How to Control Controller Conflicts

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This Article examines a question that Delaware law has grappled with for several decades: whether and when approval by independent directors, without a supplemental majority-of-the-minority (MOM) approval, is sufficient to cleanse corporate actions involving a controller conflict. After decades-long swings of the judicial pendulum, a recent legislative amendment to the Delaware General Corporation Law (DGCL) permits independent director approval to serve in all non-freezeout settings as a cleansing mechanism. In this Article, we explain that the case for general reliance on independent director approval outside freezeouts is untenable; the incentives of independent directors that were elected and can be replaced by the controller are just as problematic in non-freezeout setting—if not more so—than in freezeout settings.

We then put forward a unified approach to protect public investors from controller-related conflicts in an effective and internally consistent manner. Under this approach, for all decisions requiring a statutory vote—including not only freezeouts but also charter amendments and reincorporations—the case for applying the MFW *framework is strong and cleansing should require MOM approval. However, for decisions where a vote is not statutorily required, cleansing could also be achieved through approval by "enhanced-independence" directors—that is, directors whose appointment received MOM approval.*

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This Article was prepared for the *Journal of Corporation Law's* 50th Anniversary Symposium. The Article builds on a broader and more comprehensive article offering a framework for addressing the agency problems of controlling shareholders. Both articles build on the concept of "enhanced-independence directors" put forward in Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271 (2017).

For valuable comments, suggestions, and discussions, we are grateful to Stephen M. Bainbridge, Craig Ferrere, Joel Friedlander, Assaf Hamdani, Jonathan Macey, Guhan Subramanian, Roberto Tallarita, Maayan Weisman and participants in the JCL symposium held in September 2024.

I. INTRODUCTION

In this contribution to the 50th-anniversary edition of the *Journal of Corporation Law*, we aim to contribute to an ongoing debate that has been central to corporate law—and to many articles in this *Journal*—throughout its history:[1] How should corporate law address agency problems in companies with a controlling shareholder ("controlled companies")? When, and to what extent, should approval by independent directors be permitted to cleanse corporate decisions on conflicted issues? Viewing such decisions as "cleansed" means that, despite the presence of a conflict, the court will apply to these decisions the deferential business judgment standard that typically governs director decisions made without any conflict.[2]

We provide a critical analysis of the evolution of Delaware's law on the subject. We explain that the use of MOM approval should not be limited to freezeout situations, where the controller acquires the remaining shares of public investors, as specified by Delaware's recent legislation. We also put forward a framework for using such approvals in a way that would be consistent and conceptually coherent and that would effectively protect outside shareholders without introducing new votes for corporate actions where such votes are not statutorily required.

Part II briefly reviews the decades-long development of Delaware law on the subject. Over time, judicial decisions have come to (i) recognize that approval by independent directors alone cannot be relied upon to cleanse decisions effectuating a freezeout, where the controller and the other shareholders are on opposite sides, and (ii) permit the cleansing of such freezeout decisions only if they also receive MOM approval. Subsequent judicial decisions also introduced MOM approvals for cleansing some non-freezeout conflicted decisions. The swings of the pendulum ended thus far with a recent legislative amendment enabling independent director approvals, without any supplemental MOM approval, to fully cleanse non-freezeout conflicted decisions.

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1. For *Journal of Corporation Law* articles on the subject, see, e.g., Hyun-Chul Lee, *The Hidden Costs of Private Benefits of Control: Value Shift and Efficiency*, 29 J. CORP. L. 719 (2004); Vladimir Atanasov, Bernard Black & Conrad S. Ciccotello, *Law and Tunneling*, 37 J. CORP. L. 1 (2011); Bernard S. Sharfman, Kahn v. M&F Worldwide Corporation*: A Small but Significant Step Forward in the War Against Frivolous Shareholder Lawsuits*, 40 J. CORP. L. 197 (2014); Da Lin, *Beyond Beholden*, 44 J. CORP. L. 516 (2019); Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45 J. CORP. L. 953 (2020); Iman Anabtawi, *The Limits of Shareholder Ratification*, 50 J. CORP. L. 449 (2025).

2. Applying the business judgment standard to a decision means that the court will not examine the substantive merits of the decision and will limit itself to verifying that the decision was made in a considered and informed manner. For a discussion of the business judgment standard, see e.g., Stephen Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 99–100 (2004) ("[I]f the requisite preconditions are satisfied, there is no remaining scope for judicial review of the substantive merits of the board's decision.").

Part III explains that limiting the use of MOM approvals to freezeout settings, fully relying on independent director approval outside these settings, is untenable. We argue that allowing cleansing by independent director approval in all non-freezeout transactions is conceptually inconsistent with the recognition that such approval cannot be relied upon to cleanse controller freezeouts. Judicial opinions ultimately rejected full reliance on independent director approval to cleanse freezeout decisions. We discuss why such a conclusion is unavoidable given the structural incentives that afflict the decisions of directors whose appointment and replacement is fully dependent on the controller. We further explain that the incentives of independent directors to favor the controller are as strong, and may even be stronger, in non-freezeout conflicted settings than in freezeout settings.

Part IV puts forward the approach we favor for governing controller conflicts and discusses its merits. Our approach, we explain, would protect public investors from controller conflicts in an effective and internally consistent way.[3]

Our Article contributes to the ongoing debate on SB21, the recent Delaware legislation that establishes safe harbor provisions for conflicted transactions in controlled companies. Our analysis highlights the inconsistency between the rules that SB21 sets for conflicted decisions in freezeout and non-freezeout contexts. We further demonstrate that this legislation has shifted Delaware law on controlled companies in a decidedly negative direction.[4]

Before proceeding, we would like to highlight one important set of public companies for which the issues discussed in this paper are especially important. Although U.S. corporate law scholars have long focused on widely held public companies as the paradigmatic case, companies with a controlling shareholder have grown increasingly important. This trend is partly driven by the growing use of dual-class structures among companies going

3. Our analysis contributes to the significant existing literature on the *Match* decision, SB21, and the use of MOM votes. *See, e.g.*, Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, 49 DEL. J. CORP. L. 525 (2025); Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law* (Eur. Corp. Governance Inst., Working Paper No. 761/2024, 2024), https://ssrn.com/abstract=4746878; Jill E. Fisch & Steven Davidoff Solomon, *Control and Its Discontents*, 173 U. PA. L. REV. 641 (2025); Zohar Goshen, Assaf Hamdani & Dorothy S. Lund, *Fixing* MFW*: Fairness and Vision in Controller Self-Dealing* (Eur. Corp. Governance Inst., Working Paper No. 818/2025, 2025), https://papers.ssrn.com/abstract=5061341; Robert B. Greco, *A Corporate Governance Solution to the Inefficiencies of Entire Fairness*, 79 BUS. LAW. 993 (2024); Lawrence A. Hamermesh, Jack B. Jacobs & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321 (2022); Christine Hurt, *Texas, Delaware, and the New Controller Primacy*, 67 ARIZ. L. REV. (forthcoming 2025); Fernan Restrepo & Guhan Subramanian, *Missing MOMs: Freezeouts in the New Doctrinal Regime and the MOOM Alternative* (Nov. 5, 2025) (unpublished manuscript), https://ssrn.com/abstract=4965438.

4. Consistent with the analysis in this article, we previously criticized SB21 in two blog posts published in the lead-up to the adoption of the legislation. *See* Lucian A. Bebchuk, *Delaware: The Empire Strikes Back*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 4, 2025), https://corpgov.law.harvard.edu/2025/03/04/delaware-the-empire-strikes-back/ [https://perma.cc/8PK6-J2DF]; Lucian A. Bebchuk, Kobi Kastiel & Edward Rock, *Delaware and the Perils of Small Minority Controllers*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 5, 2025), https://corpgov.law.harvard.edu/2025/03/05/delaware-and-the-perils-of-small-minority-controllers/ [https://perma.cc/A3BU-5S2U].

We do not attempt to consider all the questions that the law of controlling shareholders has to resolve, nor do we discuss all the flaws of SB21. For example, we do not examine the criteria for determining whether a company has a controller. For a recent discussion of this issue, see Bainbridge, *supra* note 3. Regardless of the criterion used to determine the existence of a controller, a key question that remains is how potentially conflicted actions should be addressed. This is the question on which we focus.

public. At present, two of the "Magnificent Seven"—Google and Meta—are dual-class companies, with a combined market value exceeding $3 trillion.[5] The S&P 500 also includes many other dual-class companies.

In dual-class companies, controllers are commonly "small-minority controllers,"[6] having a lock on control with an ownership stake that often represents a small minority or even a very small minority of the equity capital. In such companies, agency problems are especially severe and costly.[7] These companies also seemed to have played a significant role in the pressures that led the Delaware legislature to adopt the recent legislation relaxing constraints on controlling shareholders.[8] Identifying the best way to address the severe agency problems posed by such companies is a challenge of first-order economic importance for corporate law. In this Article, we seek to contribute to addressing this challenge.

II. THE DELAWARE PENDULUM

For companies that have a controlling shareholder, a major concern for corporate law arises from potential conflicts between the interests of the controlling shareholder and other shareholders.[9] There is a wide range of corporate actions with respect to which the interests of the controller and other shareholders substantially diverge.[10] Such corporate actions include, for example, freezeouts in which the ownership rights of public investors are effectively transferred to the controller; self-dealing transactions, including compensation arrangements for controllers serving as executives of the controlled company; and the adoption of charter provisions that favor the controller's private interests.[11] These raise the concern that decisions with respect to such actions would favor the private interests of the controller. The intensity and prevalence of such situations has led many jurisdictions around the world, including Delaware, to be particularly "suspicious" in these situations.[12]

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5. The "Magnificent Seven" is a name given by investors to seven tech-focused companies—Alphabet, Amazon, Apple, Meta, Microsoft, Nvidia, and Tesla—whose performance has had an "outsize" influence on the S&P 500. Karl Russell & Joe Rennison, *These Seven Tech Stocks Are Driving the Market*, N.Y. TIMES (Jan. 22, 2024), https://www.nytimes.com/interactive/2024/01/22/business/magnificent-seven-stocks-tech.html [https://perma.cc/Y53R-3Y7R].

6. *See* Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453, 1462–68 (2019) (introducing this term and discussing in detail these structures and the policy problems they present).

7. *See* Lucian A. Bebchuk, Reinier Kraakman & George Triantis, *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash Flow Rights*, *in* CONCENTRATED CORPORATE OWNERSHIP 295 (Randall K. Morck ed., 2000); Bebchuk & Kastiel, *supra* note 6 at 1468–74.

8. *See* Bebchuk, Kastiel & Rock, *supra* note 4 (providing more information on Delaware-specific restraints).

9. *See, e.g.*, Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263, 1281–82 (2009).

10. *Id.* Such extraction is often referred to as "tunneling." *See generally* Atanasov, Black & Ciccotello, *supra* note 1.

11. *See* Bebchuk & Hamdani *supra* note 9, at 1283–84; *see also* Bebchuk & Kastiel, *supra* note 6, at 1476–78.

12. *See, e.g.*, Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 678 (2005); *see also In re* EZCORP Inc. Consulting Agreement Derivative Litig., No. 9962, 2016 WL 301245, at *11 (Del. Ch. Jan. 25, 2016) (quoting Strine, "[a]

In subsequent sections we put forward our favored approach to addressing this subject. Before doing so, we briefly discuss the evolution of Delaware law on the subject and, in particular, on whether and when independent director approval must be supplemented with MOM approval. In particular, we identify in this evolution three important milestones.

Under Delaware law, the key question, from a practical standpoint, is whether a court examining a potentially conflicted corporate action should apply the business judgment rule standard of review or the entire fairness standard of review. Under the former, the court would largely defer to the decision of the board and thereby avoid a substantive assessment of the effects of the corporate action. Under the latter standard of entire fairness, the court would scrutinize the substance of the transaction and assess the fairness of its terms.

Thus, the judicial oversight of corporate actions in potentially conflicted transactions has very much depended on whether a decision concerning a corporate action (or inaction) satisfied the conditions for the application of the business judgment standard. Corporate planners have thereby had substantial incentive to proceed in ways that would ensure the satisfaction of these conditions.

A. The Introduction of the MFW *Test for Freezeouts*

Over time, the conditions for having the business judgment standard apply to a conflicted corporate decision in a controlled company, and thereby for the decision to be cleansed, have substantially evolved. Some court decisions applied deference to decisions approved by independent directors, while others did not.[13]

Eventually, court decisions provided substantial clarity for freezeouts settings. In the case of *MFW*, the Delaware Chancery Court and subsequently the Delaware Supreme Court, established that, in freezeout situations, an independent director approval by itself would never be sufficient for use of the business judgment standard.[14] Rather, for this standard to govern a freezeout transaction, the transaction must have been approved *both* by an independent special committee and an informed vote of a majority of the minority shareholders.[15]

As will be discussed in Part III.A below, this approach was informed by the recognition that directors who are appointed and replaced by the controller, even if formally independent, should not realistically be expected to be sufficiently insulated from controller influence to serve as an effective cleansing mechanism. Accordingly, requiring MOM approval would be desirable to ensure that the terms of a freezeout are sufficiently close to those that would be produced by an arm's length negotiation.

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controlling stockholder occupies a uniquely advantageous position for extracting differential benefits from the corporation at the expense of minority stockholders").

13. *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983) (declining to apply the business judgment standard in squeeze-out mergers); Puma v. Marriott, 283 A.2d 693, 696 (Del. Ch. 1971) (applying the business judgment standard because a majority of the board which approved the transaction was independent). For a review of this development, see *In re* EZCORP Inc., *supra* note 12; *see also In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446 (Del. 2024).

14. *See generally* Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

15. *Id.* at 644–45.

B. From MFW *to* Match

Following the *MFW* decision, it remained necessary to settle whether (and to what extent) to apply "the *MFW* framework" to non-freezeout settings.[16] In a series of decisions, often described as "*MFW* creep," the Delaware Chancery Court extended the application of the *MFW* framework to other conflicted decisions in controlled companies.[17]

These other decisions included a decision to pay executive compensation or consulting fees that benefit the controller;[18] to provide the controller with a loan;[19] to adopt a reclassification introducing new classes of low-vote stock aimed at preserving a controller's lock on control;[20] to amend the charter to extend the duration of the company's dual-class stock structure;[21] and to reincorporate from Delaware to Nevada.[22] While Chancery Court decisions applied the *MFW* framework in some non-freezeout cases, they accepted it should not be applied to some corporate decisions such as decisions to initiate or terminate a derivative action.[23]

The application of the *MFW* framework beyond freezeouts generated significant discussion and debate. An article co-authored by former Chief Justice Strine argued that the use of the *MFW* framework should be limited to the freezeout setting.[24] Last year, the

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16. Nathaniel J. Stuhlmiller & Brian T.M. Mammarella, 'MFW*' Just Turned 10, But Is It Worth the Candle?*, DEL. BUS. CT. INSIDER (Jul. 3, 2024), https://www.rlf.com/wp-content/uploads/2024/07/MFW-Just-Turned-10.pdf [https://perma.cc/9UD8-DF2Z].

17. Gregory V. Gooding, Maeve O'Connor & William D. Regner, *Delaware Supreme Court Holds Entire Fairness Applicable to All Conflicted Controller Transactions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 8, 2024), https://corpgov.law.harvard.edu/2024/04/08/delaware-supreme-court-holds-entire-fairness-applicable-to-all-conflicted-controller-transactions/ [https://perma.cc/NAZ9-MFQP].

18. *See*, *e.g.*, Tornetta v. Musk, 250 A.3d 793, 800 (Del. Ch. 2019) (compensation arrangement with controller); *In re* EZCORP Inc., *supra* note 12, at *15 (services agreement with controller). For decisions prior to *MFW* that also declined to view independent director approval as cleansing a potentially conflicted decision, see Dweck v. Nasser, No. 1353, 2012 WL 161590, at *22 (Del. Ch. Jan. 18, 2012) (consulting fees paid to controller); Monroe Cnty. Emps.' Ret. Sys. v. Carlson, No. 4587, 2010 WL 2376890, at *1 (Del. Ch. June 7, 2010) (services agreement with controller); Carlson v. Hallinan, 925 A.2d 506, 529–30 (Del. Ch. 2006) (compensation paid to controller, management fee paid to controller's affiliates, and allocation of expenses to controller's affiliates); T. Rowe Price Recovery Fund, L.P. v. Rubin, 770 A.2d 536, 552–53 (Del. Ch. 2000) (services agreement with controller).

19. *See*, *e.g.*, Quadrant Structured Prods. Co. v. Vertin, 102 A.3d 155, 183–85 (Del. Ch. 2014) (decision to defer paying interest owed by controller). For an earlier decision that declined to apply the business judgment standard to a decision providing the controller with a loan, see *In re* MAXXAM, Inc., 659 A.2d 760 (Del. Ch.1995) (loan from corporation to controller and purchase of real estate from corporation by controller).

20. *See* IRA Tr. FBO Bobbie Ahmed v. Crane, No. 12742, 2017 WL 7053964, at *11 (Del. Ch. Dec. 11, 2017) (stating that there is "no principled basis on which to conclude that the dual protections in the *MFW* framework should apply to squeeze-out mergers but not to other forms of controller transactions.").

21. City Pension Fund for Firefighters & Police Officers v. Trade Desk, Inc., No. 2021-0560, 2022 WL 3009959, at *1 (Del. Ch. July 29, 2022).

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

23. *See In re* EZCORP Inc., *supra* note 12 (accepting earlier holdings that established the underlying conflicted transaction conducted by the controller as subject to entire fairness review does not automatically satisfy the demand futility test in derivative litigation, while acknowledging that these holdings are in tension with the line of cases in which the *MFW* framework was applied).

24. Hamermesh, Jacobs & Strine*, supra* note 3, at 325.

Delaware Supreme Court took up this issue in the *Match Group, Inc. Derivative Litigation* case.[25]

The *Match Group* case involved a multi-step reverse spinoff initiated by its controller.[26] The Court of Chancery applied the *MFW* framework without objection by any of the parties.[27] On appeal, however, the defendants argued that, because the reverse spinoff was not a freeze-out merger, MOM approval was not necessary for applying the business judgment standard.[28] Taking up this argument, the Delaware Supreme Court reaffirmed the applicability of *MFW* to transactions beyond the freezeout category.[29]

Whereas the Supreme Court established in *Match* that the *MFW* framework and MOM votes should not be limited to freezeout settings, the decision did not fully resolve the set of conflicted actions calling for such use in non-freezeout settings. In particular, the *Match* decision made clear that this set should not involve decisions regarding derivate suits.[30]

Furthermore, in *TripAdvisor*, in an appeal over a Chancery Court application of the *MFW* framework to a decision to reincorporate to Nevada, the Supreme Court reversed the decision.[31] The Court held that the move should not have been regarded as providing the controller with a private benefit because the alleged reduction in litigation risk resulting from a change in domicile was too hypothetical and speculative to constitute a non-ratable benefit.[32]

To the extent that the Delaware courts were to continue to examine the set of non-freezeout decisions for which MOM votes should be required, the approach we propose in Part IV would have offered a consistent and conceptually coherent framework for doing so. For now, however, this judicial inquiry will no longer continue because the Delaware legislature has stepped in.

C. SB21

In response to the *Match Group* decision, as well as some prior judicial decisions, the Delaware legislature passed in March 2025 a set of amendments to the DGCL that were commonly referred to as SB21.[33] SB21 sought to bring full clarity to the set of corporate actions for which MOM approval would be needed to supplement independent board approval in order to secure the use of the business judgment standard.

SB21 overturned *Match Group*, as well as the line of Chancery Court decisions leading to it, by mandating that independent board approval would always be sufficient to

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25. *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446 (Del. 2024).

26. *Id.* at 451.

27. *Id*. at 452.

28. *See* Suppl. Reply Br. of the IAC Defendants at 2–3, *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446 (Del. 2024) No. 2020-0505, 2023 WL 6702893.

29. *Match*, 315 A.3d at 463 (Del. 2024) (stating that there is "a heightened concern for self-dealing when a controlling stockholder stands on both sides of a transaction and receives a non-ratable benefit").

30. *Id.* at 469 ("*Aronson* and our demand review precedent stand apart from the substantive standard of review in controlling stockholder transactions. The distinction is grounded in the board's statutory authority to control the business and affairs of the corporation, which encompasses the decision whether to pursue litigation.").

31. Maffei v. Palkon, No. 125, 2024, 2025 WL 384054 (Del. Feb. 4, 2025).

32. *Id*. at *26 (stating that the plaintiffs did not allege that the reincorporation was intended "to avoid any existing or threatened litigation or that they were made in contemplation of any particular transaction").

33. *See* S. 21, 153rd Gen. Assemb. (Del. 2025) ("SB21").

cleanse corporate decisions in any non-freezeout settings.[34] With this rule in place, corporate planners would not have an incentive, and would not be expected, to seek MOM approval for such corporate decisions. By contrast, SB21 codified that MOM approval would be a necessary supplement to an independent director's approval only in freezeout decisions.[35] Does this differential treatment of freezeout and non-freezeout cases make sense? Below we explain that it does not.

III. THE UNTENABLE CASE FOR LIMITING MOM APPROVALS TO FREEZEOUTS

In what situations should MOM approval be required for a cleansing of a conflicted corporate decision? Section A begins this discussion by analyzing the rationale that was offered for the judicial introduction of MOM approval for freezeout decisions. In Section B we discuss the "MOM minimalism" view that the use of MOM approvals should be limited to freezeout settings, and we explain why the case for such a limitation is untenable.

A. The Rationale for MOM Approvals in Freezeouts

In decisions with respect to freezeout cases preceding the *MFW* ruling, judicial opinions engaged in inquiries aimed at examining whether the approval of the freezeout by independent directors could serve as an effective safeguard for protecting minority shareholders. In principle, the courts were open to relying on independent director approval, provided it withstood careful scrutiny of the process followed by the independent committee.

What led to the adoption of the *MFW* doctrine, however, was a recognition that independent directors considering a freezeout favored by the controller could well go along with the controller's preferences no matter how carefully they designed the process. An article by former Chief Justice Strine, who wrote the Chancery Court decision in *MFW*, provides a vivid and well-known explanation of the issue:

> "[A] squeeze-out merger posed special dangers of overreaching by the majority [shareholder]. In essence, this strain of thought was premised on the notion that when an 800-pound gorilla wants the rest of the bananas, little chimpanzees, like independent directors and minority stockholders, cannot be expected to stand in the way, even if the gorilla putatively gives them veto power. Lurking in the back of the directors' and stockholders' minds is the fear that the gorilla will be very angry if he does not get his way. As a result, we cannot fully trust the traditional protective devices that the law uses to validate interested transactions."[36]

An earlier article co-authored by one of us provides an analysis of the incentives of independent directors in controlled companies that provides a conceptual basis for the

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

above view.[37] Such an incentive analysis is necessary because for independent directors to vet conflicted decisions well, they must (i) lack distorted incentives to favor private interests of the controller, and (ii) have affirmative incentives to protect the interests of other shareholders and firm value.[38] Such an analysis reveals that independent directors in controlled companies often have both (i) incentives to favor controlling shareholders and (ii) little countervailing incentive to protect public investors from value diversion.

In a controlled company, the continued service of directors—including independent directors—depends on the decisions of the controller. Going along with the controller should then be expected to reduce the odds that the controller will remove the director. Individuals would be expected not to be elected or reelected following their initial term unless the controlling shareholder supports their candidacies. Furthermore, as was documented in a study by Professor Da Lin, controllers frequently appoint nominally independent directors to senior positions and directorships at other firms under their control, and going along with the controller will increase the odds of receiving such positions.[39]

This state of affairs provides directors with substantial incentives to ensure that the controller is satisfied and not displeased.[40] Incentives aside, social norms often lead individuals who are placed in a position by a given individual to feel some sense of gratitude toward that individual.[41]

The key point is that the above incentives would be at work even in the case of directors that are formally independent and have no particular ties with the controller.[42] Certainly, to the extent that a director has some significant ties to the controller that preclude classification as independent, such ties might strengthen the incentives of directors to go along with the wishes of the controller.[43] However, even without such additional ties to the

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37. Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271 (2017).

38. *See id.* at 1288–90.

39. *See generally* Da Lin, *supra* note 1.

40. There is some empirical evidence that formally independent directors might perform their oversight roles more effectively—and might have better incentives to do so—than non-independent directors. *See, e.g.*, Lucian A. Bebchuk, Yaniv Grinstein & Urs Peyer, *Lucky CEOs and Lucky Directors*, 65 J. FIN. 2363 (2010) (showing that the incidence of option backdating is lower when a majority of the board is composed of independent directors). However, much of this literature (including the above-mentioned study) is based on samples composed predominantly of public companies without a controlling shareholder. In such companies, formally independent directors may often view themselves as less dependent on the CEO than formally independent directors in controlled companies perceive themselves to be with respect to the controller.

41. *See* LUCIAN A. BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 23–44 (2006) (discussing how having a sense of obligation and loyalty toward the CEO might contribute to a tendency to go along with CEO pay wishes).

42. *See also* Goshen, Hamdani & Lund, *Fixing* MFW, supra note 3, at 52 (explaining that disinterested shareholder approval "is surely a better measure of the fairness of the transaction and its terms than an approval by independent directors").

43. A director, for example, would not be formally classified as independent if they co-own a plane, provide consulting services to the controller, or serve as an employee of a company over which the controller has considerable influence. *See* Sandys v. Pincus, No. 157, 2016, 2016 WL 7094027 at *4 (Del. Dec. 5, 2016) (noting that co-ownership of a private plane "is suggestive of the type of very close personal relationship that, like family ties, one would expect to heavily influence a human's ability to exercise impartial judgment."); *In re* Emerging Commc'ns, Inc. S'holders Litig., No. 16415, 2004 WL 1305745, at *34–35 (Del. Ch. June 4, 2004) (finding a lack of independence when a director provided and was compensated for financial advisory services to the controlled company); Del. Cty. Emps. Ret. Fund v. Sanchez, 124 A.3d 1017, 1019 (Del. 2015) (holding that a director

controller, service on the controlled company's board produces by itself a structural incentives problem.

B. Are Non-Freezeout Settings Sufficiently Different?

Having discussed the case for not relying on independent director approval as a cleansing mechanism for freezeouts decisions, we now turn to examine whether such approval should be used as a cleansing mechanism in non-freezeout contexts. The new Delaware legislation answers this question strongly in the affirmative; the legislation permits reliance on independent director approval as a cleansing mechanism in non-freezeout decisions, while continuing to avoid such reliance in freezeout situations.[44] Such differential treatment, however, cannot be grounded in any solid policy arguments, and should not be adopted as an element of corporate laws seeking to serve shareholder value and firm value.

The key point is that, if independent director approval cannot serve as an effective screening mechanism to protect against (i) freezeouts that serve the controller at the expense of other shareholders, then they also cannot serve as an effective mechanism to protect against (ii) decisions in non-freezeout conflicted settings that would serve the controller at the expense of other shareholders. If anything, independent director approval could well be less effective, and certainly not more effective, with respect to (ii) than with respect to (i).

Recall Leo Strine's metaphorical description of how chimpanzees can be expected to act when they face an 800-pound gorilla who wants the rest of the bananas all for itself.[45] Anyone who recognizes that (i) the chimpanzees could not be expected to resist the gorilla who wants certain bananas, should also recognize that in this situation (ii) the chimpanzees could not be expected to resist the gorilla if it wants certain other fruits.[46] The key problem with non-freezeout decisions in controlled companies is that, as in freezeout decisions, independent directors appointed by the controller have significant incentives to go along with the controller and lack sufficient countervailing incentives to resist the controller in order to protect other shareholders.

Might it be that non-freezeout situations, or at least some of them, have characteristics that provide independent directors with incentives to protect minority shareholders that are not present in freezeout situations? To show that this is not the case, we discuss below several possible claims.

First, it might be claimed that independent directors have incentives to avoid catering to the controller in order to protect their reputation.[47] This reputation might be valuable to the independent directors both intrinsically and to increase their chances of getting board

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was not independent of a controller when he had a close friendship of over half a century with the controller and his primary employment was as an executive of a company over which the controller had substantial influence).

44. *See* S. 21, 153rd Gen. Assemb. (Del. 2025).

45. Strine, *supra* note 36.

46. Among the favorite fruits of gorillas are berries and guavas. *See generally Mountain Gorilla Diet & Eating Habits: (What Do Gorillas Eat)*, KABIRA SAFARIS & TOURS https://kabiragorillasafaris.com/what-do-gorillas-eat [https://perma.cc/4EV6-YHYM].

47. *See* Hamermesh, Jacobs & Strine, *supra* note 3 at 342–44 (explaining that in non-freezeout situations independent directors might be motivated to constrain the controller by reputational considerations); *cf.* Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1052 (Del. 2004) ("[T]he non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director.").

seats in the future. However, if anything, this factor should not be expected to be stronger, and is likely to be weaker, in non-freezeout situations than in freezeouts settings.

Failures by independent directors to fulfill their oversight role adequately are more likely to attract the attention of institutional investors—and to influence their perceptions—in freezeout situations, and certainly not less likely, than in non-freezeout settings. A freezeout is generally a major and salient corporate event. Its occurrence and the adequacy of the freezeout terms are likely to receive significant attention from institutional investors. However, this is not generally the case for all non-freezeout situations. The economic impact of many conflicted decisions is significantly lower than that of a freezeout, and this lower economic impact may reduce the attention institutional investors devote to such decisions and to assessing their fairness.

Second, unlike freezeout decisions, non-freezeout decisions are not end-game decisions in a company that is expected to cease to exist. Consequently, the argument might go, independent directors in an ongoing company may place greater weight on how their decisions will affect their chances of being reelected in future board elections and, as a result, may be more attentive to how they are perceived by institutional investors. However, in a controlled company, continuing to have the support of the controller is critical to any future reelection. Accordingly, when it comes to increasing the odds of future reelection, how an independent director is perceived by the controller is more important than how they are perceived by institutional investors. Accordingly, the controller's perception of the directors is most critical for the prospect of obtaining directorships in other businesses owned by the same controller, as well as in companies controlled by other controllers.

Third, while going along with the controller is expected to increase the odds of receiving future directorships in controlled companies, it might be argued that how an independent director is perceived by institutional investors is relevant for the director's prospects of obtaining directorships in public companies without a controlling shareholder. However, there is no basis for viewing this factor as weightier for directors making freezeout decisions than for directors making non-freezeouts decisions. Indeed, because institutional investors (as discussed earlier) are more likely to pay attention to value-reducing freezeout decisions than to many value-decreasing non-freezeout decisions that have a smaller economic impact, this factor should not be expected to weigh heavier in non-freezeout decisions than in freezeout decisions.

Fourth, it has been argued that independent directors should not be reluctant to oppose a non-freezeout corporate action favored by the controller because the courts can be expected to block the corporate action if director approval of it was extracted by threats made to the directors by the controller.[48] We note that this claim is no longer relevant under the state of law established by the recent Delaware legislation: this legislation precludes plaintiffs from using books and record requests to obtain emails, text messages, or informal board communications to and from directors that could provide evidence of threats,[49] and,

48. This argument is made by Hamermesh, Jacobs, & Strine, *supra* note 3, at 344. *Cf In re* Dole Food Co., Inc. Stockholder Litig., No. 8703, 2015 WL 5052214, at *13–15 (Del. Ch. Aug. 27, 2015) (describing threats that a controlling shareholder made against a director who opposed a transaction proposed by the controller).

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

furthermore, the legislation would preclude courts from providing equitable relief even if evidence of such threats were provided.[50]

In any event, even assuming that controllers were fully deterred from making explicit threats to independent directors, formally independent directors would likely expect that resisting the controller might well reduce the likelihood of their reappointment by the controller. And such expectations, even without any explicit threats, should by themselves be expected to have incentives to go along with controller wishes. Any adequately lawyered controller would not cite a desire to penalize the director as a reason for choosing to discontinue the service of an independent director or as a reason for not considering them for future positions in enterprises owned by the controlled. Thus, notwithstanding the considered claim, going along with controller wishes would likely best serve the private interests of an independent director in controlled companies.

Thus, we conclude that there is no basis for believing that independent director approval should be expected to serve as a more effective oversight mechanism for addressing controller agency problems in non-freezeout settings than in freezeout settings. Indeed, if anything, independent director approval could be expected to be even *less effective* as a cleansing mechanism in non-freezeout settings than in freezeout settings.[51]

To be sure, as discussed in Part IV.A below, the use of MOM votes in non-freezeout settings might be opposed on grounds that this remedy is too costly or an ineffective instrument for protecting minority shareholders. However, a differential legal treatment of freezeout and non-freezeout settings *cannot be supported* on grounds that, while independent director approval is insufficient cleansing mechanism in freezeout settings, it is a sufficient cleansing mechanism in non-freezeout settings. Such a view, we have shown, is untenable.

The recent Delaware legislation, which allows independent director approval to serve as an absolute cleansing mechanism in non-freezeout settings but not in freezeout settings, is thus internally inconsistent and conceptually incoherent from a policy perspective. It is also detrimental to the interests of public investors in controlled companies and leaves them inadequately protected. What then would be best to do? In Part IV we turn to this question.

IV. A Proposed Approach to Governing Controller Conflicts

We now turn to outlining a framework for addressing controller conflicts. We argue this approach, would be superior to the current legal state of affairs post-SB21, and would also offer significant advantages over the approach followed by Delaware courts pre-SB21.

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

51. It is worth noting that certain provisions of SB21 make it easier for directors to qualify as independent directors. In particular, SB 21 imposes a strong presumption of independence for directors who are not a party to a transaction and who have been deemed independent under rules of the stock exchange on which the corporation's common stock is listed *See id.* § 144(d)(2). Thus, the effectiveness of independent director approval as a cleansing mechanism would be weaker post-SB21 than it was pre-SB21. This argument, however, is unnecessary given the analysis in this Section, which shows that even if this provision did not exist, there is less basis for relying on independent director approval as a cleansing mechanism in non-freezeout settings than in freezeout settings.

A. Two Types of Corporate Actions

The preceding Part has shown that opposing the use of MOM approvals in non-freezeout settings cannot be based on a claim that independent director approval is an effective cleansing mechanism in such settings. However, we would like to note some legitimate concerns that might be raised with respect to expanded use of MOM approvals even after recognizing that independent director approval is not an effective cleaning mechanism. In particular, one might be concerned that despite the limitations of relying on independent director approval in non-freezeout settings using MOM approvals is a costly and ineffective instrument.

Such a concern can be raised with respect to decisions, such as paying certain executive compensation to the controller or discontinuing a derivative suit, for which there is no statutory requirement to hold a shareholder vote. This concern might be raised for two reasons. First, it might be argued that introducing MOM votes for such decisions would substantially increase the number of votes and/or the number of issues included in each vote, and that such an increase would be excessively costly. Seeking MOM approval in such a setting could impose delay costs, as well as costs arising from increased disclosure and solicitation expenses.

Furthermore, and perhaps most importantly, beyond the increased costs, adding votes may not always produce corresponding benefits. Shareholders may be unable and unprepared to obtain relevant information and make an informed choice with respect to additional issues brought to a vote. Even institutional investors that are prepared to invest in assessing the terms of a proposed freezeout because of its large expected economic impact on their interests might not be equipped to assess and cast an informed vote on issues that are of lesser economic importance, especially when doing so requires obtaining and analyzing information they do not already possess.

Consider a decision whether to discontinue a derivative suit that was initiated against a controller. Suppose further that, for the various reasons discussed earlier, independent directors will favor the controller by being excessively willing to discontinue the suit. Even under this assumption, it is far from clear that the problem could be addressed by seeking MOM approval for a discontinuation of any such derivative suit. In many cases, institutional investors will lack sufficient information and might not be prepared to invest in acquiring it or to make an informed assessment of the pros and cons of continuing the litigation.

For this reason, we put forward an approach that would take this issue into account. In particular, our approach would distinguish between two types of potentially conflicted decisions: first, decisions for which a shareholder vote is statutorily required; and, second, decisions for which a shareholder vote is not statutorily required.

For the latter type of decisions, our proposal offers an intermediate approach. We recognize that independent director approval cannot serve as an effective cleansing mechanism. At the same time, for decisions where shareholders cannot reasonably be expected to cast well-informed votes, our approach would not require MOM approval of the decision itself, but rather approval by enhanced-independence directors who received MOM approval for their appointment.

B. When a Shareholder Vote is Statutorily Required

Under the Delaware corporate code (as well as under the corporate codes of other states), a shareholder vote of approval is required for a specified set of corporate actions that can be regarded as bringing about "fundamental" changes. These actions include mergers, the sale of substantially all the corporation's assets, and liquidations.[52] These actions also include changes to the company's basic "rules of the game"—charter amendments and reincorporations.[53]

For all these types of corporate action, we suggest that the case for applying the *MFW* framework is very strong. Independent director approval by itself should not be sufficient for cleansing, and meeting all other *MFW* conditions, including MOM approval, should be required for such cleansing.

To begin, as already explained, independent director approval is insufficient for cleansing such major corporate actions.[54] Because of the major significance of such actions, the corporate code does not view director approval as sufficient even in companies without a controlling shareholder. These statutory voting requirements reflect the importance of such corporate actions in protecting investors, and thus the need to establish an additional layer of protection for the benefit of shareholders.

However, in companies with a controlling shareholder, requiring a shareholder vote of approval does not provide any protection to public investors if MOM approval is not required. Because the controller is able to secure passage of the vote even without substantial—and sometimes without any—support from public investors, the shareholder vote of approval does not prevent an action that would hurt public investors and is favored by the controller only due to its private interests.

Furthermore, for major corporate actions that statutorily require a shareholder vote, the concern that using MOM votes would introduce costly procedures or attract little shareholder interest does not arise. In these cases, the occurrence of a vote is already mandated by the statute; the only additional step would be to count the level of support among votes cast by shares not held by the controller. As a result, using MOM approval as a screening mechanism would not produce significant additional costs or delays.

Moreover, the shareholder vote requirement reflects the corporate code's judgment that the matter is potentially important for shareholders, that it could be reasonable for them to pay attention to it, and that they could well be interested in having the opportunity to express their views on it.

We note that the above analysis warrants a different approach to reincorporations than the one adopted by the Delaware Supreme Court's pre-SB21 decision in *TripAdvisor*.[55] In this case, the Court declined to require a MOM vote for the business judgment standard to be applied, reasoning that the risk to public investors from the proposed reincorporation to Nevada was, at that stage, "speculative." However, under our analysis, the key question is

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52. *See* DEL. CODE ANN. tit. 8, § 251 (2020) (mergers); DEL. CODE ANN. tit. 8, § 271 (2010) (sale of substantially all assets); DEL. CODE ANN. tit. 8, § 275 (2022) (liquidations).

53. *See* DEL. CODE ANN. tit. 8, § 242 (2023) (charter amendments). Reincorporations are generally technically affected through a merger and thus are governed by DEL. CODE ANN. tit. 8, § 251. For an introduction and a detailed discussion of the concept of corporate "rules of the game," see Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).

54. *Supra* Part II.B.

55. *See* Maffei v. Palkon, No. 125, 2024, 2025 WL 384054 (Del. Feb. 4, 2025).

whether the reincorporation would affect the interests of the controller and public investors differently—which, in the case of a reincorporation to Nevada, it did. For this reason, given that shareholder approval was statutorily required and that the controller's support did not eliminate the possibility that the reincorporation would benefit the controller at the expense of other shareholders, cleansing would not be warranted in the absence of MOM approval.

C. When a Shareholder Vote is not Statutorily Required

We now turn to corporate actions for which a shareholder vote of approval is not statutorily required. These actions include related-party transactions with the controller, such as payment of executive compensation or consulting fees, selling or buying assets or services to or from controller-affiliated entities, and lending to or borrowing from the controller.[56] These actions also include permitting the controller to take opportunities that belong wholly or partly to the company, as well as decisions whether to initiate a derivative lawsuit against the controller and whether to settle, continue, or discontinue such litigation.[57]

As Subsection III.B explained, formally independent directors lack adequate incentives to ensure that such decisions serve the interests of shareholders and are not distorted in any way by the private interests of the controller. Therefore, independent director approval cannot—and should not—serve as a cleansing mechanism.[58] A different cleansing mechanism is needed. One option is to use MOM approvals as a cleansing mechanism. Delaware Chancery Court decisions in the pre-SB21 period applied the *MFW* framework to decisions regarding related-party transactions with the controller.[59] We view this approach as a reasonable one to follow.

However, the pre-SB21 Chancery Court decisions stopped short of applying the *MFW* framework to *all* conflicted decisions in controlled companies. In particular, even Chancery Court judges who advanced the use of MOM approvals as a cleansing mechanism accepted that some conflicted decisions—and in particular decisions with respect to the initiation, settlement, or discontinuation of derivative litigation against the controller—would not require MOM approvals for cleansing.[60] As we discussed in Subsection IV.A, there are legitimate concerns that expanding the use of MOM approvals to certain decisions, and in particular to decisions regarding derivative litigation against the controller, would impose costs without producing corresponding benefits.

Therefore, we propose an *intermediate* approach for all or certain conflicted decisions for which a shareholder vote is not statutorily required. For the decisions subject to this

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56. *In re* EZCORP Inc. Consulting Agreement Derivative Litig., No. 996, 2016 WL 301245 (Del. Ch. Jan. 25, 2016); Tornetta v. Musk, 250 A.3d 793 (Del. Ch. 2019); Monroe Cnty. Emps.' Ret. Sys. v. Carlson, No. 4587, 2010 WL 2376890 (Del. Ch. June 7, 2010); Carlson v. Hallinan, 925 A.2d 506 (Del. Ch. 2006); T. Rowe Price Recovery Fund, L.P. v. Rubin, 770 A.2d 536 (Del. Ch. 2000) (services agreement with controller).

57. *In re EZCORP,* 2016 WL 301245.

58. *Cf.* Goshen, Hamdani & Lund, *Fixing* MFW, *supra* note 3, at 43, 51 (arguing that "for transactions involving idiosyncratic vision or significant deals, special committee approval alone should not be enough to immunize the transaction from judicial review" and that "when the transaction increases in size, the risk of biased decision making rises" and makes a special committee approval inferior to an MOM vote as a cleansing mechanism).

59. *See* court decisions cited in *supra* notes 18–25.

60. *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446 (Del. 2024).

intermediate approach, independent director approval alone would not suffice for cleansing. However, a combination of MOM approval and independent director approval would be sufficient, but not required, for cleansing. Corporate planners would also be able to obtain such cleansing by having enhanced-independence directors on the board and obtaining their approval of the conflicted decision.

Enhanced-independence directors are directors that are not merely formally independent from the controller but ones that are accountable also to the other shareholders.[61] Recall our earlier conclusion that independent directors whose appointment and removal are fully dependent on the controller have strong incentives to go along with the controller's wishes and few incentives to resist the controller in order to protect other shareholders.[62] The introduction of enhanced-independence directors is aimed at putting in place directors with different incentives.

There are various alternative versions of how enhanced-independence directors would be elected. Under one version, the initial election of such directors, and each subsequent renewal of their term in office, would require MOM approval. Under this version, the veto power that public investors would have over the initial appointment and the continued service of each enhanced-independence director would provide this director with affirmative incentives to resist corporate actions that would hurt public investors while benefitting the controller's private interests.

That is, enhanced-independence directors would attain their position in a different way than "traditional" independent directors. This difference would help counteract the incentives that traditional independent directors have to go along with controller wishes, while also introducing certain incentives, currently lacking in traditional independent directors, to serve the interests of public investors. Furthermore, if strengthening these incentives for enhanced-independence directors is deemed desirable, the definition of enhanced-independence could be tightened to grant public investors exclusive power over their initial appointment or renewal of service.

It is worth highlighting how the use of enhanced-independence directors is related to, and can serve as a substitute for, the use of MOM approvals. When cleansing of conflicted actions for which a vote is not statutorily required is done via MOM approvals, public investors get the opportunity to express their preferences, and thereby protect their interests, by voting on each action. However, the addition of such votes might be costly and might not be useful to public investors who lack the necessary information. Under this intermediate approach, MOM approvals for specific conflicted actions would be replaced by MOM approval for the election of the enhanced-independence directors tasked with overseeing these conflicted actions. Essentially, each conflicted action is viewed as having indirect MOM approval if approved by directors who themselves received MOM approval.

The intuition is that annual MOM approval of enhanced-independence directors is a substitute for holding a separate MOM vote on each conflicted transaction. In each case, the action would receive the support of public investors. With a transaction-level vote, shareholders give their assent directly to conflicted corporate actions. With a MOM vote on the directors' selection, the shareholders indirectly support approved corporate actions

61. For the introduction of the concept of enhanced-independence directors, and a detailed discussion of the various ways such directors may be selected and operate, see Bebchuk & Hamdani, *supra* note 37.

62. *Supra* notes 37–39 and accompanying text.

by having approved the directors whom they rely upon to screen conflicted corporate actions. Thus, the intermediate approach enables shareholders to protect themselves not by micromanaging every potentially conflicted action, but instead by approving enhanced-independence directors to screen such actions on behalf of the public investors.

Thus, applying the intermediate approach to conflicted corporate actions can be regarded as functionally equivalent to applying the *MFW* framework to all conflicted corporate actions. To the extent that enhanced-independence directors effectively serve as a substitute for MOM approvals, using them would have the advantage of avoiding the introduction of many additional votes beyond those statutorily required.

Public investors are generally called upon to vote on directors in general shareholder meetings,[63] and requiring MOM approval for classification of directors as enhanced-independence directors would provide them with incentives to pay attention to the identity of directors and to cast an informed vote on the subject. Note that, once a practice of enhanced-independence directors is established, it is likely that institutional investors and proxy advisors would devote more attention to tracking the effectiveness of these directors in fulfilling their screening responsibilities. Accordingly, enhanced-independence directors in any given controlled company would be incentivized to protect the company's public investors not only by fear that not doing so would lead these investors to vote against their appointment in future elections but also by fear that not doing so would make it difficult for them to be elected as enhanced-independence directors in other controlled companies.

It might be argued that controllers would generally have little difficulty obtaining MOM approval for their preferred director candidates. Supporters of this argument may point out that Tesla's public investors, voting at annual meetings, did not register significant opposition to any of the Tesla directors whose decisions were scrutinized in the *Tornetta* case.[64] However, Tesla's public investors voting on Musk-supported candidates did not expect that their votes would affect the extent to which conflicted decisions would be cleansed. In a legal regime where public investor votes on directors are expected to have such an effect, public investors, and in particular institutional investors holding minority shares, should be expected to attach greater importance to these votes and to decline to support on such director candidates. It is worth noting in connection with this point that supporters of MOM votes in freezeouts required that these transactions be conditioned on obtaining a MOM approval precisely in order to make clear to minority shareholders that their votes would have a meaningful impact on the outcome.

Finally, the concept of enhanced-independence directors is not merely academic, and versions of it have been used in the past. In the United States, the AMEX exchange listing guidelines in the 1970s requiring that dual-class companies give shareholders with inferior voting rights the power to elect a quarter of the board, and the governance documents of a significant number of dual-class companies still comply with this requirement.[65] Other

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63. Adam Hayes, *What Are Stockholder Voting Rights, and Who Gets a Vote?*, INVESTOPEDIA (Jan. 28, 2025), https://www.investopedia.com/terms/v/votingright.asp [https://perma.cc/Y7TD-3DYU].

64. For the results of the director election votes at the three annual meetings preceding the Tornetta compensation decision, see Tesla, Inc., Current Report (Form 8-K) (May 16, 2023); Tesla, Inc., Current Report (Form 8-K) (Aug. 5, 2022); Tesla, Inc., Current Report (Form 8-K) (Oct. 13, 2021).

65. *See* Kobi Kastiel, *Against All Odds: Hedge Fund Activism in Controlled Companies*, 2016 COLUM. BUS. L. REV. 60, 92–93, 126–28, 127 n.212 (noting that 26 Delaware dual-class firms had proportional voting for directors in 2012 and discussing how these arrangements have operated to the benefit of public investors).

versions of this approach are currently in place in the United Kingdom,[66] Italy,[67] and Israel.[68] Delaware corporate law, and other U.S. state corporate laws, would do well to consider adopting this approach.

V. CONCLUSION

This Article has examined which controlled company situations should—and should not—require MOM approval for their cleansing. After a long, multi-decade journey, Delaware law now draws a sharp distinction between the freezeout and non-freezeout scenarios: a supplemental MOM vote is required to avoid exacting judicial scrutiny in freezeout situations, whereas independent director approval—without a MOM vote—is sufficient for non-freezeout settings. We have shown that drawing such a sharp distinction between freezeout and non-freezeout situations is conceptually inconsistent and provides shareholders with insufficient protection in non-freezeout settings.

In particular, accepting independent director approval as a sufficient cleansing mechanism outside freezeout situations—which has been supported by some commentators and court decisions with respect to some such situations, and is now enshrined in the Delaware corporate code—fails to recognize that structural incentive problems also afflict independent director decisions in non-freezeout contexts. If anything, the effectiveness of independent director approval as a cleansing mechanism may be even weaker—and certainly not stronger—in non-freezeout settings than in freezeout situations. Accordingly, general reliance on independent director approval as a cleansing mechanism for non-freezeout decisions would leave outside investors with seriously inadequate protection from decisions that may be heavily distorted by the private interests of controllers.

Furthermore, we have put forward an approach for governing controller conflicts that would constrain controller opportunism in a desirable and internally consistent way. For all corporate actions that statutorily require shareholder approval, which include not only freezeouts but also rule-of-the-game decisions such as charter amendments and re-incorporations, cleansing would also require MOM approval and not just independent director approval. For corporate actions that do not statutorily require a shareholder vote, introducing an additional special vote could be avoided by obtaining the approval of enhanced-independence directors whose appointment received an earlier MOM approval.

To address shareholder protections in controlled companies, then, it would be important to move away from the current state of Delaware law. We hope that our analysis will be useful for understanding the importance and desirable direction of such a move.

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66. The United Kingdom's Financial Conduct Authority mandates that in controlled companies, independent directors must be elected with approval by both a majority of shareholders and a majority of minority shareholders. FIN. CONDUCT AUTH. FCA 2014/33, LISTING RULES (LISTING REGIME ENHANCEMENTS) INSTRUMENT 2014 12 (2014) https://www.handbook.fca.org.uk/instrument/2014/FCA_2014_33.pdf [https://perma.cc/D723-X9KF].

67. Public Italian companies must provide minority investors with the power to elect at least one member to the board. Massimo Belcredi & Luca Enriques, *Institutional Investor Activism in a Context of Concentrated Ownership and High Private Benefits of Control: The Case of Italy* 8 (Eur. Corp. Governance Inst., Working Paper No. 225/2013, 2014) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325421.

68. In Israel, public companies must have two "external directors" who are subject to a veto by the minority shareholders and to reelection by the minority against controller opposition. Companies Law, 5759-1999, § 239 (as amended).