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A Lesson from Startups: Contracting Out of Shareholder Appraisal

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Abstract

Appraisal is a controversial topic. Policymakers have debated the goals served by the appraisal remedy, and legislatures have repeatedly revised appraisal statutes in an effort to meet those goals while minimizing the cost and potential abuse associated with appraisal litigation. Courts have struggled to determine the most appropriate valuation methodology and the extent to which that methodology should depend on case-specific factors. These difficulties are exacerbated by variation in the procedures by which mergers are negotiated and the potential for conflict-of-interest transactions.

Private ordering offers a market-based alternative to continued legislative or judicial efforts to refine the appraisal remedy. Through firm-specific appraisal waivers, issuers can limit or eliminate the scope of appraisal rights, thereby reducing the cost and uncertainty of appraisal ex ante. Private companies are making increasingly use of such appraisal waivers, an effort facilitated by a Delaware decision upholding the validity of an appraisal waiver in a private company shareholder agreement. Public companies have not followed the lead of private companies, however, presumably because of impracticality of using shareholder agreements in public companies and a concern that an appraisal waiver in a charter or bylaw would be invalid.

This Article considers both the normative and legal case for appraisal waivers. It argues that the modern role of appraisal rights – disciplining the merger negotiation process and policing potential conflicts of interest – warrants understanding appraisal as a structural component of corporate governance rather than a personal right of individual shareholders. Accordingly, it challenges legal analysis that distinguishes between contractual waivers and those in a corporation's governing documents. It nonetheless reasons that firm-specific freedom to limit or eliminate appraisal rights through waivers is normatively desirable in that it reduces the pressure on lawmakers to get the appraisal remedy "right," allows appraisal rights to vary in accordance with firm-specific factors and allows tailored appraisal rights that vary according to transactional features. It concludes that both public and private companies should have the power to adopt appraisal waivers.

The Article then considers the legal case for appraisal waivers and determines that their validity under current law is questionable at best based on both the scope of existing appraisal statutes and public policy considerations. In light of its conclusion that the availability of appraisal waivers is normatively desirable, the Argument advocates resolving this uncertainty through legislation. The Article proposes that corporation statutes explicitly authorize corporations to modify or eliminate appraisal rights, but that such waivers should only be permitted in corporate charters.

This paper was originally posted with the working title of "Appraisal Waivers."

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A LESSON FROM STARTUPS: CONTRACTING OUT OF SHAREHOLDER APPRAISAL

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Abstract

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Introduction

Appraisal is a controversial topic.[1] Although appraisal rights originated as a tool to provide shareholders with exit rights in the event of a substantial change in corporate strategy, that purpose has become less compelling in most mergers.[2] Commentators have called for reform,

[1] *See, e.g.,* Guhan Subramanian, *Appraisal after* Dell, THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? (2020) ("What used to be a sleepy backwater has become one of the hottest areas of transactional practice and Delaware doctrine").

[2] David McBride, *Rebalancing the Merger Litigation Landscape*, DEL. LAWYER (Summer 2017), at 25.

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and courts and legislatures have made multiple efforts to revise the appraisal remedy, but these efforts have largely been viewed as unsatisfactory.[3] It is unclear whether the rationale for appraisal rights is to discipline management in connection with the process of negotiating a merger, police potential conflicts of interest, or serve as a backstop mechanism for resolving valuation issues. The result is what Ann Lipton describes as "a Frankenstein's monster of different impulses that act at cross-purposes."[4]

The problems with the appraisal remedy are exacerbated by the complexity of the appraisal proceeding. Courts have struggled to determine the most appropriate valuation methodology and the extent to which that methodology should depend on vary based on case-specific factors. Application of these valuation principles is difficult and relies heavily on expert testimony. The courts face an active docket of appraisal cases and to resolve them through long technical opinions that are highly context-dependent. Variation in both the valuation method that the courts will employ and the implementation of that method create substantial uncertainty.[5]

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[3] *See, e.g.*, Charlotte Newell, *The Legislative Origins of Today's Appraisal Debate*, DEL. LAWYER (Summer 2017), at 12, http://www.delawarebarfoundation.org/wp-content/uploads/2017/09/DeLawSUM17-FINAL.pdf (reviewing statutory revisions to Delaware appraisal remedy and concluding that critics should call for broader legislative reform); Stanley Onyeador, *The Chancery Bank of Delaware: Appraisal Arbitrageurs Expose Need to Further Reform Defective Appraisal Statute*, 70 VAND. L. REV. 339, 354-59 (2017) (describing 2016 amendments to Delaware appraisal statute and additional amendment proposals and advocating more extensive legislative reform); Trevor S. Norwitz, *Delaware Legislature Should Act to Curb Appraisal Arbitrage Abuses,* CLS BLUE SKY BLOG, Feb. 10, 2015, https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.23846.15.pdf ("The Delaware General Assembly should correct the appraisal rights regime as a matter of urgency").

[4] Ann Lipton, Aruba: *So There's a Lot To Talk About Here*, Bus. Law Prof. Blog, Apr. 20, 2019. https://lawprofessors.typepad.com/business_law/2019/04/aruba-so-theres-a-lot-to-talk-about-here.html.

[5] *See, e.g.,* Matthew Evans Miehl, *Note, The Cost of Appraisal Rights: How to Restore Certainty in Delaware Mergers*, 52 GA. L. REV. 651, 673 (2018) (describing the "systemic uncertainty that corporate buyers in Delaware face" due to appraisal risk); Joel Seligman, *Reappraising the Appraisal Remedy*, 52 GEO. WASH. L. REV. 829, 830 (1984) (citing "the highly unpredictable standards for valuation, which make it difficult for either side in an appraisal proceeding to predict the outcome of the proceeding accurately").

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One potential solution to problems with the appraisal remedy is to modify it through private ordering.[6] Appraisal waivers allow issuers to limit or eliminate appraisal rights, thereby reducing the cost and uncertainty of appraisal ex ante. Private companies are implementing appraisal waivers through contractual provisions that include drag-along rights, fair price provisions and explicit appraisal waivers.[7] The case for the validity of appraisal waivers was considerably strengthened when the Delaware Chancery court held in *Manti Holdings, LLC v. Authentix Acquisition Co.*[8] that an appraisal waiver by common shareholders in a shareholders' agreement was valid and enforceable.[9] Public companies have not followed the lead of private companies, however, presumably because of impracticality of using shareholder agreements in public companies and a concern that an appraisal waiver in a charter or bylaw would be invalid.

This Article considers both the normative and the legal case for appraisal waivers. With respect to the normative case, the Article highlights the ongoing debate over whether current law has gotten appraisal "right," including the debate over appraisal arbitrage in public companies, the challenges to identifying and implement an appropriate valuation methodology in appraisal litigation, and the questions about the extent to which the merger process should inform the analysis in an

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[6] Private ordering allows corporations to tailor their governance rules and structures to their particularized needs. *See* Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOKLYN L. REV. 1637, 1638 (2015) (defining private ordering as "the adoption of issuer-specific rules that are contractual in nature (as opposed to statutes, agency rules, or decisional law)"); D. Gordon Smith, Matthew Wright, & Marcus Kai Hintze, *Private Ordering with Shareholder Bylaws*, 80 FORD. L. REV. 125, 174 (2011) (private ordering "enables each corporation to become a laboratory of corporate governance, experimenting with different models of shareholder participation and ultimately producing a diversity of governance forms and practices.").

[7] *See, e.g.*, Sean Babar, *The Enforceability of Appraisal Rights Waivers*, FORD. J. OF CORP. & FIN. L. BLOG, Mar. 31, 2019. https://news.law.fordham.edu/jcfl/2019/03/31/the-enforceability-of-appraisal-rights-waivers/ (describing use of appraisal waivers by private equity and venture capital companies).

[8] 2018 Del. Ch. Lexis 318; 2019 Del. Ch. Lexis 307.

[9] *See, e.g.,* Christopher B. Chuff, *Contracting Out of Appraisal Rights*, HARV. L. SCHOOL FOR. ON CORP. GOV., Oct. 23, 2018, https://corpgov.law.harvard.edu/2018/10/23/contracting-out-of-appraisal-rights/ ("The court's decision . . . brings further certainty to private equity and venture capital investors whose investments include drag-along rights with appraisal waivers.").

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appraisal proceeding. Without attempting to resolve these controversies the Article identifies the potential of private ordering as a market-based alternative or complement to continued legislative or judicial reform.

The Article further observes the specific advantages offered by implementing a flexible firm-specific approach to appraisal rights. Specifically, the role and value of appraisal is a function of both ongoing market developments and a company's particular features including the liquidity of its shares, its ownership structure and the needs of its shareholder base. Allowing corporations to modify appraisal rights through private ordering enables them to weigh the need to protect minority shareholders with appraisal rights against the increased certainty associated with limiting that right. The Article observes, moreover, that private ordering facilitates nuanced tailoring of appraisal rights. Waivers can be limited to specific contexts or require specified conditions such as a minimum merger price or designated procedural protections in connection with the negotiation process.

Notably, the Article explains that this analysis is not limited to private corporations, in which appraisal waivers can be implemented through a shareholder agreement, but extends to public companies, in which such private ordering would necessarily take the form of a charter provision or bylaw. In an era in which corporate law has increasingly endorsed private ordering which relies primarily on voluntary investor behavior and the capital markets to discipline value-decreasing contractual terms, the prospect of addressing the appraisal remedy through private ordering is worth consideration. Indeed, the Article specifically observes that the public capital markets provide a mechanism for evaluating appraisal waivers without the high cost of regulatory error. [10]

This Article then considers the legal case for appraisal waivers. The Model Business Corporation Act (MBCA) only authorizes charter provisions that limit or eliminate the appraisal rights of preferred shareholders.[11] The law in Delaware is less clear. In its close reading of

[10] It is unclear that either courts or legislatures are well-positioned to determine the appropriate scope of the appraisal remedy. *See, e.g*., Sam Glasscock III, *Ruminations on Appraisal*, 35 DEL. LAWYER 11 (2017), http://www.delawarebarfoundation.org/wp-content/uploads/2017/09/DeLawSUM17-FINAL.pdf ("If a stockholder's right to appraisal upon dissent from a 'clean' merger is stripped, the question is whether such a regime will limit the flow of capital to corporations").

[11] MBCA § 10.32 (2020).

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the Delaware appraisal statute, the *Manti* court concluded that "the DGCL does not explicitly prohibit contractual modification or waiver of appraisal rights, nor does it require a party to exercise its statutory appraisal rights." Such a reading is consistent with the Delaware Supreme Court's recent decision in *Salzberg v. Sciabacucchi*,[12] in which the Court both noted the breadth of charter provisions permitted by Del. Gen.Corp. L. § 102 and Delaware's legislative policy of deferring to the stockholders' will. Nonetheless, no Delaware court has considered the validity of an appraisal waiver in a public company, and public companies are unlikely to adopt such waivers in light of the legal uncertainty about their validity.[13]

In light of the normative case in favor of private ordering, the Article argues both the MBCA's prohibition of appraisal waivers in public companies and Delaware's legal uncertainty are problematic. It therefore proposes explicit legislative authorization of appraisal waivers but advocates that the legislation should permit such waivers only in corporate charters. Corporate charters are distinctive in that they require joint action by the board and shareholders. This requirement, further constrained by fiduciary duties, reduces the potential for self-dealing or opportunistic behavior. In addition, joint decisionmaking can promote collaborative information-sharing and debate about the desirability of an appraisal waiver and how it should be structured. Legislative authorization would facilitate experimentation and innovation and develop new evidence on the value of the appraisal remedy.

The Article proceeds as follows. Part I briefly reviews the appraisal remedy and the key problems that have been identified with its use. Part II describes how private companies have used shareholder agreements to limit appraisal litigation through provisions including drag-along rights and appraisal waivers. Part III considers the policy

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[12] 227 A.3d 102 (Del. 2020).

[13] By analogy, Delaware corporations were reluctant to adopt forum selection bylaws until the Delaware courts endorsed their use in Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013). Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. EMPIR. LEGAL STUD. 31, 38 (2017). In addition, proxy advisory firm Institutional Shareholder Services (ISS) recommends voting for proposals to provide shareholders with appraisal rights. Institutional Shareholder Services, *United States Taft-Hartley Proxy Voting Guidelines: 2019 Policy Recommendations,* (Jan. 28, 2019), at 50, https://www.issgovernance.com/file/policy/active/specialty/Taft-Hartley-Advisory-Services-US-Guidelines.pdf.

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case for appraisal waivers and concludes that corporations should be able to limit or eliminate appraisal rights through private ordering. Having made this case, the Article considers in Part IV the legality of appraisal waivers. Although *Manti*'s read of the Delaware statute is defensible, the Article argues that questionable legal status of appraisal waivers warrants legislative action. Accordingly, the Article argues in Part V for the amendment of appraisal statutes to provide that corporations can modify, limit or eliminate appraisal rights, but that they can do so only through a charter provision.

The Article concludes that existing efforts by private companies to use shareholder agreements to limit appraisal rights is evidence that such limitations are potentially efficient. Legal clarity would enable a more robust exploration of this issue. Allowing public companies to amend their charters to adopt appraisal waivers would enlist market discipline into evaluating the merits of the appraisal remedy and reduce the burden imposed on courts by existing appraisal statutes.

I. The Appraisal Remedy

A. Background

In the late 1880s, corporate law statutes adopted the appraisal remedy in conjunction with eliminating the requirement that shareholders unanimously consent to a merger.[14] Today, all fifty states provide dissenting shareholders with an appraisal remedy, although the nature of the remedy and the circumstances in which it applies vary substantially.[15] The appraisal remedy is limited to shareholders who dissent from a corporate transaction – that is, shareholders who do not vote their stock in favor.[16] Statutes typically contain various procedural

[14] Newell, *supra* note 3, at 12.

[15] *See, e.g.,* Shawnee Telecom Resources, Inc. v. Brown, 354 S.W.3d 542, 556 (Ky. 2011) ("Dissenters' rights statutes . . . exist in some form in every state, and in the vast majority of the states, protection is accorded by an appraisal remedy . . . ."); Athlon Sports Communs., Inc. v. Duggan, 549 S.W.3d 107, 118 ("Every state now has statutes that provide some form of appraisal remedy; these are referred to as "dissenters' rights" statutes").

[16] *See, e.g.,* Barry M. Wertheimer, *The Purpose of the Shareholders' Appraisal Remedy*, 65 TENN. L. REV. 661, 663 (1998) ("The appraisal remedy allows the shareholder a 'way out' of an investment involuntarily altered by a fundamental corporate change.").

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requirements necessary for a shareholder to pursue his or her appraisal rights.[17] If the requirements are met, a dissenting shareholder is entitled to be paid, in cash, the judicially-determined fair value of his or her shares.[18]

The original purpose of the appraisal remedy was to provide liquidity for shareholders in situations in which the nature of the business in which they had invested was undergoing a fundamental change.[19] States continue to vary in their approach to what constitutes such a change; in some states, appraisal rights are triggered only in connection with mergers or similar transactions; in other states, appraisal rights apply to a broader range of changes such as charter amendments or the sale of a significant percentage of the corporation's assets.[20] The rationale was that a shareholder who objected to "the welding of his corporation with another" should be free to exit the enterprise entirely.[21]

Over time, the importance of providing liquidity has decreased as a rationale for appraisal, and the focus of appraisal has shifted to protecting the fair value of a minority shareholder's interest in a corporation.[22] The two dominant (and distinctive) approaches to appraisal are reflected in the Delaware corporate statute and the Model Business Corporation Act (MBCA).[23] Academic commentary has focused primarily on Delaware appraisal law for several reasons: Delaware is unique in providing appraisal rights in certain public-

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[17] *See, e.g.,* 8 Del. C. § 262(d) (2020) (setting forth procedures required to perfect appraisal rights).

[18] Mary Siegel, *Back to the Future: Appraisal Rights in the Twenty-First Century*, 32 HARV. J. ON LEGIS. 79, 79 (1995).

[19] *See, e.g.,* John Jenkins, *Appraisal Rights: The Complicated World of Corporate Law's Consolation Prize*, DEAL LAWYERS, May-June 2011 at 1 (explaining that appraisal rights initially were intended to provide shareholders with "a judicial route to liquidity").

[20] *See* Siegel, *supra* note 18 at 91-92 (summarizing variation among the states as to which transactions trigger appraisal rights).

[21] Chicago Corp. v. Munds, 172 A. 452, 455 (Del. Ch. 1934),

[22] *See, e.g.,* Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 GEO. L.J. 1, 4 (1995) (appraisal's "original liquidity purpose has almost completely disappeared").

[23] *See, e.g*., Mary Siegel, *The Model Business Corporation Act at Sixty: An Appraisal of the Modern Business Corporation Act's Appraisal Rights Provisions*, 74 LAW & CONTEMP. PROB. 231, 231 (2011) (explaining that "the two statutes are diametrically opposed on many key elements"); Jenkins, *supra* note 19 at 4 ("Appraisal rights statutes are one area of corporate law where Delaware's influence is far from pervasive.").

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company mergers, more than 60 % of publicly-traded companies are incorporated in Delaware, and Delaware is also the state of incorporation for most large private companies.[24] Nonetheless, the MBCA's alternative approach provides important insights into how best to understand both appraisal rights and the potential impact of appraisal waivers on those rights.

Delaware takes a limited approach, providing statutory appraisal rights only in connection with a merger or consolidation.[25] Appraisal rights in Delaware are not exclusive; shareholders can pursue a claim for breach of fiduciary duty either as an alternative to or in conjunction with a demand for appraisal.[26] The Delaware statute entitles shareholders who dissent from a merger to a judicial determination of "fair value."[27] The concept of fair value and the methodology for determining fair value have generated substantial case law and commentary, which will be discussed in more detail in the following section.

The Delaware statute provides a "market out," as do most appraisal statutes,[28] which eliminates appraisal rights for shareholders in publicly-traded companies. The Delaware statute is distinctive,[29] however, in that it restores appraisal rights to such shareholders if they receive cash as the merger consideration.[30] As a result, a substantial

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[24] Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1061 (2000).

[25] See Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 DUKE L.J. 613, 613 n. 2 (1998) (comparing Delaware's approach to the broader approach of the MBCA and the states that follow it); Siegel, supra note 23, at 234 ("Only two jurisdictions, however, follow the Delaware statute in providing mergers as the sole statutorily-required appraisal trigger.").

[26] Appraisal is, however, the exclusive remedy in short-form mergers in Delaware. See Glassman v. Unocal Exploration Corp., 777 A.2d 242, 248 (Del. 2001) (holding that "absent fraud or illegality, appraisal is the exclusive remedy available to a minority stockholder who objects to a short-form merger").

[27] 8 Del. C. § 262(a) (2020).

[28] As of 2020, thirty-eight states had adopted some form of market out provision. Gilbert E. Matthews, The "Market Exception" in Appraisal Statutes (March 2020), https://corpgov.law.harvard.edu/wp-content/uploads/2020/03/Market-Exception-Matthews-March-2020.pdf. Although commentators typically focus on the distinction between the MBCA and Delaware, the scope of the market out exception to appraisal rights varies substantially. See id. at 6 (exploring variation in approaches).

[29] Eleven states follow the Delaware approach and limit the market exception to stock-for-stock mergers. *Id.* at 8.

[30] See Onyeador, *supra* note 3 at 359 (terming this the "cash carve-out"). Delaware substantially revised its corporate law in 1967, and one of the proposals of the revision

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number of third-party mergers in Delaware public corporations trigger appraisal rights.

With respect to private ordering, the Delaware statute authorizes a corporation, in its charter, to provide additional appraisal rights.[31] Nothing in the Delaware statute explicitly addresses whether a corporation may limit or eliminate appraisal rights.

The MBCA was first published in 1950, and its goal was to provide "greater clarify for a variety of transactions through bright line rules and safe harbors."[32] States following the MBCA approach generally provide appraisal rights in connection with a variety of transactions including not just mergers but also share exchanges, a sale or disposition of substantially all the corporation's assets, amendments to the corporation's charter, and conversion or domestication.[33]

Three features of the MBCA are distinctive relative to Delaware law.[34] First, the market-out rule under the MBCA provides that appraisal

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committee was a recommendation that Delaware eliminate the appraisal remedy entirely for publicly-traded companies, based on the rationale that the stock market provided dissenting shareholders with both an exit opportunity and an established value – the market price. Newell, *supra* note 3, citing Folk Report, http://www.delawarebarfoundation.org/wp-content/uploads/2017/09/DeLawSUM17-FINAL.pdf. The Delaware legislature did not adopt this recommendation, a decision except in the case of stock-for-stock mergers, a distinction that puzzled the revision committee and continues to puzzle commentators. *Id.* Professor Ernest L. Folk III, the reporter for the revision project, also proposed eliminating appraisal rights unless otherwise provided in a corporation's charter. Randall S. Thomas, *Revising the Delaware Appraisal Statute*, 3 DEL. L. REV. 1, 7 (2000).

[31] See 8 Del. C. § 262(c) (2020).

[32] William J. Carney & George B. Shepherd, Symposium: *The Mystery of the Success of Delaware Law: The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 57.

[33] MBCA § 13.02(a) Siegel, *supra* note 23, at 232 (describing transaction triggers in the MBCA); *id*. at 234 (summarizing degree to which adopting states follow the MBCA's approach to transaction triggers).

[34] The MBCA also differs from the Delaware statute procedurally. For example, Delaware does not require a corporation to pay dissenting shareholders until the conclusion of the appraisal proceeding (although statutory interest accrues during the proceeding). The MBCA does not delay compensation until the outcome of the appraisal proceeding but requires the corporation to pay dissenting shareholders its estimate of the fair value of their stock, plus interest, within thirty days of the appraisal demand. MBCA § 13.24. In addition, the MBCA places the initial obligation on the corporation to determine fair value. If the shareholder is dissatisfied with the corporation's decision and demands a judicial valuation, it is the corporation's obligation to commence an appraisal proceeding. MBCA § 13.30.

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rights are not available to the holders of shares that are listed on a national securities exchange or held by a sufficiently large number of shareholders.[35] Unlike Delaware, the market-out rule does not exempt transactions involving cash consideration. The 1999 revisions to the MBCA, however, limited the market-out exception to transactions that did not involve a conflict of interest.[36] Fourteen states and the District of Columbia limit the market-out exception to non-conflict transactions.[37]

Second, the MBCA provides that, in transactions subject to appraisal and in which the market-out does not apply, appraisal shall be the exclusive remedy.[38] A substantial number of states have followed this approach and expressly provide that, with limited exceptions, in cases in which the appraisal remedy applies, it is the exclusive way to challenge a transaction.[39]

Third, the MBCA explicitly authorizes corporations to modify statutory appraisal rights. Section 13.02(a)(5) authorizes a corporation to grant appraisal rights in transactions beyond those provided by statute through a charter provision, bylaw or board resolution. In addition, section 13.02(c) authorizes a corporation, through a charter provision, to limit or eliminate appraisal rights, but only for preferred stockholders.[40]

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[35] MBCA § 13.02(b).

[36] Siegel, *supra* note 23.

[37] Matthews, *supra* note 28 at 10.

[38] *See, e.g.,* Mitchell Partners, L.P. v. Irex Corp. The MBCA provides additional exceptions for transactions that are not in compliance with the procedures required by the statute or the corporations charter as well as transactions that are "procured as a result of fraud, a material misrepresentation, or an omission of a material fact necessary to make statements made, in light of the circumstances in which they were made, not misleading." MBCA §13.40(b)(2) (2019).

[39] Thirty-three states expressly provide that the appraisal remedy is the exclusive remedy in some circumstances. Of these, twenty-two jurisdictions have provisions comparable to § 13.02(b) of the Revised Model Act's language providing the appraisal remedy is exclusive except where the corporation action is "unlawful [or illegal] or fraudulent." Julie Gwyn Hudson, *Comment: The Exclusivity of the Appraisal Remedy Under the New North Carolina Business Corporation Act: Deciding the Standard of Review for Cash-Out Mergers*, 69 N.C.L. REV. 501, 503 (1992). Again, however, several states have adopted different approaches. *See* McMinn v. MBF Operating Acquisition Corp., 142 N.M. 160, 168 (N.Mex. Sup. 2007) (considering and rejecting exclusivity despite clear statute and failure to adopt MBCA amendments).

[40] In enacting the MBCA, the Maryland legislature removed this limitation. See MD Corp & Assn Code § 3-202 (c)(4) (2019).

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Section 13.02(c) further provides that such a charter amendment will not apply to transactions that occur within a year of its adoption.[41]

B. Appraisal and Fair Value

The critical component of an appraisal proceeding is the determination of fair value. As a result, commentators and courts have focused extensively on the appropriate methodology for this determination.[42] The Delaware courts have consistently explained that "fair value is the value of the company to the stockholder as a going concern,"[43] and the court's task is to determine the most reliable measure of fair value. Delaware has developed the most extensive jurisprudence on what constitutes fair value in appraisal proceedings, and other courts consistently look to Delaware decisions for guidance.[44]

As VC Laster explained, the statutory task of making "a single determination of a corporation's value introduces an impression of false precision into appraisal jurisprudence."[45] Valuation is not a precise science, all valuation methodologies have inherent limitations and law-trained judges are themselves limited in their ability to evaluate valuation evidence. As a result, it is perhaps easier to understand the judge's task as determining "the most reasonable value in light of all the relevant

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[41] The provision further limits waivers to cases in which the preferred stock has the right to vote separately on the transaction giving rise to the appraisal rights. Many statutes tie appraisal rights to the power to vote on a transaction and, as a result, the right of non-voting preferred to exercise appraisal rights, in the absence of an explicit provision of such rights in the certificate of designation, may not be clear. See, e.g., Application of Harwitz, 192 Misc. 91, 94 (N.Y. Sup. 1948) ("preferred nonvoting stockholders acquire no appraisal rights under [the N.Y. statute]").

[42] *See, e.g.,* Onyeador, *supra* note 3, at 340 ("appraisal arbitrage has sparked a close look at Delaware courts' methodology in appraisal proceedings")

[43] Verition P'rs Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 132–33 (Del. 2019).

[44] *See, e.g.,* Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd., 2020 NCBC 35, *312 ("Although Delaware's appraisal statute, 8 Del. C. § 262, is not identical to section 55-13-30, the two statutes each require a determination of "fair value" and are sufficiently similar that the Court finds decisions of the Delaware courts under section 262, although not binding, to be helpful guidance in interpreting the North Carolina appraisal statute and deciding the fair value of RAI's shares in this action").

[45] In re Appraisal of Columbia Pipeline Grp., Inc., 2019 Del. Ch. LEXIS 303.

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evidence and based on considerations of fairness."[46] This task, however, opens appraisal litigation to a wide-ranging exercise in valuation. As one Delaware court observed, "fair value has become a jurisprudential, rather than purely economic, construct."[47]

For many years, courts used the so-called Delaware block method to value stock in appraisal proceedings.[48] The Delaware block method required courts to determine the corporation's value using three separate methods: asset value, earnings value, and market value. The court would then decide on a proportionate weight to be given to each of these three valuations and determine the fair value of the corporation according to a weighted average of the three values., in which fair value was based on a weighted average of market value, asset value, and earnings value.[49] Delaware's block method was highly influential, and many jurisdictions followed Delaware's approach.[50] Because the block method tended to undervalue stock,[51] this methodology was an important factor limiting the frequency of appraisal litigation.[52]

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[46] Brigade Leveraged Capital Structures Fund Ltd. v. Stillwater Mining Co., 2020 Del. LEXIS 335, *12 (quoting Cede & Co. v. Technicolor, Inc., 2003 Del. Ch. LEXIS 146, (Del. Ch. Dec. 31, 2003, revised July 9, 2004), aff'd in part, rev'd in part on other grounds, 884 A.2d 26 (Del. 2005).

[47] Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd, 177 A.3d 1, 20 (Del. 2017).

[48] Tri-Continental Corp. v. Battye, 74 A.2d 71 (Del. 1950); *see* Lawrence A. Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 IOWA J. CORP. L. 119, 124 (2005) ("for decades prior to 1983, courts measured the intrinsic value of stock using the Delaware block method").

[49] *See, e.g.,* Francis I. duPont & Co. v. Universal City Studios, Inc., 312 A.2d 344, 348-52 (Del. Ch. 1973) (determining fair value by Delaware block method), aff'd, 334 A.2d 216 (Del. 1975).

[50] *See, e.g.,* Don S. Clardy, *Comment: Valuation of Dissenters' Stock Under the appraisal Remedy – is the Delaware Block Method Right for Tennessee?* 62 TENN. L. REV. 285, 298-299 (1995) ("In the post-World War II period, Delaware courts and virtually all other jurisdictions began to use the Delaware Block Method in appraisal proceedings").

[51] *See, e.g.,* Newell, *supra* note 3 (explaining that courts expressly distinguished between the block method and fair value).

[52] *See, e.g*., Wertheimer, *supra* note 25 at 625 (explaining that the valuation methodology used in appraisal cases "powerfully explains the relative dearth of pre-1983 appraisal proceedings."); Elmer J. Schaefer, *The Fallacy of Weighting Asset Value and Earnings Value in the Appraisal of Corporate Stock*, 55 S. CAL. L. REV. 1031, 1036-40 (1982) (stating that "the weighting method [used in the block method] always undervalues corporate stock").

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In the *Weinberger* decision, the Delaware Supreme Court replaced the block method, holding that fair value should be determined with "proof of value by any techniques or methods which are generally considered acceptable in the financial community."[53] Following *Weinberger*, most courts began to rely primarily on the discounted cash flow (DCF) methodology.[54] Under the DCF method, the value of the corporation is calculated by determining "present value of the discounted stream of future free cash flows that the asset can generate."[55] The challenge with the DCF methodology is that it is largely based on assumptions – such as assumptions about future cash flows and the choice of an appropriate discount rate – rather than objective historical facts.[56]

In appraisal proceedings, the parties typically present valuation analyses prepared by expert witnesses, and the assumptions employed by those experts may differ dramatically.[57] Concern over the potential imprecision of many of these methodologies, as well as the recognition that "paid valuation experts have assumed more of an advocacy role, and less of a traditional expert witness role (as illustrated by the wide deltas we regularly see in their valuation conclusions)"[58] led the courts to search for indicators of fair value based on prices paid by willing market participants. This has led to increased consideration of the merger or deal price and unaffected trading price.[59] Several more recent Delaware

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[53] Weinberger v. UOP, Inc., 457 A.2d 701, 713-14 (Del. 1983).

[54] See Hamermesh & Wachter, *supra* note 48, at 125 ("[T]he court of chancery has increasingly come to favor 'discounted cash flow' (DCF) analysis of modern finance theory as the core approach to measuring value.")

[55] *Id.* at 125.

[56] *See, e.g.,* In re Appraisal of Petsmart, Inc., 2017 Del. Ch. LEXIS 89 (explaining the difficulty of using DCF analysis where management's projections "are saddled with nearly all of these telltale indicators of unreliability").

[57] *See, e.g.,* In re Emerging Communs., Inc. S'holders Litig., 2004 Del. Ch. LEXIS 70, *40-41 (observing that the experts' "widely differing valuations of the same company result from quite different financial assumptions that each sponsoring side exhorts this Court to accept.").

[58] Blueblade Capital Opportunities, LLC v. Norcraft Cos., Inc., 2018 Del. Ch. LEXIS 255, *32 n. 179.

[59] Although experts in appraisal litigation commonly present a comparable companies analysis as well, courts rarely place substantial weight on the valuation produced by this analysis, largely because of the difficulty establishing a suitable peer group. *See, e.g.,* In re Appraisal of Jarden Corp., 2019 Del. Ch. LEXIS 271, *72 (explaining that "nearly every text in the record states that the accuracy of a multiples-based valuation depends

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opinions consider the circumstances under which either or both of these prices are reliable indicators of fair value.

The cases rely most heavily on deal price as the best indicator of fair value. For example, in *DCF Global*, the Delaware Supreme Court reversed a chancery court decision that had calculated fair value by equally weighing deal price, the DCF valuation, and a comparable companies valuation, concluding that the lower court's reasons for failing to give greater weight to the deal price were not supported by the record.[60] Although the court expressly warned that deal price need not always be the exclusive or best evidence of fair value, it observed that it was improper to ignore "the economic reality that the sale value resulting from a robust market check will often be the most reliable evidence of fair value, and that second-guessing the value arrived upon by the collective views of many sophisticated parties with a real stake in the matter is hazardous."[61] Similarly in *Dell*, the Supreme Court again concluded that the chancery court had given insufficient weight to deal price. The *Dell* court explained the basis for its reasoning that deal price was, at least in the context of the case before it, a more reliable indicator than DCF, noting as well as "the obvious lack of credibility of the petitioners' DCF model."[62] The court remanded with the instruction that the Vice Chancellor could "enter judgment at the deal price if he so chooses, with no further proceedings."[63]

The use of deal price involves two complications. The first is determining the circumstances under which a court is justified in deferring to deal price as the most reliable indicator of fair value. On the one hand, the courts have emphasized the fact that the negotiation of a merger, particularly by an arms-length third party buyer, is likely to lead to robust pricing. The likelihood that the buyer has access to all material information about the target, including non-public information, strengthens this claim.[64] On the other hand, not every deal process is

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entirely on the existence of comparable peers" and giving the comparable companies analysis no weight based on the court's finding that Jarden had no comparable peers).

[60] DFC Global Corp. v Muirfield Value Partners, L.P. 172 A.2d 346, 388 (Del. 2016).

[61] *Id.* at 366.

[62] Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., 177 A.3d 1, 36 (Del. 2017).

[63] *Id*. at 44

[64] *See, e.g.,* Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 138 (Del. 2019) ("[W]hen th[e] market price is further informed by the efforts of arm's length buyers of the entire company to learn more through due diligence, involving

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robust. To the extent that a deal process is flawed, the resulting merger price may not be fair.[65] The courts have identified the components of a reliable sales process as including "evidence of market efficiency, fair play, low barriers to entry, [and] outreach to all logical buyers…."[66] While the presence of multiple bidders is evidence of a reliable deal process, even a single bidder process may be acceptable if the process includes a suitable market check.[67]

The second complication is the fact that, in most cases, a deal itself creates value – the so-called synergies of the merger. In an arms-length third-party merger, these synergies will be shared by the shareholders of the two companies.[68] As a result, the deal price received by the target shareholders exceeds fair value. To be faithful to the statutory language, a calculation of fair value should subtract these synergies.[69] Calculating synergies, however, reintroduces an element of imprecision into the valuation process because the calculation is not a market-based process and relies instead on the type of judgment associated with the DCF methodology.[70] Recent decisions have

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confidential non-public information, and with the keener incentives of someone considering taking the non-diversifiable risk of buying the entire entity, the price that results from that process is even more likely to be indicative of so-called fundamental value.")

[65] *See, e.g*., In re Appraisal of SWS Group, In re Appraisal of SWS Grp., Inc., 2017 Del. Ch. LEXIS 90 (Del. Ch., May 30, 2017), aff'd sub nom. Merlin Partners, LP v. SWS Grp., Inc., 2018 Del. LEXIS 77 (Del., Feb. 23, 2018) (rejecting reliance on merger price based on flawed sales process).

[66] *Dell,* 177 A.3d at 35.

[67] *See, e.g.,* In re Stillwater Mining Co., 2019 Del. Ch. LEXIS 320, *71-72. The *Stillwater* court provided further guidance, explaining that "the deal price will provide persuasive evidence of fair value in an appraisal proceeding involving a publicly traded firm if the sale process would satisfy enhanced scrutiny in a breach of fiduciary duty case." *Id*. at *72.

[68] Hamermesh & Wachter, *supra* note 48 at 142.

[69] *See, e.g*., Global GT LP v Golden Telecom, Inc., 993 A2d 497, 507 (Del Ch 2010) (stating that deriving an estimate of fair value requires the exclusion of "any synergies or other value expected from the merger giving rise to the appraisal proceeding itself")

[70] *See, e.g.,* Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 2018 Del. Ch. LEXIS 52, *5, rev'd by Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc., 2019 Del. LEXIS 197 (Del. 2019) ("Estimating synergies requires exercises of human judgment analogous to those involved in crafting a discounted cash flow valuation."); Raffaele Fiorentino & Stefano Garzella, *The Synergy Valuation Models: Towards the Real Value of Mergers and Acquisitions*, 124 INT'L RES. J. FIN. & ECON. 71, 72 (2014) ("[T]heoretical and empirical research still lacks a common understanding of the

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allocated the burden of establishing deal synergies on the respondent and, as a result, have frequently refused to subtract any synergies from the merger price.[71]

The alternative to deal price is "unaffected market price."[72] In *Aruba I*, the Chancery court determined that unaffected market price was the best indicator of fair value because the target's shares "were widely traded on a public market based upon a rich information basis…."[73] The Delaware Supreme Court reversed this decision, however, in a decision that strongly suggested that deal price, at least under the circumstances present in the case, was more reliable.[74] Notwithstanding that decision, in *Jarden*, the chancery court again relied on unaffected market price based on its determination that flaws in the deal process made deal price unreliable.[75] The *Jarden* court noted that, because the market for Jarden's stock was efficient and that the market price

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effectiveness of synergy valuation models in M&A."); Hamermesh & Wachter, *supra* note 48**Error! Bookmark not defined.**, at 983 (identifying three different approaches to calculating synergies).

[71] *See, e.g.,* In re Appraisal of Columbia Pipeline Grp., Inc., 2019 Del. Ch. LEXIS 303, *122 ("[Respondent] bore the burden of proving a downward adjustment for synergies."); *Stillwater Mining*, 2019 Del. Ch. LEXIS 320, *140-41("[Respondent] failed to meet its burden of proof to establish a quantifiable amount that the court should deduct from the deal price."). *But see* In re Panera Bread Co., 2020 Del. Ch. LEXIS 42, *92 (concluding that "respondent has proven deduction of cost and tax synergies of $11.56 per share by a preponderance of the evidence").

[72] *See, e.g.,* Alex Pena & Brian JM Quinn, *Appraisal Confusion: The Intended and Unintended Consequences of Delaware's Nascent Pristine Deal Process Standard*, 103 MARQ. L. REV. 457, 507-8 (2019) (arguing that courts should "look to unaffected stock price rather than merger price for indications of fair value" and observing that using unaffected market price reflects "a return to the roots of appraisal before the recent attentions given to it by the financial industry"). There are, however, problems with unaffected market price. The public trading price may reflect a minority discount and, even if it does not, the parties to a deal may have access to material non-public information that, if released, would affect stock price. *See* Brian J. Broughman, et al., *Amicus Brief of Law and Finance Professors in Verition Partners v. Aruba Networks* (Appraisal Lawsuit) (October 3, 2018), https://ssrn.com/abstract=3302116 (identifying these and other concerns about the use of unaffected trading price in appraisal proceedings).

[73] Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 2018 Del. Ch. LEXIS 52, *98.

[74] See Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc., 210 A.3d 128 (Del. 2019) (holding that the chancery court had provided insufficient bases for failing to give greater weight to deal price).

[75] In re Appraisal of Jarden Corp., 2019 Del. Ch. LEXIS 271.

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reflected all material information, "Jarden's Unaffected Market Price is a powerful indicator of Jarden's fair value on the Merger Date."[76] This time, the Supreme Court affirmed, although it warned that "it is not often that a corporation's unaffected market price alone could support fair value."[77]

The calculation of fair value in the private company context is even more difficult.[78] Private companies obviously lack an unaffected market price that can be used as a reference point.[79] Although public companies produce and disclose a variety of financial information in a standardized format, the quality of that information varies substantially.[80] In addition, private company shareholders may have distinctive interests or expectations that potentially affect the determination of fair value. Finally, private companies often have substantial or controlling shareholders that are involved in the merger negotiations and that may have interests that differ from those of the minority stockholders. As a result, the deal process is less likely to be reliable.[81] Pointing to these concerns, the court observed in *Kruse v. Synapse Wireless, Inc.*[82] that it was difficult, based on the available evidence, "to discern any wholly reliable indicators of …fair value."

Efforts to value shares of private companies in other contexts, contexts that are less fraught than mergers, illustrate the challenges. For

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[76] *Id*. at *63

[77] Fir Tree Value Master Fund, L.P. v. Jarden Corp., 236 A.3d 313 (Del. July 9, 2020).

[78] For an example, see In re ISN Software Corp. Appraisal Litig., 2016 Del. Ch. LEXIS 125, *8 (observing that "The gap between the expert valuations is wide—alarmingly so—ranging from $106 million to $820 million").

[79] Similarly, private companies frequently lack public company peers whose prices can be used for comparison. See *id.* at *10 (noting that "ISN has no public competitors")

[80] See *id.* at *15 (observing that DCF calculation was complicated by the fact that "ISN itself did not regularly create long-term financial projections"); Laidler v. Hesco Bastion Envtl., Inc., 2014 Del. Ch. LEXIS 75, *29-30 (using a "direct capitalization of cash flow analysis because of "the lack of comparable companies or transactions upon which to base an analysis, and the lack of management projections upon which to conduct a DCF").

[81] *See, e.g.,* Laidler 2014 Del. Ch. LEXIS at *22 ("to defer to an interested controlling stockholder's determination of fair value in a transaction such as this would render [the appraisal] remedy illusory"). *See also* Pena & Quinn, *supra* note 72 at 509 (observing that "private companies will neither have the benefit of merger price nor unaffected stock price for purposes of valuation," requiring courts to fall back upon traditional metrics such as DCF).

[82] 2020 Del. Ch. LEXIS 238.

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example, private companies that issue stock to employees are required to provide 409A valuations every twelve months.[83] Although these valuations are supposed to reflect the fair value of the stock, they are notoriously open to manipulation.[84] Similarly, many investors, such as mutual funds, are required, for regulatory purposes, to determine the fair value of the stock they own in private companies. Reports suggest that these valuations vary dramatically among sophisticated investors even with respect to the shares of late-stage private companies with significant operating track records.[85]

C. Additional Challenges of Appraisal Litigation

Today appraisal litigation is time-consuming, costly and difficult. Between 2006 and 2018, 34 appraisal cases went to trial in Delaware.[86] The average time from when the appraisal petition was filed until the trial court opinion was issued was 2 years, 8 months.[87] Litigated cases result in lengthy trial court opinions as courts assess "all the relevant evidence" about value which includes, as a result of the effort to determine the reliability of the deal price, a detailed analysis of the strengths and weakness of the deal process.[88] The parties' positions with

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[83] *See, e.g.,* Yifat Aran, *Making Disclosure work for Start-up Employees*, 2019 COLUM. BUS. L. REV. 867, 947 (describing the 409A valuation process).

[84] *Id*. at 949-50 ("these valuations are highly inaccurate and can be negotiated down by the company.").

[85] *See, e.g.,* Jean Eaglesham & Coulter Jones, *Mutual Funds' Embrace of High-Profile Unicorns Backfires*, WALL ST. J., Oct. 11, 2019, https://www.wsj.com/articles/mutual-funds-embrace-of-high-profile-unicorns-backfires-11570786202 (observing that valuation of We shares in 2018 by large asset management firms varied by as much as 67%).

[86] David F. Marcus, et al., Cornerstone Research, *Appraisal Litigation in Delaware: Trends in Petitions and Opinions, 2005-2018* (2019), https://www.cornerstone.com/publications/reports/appraisal-litigation-delaware-2006-2018. The trials continued in 2019. See, e.g. In re Appraisal of Columbia Pipeline Grp., Inc., 2019 Del. Ch. LEXIS 303; In re Appraisal of Jarden Corp., 2019 Del. Ch. LEXIS 271; In re Stillwater Mining Co., 2019 Del. Ch. LEXIS 320.

[87] Marcus, et al., *supra* note 86.

[88] *See, e.g.,* In re AOL Inc., 2018 Del. Ch. LEXIS 63 (50 pages) (all using LEXIS pagination); In re Appraisal of Columbia Pipeline Grp., Inc., 2019 Del. Ch. LEXIS 303 (144 pages); In re Appraisal of Dell Inc., 2016 Del. Ch. LEXIS 81 (169 pages); In re DFC Global Corp., 2016 Del. Ch. LEXIS 103 (69 pages). Although the Delaware courts may be notable for the length of their corporate law decisions, the phenomenon is not limited to Delaware. *See, e.g.,* Reynolds Am. Inc. v. Third Motion Equities

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respect to fair value often vary dramatically,[89] and it is common for the trial record to be reevaluated overturned on appeal.[90] Significantly, because an appraisal proceeding does not require allegations of misconduct, appraisal claims are not readily dismissed at the pleadings stage, and the terms of the transaction are not protected by the business judgment rule.

Uncertainty both about the valuation methodology a court will employ and how it will apply that methodology increases the potential for appraisal litigation.[91] Between 2012 and 2016, the quantity of appraisal litigation in Delaware quadrupled.[92] As Korsmo and Myers report, "During 2015, more than $2 billion of stock dissented in Delaware, and in 2016, 20% of public company transactions faced an appraisal claim"[93] The volume of both merger filings and deals challenged continued to grow in 2017.[94]

Commentators debate the reasons for this increase,[95] but a substantial contributing factor appears to be an increased use of appraisal

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Master Fund Ltd., 2020 NCBC 35, 2, 2020 NCBC LEXIS 56 (NC Super. Ct.) (235 pages).

[89] For example, the Delaware Supreme Court observed in *Dell* that "each party—petitioners and the Company—enlisted highly paid, well-credentialed experts to produce DCF valuations. But their valuations landed galaxies apart—diverging by approximately $28 billion, or 126%." Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., 177 A.3d 1, 36 (Del. 2016).

[90] *See, e.g.,* Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc., 210 A.3d 128 (Del. 2019).

[91] *Cf.* William Landes & Richard Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 269-70 (1976) (explaining, as uncertainty in the law increases, "parties to a dispute would find it more difficult to forecast the outcome of litigation, and litigation would increase").

[92] Marcus, et al., *supra* note 86.

[93] *Id*.

[94] Potter, Anderson Corroon LLP, *2017 Year in Review: The State of Appraisal in the Delaware Courts*, http://www.potteranderson.com/media/publication/819_Potter_Anderson_2017_Year_in_Review.pdf

[95] See, e.g. Wei Jiang, Tao Li, Danqing Mei, & Randall Thomas, *Appraisal: Shareholder Remedy or Litigation Arbitrage?,* 59 J. LAW & ECON. 697, 715 (2016) ("Some legal scholars argue that the landscape of appraisals changed dramatically around 2007-8, after the landmark Transkaryotic ruling and the 2007 amendment to the Delaware appraisal statute that set the default prejudgment interest rate"); Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1553 (2015) (claiming, based on empirical analysis of appraisal filings, to "confidently dismiss" efforts to explain the increase in merger

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litigation by hedge funds and other sophisticated investors. The Delaware cases were filed primarily by sophisticated hedge funds and private equity funds,[96] many of whom purchased their stakes after the announcement of the merger. [97] The use by hedge funds of appraisal litigation as an investment strategy has been termed "appraisal arbitrage" [98] and has generated criticism.[99]

Because of the cost and complexity of the valuation process, small shareholders rarely pursue appraisal claims in public companies.[100] Instead, "that hedge funds are by far the dominant force among the appraisal petitioners, especially after 2010…."[101] Hedge funds are particularly well-positioned to litigate the complex valuation issues in appraisal cases. In addition, competition among hedge fund managers has increased the attraction of appraisal litigation as an investment strategy. Since 2004, the number of hedge funds has more than doubled, and the financial crisis of 2008 led to a low interest rate environment, an increase in passive investing and a number of other industry changes that

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filings by either the *Transkaryotic* decision or the new statutory interest rate in appraisal cases).

[96] Marcus, et al., *supra* note 86. See also Charles Korsmo & Minor Myers, *The Flawed Corporate Finance of Dell and DFC Global*, 68 EMORY L.J. 221, 223 (2018) ("The dollar value at stake in appraisal claims has grown dramatically, as has the sophistication of the dissenting stockholders"); Hamermesh & Wachter, *supra* note 48 ("Much of this growth has been driven by specialized players in the appraisal arbitrage field, one of whom (Merion Capital) by itself accounted for 36% of the face value of all appraisal claims during the measurement period (2009-2016)").

[97] In In re Appraisal of Transkaryotic Therapies, Inc., 2007 Del. Ch. LEXIS 57. the court held that shares acquired after the public announcement of a merger were eligible for appraisal. The MBCA and most states other than Delaware do not provide appraisal rights for after-acquired shares. See Desiree M. Baca, *Note, Curbing Arbitrage: The Case for Reappraisal of Delaware's Appraisal Rights*, 13 N.Y.U. J.L. & BUS. 425, 455 ("In thirty states, shareholders must certify in their demand payment that they had purchased their shares prior to the announcement of the merger,").

[98] Marcus et al., *supra* note 86, at 5 (explaining that the funds' strategy of appraisal arbitrage "involves purchasing shares after the record date and filing appraisal petitions with the goal of receiving an award greater than the deal price as well as statutory interest.").

[99] *See, e.g.,* Norwitz, *supra* note 3.

[100] Unlike class action claims, appraisal claims can only be brought on behalf of dissenting shareholders, which reduces the potential recovery and, for plaintiffs' attorneys, the potential size of the fee award in a successful case.

[101] Jiang et al., *supra* note 95**Error! Bookmark not defined.**, at 704.

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hurt hedge fund performance.[102] Appraisal litigation offered an attractive and relatively low risk strategy, a strategy that was facilitated by the interest rate available in litigation.[103]

At least some commentators have argued that appraisal arbitrage is abusive and creates a need to modify or eliminate statutory appraisal rights.[104] Similarly, the Delaware courts' recent move in valuation methodology from DCF toward measures such as deal price minus synergies can be understood both as a way to make the appraisal process more objective and as a way of reducing the potential return to hedge funds from appraisal litigation.[105]

Some commentators have also expressed concern that the risk of appraisal litigation adversely affects deal quality. For example, buyers concerned about the risk and potential cost of appraisal litigation may include a merger-out provision that enables them to terminate the deal if a sufficient number of shares demand appraisal.[106] Another possibility is that buyers will negotiate a lower deal price in order to retain funds to pay off shareholders that demand appraisal.[107] This practice has the potential to cause price discrimination in the merger terms; the small and passive investors who do not seek appraisal receive a lower price, while the hedge funds are able to obtain a higher premium.[108]

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[102] Barry Ritholtz, *The Financial Crisis Killed Hedge-Fund Performance*, BLOOMBERG, Sept. 17, 2018, https://www.bloomberg.com/opinion/articles/2018-09-17/hedge-funds-blame-the-financial-crisis-for-shrinking-performance.

[103] *See* Jiang, et al, *supra* note 95 at 727 (reporting that "over half of the returns to appraisal filings come from prejudgment interest accruals rather than valuation improvements").

[104] *See, e.g.,* Jay B. Kesten, *The Uncertain Case for Appraisal Arbitrage*, 52 WAKE FOREST L. REV. 89, 90 (2017) (describing six cases in which "appraisal arbitrageurs challenged seemingly unobjectionable mergers").

[105] *See, e.g*., Justine Drohan, *The Delaware Shift in Appraisal Fair Value Methodology* (working paper 2020).

[106] *See* Audra Boone, Brian Broughman & Antonio J. Macias, *Merger Negotiations in the Shadow of Judicial Appraisal*, 62 J. LAW & ECON. 281, 312-12 (2019) (describing and empirically examining use of appraisal out clauses); Subramanian, *supra* note 1 (noting that an appraisal out clause has never been triggered).

[107] Kesten, *supra* note 104 at 129 (observing that "acquirers might view the costs of those claims as a form of deal tax and self-insure by lowering their bids").

[108] *See, e.g.,* Boone, et al., *supra* note 106, at 283 (describing such "price discrimination" could "shift[] economic returns away from passive investors and toward arbitrage hedge funds" but finding no evidence of such price discrimination); Kesten*, supra* note 104 at 127 ("appraisal arbitrage perniciously redistributes value from acquirers and ordinary shareholders to the arbitrageurs.").

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The counterargument is that appraisal litigation serves a useful role in disciplining participants in a merger. Several empirical studies find that the quality of the merger process is related to the strength of the appraisal remedy and that legislative or judicial decisions that restrict appraisal rights hurt shareholders.[109] This Article returns to the issue in Part III below and argues that the potential costs of regulatory change to address potential excesses in merger litigation counsel in favor of a private ordering solution.

II. Private Ordering Solutions to Appraisal

Appraisal litigation is relatively rare[110] in the venture-backed private company context.[111] To a degree, this may be surprising. Mergers have overwhelming eclipsed IPOs as the most likely exit event for a start-up company, and there are thousands of private company mergers per year.[112] In addition, virtually every private company merger triggers statutory appraisal rights because the market out exception does not apply.[113] The rationale for appraisal is also more compelling in

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[109] *See, e.g.,* Boone, et al., *supra* note 106 at 285 (finding that "a strong appraisal regime increases returns to target shareholders."); Scott Callahan, Darius Palia, & Eric Talley, *Appraisal Arbitrage and Shareholder Value*, 3 J. L. FIN & ACCT'G 147 (2018) (shareholders tend to receive higher premia as the strength of the appraisal remedy increases). *See also* Albert H. Choi & Eric Talley, *Appraising the "Merger Price" Appraisal Rule*, 34 J. L. ECON. & ORG. 543 (2019) (developing model showing that judicial deference to deal price in appraisal litigation undercuts the ability of appraisal to serve as a de facto reserve-price in a merger and therefore reduces shareholder welfare).

[110] But see In re Trados Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. 2013) (appraisal and breach of fiduciary duty claims by 5% stockholder in VC-funded private company merger).

[111] This article does not address the use of appraisal in closely-held corporations. Such corporations, which typically operate in a manner very similar to partnerships raise a variety of distinctive issues. *See* George D. Hornstein, *Judicial Tolerance of the Incorporated Partnership*, 18 L. & CONTEMP. PROBS. 435, 435 (1953) (describing the distinctive legal issues of closely-held corporations).

[112] *See, e.g.,* Steve Blank, *When Founders Go Too Far*, HARV. BUS. REV. (Nov.-Dec. 2017), https://hbr.org/2017/11/when-founders-go-too-far ("In 2016 there were 3,260 acquisitions of technology companies and only 98 tech IPOs, according to CB Insights").

[113] *See, e.g.,* Jeff Wolters, *Delaware Law for Venture-Backed Companies: 2017 Year in Review*, Morris Nichols VC/PE Update, Jan. 2018, http://www.mnat.com/files/BylinedArticles/2018_DelawareLawforVentureBackedCom

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private companies, as shareholders lack both a readily-ascertainable market price as some benchmark of value and the liquidity of a market sale as an alternative to the merger consideration.

One factor is the absence of appraisal arbitrage. Shares in private companies are, by definition, not traded in the public market, which means that hedge funds typically cannot invest in them as easily.[114] A second factor is that many private company participants are repeat players who are subject to reputational constraints.[115] The risk that a party will be excluded from future investment opportunities exerts discipline on both sides – it limits opportunistic behavior by controlling shareholders and reduces an investor's willingness to challenge the fairness of a transaction through litigation.[116]

A third factor is the prevalence of contractual limitations on the right of shareholders to exercise appraisal rights. This Article focuses on contract provisions that are entered into in advance of a proposed merger.[117] Such provisions are generally contained in shareholder

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panies2017YearinReview_January2018.pdf ("in private company mergers … every merger triggers appraisal rights,").

[114] Although hedge fund strategies typically focus on publicly-traded companies, hedge funds do invest in VC-backed private companies. *See, e.g.,* George O. Aragon, Emma Li, & Laura Anne Lindsey, *Exploration or Exploitation? Hedge Funds in Venture Capital* (September 18, 2018), https://ssrn.com/abstract=3251086 (documenting VC financing rounds with hedge fund investment).

[115] *See* Vladimir Atanosov, Vladimir Ivanov & Kate Litvak, *Does Reputation Limit Opportunistic Behavior in the VC Industry? Evidence from Litigation against VCs*, 67 J. FIN. 2215 (2012) (discussing how reputational constraints reduce opportunism by VCs and documenting the fact that VCs involved in litigation suffer declines in future business opportunities).

[116] Private company investors, particularly VC funds, are repeat players who are interested in being involved in future deals. See Blank, *supra* note 112 (noting that, because of the increasing supply of private capital and the limited number of attractive start-ups, VC funds have less power and are more deferential to the interests of founders). *See also* Matthew Lynley, *Very Famous VC Bill Gurley Says Startup Boardrooms Are Now Just Filled With *Clapping Hand Noise**, TECHCRUNCH (Feb. 14, 2018), https://techcrunch.com/2018/02/14/very-famous-vc-bill-gurley-says-startup-boardrooms-are-now-just-filled-with-clapping-hand-noise/. (observing that "What the venture capitalist is afraid of is losing the next big one.").

[117] Corporate participants may also obtain appraisal waivers in connection with the negotiation of a specific transaction. In the private company context, for example, it is common for the buyer to seek the support of a specified percentage of the target company's shareholders through a support agreement, which typically includes an express waiver of the signatories' right to seek appraisal. *See, e.g.,* Voting and Support Agreement by and among Bidfair USA LLC, Bidfair Mergeright Inc. and certain

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agreements which are widely used in startup companies.[118] Although few judicial decisions have considered the enforceability of these provisions, their use in the startup world is evidence of the potential value of private ordering in addressing the cost and uncertainty of appraisal litigation.[119]

Drag-along provisions are most common form of limitation on appraisal rights used by startups.[120] Drag-along provisions require shareholders, in specified conditions, to vote their stock in favor of a merger. Typically, the conditions required to trigger the vote are board approval of the merger, support for the merger by a specified percentage of the other shareholders, or both. Some drag-along provisions also specify conditions such as a minimum price or require that all shareholders receive equal consideration for the provision to be triggered.

Drag-along provisions facilitate a sale or merger of the company by reducing the percentage of shares required to accomplish a

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Stockholders of Sotheby's, Dated as of June 16, 2019, at 2, https://www.sec.gov/Archives/edgar/data/823094/000119312519174301/d766624dex991.htm ("Each Stockholder hereby irrevocably and unconditionally waives, and agrees not to exercise, any rights to seek appraisal or rights of dissent in connection with the Merger Agreement and the Merger, including under Section 262 of the DGCL, that such Stockholder may have with respect to the Stockholder Shares.").

[118] Shareholder agreements take a variety of forms including purchase agreements, financing agreements, and shareholder rights agreements – all of which this article will term shareholder agreements. See Jill. E. Fisch, *Private Ordering and the Role of Shareholder Agreements*, working paper (2020) (discussing the various types of shareholder agreements).

[119] Concededly, some contractual provisions such as drag-along rights provide value to start-up participants beyond limiting appraisal. *See, e.g.*, Robert B. Little & Joseph A. Orien, *Issues and Best Practices in Drafting Drag-Along Provisions*, HARV. L. SCH. FOR. ON CORP. GOV., Dec. 14, 2016, https://corpgov.law.harvard.edu/2016/12/14/issues-and-best-practices-in-drafting-drag-along-provisions/ (describing issues that can be addressed through an appropriately-drafted drag-along provision).

[120] *See, e.g.,* Douglas G. Smith, *The Venture Capital Company: A Contractarian Rebuttal to the Political Theory of American Corporate Finance*, 65 TENN. L. REV. 79, 128 (1997) (observing that "venture capital agreements often contain … drag-along rights,"); Steven B. Gorin, *Shareholders Agreements for Closely-Held Corporations*, 2018, SA011 ALI-CLE 2629 (observing that "shareholder agreements often contain a 'drag-along' right"); Joseph A. Bartlett, Ross Barrett & Michael Butler, ADVANCED PRIVATE EQUITY TERM SHEETS AND SERIES A DOCUMENTS, § 7.03[4], at 7-10 (2004) (describing survey results reporting that venture capital funds "always" or "often" demand and receive drag-along rights sixty-five percent of the time)..

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transaction. Drag-along rights both prevent a hold-up problem by the minority shareholders when the majority shareholders negotiate a deal[121] and encourage the majority stockholder to adhere to the requirements necessary to trigger the drag-along, implicitly improving the fairness of the price and process for the minority shareholders.[122]

Technically drag-along provisions are a form of voting agreement. As such, they fall within the scope of statutes that explicitly authorize shareholder voting agreements. Significantly, drag-along provisions do not expressly speak to dissenting shareholders' appraisal rights. Instead, drag-along provisions operate indirectly by eliminating the ability of a shareholder to dissent from a merger. Because statutory appraisal rights are limited to dissenting shareholders,[123] if a shareholder must vote in favor of a merger pursuant to the terms of the drag-along provision, the theory is that such shareholder will not be eligible for appraisal rights. [124] As one commentator observes, although academics have argued that drag-along provisions therefore operate as implicit appraisal waivers, courts have not addressed the issue.[125]

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[121] John Agogliati III & Ross Hurwitz, *Tag-Along And Drag-Along Rights: A Valuation Analyst's View*, LAW360 (May 12, 2015), ("Drag-along provisions can prevent a situation where minority shareholders have the ability to block a sale of the company that was otherwise initiated by the controlling shareholder or a majority of the other shareholders.")

[122] Corporate Finance Institute, *Drag Along Rights*, https://corporatefinanceinstitute.com/resources/knowledge/deals/drag-along-rights/

[123] *See, e.g.*, 8 Del. C. § 262(a) (restricting appraisal rights to any shareholder "who has neither voted in favor of the merger or consolidation nor consented thereto in writing").

[124] *See, e.g.,* Brian Broughman & Jesse M. Fried, *Carrots & Sticks: How VCs Induce Entrepreneurial Teams to Sell Startups*, 98 CORNELL L. REV. 1319, 1331, n. 50 (2013) ("To the extent that common shareholders have agreed to vote their shares as directed by the VCs, and the shares are voted in favor of a transaction, the common shareholders may lose their right to appraisal, which is generally available only to shareholders who vote against the transaction"). *See also* Lisa R. Stark, *Side-Stepping Fiduciary Issues in Negotiating Exit Strategies for Preferred Stock Investments After Trados*, AMER. BAR FOUND, 2013, (observing that drag-along provisions can be used to limit the board's exposure for breach of fiduciary duty).

[125] Steve Hecht, *Can Drag-Along Provisions Be Used To Stifle Appraisal Rights?,* Appraisal Rights Litigation Blog, Dec. 16, 2014, https://www.appraisalrightslitigation.com/2014/12/16/can-drag-along-provisions-be-used-to-stifle-appraisal-rights-2/ ("we are not aware of any case in Delaware or New York that has decided whether a drag-along clause can be enforced to effectively waive appraisal rights on the part of the shareholder being dragged along to consent to the deal.").

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One potential concern is that waivers of statutory rights must be knowing and explicit. Whether a drag-along meets that standard is unclear. Dicta from a 2016 Delaware chancery court decision is instructive. In *Halpin v. Riverstone National, Inc.* a controlling stockholder used its voting power to effectuate a merger by written consent [126] Although Riverstone had a shareholder agreement that contained a drag-along, because of the merger structure, the transaction did not involve a formal shareholder vote. Accordingly, the court held that the drag-along was not triggered and that it need not consider whether a drag-along provision was the equivalent of a waiver of appraisal rights.

The *Halpin* court noted that the question of whether common stockholders may "ex ante contractually commit to a waiver of the appraisal rights provided by statute" was unresolved by prior case law. It observed that prior case law spoke to the question of whether preferred shareholders could contract out of their appraisal rights,[127] but that "whether a common stockholder may contractually waive its statutory appraisal rights for consideration to be set later by a controlling stockholder" was a different and 'interesting legal issue.'"[128] On the facts before it, however, the court determined that it was unnecessary to resolve that question.[129] In particular, the court observed that case law required that any waiver of the shareholders' statutory appraisal right be clear and that the language of the drag-along provision "lacks the clarity to compel a waiver."[130]

Shareholders can also limit appraisal rights through contractual provisions that designate the consideration shareholders will receive in a merger or how that consideration will be determined. As John Coates has explained, these contractual provisions can take various forms such as "fair price charter provisions, entering into buy/sell agreements, or issuing redeemable stock."[131] An example of this type of provision was

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[126] Halpin v. Riverstone Nat'l, Inc., 2015 Del. Ch. LEXIS 49.
[127] *Id*. at *16 and n.23.
[128] *Id*. at *27.
[129] *Id*.
[130] *Id*. at *35 n. 55.
[131] See John C. Coates IV, *"Fair Value" as an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions*, 147 U. PA. L. REV. 1251 (1999) (observing that issuers can contract around judicial determinations of fair value by "fair price charter provisions, entering into buy/sell agreements, or issuing redeemable stock".).

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found in *Ford Holdings*, in which the certificate of designation for the preferred stock explicitly stated that the preferred stockholders would receive the liquidation preference plus any accrued and unpaid dividends in the event of a cash out merger.[132] Chancellor Allen concluded that this language determined the merger consideration to which the shareholders were entitled and that they were "not entitled to anything additional."[133] Charter provisions or provisions in the certificate of designation for preferred stock may also provide that a merger or other transaction triggers a redemption right or a conversion of the preferred stock, on designated terms or at a designated price.[134]

A third option is an explicit waiver of appraisal rights or an agreement to refrain from bringing an appraisal proceeding.[135] As noted above, the court in *Halpin* relied on the fact that the contractual drag-along had not been triggered to conclude that the shareholders had not waived their appraisal rights. The possibility that a transaction can be structured in a way that does not trigger drag-along rights or involve a shareholder vote highlights the potential value of an explicit appraisal waiver. Following *Halpin*, practitioners sought to address this concern and explicit waivers became more common.[136] Nonetheless, there was uncertainty over the extent to which appraisal waivers were valid, and, if so, whether they could be used to eliminate the appraisal rights of common as opposed to preferred stockholders.[137]

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[132] In re Appraisal of Ford Holdings, Inc., Preferred Shares, 698 A.2d 973, 978 (1997).
[133] *Id*.
[134] *See, e.g.*, Gearreald v. Just Care, Inc., 2012 Del. Ch. LEXIS 91, C.A. No. 5233-VCP, at 8-9 (Del. Ch. Apr. 30, 2012) (upholding, in an appraisal, a charter provision allowing company, in connection with a merger, to convert preferred shares to common stock).
[135] Notably, the NVCA Model Venture Capital Voting Agreement provides suggested separate language for drag-along provisions and explicit appraisal waivers. See NYCA Model Voting Agreement (updated Jan. 2018) §3.2(e), https://nvca.org/download/5094/ (providing model language for appraisal waiver).
[136] *See, e.g.,* Robert C. Schwenkel, et al., *Court Leaves Open Whether Appraisal Rights May Be Waived By Agreement—Halpin v. Riverstone*, 19 M&A LAW. 16 (2015), https://www.friedfrank.com/siteFiles/Publications/Court%20Leaves%20Open.pdf (observing that "Controllers seeking to enforce a waiver of appraisal rights through a drag-along should: include in the drag-along agreement an explicit acknowledgment by the minority stockholders that they waive their appraisal rights if the drag-along is invoked").
[137] *See, e.g.,* Ryan Taylor, *The Implications of Halpin v. Riverstone National for Drafting and Exercising Drag-Along Provisions*, Weil Global Private Equity Watch,

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The Delaware chancery court finally addressed this issue in the *Manti* case.[138] Petitioners in *Manti* were common stockholders who sought appraisal following a "company sale," in which the merger proceeds were to be distributed pursuant to the waterfall provision in the charter under which they would receive little or nothing. Petitioners had signed a shareholder agreement providing that they would "refrain from the exercise of appraisal rights with respect to such transaction."[139]

The court concluded that the appraisal waiver was clear and unambiguous: "No contracting party, agreeing to the quoted language, would consider itself free to exercise appraisal rights in light of Board approval of a contractually-compliant Company Sale."[140] It found that the terms of the shareholder agreement had been met and held that the company, which was a party to the shareholder agreement, could enforce those terms.

Petitioners subsequently moved for reargument, arguing that the waiver of appraisal rights was not enforceable because it was contrary to Delaware law and inconsistent with public policy.[141] Relying on *Ford Holdings*, the court found that Delaware law permitted a waiver of statutory rights, at least on the facts of the case at bar where the waiver was clear and unambiguous and where the petitioners were sophisticated investors who were fully informed and represented by counsel when they signed the SA."[142] Notably, the court considered and rejected petitioners' claim that appraisal rights are a mandatory feature of Delaware law that is not subject to private ordering. Instead, the court observed that "the DGCL does not explicitly prohibit contractual modification or waiver of appraisal rights, nor does it require a party to exercise its statutory appraisal rights.[143]

Apr. 28, 2015, https://privateequity.weil.com/insights/the-implications-of-halpin-v-riverstone-national-for-drafting-and-exercising-drag-along-provisions/ ("While waiting for the courts to ultimately rule on the validity of prospective waivers of appraisal rights by common stockholders, practitioners and private equity professionals should take a cautious approach when drafting and exercising rights under provisions that purport to require stockholder participation or voting in a merger").

[138] Manti Holdings, LLC v. Authentix Acquisition Co., 2018 Del. Ch. LEXIS 318

[139] *Id*. at *4.

[140] *Id*. at *5.

[141] Manti Holdings, LLC v. Authentix Acquisition Co., 2019 Del. Ch. LEXIS 307

[142] *Id*. at *11. The court noted that it "need not decide whether a waiver of appraisal would be upheld in other circumstances." *Id.*

[143] *Id*. *11.

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Commentators have characterized *Manti* as "bring[ing] additional certainty to private equity and venture capital." Significantly, *Manti* both upholds the contractibility of appraisal rights under Delaware law and accepts the proposition that this contractual analysis applies to common as well as preferred stockholders. Both the rationale and effect of the *Manti* decision are, at this point, unclear, and VC Glasscock explicitly limited his analysis in *Manti* to the circumstances of the case.[144] Notably, the broader implications of *Manti* for the permissibility of explicit appraisal waivers depend on several factors, including the extent to which Manti is context-specific, whether the holding is predicated on the conclusion that statutory appraisal rights are subject to private ordering, and the degree to which this conclusion would apply in the context of a public company charter or bylaw provision. The Article addresses those issues in Part VI below. Before doing so, however, the Article considers, in more detail, the policy case for appraisal waivers.

III. The Policy Case for Appraisal Waivers

The debate over appraisal litigation focuses on how to get the appraisal remedy right. As commentators have observed, appraisal operates to discipline both the merger price and the deal process by providing a mechanism by which minority shareholders can challenge deals that are unfair. If the appraisal remedy is too restrictive – either with respect to when appraisal is available or how courts calculate fair value -- shareholder welfare will be adversely affected. If appraisal is available, however, in cases in which it is unnecessary to protect investor welfare, then the costs of implementing the remedy are unwarranted, a situation that is exacerbated if the remedy is used abusively or opportunistically.[145]

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[144] See *id.* at *10 ("in light of the specific facts here, I find that waiver of appraisal rights is permitted under Delaware law").

[145] *See, e.g.,* Glasscock, *supra* note **Error! Bookmark not defined.**10 at 29 (observing that "appraisal arbitrage is no better or worse than the underlying appraisal cause of action: whether that action promotes efficiency or not, the effect -- good or ill -- is simply magnified by the availability of arbitrage").

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Both the variation in state appraisal statutes and the repeated amendments to the Delaware statute[146] and the MBCA[147] reflect a lack of consensus about the appropriate scope of appraisal. For example,[148] there is broad disagreement about the circumstances under which the market-out exception should apply,[149] whether appraisal rights should differ in controlling stockholder transactions[150] and the impact of the quality of the deal process on the availability of appraisal rights or the scope of the court's valuation analysis.[151] Similarly, the Delaware courts' struggles over valuation methodology demonstrate the challenge of a statutory mandate that the court conduct its own independent valuation without the support of traditional litigation features like burden of proof[152] or presumptions.[153] Efforts at reform continue to pose the risk of regulatory error.

Scholars have sought to evaluate the effect of appraisal rights through empirical studies, but it is unclear that these studies have the

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[146] *See* Newell, *supra* note 3 (describing history of Delaware appraisal statute).
[147] Robert B. Thompson, *Appraisal and the Model Business Corporation Act*, 74 LAW & CONTEMP. PROB. 253, 264-66 (2011) (describing amendments to the MBCA appraisal provision).
[148] Other issues include whether appraisal rights should be available to investors who purchase their shares after the merger announcement, the rate at which interest is calculated, and the conditions under which a buyer may limit its exposure in an appraisal proceeding by prepaying the merger price. See, e.g., In re Panera Bread Co., 2020 Del. Ch. LEXIS 42, *106 (discussing new prepayment option under Delaware statute and concluding that it did not authorize a refund of amounts paid in excess of fair value).
[149] See Newell, *supra* note 3; Matthews, *supra* note 28.
[150] See Thompson, *supra* note 147**Error! Bookmark not defined.** at 266 (describing the 2006 changes to the MBCA that "make clear the shift of appraisal away from liquidity toward fiduciary-duty policing of conflict of interest").
[151] Glasscock, *supra* note **Error! Bookmark not defined.** at 10 (asserting that there is "little to recommend extending an appraisal right to dissenters in the case of a 'clean' merger."). Vice-Chancellor Glasscock defines a clean merger as "stock that trades freely, determination by an untainted board that the merger represents greater than standalone value, and exposure to a market" *Id.* at 9.
[152] In re Appraisal of Columbia Pipeline Grp., Inc., 2019 Del. Ch. LEXIS 303, *34 ("Because of the statutory mandate, the allocation of the burden of proof in an appraisal proceeding differs from a traditional liability proceeding.").
[153] *See, e.g.,* Merion Capital LP v. BMC Software, Inc., 2015 Del. Ch. LEXIS 268 ("in appraisal actions, this Court must not begin its analysis with a presumption that a particular valuation method is appropriate, but must instead examine all relevant methodologies and factors, consistent with the appraisal statute").

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capacity to answer the questions they pose.[154] A substantial limitation of these studies is that they look at the evolution of deal terms over time,[155] but the role of appraisal is a function of ongoing market developments.[156] For example, the combination of the rise of hedge funds and low market interest rates contributed to the increased use of appraisal litigation as an investment strategy. Other market developments such as the growth in passive investing strategies, the concentration of ownership in the hands of a small number of asset managers, and the increase in the number of large companies that are staying private may also affect the value of appraisal rights. Similarly the structure of mergers and their terms is affected by a variety of developments outside appraisal law, including stock market prices, interest rates and the availability of credit, and perceptions about financial and regulatory risk.[157]

In addition, the appropriate scope of the appraisal remedy may vary depending on firm-specific characteristics. To the extent that appraisal rights protect liquidity interests, those rights are more important for shareholders who hold illiquid shares. The distinction today does not depend entirely on public company status; rather, share liquidity exists along a spectrum in which the shares of some public

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[154] Compare Arlen et al., Brief of Law and Corporate Finance Professors as Amici Curiae, DFC Global Corp. v. Muirfield Value Partners, L.P. (Feb. 3, 2017), 11-16, https://lawprofessors.typepad.com/files/dfc-holdings---appraisal.pdf (summarizing results of studies to argue that "sound economic theory" counsels against a presumption that deal price constitutes fair value) with Stephen Bainbridge et al., Brief of Law and Corporate Finance Professors as Amici Curiae in Support of Reversal, DFC Global Corp. v. Muirfield Value Partners, L.P. (Jan. 6, 2017) (arguing that financial analysis supports a presumption of deal price unless "the transaction price bears indications of misinformation or bias."). See also Korsmo & Myers, *supra* note 96 (criticizing the Delaware Supreme Court's corporate finance analysis in *DFC Global* and *Dell*).

[155] *See, e.g.,* Boone, et al., *supra* note 106, at 312-12.

[156] *See, e.g.,* Guarav Jetley & Yuxiao Huang, *Appraisal Challenges and Benefits to Target Shareholders Through Narrowing Arbitrage Spread*, HAR. L. SCH. FORUM ON CORP. GOV., Oct. 3, 2019, https://corpgov.law.harvard.edu/2019/10/03/appraisal-challenges-and-benefits-to-target-shareholders-through-narrowing-arbitrage-spread/ (arguing that Boone et al.'s findings are a product of "the economic environment during which the deal was announced,").

[157] *See, e.g.,* Steven Epstein, *Mergers and Heightened Regulatory Risk*, HARV. LAW SCH. FORUM ON CORP. GOV., May 5, 2016, https://corpgov.law.harvard.edu/2016/05/05/mergers-and-heightened-regulatory-risk/ (describing impact of various types of regulatory risk on mergers).

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companies are thinly-traded and the shares of some large private companies enjoy considerable liquidity.[158]

The importance of appraisal also depends on a firm's ownership structure. Minority stockholders in corporations with a controlling stockholder or a control group may be more vulnerable to self-dealing in connection with a merger. Concerns of self-dealing increase in the context of freeze-outs or when majority stockholders receive different merger consideration than minority stockholders. Control is not the only relevant aspect of ownership structure. The value of appraisal rights may also depend on the identity and characteristics of the shareholder base as a whole – the shareholders' ability to identify and vote against suboptimal transactions, the shareholders' investment horizon, and the extent to which shares are held by intermediaries who may face a conflict in voting on a merger.

Finally, the importance of appraisal rights may vary based on the industry.[159] Share price volatility may increase the risk of opportunistic merger timing. Industry characteristics affect the likelihood of a merger and the availability of comparable transactions to serve as metrics of fair value. Shareholders in new economy companies with substantial information asymmetries about future growth may need greater protection than shareholders in corporations with predictable cash flows.

Both the apparent difficulty in establishing an optimal appraisal remedy and the degree to which what is optimal depends on firm and market characteristics suggest that private ordering may be preferable to regulation in determining the availability of appraisal rights. Corporate law broadly supports private ordering through statutory provisions that authorize a substantial degree of firm-specific tailoring.[160] Common examples of private ordering include dual-class voting structures, classified boards of directors, forum selection provisions and majority voting. Private ordering facilitates efficient customization through rules

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[158] Elizabeth Pollman, *Information Issues on Wall Street 2.0*, 161 U. PA. L. REV. 179, 182 (2012) (detailing the growth of secondary markets in private company stock and estimating their "the total transaction volume in the billions").

[159] *See, e.g.*, Jordan M. Barry & John William Hatfield, *Pills and Partisans: Understanding Takeover Defenses*, 160 U. PA. L. REV. 633, 692 (2012) (demonstrating through model that "Shareholders' and Insiders' preferences [with respect to takeover defenses] depend on the Target's particular characteristics, and there are instances in which both groups prefer the same level of defenses.").

[160] *See, e.g.,* Boilermakers Local 154 Retirement Fund v. Chevron Corporation, 73 A.3d 934 (Del. Ch. 2013); Salzberg v. Sciabacucchi, 227 A.3d 102 (Del. 2020).

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that vary based on firm-specific differences.[161] Private ordering also allows innovation and experimentation and reduces the risk of regulatory error associated with mandatory regulation.[162]

As noted in Part II, private companies currently engage in extensive private ordering with respect to appraisal rights by including fair price provisions, drag-along rights and explicit appraisal waivers in their shareholder agreements. These provisions enable firms that view the existing scope of the appraisal remedy as either too expansive or too uncertain to select greater predictability by contract. The advantage of these provisions is that corporate participants can agree in advance to insulate a transaction from the prospect of a subsequent challenge through an appraisal proceeding. This empowers a target company to negotiate a merger without the concern that the acquirer will lower the deal price so as to leave money available to pay dissenting shareholders. It eliminates the need to include an appraisal-out term. And, to the extent that some transactions may be deterred by the risk of appraisal litigation, a target with an appraisal waiver makes itself more attractive to prospective buyers.

Allowing appraisal rights to be subject to private ordering does not mean that all firms could or should eliminate appraisal rights. Appraisal waivers simply provide corporate participants with the option of limiting or eliminating appraisal rights on a firm-specific basis. Importantly, appraisal waivers also need not be all-or-nothing provisions. Appraisal waivers could be premised on a merger satisfying designated conditions as to structure, price or process.

For example, the waiver might only apply if a merger received approval by a supermajority of the shareholders or approval by a majority of the minority shareholders.[163] The waiver might apply only to mergers involving an arms-length negotiated transaction with an independent third-party acquirer and exclude transactions involving a controlling shareholder or a management group buy-out. If corporate participants were wary that a controlling shareholder might receive a

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[161] *See* Jill E. Fisch, *supra* note 6, at 1639 (describing the advantages of private ordering).

[162] See *id*. (citing bylaws responding to board adoption and use of poison pills as an example of innovation through private ordering).

[163] This would be akin to the majority of the minority condition necessary to obtain business judgment protection for a transaction involving a controlling stockholder under the standard set out in Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

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disproportionate share of the gains associated with a merger, they could structure an appraisal waiver that only applied if the controlling shareholder's consideration were identical to that of the minority shareholders.

The waiver might also depend on the merger consideration exceeding a threshold price such as a specified premium over the pre-announcement trading price. In a private company, to reduce the risk that VC fund will structure a merger to extract all of the value from a corporation – as in the *Trados* situation[164] -- employee-shareholders' appraisal waivers could be conditioned on their receiving a specified minimum price per share. Issuers could also specify a valuation methodology as an alternative to the existing uncertainty about the methodology by which the courts determine fair value.

Appraisal waivers would also a corporation to dictate, in advance, the appropriate procedures by which a merger is to be negotiated by stipulating those procedures as conditions for the application of the waiver.[165] The waiver might require that the merger include specified process protections such as an auction, a shopping period, the use of an independent special committee or other indicia of fairness. If, for example, an issuer believes that the standards set out in *Dell* warrant a dereference to the price reached in a deal negotiated in accordance with those standards, compliance with the *Dell* standards could be the predicate condition for waiver of the appraisal remedy.[166] Or the waiver might only be triggered if the merger process included specified safeguards such as multiple bidders or some other form of market test. In a transaction involving a controlling stockholder or management group, the appraisal waiver might require compliance with the type of procedure set out in *MFW*.[167]

In addition, appraisal waivers can be coupled with alternative mechanisms for addressing a given concern. For example, rather than

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[164] In re Trados Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. 2013).

[165] In theory, appraisal waivers may be most appropriate in situations in which process of negotiating the merger has been "clean." See Glasscock, *supra* note 10 at 10. The process of drafting a charter provision that identifies a clean merger process with sufficient clarity ex ante is nontrivial, however.

[166] See Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., 177 A.3d 1, 35 (Del. 2017) (explaining that Dell's sale process featured ""fair play, low barriers to entry, outreach to all logical buyers, and the chance for any topping bidder to have the support of Mr. Dell's own votes . . . .").

[167] Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

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using appraisal rights to address differential treatment of shareholders, the corporate charter could contain a requirement that, in a merger, all shareholders receive equal consideration.[168] A charter could establish a supermajority voting requirement for mergers to ensure the support of the minority shareholders.[169] And a charter could provide that a merger triggered redemption rights, at a specified price, to ensure liquidity for shareholders in a private company. Similarly, appraisal waivers can be efficiently packaged with other governance provisions. For example, corporate participants might limit restrictions on transferability, increasing liquidity for existing shareholders, if they have the assurance that the potential purchasers – who are strangers to the enterprise – will lack the capacity to hold up a future transaction by exercising appraisal rights.

Notably, the advantages of predictability, firm-specific tailoring and limiting regulatory error apply in both public and private companies. Appraisal waivers reduce the risk that appraisal litigation will distort the terms of a merger. Appraisal waivers reduce the potential for price discrimination between the passive investors who accept the deal price and hedge funds that litigate in an effort to obtain a higher premium. And appraisal waivers could eliminate the potential cost of appraisal proceedings in clean mergers.

Critically, an issuer's choice of contract terms would be transparent and subject to market discipline. Shareholders could evaluate the effect of an appraisal waiver both on the prospect of a merger and on the merger price and factor that into the price that they are willing to pay for the issuer's shares.[170] Prospective bidders would be able to determine the conditions under which an appraisal waiver would

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[168] *See, e.g.,* Kirby Smith, *The Agency Costs of Equal Treatment Clauses*, 127 YALE L.J. F. 543, 547 (2017) (describing and evaluating the costs and benefits of equal treatment clauses).

[169] A supermajority requirement would be expected to increase the size of the premium, reducing the need for appraisal). *See, e.g.,* Audra Boone, Brian Broughman & Antonio J. Macias, *Shareholder approval thresholds in acquisitions: Evidence from tender offers,* 53 J. CORP. FIN. 225 (2018) (considering the extent to which a supermajority approval requirement may result in a higher deal premium).

[170] *See, e.g*., Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1562 (1989) ("A charter term that significantly affected risk or return should be noticed by the informed investor, in the same way that any other business factor would be noticed. . . . and we would readily observe price effects for significant variations from the standard form."),

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apply and structure the deal negotiation process accordingly.[171] Moreover, because the terms of any particular appraisal waiver can vary, firms, shareholders and ultimately the market, would be able to evaluate the extent to which specific process protections are valuable to shareholders. The variation in these terms would be reflected in stock price. Merger waivers would thus, in the words of then-Vice Chancellor Strine, enable "the market [to] assess what works best without the high costs that come with the imposition of an unproven, invariable mandate."[172]

IV. The Legality of Appraisal Waivers

The preceding part defends allowing firms to limit or eliminate shareholder appraisal rights through private ordering. The courts have broadly recognized that corporate law imposes some limits on private ordering – these limits are common described as mandatory features of corporate law.[173] Accordingly, this part considers the question of whether statutory appraisal rights, under existing law, are mandatory, or can be tailored by individual corporations.

A. The Appraisal Statute Itself

Although the precise boundary between mandatory and enabling features of corporate law is somewhat unclear, courts have generally begun their analysis with the text of the statute. Here the clarity of the MBCA simplifies the legal analysis. MBCA § 13.02 provides that a shareholder "is entitled to appraisal rights." The MBCA sets out the

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[171] Although appraisal waivers technically govern the rights of the acquirer by limiting the ability of target company shareholders to obtain more than the negotiated deal price, there are reasons to believe that the terms of deals are negotiated in the shadow of the availability of appraisal rights. As a result, a target should be able to obtain more favorable deal terms if the acquirer need not factor in the potential cost of appraisal. *See* Miehl, *supra* note 5, at 669-71 (describing potential mechanisms for acquirer to engage in self-help *to avoid "the risk of exorbitant post-closing costs").*

[172] Leo E. Strine, Jr.*, One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?,* 66 BUS. LAW. 1, 7 (2010).

[173] *See* Bernard S. Black, *Is Corporate Law Trivial? A Political and Economic Analysis*, 84 NW. U.L. REV. 542, 543 (1990) (describing "mandatory corporate law" as corporate law rules that are not "waivable by contract among the relevant parties").

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circumstances under which appraisal rights are provided by statute and authorizes a corporation to supplement those statutory appraisal rights.[174] With respect to appraisal waivers, the MBCA explicitly allows charter provisions that limit or eliminate appraisal rights, but only for preferred shareholders that have the right to vote separately on the action giving rise to such appraisal rights.[175] The official comment to the text conveys the negative implication of this provision: "Chapter 13 does not permit the corporation to eliminate or limit the appraisal rights of common shares."[176]

Notably Maryland has adopted the MBCA language but modified its treatment of appraisal waivers.[177] The Maryland statute was amended in 2000 to provide that statutory appraisal rights do not apply if a corporation's "charter provides that the holders of the stock are not entitled to exercise the rights of an objecting stockholder under this subtitle."[178] The statute thus allow private ordering with respect to the appraisal rights of both common and preferred stockholders (but only in the charter).[179] The court in *Egan v. First Opportunity Fund* relied on this provision to uphold a waiver of common shareholders' appraisal rights that was presented to and approved by the shareholders immediately prior to their vote on a merger. [180] *Egan* likely illustrates exactly the type of transaction that the MBCA was designed to prevent. Accordingly, under the existing language of the MBCA, appraisal waivers are not legal.

The MBCA is less clear on the legality of appraisal waivers that are adopted pursuant to a shareholder agreement like the one in *Manti*.

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[174] MBCA § 13.02(a)(5).

[175] Such a provision, if adopted through an amendment to the charter, does not apply to any corporate action within a year after the amendment. MBCA § 13.02.

[176] MBCA § 13.02(c), official comment 3.

[177] *See* Ryan Stoker, Guest Post: *Minority Stockholders Beware – Disappearing Appraisal Rights in Maryland, Appraisal Rights* Litig. Blog, Feb. 19, 2019, https://www.appraisalrightslitigation.com/2019/02/19/guest-post-minority-stockholders-beware-disappearing-appraisal-rights-in-maryland/ (last visited June 8, 2020) (terming the ability of a Maryland corporation to eliminate shareholder appraisal rights through a charter provision "unique").

[178] Md. Ann Code Corps. & Ass'ns. Art. § 3-202(c)(4).

[179] The statute also eliminates the delayed effective date provided by the MBCA for an appraisal waiver.

[180] Egan v. First Opportunity Fund, Inc., 2016 Md. Cir. Ct. LEXIS 12, Case No. 24-C-14-008132 (Cir. Ct. Balt. City, Apr. 22, 2016),

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MBCA § 7.32 broadly authorizes the use of shareholder agreements.[181] The section identifies a variety of matters that may be addressed through a shareholder agreement and provides that an agreement that complies with § 7.32 is valid "even though it is inconsistent with one or more other provisions of this Act."[182] The enumerated subjects do not, however, include appraisal rights. In addition, Section 7.32 imposes procedural requirements on shareholder agreements, however, including a requirement that the agreement be set forth in the articles of incorporation or the bylaws and approved by all persons who are shareholders at the time of the agreement.[183] Accordingly, the MBCA does not appear to distinguish between the validity of appraisal waivers in public versus private companies nor, under a strict reading of § 7.32, to permit appraisal waivers in a shareholder agreement.

The Delaware appraisal statute, §262, is less explicit than the MBCA. The statute provides that a shareholder who meets the statutory conditions and complies with the required procedures to perfect his or her appraisal rights "shall be entitled to an appraisal." Some courts have viewed the use of the term shall as conveying that a particular statutory right is mandatory.[184] In addition, section 262(c) includes language expressly authorizing corporations, through a charter provision, to extend appraisal rights to a broader range of transactions than those required by the statute but contains no comparable language authorizing charter provisions that restrict or eliminate appraisal rights. The implication is that the statute's failure to authorize appraisal waivers means that such waivers are not permitted.

This negative implication is not the only possible approach. Indeed, other sections of the Delaware statute contain express limitations on private ordering. For example, 8 Del. C. § 102(f) prohibits fee shifting charter provisions in connection with internal corporate claims.

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[181] Notably, §7.32 historically was limited to private companies, but the drafters removed that limitation in 2017. Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, working paper dated June 2020, at 24 n.89.

[182] MBCA §7.32 (a).

[183] MBCA §7.32 (b).

[184] See, e.g., H-M Wexford LLC v. Encorp, Inc., 832 A.2d 129, 152 (Del. Ch. 2003) (reasoning that the requirements of section 228 (c) are mandatory because "the word 'shall' is a mandatory term"); Speiser v. Baker, 525 A.2d 1001 (Del. Ch. 1987) (interpreting as mandatory the language of section 211 stating that a corporation "shall" hold an annual meeting).

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Similarly, Section 102(b)(7) bars a charter provision that limits or eliminates director liability for a breach of the duty of loyalty. Accordingly, it is plausible to read § 262's silence as permissive rather than prohibitive. As the court observed in *Jones Apparel* that "for section 102(b)(1) to have meaning, it must not be limited to altering default provisions in statutory sections that contained 'magic words' permitting contrary provisions."[185]

The *Manti* court followed the guidance suggested by the language from *Jones Apparel*. Relying on the absence of an express statutory provision on the contractual waiver or modification of appraisal rights, the court observed that "the DGCL does not explicitly prohibit contractual modification or waiver of appraisal rights, nor does it require a party to exercise its statutory appraisal rights."[186] The court therefore concluded that the appraisal waiver in the case before it served "to supplement the DGCL, and is not inconsistent with, nor contrary to, the DGCL.[187]

Notably, DGCL § 262 does not distinguish between the appraisal rights of preferred and common stockholders. [188] As *Manti* noted, Chancellor Allen held in *Ford Holdings* that a preferred stockholders could fix the fair value of their shares in the event of a merger through a provision in the certificate of designation.[189] This provision, the *Manti* court concluded, "effectively" waived the shareholders' right to an appraisal and, as such served a precedent that appraisal waivers, where clear, were permitted under § 262.[190]

Concededly, *Manti*'s holding was narrow. The court explained: "I need not decide whether a waiver of appraisal would be upheld in other circumstances."[191] Its analysis also differs from that of prior

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[185] Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 856-60 (2008), citing Jones Apparel, 883 A.2d at 848.
[186] Manti Holdings, LLC v. Authentix Acquisition Co., 2019 Del. Ch. LEXIS 307, *11
[187] Id.
[188] See also 2 DELAWARE CORPORATION LAW AND PRACTICE § 36.07 (2018) ("As a general rule, preferred stock possesses the same appraisal rights as common stock.").
[189] In re Appraisal of Ford Holdings., Inc. Preferred Stock, 698 A.2d 973 (Del. Ch.1997)
[190] *Manti* at *10. Significantly, Chancellor Allen held in *Ford Holdings* that appraisal rights are a "mandatory provision[] of Delaware law"). *Ford Holdings*, 698 A.2d at 976.
[191] *Manti* at *11.

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courts. For example, in upholding the provision in *Ford Holdings*, Chancellor Allen explicitly emphasized that preferred stock is different and that his holding "deals only with the appraisal remedy for preferred stock."[192] The court specifically noted that "preferred stock is a very special case."[193] The court in *Halpin* emphasized this language in observing in dicta that case raised an "interesting legal issue as to whether a common stockholder may contractually waive its statutory appraisal rights for consideration to be set later by a controlling stockholder."[194]

Whether subsequent courts in Delaware will both follow the *Manti* court's analysis of the statute and apply it in different contexts remains to be seen. Recent Delaware decisions have upheld innovative efforts at private ordering in the absence of express statutory authorization.[195] Indeed, the Delaware Supreme Court recently reiterated the broadly permissive nature of the Delaware statute in upholding a charter provision providing exclusive federal court jurisdiction for claims arising under §11 of the Federal Securities Act of 1933.[196] In *Salzberg v. Sciabacucchi*, the Court observed the Delaware statute grants corporations wide latitude in adopting firm-specific charter provisions that address the operations of the corporation and the powers of its shareholders.[197] It explained that the Delaware statute is "broadly enabling"[198] and that allowing private ordering through charter provision is consistent with shareholder will."[199]

A further complication is that the Delaware courts have only considered the legality of appraisal waivers in the context of shareholder agreements involving private companies. Delaware precedent suggests,

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[192] In re Appraisal of Ford Holdings, 698 A.2d at 977.
[193] *Id.* ("All of the characteristics of the preferred are open for negotiation; that is the nature of the security."). Similarly, in *Metromedia*, the court upheld a contractual designation of the merger consideration to be paid to preferred stockholders rather than conducting its own independent valuation under the appraisal statute but emphasized the fact that its holding involved the rights of preferred stockholders. In re Appraisal Metromedia Int'l Grp., Inc., 971 A.2d 893 (Del. Ch. 2009).
[194] Halpin v. Riverstone Nat'l, Inc., 2015 Del. Ch. LEXIS 49, *26.
[195] *See, e.g.,* Boilermakers Local 154 Retirement Fund v. Chevron Corporation, 73 A.3d 934 (Del. Ch. 2013) (upholding forum selection bylaw despite the absence of clear statutory language that the topic was the appropriate subject of a bylaw).
[196] Salzberg v. Sciabacucchi, 227 A.3d 102 (Del. 2020).
[197] *Id*. at 113.
[198] *Id.* at 115.
[199] *Id*. at 116,

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albeit frequently in dicta, that shareholder agreements may be subject to different analysis than a charter or bylaw provision and that, in some cases, shareholders have broader power to waive their rights through a shareholder agreement. [200] Whether the case law concerning appraisal waivers depends on this distinction and, if so, whether that distinction warrants different legal analysis are beyond the scope of this Article, and I address them elsewhere.[201]

Given that the Delaware statute does not directly prohibit appraisal waivers at least to the same degree as the MBCA, the Delaware courts are likely to consider public policy considerations in addition to the statutory text in evaluating the legality of appraisal waivers. The Article turns next to those considerations.

B. Public Policy Considerations

As *Salzberg* observed, even in the absence of textual limits, courts have maintained that some provisions of corporate law are mandatory as a matter of public policy. The precise extent to which public policy imposes limits on private ordering is unclear. [202] As the Court explained in *Sterling*, "A precise delimitation of the scope of the

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[200] *See, e.g.*, Rauterberg, *supra* note 181 at 3 (making this claim). Although courts explicitly evaluate shareholder agreements through a contractual lens that permits the waiver of statutory or even constitutional rights, the number of actual cases in which courts have enforced provisions in shareholder agreements that would not be permitted in the charter and bylaws is limited. See Fisch, *supra* note 118 (describing case law on enforceability of shareholder agreements).

[201] *See* Fisch, *supra* note 118 (proposing that courts require corporations to use charter and bylaw provisions for private ordering and refuse to uphold circumvention of statutory limits through shareholder agreements). Language in the chancery court's decision in *Salzberg* also suggests that, because the corporation is a creature of state law, the ability of corporate participants to arrange their rights and powers by private contract is limited. *See* Sciabacucchi v. Salzberg, 2018 Del. Ch. LEXIS 578, *42 ("The contract that gives rise to the artificial entity and confers these powers is not an ordinary private contract among private actors. The certificate of incorporation is a multi-party contract that includes the State of Delaware.")

[202] This Article does not advocate complete freedom of contract in corporate law. Commentators have identified significant policy arguments in favor of mandatory rules. *See, e.g.,* Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, in RESEARCH HANDBOOK ON PARTNERSHIPS, LLCS, AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 11 (Mark Lowenstein & Robert Hillman eds., 2014). Those arguments, this Article maintains, should not preclude private ordering with respect to appraisal rights.

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proviso is difficult to formulate; the limits of 'public policy' are ill-defined and changing."[203]

Salzberg cited with approval a law review article identifying only three areas[204] in which the courts appear impose such public policy limits on the otherwise enabling approach to Delaware corporate law – "cases concerning the rights of stockholders to periodically elect directors, to inspect books and records, and directors' duty of loyalty."[205] The authors of the article, Welch and Saunders, attempt to discern the policy considerations motivating the cases in these areas.[206] They observe the right of shareholders periodically to elect directors is a fundamental component of corporate law, thereby explaining the prohibition on provisions that have the effect of establishing permanent directors.[207] Similarly they reason that inspection rights are "necessary to allow stockholders-the owners of Delaware corporations-to monitor their fiduciaries' discharge of management duties."[208] Finally, although they concede that the directors' duty of loyalty is widely understood to be mandatory, they nonetheless identify at least three ways in which corporate law offers directors some degree of protection from liability for breaches of the duty of loyalty, tempering the policy case in favor of its immutability.[209] Accordingly, the authors conclude that, as a descriptive matter, the scope of mandatory corporate law based on public policy considerations is quite limited.

The significance of public policy considerations may be further reduced when private ordering takes the form of a charter provision. Many statutory provisions that authorize private ordering limit its

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[203] Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 118 (Del. 1952).

[204] Another area in which the statute appears to reflect public policy limits on private ordering is with respect to the scope of indemnification permitted by §145(f). See Waltuch v. Conticommodity Servs., Inc., 88 F.3d 87 (2d Cir. 1996). Although *Waltuch* is a Second Circuit decision, Delaware commentators "resoundingly agree" that the scope of 145(f) is limited by public policy. Kurt A. Mayr, II, *Note, Indemnification of Directors and Officers: The "Double Whammy" of Mandatory Indemnification under Delaware Law in Waltuch v. Conticommodity Services Inc.*, 42 VILL. L. REV. 223, 269 (1997).

[205] Salzberg v. Sciabacucchi, 227 A.3d 102, 116 n. 55 (Del. 2020) citing Welch & Saunders, *supra* note 185, at 856-60

[206] Welch & Saunders, *supra* note 185, at 857-64

[207] *Id*. at 857.

[208] *Id*. at 858.

[209] *Id*. at 858.

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permissibility to the charter.[210] The rationale for this appears to be twofold. First, a charter provision (unlike a bylaw) requires shareholder approval. Accordingly, as the Delaware Supreme Court explained, permitting more extensive private ordering in the charter is consistent with "Delaware's legislative policy . . . to look to the will of the stockholders in these areas."[211] Second, charter amendments require joint action by both the board of directors and the shareholders. Accordingly, neither the board nor the shareholders can act unilaterally, the board's authority to adopt a charter provision is constrained by its fiduciary duties[212] and the "the stockholders control their own destiny through informed voting."[213] As the Court put it "This is the highest and best form of corporate democracy."[214] This Article incorporates these considerations by proposing, in Part V, that appraisal waivers be permissible only if implemented through a charter provision.

One may argue that appraisal rights are different from other corporate governance provisions in that they have a distinctive role in protecting minority shareholders who disagree with the outcome of the democratic process.[215] Put differently, protection for dissenting shareholders supports deference to majority shareholder approval. One may also question the weight to be given to a shareholder vote because of concerns over asymmetric information and rational apathy.[216]

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[210] *See, e.g.,* 8 Del. §102(b)(7) (requiring that director exculpation provisions be contained in the charter); 8 Del. §122(17) (requiring that waivers of the corporate opportunity doctrine be in the charter).

[211] Salzberg v. Sciabacucchi, 227 A.3d 102 (Del. 2020), quoting Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996) (explaining that §102(b)(7) incorporates this policy).

[212] Moreover, the standard for judicial review of the board's actions may be heightened, depending on the context in which the charter provision is adopted. See Williams v. Geier, 671 A.2d at 1388 (considering the appropriate standard for review of the board's action in approving a charter amendment and recommending it to the shareholders).

[213] *Id.* at 1381.

[214] *Id.*

[215] *See, e.g.,* David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?,* 41 DEL. J. CORP. L. 461, 492-93 (2017) (observing that one justification for mandatory corporate law rules is that they "might protect vulnerable parties to the corporate contract (especially shareholders) from exploitation that could occur under a private-ordering regime.").

[216] *See* In re Appraisal of Ford Holdings, 698 A.2d 973, 977 n. 8 (1997) ("Notably the explanation most often pressed forward for the efficiency of mandatory terms in corporate law is that the consent to modified terms of a corporate contract through a corporate election may (in the case of public corporations particularly) not really constitute the sort of agreement that we ought to enforce because of the existence of

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Four considerations undercut these arguments as a basis for treating appraisal rights as distinctive. First, as noted above, charter provisions limiting appraisal rights require board approval, and the board's approval of such a provision is constrained by its fiduciary duties. Second, Delaware amended its appraisal statute in 2016 to require that a minimum of 1% of the outstanding shares petition for appraisal.[217] This de minimis exception removed appraisal rights for the most disempowered shareholders, undercutting the argument that appraisal rights are a critical source of minority shareholder protection. Third, LLC statutes fail to provide any appraisal rights by default, making the scope of the appraisal remedy entirely contractual.[218] Legislative decisions not to protect passive LLC investors automatically may be indicative of the importance of appraisal rights. Although some investors in LLCs may be more sophisticated than corporate shareholders, shares of LLCs can be publicly traded and freely purchased by ordinary investors.[219] Fourth, unlike shareholder election or inspection rights, appraisal rights are largely remedial and only discipline corporate decisions indirectly.

Ultimately, the legislature may be better positioned than the courts to consider the merits of these policy arguments. The legislature may also be well-positioned to consider appraisal waivers in light of the general statutory trend toward facilitating greater private ordering and to compare appraisal waivers to similar charter provisions such as waivers of the corporate opportunity doctrine.[220] Consequently, in Part V, the Article calls for explicit legislation authorizing appraisal waivers.

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asymmetrical information and rational apathy on the part of widely disaggregated shareholders of public companies.").

[217] 8 Del. C. § 262(g). *See* Onyeador, *supra* note 3 at 357-8 (describing and evaluating the 2016 amendments).

[218] *See* 6 Del. § 18-210 (1998) (recognizing contractual appraisal rights).

[219] Appraisal waivers are common in both private and publicly-traded LLCs. *See, e.g.,* Woodcrafters Home Products Holding, LLC, Amended and Restated Limited Liability Company Agreement dated Jan. 4, 2010, at 51 (privately-held) ("No Member shall be entitled to any appraisal rights . . . ."); Travel Centers of America L.L.C. Operating Agreement dated May 13, 2010, at 48 (publicly-traded) ("Shareholders are not entitled to dissenters' rights of appraisal in the event of a merger, consolidation or conversion involving the Company, a sale of all or substantially all of the assets of the Company or the Company's Subsidiaries, or any other transaction or event.").

[220] See Gabriel Rauterberg & Eric Talley, *Contracting out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L.

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V. Legitimizing Appraisal Waivers

The preceding discussion suggests that appraisal waivers are of dubious legality in states that follow the MBCA and that, although there are plausible arguments for their legality under current Delaware law, there is nonetheless substantial uncertainty. Widespread use of appraisal waivers in private company shareholder agreements suggests the potential value of appraisal waivers. Accordingly, this Article argues for legislation explicitly their use. For the reasons detailed below, the Article argues that appraisal waivers should be permitted exclusively through charter provisions.

Legislation would increase predictability as well as providing guidelines as to the circumstances under which such waivers will be enforceable. Legislation would also facilitate the adoption of appraisal waivers by public companies, adoption that offers a market-based alternative to legislative and judicial efforts to reform the scope of the appraisal remedy. In turn, corporate implementation practices may inform decisions to modify the statutory default.

A. Legislative Clarification

Both the Delaware statute and the MBCA are frequently amended to modernize and improve the statutory structure. Both statutes have evolved to facilitate private ordering by taking an increasingly enabling approach. Features of corporate law that were once considered immutable have been revisited and, in many cases, converted into default provisions. As one article has observed: "It may be that the mandatory rules that exist today will be loosened tomorrow."[221]

These statutory modifications or clarifications respond to a variety of stimuli. One trigger is demand from the business community. For example, corporations faced a crisis in directors' and officers' liability insurance after the Delaware Supreme Court's decision in *Smith*

REV. 1075, 1093 (2017) (discussing history of Delaware's statutory authorization of charter provisions waiving the corporate opportunity doctrine).

[221] Welch & Saunders, *supra* note 185 at 955.

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v. Van Gorkam.[222] The high cost and limited availability of insurance led to concerns that corporations would be unable to attract qualified directors.[223] The Delaware legislature responded by adopting §102(b)(7) which authorized corporations to adopt charter provisions limiting or eliminating director personal liability for breaches of the duty of care.[224]

Legislatures also react to changes in the business environment. As Gabriel Rauterberg and Eric Talley explain, "The dot-com era of the 1990s ushered in a wave of novel market-mediated corporate structures [many of which] resulted in extended families of corporate affiliates with partially overlapping ownership, partially overlapping board membership, and partially overlapping lines of business."[225] These structures placed increased pressure on "the canonical 'undivided-loyalty' model of corporate opportunities."[226] As two high-stakes cases made clear, the model was not workable for corporations with overlapping dominant ownership or boards.[227] The Delaware legislature responded in 2000 by amending the statute expressly to authorize waivers of the corporate opportunity doctrine.[228]

Finally, legislative changes reflect the evolution of the capital markets and the nature of share ownership. The rise of institutional investors, for example, and their growing participation in corporate governance, led to greater efforts to hold directors of public companies accountable through the election process. Institutional investors began to introduce proposals to formalize the process by which shareholders could nominate director candidates.[229] The Delaware Supreme Court initially concluded that a so-called proxy access bylaw was beyond the limits of shareholder authority pursuant to section 109.[230] The Delaware

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[222] *See, e.g*., Michael Bradley & Cindy A. Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance*, 75 IOWA L. REV. 1 (1989) (empirically analyzing the reaction in the insurance market to the court's decision).
[223] *Id*.
[224] See *id.* at 7 ("In direct response to these concerns, the Delaware Legislature enacted section 102(b)(7)")
[225] Rauterberg & Talley, *supra* note 220 at 1093.
[226] *Id.* at 1093.
[227] *Id*. at 1094.
[228] 8 Del. C. § 122 (7).
[229] *See generally* Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L.J. 435 (2012) (describing the evolution of proxy access).
[230] CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 229 (Del. 2008) (finding that a proxy access bylaw was invalid).

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legislature responded a year later by enacting two provisions to facilitate proxy access by investors.[231]

Notably, these legislative responses reflected market demand. In each case, other states followed Delaware's lead, and corporations widely adopted the contemplated provisions. State legislatures followed Delaware's lead in amending their statutes to authorize private-ordering limitations on directors' duty of care, and provisions limiting director liability in accordance with these statutes are ubiquitous in public companies.[232] Similarly, proxy access bylaws are now "mainstream" at large public companies, and their adoption is increasing at smaller public companies as well.[233] Although one might expect waivers of the corporate opportunity doctrine to be relatively rare, Rauterberg and Talley report that "hundreds of public corporations in [their] sample--and well over one thousand in the population--have disclosed or executed waivers."[234]

Similar legislative authorizing appraisal waivers is appropriate. Within Delaware, the context-specific analysis of *Manti* and the cases on which it relies do not provide sufficient clarity as to the extent to which appraisal waivers will be enforceable and, as a result, do not provide a reliable basis for structuring the terms of a merger. In other states, particularly those that follow the MBCA, the statute appears to prohibit limitations on the appraisal rights of common stockholders – and the extent to which this prohibition extends to related terms such as drag-along provisions is uncertain. Given the advantages of encouraging private ordering with respect to appraisal rights, the market demand for contractual waivers, and the prospect that firm-specific innovation will

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[231] *See, e.g.*, David Skeel, *The Bylaw Puzzle in Delaware Corporate Law*, 72 BUS. LAW. 1 (2016). As Skeel observes, Delaware's adoption of the proxy access legislation was likely also motivated by an effort to limit federal preemption.

[232] *See, e.g.,* Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L.J. 1155, 1160 (1990) (observing that, within two years of Delaware's adoption forty-one states had adopted similar director exculpation provisions); Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Suits*, 57 VAND. L. REV. 1747, 1786 (2004) ("It is very rare for a public company not to have taken advantage of this exculpation.").

[233] *See* Holly J. Gregory, Rebecca Grapsas & Claire Holland, *The Latest on Proxy Access*, HARV. L. SCH. FORUM ON CORP. GOV., Feb. 1, 2019, https://corpgov.law.harvard.edu/2019/02/01/the-latest-on-proxy-access/ ("Proxy access is now mainstream at S&P 500 companies (71%) and is nearly a majority practice among Russell 1000 companies (48%).").

[234] Rauterberg & Talley, *supra* note 220 at 1079.

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lead to increased efficiency, the case for statutory authorization appears clear. The next section considers the appropriate structure of that authorization.

B. Structuring Appraisal Waivers

As Section A explained, the first step in legitimizing appraisal waivers is amending corporation statutes to provide explicitly that shareholder appraisal rights can be modified, limited or eliminated through private ordering. The second step is determining the permissible vehicle by which that private ordering should occur. As noted above, some statute sections require a charter provision, such as 8 Del. C. §§102(b)(7) and 122(17). Others allow private ordering in the charter or bylaws, through board resolutions, and in some cases by contracts such as shareholder agreements.

The foregoing instruments vary in terms of formality and transparency - the charter and bylaws are the governing documents of the corporation, the statute specifies the process by which they are amended, charter amendments must be filed with the state, and bylaw amendments, for public companies, must be filed with the SEC and disclosed to shareholders on a form 8K. Although the MBCA appears to contemplate transparency of shareholder agreements, private companies do not publicly disclose their bylaws, and a shareholder agreement need not be disclosed to or signed by all shareholders.[235]

Critically corporate charters differ from bylaws in that charter provisions require both board and shareholder approval to amend as opposed to bylaws which can generally be amended unilaterally.[236] The requirement of joint action reduces the potential for self-dealing or opportunistic behavior by either management or shareholders. Given that the board's actions are limited by fiduciary duties, board acquiescence also operates as a constraint against self-dealing by a

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[235] See Rauterberg, *supra* note 181 (private companies "are not required to publicly disclose any instrument of governance beyond filing their charter with the Secretary of State"); cf. In re Altor Bioscience Corp., C.A. No. 2017-0466-JRS (Del. Ch. May 15, 2019) (TRANSCRIPT) (observing that not all shareholders were bound by a shareholder agreement waiving the plaintiffs' right to sue).

[236] *See, e.g.,* Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CAL. L. REV. 373, 390-92 (2018) (identifying the problems with board-adopted bylaws that reduce shareholder rights).

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controlling stockholder.[237] More broadly, joint decisionmaking can promote collaborative information-sharing and debate about the desirability of an appraisal waivers and how it should be structured.[238]

As commentators and the MBCA have observed, a substantial justification for the modern appraisal remedy lies in its role in protecting minority shareholders from abuse of control and self-dealing transactions. Indeed, this concern is highlighted in the 2006 amendments to the MBCA. Minority shareholders can be exploited by other shareholders, by management or by a board responsive to the interests of the majority of the shareholders. A requirement of joint action, coupled with the constraint of fiduciary principles, is a powerful weapon limiting the potential for appraisal waivers to insulate abusive transactions. For these reasons, this Article proposes that the authorizing legislation limit appraisal waivers to exclusively to charter provisions. This approach is consistent with the court's recognition in *Williams v. Geir* that corporate democracy is at its best when private ordering occurs by means of the corporate charter.[239]

Concededly, in Boilermakers, then-Chancellor Strine concluded that a forum selection bylaw unilaterally adopted by the board (which, under the corporation's charter had the authority to amend the bylaws), was valid notwithstanding the absence of shareholder approval. Strine emphasized the flexibility of the bylaws and the ability of shareholders to override board decisions with which they disagreed, either by amending or repealing a board-adopted bylaw or by using their election power to "discipline boards" that act contrary to the shareholders' interests.[240] I have argued elsewhere that Strine's claim is overstated.[241] A variety of practical and legal constraints operate to give boards and shareholders disparate power to adopt and amend the bylaws. As a result, allowing private ordering through board-adopted bylaws is

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[237] Moreover, a board's decision to adopt an appraisal waiver that worked to the advantage of a controlling shareholder would likely be evaluated by the courts under a good faith standard.

[238] *See, e.g.* Jill E. Fisch & Simone Sepe, *Shareholder Collaboration*, 98 TEX. L. REV. 863 (2020) (explaining the value of shareholder/board collaboration in promoting efficient corporate decisionmaking).

[239] Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996).

[240] *See* Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934, 956-957 (describing shareholders' voting power as "a potent tool to discipline boards who refuse to accede to a stockholder vote").

[241] *See* Fisch, *supra* note 236.

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problematic when the issue involves increasing board authority at the potential sacrifice of shareholder interests. Appraisal waivers present the additional complication in that they can also operate to protect self-dealing by a majority of the shareholders. Accordingly, unilateral shareholder action is equally problematic.

Similarly, I have argued that shareholder agreements are, in general, a problematic mechanism for private ordering.[242] Shareholder agreements lack the formality and transparency of traditional corporate governance instruments, their enforceability is likely to depend on context-specific factors such that they do not apply equally to all shareholders, and they import contractual concepts such as affirmative consent and consideration that are inconsistent with the structure of corporate law.[243] Indeed, it is likely that corporate participants currently use shareholder agreements to implement appraisal waivers based in part on the perception that this enables them to circumvent an otherwise-mandatory provision of corporate law.

One final point is mid-stream adoption. When a corporation adopts an appraisal waiver prior to its IPO, "any potential wealth effect can be impounded into the stock price before public investors purchase their shares."[244] A legislative change authorizing appraisal waivers could potentially affect the rights of existing shareholders and the value of their stock.[245] Should the mid-stream adoption of an appraisal waiver be treated as the equivalent of a recapitalization or substantive charter amendment under current law and provide current shareholders with an exit remedy such as appraisal?

The claim that such protection is necessary is flawed. Legislatures amend corporation statutes frequently, and shareholders invest in corporations with the knowledge that these amendments have

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[242] Fisch, *supra* note 118.

[243] *Id*.

[244] Romano & Sanga, *supra* note **Error! Bookmark not defined.**13 at 32-33. A countervailing concern is the possibility that governance provisions are not efficiently priced in the IPO market. *See, e.g.,* Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HARV. BUS. L. REV. 131, 145-51 (2018) (raising concerns about inefficient tailoring at the IPO stage).

[245] *See, e.g.,* Romano & Sanga, *supra* note 13 at 32-33 (observing that shareholders lack the opportunity to avoid a negative price effect if a firm adopts a value-decreasing corporate governance provision mid-stream).

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the potential to affect the value of their investments.[246] Accordingly, shareholders have no vested rights in the existing scope of their appraisal rights. Indeed, the 2016 Delaware amendments eliminated the appraisal rights of all shareholders owning less than 1% of a company's shares, a far greater change that the mere authorization of firm-specific appraisal waivers.

Similarly, Delaware's Public Benefit Corporation statute previously provided both that a supermajority vote of the shareholders was required to convert a traditional corporation into a Public Benefit Corporation and that dissenting shareholders were entitled to appraisal rights.[247] In 2020, the legislature removed both requirements.[248] The 2020 amendments impose a more significant limitation on the appraisal rights of existing shareholders of Delaware corporations who no longer have the right to be cashed out at fair value upon conversation to a

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[246] *See, e.g.,* 8 Del. § 394 (reserving to the legislature the right to amend the statute and providing that such amendments shall be part of the charter of every corporation so long as they do not take away a remedy or liability that has "been previously incurred"). Such reservation clauses are a standard provision in corporation statutes. Nelson Ferebee Taylor, *Evolution of Corporate Combination Law: Policy Issues and Constitutional Questions*, 76 N.C.L. REV. 687, 724-30 (1998). As commentators have observed, these provisions overcome the result in Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), but whether the reserved power can be used by private parties to alter the terms of an existing charter is a different question about which some commentators disagree. See *id*. at 992 ("For almost a century and a half, there has been a split among the highest courts of various states over the question whether the reserved power does or does not sustain a corporation's utilization of permissive post-incorporation legislation in altering the rights of shareholders.").

[247] Noam Noked, *DGCL Amended to Authorize Public Benefit Corporations*, HARV. L. SCH. FOR. ON CORP. GOV., Aug. 15, 2013, https://corpgov.law.harvard.edu/2013/08/15/dgcl-amended-to-authorize-public-benefit-corporations/.

[248] An Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law, House Bill No. 341, House of Representatives, 150th General Assembly (2020), https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=48122&legislationTypeId=1&docTypeId=2&legislationName=HB341;
Allison L. Land & Edward B. Micheletti. *Delaware Corporate Law Amendments Address Emergency Powers, Public Benefit Corporations and Other Matters*, Skadden Arps Client Memorandum, June 25, 2020, https://www.skadden.com/insights/publications/2020/06/delaware-corporate-law-amendments

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corporation that has the legal right to pursue stakeholder or societal interests even at the expense of shareholder value.[249]

Conclusion

The appropriate scope of the appraisal remedy continues to elude courts, commentators, and legislatures, resulting in a body of legal doctrine that is inconsistent and unpredictable. Private ordering offers a market-based alternative to regulatory reform. Private corporations are adopting a variety of contractual tools to limit or eliminate appraisal rights despite the limited judicial guidance as to whether those provisions are enforceable. Allowing corporations to modify or eliminate appraisal rights through firm-specific waivers facilitates the tailoring of the appraisal remedy to individual firm circumstances and limits the potential costs of regulatory error. Extension of these tools to public corporations offers similar potential benefits.

Despite the use of appraisal waivers in private companies, their legal status is questionable, and public companies are unlikely to adopt them absent legislative clarification. This Article therefore calls for legislation explicitly authorizing the adoption of charter provisions limiting or eliminating appraisal rights. Such a move would facilitate experimentation and innovation and develop new evidence on the value of the appraisal remedy.

[249] *See, e.g.,* Press Release, *Veeva Becomes First Public Company to Convert to a Public Benefit Corporation*, BUSINESSWIRE, Jan. 14, 2021, https://markets.businessinsider.com/news/stocks/veeva-becomes-first-public-company-to-convert-to-a-public-benefit-corporation-1029967097 (announcing publicly-traded Veeva's conversion to a Public Benefit Corporation).

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