG L. (Mar. 26, 2025), https://news.bloomberglaw.com/esg/private-equity-joins-fight-to-overhaul-delaware-corporate-law.

to light with Musk's outburst.[91] Governor Meyer lauded the legislature, stating that the bill "protect[ed] [Delaware's] reputation and continue[d] Delaware's tradition of a balanced and measured approach."[92] Though Musk would not receive vindication with the passing of the law—the law was not retroactive to his grant—the law was broadly seen as capitulation to the interests of the controlling founder-operator. In March 2025, the Delaware Senate unanimously voted in support of the bill, the Delaware House passed the bill thirty-two to seven, and Governor Meyer signed it into law.

Described by some practitioners as a "sweeping reform,"[93] SB 21 amended two sections of the Delaware General Corporation Law (DGCL), Sections 144 and 220. The amendments adjusted transaction cleansing mechanisms and limited shareholder investigation rights.

A. *Amendments to DGCL § 144: The Cleansing Mechanisms*

Before the SB 21 amendment, DGCL § 144 provided that a conflicted transaction involving an interested director or officer was not void or voidable due to the conflict if the transaction was approved by disinterested directors or stockholders.[94] These approvals did not explicitly provide safe harbors for the transaction, and the Section did not address controlling stockholders. After amendment, DGCL § 144 now provides safe harbor protections both for conflicted transactions that involve an interested director or officer and conflicted transactions involving controlling stockholders.[95] Notably, the bill defines a controlling stockholder as:

> [A]ny person that, together with such person's affiliates and associates:
>
> a. Owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote

[91] Jordan Howell, *Delaware Call Interviews Sen. Bryan Townsend About SB21*, DEL. CALL (Feb. 21, 2025), https://delawarecall.com/2025/02/21/delaware-call-interviews-sen-bryan-townsend-about-sb21/.

[92] Press Release, Delaware Senate Democrats, Bipartisan Legislation Filed to Promote Clarity and Balance in Delaware's Corporate Laws (Feb. 17, 2025), https://senatedems.delaware.gov/2025/02/17/bipartisan-legislation-filed-to-promote-clarity-and-balance-in-delawares-corporate-laws/.

[93] Michelle J. Annunziata et al., *Delaware Changes Its Corporate Law: What Litigators and Clients Need To Know About Senate Bill 21*, MAYER BROWN (Apr. 2025), https://www.mayerbrown.com/en/insights/publications/2025/04/delaware-changes-its-corporate-law-what-you-should-know-about-senate-bill-21 (discussing SB 21's amendments to DGCL §§ 144 and 220, which expand safe harbor protections for controlling shareholder transactions and limit shareholders' books and records inspection rights).

[94] S.B. 21, 85 Del. Laws Ch. 6 (2025); Del. Code Ann. tit. 8, § 144 (West).

[95] § 144.

generally in the election of directors or in the election of directors who have a majority in voting power of the votes of all directors on the board of directors;

b. Has 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; or

c. Has the power functionally equivalent to that of a stockholder that owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors by virtue of ownership or control of at least ⅓ in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors or in the election of directors who have a majority in voting power of the votes of all directors on the board of directors and power to exercise managerial authority over the business and affairs of the corporation.[96]

With this amendment, the common-law-based actual control test is replaced by a clear bright line rule at one-third ownership. This clarity applies not only to individuals in founder-led organizations like Musk and Zuckerburg, but also to other large minority shareholders looking to influence—but not control—corporations to pursue organizational change.

Under SB 21, a conflicted transaction involving directors, officers, or controlling stockholders can be cleansed by either: (1) approval by an informed majority of the corporation's disinterested directors acting in good faith; or (2) approval by an informed majority of the corporation's disinterested stockholders. A Delaware court will apply business judgment review, rather than entire fairness, to any challenged transaction that survives either cleansing procedure. Prior to SB 21, Section 144 did not explicitly cover controlling stockholder transactions, and Delaware case law applied entire fairness review unless the transaction was approved by both a majority of informed disinterested directors and a majority of informed disinterested stockholders.[97] SB 21 resolved that ambiguity by explicitly extending Section 144 coverage to controlling stockholder transactions as long as one of the cleansing mechanisms in the safe harbor provisions is satisfied.

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[96] § 144(e)(2) (West).

[97] SB 21 also extends the safe harbor for interested director transactions to cover equitable challenges if the director discloses the material facts regarding its interest in the transaction and the transaction is ratified or if the transaction is fair to the corporation. 85 Del. Laws Ch. 6 (2025).

B. *Amendments to DGCL § 220: Limiting Shareholder Investigatory Rights*

SB 21 also amended Section 220 of the DGCL regarding the right to inspect corporate books and records. Before the amendment, DGCL § 220 granted stockholders and directors the right to inspect the corporation's books and records upon written notice stating the purpose of the inspection.[98] DGCL § 220 did not include a definition for "books and records," so caselaw governed the contours of what materials stockholders would receive and what they would need to show to justify relevancy and purpose. The amendment specifies in statute which core documents the corporation must produce in a books and records action, and, among other things, requires stockholders seeking access to records not listed in the statute to show a compelling need and demonstrate by clear and convincing evidence that the additional documents are necessary and essential to advance the stockholder's proper purpose.[99] By creating a more restrictive books and records regime, SB 21 has increased the burden on plaintiffs pursuing shareholder litigation. On the margin, those plaintiffs will have less information available to survive pre-trial motions.

C. *Response from Commentators to SB 21*

The academic response to SB 21 has been decidedly mixed. Proponents argue that the bill was a legitimate and laudable response to the ill-advised doctrinal changes emerging from Chancery which threatened to drive corporations away from Delaware.[100] Opponents argue that the bill undermines decades of judicial precedent, limits the Delaware Court of Chancery's equitable authority, and nakedly protects billionaires from fiduciary duties and meaningful judicial scrutiny.[101]

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[98] Del. Code Ann. tit. 8, § 220 (West).

[99] *Id.*

[100] *See, e.g.*, Stephen M. Bainbridge, *Delaware Senate Bill 21: What It Does and What Questions Remain Open* (Univ. of Cal. L.A. Sch. of Law, Law & Econ. Research Paper No. 25-02, 2025), https://ssrn.com/abstract=5243857; Amy Simmerman, et al., *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 8, 2024), https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations/ (noting an increase in clients questioning whether they should incorporate in Delaware).

[101] Ann Lipton, *Delaware Decides Delaware Law Has No Value*, BUS. L. PROF BLOG (Feb. 17, 2025), https://www.businesslawprofessors.com/2025/02/delaware-decides-delaware-law-has-no-value/; Jeff Mahoney, *Letter on Delaware Senate Bill 21*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 12, 2025), https://corpgov.law.harvard.edu/2025/03/12/letter-on-delaware-senate-bill-21/.

Critics also questioned whether the "DExit" fear was actually a legitimate threat.[102] As of November 2025, fewer than twenty-eight companies had reincorporated outside of Delaware.[103] Delaware continued to see a high number of entity formations in the state.[104] Though there may be some advantages under the laws of other states for avoiding controlling-shareholder liability risk, those benefits come at the cost of the numerous other benefits of Delaware law. Most publicly traded firms are widely held, and convincing shareholders in widely held firms to vote for reincorporation is, at best, extremely difficult. Moreover, as some commentators have noted, the concerns about controller law in Delaware have been at least partially addressed by the recent changes to SB 21.[105]

D. *The Interpretive Fork: Narrow vs. Expansive Interpretation of the Scope of SB 21's Definition of Controlling Stockholder*

By adding a definition of controller to Section 144(e), SB 21 sparked a doctrinal debate over whether the new 33.3% bright line simply defined which stockholders were controllers for purposes of using the statute's alternative mechanisms for cleansing interested controller transactions (the "narrow interpretation") or whether it completely displaced the decades-old common law "actual control" test used to decide who owes fiduciary duties to stockholders (the "expansive interpretation").

a. *The Narrow Interpretation*

The narrow interpretation construes the new Section 144 as simply offering safe harbor protections to stockholders who meet a specific definition of "controller"—the definition in Section 144(e)(2)—rather than creating a statutory definition of "controller" for the DGCL writ large. Understanding the change as a new statutory definition would completely displace the flexible, case-by-case analysis of transactional control that has emerged from Delaware case law.

Under the narrow interpretation, a founder who owns, for instance, twenty-eight percent of a corporation's stock and initiates a freeze-out transaction would not be considered a "controlling stockholder" under

[102] Jens Frankenreiter, *What the Past Can Teach Us About SB 21 and the Threat of Corporate Exodus*, THE CLS BLUE SKY BLOG (MAR. 12, 2025), https://clsbluesky.law.columbia.edu/2025/03/12/what-the-past-can-teach-us-about-sb-21-and-the-threat-of-corporate-exodus/.
[103] Lora Kolodny, *Despite Coinbase Departure, Only 28 Companies Have Left Delaware This Year*, CNBC (Nov 14, 2025, 12:31 PM), https://www.cnbc.com/2025/11/14/despite-coinbase-departure-only-28-companies-left-delaware-this-year.html.
[104] *Id.*
[105] Stephen M. Bainbridge, DExit Drivers: Is Delaware's Dominance Threatened?, 50 J. CORP. L. 823, 886–87 (2025).

Section 144(e) as the founder owns less than one-third of the corporation's voting rights.[106] The founder, therefore, could not enjoy the safe harbor protections of Section 144(c).[107] Of course, even though the founder is not a "controlling stockholder" by statute, a Delaware court could still find that the founder was a "common-law controller" if there was evidence that the founder exercised effective control over the company during the transaction. In that case, the freeze-out transaction would be subject to entire fairness review unless the founder satisfied the conditions established in *MFW*.[108] The mechanisms provided by Section 144 would be irrelevant. Proponents of this interpretation argue, inter alia, that this view better responds to recent corporate governance innovations. As Professors Kahan and Rock put it, under the narrow interpretation, "controllers with less than 1/3 of the voting power who control through a Stockholder Governance Agreement—would be analyzed under existing Delaware fiduciary duty law because they would fall outside the limited scope of 144's 'exculpation.'"[109]

Under the narrow interpretation, Section 144 is intended to protect interested transactions completed by a subcategory of controllers who have incentives that are sufficiently aligned with those of the corporation. Prominent commentators have expressed concern that innovations in private ordering have enabled shareholders with incentives that are decreasingly aligned with the corporation to exert excessive influence—or even control—over the corporation's actions.[110] With this insight in mind, the narrow view can be understood as identifying the Delaware legislature's recognition that minority shareholders with larger equity stakes have incentives that are more aligned with the firm than minority shareholders with smaller equity stakes. Therefore, large-stake minority shareholders should have more lenient mechanisms to cleanse their interested transactions. SB 21 is not a blanket proclamation about the necessary conditions for finding that a shareholder is a controller. Instead, it is a path

[106] *See* Marcel Kahan & Ed Rock, *What Newly Amended DGCL § 144 Says (and Does Not Say) About Controlling Stockholder Transactions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 5, 2025), https://corpgov.law.harvard.edu/2025/06/05/what-newly-amended-dgcl-§144-says-and-does-not-say-about-controlling-stockholder-transactions/ (providing a full analysis of the "founder" hypothetical).
[107] *Id.*
[108] Kahn v. M&F Worldwide Corp., 88 A.3d 635, 639 (Del. 2014).
[109] Kahan & Rock, *supra* note 106. *See also* Fisch & Solomon, *supra* note 47.
[110] *See* Lucian Bebchuk & Kobi Kastiel, *The Perils of Small Minority Controllers*, GEO L. J. 1454, 1467 (arguing that "small minority" controllers pose a greater threat to other minority shareholders than traditional "majority" controllers do because majority controllers have a larger equity stake in the company which better aligns their interests with those of non-controlling shareholders. Majority controllers share 50% of the benefit and incur 50% of the costs that accrue to the corporation, and thus have a reduced incentive to pursue non-ratable benefits that injure the company).

for a subset of controlling shareholders to cleanse a subset of transactions and avoid a heightened standard of review.[111]

Under the narrow reading of "controlling stockholder" in SB 21, control jurisprudence for activist investors is essentially unchanged. Indeed, supporters of the view that activists extract wealth from the corporation at the expense of its long-term health would favor the narrow interpretation because it would not provide an activist—who typically owns less than one-third of a corporation's voting securities—access to section 144's cleansing mechanisms. According to the narrow interpretation, a stockholder with less equity (e.g. twenty percent) is in a higher-risk position when executing an interested transaction than a stockholder with more equity (e.g. thirty-five percent) would be because the higher-equity stockholder has a clear statutory path to follow (use a Section 144 cleansing mechanism and avoid a heightened standard of review), while the twenty percent holder cannot rely on the safe harbors and is therefore subject to the unpredictable common law of the Delaware courts.

Proponents of the narrow interpretation put forward a traditional statutory interpretation argument. They point out that § 144(e) begins with: "For purposes of *this section*" (emphasis added), just as Subsection (c)(5) of DGCL § 203[112] on Business combinations with interested stockholders, defining "interested stockholder", begins with "As used in this section." Basic principles of statutory interpretation thus support the reading that common law definitions of control still apply outside the specific contexts addressed by those statutes, namely interested party transactions and takeovers.

In support of this interpretation, proponents emphasize that the legislative synopsis indicates that the purpose of the bill is to create a safe harbor for the acts and transactions of interested directors and controlling stockholders. The legislative synopsis states:

> Section 1 of this Act amends § 144 of Title 8 to provide safe harbor procedures for acts or transactions in which one or more directors or officers as well as controlling stockholders and members of control groups have interests or relationships that might render them interested or not independent with respect to the act or transaction.[113]

Finally, critics of the narrow interpretation argue that fiduciary duties arise from equity, and the Delaware legislature cannot dictate to the Court of Chancery—a court sitting in equity—who is and is not a fiduciary

[111] *See, e.g.*, Kahan & Rock, *supra* note 106 (stating that "The actual language of the new section, which we will call the Safe Harbor Provision, does not reflect either its proponents' dreams nor its opponents' nightmares. It instead draws a distinction between statutory controllers and common law controllers and leaves Delaware's law on the latter untouched").
[112] Del. Code Ann. tit. 8 (West).
[113] S.B. 21, 85 Del. Laws Ch. 6 (2025).

under specific facts and circumstances.[114] Reading Section 144's definition of "controlling stockholder" as applying to the DGCL at large would do just that.

b. The Expansive Interpretation

The expansive interpretation of the revised Section 144 posits that the statute creates a new and binding definition of control that entirely supplants the prior common law test for control.[115] This interpretation is rooted in the plain language of Section 144(d)(4), which states: "No person shall be deemed a controlling stockholder unless such person satisfies the criteria in paragraph (e)(2) of this section." Some commentators, including both academics and practitioners, construe that section as an intentional legislative repudiation of so-called "*MFW* creep"—which describes the gradual expansion of *MFW*[116] to all categories of controller transactions and the Delaware court's increased willingness to label minority shareholders "controllers." Under this view, Section 144(d)(4) creates an impermeable barrier under which any stockholder that owns thirty-two percent (or any quantity less than the one-third statutory threshold) and does not have a contract to elect the board as in Section 144(e)(2)(b) is never a controller and therefore does not have fiduciary duties to the remaining stockholders.[117]

III. SB 21's Codified Distinction Between Influence and Control Carries Important Implications for Private Funds

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[114] This argument corresponds with the insight in Bainbridge, *supra* note 100 (noting that Delaware courts might cite *Schnell* to justify an "end-run" around SB 21).
[115] *See* Fisch & Solomon, *supra* note 47; *See also* Bainbridge, *supra* note 100, at 6, 10–11 (stating that SB 21 created "a bright-line requirement of at least one-third ownership for minority shareholders to be deemed controllers . . . eliminat[ing] the growing risk that one could be deemed a controller despite owning nominal (or even no) stock." Also stating that, "an activist judge could invoke [*Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del 1971), which established that Delaware courts can use their equitable authority to correct a corporate action even if the action facially complied with relevant statutory requirements] to impose liability in a particular case even though the technical requirements of SB 21 were satisfied."). The essay also states, in considering whether *Tornetta v. Musk*, would be decided differently post-SB 21, that "a minority stockholder must own at least one-third of voting power to be considered a controller, which Musk did not" before recognizing that SB 21's officer conflicts provisions may have led to the same result. However, the essay also states that "SB 21 should explicitly state that someone who owns less than one-third of voting stock is not a controlling shareholder and owes no fiduciary duties to the entity or other shareholders").
[116] *See supra* text accompanying notes 73–73.
[117] Del. Code Ann. tit. 8 (West).

Regardless of whether SB 21 was enacted at the behest of tech billionaire lobbying, this new law of control applies to all market participants going forward. An institutional investor's stance on gaining formal control of their target entity depends in large part on their investment strategy. Private equity funds, for example, have historically premised their strategy on taking majority ownership of an underperforming target, overhauling it in the name of efficiency, and exiting their position at a gain. Far from avoiding "control," this strategy relies on the private equity fund gaining majority ownership to force any change it wants to see. But increasingly, private equity funds find themselves taking minority stakes in companies thereby implicating questions of control. Venture capital funds may effectively, as a group, control a portfolio company while it is still private. If and when that firm goes public via an initial public offering or direct listing, venture capital firms may keep board seats they held and a meaningful minority stake in the now-publicly traded firm for a number of years. Activist hedge funds typically operate by gaining a minority stake in their target and attempting to convince the company to change in some fashion that improves its value. This activism is often done through leveraging threats of a proxy fight to get the target's board to concede to their demands and/or give the activist board representation. While activists typically hold far less than a majority of shares, their nevertheless significant stakes, combined with a track record of successfully getting management to enact the activist's plans, bring such investors within the potential gambit of the laws of control as well.

In this Section, we highlight the effects of these rules on three important categories of private funds that often take large minority stakes in public firms while engaging with the management of the firm: private equity firms, venture capital investors, and activist hedge funds. Further, we examine the interaction of SB 21 with recent changes to rules governing shareholder agreements, as well as potential interactions with other areas of law.

A. *Private Equity Investment: Majority Control Tradition Evolving into Various Strategies*

Traditionally, private equity funds adhered primarily to the classic leveraged buyout ("LBO") strategy.[118] In an LBO, a private equity fund identifies and acquires an underperforming target firm, engages in financial engineering to increase returns to equity holders, and improves management practices. The fund then sells the firm to another institutional investor (maybe even another private equity buyer) or takes the target public to exit

[118] Elisabeth de Fontenay, *Private Equity's Governance Advantages: A Requiem*, 99 B.U.L., REV. 1095, 1098 (2019).

the investment.[119] Because of the manner in which private equity funds are financed, the typical LBO lasts approximately three to seven years from the time the fund acquires the portfolio company to the time it exits its position. This strategy was initially incredibly successful, generating substantial returns for private equity investors. However, over the last few decades, competitive pressures and market dynamics[120] have made it more difficult for private equity firms to find suitable LBO targets. Ironically, the private equity LBO boom of the 1980s raised corporate governance standards across the market: to avoid meeting the same fate as their overtaken peers, managers simply had to look at the improvements private equity investors had made to their target's corporate governance and financial policies, and make the same changes to their own firm. Once the firm was improved, it no longer stood to benefit from the transformative power of a private equity takeover and therefore no longer looked like a profitable LBO target.

A private equity firm using an LBO strategy would have no concerns about whether it would assume control status as to its target—by owning all of its target's stock, there was no question the private equity firm was in control. SB 21 has no effect on LBOs—after an LBO, a private equity firm would surely meet Section 144(e)(2)(a)'s definition of "controlling shareholder": one who "[O]wns a majority in voting power of the outstanding stock."

But shifts in private equity practices bring such investment firms into the reach of SB 21. With a relative dearth of viable targets for a traditional LBO strategy, net-of-fees performance in private equity has failed to exceed public equity market returns over the past two decades.[121] In response, private equity firms have turned to a variety of alternative investment strategies.[122]

One alternative strategy private equity firms have deployed is minority equity investments in public and private companies.[123] An empirical analysis of private equity fund minority investment strategies found that the mean largest percentage holding of a private equity fund in a target company over the three years after announcing their position is 20.5%. .[124] Furthermore, the study found that private equity funds are more likely than other institutional investors to place representatives on the portfolio company's board. This combination of relatively large stock

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[119] Steven N. Kaplan & Per Strömberg, *Leveraged Buyouts and Private Equity*, 23 J. ECON. PERSP. 121 (2009).

[120] *Id.* at 143 (2009) (". . . the evidence also is strong that private equity activity is subject to boom and bust cycles, which are driven by recent returns as well as by the level of interest rates relative to earnings and stock market values").

[121] Ludovic Phalippou, *An Inconvenient Fact: Private Equity Returns & the Billionaire Factory*, at 3 (June 10, 2020) (unpublished manuscript), University of Oxford, Saïd Business School (working paper), https://ssrn.com/abstract=3623820.

[122] de Fontenay, *supra* note 118, at 1100.

[123] *See* Guojun Chen et al., *Sources of Value Gains in Minority Equity Investments by Private Equity Funds: Evidence from Block Share Acquisitions*, 29 J. CORP. FIN. 449, 449–50 (2014).

[124] *Id.* at 457.

ownership along with board representation created a distinct risk that a reviewing court would find that the private equity firm exercised actual control over a challenged corporate action. The Delaware court's intensely factual case-by-case method of assessing whether a minority shareholder exercised actual control over any controlled transaction increased the risk of this new private equity strategy.

SB 21 resolves any potential ambiguity of Delaware's "actual control" common law in the favor of private equity firms with minority positions. A private equity firm using the traditional LBO method is, as before, a controlling shareholder. But firms using the newer minority stake model, on the other hand, can rely on Section 144(e)(2)(c)'s one-third ownership threshold to help establish that they do not have control so long as the investor stays below one-third ownership. As noted above, the normal stake private equity firms take in public companies is 20.5%, so SB 21 now protects private equity firms in their average equity minority-stake investment from being deemed controllers.

Crucially, minority-stake private equity investment strategies typically do not face the same securities regulation limits as traditional hedge fund activity. Section 16 of the Securities Exchange Act of 1934 (the short swing profit rule, introduced in Section III.C below[125]) provides a serious incentive for certain investors to avoid owning more than ten percent of a corporation's stock, because to do so is to subject oneself to Section 16's prohibition on insiders earning profits from short selling stocks (which Section 16 defines as profiting using a shorting strategy within a six-month period).

Because of its model, private equity is less constrained by Section 16. As discussed above, an LBO strategy usually required investment in the target lasting around three to seven years—much longer than the six-month period for which Section 16 applies. Even the more recent minority stake private equity strategy is likely not seriously impacted by Section 16, because private equity funds tend not to trade their minority positions in public companies as often as hedge funds may. This suggests the average private equity investor is less impacted by being an "insider" for the purposes of Section 16.

B. *Venture Capital Funds and Stub Stakes in Public Companies*

Venture capital funds frequently find themselves significant minority shareholders in recent-IPO companies. The venture capital strategy guides capital to bright leaders and their ideas in the hopes that their businesses become outsized successes. While private equity and hedge funds tend to search for rates of return on investment that are in the teens—or if they're lucky, twenty to thirty—range per year, venture capital firms target investments that can return orders of magnitude more than their initial

[125] *See supra* notes 167–70 and accompanying text.

investment.[126] After all, only a relatively small number of firms in a venture capital portfolio succeed, and the successes must cover the failures as well. To achieve this, venture capitalists take minority stakes of varying sizes at different rounds of investment while the company is private and hope to see the business achieve a large, successful exit through either acquisition or IPO.[127]

Ownership structure in venture-funded businesses is typically highly diversified across many venture capital firms. Each new investment round is typically "led" by a single venture fund that sets valuation, governance expectations, grants board representation, and creates space for "follow-on" investors. It is rare for a single VC fund to take the entirety of a venture round. These mini-syndicated deals allow venture funds to invest in a larger number of startups and spread the risk of failure across the many deals that each will complete. A typical firm will exit with venture capital owning around 50% of the firm, but that ownership will be spread across numerous investors.[128]

Venture capital is unique from other investment styles given that each round of funding comes with new or additional governance expectations, frequently new board members, and numerous contractual obligations that adjust Delaware default rules.[129] Board members are typically added from the venture capital fund that leads each successive VC round. Depending on the leverage founders have in negotiating each round, boards may remain majority controlled by founders or may transition to control by a panel of venture capitalists as more rounds are completed.[130] Dual class structures can significantly adjust the corporate governance balance with the hottest startups having leverage to seek super-voting shares for their founders.[131] In most cases, however, both voting power and board representation will transition away from founders to the venture capital funds that have collectively invested in the business.

Governance issues are simple in good times: the only cap table members are founders, early "angel" investors, employees, and outside venture capital firms. Every shareholder wants to see the company realize a large multiple in value followed by a large exit. Venture capital firms rarely invest for activist reasons such as improving operations, social causes, or company governance. Instead, venture capitalists target companies with high growth potential under existing management in pursuit of outsized

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[126] Predrag Shipov, *Private Equity vs Venture Capital vs Hedge Fund: Key Differences and Investment Strategies*, HEDGEFUNDALPHA (Sep. 12, 2024), https://hedgefundalpha.com/education/private-equity-vs-venture-capital-vs-hedge-fund/.
[127] Elizabeth Pollman, Startup Governance, 168 U. PA. L. REV. 155, 172 (2019).
[128] CRUNCHBASE, *What Percentage Do Venture Capitalists Take? Average VC Ownership of 105 Tech Companies* (last visited Jan 31, 2026), https://about.crunchbase.com/blog/venture-capitalist-percentage-ownership.
[129] Pollman, *supra* note 127, at 160.
[130] *Id.* at 182.
[131] *Id.*

returns.[132] What venture capital contributes back to the firm is better access to resources, support with recruiting, and a strong reputation that helps the company achieve further growth.[133]

Corporate governance issues appear quickly when business turns sour, which happens frequently in venture-backed companies. Leaders who excel at getting early-stage businesses off the ground are often not the right individuals to scale a startup into a stable company.[134] When funding gets tight, conflicts of interest may emerge between management, who has contributed significant "sweat-equity," and venture funds, who collectively have voting control through preferred shares[135] and a strong interest in not losing their invested capital. These preferred shares frequently include anti-dilutive provisions that preserve capital in the event that a startup has to raise a "down round" of financing to survive. Cash-burning startups rely on a series of funding rounds to achieve profitability, and if attitudes towards the startup's success sour, the board may force management to accept a down-round of fundraising against management protest.

Despite this obvious governance conflict, Delaware law before SB 21 largely still permitted venture capital to engage heavily in large decisions for the company in the face of adversity. The numerous venture capital firms that individually have a minority stake only control the business together—called a control group in Delaware law—if the funds are connected in some "legally significant way."[136] The often nearly identical financial interests of venture capitalists are not equivalent to an agreement to act collectively to control the business.[137] Nonetheless, board members from venture capital firms may face director fiduciary conflicts as their economic interests conflict with management goals in times of firm distress.[138] These conflicts produce entire fairness review not based on control, but on their requirements under DGCL §141(a) for directors to serve the interests of the common shareholders.[139] Elevated duties brought on by control have less

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[132] Some venture capitalists may encourage founders to bring on additional professional management or co-founders in the event that the current founding team is highly technical while lacking the business savvy to operate a company. Google famously hired CEO Eric Schmidt at the encouragement of Sequoia capital during the Google Series A funding round. *See Google: The Origin of Search*, ACQUIRED (June 29, 2025), https://www.acquired.fm/episodes/google.

[133] Pollman, *supra* note 127, at 180.

[134] *Id.* at 185. *See also* Mike Isaac, *Uber Founder Travis Kalanick Resigns as C.E.O.*, N. Y. TIMES (June 21, 2017), https://www.nytimes.com/2017/06/21/technology/uber-ceo-travis-kalanick.html (Uber's major VC investors directing CEO Travis Kalanick to resign).

[135] Pollman, *supra* note 127, at 189.

[136] *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 252 (Del. 2019) (quoting *In re Crimson*, 2014 WL 5449419, at *15).

[137] *Id.* at 252.

[138] *In re Trados Inc. S'holder Litig*., 73 A.3d 17, 51–52 (Del. Ch. 2013) (holding a conflict existed in a valuation dispute between a common shareholder and the company after venture capital management signed off on the deal while having preferred liquidation preferences over the common shareholder).

[139] *Id.*

concern, because a firm in significant financial distress typically must make the best of the few bad options available to them.[140]

Relevant to this Article is what happens when a venture capital firm has a portfolio company succeed by going public. At that point, the company is publicly traded, but the venture capital firm often maintains a "stub" stake in the public company for some number of years. During that period of time, the venture capital firm often still has directors on the board, a close relationship with the founder and/or CEO, and intimate knowledge of the inner workings of the business. The stakes held by such firms, while normally not a majority, may nevertheless constitute a meaningful minority position.

In that situation, a venture capital firm prior to SB 21 might be reasonably concerned that it could be deemed a controller ex post should a challenged transaction arise. SB 21, however, provides a simple roadmap to avoid that risk: hold less than one-third of the outstanding shares. If a venture capital firm takes this simple, bright-line step, then it may keep its board representation and push as aggressively as it wants for its views without fear of being deemed a controller.

C. *Activism Vindicated: SB 21 Blesses the Activist Playbook*

Activist shareholders neither seek nor obtain a majority control block. Because activists do not control the majority of a firm's voting equity and thus do not have hard control, it might be puzzling at first blush to consider whether an activist could be deemed a controller. However, the Delaware case law detailed in our Sections above demonstrates that, over time, courts have become increasingly willing to find that specific circumstances render a minority shareholder a controller ex post. Although this evolution in control doctrine had not ultimately manifested as a widespread threat for activist shareholders at the time SB 21 was passed, a continued drift in the same historical direction in the test for actual control might have ensnared activists over time and diminished their ability to reduce management-generated agency costs. In turn, this would have had a chilling effect on hedge fund activist interventions.

Under the expansive interpretation of SB 21's controller definition, the bill recognizes the distinction between activist investors campaigning for influence —which they typically do—and exerting actual control over a firm—which they typically do not. In their seminal work, Ronald Gilson and Jeffrey Gordon fundamentally reconceptualized the modern American corporate governance landscape by identifying the transformation from the

[140] *See* Jacobs v. Akademos, Inc., 326 A.3d 711, 763 (Del. Ch. 2024), *aff'd*, 342 A.3d 1165 (Del. 2025) (holding that the transaction met entire fairness standard of review because of the distressed position of the firm and limited outside options).

dispersed ownership structure of the canonical Berle-Means corporation to what they term “agency capitalism.”[141]

Gilson and Gordon argued that equity ownership in the United States “no longer reflects the dispersed share ownership of the canonical Berle-Means firm.”[142] Instead, capital has been reconcentrated in the hands of institutional investment intermediaries, who have become the dominant record owners of company stock.[143] This reconcentration has given rise to what they labeled the “agency costs of agency capitalism,”[144] shedding new light on the value of shareholder activism.

There were two primary drivers behind the stock ownership shift. First, the political decision to privatize retirement savings and to mandate employer retirement funding created massive pools of capital in need of professional management.[145] Second, developments in the capital markets favored investment intermediaries offering low-cost diversified investment vehicles, further concentrating assets under institutional control.[146]

This structural transformation generated a novel agency cost problem. While traditional corporate governance theory focused on the interest divergence between managers and shareholders, agency capitalism introduces an additional layer of divergence “between the interests of record owners—the institutional investors—and the beneficial owners of those institutional stakes.”[147] The business model of key institutional investors, particularly mutual funds that “focus on increasing assets under management through superior relative performance, undermines their incentive and competence to engage in active monitoring of portfolio company performance.”[148] This creates “rationally reticent” institutional investors: entities willing to respond to governance proposals but lacking incentives to initiate them.[149]

Gilson and Gordon’s central insight is that shareholder activists serve an essential function in this new ownership structure. They argue that “shareholder activists should be seen as playing a specialized capital market role of setting up intervention proposals for resolution by institutional investors.”[150] This dynamic “potentiate[s] institutional investor voice” and “increase[s] the value of the vote,” thereby reducing the agency costs

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[141] Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013).
[142] *Id.* at 863.
[143] PENSIONS & INVESTMENTS, *80% of Equity Market Cap Held by Institutions* (Apr. 25, 2017), https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions/ (stating that institutions own approximately 80% of the large-cap S&P 500 index.).
[144] *Id.*
[145] *Id.*
[146] Gilson & Gordon, *supra* note 141, at 863.
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*

inherent in agency capitalism.[151] In other words, activists bridge the gap between passive institutional capital and active governance by identifying intervention opportunities and structuring proposals for institutional investors to consider.

Shareholder activism grew rapidly in the mid-2000s due to a confluence of market forces and government regulation.[152] First, highly publicized corporate scandals involving management misbehavior created the public perception that corporate officers and directors needed greater discipline from outsiders.[153] Second, depressed stock prices after the burst of the dot.com bubble reduced the cost of mounting an activist campaign.[154] Third, changes in domestic capital markets caused an increase in the percentage of U.S. public equities managed by institutional investors from around eight percent in 1950 to sixty-seven percent by 2010.[155] And traditionally passive institutional investors demonstrated an increased appetite to support shareholder activism.[156] Finally, the SEC's 1992 proxy rule amendments loosened regulations discouraging intra-shareholder communication about matters that might be subject to a shareholder vote, thus removing a barrier to shareholder activism.[157] Simultaneously, shareholder advisory services emerged to provide informed guidance to investors voting proxies, ultimately helping aggregate and coordinate institutional investor voting power.[158] While these developments collectively made shareholders more active and influential, they did not grant shareholders more control over corporate policy. Rather, they improved the marketplace of ideas for corporate policy by increasing competition and transparency.

The traditional hedge fund activist's strategy is predicated on the hedge fund's ability to persuade corporate stakeholders—either management or shareholders—to support the value-increasing proposal it

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[151] *Id.*

[152] Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 58 (2011) ("The forthright brand of shareholder activism hedge funds deploy emerged by the mid-2000s as a major corporate governance phenomenon"); Alistair Barr, *Swashbucklers Hit the Wall*, MARKETWATCH (Sep. 14, 2006), https://www.marketwatch.com/story/activist-hedge-fund-returns-wane-as-their-niche-gets-crowded ("According to data provider Hedge Fund Research hedge funds that used shareholder activism as part of their investment strategy managed almost $100 billion worth of assets as of 2006, compared with $23 billion in 2002").

[153] Cheffins & Armour, *supra* note 152, at 61.

[154] *Id.*

[155] Marshall E. Blume & Donald B. Keim, *Institutional Investors and Stock Market Liquidity: Trends and Relationships* (Jacobs Levy Equity Mgmt. Ctr. for Quantitative Fin. Rsch., Working Paper, Aug. 21, 2012), https://ssrn.com/abstract=2147757.

[156] Cheffins & Armour, *supra* note 152, at 61.

[157] *See generally* ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION (6th ed. 2021) (describing the SEC's 1992 amendments and their impact on shareholder communication).

[158] Anabtawi & Stout, *supra* note 43, at 1277–78.

presents. The process begins when the activist hedge fund invests in research to identify an ostensibly underperforming firm.[159] When the activist locates such a firm, it might conclude that the firm would benefit from financial reforms, including increasing leverage, selling underperforming assets, or distributing excess cash to shareholders through dividends or share buybacks.[160] Alternatively, the activist might propose improvements to the firm's operations or strategy, or it might advocate for the firm to put its assets up for sale or to be sold as a going concern.[161]

Before approaching the target firm, the hedge fund activist usually establishes a toehold position, typically by acquiring between five- and ten-percent of the target firm's outstanding shares at a price that has not incorporated the activist's plans[162]—that is, at the target's current underperforming value.

Once the activist acquires a more-than-five-percent ownership toehold, under securities regulation 17 C.F.R. § 240.13d-1(a) (2012), it must file a statement on Schedule 13D within five business days revealing its ownership stake and its intentions and goals for its investment.[163] Hedge funds enjoy a reputation for raising target firm value—whether deserved or not—and so, anticipating this increase in value, share price typically jumps by seven percent after a hedge fund files its Schedule 13D. The hedge fund is thus incentivized to acquire as many shares as possible in the five-business-day period between triggering the Schedule 13D filing requirement and its due date, while the share price remains depressed. The activist strategy is only economically feasible if the fund can acquire enough shares in the target company to recoup its costs through share price appreciation once the company has implemented the activist's proposal.

Once the hedge fund activist has enough shares to pose a legitimate takeover threat, it contacts the firm's management, beginning the "demand negotiation" stage of its campaign.[164] During this stage, the activist and the managers either have an amicable exchange of ideas or launch into a contentious battle.[165] Regardless of whether this encounter is amicable or combative, the activist's goal is always to persuade incumbent management

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[159] Cheffins & Armour, *supra* note 152, at 59–60 (describing that activists target firms that are underperforming, not merely underpriced).
[160] April Klein & Emanuel Zur, *Hedge Fund Activism* 1 (N.Y.U. Pollack Ctr. for L. & Bus. Working Paper, No. CLB-060017, 2006) https://ssrn.com/abstract=1291605 [https://perma.cc/4WGP-NRT4].
[161] Cheffins & Armour, *supra* note 152, at 59–60.
[162] *Id.*
[163] See 17 C.F.R. § 240.13d-1(a) (2012) (requiring any person acquiring more than five percent of any equity security to file a statement with the SEC on Schedule 13D within ten days after acquisition).
[164] Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model*, 107 J. FIN. ECON. 610, n. 52, at 612 (2013).
[165] *See e.g.*, Singh et al., *Southwest Airlines Settles Boardroom Feud with Activist Investor Elliott*, REUTERS (Oct. 24, 2024), https://www.reuters.com/business/aerospace-defense/southwest-airlines-reports-surprise-q3-profit-improved-pricing-2024-10-24/.

to make changes that increase shareholder value,[166] increasing the value of its own position in the target. If the parties choose to "battle" and that battle goes full scale, it can turn into a proxy fight. However, it is more common for a hedge fund activist to simply threaten a proxy fight, and the parties typically settle before the hedge fund actually launches a fight.

Throughout this process, a hedge fund activist usually must be cautious that it does not own too much of its target. Section 16 of the Securities Exchange Act of 1934 and its accompanying short swing profit rule constrains a hedge fund activist's ability to acquire large equity stakes.[167] Under Section 16, any investor who crosses the ten-percent ownership threshold in a public company is subject to the same restrictions that apply to officers and directors—including the prohibition on profiting from short swing transactions. [168] A short swing transaction occurs when an investor buys and then sells, or sells and then buys, the same security within a six-month period. The prohibition on profiting from these transactions creates a powerful disincentive against an activist accumulating an ownership stake over ten percent; a hedge fund usually wants to avoid severely limiting its liquidity and potential profit opportunities. The short swing profit rule, then, is an additional reason activist investors typically maintain minority positions and leverage the power of persuasion rather than seeking control through large ownership stakes.[169] Traditional hedge

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[166] Matteo Tonello, *Hedge Fund Activism: Finding and Recommendations for Corporations and Investors*, 43–44 (2008), https://ssrn.com/abstract=1107027; Jeffrey N. Gordon, *The Rejected Threat of Corporate Vote Suppression: The Rise and Fall of the Anti-Activist Pill*, COL. BUS. L. REV. 206, 211 (defining three categories of shareholder activism: "governance activism", "performance activism" and "ESG activism").

[167] 15 U.S.C. § 78p(b) (2018) (requiring stockholders, officers, and directors with ten percent beneficial ownership to disgorge short swing profits from transactions within six months of crossing that threshold); 17 C.F.R. § 240.16a-2(a) (2023) (including ten percent beneficial owners in the definition of persons subject to Section 16); John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 562–63 (2016) (stating that "the typical activist will not cross the 10% threshold, probably because at that point it will become subject to section 16(b) of the Securities Exchange Act, which may force it to surrender any 'short swing' profits to the corporation on shares acquired in excess of 10%"); Proskauer Rose LLP, *Special Issues Under Sections 13(d) and 16 for Hedge Funds*, *in A Practical Guide to the Regulation of Hedge Fund Trading Activities* ch. 3 (2024) (exploring the implications of Section 16 compliance on hedge fund activist strategy).

[168] U.S. Sec. & Exch. Comm'n, *Officers, Directors and 10% Shareholders*, https://www.sec.gov/resources-small-businesses/going-public/officers-directors-10-shareholders (explaining that "Section 16 of the Exchange Act applies to an SEC reporting company's directors and officers, as well as shareholders who own more than 10% of a class of the company's equity securities" and that Section 16 "establishes mechanisms for a company to recover 'short swing' profits...from a purchase and sale of the company's security that occur within a six-month period").

[169] Alon Brav, et al., *Governance by Persuasion: Hedge Fund Activism and Market-based Shareholder Influence*, OXFORD RSCH. ENCYC. OF ECON. AND FIN., 1 (2022) (finding that, unlike the corporate raiders in the 1980s, activist hedge funds typically accumulate minority equity stakes and do not seek to exercise control and "activists must win support

fund strategy, which only takes five- to ten-percent ownership of the target, does not bring Section 16 into play, and neither does it implicate the one-third "control" definition in SB 21. Of course, it is possible, and not particularly uncommon,[170] for a hedge fund activist to exceed the ten-percent threshold but simply wait out the six-month restricted period, so long as the fund figures the resulting temporary illiquidity risk into its strategy.

Nevertheless, of late, hedge funds have pioneered new investment strategies, including accumulating larger post-disclosure economic exposure to target companies primarily through derivative instruments, including cash-settled swaps. As a result, hedge funds have become increasingly vulnerable to claims that they exercise actual control of the target firm through a combination of large stockholdings, strong incentives borne of significant economic exposure, and influence over management, especially through private ordering arrangements wherein the hedge fund bargains to supplant the board's role.[171]

By heightening the threshold for control to managerial authority plus ownership of one-third of the voting stock of the firm (absent a contractual right to cause the election of directors), SB 21 made it far less likely that traditional activist strategies, including accumulating meaningful but minority stakes and seeking board representation, will trigger controlling shareholder liability. This development removes any legal uncertainty for activist investors and provides greater clarity for activists, their counsel, and institutional investors evaluating whether to initiate or support activist interventions.

In effect, the new "control" definition clarifies that activists operate in a specific category: they are sophisticated shareholders seeking to influence corporate governance and strategy without assuming the full powers or responsibilities of control. To the extent activists create value, freeing activist shareholders in this way could have beneficial impacts not only on their fellow shareholders, but on the capital markets at large. Although there is some debate about their success rate, activist investors' strategies typically hinge on making their target entities more efficient and more profitable, including by improving the target's management. With a bright-line rule and therefore an avoidable "control" threshold, activist investors may push their ideas even more aggressively at firms without fear of being deemed a controller.

D. *SB 21 and Shareholder Agreements*

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from fellow shareholders via persuasion and influence, representing a hybrid internal-external role in a middle-ground form of corporate governance").

[170] *See* Cheffins and Armour, *supra* note 132, at 9 (noting that hedge funds sometimes act as "long term supportive investors" of their target firms).

[171] *See, e.g.*, Gladriel Shobe et al., *Moelis and Private Equity in the Public Market*, 43 YALE J. ON REGUL. (forthcoming 2026), https://ssrn.com/abstract=5160684.

Recent scholarship has shed light on novel attempts by venture capital-funded startups to increase their control over corporate actions through private contracts.[172] Such actions are consistent with private ordering, wherein corporations create firm-specific rules, typically through charter and bylaw provisions, allowing the firm to opt out of statutory default rules that allocate rights and powers to corporate constituents.[173]

Private equity and venture capital firms commonly use shareholder agreements to obtain governance rights that their equity stake would not otherwise afford.[174] Shareholder agreements can transfer rights from the board to the venture capital investor, but they can also address a wide range of other important corporate matters including forum selection, inspection rights, and fiduciary duties.[175] More strikingly, some shareholders agreements have gone so far as to grant a subset of shareholders the right to determine the composition of the board of directors and to alter the scope of officer, director, and controlling shareholder liability.[176] Furthermore, some shareholder agreements grant the right to unilaterally pass or block amendments to the charter or bylaws, or to force the corporation to take actions that traditionally require board authorization.[177] Sophisticated venture capital firms negotiate complex board structures that distribute control-related rights and veto authority between shareholders with different expertise and incentives.[178] These shareholder agreements often remain in effect even after a venture capital-funded startup completes an IPO.[179]

For example, *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, a case decided by the Delaware Chancery Court in 2024, reveals the type of control arrangements that warrant judicial intervention

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[172] *See* Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. UNIV. L. REV. 913 (2021) (coining the term "stealth governance" to distinguish between the generally accepted and transparent practice of private ordering through charter and bylaw amendments and the less transparent practice of using shareholder agreements to influence corporate governance).

[173] *See* Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1638 (2016) (offering an expansive definition of private ordering as "the adoption of issuer-specific rules that are contractual in nature (as opposed to statutes, agency rules, or decisional law)").

[174] *See* Gabriel V. Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 YALE J. ON REGUL. 1124, 1134 (2021) ("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").

[175] Fisch, *supra* note 172, at 916.

[176] *Id.*

[177] *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/ (exploring shareholder agreements that confer veto rights to shareholder signatories).

[178] Fisch, *supra* note 172, at 920.

[179] *See* Rauterberg, *supra* note 174 (documenting prevalence of shareholder agreements continuing to operate post-IPO).

and sheds light on the proper boundary between influence and control.[180] In *Moelis*, the court invalidated a shareholder agreement that granted Moelis—the corporation's founder, 6.5% equity holder, and controller of 40% of its voting power—a cluster of significant rights including the right to have the board obtain his consent before entering into a merger agreement, the right to designate a minimum number of directors even if his voting power decreased significantly, and the right to have the board recommend that shareholders vote for his director nominees.[181] Vice Chancellor Laster's opinion rejecting the agreement "warned that an activist settlement which binds the decisions of directors irrespective of future events, specifically with respect to director recommendations and the size of the board/committees, may violate Section 141(a) of the Delaware Code."[182] Delaware courts have subsequently invalidated provisions in several shareholder agreements granting the shareholder signatory pre-approval powers over certain significant transactions or the ability to dictate board size or constituency.[183]

Activist investors have also sought to use private contracts to obtain additional influence without crossing into the domain of control. In *Aaron Jones v. BioMarin Pharmaceutical Inc. et al.*,[184] the shareholder-plaintiff challenged a shareholder agreement that gave Elliott Investment Management LP, another investor in BioMarin Pharmaceutical, three new seats on the company's board.[185] The agreement was the result of a settlement between Elliott and BioMarin and required the board to recommend Elliott's director nominees in an upcoming election. The plaintiff-shareholder alleged that, in exchange for these contracted-for rights, Elliott agreed to abandon its proxy contest and reign in its campaign against incumbent management. The court did not decide whether these provisions were invalid because the case was mooted when Elliott waived its enforcement.

SB 21's definition of "control" interacts with another recent development related to these types of shareholder agreements under Delaware corporate law. On July 17, 2024, pursuant to the enactment of SB 313, the Delaware legislature adopted DGCL section 122(18), which

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[180] 311 A.3d 809 (Del Ch. 2024).
[181] *Id.*
[182] Jim Woolery, *From Moelis to Miller: How to Settle With Activists*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 26, 2024), https://corpgov.law.harvard.edu/2024/03/26/from-moelis-to-miller-how-to-settle-with-activists/ (analyzing the impact of *Moelis* and *Theodore B. Miller, Jr., et al. v. P. Robert Bartolo, et al.* C.A. No. 2024-0176-JTL on board behavior and activist campaigns).
[183] *See e.g. Wagner v. BRP Gp.*, 316 A.3d 826 (Del Ch. 2024); *Seavitt v. N-Able*, 321 A.3d 516 (Del. Ch. 2024) (granting two primary investors the right to designate six directors to an eight director board if each investor maintained at least 20% equity ownership, and four directors if their individual equity stake declined to 10%).
[184] Case No. 2024-0360 (Del Ch. 2024).
[185] *See, e.g.*, Leslie Pappas, *Elliott Waives BioMarin Board Deal, Moots Del. Suit*, LAW360 (Apr. 17, 2024), https://www.law360.com/healthcare-authority/articles/1826359/elliott-waives-biomarin-board-deal-moots-del-suit.

furthered the ongoing Delaware trend of permitting corporations to grant their shareholders the authority to take actions that were traditionally within the board's power.[186]

Section 122(18) authorizes corporations to enter into agreements with current and prospective shareholders that restrict the board's managerial authority. However, the legislation makes clear that directors, officers, and shareholders must still honor their fiduciary duties when entering into such agreements. Thus, there is an intersection between the grant of rights under such an agreement, a shareholder's exercise of those rights, and whether the shareholder is deemed a controller owing fiduciary duties to the corporation and its stockholders.

SB 21's definition of control is centered on a shareholder's ability to control the composition of the board of directors. The Delaware legislature's decision to have controller status turn on the power to control the board has caused some commentators to lament that this definition of control is insufficiently expansive to capture the other types of controlling behavior that Section 122(18) permits.[187] Specifically, they complain that the definition would not, but should, capture a provision granting the shareholder signatory the power to effectuate a challenged action that would have otherwise required board authorization.[188] As Professors Fisch and Solomon put it, absent the contractual right to control the composition of the board or to force a corporate action that, but for the private contract, would have required board approval, "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."[189] As others have noted, SB 21 pushes the principle that fiduciary duties should attach when a controlling shareholder obtains a benefit to the detriment of other shareholders, beyond the standard exercise of their shareholder rights.[190]

SB 21 would capture any Section 122(18) agreement allowing a shareholder to control at least a majority of the board membership—which counts as "control" according to Section 144(e)(2)(b). But it would not capture an agreement giving a shareholder the right to force a corporate action that the board otherwise could have approved, which as Professors Fisch and Solomon observe, really is control.

Together, these two pieces of legislation create an asymmetry wherein a group of activist shareholders could contract for practical control under Section 122(18) without being held a controlling shareholder under SB 21, so long as the shareholders avoided reaching one-third ownership. While SB 21 provides a comforting and definitive "control" threshold for active investors, in combination with Section 122(18), it also provides for a

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186 *See* Fisch & Solomon, *supra* note 47, at 102.
187 *See id.*
188 *See id.* at 103.
189 *Id.*
190 *See id.*

zone of informal control without the liability associated with formal control. This zone is, of course, open for potential exploitation.

Indeed, by anchoring controller status to individual ownership thresholds and formal board-level authority, SB 21 substantially reduces the risk that coordinated minority shareholders will be deemed controllers, even where their collective influence is significant.

Practitioners emphasized that this shift is already affecting activist strategy. Rather than pursuing larger single-fund positions, activists increasingly consider coalitional approaches that rely on coordination, persuasion, and parallel conduct—strategies that remain squarely on the "influence" side of SB 21's control line. Whether this represents efficient collective monitoring or an erosion of fiduciary accountability is a question SB 21 leaves unresolved.

E. *SB 21 and Other Understandings of Control*

Naturally, other legal issues beyond Delaware control transaction law implicate questions of the nature of control. For example, in another article, one author examined federal antitrust laws in the context of shareholder activism and showed that federal regulators have become increasingly willing to bring Hart-Scott-Rodino enforcement actions against activist investors, on the grounds that their actions evince non-passive investment intent.[191] For instance, in 2012, the DOJ and FTC charged Biglari Holdings Inc., a restaurant holding group, with violating the HSR Act, culminating in a $850,000 settlement. In its complaint, the DOJ asserted that the Biglari CEO's attempt to gain two seats on its target's board was evidence that the transaction did not qualify for the investment-only exception.

Similarly, in July 2016, the DOJ charged ValueAct, an activist investor, with violating the reporting and waiting period requirements of the HSR Act resulting in an $11 million settlement. ValueAct acquired shares in Halliburton and Baker Hughes after the companies publicly released a merger announcement. The DOJ asserted in its complaint that ValueAct's stock acquisition did not qualify for the investment-only exception because internal communications indicated that ValueAct intended to push the companies to complete the merger or to influence the management of both companies in other ways.

In August 2015, the DOJ charged Third Point, an activist investor, with violating the HSR Act's reporting and waiting period requirements, resulting in a settlement for injunctive relief. In that action, the DOJ asserted that Third Point's acquisition of Yahoo stock in excess of the HSR filing thresholds did not qualify for the investment-only exception because Third Point openly expressed its intent to nominate directors to Yahoo's board and to initiate a proxy contest if necessary to secure those board seats.

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[191] Robert E. Bishop, et al., *Antitrust, Anti-Activism* (forthcoming 2026), https://ssrn.com/abstract=6061814.

These DOJ actions suggest that regulators have an increasingly "reflexive suspicion" toward any investor who seeks to engage with a target firm in ways that relate to the traditional means of control.[192] In other words, regulators have become more inclined to construe an investor's attempt to pursue a non-control investment strategy as warranting the kind of heightened scrutiny that controllers receive.[193]

IV. SB 21: THE PRACTITIONERS' PERSPECTIVE

To ground our analysis of the ways SB 21 will impact activist investors specifically, and institutional investors generally, we conducted a series of semi-structured qualitative interviews with ten leading corporate law advisors from the most prominent corporate defense firms and leading shareholder litigation firms. Their responses both corroborated the analysis we provided above and revealed how practitioners expect market participants to react to this new statutory landscape. A table describing the interviews is set out in the Appendix.

The interview subjects reflect a carefully selected sample of the leading attorneys who represent each of the major types of institutional players involved in major transactions and shareholder litigation. We interviewed representatives from plaintiff's law firms, defense firms that specialize in defending companies and transactions against claims alleging breaches of fiduciary duties and securities regulations, transaction planners who lead M&A transactions, advisors who specialize in counseling investment funds on how to manage risk, and board advisors.

We designed and implemented an interview questionnaire that reduced the risk of priming our interview subjects with our own views. Specifically, we did not disclose our thesis or position to interviewees at any time during the interview. Instead, we began each interview by informing the subject that we were investigating the impact of SB 21 on a variety of institutions. Throughout the interview we asked open-ended questions to ensure that interviewees responded based on their own observations and analysis of SB 21. We also guaranteed the anonymity of each respondent to encourage candid and robust responses.

Even with these precautions, the sampling process cannot completely eliminate bias. We were limited to the market participants in our network who were willing to have their (anonymized) views reflected in academic literature. Although everyone we asked to participate agreed to be interviewed, their views may not be representative of the industry. To limit

[192] Bainbridge, *supra* note 100, at 2 (arguing that "Delaware courts increasingly exhibit a reflexive suspicion of transaction involving a controlling shareholder").
[193] *See* Fisch & Solomon, *supra* note 47, at 641–42 (critiquing Delaware court's "growing skepticism toward corporate actions in controlled companies" and "argu[ing] that controlling shareholders acting in their capacity as shareholders should not be considered fiduciaries").

biases in our sample, we included representatives from the primary private sector organizations involved in interpreting and enforcing SB 21's provisions. We also only included market leaders in the interview pool. Collectively, our interview subjects were involved in nearly every major transaction involving controllers over the past two decades.

A. *Ex Ante Planning*

First, all interviewees highlighted that the bright line nature of the definition of "controller" in SB 21 would allow transactional planners to structure some transactions ex ante to avoid entire fairness review.[194] Given the different natures of their positions, various interviewees took different views on whether this is overall a positive or negative development. Several defense attorneys (that is, attorneys who would defend against a lawsuit alleging a breach of fiduciary duty) started by discussing how difficult structuring a transaction may be when it is unclear whether a court would deem a certain large shareholder to be a controller.[195] On the one hand, if the transactional planners believed that a court would deem a shareholder to be a controller, then they would generally advise that the company structure the transaction using the extensive cleansing process developed in *Kahn v. M&F Worldwide*.[196] But if it turns out the court would not have deemed the shareholder to be a controller, then going through that process wastes a great deal of money, time, and focus.[197] Moreover, the emphasis under the MFW doctrine that the process be used ab initio means that the attorneys involved are effectively unable to do a sufficient investigation into the shareholder and its relationship with the company and the other board members to know all of the facts that later would be used in an analysis of whether a shareholder is, in fact, a controller.[198]

Instead of being caught in this uncertain and potentially wasteful situation, SB 21 allows transaction planners to rely with certainty on the fact that a minority shareholder with under one-third ownership is not a controller. All told, the attorneys who advise companies all agreed that the ex-ante planning element with respect to controller determinations of SB 21 is a positive development.[199] While they felt less positively about the change, plaintiffs' attorneys also agreed that companies doing deals and

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[194] Interviews with Participants 1-10.

[195] *See* Interview with Participant 1 (Dec. 10, 2025); Interview with Participant 3 (Dec. 10, 2025); Interview with Participant 5 (Dec. 12, 2025); Interview with Participant 8 (Dec. 18, 2025).

[196] *Id.*

[197] *Id.*

[198] Interview with Participant 3 (Dec. 10, 2025); Interview with Participant 5 (Dec. 12, 2025).

[199] *See* Interview with Participant 1 (Dec. 10, 2025); Interview with Participant 3 (Dec. 10, 2025); Interview with Participant 5 (Dec. 12, 2025); Interview with Participant 8 (Dec. 18, 2025).

their counsel would use the certainty of the new ex ante definition of control in their transaction planning.[200]

B. *Lawsuit Effects*

It was implicitly evident from the interviews that all interviewees, whether attorneys for plaintiffs or attorneys who advise or defend companies, read SB 21 consistent with the "expansive interpretation" of the new definition of a controller[201]—that is, that SB 21's definition of "control" applies to the DGCL at large, not merely to DGCL § 144. Plaintiffs' attorneys differed somewhat in their assessment of whether and how this ex-ante planning would affect transactions.[202] All agreed that they expected transactional planners to consider the new definition of control when structuring transactions.[203] Several interviewees believed that planning would reduce the number of potentially valuable cases that otherwise might have been brought.[204] Another interviewee did not believe there would be a material reduction in the number of viable cases, but admitted there may be a marginal reduction.[205] Still another interviewee stated that the interviewee expected the types of cases that were brought to change somewhat, but not the overall quality or volume.[206] Attorneys who advise or defend companies largely believed that SB 21 would reduce certain cases, namely those where the shareholder held less than one-third of the outstanding shares of the firm.[207] All told, plaintiffs' attorneys seemed less certain of the effects of SB 21 on post-transaction shareholder litigation.

C. *New Battleground: Shareholders with One-Third to One-Half Ownership*

A number of interviewees noted that one likely area of substantially increased litigation may be where a stockholder holds more than one-third

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[200] *See* Interview with Participant 4 (Dec. 11, 2025); Interview with Participant 7 (Dec. 18, 2025); Interview with Participant 9 (Dec. 22, 2025); Interview with Participant 10 (Jan. 15, 2026).
[201] Interviews with Participants 1-10.
[202] *See* Interview with Participant 4 (Dec. 11, 2025); Interview with Participant 7 (Dec. 18, 2025); Interview with Participant 9 (Dec. 22, 2025); Interview with Participant 10 (Jan. 15, 2026).
[203] *Id.*
[204] *See* Interview with Participant 4 (Dec. 11, 2025); Interview with Participant 10 (Jan. 15, 2026).
[205] *See* Interview with Participant 7 (Dec. 18, 2025).
[206] *See* Interview with Participant 9 (Dec. 22, 2025).
[207] *See* Interview with Participant 1 (Dec. 10, 2025); Interview with Participant 3 (Dec. 10, 2025); Interview with Participant 5 (Dec. 12, 2025); Interview with Participant 8 (Dec. 18, 2025).

of the stock but less than one-half.[208] Several defense attorneys expressed hope that Section 144's one-third ownership plus managerial authority test would lead courts to more consistently identify controllers with one-third or more of the vote only where there is clear evidence of an agreement giving mechanisms of actual control.[209] Several plaintiffs' attorneys, on the other hand, suggested the Chancery Court might be more likely to deem a shareholder with more than one-third of the outstanding shares as a controller post-SB 21, under the argument that the legislature set the line for clearly not being a controller at one-third.[210]

D. *Mitigating Risk for Private Funds*

As explored above in Part III, private equity and venture capital investors have unique and varied strategies for influencing—or flat out controlling—their targets. Many private equity strategies rely on the private equity sponsor taking full control of its target and plan for the fiduciary duties that come with it. SB 21 is unlikely to affect those strategies. Other private equity sponsors and some venture capital investors, on the other hand, take smaller positions in their targets and would prefer to avoid the liability associated with formal control. Accordingly, interviewees stated that private equity sponsors and venture capital firms who use relatively low-ownership strategies will likely continue to leverage shareholder agreements to strategically structure control rights while staying below the one-third ownership threshold.[211] These agreements become all-the-more important in light of SB 313,[212] which explicitly allows boards to transfer some of their managerial authority to shareholders via privately ordered agreements.

E. *Impact of SB 21 on Activist Investors*

Although an activist with a small minority stake has never been held to be a controller, two interviewees commented that SB 21 removes that tail

[208] *See* Interview with Participant 1 (Dec. 10, 2025); Interview with Participant 3 (Dec. 10, 2025); Interview with Participant 7 (Dec. 18, 2025); Interview with Participant 9 (Dec. 22, 2025).
[209] Interview with Participant 3 (Dec. 10, 2025); Interview with Participant 5 (Dec. 12, 2025).
[210] Interview with Participant 3 (Dec. 10, 2025); Interview with Participant 9 (Dec. 22, 2025).
[211] *See* Interview with Participant 4 (Dec. 11, 2025) (explaining the important interaction between SB 21 and SB 313. Predicting that investors will get more aggressive with the terms in shareholder agreements and that current shareholder agreements will become even more important to reviewing courts); Interview with Participant 7 (Dec. 18, 2025) (anticipating more aggressive deal structuring post SB 21's controller-friendly changes); Interview with Participant 9 (Dec. 22, 2025) (same).
[212] *Id.*

risk—it stops the possible drift in the law where a Delaware court could conceivably hold that an activist is a controller.[213]

Regarding which parts of SB 21 will most impact activist investors, our interviewees expect the amendments to Section 220 regarding a shareholder's rights to inspect corporate books and records will have a more significant impact on activists than the new provisions in Section 144, in part because activist investors tend to take ownership stakes far smaller than one-third.[214]

The impact of the amendments to Section 220 cuts both ways for activist investors. On the one hand, activist investors who need access to corporate records to challenge management actions will have more difficulty obtaining the documents they need. However, the increased burden that Section 220 places on requesting shareholders by requiring they establish by "clear and convincing evidence" that they need specific documents other than the ones identified in the statute will also reduce litigation risk for investors that take mid-level stakes.[215] One interviewee expressed skepticism that Section 220 will have a significant effect because he believed it merely codified existing practices that already make it difficult to obtain the documents that fall outside Section 220's listed categories.[216]

Section 144, on the other hand, might not have as significant an impact on activist investors due to the numerous other hurdles activists face in building large positions.[217] For example, as discussed above, the activist investor strategy is still restricted by Section 16's short swing profit rule, which exerts downward pressure on the size of an activist's equity stake by constraining the activist's ability to actualize gains or minimize losses. Other regulations and stock exchange requirements create analogous constraints.

F. *Gamesmanship Around One-Third Ownership*

We consistently heard from interview participants that while the one-third ownership threshold for control may not significantly affect most

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[213] *See* Interview with Participant 1 (Dec. 10, 2025); Interview with Participant 2 (Dec. 10, 2025).
[214] Interview with Participant 2 (Dec. 10, 2025); Interview with Participant 4 (Dec. 11, 2025); Interview with Participant 6 (Dec. 17, 2025).
[215] *Id.*
[216] Interview with Participant 7 (Dec. 18, 2025).
[217] *See* Interview with Participant 2 (Dec. 10, 2025) (highlighting that activists must also navigate other restrictions like Section 16(b)'s short swing profit rule and the 15% interested stockholder threshold for DGCL §203); *See also* Interview with Participant 6 (Dec. 17, 2025) (expressing skepticism that courts would ever hold that an activist investor was a controller and recognizing that activist holdings experience downward pressure from many other provisions as well).

investors or most companies, it introduces new opportunities for gamesmanship for those near the threshold. In fact, funds have already started to ask advisors whether they should strategically limit their stockholdings to thirty-two percent of the corporation's voting stock—or sell shares to reduce their holdings to thirty-two percent or less of a corporation's stock—prior to engaging in a transaction.[218]

This gamesmanship is the "evading" principle that concerns Vice Chancellor Laster and caused him to fear that Delaware will become a "haven for shadow controllers." Investors could conceivably build a larger-than-one-third ownership stake in their target, elect directors to the board, create shareholder agreements granting themselves vast discretion, and make other arrangements to ensure their lasting control, quickly sell enough shares to duck the one-third formal control threshold, and make their transaction as a technical SB 21-non-controller while the vestiges of their formal control persist. Practitioners expect this type of gamesmanship to first emerge in private companies before spreading to the public markets.[219]

G. *New Control Group Risk*

Although SB 21 created a bright-line test for control that reduces the likelihood minority shareholders will be deemed controllers, the statute explicitly recognizes control groups. Under Section 144(e)(1), the voting stock ownership of each shareholder in the group is aggregated for purposes of determining whether the group crossed the statutory control thresholds.[220] As a result, the way that courts define "agreement, arrangement, or understanding between" stockholders will be of great significance. Some interviewees expect courts to become more receptive to plaintiff's arguments that shareholders have acted in concert to bind a group of stockholders into a minority control block.[221] If this happens, then large asset managers who are generally passive but occasionally coordinate with significant stockholders within a company might be exposed to greater control-related risk. In addition, hedge funds that coordinate with strategic buyers could be affected by the new definition. Much will depend on the Chancery court's interpretation of the group rule.

Thus, interviewees highlighted that investors must continue to avoid engaging in any behaviors that could be construed as evidence of group

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[218] *See* Interview with Participant 3 (Dec. 10, 2025) (reporting conversations with funds inquiring whether they should limit their pre-transaction equity stake to 32%); Interview with Participant 7 (Dec. 18, 2025) (same).
[219] *See* Interview with Participant 4 (Dec. 11, 2025).
[220] 8 Del. C. § 144(e)(1) ("'Control group' means 2 or more persons that are not controlling stockholders that, by virtue of an agreement, arrangement, or understanding between or among such persons, constitute a controlling stockholder").
[221] Interview with Participant 7 (Dec. 18, 2025); Interview with Participant 9 (Dec. 22, 2025).

formation.[222] Furthermore, some interviewees noted that it is unlikely the Delaware legislature will act quickly to correct any unexpected interpretations of SB 21's provisions, including if the courts take a stricter view of what constitutes "independence" for directors who approve controlling stockholder transactions.[223]

H. *SB 21 Disadvantages Small Companies*

One underappreciated consequence of SB 21 is that its benefits are distributed unevenly across firms. While the statute meaningfully reduces uncertainty for large, well-capitalized companies and sophisticated financial sponsors, practitioners consistently emphasized that it creates new frictions for small and mid-cap companies—particularly those with concentrated ownership structures, limited liquidity, and fewer governance degrees of freedom. One interviewee also noted that private companies, which are typically smaller than public companies, often have difficulty maintaining two independent directors as required by Sections 144(b) and (c).[224] Two independent directors are likely prohibitively expensive for small businesses and would not be treated as a strategic priority compared to other company goals.

Small and mid-cap firms are far more likely than large public companies to have one or more stockholders holding ownership stakes near or above the one-third threshold without any intent to assume control. Founders, legacy investors, PIPE participants, and rescue-capital providers routinely accumulate large minority positions as a function of necessity rather than governance design. Unlike large-cap companies, these firms often lack the liquidity, trading volume, or capital markets access necessary to engineer ownership levels safely below SB 21's bright-line threshold through secondary offerings, block trades, or derivative exposure.

Practitioners noted that SB 21 effectively converts what was once a contextual inquiry into a cliff.[225] Before SB 21, counsel advising a small company could argue—sometimes successfully—that a large minority holder exercised influence but not control, particularly where governance rights were modest and board processes were independent. After SB 21, once a stockholder crosses the one-third threshold, the analysis shifts abruptly. Transaction planners must now choose ex ante between dilution, the removal of governance rights, or acceptance of formal controller status—with all of its attendant fiduciary consequences.

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[222] *See* Interview with Participant 3 (Dec. 10, 2025).
[223] Interview with Participant 8 (Dec. 18, 2025); Interview with Participant 9 (Dec. 22, 2025).
[224] *See* Interview with Participant 1 (Dec. 10, 2025).
[225] Interview with Participant 2 (Dec. 10, 2025); *See* Interview with Participant 4 (Dec. 11, 2025).

Furthermore, private companies are structurally disadvantaged due to their board compositions, which could negatively impact their ability to utilize the new Section 144 safe harbors fully. This dynamic disproportionately burdens firms with fragile governance infrastructures. Small companies typically have fewer independent directors, greater overlap between management and ownership, and long-standing relational ties among principals. In that setting, even benign forms of engagement—board representation, negative covenants, or historical influence—can quickly become problematic once the ownership threshold is crossed. Practitioners described advising boards that were forced to restructure otherwise efficient governance arrangements solely to avoid triggering controller status, even where no party sought control and no conflicted transaction was contemplated.

SB 21 thus reallocates control risk in a manner that correlates more closely with firm size and capital-market flexibility than with actual misconduct or domination. While the statute succeeds in clarifying the law of control, it does so by privileging firms that can design around the threshold and disadvantaging those that cannot. In this sense, SB 21 does not merely stabilize doctrine; it reshapes the practical cost of capital for smaller firms by transforming controller status into an ex ante pricing and structuring constraint rather than a fact-sensitive equitable determination.

I. *The Resurgence of Appraisal Claims*

Multiple interviewees who frequently represent investors in shareholder derivative suits in Delaware highlighted that transaction planners have begun to take advantage of SB 21's new safe harbors by using shareholder agreements to reduce protections for other shareholders.[226] To combat this trend, practitioners expect there to be more appraisal arbitrage cases, where plaintiffs initiate an appraisal proceeding in order to force the subject company to produce evidence in discovery with the end goal of discovering evidence to support other claims as well. For example, after a transaction between a company and one of its large—but not SB 21 controlling—shareholders, a displeased minority shareholder might initiate an appraisal proceeding ostensibly for the purpose of receiving the appraised value of its shares. Secretly, though, that minority shareholder's real goal is not to have the court appraise its shares, but to make the company produce an unflattering shareholder agreement that might give the minority shareholder another claim, for example a claim for breach of fiduciary duty. Corporate defense lawyers are especially concerned about

[226] *See* Interview with Participant 7 (Dec. 18, 2025).

the increase in appraisal claims because appraisal litigation is not covered by D&O insurance.

V. CONCLUSION

This Article looks to move past the contentious debate over the origins of SB 21 to examine its doctrinal consequences and its effects on major market participants. We surveyed the evolution of the case law on control in Delaware, showing descriptively that the Chancery court increasingly found minority stockholders to be controllers in recent years. We show how SB 21 reframed corporate control as an ex-ante design choice rather than a post hoc judicial determination. We detail the effects of that change on some important market participants, namely private equity funds, venture capital firms, and activist funds. Through a series of interviews with leading advisers on the transaction and defense side as well as the plaintiff's side, we compared our theoretical insights with input we received from conducting interviews with ten leading members of the corporate bar. Taken together, we argue that SB 21 codifies a doctrinal distinction between influence and control that will carry important impacts in the market for corporate control.

APPENDIX

Interview List

Participant	Date Interviewed	Background
1	December 10, 2025	A litigation partner at a leading law firm, specializing in corporate defense, transaction planning and corporate governance
2	December 10, 2025	A litigation partner at a leading law firm, specializing in shareholder litigation and advising activist funds
3	December 10, 2025	A litigation partner at a leading law firm, specializing in corporate defense, transaction planning and corporate governance
4	December 11, 2025	A litigation partner at a leading law firm, specializing in shareholder litigation
5	December 12, 2025	A litigation partner at a leading law firm, specializing in corporate defense, transaction planning and corporate governance
6	December 17, 2025	A corporate partner at a leading law firm, specializing in corporate governance and activism defense
7	December 18, 2025	A litigation partner at a leading law firm, specializing in shareholder litigation
8	December 18, 2025	A litigation partner at a leading law firm, specializing in corporate defense, transaction planning and corporate governance
9	December 22, 2025	A litigation partner at a leading law firm, specializing in shareholder litigation
10	January 15, 2026	A litigation partner at a leading law firm, specializing in shareholder litigation and business litigation

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