Moelis and Private Equity in the Public Market

Gladriel Shobe,[†] Jarrod Shobe[††] & William W. Clayton[†††]

In 2024, the landmark Moelis *opinion invalidated certain types of contractual control provisions that allow an insider stockholder to supplant a board's statutory role. The* Moelis *opinion sparked a corporate-law civil war, with proponents of* Moelis *arguing that insider control rights harmfully undermine Delaware's historic board-centric model. Critics claimed the decision upended long-established market practices and used that justification to support new, broad legislation overruling* Moelis*. The Delaware legislature, practitioners, and scholars invoked assertions about "market practice" without citing data on who uses these rights, how often they are used, how they operate, and whether and how they sunset.*

This Article draws on a novel dataset of 1,362 IPOs from 2010 to 2021, to provide the context and nuance that was missing from the Moelis *debate. This study finds that the broad veto rights present in the* Moelis *case, which allowed one stockholder to block nearly any significant board action, are relatively rare, while board nomination rights, which were not invalidated by* Moelis*, are common. It also finds that private equity funds are the primary beneficiaries of these rights. Private equity funds' abbreviated investment timelines, coupled with their managers' compensation structures, create a unique set of characteristics, motivations, and incentives in an IPO that are different from other pre-IPO owners and public investors. This Article examines those differences and the unexplored implications that they have for public markets.*

The findings also challenge key justifications for overriding Moelis*. Contrary to claims that* Moelis *urgently needed to be overruled because it threatened a vast number of stockholder agreements, our data show that aggressive stockholder agreements of the type invalidated in* Moelis *are rare and phased out relatively quickly. Nevertheless, the debate surrounding*

† Professor of Law, Brigham Young University, J. Reuben Clark Law School.

†† Professor of Law, Brigham Young University, J. Reuben Clark Law School.

††† Professor of Law, Brigham Young University, J. Reuben Clark Law School. For helpful comments and discussions, thanks to Emiliano Catan, Elisabeth De Fontenay, Jill Fisch, Marcel Kahan, Elizabeth Pollman, Ed Rock, participants at the BYU Winter Deals Conference, American Law and Economics Association Conference, and the London School of Economics Law and Finance of Private Equity and Venture Capital Conference. For especially helpful comments on our discussion of the *Moelis* decision and the interaction between stockholder agreements and fiduciary duties, we thank J. Travis Laster. For earlier conversations regarding private-equity shareholders and data collection, we acknowledge Ria Sen. We are grateful for support from BYU Law School, including BYU Law Library Director Shawn Nevers. For invaluable research assistance we are grateful to Jack Chiu, Emily Christensen, and Chase Geertsen.

Moelis *ended with a legislative response that not only overruled* Moelis *but went much further by allowing corporations to enter contracts that can allocate virtually any board-level governance power to insiders. By extending well beyond existing market practice, the new law invites insider stockholders, and private equity firms in particular, to test the outer limits of contractual governance.*

Introduction

In 2024, Delaware corporate law underwent a dramatic upheaval in response to *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*,[1] a Court of Chancery decision that cast doubt on the enforceability of certain stockholder contractual control rights. Invoking Delaware's statutorily required board-centric model of corporate governance, *Moelis* invalidated certain contractual provisions that granted a corporate insider extensive veto power and board-composition authority via a stockholder agreement, concluding that these provisions improperly divested the board of its statutory role.[2] The ruling provoked swift backlash. Within months, the Delaware General Assembly enacted S.B. 313, effectively overruling *Moelis* and turning Delaware's long-standing board-centric model of corporate governance on its head.[3] By broadly endorsing the right of corporations to allocate virtually any board-level governance power to

1. 311 A.3d 809 (Del. Ch. 2024).
2. *Id.*
3. For a discussion of the accountability of boards of directors to stockholders, see generally Stephen J. Choi, Jill E. Fisch, Marcel Kahan & Edward B. Rock, *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119 (2016).

stockholders, the legislature ignited impassioned debate among judges, practitioners, scholars, and policymakers.[4]

Supporters of S.B. 313 characterized the new statute as a narrowly tailored measure that was necessary to restore longstanding "market practice" and preserve Delaware's competitiveness as a favored state of incorporation.[5] Opponents described it as a rushed and sweeping departure from the principle of board primacy without full consideration of its implications.[6] Over fifty prominent law professors decried the legislation as an overcorrection to a single trial-level decision that was still subject to

4. *See infra* Section III.B. The core concern is similar to that in the extensive debate over dual-class structures that grant high-vote stock to insiders, which allows them to use the corporation for their personal benefit while only suffering "a small fraction of the negative effects of their actions on the company value." Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 602-03 (2017) [hereinafter Bebchuk & Kastiel, *The Untenable Case*]; *see also* Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641, 1651 (2006) ("Conditional on maintaining control, the less equity the controlling shareholder has, the greater the incentive to extract private benefits."). For scholarly analyses of the costs of dual-class structures, see, for example, Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453, 1465-66 (2019); Bebchuk & Kastiel, *The Untenable Case*, *supra*, at 604 ("Therefore, supporters of dual class often argue that it is preferable to let such a talented controller remain in control long after the IPO."); Jeffrey N. Gordon, *Ties That Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CALIF. L. REV. 1, 10-39 (1988); Dorothy S. Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 STAN. L. REV. 687, 693 (2019) ("Critics of dual-class structures argue that issuing nonvoting or low-voting shares increases agency costs and results in suboptimal decisionmaking."). For scholarly support of dual-class structures, see Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 565-67 (2016) ("[W]hen the entrepreneur's idiosyncratic vision is ultimately realized, the benefits will be distributed pro rata to all investors."); Daniel R. Fischel, *Organized Exchanges and the Regulation of Dual Class Common Stock*, 54 U. CHI. L. REV. 119, 136-40 (1987) (arguing that dual-class structures allow for long-term planning because founders can avoid the threat of takeovers). For a discussion of contractual control rights in dual-class companies, see generally Gladriel Shobe & Jarrod Shobe, *Contractual Control in Dual-Class Corporations*, 42 YALE J. ON REGUL. 332 (2025).

5. *See, e.g.*, *Del. H.R. Legislative Session*, 152d Gen. Assemb., 39th Legis. Day, 2d Sess. (Del. June 20, 2024) [hereinafter Delaware House of Representatives Legislative Session] (statement of Rep. Krista Griffith), *transcribed by* THE LONG FORM, CHANCERY DAILY (June 27, 2024), https://mailchi.mp/chancerydaily.com/2024-06-27-long-form-ptgeelkmnbvfty78ijhb [https://perma.cc/65UG-JTSK] ("The companies that incorporate in Delaware and bring business and employers to the state—commonly referred to as Delaware's franchise—are integral to our economy. In fact, the franchise represents the largest combined source of state revenue: two billion in corporate franchise taxes and fees, over 600 million in abandoned property (the state of incorporation is how those funds come in), and income tax from thousands of jobs across multiple industries. This represents close to $3 billion, or 45% of our general fund revenues.").

6. *See, e.g.*, *Del. State Sen. Judiciary Comm. Meeting*, 152d Gen. Assemb. (Del. June 11, 2024) [hereinafter Delaware State Senate Judiciary Committee Meeting] (statement of Robert B. Thompson, Professor, Georgetown Univ. L. Ctr.), *transcribed by* THE LONG FORM, CHANCERY DAILY (June 13, 2024), https://mailchi.mp/chancerydaily.com/2024-06-13-long-form-fhwihie2oh2ihiuhfifhhfiofn [https://perma.cc/DT46-2CW2] ("The current proposal to amend the statute . . . had no explanation of the market changes that have pushed this . . . . This [set of amendments] has been justified as 'market changes,' as 'we need to maintain the franchise, keep it current.' If you're going to do that, spend more time than you spent so far. It didn't happen in this case . . . ."); *see also id.* (statement of John Livingstone) ("This bill is a solution to a problem that doesn't exist.").

appeal[7]—legislation that on its face risked enabling insider stockholders to entirely override director discretion. Even some members of the judiciary expressed concern that the legislation was the result of a "flawed"[8] process and that displacing *Moelis* in such a rapid fashion would "fundamentally change Delaware law."[9] What all sides lacked, however, was robust empirical data on how common such contractual control rights are, who holds them, and what "market practice" actually is.

This Article provides the most comprehensive large-scale empirical study of these issues to date. Drawing on a dataset of 1,362 domestic IPOs from 2010 through 2021, it systematically documents the presence, nature, and scope of the contractual control provisions that were the subject of debate in *Moelis* and the ensuing legislative override. We found a variety of contractual control rights in each year of our sample, showing that these rights have existed for well over a decade. These rights include veto or "pre-approval" rights, board-composition rights, and committee-designation rights—all of which allocate substantive governance authority to one or more insider stockholders.

Our findings provide several critical insights. First, all-encompassing pre-approval rights along the lines of what was struck down in *Moelis*—which prohibited the board from undertaking virtually any meaningful corporate action without the stockholder's consent—appear only rarely in our sample. Second, the vast majority of contractual control rights identified in our sample are held by private equity investors who liquidate their stakes within a few years post-IPO. Indeed, these rights almost invariably phase out once the investor's equity ownership falls below a contractually designated threshold, which usually occurs within a few years after IPO, suggesting that *Moelis* would have affected far fewer companies than supporters of S.B. 313 claimed in testimony to the Delaware legislature.[10] Third, our data also show that many companies that grant insider stockholders contractual control achieve similar outcomes in ways that *Moelis* would

7. Sarath Sanga, Gabriel Rauterberg & Eric Talley, *Letter in Opposition to the Proposed Amendment to the DGCL*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 7, 2024), https://corpgov.law.harvard.edu/2024/06/07/letter-in-opposition-to-the-proposed-amendment-to-the-dgcl [https://perma.cc/R7BM-CEAD].

8. Letter from Chancellor Kathaleen St. Jude McCormick, Del. Ch., to the Del. State Bar Ass'n Exec. Comm. 6 (Apr. 12, 2024) [hereinafter Letter from Chancellor McCormick], [https://perma.cc/852T-T6ZR].

9. Travis Laster, LINKEDIN, *The Unintended Beneficiaries of Section 122(18)* (May 29, 2024), [https://perma.cc/HUV6-7LVT].

10. *See Del. State Sen. Legis. Sess.*, 152d Gen. Assemb., 37th Legis. Day, 2d Sess. (Del. June 13, 2024) [hereinafter S.B. 313 Senate Debate and Final Vote] (statement of Srinivas Raju, Chair, Corp. L. Council), *transcribed by* THE LONG FORM, CHANCERY DAILY (July 18, 2024), https://mailchi.mp/chancerydaily.com/2024-07-18-long-form-sb313-final [https://perma.cc/TK32-NLLM] ("[T]here's lots of agreements already out there that are of questionable validity, or arguably, potentially invalid."); *see also id.* (statement of Jim An, Lecturer, Stanford L. Sch.) ("[Y]ou've heard this bill validates long standing market practice. But selling lead paint was market practice; discrimination was market practice; backdating options was market practice. Simply because something is market practice doesn't make it good or right.").

likely have allowed—including by placing governance rights in a certificate of incorporation or coupling control rights with mechanisms like "fiduciary outs" for the board. In other words, many companies were already using legal structures that would have avoided invalidation under the reasoning of *Moelis*. Our data indicate that it is highly likely that companies would have adjusted their control structures to comply with the *Moelis* decision, with the attendant benefits of greater public transparency and shareholder involvement.[11]

These findings provide a response to the drafters of S.B. 313 who claimed that the amendments were "urgently needed" and that they needed to operate on a "compressed timeframe" because so many companies' stockholder agreements, perhaps thousands,[12] were left in limbo by the *Moelis* decision. S.B. 313 explicitly allowed shareholders to bring new lawsuits challenging contractual control rights before the legislation went into effect.[13] If so many companies' stockholder agreements would have been invalidated under the reasoning of *Moelis*, one would have expected a flood of new suits challenging those agreements, since it would have been easy money for plaintiffs' lawyers. However, there wasn't even a trickle. Our findings show why there was no flood of litigation—there were not many companies to sue because there were not many aggressive stockholder agreements in the first place. Even those that were in existence had mostly phased out.

These findings speak directly to the core questions of the *Moelis* debate, providing a more nuanced perspective. While insider control contracts are undeniably present across the IPO spectrum, most do not approach the breadth or permanence of the *Moelis* arrangement. Moreover, to the extent that the legislature sought to allow contractual flexibility while preserving Delaware's board-centric governance model, S.B. 313 far overshoots the mark. Its language extends well beyond current market practice for contractual control (including even extreme examples like the set of rights at issue in *Moelis*) by endorsing virtually any contractual device that stockholders (and their lawyers) can imagine, thereby allowing corporate insiders to essentially override fiduciary duties under the guise of contractual freedom.

11. *See* Travis Laster, LINKEDIN, *Some thoughts on the Senate testimony in support of 122/18, part one* (2024), https://web.archive.org/web/20250222010647/https://www.linkedin.com/posts/travis-laster-397079216_some-thoughts-on-the-senate-testimony-in-activity-7207829805189189635-CjQg [https://perma.cc/BL73-3JV2] ("A certificate of designations can include veto rights, but it can't impose covenants on the board, it's also publicly filed with the Delaware Secretary of State, and any amendments must go through 242. A Section 122/18 agreement will be able to impose covenants, will not be filed with the Secretary of State, and can be amended like any other contract."); *see also* Section I.A (discussing benefits of memorializing control rights in a certificate of incorporation over a stockholder agreement).

12. *See infra* Section I.B.

13. For a discussion of the effects of S.B. 313 on private companies, see *infra* note 170.

Ultimately, this Article contends that S.B. 313 reflects an excessively broad response to a narrowly tailored judicial decision. Instead of simply overturning *Moelis* and allowing current market practice to continue, S.B. 313 was drafted in a sweeping and ambiguous way that bears no connection to current market practice. The legislation goes far beyond just repealing *Moelis*, instead endorsing almost any private contract that restricts a board's exercise of its power. Our findings suggest that there was no imminent crisis requiring such a sweeping fix and that incremental reforms—codifying, for example, the validity of more conventional board-composition rights—could have provided sufficient clarity without stripping boards of unknown future decision-making power. Instead, the law now grants insiders the right to change any aspect of corporate governance through contract, including in ways that cannot possibly have been intended.[14] As Vice Chancellor Laster put it in the *Moelis* opinion, "clients pay corporate lawyers to push the envelope."[15]

Our findings also show that to fully understand the implications of *Moelis* and S.B. 313 requires understanding private equity and its distinctive characteristics, incentives, and market practices in the IPO space. Private equity firms are in the business of raising money from institutions and high-net-worth individuals, pooling it into funds that buy private companies, and implementing operational and financial changes intended to increase the value of those companies over a relatively short timeframe.[16] After investing in a company for several years,[17] private equity funds are required under fund terms to "exit" the investment and return the

14. For example, it appears unlikely that a corporation could validly adopt a contract promising never to sue the board or a controlling stockholder for an intentional tort, bad-faith acts, or even for violating the covenant of good faith and fair dealing. However, as the law is written, it appears a contract could do just that. *See* Sarath Sanga & Gabriel Rauterberg, *Proposed Amendments to DGCL on Stockholder Contracting Would Create More Problems Than They Purportedly Solve*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 5, 2024), https://corpgov.law.harvard.edu/2024/04/05/proposed-amendments-to-dgcl-on-stockholder-contracting-would-create-more-problems-than-they-purportedly-solve [https://perma.cc/H7UE-BFA2].

15. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 936 (Del. Ch. 2024).

16. *See* STEPHANIE R. BRESLOW & PHYLLIS A. SCHWARTZ, PRIVATE EQUITY FUNDS: FORMATION AND OPERATION § 1:1.12 (Carol Benedicto ed., 2015); *see, e.g.*, Tom Zanki, *Mounting Pressure for PE Exits to Drive IPO Volume in 2025*, LAW360 (Jan. 22, 2025, 3:19 PM), https://www.law360.com/articles/2287524/mounting-pressure-for-pe-exits-to-drive-ipo-volume-in-2025 [https://perma.cc/VE2G-BCDQ] ("Private equity-backed companies will generate nearly half of initial public offerings in 2025, analysts predicted on Wednesday, driven by a growing demand for exit strategies among investors that have owned stakes in companies for lengthy periods."). The goal of the private equity firm is to enhance their investments' value over time through various strategies, such as cost-cutting, operational improvements, or expanding into new markets, with the ultimate aim of achieving a profitable exit.

17. *See* BRESLOW & SCHWARTZ, *supra* note 16, § 2:4.2 ("The appropriate length of the commitment period will vary depending on the investment strategy of the fund, with a time period of three to five years being typical for many strategies.").

proceeds to their investors,[18] and an IPO is an important exit strategy for private equity firms that need to monetize their investment relatively quickly.[19] However, private equity funds generally do not sell their shares in the IPO. Instead, they commonly keep a substantial number of shares and gradually sell down their interest over time following the IPO. Research shows that the average duration of these "leftover" holdings is variable but that, on average, a private equity fund's sale of its final stake in a company that it took public happens three years after the IPO.[20] This is consistent with our finding that private equity funds' contractual control rights are subject to ownership-based phase-outs that tend to be triggered between two to three years after IPO.[21]

Our findings also show that private equity firms commonly choose to use contractual control rights instead of high-vote dual-class stock structures.[22] Private equity funds' need to liquidate their investment in a relatively compressed time frame, coupled with the fact that fund managers' compensation is tied to gains from the sale, fuels a strong interest in elevating the short-term stock price during their exit period. We posit that private equity funds, as repeat players in the IPO market, find high-vote stock less attractive than bespoke contractual mechanisms that can directly shape and constrict board actions in ways they believe can maximize their returns during the relatively short sell-down period after the IPO. These control rights enable private equity funds to exercise granular authority

18. There are several common ways for private equity funds to exit an investment company, including by selling the business to one of its competitors in a strategic acquisition, selling it to a fund managed by a different private equity sponsor, or selling the company's shares to the public in an IPO. The selection of an exit strategy depends on various factors, including market conditions, the company's growth potential, industry dynamics, and the investment horizon. Each of these exit options has important implications for the market and has been studied extensively by academics and practitioners. *See, e.g.*, Steven N. Kaplan & Per Strömberg, *Leveraged Buyouts and Private Equity*, 23 J. ECON. PERSPS. 121, 128-30 (2009) (setting forth the volume of different kinds of private equity exits from 1970 to 2007).

19. The use of private equity-backed IPOs as an exit strategy fluctuates due to market volatility and regulatory challenges but remains significant, particularly in strong market conditions. *See, e.g.*, IPO REPORT, WILMERHALE 4 (2024), https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/documents/2024-wilmerhale-ipo-report.pdf [https://perma.cc/6QEG-92LB] ("After almost tripling from 30 in 2020 to 86 in 2021, the number of private equity-backed IPOs shrank to just two in 2022 and four in 2023. PE-backed issuers accounted for only 4% of all US-issuer IPOs in 2022 and 8% in 2023, compared to 23% over the five-year period from 2017 to 2021."); *see also* Maria Armental, *IPOs by Private Equity-Backed Companies Suggest a Market Revival Is Brewing,* WALL ST. J. (Sep. 13, 2024), https://www.wsj.com/articles/ipos-by-private-equity-backed-companies-suggest-a-market-revival-is-brewing-8dca5421?msockid=0e331abfe3d66bce17ad0cbae2956aed [https://perma.cc/KQ8T-FH5Z] (discussing a recent increase in private equity-backed IPOs).

20. For example, in about 25% of IPOs, private equity funds still retain about one-half of their holdings after five years, and some private equity funds have been found to hold onto stakes for over ten years. Tim Jenkinson, Howard Jones & Christian Rauch, *Long Goodbyes: How Do Private Equity Funds Manage Sell-Downs After Initial Public Offerings?*, MGMT. SCI., Sep. 2025, at 2, 14-15.

21. *See infra* Section II.B.

22. *See infra* Section III.C.

without the procedural hurdles or fiduciary-duty complexities that can be associated with dual-class structures.

Our data, by contrast, show that founders are far less likely to receive contractual control rights and instead are far more likely to receive high-vote dual-class shares that give them outsized control over stockholder items subject to stockholder vote.[23] Of the 197 high-vote dual-class corporations in our sample, 178 grant high-vote stock to founders, which is a stark contrast with contractual control rights, which are rarely granted to founders. While we found ninety-one companies that granted high-vote stock to private equity firms, they almost always do so in conjunction with granting founders the same high-vote stock, and nearly half of the time they also grant contractual control rights to the private equity firms in addition to such high-vote stock. Only eight companies in our sample granted high-vote stock to private equity firms alone, compared to eighty-seven companies that granted high-vote stock to founders alone. Our findings indicate that founders find high-vote stock to be a better long-term tool for controlling board composition and policy.[24] This is consistent with the fact that founders, unlike private equity funds, generally intend to stay invested in the company for the relatively long term, since they do not have the immediate liquidity needs that private equity investors do.[25]

The widespread prevalence of contractual control rights in private equity-backed IPOs raises many questions and potential concerns. When a private equity fund invests in a public company, it creates a basic conflict of interest between the fund manager, who has a fiduciary duty to generate short-term gains for the fund's investors, and the other shareholders in the company. This dynamic raises the concern that the private equity fund might use its contractual control rights to benefit itself at the expense of the public-company shareholders investing alongside it, either by causing the firm to be run with a short-term focus or by engaging in more direct self-dealing.[26] At the same time, however, because private equity funds have high-powered incentives to increase firm profitability, it is also plausible that granting contractual control rights to private equity funds could ultimately have a positive impact on firm value, even if the fund's time horizon is different than other shareholders'.

Interestingly, existing studies suggest that private equity-backed IPOs tend, on average, to outperform IPOs that are not private equity-backed.[27] But because researchers have paid little attention to the role of contractual control rights or attempted to isolate the impact of specific rights, it is impossible to do the kind of right-by-right analysis needed to evaluate the

23. *Id.*

24. *See, e.g.*, Bebchuk & Kastiel, *The Untenable Case*, *supra* note 4, at 592.

25. *Id*.

26. Private equity firms have also been accused of taking advantage of opacity and using control to benefit themselves at various times in the industry's history. *See infra* Section III.A.

27. See *infra* note 69.

arguments that have been made for and against S.B. 313 and to determine whether the kinds of guardrails that *Moelis* established are, in fact, beneficial. By providing a novel dataset of private equity-backed IPOs and the contractual control rights they contain, this Article establishes the groundwork for future theoretical and empirical studies that can inform normative questions about what the law of contractual control rights should look like.

Moreover, our finding that contractual control provisions are private equity driven provides insight into why the Corporation Law Section, which is the small group of Delaware lawyers that drafted S.B. 313, engaged in what Chancellor McCormick called a process that was "rushed," "flawed," and "a dramatic departure from Delaware's esteemed tradition."[28] The Corporation Law Section, the "overwhelming majority" of which are transactional or defense attorneys at large firms, acknowledged lobbying from unnamed sources.[29] Our data indicate that private equity firms, which are notoriously aggressive at lobbying in other contexts,[30] are the most plausible source of lobbying on S.B. 313, since they are by far the largest beneficiaries of it. That the Corporation Law Section would take direction from private equity firms is unsurprising, since it is widely documented that private equity firms are among the most important revenue drivers for large law firms.[31]

28. Letter from Chancellor McCormick, *supra* note 8, at 6.

29. S.B. 313 Senate Debate and Final Vote, *supra* note 10 (statement of Rep. Madinah Wilson-Anton); Jordan Howell, *Dissent in House Judiciary Over Controversial Corporation Amendments*, DEL. CALL (June 19, 2024), https://delawarecall.com/2024/06/19/dissent-in-house-judiciary-over-controversial-corporate-amendments [https://perma.cc/2YAV-B6PE] ("'You mentioned that you all are lobbied by lots of people,' Rep. Wilson-Anton said. 'Who lobbies you? Can you share some examples of folks who are unhappy with this?' . . . Mr. Raju concluded his response without including any specific information about individuals or organizations that had lobbied him or members of the Corporation Law Council for changes to the corporate code.").

30. *See generally* Sabrina Willmer, *Musk's War on Delaware Spurs Law Pushed by Private Equity*, BLOOMBERG NEWS (Mar. 26, 2025), https://news.bloomberglaw.com/private-equity/private-equity-joins-fight-to-overhaul-delaware-corporate-law [https://perma.cc/VY8V-DPAY] (discussing private equity lobbying for S.B. 21); Chris Cumming, *Private Equity Spends Heavily in 2024 Election*, WALL ST. J. (Nov. 1, 2024), https://www.wsj.com/articles/private-equity-spends-heavily-in-2024-election-3b254038?msockid=0e331abfe3d66bce17ad0cbae2956aed [https://perma.cc/D82C-YH9L] (discussing private equity lobbying for more favorable regulations); Antoine Gara, *Private Equity to Lobby Donald Trump for Access to Savers' Retirement Funds*, FIN. TIMES (Jan. 5, 2025), https://www.ft.com/content/dddd1752-789a-40b6-9aa8-d7cf6f408c81 [https://perma.cc/E4AC-6AHR] (same); Kalyeena Makortoff & Anna Isaac, *How Private Equity Convinced Labour to Go Easy on Its Multimillion Pound Tax Perk*, GUARDIAN (Oct. 31, 2024), https://www.theguardian.com/business/2024/oct/31/how-private-equity-convinced-labour-to-go-easy-on-its-multimillion-pound-tax-perk [https://perma.cc/R46H-S3WX] (same).

31. *See* Maureen Farrell & Anupreeta Das, *Pay for Lawyers Is So High People Are Comparing it to the N.B.A.*, N.Y. TIMES (July 1, 2024), https://www.nytimes.com/2024/07/01/business/law-firm-pay-salary.html [https://perma.cc/JC3X-FWBZ] ("Eight-figure pay packages—rare a decade ago—are increasingly common for corporate lawyers at the top of *their* game, and many of these new heavy hitters have one thing in common: private equity."); *see also* Cara Lombardo, *On Wall Street, Lawyers Make More Than Bankers Now*, WALL ST. J. (June 22, 2023), https://www.wsj.com/finance/on-wall-street-lawyers-make-more-than-bankers-now-

Against this backdrop, this Article aims to provide an empirical foundation to the ongoing debate. Part I revisits *Moelis* in detail, situating it within Delaware's historical emphasis on board-centric governance. It illuminates the features that set the *Moelis* arrangement apart from other stockholder agreements and discusses Vice Chancellor Laster's analysis invalidating certain provisions as improperly supplanting the board's decision-making authority. Part II turns to our empirical study. We offer a taxonomy of the different contractual control rights present in newly public companies, highlighting key trends in who receives these rights, how extensively they constrain the board, and how they typically sunset. Part III considers the legislative override, S.B. 313, in light of these findings, and also discusses the implications of private equity funds acting as the dominant holders of contractual control rights. We argue that because the debate over *Moelis* was largely theoretical and lacked empirical grounding, the reforms that were supposed to overturn *Moelis* overshot the actual scope of the purported *Moelis* problem. Although the drafters of S.B. 313, commonly referred to as the "Market Practice Amendments,"[32] claimed they were aiming to validate only those contracts "common" in the market, our data reveal a mismatch between those claims, actual market practice, and the extraordinarily broad scope of the new statutory language. By providing data that, until now, has remained largely anecdotal, this Article injects much-needed evidence into ongoing discussions of board-centric governance, private ordering, and the unique influence of private equity.[33] With S.B. 313 now enacted law, this Article's findings can help future scholars, courts, policymakers, and practitioners grapple with the meaning and consequences of its far-reaching language and its effect on Delaware's hallmark emphasis on fiduciary duties and board-centric governance.

I. *Moelis* and the Ensuing Debate

In the landmark 2024 *Moelis* decision, the Delaware Chancery Court controversially held that certain contractual control rights granted to

ae8070a7?msockid=0e331abfe3d66bce17ad0cbae2956aed [https://perma.cc/UG55-3Y85] ("They have also received an outsize amount of work from the rise of private equity, a client base that was nowhere near as active 20 years ago."); Will Louch, *Kirkland & Ellis: Is it Party Over for the World's Most Profitable Law Firm?*, FIN. TIMES (Dec. 11, 2023), https://www.ft.com/content/d89b8105-0b71-49cd-83f7-3ce48f7ddbdd [https://perma.cc/C388-ZKY7] ("[Kirland and Ellis] has been able to afford such largesse because of its fee income from the booming private equity industry.").

32. *Delaware Governor Signs Corporate Law Amendments Into Law*, SIMPSON THACHER & BARTLETT LLP (July 18, 2024), https://www.stblaw.com/about-us/publications/view/2024/07/18/delaware-governor-signs-corporate-law-amendments-into-law [https://perma.cc/42D7-8ED8] ("Senate Bill 313 has been colloquially referred to as the 'market practice amendments' . . . .").

33. Jill Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913, 913 (2022) ("Corporate law has embraced private ordering—tailoring a firm's corporate governance to meet its individual needs.").

insider stockholders were invalid.[34] In response, the Delaware legislature passed what were termed the "Market Practice Amendments," which purportedly were intended only to overrule that decision based on a belief that the types of contractual control rights at issue in *Moelis* reflected widely accepted "market practice."[35] Although experts testified that the contractual rights were standard market practice,[36] the legislation was passed without any empirical understanding of the market practice surrounding these contractual control rights, including who receives them, when, and how.

A. The Debate Over Contractual Control Rights in Delaware

One of the mechanisms for distributing power in a corporation between insider stockholders, public stockholders, and the board is through contracts.[37] Contracts are commonly used to regulate the relationship between stockholders, protect minority stockholders, and establish rules for how the company is managed and operated. These agreements can also grant contractual control rights to insider stockholders, such as founders, executives, or key investors.

Recent research has identified numerous ways in which founders and other insider stockholders commonly use contracts to grant themselves various forms of control.[38] For example, insider stockholders can obtain

34. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 821 (Del. Ch. 2024).

35. Christopher Giordano & Carina Meleca, *Delaware Adopts 2024 "Market Practice" Amendments to DGCL*, DLA PIPER (July 31, 2024), https://www.dlapiper.com/en/insights/publications/2024/07/delaware-adopts-2024-market-practice-amendments-to-dgcl [https://perma.cc/7PKV-SLPL] ("The amendments codify what is largely considered to be certain prevailing market practices . . . ."); *Delaware Governor Signs Controversial "Market-Practice" Amendments to General Corporation Law*, DECHERT LLP (July 22, 2024), https://www.dechert.com/knowledge/onpoint/2024/7/delaware-governor-signs-controversial--market-practice--amendmen.html [https://perma.cc/ZZ2K-KCWL] (claiming that S.B. 313 amends the DGCL "to reinstate market practices"); Nicholas O'Keefe, *Delaware Enacts Controversial Market Practice Amendments to Its General Corporation Law*, FOLEY & LARDNER LLP (July 18, 2024), https://www.foley.com/insights/publications/2024/07/delaware-market-practice-amendments-general-corporation-law [https://perma.cc/E6XU-TW73] ("The decision caused consternation in the legal community because it was perceived as running contrary to market practice . . . .").

36. *See, e.g.*, S.B. 313 Senate Debate and Final Vote, *supra* note 10 (statement of Srinivas Raju, Chair, Corp. L. Council) ("From our perspective, this is not a major change. The market practice . . . has developed based on an interpretation of a statute that's been in the code for a very long time . . . [.] [Delaware precedent] led to a market practice where market and corporate practitioners believed various rights could be documented in the form of a stockholders' agreement . . . .").

37. *See* Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1430-33 (1989); John C. Coffee, Jr., *No Exit?: Opting Out, The Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919, 939 (1988).

38. *See generally* Megan Wischmeier Shaner, *Corporate Resiliency and Relevance in the Private Ordering Era*, 2022 COLUM. BUS. L. REV. 804 (examining the effects of private ordering through stockholder agreements and other contracts); Gladriel Shobe & Jarrod Shobe, *The Dual-Class Spectrum*, 39 YALE J. ON REGUL. 1286 (2022) (providing an empirical study of insider stockholders' contractual control rights in single-class companies); Fisch, *supra* note 33 (criticizing the

contractual rights to veto certain actions of the board of directors, thereby giving the insider the ability to participate directly in board-level governance. These rights can be captured in the company's certificate of incorporation and bylaws or through separate contracts between the insiders and the corporation, including stockholder agreements, director-designation agreements, voting agreements, and nomination agreements.[39] Over time, market practice in this area has become increasingly aggressive, moving beyond traditional rights like voting and influencing board composition and increasingly toward foundational governance rights.[40]

In 2024, the legal status of contractual control rights became one of the most important and contentious debates in Delaware corporate law. Even though these rights have been used for decades by corporations to give insider stockholders control over corporate decisions, their legality was only recently challenged in court. Stockholders started filing derivative lawsuits questioning various contractual control mechanisms, including board nomination and veto rights, on the theory that these rights were invalid under Section 141(a) of the Delaware General Corporation Law (DGCL).[41] Section 141(a) mandates that the board of directors has authority to manage a corporation unless otherwise provided by law or the certificate of incorporation,[42] and Delaware courts have interpreted this statute to mean that the board may not delegate its management responsibility to anyone else.[43] Recent stockholder complaints have argued that some governance powers are so fundamental that boards should never be permitted under Section 141(a) to allocate them to stockholders by contract.[44]

---

use of shareholder agreements to affect corporate governance); Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 YALE J. ON REGUL. 1124 (2021) (offering an empirical study of stockholder agreements in publicly traded companies).

39. *See* Shobe & Shobe, *supra* note 38, at 1286 (showing that over the past two decades, companies have granted corporate insiders special control rights through contracts more often than through high-vote dual-class structures); *see also* Rauterberg, *supra* note 38, at 1124 ("[F]ifteen percent of corporations that went public in recent years did so subject to a shareholder agreement.").

40. *See* Shaner, *supra* note 38, at 804, 827-28 ("[T]he current trajectory of corporate law appears to privilege freedom of contract and the contractarian theory above other principles and theories of the firm.").

41. See *infra* note 168.

42. *See* DEL. CODE ANN. tit. 8, § 141(a); *see also* Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) ("A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation.").

43. *See, e.g.*, Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1291 (Del. 1998) ("To the extent that a contract . . . purports to require a board to act *or not act* in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable."); Abercrombie v. Davies, 123 A.2d 893, 899 (Del. Ch. 1956), *rev'd on other grounds*, 130 A.2d 338 (Del. 1957) (ruling that governance restrictions violate Section 141(a) when they "have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters" or "tend[] to limit in a substantial way the freedom of director decisions on matters of management policy").

44. Opening Brief in Support of Plaintiff's Motion for Summary Judgment, Seavitt v. N-Able, Inc., 321 A.3d 516 (Del. Ch. 2024) (No. 2023-0326-JTL), 2023 WL 4204900, at *3 (arguing

The Delaware Court of Chancery issued its first opinion addressing these stockholder challenges in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co*.[45] In that opinion, Vice Chancellor Laster sided with the plaintiffs, ruling that certain contractual control arrangements violated DGCL Section 141(a), including veto rights, committee-composition rights, and certain other contractual control arrangements.[46] Vice Chancellor Laster was unsympathetic to the defendant's arguments that the stockholder-agreement provisions reflected widely accepted "market practice," holding that "[w]hen market practice meets a statute, the statute prevails."[47]

In his analysis of the validity of the individual rights, Vice Chancellor Laster discussed veto rights and took issue with the fact that they require the board to obtain "prior written consent before taking virtually any meaningful action."[48] He concluded that granting veto rights with respect to board-level actions made it so "the Board is not really a board."[49] He also reviewed six board-composition provisions, finding three of them invalid and three valid. For example, he upheld a director-nomination right, which he noted is a standard power that stockholders are normally allowed to exercise and should therefore be valid whether it was granted in the charter or a separate corporate contract. At the same time, however, he struck down the right to determine board-committee membership, ruling that this power extends beyond traditional stockholder authority.

Vice Chancellor Laster's ruling emphasized that the legal structure of these rights is critical. As noted above, Section 141(a) of the DGCL establishes that a board controls a corporation's business and affairs "except as may be otherwise provided in . . . its certificate of incorporation."[50] Accordingly, Vice Chancellor Laster noted that Moelis could have implemented many of the contractual control rights in a valid manner by granting the rights either directly in the certificate of incorporation or by creating a separate class of preferred stock with rights set forth in that stock's certificate of designations.[51] Some (as Vice Chancellor Laster

that contractual control rights bestow a "*contractual* right to control the most important decisions and functions of your company and its board of directors"); *id.* at *12 ("[T]here are certain fundamental powers provided to Boards (and stockholders) under the DGCL that are so core to our system of corporate governance that they should never be permitted to be curtailed by any means . . . .").

45. 311 A.3d 809, 816 (Del. Ch. 2024).

46. *Id.*

47. *Id.* at 881.

48. *Id.* at 820.

49. *Id.* at 820. Vice Chancellor Laster ruled that the veto rights, taken together, were invalid but did not rule on each veto right individually.

50. DEL. CODE ANN. tit. 8, § 141(a).

51. *See Moelis*, 311 A.3d at 822 ("He could have accomplished the vast majority of what he wanted through the Company's certificate of incorporation . . . . Even now, the Board could implement many of the Challenged Provisions by using its blank check authority to issue Moelis

acknowledged in *Moelis*[52]) might be skeptical of the logic of permitting control rights in a certificate of incorporation and not in stockholder agreements, ultimately viewing this distinction as arbitrary. But this distinction serves important practical purposes. Control rights embedded in the charter or in preferred shares offer greater transparency and accessibility to stockholders because, unlike stockholder agreements, they are publicly filed with the Delaware Secretary of State and are more prominently featured in public filings.[53] Additionally, rights established in the charter can only be changed after IPO with a shareholder vote, making them more accountable to stockholder interests. The enhanced salience of control rights in foundational documents not only aligns with principles of corporate transparency but also enables more accurate pricing by public stockholders—as research has shown that the relative prominence of legal provisions can significantly impact investor behavior.[54]

Moelis established a blueprint for companies that were considering entering into pre-IPO stockholder agreements, but it also created complications and uncertainty for public companies with existing agreements that were rendered invalid by *Moelis*. While converting these rights into the charter or preferred shares would require stockholder approval and raise fiduciary-duty concerns, subsequent cases revealed a viable alternative. Most notably, in *Wagner v. BRP Group*, a post-*Moelis* case where the court further developed its jurisprudence regarding stockholder agreements,[55] the court endorsed a solution where the company implemented a "consent agreement" in response to litigation challenging the founder's contractual control rights.[56] This agreement allowed the board to override the founder's veto power, though only when independent board members

preferred stock carrying a set of voting rights and director appointment rights."). The opinion also noted that there are limits to the types of rights that can be granted through a charter validly. *Id.* at 822 n.19 ("That said, Moelis may not be able to get everything he wanted. Even a charter provision cannot override a mandatory feature of the DGCL.").

52. *Id*. at 822 (noting that "some might find it bizarre that the DGCL would prohibit one means of accomplishing a goal while allowing another").

53. *See* Fisch, *supra* note 33, at 946 ("As the title of this Article suggests, the first problem with shareholder agreements is their lack of transparency. To the extent that shareholder agreements address governance issues, those issues would normally be addressed in the charter or bylaws and would be visible to the public or, at a minimum, the corporation's participants.").

54. *See generally* Cary Frydman & Baolian Wang, *The Impact of Salience on Investor Behavior: Evidence from a Natural Experiment*, 75 J. FIN. 229 (2019) (employing a natural experiment to find that the salience of information display has a causal effect on investor behavior in a high-stakes trading environment).

55. 316 A.3d 826 (Del. Ch. 2024). In *Wagner*, the Court of Chancery considered the validity of three challenged provisions of a stockholder agreement, including broad pre-approval rights. As detailed below, broad pre-approval rights are uncommon, showing that the stockholder agreements at issue in the *Wagner* and *Moelis* cases were outliers. *See infra* Section II.B.1. For further background on *Wagner*, see Gail Weinstein, Philip Richter & Steven Epstein, *Uncertainty on Governance Rights in Stockholders Agreements Continues Pending a Decision in the Appeal of* Moelis, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 9, 2024), https://corpgov.law.harvard.edu/2024/10/09/uncertainty-on-governance-rights-in-stockholders-agreements-continues-pending-a-decision-in-the-appeal-of-moelis [https://perma.cc/PP9A-6KKQ].

56. *Wagner*, 316 A.3d at 843-44.

unanimously agreed that an action served the company's best interests. Despite this "major restriction" on board authority, the court determined that the procedural nature of these limitations adequately preserved the board's substantive decision-making power and thus complied with Section 141(a),[57] providing a key alternative for companies with stockholder agreements invalidated by *Moelis*.

B. The Need for Research to Catch Up with Policy

Within a matter of months after *Moelis*, the legislature enacted S.B. 313, adding subsection 18 to DGCL Section 122 for the purpose of overriding the ruling.[58] The new legislation, described by Chancellor McCormick as the most substantial amendment since the 1960s, on its face allows a corporation to enter into virtually any contract to modify its governance.[59] The broadly worded amendment extends well beyond the specific circumstances of *Moelis*, giving corporations extensive latitude to modify their governance structures through contractual agreements, including giving insider stockholders greater control over board-level decisions through provisions that can restrict corporate actions, mandate approval requirements, and specify required or prohibited activities.

Section 122(18) faced vigorous opposition from scholars, Delaware judges, and policymakers. At the heart of the debate was a fundamental difference of opinion about market practice. Supporters of the amendment argued that the legislation was necessary to align Delaware law with existing market practices,[60] and accordingly, the *N-Able* decision dubbed the

57. *Id.* at 883 ("The Committee Provision sufficiently frees the Board to make substantive decisions on matters otherwise governed by the Pre-Approval Requirements. After the execution of the Consent Agreement, the Challenged Provisions no longer violate Section 141(a).").

58. *See* S.B. 313, 152d Gen. Assemb., 84 Del. Laws 309 (2024) (codified as amended at DEL. CODE ANN. tit. 8, § 122(18)).

59. *See* Letter from Chancellor McCormick, *supra* note 8, at 5. Some law firms have claimed that the proposed amendments are not very broad, though this interpretation deviates substantially from the "plain language" of the amendment. *See, e.g.*, Richards, Layton & Finger, *The Proposed 2024 Amendments to the Delaware General Corporation Law*, CLS BLUE SKY BLOG (Apr. 3, 2024), https://clsbluesky.law.columbia.edu/2024/04/03/the-proposed-2024-amendments-to-the-delaware-general-corporation-law [https://perma.cc/SWG4-VA2Z] ("While the plain language of the new subsection would appear to give the board the power to bind the corporation to take fundamental action, such as approving a merger, at the direction of a stockholder, the real-world operation of any provision included in a stockholders' agreement will be much more limited.").

60. Srinivas Raju, Chair of the Corporation Law Council, talked at length about the market practice of stockholder agreements at the Senate Debate and Final Vote on Senate Bill 313. For example, he stated:

> [C]ertainly the prevailing view in the marketplace and among corporate practitioners was: it was not necessary to put these rights in the charter or in a preferred stock. It was permissible, based on the existing interpretation of the law, and based on existing case law. It was the prevalent belief in the marketplace that this could be done, also, through stockholders agreements . . . .

enacted legislation the "Market Practice Amendments."[61] Opponents of the amendment vehemently disagreed and criticized the proposal. Perhaps most notably, more than fifty law professors signed a letter opposing the legislation, contending that *Moelis* involved an atypical, exceptionally broad stockholder agreement that was outside standard market practice.[62] The letter stated: "Proponents of the Proposal argue that the *Moelis* decision struck down a common practice of Delaware corporations and that the Proposal merely restores the status quo ante. Not so. The contract in *Moelis* was far from typical, especially for public corporations . . . ."[63] In essence, both sides made empirical claims about how Delaware corporations use contractual control rights; however, neither side was able to offer any conclusive data showing market practice in this area. In addition, the letter further argued that the proposed amendments "would give free rein to influential stockholders in ways that could hurt other investors,"[64] without explaining who those influential stockholders might be. Chancellor McCormick[65] and Vice Chancellor Laster[66] also expressed serious concerns about the bill's hasty development and the profound changes it made to core doctrines of Delaware law. Despite vigorous opposition to the Market Practice Amendments, the bill was signed into law on July 17, 2024, and went into effect on August 1, 2024.[67]

S.B. 313 Senate Debate and Final Vote, *supra* note 10 (statement of Srinivas Raju, Chair, Corp. L. Council).

61. *See* Seavitt v. N-Able, Inc., 321 A.3d 516, 523 n.3 (Del. Ch. 2024) (referring to enacted legislation as the "Market Practice Amendments"); *see also* Dechert LLP, *Delaware Governor Signs Controversial "Market-Practice" Amendments to General Corporation Law* (July 22, 2024) https://www.dechert.com/knowledge/onpoint/2024/7/delaware-governor-signs-controversial--market-practice--amendmen.html [https://perma.cc/3V8H-TR7Q] ("On July 17, 2024, Governor Carney signed into law S.B. 313, which amends the Delaware General Corporation Law ('DGCL') to reinstate market practices that would have been impacted by a series of Court of Chancery decisions from late 2023 and early 2024. In particular, the amendments conform Delaware law to match current practice . . . .").

62. Sanga et al., *supra* note 7.

63. *Id.*

64. *Id*. In addition, several prominent law professors voiced opposition to the Market Practice Amendments during testimony at the Delaware General Assembly's Senate Judiciary Committee. *See* Delaware State Senate Judiciary Committee Meeting, *supra* note 6; *see also* Sanga & Rauterberg, *supra* note 14 ("The Amendments may be well-intentioned, but regardless of one's view of *Moelis*, they are not well-suited to their purpose. They would not resolve the deep legal uncertainties inherent in stockholder agreements such as the one at issue in *Moelis*. Instead, they would replace a century of nuanced if imperfect Delaware jurisprudence with an open-ended statement that enables too much to be taken at face value.").

65. *See* Letter from Chancellor McCormick, *supra* note 8, at 5 ("The Proposal was not the product of a cautious and deliberative process. The Proposal is not targeted in scope or uncontroversial. The Proposal does not address Delaware Supreme Court decisions. Quite the opposite. The Proposal was the product of a rushed reaction, prepared mere weeks after *Moelis* and *Activision* were issued.").

66. *See* Laster, *supra* note 11; *see also* Laster, *supra* note 9 ("Smart people, acting in good faith, can disagree about whether [the 2024 amendment] is a good thing. What should be indisputable is the magnitude of the change.").

67. *See* S.B. 313, 152d Gen. Assemb., 84 Del. Laws 309 (2024) (codified as amended at DEL. CODE ANN. tit. 8, § 122(18)).

When the *Moelis* decision came out, the academic literature was ill-equipped to support the rapid-fire policy debate that ensued. While various articles had studied the phenomenon of contractual control rights in general terms, only two of them had collected data, and neither of these articles provided sufficient information to answer questions about the market practice of the specific control rights that factored so prominently in Vice Chancellor Laster's opinion, nor did they provide detail about who receives these rights and how these rights phase out over time.[68]

At the same time, while numerous papers have studied the performance of private equity-backed IPOs,[69] none of those papers focuses on the contractual control rights in those transactions.[70] Accordingly, not only do those studies fail to catalog what these rights are and how they are documented in private equity-backed IPO companies, but they also as a result provide an imprecise measure of the effect of control rights on those companies' performance.[71] Taking this imprecision a step further, these studies also provide no basis for distinguishing between the various kinds of contractual control rights and whether those rights have differing impacts on

68. Professor Rauterberg's seminal empirical study on stockholder agreements predated the *Moelis* opinion and therefore was not designed to analyze *Moelis* or the Market Practice Amendments. For example, that study was limited to stockholder agreements, and the contractual control rights reviewed in *Moelis* are frequently granted through other types of corporate contracts. Therefore, that study captured only a portion of the contracts that contain these rights. *See* Rauterberg, *supra* note 38. Similarly, in *The Dual-Class Spectrum*, an empirical study by two of the authors published before *Moelis*, certain categories of contractual control rights that were central to the *Moelis* holding were excluded from the analysis altogether, while other categories were given different definitions than the definitions used by Vice Chancellor Laster in the opinion. The paper also focused much of its analysis on rights that were not even addressed in the case. *See* Shobe & Shobe, *supra* note 38.

69. For empirical analysis on private equity-backed IPOs, see generally Jerry X. Cao & Josh Lerner, *The Performance of Reverse Leveraged Buyouts*, 91 J. FIN. ECON. 139 (2009); Jerry X. Cao, *IPO Timing, Buyout Sponsors' Exit Strategies, and Firm Performance of RLBOs*, 46 J. FIN. & QUANTITATIVE ANALYSIS 1001 (2011); Mario Levis, *The Performance of Private Equity-Backed IPOs*, 40 FIN. MGMT. 253 (2011); Qi Dong, Myron B. Slovin & Marie E. Sushka, *Private Equity Exits After IPOs*, 64 J. CORP. FIN. 1 (2020); Clas Bergstrom, Daniel Nilsson & Marcus Wahlberg, *Underpricing and Long-Run Performance Patterns of European Private-Equity-Backed and Non-Private-Equity-Backed IPOs*, 9 J. PRIV. EQUITY 16 (2006); Natalia Matanova, Tanja Steigner, Ninon Sutton & Linh Thompson, *The Influence of Private Equity and Venture Capital on the Post-IPO Performance of Newly-Public Acquirers*, 59 N. AMER. J. ECON. & FIN. 1 (2022); Jenkinson et al., *supra* note 20.

70. One particularly prominent study on the performance of private equity-backed IPOs acknowledged that this neglect was a shortcoming. Cao & Lerner, *supra* note 69, at 156 ("[W]e have taken an initial look at the buyout groups' involvement with their portfolio firms . . . . Characterizing in more detail the extent of the buyout groups' involvement, and understanding the consequences of those connections, is challenging. But if these relations can be tracked more carefully (as has been done in research on venture capital), they should help us enhance our understanding of the buyout process.").

71. The papers that study the performance of private equity-backed IPOs generally measure the performance of the company anywhere from six months to five years after the date of the IPO. But the duration of the control rights held by private equity funds and the nature of the control rights themselves is likely to vary considerably from post-IPO company to post-IPO company. Failing to account for the timing when the private equity fund's control rights expire in each specific company makes it much more difficult to draw inferences about the effect of contractual control rights (and the expiration of those rights) on performance.

company performance and non-insider stakeholders. This means that the existing literature on private equity-backed IPOs cannot provide much help in answering the core questions raised by *Moelis* about permissible and impermissible forms of contractual control rights and how they differ from each other.

This Article breaks important new ground in both of these neglected areas. By providing a more complete account of the contractual control rights granted to insider stockholders and orienting its analysis around the categories of rights delineated by Vice Chancellor Laster in *Moelis*, this Article offers empirical evidence to support a more informed conversation about *Moelis* and the effect of the Market Practice Amendments on actual market practice. Moreover, by showing that the most common setting (by far) for these contracting practices is private equity-backed IPOs, this Article provides valuable context for understanding the motivations of market participants in bargaining for contractual control rights and the potential implications of these practices for the broader economy.[72]

II. Empirical Findings of IPOs with Contractual Control Rights

This Part describes our novel dataset and explores its considerable implications. In particular, our findings show the frequency of the contractual control rights that were addressed in *Moelis* and two follow-up cases, *Wagner* and *N-Able*, thereby providing empirical answers to many of the questions that have been at the forefront of Delaware's contractual-control debate. Notably, our dataset reveals that contractual control rights are used most frequently in private equity-backed IPOs.[73] Because contractual control rights almost always phase out as an insider's ownership decreases, and the majority of the contractual control rights are held by private equity firms that typically sell down their interests within a few years of the IPO, most of the rights in our sample had already phased out prior to the *Moelis* holding. Therefore, only a relatively small number of companies that went

72. The role of private equity in the use of these agreements was hinted at during the legislative process for the Market Practice Amendments but not supported with any empirical evidence. *See, e.g.*, *An Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law: Hearing on S.B. 313 Before the H. Comm. on the Judiciary*, 152d Gen. Assemb. 47 (Del. June 18, 2024) [hereinafter Delaware House Judiciary Committee Hearing on S.B. 313] (written remarks of Dael Norwood, Historian), https://legis.delaware.gov/json/Meeting-Minutes/GetMeetingMinutesDocumentByFileAttachmentId?fileAttachmentId=646135 [https://perma.cc/FM7B-YKER] ("I urge you to put our state's needs before the transient tantrums of a small number of private equity's special pleaders.").

73. Professor Rauterberg similarly noted in his pre-*Moelis* empirical study that private equity firms were the most common signatory to shareholder agreements. However, unlike the other empirical issues he explored, he simply noted that private equity firms were the most frequent signatory without providing data or his empirical findings on that point or exploring it in further depth. *See* Rauterberg, *supra* note 38, at 1154 ("Private equity firms are by far the most common institutional signatory to the agreements, while other common institutional signatories are public and private companies, venture capital firms, and hedge funds. . . . While I do not explore this issue, it is probable that most of these parties unwind their ownership positions over time, limiting the duration of the shareholder agreements.").

public using a stockholder agreement that, at the time of IPO, granted an invalid contractual control provision, would have been affected by the *Moelis* decision. This Part also gives examples of companies granting rights through charters, a separate class of stock, or through other means that would not have been invalid under *Moelis*, showing that at least some stockholders were capable of granting these rights in valid ways, even without the new Delaware legislation.

Our dataset also reveals ways in which the contractual control rights litigated in *Moelis* and *Wagner* are not representative of typical market practice. Among other things, both of those companies gave extensive contractual control rights to their founders, while our findings show that the overwhelming majority of contractual control rights go to private equity investors. Therefore, these two companies were unique in the long-lasting nature of their contractual control provisions. In addition, the contractual control rights granted by these companies were more aggressive than most of the other companies in our sample, which may explain why plaintiff's attorneys chose to litigate those particular cases. Finally, *Moelis* and *Wagner* were both structured as "Up-C IPOs," which have unique considerations that may motivate insider stockholders to enter into particularly aggressive contractual control agreements.

Our dataset further shows that while private equity-backed IPOs frequently grant the types of control rights at issue in *Moelis* and the related cases, private equity-backed IPOs frequently grant their insiders other significant control rights that have gone virtually unnoticed in the current contractual control debate. Therefore, this Part considers how the rights analyzed in *Moelis* and related cases are only one piece of the contractual-control story and explains how many companies grant contractual control rights in ways that were not at issue in the recent Delaware cases. We analyze how these rights should impact our understanding of ways that insiders gain and retain disproportionate corporate control over the companies that they take public.

A. Methodology

To create a dataset of companies that grant insider stockholders significant contractual control rights, we started by deriving a sample of all IPOs from the Thompson Securities Data Company Platinum (SDC Platinum) database of global IPOs for a twelve-year period, from 2010 through 2021.[74] We limited our search to companies incorporated in the United

74. We excluded special purpose acquisition corporations, limited partnerships, limited-liability companies, closed-end funds, and trusts (including real-estate investment trusts) because those entities do not have traditional boards of directors and other characteristics of corporations, which are the focus of this Article. Excluding these types of companies from samples is common in corporate-law literature. *See, e.g.*, Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme*

States with a market cap over $100 million at IPO that are traded on a major stock exchange. This yielded a sample of 1,362 companies. Using this sample of 1,362 companies, we then examined their IPO prospectuses, which contain detailed disclosures about economic control arrangements, to hand-collect and code for contractual control rights granted to insider stockholders at the time of IPO.[75] We coded for (i) the contractual control rights at issue in *Moelis* and subsequent related cases, including veto and pre-approval rights, board-designation and -nomination rights, board-size requirements, vacancy requirements, removal rights, and committee-designation rights, and (ii) other significant contractual control rights that were not raised in *Moelis* or other cases but which we found commonly disclosed in IPO prospectuses. Our examination of these rights allowed us to analyze the frequency of the use of *Moelis*-type rights and other significant contractual control rights.

With this information, we created a database of *which* types of contractual control rights are used in IPOs, but in order to create a full picture of the landscape of contractual control, we also coded for *who*, *when*, and *where* these rights are used. To answer the question of "who" uses these rights, we coded for the identity of the individual rights holders, which revealed that most of these rights are primarily held by private equity investors in private equity-backed IPOs, but that these rights are also frequently held by individual founders.[76] We found that they are rarely granted to venture capital investors even though according to SDC Platinum's coding, venture capital-backed companies are much more common than private equity-backed companies.[77] To answer the question of "when" these rights

Governance: An Analysis of Dual-Class Firms in the United States, 23 REV. FIN. STUD. 1051, 1056 (2010); Scott B. Smart, Ramabhadran S. Thirumalai & Chad J. Zutter, *What's in a Vote? The Short- and Long-Run Impact of Dual-Class Equity on IPO Firm Values*, 45 J. ACCT. & ECON. 94, 99 (2008) ("Types of firms excluded from our dataset include closed-end funds, unit offers, investment companies, real-estate investment trusts, and limited partnerships.").

75. We found the special control rights discussed in this Article (i) by reading relevant sections of each prospectus that typically contain discussion of special rights, (ii) by searching the entire prospectus using relevant search terms, and (iii) by reading the operative documents that contain the special control rights (e.g., the stockholder agreements, director-nomination agreements, and investor agreements). The relevant sections of the prospectuses where these special rights are found are typically labeled with names like "Management," "Certain Related Party Transactions," "Certain Transactions," and "Description of Capital Stock." Board- and committee-designation rights are typically found either in the "Management" or "Certain Transactions" sections of a prospectus or both. Veto/pre-approval rights are typically found in either the "Certain Transactions" or "Description of Capital Stock" sections. We also hand-checked the underlying contractual documents, including charters, stockholder agreements, and board-nomination agreements, when the IPO prospectus was silent about certain contractual control rights.

76. Our findings showed that these rights were granted to a wide variety of private equity firms, and therefore we did not note trends with respect to particular private equity firms. We also did not note strong trends with respect to the law firms that drafted such rights. *See infra* Section II.B.1.

77. Our sample included 382 companies that SDC Platinum coded as private equity-backed and 708 companies that SDC Platinum coded as venture capital-backed. For a discussion of the unique corporate-governance aspects of venture-backed startups, see generally Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155 (2019).

are valid, we coded for when the contractual rights phase out, revealing that the types of rights at issue in *Moelis* are almost always subject to ownership-based sunsets that usually lapse within a few years post-IPO (strongly indicating that fewer companies were affected by the *Moelis* holding than the Delaware legislature was led to believe).[78]

To answer the question of where these rights are used, we coded for where companies that use these rights are incorporated and found that the vast majority of companies are unsurprisingly incorporated in Delaware.[79] We also coded for where the rights are memorialized. In recent years, it has become clear that stockholder agreements are commonly used to grant contractual control rights to insider stockholders. Although some academic research and the debates in Delaware treat stockholder agreements as synonymous with contractual control rights,[80] contractual control rights are also granted through other types of private contracts, bylaws, or certificates of incorporation.[81] Therefore, we coded for control rights anywhere—not just stockholder agreements—that grant stockholders disproportionate control rights in an IPO.[82] While stockholder agreements are the most common form of contractual agreement, we found rights in a wide variety of types of contracts. For example, we found that, of the 337 companies in our sample that granted some kind of board-composition right to insiders, 204 of them used a contract called a stockholder agreement or shareholder agreement, while the other 133 companies used certificates of

78. *See* S.B. 313 Senate Debate and Final Vote, *supra* note 10 (statement of Srinivas Raju, Chair, Corp. L. Council) ("[T]here's lots of agreements already out there that are of questionable validity, or arguably, potentially invalid.").

79. Approximately 92% of the companies in our sample were incorporated in Delaware. We did not find noteworthy trends with respect to states of incorporation in our data except that where companies granted veto or pre-approval rights, vacancy rights, or size-requirement rights in ways that we believe would not have violated Delaware law under the reasoning in *Moelis*, 100% of those companies were incorporated in Delaware. This finding could indicate that companies who chose to grant such rights in "valid" formats were aware of the fact that granting these rights through stockholder agreement or similar contracts would have been invalid, and therefore deliberately chose to grant these rights in ways that would not violate Delaware law (as it stood at the time these companies granted such rights). However, given the relatively small number of companies that used these valid formats, we do not want to draw strong conclusions and therefore do not elaborate on this finding in our analysis below.

80. *See, e.g.*, Rauterberg, *supra* note 38, at 1124, 1149; S.B. 313 Senate Debate and Final Vote, *supra* note 10 (containing many references to stockholder agreements as the contract companies use for granting these rights but making no references to other types of contracts that contain such rights). *See generally* Fisch, *supra* note 33 (analyzing the use of shareholder agreements in corporate governance).

81. *See* Shobe & Shobe, *supra* note 38, at 1358 (explaining that "contractual rights relating to board nomination, board-committee nomination, information rights, shareholder meetings, written-consent rights, and veto rights over certain company actions . . . were generally located in companies' certificates of incorporation, bylaws, or through separate contractual agreements").

82. For example, twenty-two companies granted insider control rights through contracts titled "investor rights agreement," thirteen companies granted insider control rights through contracts titled "voting rights agreement," and fifteen companies used the company's charter or bylaws to grant control rights to specific insiders. The remainder granted rights through myriad other types of contracts.

incorporation or contracts with a wide range of names.[83] The fact that companies use a wide variety of contractual agreements to grant control rights to insiders has important academic and practical implications. To the extent that prior empirical research and debates about market practice, including the debates in the Delaware Senate and House of Representatives that led to the Market Practice Amendments, have been based only on contracts titled "stockholder agreement" or a close variation of that title, those important debates have been underinclusive. Our dataset attempts to provide a more complete understanding of the full spectrum of ways in which companies grant contractual control rights.

B. Moelis *Rights*

This Section discusses our findings relating to the contractual control rights litigated in *Moelis* and the two subsequent, related cases, *Wagner* and *N-Able*.[84] Although there has been much analysis of the rights granted in those few specific cases, little has been understood about how those rights have been granted in the broader market over the past two decades.[85] As described in detail below, we found 341 companies that granted at least one right of the types discussed in recent Delaware cases, with most of the companies granting board-nomination rights that were not invalidated under *Moelis*. The vast majority of these rights were granted to private equity companies subject to phaseouts as their equity ownership dropped after the IPO. Consistent with the fact that private equity companies liquidate their interests soon after IPO, we found that these rights on average phase out over three years or less. By creating a dataset that documents the use of contractual control provisions over more than a decade, this Section fills a significant gap in our knowledge about market practice.[86]

1. Pre-Approval and Veto Rights

Pre-approval rights give certain stockholders the ability to approve or block specific decisions or actions of the company before they are implemented. These rights protect the interests of key insider stockholders and ensure that important board-level decisions align with their objectives or

83. For example, forty-one companies in our sample granted insiders board- and committee-composition rights through contracts titled "director nomination agreements."

84. This Section analyzes pre-approval and veto rights, board-designation and -nomination rights, board-size requirements, board-vacancy control, committee-composition provisions, and removal provisions. Due to difficulties with coding recommendation requirements and efforts requirements, which were both discussed in *Moelis*, we did not code for those two rights.

85. *See generally* Shobe & Shobe, *supra* note 38 (analyzing contractual control rights in dual-class corporations over a twenty-one-year period).

86. Interestingly, we did not note significant trends or increases in the use of these contractual control provisions—the use of the types of contractual provisions at issue in *Moelis* and related cases seemed to be relatively well established by the start of our sample and the frequency of these provisions in IPOs was relatively stable over our sample period.

risk tolerance. These rights are typically structured as either a requirement that certain board-level decisions receive pre-approval from insiders or a right to stop a board decision that has been made. Either way, these rights effectively grant certain insiders the ability to veto certain types of significant corporate actions that would otherwise be entirely in the purview of the board.[87] These rights are generally framed as a right to respond to a board decision that has already been made. However, as the *Moelis* court acknowledges, while these rights do not explicitly allow input from stockholders beforehand, they effectively "shape the Board's sense of the possible and what the directors pursue" in the same manner as a presidential veto.[88] In the words of Kenneth J. Arrow, "[i]f every decision of A is to be reviewed by B, then all we have really is a shift in the locus of authority from A to B."[89]

Pre-approval rights featured prominently in the *Moelis* opinion. The stockholder agreement at issue in *Moelis* stated that "the Board shall not authorize, approve or ratify any of the following actions or any plan with respect thereto without the prior approval . . . of [Moelis.]"[90] The list of actions included a wide variety of typical board-level decisions, including incurring new debt, issuing new stock, approving new investments by the company, removing or appointing officers of the company, declaring or paying dividends, amending the certificate of incorporation, and many others.[91] Vice Chancellor Laster described this list of pre-approval rights as "so all-encompassing as to render the Board an advisory body" because they remove "from the directors in a very substantial way their duty to use their own best judgment on virtually every management matter."[92] Because of this, these rights were found to be "facially invalid" as a violation of DGCL Section 141(a).[93]

87. The *Moelis* decision held that veto rights are effectively the same as pre-approval rights because they allow certain stockholders to block transactions that would otherwise be left to the discretion of the board of directors. Stockholder agreements often grant insiders special approval or veto rights over certain significant corporate decisions. These decisions might include issuing new shares or raising capital; approving mergers, acquisitions, or sales of significant company assets; amending the company's articles of incorporation or bylaws; or changing the dividend policy. *See, e.g.*, W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 825 (Del. Ch. 2024).

88. *Id.* at 868.

89. Kenneth J. Arrow, THE LIMITS OF ORGANIZATION 78 (1974); *see also* Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 815 (2002) (noting that "the power to review is the power to decide"); Michael P. Dooley & E. Norman Veasey, *The Role of the Board in Derivative Litigation: Delaware Law and the Current ALI Proposals Compared*, 44 BUS. LAW. 503, 522 (1989) ("The Power to hold to account is the power to interfere and, ultimately, the power to decide.").

90. Moelis & Co., Shareholders Agreement Dated as of Apr. 15, 2014, Between Moelis & Co. and Moelis & Co. Partner Holdings LP (Form 8-K, Ex. 10.1) § 2.1(a) (Apr. 22, 2014) [hereinafter Moelis Shareholders Agreement], https://www.sec.gov/Archives/edgar/data/1596967/000110465914029215/a14-10912_1ex10d1.htm [https://perma.cc/DC2E-AT2N].

91. *Id.*

92. *Moelis*, 311 A.3d at 869.

93. *Id.*

In our sample, we found ninety-one companies that grant pre-approval or veto rights to stockholders. Overall, our sample shows that *Moelis*, *Wagner*, and subsequent Delaware stockholder-agreement cases are not illustrative of "typical" companies that grant pre-approval or veto rights. First, as discussed further below, the pre-approval rights in *Moelis* and *Wagner* were significantly more aggressive than the majority of the other ninety-one companies in our sample. While some of the companies granted their insider stockholders extensive pre-approval or veto rights (using lists that are strikingly similar to those at issue in the recent Delaware cases), the majority of the ninety-one companies grant far fewer, and far less aggressive, pre-approval or veto rights. In other words, our findings show that *Moelis* and related cases are on the most aggressive end of the spectrum, which helps explain why plaintiffs' lawyers chose to litigate those particular stockholder agreements.[94]

Second, *Moelis* and *Wagner* both addressed companies structured as "Up-C" IPOs, which typically provide insider stockholders with a wide range of contractual benefits that are not available to public stockholders.[95] While only 6.6% of IPOs in our total sample used an Up-C structure,[96] 25% of the companies that granted insider stockholders pre-approval or veto rights used an Up-C structure.[97] Up-C IPOs typically grant their insider stockholders valuable, disproportionate economic rights in addition to contractual control rights.[98] Therefore, one possible explanation for the

94. The findings also provide support for the argument made by fifty law professors who opposed the proposed Market Practice Amendments. *See supra* Section I.B; Delaware State Senate Judiciary Committee Meeting, *supra* note 6; *see also* Delaware House of Representatives Legislative Session, *supra* note 5 (statement of Charles Elson, Founding Dir., Weinberg Ctr. for Corp. Governance at the Univ. of Delaware) ("I think the *Moelis* case was a rather extreme example of a shareholder agreement that went way beyond what typical agreements, in fact, entail . . . .").

95. Up-C corporations are a tax-driven structure whereby an entity that historically operated as a tax partnership goes public in an IPO by creating a new shell corporation that holds units in the underlying tax partnership and sells shares in the shell corporation to public stockholders. The reason a rising number of companies have chosen to use this structure is primarily because it can generate significant tax assets for the new public corporation. However, as part of the IPO, nearly every Up-C company enters into a contract, called a tax receivable agreement, with its pre-IPO insiders to pay most of the value of those tax assets to the insiders. *See* Gladriel Shobe, *Supercharged IPOs and the Up-C*, 88 U. COLO. L. REV. 913, 914-915 (2017); Gladriel Shobe, *Private Benefits in Public Offerings: Tax Receivable Agreements in IPOs*, 71 VAND. L. REV. 889, 926-927 (2018).

96. Of our total sample of 1,362 IPOs, ninety companies went public using an Up-C structure.

97. Of the ninety-one companies in our sample that granted pre-approval or veto rights, twenty-three went public using an Up-C structure. Twenty-one of those companies granted pre-approval or veto rights in ways that we coded as invalid because they violated DGCL Section 141(a), while two of those companies granted pre-approval or veto rights in ways we coded as not violating any provision of Delaware law.

98. Our dataset shows that for Up-Cs, contractual control rights discussed in *Moelis* and related cases are usually just one piece of a more complicated web of contractual rights. Insiders in most Up-Cs receive contractual control rights, which give them disproportionate control over the board, and insiders in almost every Up-C also receive tax receivable agreement rights, which give them disproportionate economic rights. Although our data showing the frequency of the

strong correlation between Up-C IPOs and pre-approval or veto rights, especially the aggressive contractual control rights seen in *Moelis* and *Wagner*, is that insider stockholders' desire for contractual control rights is driven by their interest in controlling actions that could affect their disproportionate economic rights. Either way, Up-C IPOs have unique contractual issues that are not present in typical IPOs, and therefore *Moelis* and *Wagner* are not representative of the average company that grants contractual control rights to insiders.[99]

Third, the stockholder agreements in *Moelis* and *Wagner* granted pre-approval rights to founders—not private equity funds. However, we found only five companies, including Moelis and BRP Group (the company that was the subject of the *Wagner v. BRP Group* case), that granted pre-approval rights only to their founders. Another five companies granted pre-approval rights to founders and private equity firms. Sixty-four companies, or approximately 70% of companies that granted pre-approval rights, granted such rights to private equity holders but not founders, with the rest granting these rights to other companies that were early investors.[100] As discussed in Part III, founders often have a long-term interest in controlling a company post-IPO, while private equity companies typically plan to sell their interests in any company they take public within a few years, and therefore we would expect to see some differences in their desire for contractual control over company actions post-IPO.

Fourth, *Moelis* and *Wagner* both involved veto rights that lasted much longer than average veto rights. Specifically, the stockholder agreement in *Moelis* had existed since 2014—longer than all but one other company in our sample. We examined the phaseouts for the veto rights in our sample and found only six companies that went public before 2020 whose veto rights had not already phased out, with two from 2019 (one of which was BRP Group, the company at issue in *Wagner*), one from 2018, one from 2015 (Shake Shack, an Up-C company), one from 2014 (Moelis, an Up-C company), and one from 2013 (PennyMac, also an Up-C company).[101] We

combination of these contractual control rights is novel, the finding is unsurprising. Given the extensive economic rights at stake, insiders in Up-C IPOs have a strong incentive to obtain disproportionate corporate control rights over the board and corporate-governance decisions.

99. Although the tax-driven mechanics are complicated, the underlying economic reality is simple: through a contractual arrangement, insiders extract disproportionate economic value from the company at the expense of public stockholders. The structure "raises significant tax and corporate governance issues" for a number of reasons, including lack of "alignment between the managers-founders and the investors." Reuven S. Avi-Yonah, *The Up-C, Taxation, and Corporate Governance*, 115 TAX NOTES 1991, 1993 (2024).

100. The remaining companies granted pre-approval rights to founders or other types of stockholders but not private equity investors.

101. This is compared to sixteen companies from 2020 and 2021 whose veto rights had not yet phased out. Under the terms of stockholder agreements, these phaseouts generally occur once the beneficiary of the agreement ceases to hold a certain percentage of the company's equity or vote. For example, we found veto-right phaseouts that occur at 5%, 10%, 15%, 20%, 25%, 30%, 35%, and 50%. The three oldest companies that continued to grant veto rights by far were

found that, on average, pre-approval rights phase out relatively soon after IPO, with the average rights phasing out 31.8 months after IPO. The median phaseout in our sample was twenty-seven months, with a range of zero months to ninety months. That these phaseouts occur relatively soon after IPO, and that the few that take longer to phase out are generally held by founders, is consistent with the fact that the rights are mostly held by private equity firms, which use the IPO as an opportunity to begin selling down their interests in the companies, thereby triggering the phaseout provisions of the stockholder agreement.

While ninety-one companies in our sample granted pre-approval or veto rights to insider stockholders, the extent of those rights varied significantly. On the aggressive end of the spectrum, we found only a handful of companies granting pre-approval or veto rights that were as extensive in nature and scope to the list in *Moelis* and the subsequent, related Delaware cases. For example, when Warner Music Group went public in 2020, the insiders also entered into an extensive stockholder agreement that terminated when their ownership of the overall outstanding shares went below 10%.[102] This stockholder agreement granted the insiders wide-ranging control rights, including the ability to veto any merger; acquisition of assets greater than $25 million; change in the company's capital stock; issuance of debt exceeding $25 million; listing on a securities exchange; action to increase or decrease the size of the board or create any new committee of the board; amendments to the certificate of incorporation or bylaws; hiring of a CEO, CFO, or general counsel; change in auditor; implementation of stock-compensation plan; or settlement of litigation exceeding $15 million.[103] Like the extensive pre-approval rights in *Moelis*, these rights effectively guaranteed that the insiders would not only control all stockholder votes but that they could also determine the day-to-day actions of the board, including choosing the company's most important executives.[104]

Shake Shack (2015), Moelis (2014), and PennyMac Financial Services (2013), although, as discussed below, PennyMac's veto rights were far less extensive than Moelis's. Moelis's phaseout was particularly aggressive, requiring Mr. Moelis to retain only 5% of the company's stock in order to maintain the full suite of control under the stockholder agreement, which explains why his veto rights persisted. Shake Shack's agreement was also aggressive, requiring the company's founder to maintain only 10% of what he held at the time of IPO to maintain his veto right.

102. Warner Music Grp. Corp., Prospectus (Form 424B4) 40 (June 3, 2020), https://www.sec.gov/Archives/edgar/data/1319161/000119312520160812/d833365d424b4.htm [https://perma.cc/E46V-4ZNC].

103. *Id*. at 163.

104. Similarly, Rackspace Technology Inc. entered into Investor Rights Agreements that provided its private equity investor, Apollo, the ability to veto certain issuances of stock, the acquisition or disposition of assets exceeding $50 million in any single transaction, hiring or firing of the company's CEO or CFO, or effecting a material change to the business of the company. Rackspace Tech. Inc., Prospectus (Form 424B4) 188 (Aug. 4, 2020), https://www.sec.gov/Archives/edgar/data/1810019/000119312520210692/d915709d424b4.htm [https://perma.cc/WG6U-PNY9]; *see also* Liberty Oilfield Servs. Inc., Prospectus (Form 424B4) 117-18 (Jan. 11, 2018), https://www.sec.gov/Archives/edgar/data/1694028/000119312518010251/d313047d424b4.htm [https://perma.cc/CT52-7BJQ] (requiring the company to receive prior consent of Riverstone for

Under the reasoning of *Moelis*, these formulations of veto rights would have been invalid as improperly usurping the power of the board of directors to act on behalf of the corporation.[105]

On the other end of the spectrum, some companies granted insider stockholders pre-approval or veto rights over a very limited number of board-level actions. For example, when PennyMac Financial Services, Inc. went public, it granted its private equity investors, Blackrock and Highfields, a single pre-approval right: the right to pre-approve (or reject) an amendment to the certificate of incorporation if that amendment would be adverse to either Blackrock or Highfields.[106] While we included PennyMac in our list of ninety-one companies that granted pre-approval or veto rights, receiving a single pre-approval right of that nature is fundamentally different from, and significantly less extensive than, the types of rights that were granted in *Moelis* and the subsequent, related cases.[107] The majority

the following actions: entering into a transaction that could change the company's business; hiring or firing the company's CEO or CFO; entering into a transaction that could result in a change of control; acquisition or disposition of assets in excess of $100 million in a single or a series of related transactions during any twelve-month period; incurrence of debt in excess of $100 million in a single or a series of related transactions during any twelve-month period; certain issuances of equity securities; paying dividends, settling certain litigation; entering certain business ventures or alliances involving a transaction in excess of $100 million); J. Jill, Inc., Prospectus (Form 424B4) 118-19 (Mar. 8, 2017), https://www.sec.gov/Archives/edgar/data/1687932/000119312517077022/d272297d424b4.htm [https://perma.cc/QE25-YGKC] (providing Towerbrook, an international private equity firm, with pre-approval rights over decisions to: incur certain debts exceeding $10 million; issue or redeem certain equity securities; acquire assets or equity of any other entity; change the business of the company by entering a new line of business; adopt "poison pills" or a similar plan by the company or its subsidiary; modify company bylaws; hire or fire the chairperson of the board; enter into agreements that would affect a change of control; or file voluntary bankruptcy or not oppose involuntary bankruptcy, so long as Towerbrook owns at least 50% of J. Jill, Inc. common stock).

105. We found many other examples of companies that grant relatively extensive pre-approval or veto rights, though not as extensive as the pre-approval rights in *Moelis*. For example, EngageSmart, Inc. entered into a stockholder agreement whereby so long as a private equity investor, General Atlantic, held at least 25% of the company's stock, the company was required to provide written consent before the board could engage in certain acquisitions or dispositions of assets, hire or fire the Company's CEO, or incur indebtedness beyond a certain amount. EngageSmart Inc., Prospectus (Form 424B4) 158 (Sep. 22, 2021), https://www.sec.gov/Archives/edgar/data/1863105/000119312521282446/d157962d424b4.htm [https://perma.cc/7Q2L-6HD4].

106. *See* PennyMac Fin. Servs., Inc., Prospectus (Form 424B4) 179 (May 8, 2013), https://www.sec.gov/Archives/edgar/data/1464423/000104746909007059/a2193874z424b4.htm [https://perma.cc/69ZJ-UWV5] ("In addition to the stockholder approval required by the DGCL, our separate stockholder agreements with BlackRock and Highfields will provide that our amended and restated certificate of incorporation may not be amended in any manner that is adverse to BlackRock or Highfields without the consent of BlackRock or Highfields, as applicable, as long as such stockholder, together with its affiliates, holds more than 5% of the voting power of all of our outstanding shares of capital stock.").

107. Although a single pre-approval right is quite different from the package of rights received in *Moelis* and the subsequent, related cases, based on the reasoning in those cases, we coded it as violating Delaware law. *See* Wagner v. BRP Grp., Inc., 316 A.3d 826, 838-839 (Del. Ch. 2024) (holding that a pre-approval right over charter amendments violates the order of operations set forth in DEL. CODE ANN. tit. 8, § 242). For an additional example of a company that granted only "weak" pre-approval or veto rights, see Benefitfocus, Inc., Prospectus (Form 424B4) 35 (Sep. 17, 2013),

of the companies in our sample fell somewhere between these extremes—granting some of the rights that were at issue in *Moelis*, but granting a less extensive list of rights than in that and subsequent cases.[108] Of the ninety-one companies in our sample that granted pre-approval rights, seven used methods that we coded as valid.[109]

Of the ninety-one companies in our sample that granted pre-approval or veto rights to insider stockholders, eighty-four used methods that we coded as invalid under the reasoning of the *Moelis* decision. Of those eighty-four companies, seventy were private equity backed. We explored various ways to identify determinants of the use of these invalid pre-approval and veto rights, including whether there was any evidence that the use of invalid rights was law firm driven. Only around one-third of the contracts that granted veto rights provided clear evidence of which law firm represented the insider stockholders receiving such right, so any takeaways regarding this point are based on a small percentage of the overall sample. Based on this limited information, which should be considered in such light, we found that around a dozen firms were involved in drafting contracts that included invalid pre-approval or veto rights, and that only two firms were involved in drafting more than two contracts with such invalid rights: Kirkland & Ellis was the counsel for five insider stockholders who received invalid pre-approval rights, and Paul Weiss was the counsel to eight insider stockholders who received invalid pre-approval rights. Given the variety of law firms involved in drafting such invalid rights, the use of these rights does not appear to be driven by any particular firm.

https://www.sec.gov/Archives/edgar/data/1576169/000119312513370527/d497856d424b4.htm [https://perma.cc/C4RF-22GL], which provides:

> [S]o long as The Goldman Sachs Group, Inc. and its affiliates own, collectively, at least 35% of our common stock, we may not amend, without the written consent of the Goldman Sachs Group, provisions in our amended and restated certificate of incorporation or our amended and restated bylaws related to the ability of our stockholders to act by written consent, the procedures by which our stockholders may call a special meeting of stockholders, and the classification of our board of directors into three classes.

108. *See, e.g.*, Nat'l Vision Holdings, Inc., Prospectus (Form 424B4) 146 (Oct. 15, 2017), https://www.sec.gov/Archives/edgar/data/1710155/000156761917002242/s001582x17_424b4.htm [https://perma.cc/TFP4-GMX7] (providing KKR with approval rights over "mergers or other transactions involving a change in control" and appointment of the company's CEO so long as KKR owns 25% of National Vision Holdings, Inc.'s outstanding common stock).

109. We coded companies as granting valid pre-approval rights when such rights were granted through a separate class of stock or through the certificate of incorporation. *See, e.g.*, Pivotal Software, Inc., Prospectus (Form 424B4) 129 (Apr. 19, 2018), https://www.sec.gov/Archives/edgar/data/1574135/000104746918003019/a2235389z424b4.htm [https://perma.cc/LML8-HVT4] (granting its Class B stockholders pre-approval rights over a large number of actions, including mergers, acquisitions, entering into debt agreements, amending the certificate of incorporation, etc.).

2. Board-Designation and -Nomination Rights

The right to designate or nominate a certain number of directors for board elections is by far the most common contractual control right in our sample. These rights generally do not allow the stockholder to unilaterally place a director on the board but instead allow them to place their preferred candidates on the slate of directors available for stockholders to vote on. Because these candidates usually run unopposed with the support of the board, the right to designate or nominate a member of the board of directors typically guarantees that an insider's chosen designees or nominees will have a seat on the board of directors.

In the *Moelis* case, the stockholder agreement granted Mr. Moelis the right to nominate "a number of directors equal to a majority of the Board."[110] The company was required to include those director nominees on the slate of director nominees for stockholder vote. The court found that nominating directors "is not a power that the board holds exclusively" because "[s]tockholders have the right to nominate candidates as well."[111] Because "a company can agree to nominate candidates that a stockholder proposes without violating Section 141(a)," the court held that the provision is not facially invalid, although the court left open the possibility that there could be situations where it is applied in invalid ways.[112]

We found 335 companies with director-designation or -nomination rights, or around 25% of our sample.[113] Of these, 267, or 80%, granted rights to a private equity firm but not to founders, while only twenty, or 6%, granted rights to founders but not a private equity firm.[114] Another twenty-four companies, or 7%, granted director-nomination rights to both founders and private equity firms, with the remaining companies granting

---

110. Moelis Stockholders Agreement, *supra* note 90, at § 4.1(a).

111. West Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 875 (Del. Ch. 2024).

112. *Id*.

113. Professor Rauterberg similarly found that stockholder agreements grant board-nomination rights more frequently than any other contractual control right. *See* Rauterberg, *supra* note 38, at 1177-78. It is worth noting that Rauterberg's empirical study of stockholder agreements found that only around 13% of public companies granted director-nomination rights. However, we believe that this lower finding is because, as explained above in Section II.A, companies often grant board-nomination rights and other contractual control rights through other corporate contracts that are included in our sample. *See, e.g.*, Ryan Specialty Grp. Holdings, Inc., Prospectus (Form 424B4) 195-96 (July 21, 2021), https://www.sec.gov/Archives/edgar/data/1849253/000119312523152943/d511662d424b4.htm [https://perma.cc/HX8W-CMLN] (granting director-nomination rights through a contract called the "Director Nomination Agreement"); P10, Inc., Prospectus (Form 424B4) 65 (Oct. 20, 2021), https://ir.p10alts.com/node/15831/html [https://perma.cc/R6VT-U3VQ] (granting director-nomination rights through a contract called the "Controlled Company Agreement"). Another prior study reported that approximately 19% of the companies in their sample granted insider stockholders board-nomination rights. *See* Shobe & Shobe, *supra* note 39 (finding that 364 of 1,870 single-class companies granted their insider stockholders board-nomination rights).

114. For a discussion of "super directors," including private equity-nominated directors, see generally Kobi Kastiel & Yaron Nili, *"Captured Boards": The Rise of "Super Directors" and the Case for a Board Suite*, 2017 WISC. L. REV. 19.

these rights to another corporation that continued to own a substantial interest in the public company post-IPO.[115] Although these nomination rights vary significantly in form, they were substantively similar to the rights at issue in *Moelis* and therefore do not appear to be facially invalid on their own. By far the most common form allows a private equity investor to nominate a number of directors on a sliding scale depending on their equity holdings of the company. This formulation generally allows the private equity investor to designate a majority of the board when they hold a majority of the company's equity and then a decreasing number as their equity ownership decreases. For example, Agilon Health Inc. granted its private equity investor, CD&R, the right to designate "CD&R Designees equal to" a majority of the board for so long as they held 50% of the company's stock, 40% of the board as long as they held 40% but less than 50% of the company's equity, 30% of the board as long as they held 30% but less than 40% of the company's equity, 20% of the board as long as they held 20% but less than 30% of the company's equity, and at least 5% as long as they held 5% but less than 20% of the company's equity.[116]

In other companies, the director-nomination rights allow multiple private equity investors and founders to nominate members to the board. For example, Allison Transmission Holdings, Inc. allowed its two private equity investors, Carlyle and Onex, to designate four and two directors respectively, with "the Board of Directors . . . having the right to nominate the remaining two board members."[117] And Bumble Inc. granted its private

115. *See, e.g.*, Bellring Brands, Inc., Prospectus (Form 424B4) 159-60 (Oct. 16, 2019), https://www.sec.gov/Archives/edgar/data/1772016/000119312519269310/d727525d424b4.htm [https://perma.cc/UZ2Y-QWSU] (providing majority shareholder Post Holdings, Inc., with certain board-designation rights); Airbnb, Inc., Prospectus (Form 424B4) 306 (Dec. 9, 2020), https://www.sec.gov/Archives/edgar/data/1559720/000119312520315318/d81668d424b4.htm [https://perma.cc/A8Y6-S73X] ("We and Messrs. Blecharczyk, Chesky, and Gebbia, referred to in this prospectus as our founders, have entered into a Nominating Agreement, which will become effective prior to the completion of this offering ('Nominating Agreement'), under which we and the founders are required, following the offering and upon the terms set forth in the Nominating Agreement, to (i) include our founders in the slate of nominees nominated by our board of directors for the applicable class of directors for election by our stockholders, and (ii) include such nomination of our founders in our proxy statement.").

116. *See, e.g.*, Agilon Health, Inc., Prospectus (Form 424B4) 161-62 (Apr. 14, 2021), https://www.sec.gov/Archives/edgar/data/1831097/000119312521118203/d10763d424b4.htm [https://perma.cc/R9VS-8E6G] [hereinafter Agilon Prospectus]. Many other companies in our sample granted very similar rights to their private equity sponsors. For example, La Quinta Holdings granted a nearly identical right to its private equity investor, Blackstone. *See* La Quinta Holdings, Inc., Prospectus (Form 424B4) 155 (Apr. 9, 2014), https://www.sec.gov/Archives/edgar/data/1594617/000119312515104620/d859384d424b4.htm [https://perma.cc/TYT9-JU8F].

117. *See* Allison Transmission Holdings, Inc., Prospectus (Form 424B4) 111 (Mar. 14, 2012), https://www.sec.gov/Archives/edgar/data/1411207/000119312512117685/d254159d424b1.htm [https://perma.cc/J6K8-PHSD]; *see also* Dunkin Brands Group, Inc., Prospectus (Form 424B4) 140 (July 26, 2011), https://www.sec.gov/Archives/edgar/data/1357204/000119312512144087/d308605d424b4.htm [https://perma.cc/539Y-HL6N] ("The investor agreement as amended will grant each of the Sponsors the right, subject to certain conditions, to name representatives to our board of directors and committees of our board of directors. Each Sponsor will have the right to designate two nominees

equity investor, Blackstone, the right to nominate directors on a sliding scale according to its equity investment, while also granting to its founder the right to nominate one member of the board as long as she held at least 50% of the stock she held at the time of IPO.[118]

In addition, we found some variations of board-designation rights that appear to be previously unmentioned in academic literature or court proceedings. One of the most interesting variations is where companies grant double voting rights to the directors nominated by an insider stockholder. For example, Townsquare Media, Inc. granted Oaktree, its private equity investor, the right to designate three directors to the company's board of directors and granted each of those directors *two* votes on each matter presented to the board.[119] Since the board size at the time of the IPO was set at seven members, this effectively gave Oaktree control over the board, even though their board designees constituted only three out of the seven board members.[120] Similarly, JGWPT Holdings granted JLL, its private equity investor, the right to designate four directors to its board and granted each of those directors double votes:

> Pursuant to our certificate of incorporation, the four directors designated by the JLL Holders will each be entitled to cast two votes on each matter presented to the board of directors . . . . All other directors will each be entitled to cast one vote on each matter presented to the board of directors.[121]

---

for election to our board of directors until such time as that Sponsor owns less than 10% of our outstanding common stock, and then may designate one nominee for election to our board of directors until such time as that Sponsor's ownership level falls below 3% of our outstanding common stock. In addition, the Sponsors will have certain contractual rights to have their nominees serve on our compensation committee. Subject to the terms of the investor agreement, each Sponsor agrees to vote its shares in favor of the election of the director nominees designated by the other Sponsors pursuant to the investor agreement.").

118. *See* Bumble, Inc., Prospectus (Form 424B4) 203 (Feb. 20, 2021) [hereinafter Bumble Prospectus], https://www.sec.gov/Archives/edgar/data/1830043/000119312521041904/d20761d424b4.htm [https://perma.cc/Q7CS-3A3N].

119. *See* Townsquare Media, Inc., Prospectus (Form 424B4) 13 (July 23, 2014), https://www.sec.gov/Archives/edgar/data/1499832/000157104914003250/t1401351-424b.htm [https://perma.cc/P3UR-YGT6] ("[P]ursuant to the Stockholders' Agreement, until Oaktree ceases to beneficially own at least 33.3% of the number of shares of common stock it will hold immediately following the consummation of this offering, Oaktree will have the right to designate three directors to our board of directors. Each of these directors will have two votes on each matter submitted to the board of directors, until Oaktree ceases to beneficially own at least 70% of the number of shares of common stock it will hold immediately following the consummation of this offering.").

120. Interestingly, Oaktree also received high-vote stock that gave it voting control over all stockholder-level matters. *Id.* at 12-13. Therefore, the combination of the high-vote stock and contractual control rights effectively gave Oaktree control over both board- and stockholder-level matters. *See generally* Shobe & Shobe, *supra* note 4 (discussing and analyzing empirically the combination of contractual control rights with high-vote stock in dual-class corporations).

121. *See* JGWPT Holdings, Inc., Prospectus (Form 424B4) 111 (Nov. 7, 2013), https://www.sec.gov/Archives/edgar/data/1580185/000156761913000137/s000086x9_424b1.htm [https://perma.cc/CCR9-PA5N]. Interestingly, JGWPT was also a dual-class company and granted JLL high-vote stock, which gave the private equity investor voting control over stockholder-level matters. *Id.* at 131. *See generally* Shobe & Shobe, *supra* note 4 (discussing and analyzing empirically the combination of contractual control rights with high-vote stock in dual-class corporations).

3. Board-Size Requirements

Contractual board-size requirements generally allow stockholders to limit the number of individuals who will sit on the company's board of directors. These rights allow certain insider stockholders to establish a size requirement for the board, overriding the size that would typically be set by the company's bylaws or certificate of incorporation and determined by the board of directors.[122] Generally, the purpose of a size requirement is to ensure that an insider stockholder who receives director designation or nomination rights does not have their representation on the board diluted by the addition of more directors. Therefore, board-size requirements act in tandem with board-designation rights to ensure that an insider stockholder has representation on the board and that this representation is not diluted without their express consent.

In the *Moelis* case, the company's certificate of incorporation mandated that the board of directors consist of not more than eleven members, while the stockholder agreement required consent from Mr. Moelis to expand the board beyond eleven members. This meant that the stockholder agreement was "superfluous," since the certificate of incorporation already limited the board's ability to expand its size beyond eleven members.[123] Vice Chancellor Laster nevertheless found the board-size requirement of the stockholder agreement facially invalid because, were the certificate of incorporation amended to allow for a larger board size, Moelis would retain the right to override directors' "duty to use their own best judgment on a management matter, viz., the size of the Board."[124]

We found eighty-five companies in our sample that grant insider stockholders the right to restrict directors' ability to exercise their independent judgment with respect to board size. Sixty-eight of these companies, or 80%, granted these rights to private equity firms and not founders; six of these companies, including Moelis and BRP Group, granted these rights to founders and not private equity firms; three granted the rights to both; and the remaining granted the rights to other investors.[125] Most of

122. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 873-74 (Del. Ch. 2024).

123 *Id.* at 870.

124. *Id.* at 872.

125. For example, Shake Shack entered into a Stockholder Agreement with Meyer Group whereby so long as the Meyer Group collectively owns at least 10% of the Class A and Class B common stock it owned immediately following the offering, the company must obtain Meyer Group's approval to increase or decrease the size of the board of directors. *See* Shake Shack, Inc., Prospectus (Form 424B3) 145 (Jan. 29, 2015), https://www.sec.gov/Archives/edgar/data/1620533/000162053315000126/shak-20151112_424b3.htm [https://perma.cc/T762-W74J]; *see also* WageWorks, Inc., Prospectus (Form 424 B4) 21 (May 9, 2012), https://www.sec.gov/Archives/edgar/data/1158863/000119312512223588/d213653d424b4.htm [https://perma.cc/36LX-XFU2] (requiring the company to receive the consent of Vantage Point, a venture capital firm, to change the number of authorized directors as long as Vantage Point owned 25% or more of the company's outstanding common stock).

these companies use formulations that allow the insider stockholders to overrule any change to the size of the board and are therefore more restrictive than the contested provision in *Moelis*. For example, Bumble Inc. entered into a stockholder agreement with Blackstone, its private equity investor, requiring Blackstone's "consent to any increase or decrease in the total number of directors on our board."[126] Similarly, Agiliti Inc. entered into a "director nomination agreement" that prohibited "increasing or decreasing the size of [its] Board without the prior written consent of" its private equity investor, Thomas H. Lee Partners.[127] These provisions would appear to be invalid under *Moelis*.

Of the eighty-five companies that grant insider stockholders the right to restrict changes to board size, three granted such rights through a separate class of stock, which would be valid under *Moelis*. In addition to the three companies that granted valid board-size requirements, our research found that companies frequently grant different valid contractual control rights that effectively achieve the same goal as the size requirement. Because the general purpose of a board-size requirement is to ensure that an insider stockholder's board-nomination or -designation rights are not diluted by an increase in the size of the board, a contractual right to a certain percentage of seats on the board (as opposed to a set number of seats) achieves the same general goal. For example, the stockholder agreement between Catalent Inc. and Blackstone, its private equity investor, ensured that Blackstone's representation on the board would not be diluted:

> For purposes of calculating the number of directors that Blackstone is entitled to nominate pursuant to the formula outlined above, any fractional amounts would be rounded up to the nearest whole number (e.g., one and one quarter directors shall equate to two directors) and the calculation

126. Bumble Prospectus, *supra* note 118, at 203.

127. Agiliti, Inc., Prospectus (Form 424B4) 39 (Apr. 22, 2021) [hereinafter Agiliti Prospectus], https://www.sec.gov/Archives/edgar/data/1749704/000119312521131770/d59213d424b4.htm [https://perma.cc/J9TJ-J2PX] ; *see also* Evo Payments, Inc., Prospectus (Form 424B4) 140 (May 22, 2018), https://www.sec.gov/Archives/edgar/data/1704596/000119312518172449/d386290d424b4.htm [https://perma.cc/KU8X-QLAX] (requiring the company to receive Madison Dearborn Partners' approval before increasing the size of the board of directors to more than seven); Rackspace Prospectus, *supra* note 104, at 188 (requiring approval from Apollo and its affiliates to change the size of the board as long as they own at least 33% of the company); European Wax Ctr., Inc., Prospectus (Form 424B4) 144 (Aug. 4, 2021), https://www.sec.gov/Archives/edgar/data/1856236/000110465921101459/tm2114247-17_424b4.htm [https://perma.cc/FGD7-GHA6] (requiring the company to obtain written consent from General Atlantic and its affiliates to change the number of authorized directors as long as General Atlantic beneficially owns at least 25% of the company's outstanding common stock); e.l.f. Beauty, Inc., Prospectus (Form 424B4) 32 (Sep. 22, 2016), https://www.sec.gov/Archives/edgar/data/1600033/000119312516716529/d179389d424b4.htm [https://perma.cc/G5AG-L548] (requiring the company to obtain consent from TPG Growth to change the size of the board of directors as long as TPG owns, directly or indirectly, at least 30% of the shares of the company's outstanding stock).

> would be made on a pro forma basis *after taking into account any increase in the size of our board of directors*.[128]

As with veto rights, board-size requirements phase out relatively quickly. In our sample, these rights phase out after thirty-two months on average, consistent with the fact that the rights are mostly held by private equity firms that use the IPO as a precursor to exiting their investments. In our sample, we found only four board-size control rights from before 2020 that had not already phased out, or 0.4% of all companies that went public before 2020 in our sample. This group included Moelis from 2014, Shake Shack from 2015, Goosehead Insurance from 2018, and BRP Group from 2019 (the company at issue in *Wagner*). In other words, the four companies in our sample that granted the longest-lasting board-size control rights granted those rights to founders. This was the case even though far fewer companies granted these control rights to founders than to private equity investors. While these rights are mostly held by private equity firms for a relatively short period of time prior to exiting their investments, when founders hold these rights, they are much more likely to hold them indefinitely and not exit their investments in the short term.

4. Board-Vacancy Control

Board-vacancy control provisions allocate the power to fill vacancies in a company's board of directors to certain insider stockholders. Vacancy control rights give a stockholder the right to fill vacancies that arise between director elections—generally where a vacancy arises for a board seat for which the stockholder has nomination rights. For example, if a director nominated by a certain stockholder resigns, dies, or is otherwise removed from their position, the agreement allows the stockholder to designate a replacement, thereby giving the insider stockholder the ability to choose who fills the vacant seat on the board of directors. Unlike board-nomination rights, which grant the right to nominate candidates who are then voted on by stockholders, vacancy rights allow a stockholder to fill a board

128. Catalent, Inc., Prospectus (Form 424B1) 139 (July 30, 2014), https://www.sec.gov/Archives/edgar/data/1596783/000119312514291034/d655309d424b1.htm [https://perma.cc/AHS5-4Z43] (emphasis added); *see also* SiteOne Landscape Supply, Inc., Prospectus (Form 424B4) 114 (May 11, 2016), https://www.sec.gov/Archives/edgar/data/1650729/000119312516589066/d168346d424b4.htm [https://perma.cc/BNY4-YAE2] ("For purposes of calculating the number of CD&R Designees and Deere Designees that the CD&R Investor and Deere, respectively, are entitled to nominate pursuant to the formulas outlined above, any fractional amounts will be rounded up to the nearest whole number and the calculation will be made on a pro forma basis after taking into account any increase in the size of our board of directors."); Ryerson Holding Corp., Prospectus (Form 424B4) 28 (Aug. 8, 2014), https://www.sec.gov/Archives/edgar/data/1481582/000119312514303162/d618878d424b4.htm [https://perma.cc/46LU-K6W6] ("The agreement will also provide that if the size of the board of directors is increased or decreased at any time, Platinum's [(the private equity firm that controlled Ryerson at the time)] nomination rights will be proportionately increased or decreased, respectively, rounded up to the nearest whole number . . . .").

seat unilaterally until the next stockholder vote for that seat. Absent this right, the board seat would either remain vacant or be filled by a majority vote of the board until the following stockholder election.

The stockholder agreement at issue in *Moelis* contained a typical vacancy requirement that allowed Mr. Moelis to replace any of his board designees who departed because of "death, disability, retirement, resignation or removal" with a new designee "as promptly as practicable."[129] Under Moelis's certificate of incorporation, only the Board had the right to fill vacancies according to its own judgment.[130] Vice Chancellor Laster noted that the stockholder agreement only operated when there was a disagreement: if the board and Mr. Moelis agreed on who to fill a vacancy, then the stockholder agreement had no effect. However, if there was a disagreement, then Mr. Moelis' choice would always win out under the terms of the stockholder agreement. Vice Chancellor Laster therefore ruled that this provision was facially invalid because it removed from the board the ability to use their own best judgment in how to run the company.

We found 136 companies in our sample that grant insider stockholders similar rights to fill board vacancies. Of these companies, 121, or 89%, granted rights to private equity funds but not founders; four companies, including Moelis, granted rights to founders but not private equity funds; and six companies granted rights to both. Most of these provisions took a form similar to the provision in the *Moelis* case and therefore would be invalid under the reasoning in *Moelis*. For example, Agiliti Inc. entered into a stockholder agreement with THL that granted them the right to "designate the replacement for any of its board designees whose board service terminates prior to the end of the director's term regardless of THL Stockholder's beneficial ownership at such time."[131] Similarly, Change Healthcare Inc. entered into a stockholder agreement that provided its private equity investor, Blackstone, the ability to nominate individuals to fill the board vacancy resulting from the removal or resignation of a Blackstone director so long as Blackstone and its affiliates collectively owned at least 5% of the company's voting common stock at the time.[132]

Of the 136 companies that grant insiders rights to fill board vacancies, we found thirty-four that we believe would not have been invalidated under the reasoning of the *Moelis* case. One way that these companies would

129. Moelis Shareholders Agreement, *supra* note 90, at § 4.1(d).

130. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 819 (Del. Ch. 2024).

131. Agiliti Prospectus, *supra* note 127, at 125-26.

132. Change Healthcare, Inc., Prospectus (Form 424B4) 229 (June 26, 2019), https://www.sec.gov/Archives/edgar/data/1756497/000119312519186131/d748301d424b4.htm [https://perma.cc/J75M-VMQM]; *see also* First Advantage Corp., Prospectus (Form 424B4) 144 (June 22, 2021), https://www.sec.gov/Archives/edgar/data/1210677/000119312521198716/d147929d424b4.htm [https://perma.cc/85TB-4U3D] (providing Silver Lake and its affiliates with the right to fill any board vacancy resulting from the departure of their designated directors).

have avoided invalidation is by putting the relevant provision in the charter and bylaws, thereby rendering them presumptively valid. For example, MeridianLink Inc. disclosed that its "charter and bylaws allow Thoma Bravo to . . . fill any vacancy on [its] board of directors, including newly created seats, for so long as Thoma Bravo beneficially owns at least 30% of the outstanding shares of [its] common stock."[133]

Another seemingly valid way to grant insiders the ability to fill vacancies is to require board consent or to subject the selection to the board's fiduciary duties. This obviously weakens the power of the provision for the insider stockholder since it does not guarantee that their chosen successor will fill the seat. For example, Fluence Energy granted its insider stockholders the right to designate new directors for vacancies created by the departure of their respective designees, but those new designees could be rejected by the board of directors if the appointment would cause the board to breach their fiduciary duties.[134] This formulation allowed the private equity investors to choose replacements in the first instance, which presumably were likely to be approved, while allowing the remaining directors to override the private equity investors' preferences. Similarly, Rent the Runway Inc. granted insiders a stockholder agreement that allowed them to "fill the applicable vacancies on the board of directors."[135] However, the stockholder agreement also had a "fiduciary out" provision that allowed "the board of directors to reject the nomination, appointment or election of a particular director if such nomination, appointment or election would constitute a breach of the board of directors' fiduciary duties to our stockholders."[136] By granting the ultimate authority to the board to act

133. MeridianLink, Inc., Prospectus (Form 424B4) 12 (July 27, 2021) [hereinafter MeridianLink Prospectus], https://www.sec.gov/Archives/edgar/data/1834494/000119312521227555/d66582d424b4.htm [https://perma.cc/6JDP-HXRE].

134. Fluence Energy, Inc., Prospectus (Form 424B4) 160-61 (Oct. 27, 2021), https://www.sec.gov/Archives/edgar/data/1868941/000110465921131847/tm2120236-13_424b4.htm [https://perma.cc/H9KS-84YV] ("[W]e shall take all commercially reasonable actions to cause . . . (2) the individuals nominated in accordance with the terms of the Stockholders Agreement to fill the applicable vacancies on the board of directors . . . . The Stockholders Agreement allows for the board of directors to reject the nomination, appointment or election of a particular director if such nomination, appointment or election would constitute a breach of the board of directors' fiduciary duties to our stockholders or does not otherwise comply with any requirements of our amended and restated certificate of incorporation or our amended and restated bylaws or the charter for, or related guidelines of, the board of directors' nominating and corporate governance committee.").

135. Rent the Runway, Inc., Prospectus (Form 424B4) 224 (Oct. 27, 2021), https://www.sec.gov/Archives/edgar/data/1468327/000119312521308630/d194411d424b4.htm [https://perma.cc/8EZU-6Q8D].

136. *Id.* ("Additionally, pursuant to the Stockholders' Agreement, we shall take all commercially reasonable actions to cause (1) the individuals designated in accordance with the terms of the Stockholders' Agreement to be included in the slate of nominees to be elected to the board of directors at the next annual or special meeting of our stockholders at which directors are to be elected and at each annual meeting of our stockholders thereafter at which a director's term expires and (2) the individuals designated in accordance with the terms of the Stockholders' Agreement to fill the applicable vacancies on the board of directors. The Stockholders' Agreement

in accordance with its fiduciary duties when filling vacancies on the board, this provision would appear not to violate Section 141(a) under the reasoning of *Moelis*.

As with other contractual control rights, and consistent with the fact that these rights are held mostly by private equity funds, board vacancy control rights sunset relatively soon after IPO, with an average of just over three years. Consistent with these findings, we found only five companies from before 2020, or 0.51% of our dataset, that granted board vacancy control rights which have not already phased out. Of those five, one was Moelis and two were other companies that granted the control rights to founders.[137] Of the remaining two, one granted the vacancy control right to a long-time family-office investor that has maintained a long-term investment[138] and the other granted the control rights to the private equity giant Apollo, which has been selling down its investment but not yet enough to phase out this particular control right.[139] Again, as with other contractual control rights, even though founders hold only a small portion of these rights in our sample, they disproportionately hold these rights for a long period. Private equity investors, on the other hand, tend to liquidate their investments relatively quickly following the IPO, and as a result, their control rights also phase out relatively quickly.

5. Committee-Composition Provisions

An additional contractual control right analyzed in *Moelis* grants insiders the ability to designate who serves on the committees of the board,

allows for the board of directors to reject the nomination, appointment or election of a particular director if such nomination, appointment or election would constitute a breach of the board of directors' fiduciary duties to our stockholders or does not otherwise comply with any requirements of our amended and restated certificate of incorporation or our amended and restated bylaws.").

137. The two companies are Walker & Dunlop, Inc. and FB Financial Corp. *See* Walker & Dunlop, Inc., Stockholders Agreement Dated as of Dec. 20, 2010, By and Among William M. Walker, Mallory Walker, Column Guaranteed LLC and Walker & Dunlop, Inc. (Form 8-K, Ex. 10.2) § 2.2 (Dec. 20, 2010), https://www.sec.gov/Archives/edgar/data/1497770/000110465910064297/a10-24151_1ex10d2.htm [https://perma.cc/22P3-QM25] (granting Column, an entity that co-founded Walker & Dunlop, the right to fill vacancies of its own nominee); FB Fin. Corp., Prospectus (Form 424B4) 196 (Sep. 15, 2016), https://www.sec.gov/Archives/edgar/data/1649749/000119312516713553/d241660d424b4.htm [https://perma.cc/V59Y-JFKH] ("If at any time a designee of Mr. Ayers ceases to serve on our board of directors, Mr. Ayers will have the right to designate or nominate a successor to fill such vacancy . . . .").

138. *See* CPI Card Grp., Inc., Prospectus (Form 424B4) 135 (Oct. 8, 2015), https://www.sec.gov/Archives/edgar/data/1641614/000104746915007767/a2226232z424b4.htm [https://perma.cc/FE7M-KHM7] ("[T]he Tricor Funds shall be entitled to designate the replacement for any of its board designees whose board service terminates prior to the end of such designee's term regardless of the Tricor Funds' beneficial ownership at such time.").

139. *See* ADT, Inc., Prospectus (Form 424B4) 210 (Jan. 18, 2018), https://www.sec.gov/Archives/edgar/data/1703056/000119312518016233/d517732d424b4.htm [https://perma.cc/F83F-YV6R] ("Any vacancy on our board of directors in respect of an Apollo Designee will be filled only by a majority of the Apollo Designees then in office or, if there are no such directors then in office, our Sponsor.").

which is a decision that is generally left to the board itself. We found 111 companies in our sample that grant committee-composition rights to insider stockholders, of which eighty-seven granted such rights to private equity firms but not founders. Two companies, including Moelis, granted such rights to founders but not private equity firms, and six granted these rights to both founders and private equity firms, with the remaining going to other types of pre-IPO investors.

Committees wield significant control over certain aspects of corporate governance and often are charged with making proposals to the larger board with regard to many important corporate decisions.[140] For example, the compensation committee determines executive compensation, the audit committee oversees internal controls and financial reporting, the finance committee considers alternative uses for the company's capital, and the governance committee is charged with board recruitment and onboarding.[141] Because of the significant influence that committees wield over ultimate board decisions, insider stockholders often want to ensure they are represented not only on the board more generally, but also on specific committees of the board.

The stockholder agreement at issue in the *Moelis* case gave Mr. Moelis the right to have a proportionate number of the board members he designated also serve on each board committee.[142] Because Mr. Moelis had the right to designate a majority of the board of directors, this provision allowed him to also designate a majority of each committee of the board. Unlike stockholder votes on Mr. Moelis's board nominees, there is no stockholder vote on who serves on which committee of the board, which is generally left to the board under Sections 141(a) and (c) of the DGCL.[143] This provision left no room for the board to override Mr. Moelis's designees. Because this right allowed Mr. Moelis to remove unilaterally the board's ability to use its own best judgment regarding this board-level

140. Karen Kane, *Where the Action Is: Board Committees*, BRIEFINGS MAG. (Nov. 2014), https://www.kornferry.com/content/dam/kornferry/docs/article-migration/Briefings25_LatestThinking_BoardCommittees_10-12.pdf [https://perma.cc/8SW8-8Q7D]; *see also* Wei-Ming Lee, *The Determinants and Effects of Board Committees*, 65 J. CORP. FIN., no. 101747, 2020, at 36 ("Many important decisions, such as executive compensation and turnovers, are made in board committees.").

141. *See* ASAE, *The Basics of Board Committee Structure*, https://www.asaecenter.org/resources/articles/an_plus/2020/april/the-basics-of-board-committee-structure [https://perma.cc/NA95-X9LA].

142. Moelis Shareholders Agreement, *supra* note 90, at 10 ("For so long as this Agreement is in effect, the Company shall take all reasonable actions within its control at any given time so as to cause to be appointed to any committee of the Board a number of directors designated by [Moelis] that is up to the number of directors that is proportionate (rounding up to the next whole director) to the representation that [Moelis] is entitled to designate to the Board under this Agreement.").

143. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 821 (Del. Ch. 2024) ("The Committee Composition Provision violates both Section 141(a) and Section 141(c). Determining the composition of committees falls within the Board's authority.").

decision, this committee-designation provision was found to be facially invalid.

The extent of this right varies based on the contract, and these rights appear to be more bespoke than many other contractual control rights, though we did notice several trends. Approximately half the companies, including Moelis, allow insiders to appoint their board designees to each committee of the board. For example, PlayAGS Inc., entered into a stockholder agreement similar to the stockholder agreement in Moelis, that provided its private equity investor, Apollo, the ability to appoint directors to each company committee in proportion to its board-nomination rights, as long as Apollo Group maintained at least 5% ownership of PlayAGS Inc.'s outstanding common stock.[144] The other half of the companies that grant committee designation rights grant stockholders the right to appoint their board designees to specific committees. For example, Adeptus Health Inc. granted its private equity investor, Sterling Partners, "the right to designate (i) a majority of the members of our nominating and corporate governance committee and (ii) up to two members of our compensation committee."[145]

144. PlayAGS, Inc., Prospectus (Form 424B4) 137 (Jan. 25, 2018), https://www.sec.gov/Archives/edgar/data/1593548/000119312518022495/d499581d424b4.htm [https://perma.cc/AX5Q-HXPD] ("Pursuant to the Stockholders Agreement, at any time until the Apollo Group no longer beneficially owns at least 5% of our issued and outstanding common stock, we will cause to be appointed to each committee of the board of directors a number of directors nominated by Holdings that is as proportionate (rounding up to the next whole director) to the number of members of such committee as is the number of directors that Holdings is entitled to nominate to the number of members of our board of directors."); *see also* Sun Country Airlines Holdings, Inc., Prospectus (Form 424B4) 138 (Mar. 16, 2021), https://www.sec.gov/Archives/edgar/data/1743907/000119312521085551/d71456d424b4.htm [https://perma.cc/H6B9-K5A3] (providing a private equity investor, Apollo, with the rights to have its directors to serve on each committee of the company's board so long as Apollo and its affiliates own at least 5% of the voting power of the company's outstanding common stock); Instructure Holdings, Inc., Prospectus (Form 424B4) 187 (July 21, 2021), https://www.sec.gov/Archives/edgar/data/1841804/000119312521223022/d47346d424b4.htm [https://perma.cc/DK9N-W9QB] (providing private equity investor, Thoma Bravo, the right to have its designated directors participate on committees of the company's board proportionate to Thoma Bravo's stock ownership under the director-nomination agreement).

145. Adeptus Health, Inc., Prospectus (Form 424B4) 143 (June 24, 2014), https://www.sec.gov/Archives/edgar/data/1602367/000104746914005870/a2220618z424b4.htm [https://perma.cc/SAM4-PS9S]. Similarly, US Foods Holding Corp. entered into a stockholder agreement whereby so long as private equity investors, KKR and CD&R, held at least 10% of the company's stock, the company would include at least one designee from KKR and CD&R in the Audit Committee, Compensation Committee, and the Nominating and Corporate Governance Committee. *See* US Foods Holding Corp., Prospectus (Form 424B4) 150 (May 25, 2016), https://www.sec.gov/Archives/edgar/data/1665918/000119312516604728/d131738d424b4.htm [https://perma.cc/94AT-TWXX]; *see also* e.l.f. Beauty Prospectus, *supra* note 127, at 96 (providing private equity investor, TPG, with the right to appoint a representative on each committee of the company's board other than the audit committee so long as TPG owns at least 5% of the company's outstanding common stock); Vanguard Health Sys., Inc., Prospectus (Form 424B4) 211 (June 22, 2011), http://pdf.secdatabase.com/912/0000950123-11-061115.pdf [https://perma.cc/X82W-TVM5] (providing a private equity investor, Blackstone, with the right to designate a majority of each committee of the company so long as Blackstone holds more than 50% of the voting stock); Bloomin' Brands, Inc., Prospectus (Form 424B4) 154 (Aug. 7, 2012), https://www.sec.gov/Archives/edgar/data/1546417/000119312512344417/d319863d424b4.htm

While there was variation in the committees where insiders received designation rights, the compensation committee was the most popular choice.[146] This is possibly because the compensation committee gives a board member a degree of leverage over the company's officers, including the CEO, thereby giving the insider stockholder who holds this committee-designation right unique power over the officers of the company. Another common right includes the right to designate the chair of the board of directors or the right to designate the chair of specified committees.[147]

Regardless of the formulation of these rights, we found that these provisions were typically invalid. Except for a handful of companies, these rights were not granted through a certificate of incorporation or a second class of stock,[148] and they allow an insider stockholder to designate which board members serve on which committees unilaterally, which is the type of power that is reserved for boards under Delaware law. As with other rights discussed in this section, committee-designation rights tend to phase out relatively quickly, with an average phaseout of thirty-two months after IPO. Of companies in our sample that went public before 2020, only six, or 0.62%, grant committee designation rights that have not phased out, one of which is Moelis.

[https://perma.cc/77XU-V35Q] (providing private equity investor, Bain Capital, with the rights to have one of its nominees serve on each committee of the company other than the audit committee so long as Bain Capital and Catterton Management Company collectively own 35% of the company's outstanding common stock).

146. *See, e.g.*, Sprout Soc., Inc., Prospectus (Form 424B4) 133 (Dec. 12, 2019), https://www.sec.gov/Archives/edgar/data/1517375/000162828019015085/sproutsocial424b4.htm [https://perma.cc/78EL-H2V8] ("[T]he Company shall nominate the Goldman Sachs Nominee to the compensation committee of the board of directors.").

147. *See, e.g.*, Agilon Prospectus, *supra* note 116, at 162 ("The stockholders agreement will provide that a CD&R Designee will serve as the Chairman of our board of directors as long as the CD&R Investor beneficially owns at least 25% of the outstanding shares of our common stock."); Yeti Holdings, Inc., Prospectus (Form 424B4) 97 (Oct. 24, 2018), https://www.sec.gov/Archives/edgar/data/1670592/000104746918006867/a2236975z424b4.htm [https://perma.cc/B9KL-42YA] ("[P]ursuant to the New Stockholders Agreement, Cortec has the right to have one of its representatives serve as Chairman of our Board of Directors and Chairman of our nominating and governance committee so long as it beneficially owns at least 20% of our then-outstanding shares of common stock."); AirSculpt Techs., Inc., Prospectus (Form 424B4) 109 (Oct. 29, 2021), https://www.sec.gov/Archives/edgar/data/1870940/000110465921131735/tm2121217-21_424b3.htm [https://perma.cc/3BRX-6GF3] ("Further, for so long as affiliates of our Sponsor are entitled to designate two Sponsor Directors for election to our board of directors, we will be required to take all necessary action to cause the chairperson of our board of directors to be an individual chosen by affiliates of our Sponsor."); Sotera Health Co., Prospectus (Form 424B4) 160 (Nov. 19, 2020), https://www.sec.gov/Archives/edgar/data/1822479/000119312520299567/d93452d424b4.htm [https://perma.cc/AUX3-JW69] (providing private equity investors, Warburg Pincus and GRCT, with the right to have representation on each board committee proportionate to the number of directors they are entitled to designate on the company's board of directors and providing Warburg Pincus the right to appoint the chairperson of the compensation committee).

148. *But see* MeridianLink Prospectus, *supra* note 133, at 133 ("Additionally, our charter provides that for so long as Thoma Bravo beneficially owns in the aggregate at least (i) 30% of our outstanding shares of common stock, Thoma Bravo will have the right to designate the chairman of our board of directors and of each committee of our board of directors as well as nominate a majority of our board of directors . . . .").

6. Removal Provisions

Another facially invalid provision is the contractual right of an insider stockholder to remove their designated directors from the board of directors. This is the most uncommon right—we found only twenty-six companies that granted removal rights, and of those twenty-six companies, twenty-four granted these rights to private equity firms alone, one granted these rights to both a founder and private equity firm, and one granted these rights to a founder alone. Unlike the other contractual control rights discussed in this Part, removal rights were not directly discussed in *Moelis* but were instead addressed in *Seavitt v. N-Able, Inc.*, a subsequent Delaware case addressing contractual control rights in a stockholder agreement.[149] In *Seavitt*, the court found that a stockholder's right to remove directors from the company's classified board, with or without cause, so long as the stockholders held at least 30% of the company's voting shares, violated DGCL Section 141(i).[150]

Although removal rights are relatively uncommon, they are also among the most aggressive and arguably problematic rights we found. Some companies granted insiders a consent right over the removal of their director designees from the board,[151] while other companies granted insiders a more aggressive right allowing them to affirmatively remove and replace their director designees. For example, Spirit Airlines Inc. entered into a Stockholders Voting Agreement that provided its private equity investors, Oaktree and Indigo, the right to remove directors they designated at any time and for any reason so long as Oaktree and Indigo collectively owned 50% of the company's outstanding common stock.[152] Similarly, Bankrate Inc. entered into a stockholder agreement whereby so long as Apax Partners, a private equity firm, held at least 5% of the company's outstanding voting stock, Apax had "the right to remove and replace any or all of its director-nominees at any time and for any reason and to

149. 321 A.3d 516 (Del. Ch. 2024).

150. *Id.* at 554 (holding that "permitting the Lead Investors to remove directors with less than a majority vote . . . conflicts with Section 141(k) and is therefore facially invalid").

151. *See, e.g.*, Apria, Inc., Prospectus (Form 424B4) 150 (Feb. 10, 2021), https://www.sec.gov/Archives/edgar/data/1735803/000119312521187819/d182907d424b4.htm [https://perma.cc/57FU-ZPJZ] ("For so long as the stockholders' agreement remains in effect, Sponsor Directors may be removed only with the consent of our Sponsor. In the case of a vacancy on our board created by the removal or resignation of a Sponsor Director, the stockholders' agreement will require us to nominate an individual designated by our Sponsor for election to fill the vacancy.").

152. Spirit Airlines, Inc., Prospectus (Form 424B4) 109 (May 25, 2011), https://www.sec.gov/Archives/edgar/data/1498710/000119312511152040/d424b4.htm [https://perma.cc/SMK3-W48P] ("The investment funds managed by Indigo and Oaktree have the right to remove and replace their respective director-designees at any time and for any reason and to fill any vacancies otherwise resulting in such director positions.").

designate any individual(s) to fill any such vacancies."[153] Most of the companies that granted removal rights did so through stockholder agreements, though some granted such rights through a certificate of incorporation.[154] Only one company in our sample from before 2020 had a removal provision that had not previously lapsed, with the removal provisions lasting thirty-nine months on average post-IPO.

7. Summary of *Moelis* Rights

The dominant role of private equity funds in the market for *Moelis*-related contractual control rights revealed in our dataset is striking. Across every *Moelis* right, private equity funds are many, many times more likely to be the sole holder of the right than founders or other pre-IPO shareholders. Had this kind of information been available to the public during the debate over *Moelis* and S.B. 313, it would have supported a much more informed policy dialogue. A table detailing the various *Moelis* rights granted to each investor type is set forth below.

153. Bankrate, Inc., Prospectus (Form 424B1) 121 (June 6, 2011), https://www.sec.gov/Archives/edgar/data/1518222/000119312511167911/d424b1.htm [https://perma.cc/8XDW-VVKC]; *see also* Duckhorn Portfolio, Inc., Prospectus (Form 424B4) 124 (Mar. 17, 2021), https://www.sec.gov/Archives/edgar/data/1835256/000119312521087674/d90982d424b4.htm [https://perma.cc/NR74-4QCU] ("Investment funds affiliated with TSG will also have the exclusive right to remove their designees and to fill vacancies created by the removal or resignation of their designees, and we are required to take all necessary action to cause such removals and fill such vacancies at the request of TSG."); Dutch Bros Inc., Prospectus (Form 424B4) 168 (Sep. 14, 2021), https://www.sec.gov/Archives/edgar/data/1866581/000162828021018784/dutchbros424b4.htm [https://perma.cc/4HUA-KUJN] (providing a private equity firm, TSG Consumer Partners, the exclusive right to remove its designees on the board and to fill the vacancies resulting from any removals); EP Energy Corp., Prospectus (Form 424B4) 49 (Jan. 16, 2014), https://www.sec.gov/Archives/edgar/data/1584952/000104746914000255/a2217985z424b4.htm [https://perma.cc/94E4-NZMK] (providing private equity investors, Apollo and Riverstone Holding, with the sole rights to remove, with or without cause, any directors they designated so long as they own a certain percentage of the company's common stock); Freescale Semiconductor Holdings I, Ltd., Prospectus (Form 424B4) 158 (May 25, 2011), https://www.sec.gov/Archives/edgar/data/1392522/000119312511151656/d424b4.htm [https://perma.cc/8RC7-WACS] ("Any director who is nominated by a Sponsor may only be removed by the affirmative vote or written consent of the nominating Sponsor. If Freescale LP or our Sponsors provide notice of their desire to remove one of the directors nominated by such Sponsor, we and Freescale LP agree to take all reasonable action necessary to effect such removal.").

154. *See, e.g.*, U.S. Silica Holdings, Inc., Prospectus (Form 424B4) 127 (Jan. 31, 2012), https://www.sec.gov/Archives/edgar/data/1524741/000119312512034198/d203459d424b4.htm [https://perma.cc/5D8C-YH5L] ("Our certificate of incorporation will provide that any director nominated by our parent LLC may, at its discretion, be removed at any time with or without cause.").

Table 1: *Moelis* Rights

	Pre-Approval Rights	Designation or Nomination Rights	Board Size Req's	Board Vacancy Control	Committee Composition Rights	Removal Rights
PE Fund Alone	64	267	68	121	87	24
Founders Alone	5	20	6	4	2	1
PE Fund + Founders	5	24	3	6	6	1
Other Pre-IPO Investors	17	24	8	5	16	0
Total	91	335	85	136	111	26

III. Policy Implications

The policy debate over *Moelis* and the Market Practice Amendments played out in a dramatic, rapid-fire fashion,[155] culminating in the enactment of legislation that was purportedly intended only to overrule *Moelis* but that profoundly changed Delaware's long-time board-centric approach to corporate governance. Analysis of whether the Delaware legislature made the right decision, the impact of the legislation, and whether further changes would make sense, has only just begun. With limited data demonstrating the use of contractual control rights in the market and the identity of the stockholders who hold them, it has been difficult to make any real headway on these questions.

For a topic of such importance, the decision of whether to override *Moelis* and related cases, and, if so, what form such an override should take, would have benefitted from a much longer, more robust, and more empirically grounded conversation among scholars, policymakers, practitioners, and market participants. By providing a detailed empirical accounting of contractual control rights in public companies and identifying who holds them, this Article unlocks the ability to have this conversation. It also shines a light on critical developments in one of the most dynamic and high-impact areas of the capital markets, an area that until now has been a giant (and highly consequential) black box.

A. The Moelis *Decision*

This Article provides important insight into how the many other companies with contractual control rights would have fared under a *Moelis*-

155. *See supra* Part I.

type analysis. In particular, our findings help answer whether, absent the Market Practice Amendments, the *Moelis* decision might have led to a flood of litigation challenging contractual rights for company insiders and external parties.

First, our data indicate that the *Moelis* decision was unlikely to lead to a flood of litigation, even without legislative amendment, both because companies have historically granted the rights at issue through methods that the decision sanctioned and because many invalidly granted rights had already phased out at the time of the court's holding. The *Moelis* decision explained that many control provisions included in a company's certificate of incorporation are valid under Section 141(a), which imposes a board-centric governance model "except as otherwise provided in this chapter or in [a company's] certificate of incorporation."[156] As described in Part II, our dataset shows that while stockholder agreements and similar contracts are the most common way to grant control rights to insiders, many companies grant these rights in their certificate of incorporation.[157] Our findings provide support for the idea that including control rights in a certificate of incorporation has historically been a viable way to provide outsized control and, therefore, that the market could have adjusted to the *Moelis* decision. Although this solution does not apply to companies that have already gone public with contractual control rights, our findings also show that the majority of companies that granted control rights in an invalid way at the time of the IPO no longer held such rights, and those rights therefore could not be invalidated.

Next, our analysis shows that fears that *Moelis* could lead to the invalidation of all types of commercial contracts was unfounded. For rights that are not granted through a certificate of incorporation, the court in *Moelis* asked two questions to determine whether the rights were invalid: (i) is the contractual provision an internal-governance arrangement or an external one, and (ii) does the contractual provision improperly restrict the board? On the first question, the defendants in *Moelis* claimed that it is impossible to determine whether an agreement is an internal or external arrangement and that because "differentiation is impossible, either all contracts fail under Section 141(a) or none do."[158] Defendants exaggeratedly claimed that invalidating the stockholder agreement would also invalidate all kinds of commercial contracts like credit agreements and supply contracts, which would "lead to the demise of contract law."[159] The court refuted this argument, arguing that courts have the ability to distinguish between provisions that allocate control to internal corporate actors and similar provisions in

156. DEL. CODE ANN. tit. 8, § 141(a).

157. *See supra* Part II.

158. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 819 (Del. Ch. 2024).

159. *Id*. at 858.

commercial agreements with outside parties.[160] Our experience coding the data for this paper supports the court's reasoning. Although we found contractual control agreements with a wide variety of names and provisions, we had no difficulty ascertaining whether a contract was an internal-governance agreement. The existence of the control contracts we uncovered were always disclosed at IPO in the companies' prospectuses, along with a discussion of the manner in which they allocate outsized control to specific insiders.[161] We did not see a blurry line between these types of contracts and commercial contracts with third parties.

On the second question, our data also reveal that companies can and have granted insiders special rights that nevertheless comply with *Moelis* because they do not impermissibly constrain board action and, therefore, did not "limit in a substantial way the freedom of directing decisions on matters of management policy."[162] While the court found many of the rights invalidly infringed on the board's power, and our data uncovered many similarly invalid rights, our data also provided many examples of companies that achieved similar results in ways that we believe would have been valid because they did not unduly remove the board's discretion.[163] Also, while the *Moelis* case received the most attention by far because it was the first Delaware case to address the issue in a motion-to-dismiss opinion, other cases filed around the same time that addressed similar contractual-control issues were rendered moot when insider stockholders decided to scale back some of their rights, giving the board additional discretion. For example, as a result of stockholder lawsuits, Traeger,[164] Driven Brands,[165] Goosehead Insurance,[166] and Biomarin Pharmaceuticals[167] all agreed to amend their stockholder agreements to provide a "fiduciary out"

160. *Id*.

161. We found that the agreements were typically disclosed in multiple sections of the prospectus, including the risk-factors section and the section disclosing related-party transactions.

162. 311 A.3d at 833.

163. *See supra* Section II.B.

164. *See* Stipulation and (Proposed) Order Voluntarily Dismissing the Action as Moot and Retaining Jurisdiction Regarding Attorneys' Fees at 2, Taylor v. Alvarez, No. 2024-0058-JTL (Del. Ch. May 8, 2024), 2024 WL 2093881, at *1. Traeger revised its stockholder agreement to add a fiduciary out, ensuring the board could prioritize its fiduciary duties over strict contractual compliance.

165. *See* Stipulation and (Proposed) Order Closing the Case at 2, Taylor v. Driven Equity LLC, No. 2023-1256-JTL (Del. Ch. Nov. 8, 2024), 2024 WL 4723163, at *1. Driven Brands revised its stockholder agreement to add a fiduciary out, ensuring the board could prioritize its fiduciary duties over strict contractual compliance.

166. *See* Plaintiff's Reply Brief in Support of the Proposed Settlement, Class Certification, an Award of Attorneys' Fees and Expenses, and a Plaintiff Incentive Award at 2, Dollens v. Goosehead Ins., Inc., No. 2022-1018-JTL (Del. Ch. Feb. 1, 2024), 2024 WL 497461. Goosehead Insurance revised its stockholder agreement to add a fiduciary out, ensuring the board could prioritize its fiduciary duties over strict contractual compliance.

167. Stipulation and Order Closing Case at 2, Jones v. Biomarin Pharms., Inc., No. 2024-0360-JTL (Del. Ch. Aug. 1, 2024), 2024 WL 3634759, at *1. Biomarin Pharmaceuticals was cited as an example of a company that amended its stockholder agreement to include a fiduciary out in response to stockholder litigation challenging the board's ability to uphold its fiduciary duties.

for the board whereby the board could choose to not comply with the stockholder agreement if it decided in its business judgment that its fiduciary duties required it to do so.[168] These cases indicate that many companies with existing invalid contractual control rights, and companies in future IPOs, would have taken a similar approach, which likely would have rendered their contractual control rights valid under Delaware law.[169]

B. The Market Practice Amendments

As discussed above, the *Moelis* decision set off a heated debate among practitioners, scholars, and judges and ultimately led to the enactment of S.B. 313, the Market Practice Amendments, which allows corporations to enter into stockholder agreements with virtually no limits or restrictions. Although we have neither the space nor inclination to rehash this debate here, we do believe that the debate suffered from a lack of empirical grounding, which this Article provides. We focus here on the parts of the debate where our dataset provides useful insight.[170]

Supporters and opponents of the legislation relied on a variety of empirically based but unproven claims to support their positions. One common claim by supporters was that they needed to rush the amendments

168. Two other companies amended their stockholder agreements to waive the rights altogether. *See* Stipulation and [Proposed] Order Closing the Case at 2, Taylor v. L3Harris Techs., Inc., No. 2024-0205-JTL (Del. Ch. July 1, 2024), 2024 WL 3274618, at *1; Stipulation and (Proposed) Order Closing the Case at 2, Maglione v. Konowiecki, No. 2023-0691-JTL (Del. Ch. Apr. 9, 2025), 2025 WL 1082197, at *1. Three other cases are pending and will depend on how the Delaware Supreme Court rules in the appeal of the *Moelis* decision. Stipulation and (Proposed) Order Staying Defendant's Motion to Dismiss at 2, Quade v. Apollo Glob. Mgmt., Inc., No. 2024-0254-NAC (Del. Ch. Aug. 7, 2024), 2024 WL 3699918, at *1; Kaur v. Scooby Aggregator, LP No. 2024-0129; (Proposed) Order Granting Defendant's Motion to Stay Pending Delaware Supreme Court Appeal in *Moelis* at 1, Garfield v. Shake Shack, No. 2024-0642-PAF (Del. Ch. Oct. 7, 2024), 2024 WL 4449791, at *1 (stayed pending *Moelis* decision).

169. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 878 (Del. Ch. 2024) (discussing fiduciary duties and "fiduciary out" clauses).

170. While private companies can, and commonly do, have stockholder agreements, because those companies are not required to disclose their stockholder agreements, we are not able to quantify the extent of their usage. However, we believe the *Moelis* decision had a much smaller effect on private companies for a variety of reasons. First is that they do not have public stockholders who may sue to invalidate a stockholder agreement, which is illustrated by the fact that not a single private-company stockholder sued to invalidate a stockholder agreement before or after *Moelis*. Also, private companies are generally closely held and do not require a public-stockholder vote to amend their certificate of incorporation to include rights that otherwise were in a stockholder agreement. The supporters of the Market Practice Amendments briefly claimed that *Moelis* could be harmful to private companies because a certificate of incorporation, but not a stockholder agreement, is required to be publicly filed. Their claim was that private companies would want to keep these agreements private—although the supporters provided no explanation as to why they would need to keep it private beyond a general privacy interest. *See* Delaware House Judiciary Committee Hearing on S.B. 313, *supra* note 72, at 1 ("Srinivas Raju explained that confidentiality is important for private companies to keep sensitive information from being publicly accessible.") Their real complaint seems to be with the requirement that a certificate of incorporation of a private company be made public in the first place, which is an entirely different subject. The focus of the Market Practice Amendments debate was on publicly traded companies, and that is our focus here.

through because they were urgently needed and that a "compressed time frame" was therefore justified.[171] Some even claimed that there were thousands of rights at risk.[172] Based on our data and the state of litigation over these rights in Delaware courts, this justification for rushing the amendments was vastly overstated. First, as many opponents of the bill noted, a final resolution of *Moelis*, which would have determined whether other stockholder agreements were invalid, required a decision of the Delaware Supreme Court, something that still has not happened as of writing. Second, the Market Practice Amendments explicitly allowed ongoing cases challenging stockholder agreements and new cases brought through August 2024 to proceed unaffected by the legislation. One would have expected plaintiffs' lawyers, eager to make a quick dollar by challenging the supposedly many now-invalidated stockholder agreements, to have flooded the court with litigation in anticipation of the legislation being enacted. However, there wasn't even a trickle. As discussed above, plaintiffs had filed around a dozen cases close in time to Moelis, two of which, *N-Able* and *Wagner*, had already survived a motion to dismiss,[173] and others of which had been mooted because defendants agreed to modify or waive their stockholder agreements.[174] We find the lack of a flood of lawsuits unsurprising because, as our findings show, there were not many companies to sue. Most stockholder agreements had either already phased out, used valid methods, or were much weaker than Moelis's stockholder agreement, and therefore less likely to be lucrative for a plaintiff's lawyer.[175]

The fundamental issue with the debate surrounding the Market Practice Amendments is that it was not grounded in data about what constituted actual market practice. Because of a lack of data, the debate proceeded at an abstract level, with mostly general discussions of stockholder

171. *See id.* at 5 ("He emphasized that despite a compressed time frame due to the need for timely action, no corners were cut.").

172. *See supra* Section I.B.

173. *See* Seavitt v. N-Able, Inc., 321 A.3d 516, 537 (Del. Ch. 2024); Wagner v. BRP Grp., Inc., 316 A.3d 826, 839 (Del. Ch. 2024). These cases were cited as some of the small number of lawsuits that advanced past the litigation stage, bolstering our argument that litigation activity remained limited despite the prediction of a surge.

174. *See supra* notes 164-167 and accompanying text.

175. These findings also add color to, but do not resolve, the debate surrounding whether companies believed that these contractual control rights could be granted through stockholder or similar agreements or whether they had to be granted through the charter or other valid means. On the one hand, since the majority of these rights were granted in invalid ways, this finding supports the idea that companies believed that such methods were valid. *See, e.g.*, S.B. 313 Senate Debate and Final Vote, *supra* note 10 (statement of Srinivas Raju, Chair, Corp. L. Council) ("[T]he prevailing view in the marketplace and among corporate practitioners was it was not necessary to put these rights in the charter or in preferred stock. It was the prevalent belief in the marketplace that this could be done, also, through stockholders agreements . . . ."). On the other hand, the fact that many companies granted such rights through the charter or through a second class of stock strongly indicates that at least some companies were aware of potential legal issues stemming from putting such rights in a stockholder or similar agreement. *See, e.g.*, *id.* (statement of Rep. Madinah Wilson-Anton) ("I've seen several memos from years back with the precise warning that these agreements are unenforceable.").

and board power that didn't consider the details and nuances of actual market practice. Our findings show that the Market Practice Amendments are not well tailored to existing market practice, even though the drafters of the legislation repeatedly told the legislature that the bill simply codified the status quo.[176] The language of the bill is broad and sweeping, allowing a corporation to bind itself in a stockholder agreement to act only with permission of an insider stockholder or "prospective stockholder" or to ensure that the corporation always takes certain actions. This language is open-ended, without any apparent limitation, leading commentators to speculate as to how far this language could be taken if read literally.[177]

We believe that a more granular discussion and analysis that disaggregated the categories of rights that the *Moelis* decision invalidated would have led to better-reasoned legislation. Our findings show that there are two general categories of contractual control rights, both of which were present in *Moelis*: one category includes common and relatively uniform rights that allow a stockholder to dictate various aspects of the composition of the board; the other category comprises a kind of right, pre-approval rights, which range significantly in strength, are relatively rare, and which allow a stockholder to dictate certain actions by the board. The board-composition rights relate to something that stockholders always have a say on: who gets to be on the board. These rights relating to board composition are arguably innocuous, especially compared to pre-approval rights, because even if a stockholder has the unfettered ability to put directors on the board, those directors still have fiduciary duties to all stockholders and can be liable to all stockholders if they act in ways that disproportionately benefit the person who designated them.

Aggressive pre-approval rights like those present in *Moelis*, on the other hand, generally address board-level decisions about how to run the company, decisions that are normally completely shielded from stockholder input and subject to the board's fiduciary duties. Pre-approval rights allow private equity firms to operate in their own interests, shielded from any liability to other stockholders under Delaware's contractarian approach. We found that some pre-approval rights are narrow, allowing insiders the ability to veto only a small number of corporate decisions, while others, like the rights in *Moelis*, are broad. The broadest versions of veto

176. *Id.* (statement of Srinivas Raju, Chair, Corp. L. Council) ("From our perspective, this is not a major change. The market practice . . . has developed based on an interpretation of a statute that's been in the code for a very long time . . . [.] [Delaware precedent] led to a market practice where market and corporate practitioners believed various rights could be documented in the form of a stockholders' agreement . . . .").

177. Sanga & Rauterberg, *supra* note 14 ("On its face, the Amendment seemingly authorizes corporations to enter *any* contract changing *any* aspect of corporate governance. But that cannot be its intended effect. Do the Amendments intend, for example, to empower a corporation to promise its directors that it will never sue them, even for an intentional tort or bad faith act? Do the Amendments intend to empower a board to cede 100 percent of its decisionmaking power to a single person? The answers to these questions cannot be yes.").

rights were relatively rare in our sample compared to other types of contractual control rights. A more deliberate and informed legislative process that focused on market practice would have considered the different types of contractual control rights, their frequency of use, and whether they are a good fit for Delaware's corporate law. Overall, our findings support the argument that if the concern were protecting rights granted through existing stockholder and similar agreements, the Delaware legislature could have drafted a narrower piece of legislation that could have targeted the types of contractual control rights that companies most commonly granted.[178]

Opponents of the legislation argued that the Moelis stockholder agreement was an outlier and not representative of market practice.[179] Our dataset shows that it is more accurate to state that Moelis is among a small group of companies that have granted the most aggressive combination of rights to insiders, most of which have already been phased out. If the goal of the Market Practice Amendments was to allow market practice to continue, it could have simply overturned *Moelis* by explicitly allowing all of the types of rights granted in the Moelis stockholder agreement. This would have, in a clear and straightforward manner, allowed all of the most aggressive contractual control rights we found in our sample, since Moelis's stockholder agreement included all of those rights. But the Market Practice Amendments do not just overturn *Moelis* and allow current market practice to continue. Because they were drafted in a sweeping and ambiguous way that is unconnected to current market practice,[180] the Market Practice Amendments validate all types of existing control rights and untold future rights that are not currently standard. As Vice Chancellor Laster put it in the *Moelis* opinion, "[C]lients pay corporate lawyers to push the envelope."[181] It seems likely that the Market Practice Amendments will invite envelope pushing.

Instead of engaging with the empirical reality of market practice and the effect of the legislation on it, supporters of the legislation provided misleading or false justifications for enacting it. In response to direct questions

178. *See id.* ("You could completely overturn *Moelis* and still have a cabining provision that doesn't invite endless uncertainty . . . ."); S.B. 313 Senate Debate and Final Vote, *supra* note 10 (statement of Usha Rodrigues, Professor, Univ. of Georgia) ("[Y]ou can look at remedying these past agreements that are already in place in a much more targeted and precise way.").

179. *See supra* notes 62, 94 and accompanying text.

180. As many have noted, S.B. 313 is far from a model of legislative drafting. It is written in an open-ended and ambiguous manner that is sure to cause confusion in the future. *See* Joan Heminway, Moelis*, § 22(18), and DGCL Subchapter XIV—Knowing Legislative Policy Shift?!*, BUS. L. PROF. BLOG (June 13, 2024), https://www.businesslawprofessors.com/2024/06/moelis-12218-and-dgcl-subchapter-xiv-knowing-legislative-policy-shift [https://perma.cc/3MPD-CBVS] ("As others have noted (at least in part), the drafting of the proposed DGCL § 122(18) (and the related additional changes to DGCL § 122) reflects a belt-and-suspenders approach and is otherwise awkward. Multiple sentences are crammed into this one new subpart of DGCL § 122 to effectuate the drafters' aims.").

181. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 879 (Del. Ch. 2024).

from legislators about whether the bill does "anything to impact fiduciary duties," the head of the Corporation Law Council responded that "[t]here's no effect whatsoever that the amendments make with respect to fiduciary duty or equity-based principles or the application of those principles or holding actors [to] account based on fiduciary duty or equitable-based claims."[182] Supporters claimed that fiduciary duties could act as a constraint at the time a stockholder agreement is invoked.[183] It is plainly untrue that fiduciary duties could meaningfully constrain the application of a stockholder agreement.[184] The point of a stockholder agreement, especially the most aggressive ones, is to override the board, and its fiduciary duties, by allowing the stockholder to unilaterally direct corporate actions. Indeed, as discussed above, defendants' and plaintiffs' lawyers all agreed in at least four different cases that adding a "fiduciary out" provision to a stockholder agreement was enough to render moot a lawsuit challenging provisions of the agreement.[185] If a fiduciary provision needs to be added to a stockholder agreement to allow the board to invoke its fiduciary duties to act against the wishes of the stockholder, then it must be true that a stockholder agreement without such a provision leaves no room for a board to invoke its fiduciary duties. The Market Practice Amendments clearly weaken the power of fiduciary duties, in broad and unknowable ways, to limit opportunistic behavior by insider stockholders.

182. S.B. 313 Senate Debate and Final Vote, *supra* note 10 (statement of Srinivas Raju, Chair, Corp. L. Council).

183. Delaware House of Representatives Legislative Session, *supra* note 5 (statement of Rep. Krista Griffith) ("Finally, and really, really critically; most importantly—fiduciary duties trump contracts, always. Fiduciary duties trump contracts always. There is nothing in this legislation that changes that."); S.B. 313, 152d Gen. Assemb., 84 Del. Laws 309, Original Synopsis § 1 (2024) (codified as amended at DEL. CODE ANN. tit. 8, § 122(18)), https://legis.delaware.gov/BillDetail/141480 [https://perma.cc/AFH8-SN3S] ("New § 122(18) does not relieve any directors, officers or stockholders of any fiduciary duties they owe to the corporation or its stockholders, including with respect to deciding to cause the corporation to enter into a contract with a stockholder or beneficial owner of stock and with respect to deciding whether to perform, or cause the corporation to perform, or to breach, the contract, whether in connection with their management of the corporation's business and affairs in the ordinary course or their approval of extraordinary transactions, such as a sale of the corporation. New § 122(18) also does not affect the case law empowering a court to grant equitable relief in respect of a contract, such as when a contract is set aside because the counterparties thereto have aided and abetted a breach of fiduciary duty or when a court reviews director actions under an enhanced form of judicial scrutiny.").

184. Delaware courts have held that courts cannot invoke fiduciary duties to limit contractual rights. *See, e.g.*, Wagner v. BRP Grp., Inc., 316 A.3d 826, 857-59, 862-69 (Del. Ch. 2024); *In re* Columbia Pipeline Grp. Merger Litig., 316 A.3d 359, 383-95 (Del. Ch. 2024) (internal citations omitted) ("Under Delaware law, fiduciary duties do not trump contracts. Instead, contractual commitments trump fiduciary duties . . . . [T]he cases overwhelmingly demonstrate that a court cannot invoke the fiduciary duties of directors to override a counterparty's contract rights. That is true even when a heightened standard of review applies . . . . The Delaware Supreme Court has asserted that contractual obligations preempt overlapping fiduciary duty claims that arise out of the same set of facts. Other decisions likewise hold that a claim for breach of contract occupies the field and preempts overlapping claims for breach of duty against corporate fiduciaries . . . . [A] court will not impose equitable limitations on the enforceability of a contract based on assertions that the performance of the contract constitutes a breach of fiduciary duty.").

185. *See supra* notes 164-168 and accompanying text.

This leads to the question of why the Corporation Law Council engaged in a process that, in the words of Chancellor McCormick, was "rushed," "flawed," and "a dramatic departure from Delaware's esteemed tradition."[186] We believe our findings provide clues to what happened behind the scenes. The chair of the Corporation Law Council acknowledged lobbying from unnamed sources, and when pressed by legislators on who exactly lobbied them, he replied merely "all constituencies."[187] Opponents of the bill also claimed that "interest group politics" played a role in the rushed and relatively haphazard manner through which the bill was proposed, although no one seemed to be able to put their finger on exactly who these interest groups were.[188]

Our research provides no direct evidence, but it hints at one group in particular that might've benefitted from the process: private equity firms. Our data show that private equity firms are responsible for nearly all existing stockholder agreements. They therefore should be the largest beneficiaries of the legislation. Private equity funds are repeat players in the IPO world and have a strong interest in continuing to be able to take new companies public with stockholder agreements.[189] That members of the Corporation Law Council could be responsive to private equity lobbying is unsurprising. As one Delaware representative who opposed the bill put it, "the overwhelming majority [of members of the Corporation Law Section] are defense attorneys" at large law firms.[190] Private equity firms are heavy users of these types of law firms because of their business model and acquisitive nature. Recent reports show that "highly profitable private equity giants like Apollo, Blackstone and KKR," the very firms that our data show are among the most likely to use stockholder agreements, "have become big revenue drivers for law firms" because "their demand for legal services has skyrocketed."[191] This is because private equity funds "can generate legal work from the constellation of companies, banks and others in [their] universe," usually paid for by the underlying funds and their

186. Letter from Chancellor McCormick, *supra* note 8, at 6.

187. S.B. 313 Senate Debate and Final Vote, *supra* note 10 (statement of Srinivas Raju, Chair, Corp. L. Council).

188. Marcel Kahan & Edward Rock, *Proposed DGCL §122(18), Long-Term Investors, and the Hollowing Out of the DGCL § 141(a)*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 21, 2024), https://corpgov.law.harvard.edu/2024/05/21/proposed-dgcl-%C2%A7-12218-long-term-investors-and-the-hollowing-out-of-dgcl-%C2%A7-141a [https://perma.cc/29LN-HNFJ]; Lawrence Hamermesh, *Letter in Support of the Proposed Amendments to § 122 DGCL*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 11, 2024), https://corpgov.law.harvard.edu/2024/06/11/letter-in-support-of-the-proposed-amendments-to-%C2%A7-122-dgcl [https://perma.cc/4K8U-3T8U].

189. For example, of the 1,362 companies in our sample, 382 were coded as private equity backed and another 708 companies were coded as venture capital backed.

190. S.B. 313 Senate Debate and Final Vote, *supra* note 10 (statement of Rep. Madinah Wilson-Anton).

191. *See supra* note 31.

investors.[192] Whatever private equity's role, the Market Practice Amendments will likely prove a boon for the industry.[193]

C. Private Equity: The Dominant Holders of Contractual Control Rights

As detailed above, our dataset shows that the overwhelming majority of contractual control rights in public companies are held by private equity funds.[194] This finding has important implications for the debate surrounding *Moelis*, the Market Practice Amendments, and contractual control rights in general. As we describe below, a private equity fund is very different from most investors in public-company stock, with a distinctive set of incentives and objectives, and these differences are likely to have important real-world effects that should influence policy decisions.

1. Why Private Equity Funds Want Contractual Control Rights

Following a private equity-backed IPO, a private equity fund's interest in the company is very short-term in nature.[195] Private equity funds are generally required to liquidate the funds' investments within a set period of time, and most funds must raise capital, invest the capital, and sell all of their investments within approximately ten years, which is the typical lifespan of a private equity fund before liquidation.[196] Therefore, if a fund invests in a privately held company in Year 3 and then takes that company public in an IPO in Year 7, the fund must sell its shares in the newly public company within the following three years in order to return its capital to its investors and wind up the fund.[197] Adding to the pressure to sell quickly is the fact that private equity fund managers get a percentage of profits as part of their compensation.[198] By maintaining control, they can attempt to

192. Farrell & Das, *supra* note 31.

193. Private equity firms are notoriously aggressive at lobbying, as evidenced by, among many other examples, their successful retention of the carried-interest tax break, despite opposition from all sides, and their successful lobbying for S.B. 21. *See supra* note 30.

194. *See supra* Part II.

195. *See, e.g.*, Zanki, *supra* note 16 ("Private equity-backed companies will generate nearly half of initial public offerings in 2025, analysts predicted on Wednesday, driven by a growing demand for exit strategies among investors that have owned stakes in companies for lengthy periods."). Going public allows the company to raise capital and provide liquidity for its stockholders. However, it also brings increased scrutiny, regulatory compliance, and the pressures of being publicly traded. Therefore, an IPO is generally pursued when the company has matured to a stage where it can meet the regulatory and operational demands of being a publicly traded entity.

196. *See* BRESLOW & SCHWARTZ, *supra* note 16, § 2:18.1 ("A standard private equity fund term ends on the tenth anniversary of the final closing of the sale of partnership interests by the fund.").

197. Managers often have the right to extend the fund for one or two years while they wrap up investments. *See id.* ("[T]he general partner may have the right to extend the term of the partnership for a stated period, generally for up to two additional one-year periods.").

198. Manager fee structures in private equity funds can significantly affect managers' behavior in these funds, depending on the overall performance of the fund and the amount of time

maximize the short-term stock price during their relatively brief exit window. This helps explain why the contractual control rights held by private equity funds generally sunset so quickly.[199]

In contrast, our data show that founders overwhelmingly choose to use high-vote dual-class structures instead of contractual control rights. Of the 197 high-vote dual-class corporations in our sample, 178 grant high-vote stock to founders. In contrast, contractual control rights are hardly ever granted to founders. While we found ninety-one companies that granted high-vote stock to private equity firms, they nearly always do so in conjunction with granting founders the same high-vote stock. Only eight companies in our sample, or 0.59%, granted high-vote stock to private equity firms alone, compared to eighty-seven companies that granted high-vote stock to founders alone. Even when private equity firms receive high-vote stock, they also often receive contractual control rights, with forty-one of these ninety-one companies granting private equity funds both types of control. Our data indicate that private equity firms almost always receive high-vote stock as part of a power-sharing arrangement with a founder that desires high-vote stock and that, when a founder is not in the picture, private equity firms overwhelmingly choose to receive contractual control rights and not high-vote stock.

Private equity funds' intense interest in maximizing company share price in the short term helps explain why private equity funds have such a strong preference for customized contractual control rights over high-vote dual-class stock. Even though dual-class stock affords a high-vote stockholder the ability to control the composition of the board and thereby shape company policy over the long term, it is a blunt instrument that requires a stockholder to attempt to direct board members' behavior through informal means that may be a violation of the board members' fiduciary duties. If the members of the board do not comply, then the stockholder must go through the process of removing them and replacing them with a board member who will do the stockholder's will. Contractual control rights provide a private equity fund with a more focused and immediate source of power whereby they can directly dictate board composition or otherwise influence board-level decisions that could affect share price but may not be subject to stockholder vote. Once the board is in place, contractual control rights allow a stockholder to direct the actions the board takes.[200]

left in the fund's life. *See generally* Jarrod Shobe, *Misaligned Interests in Private Equity*, 2016 BYU L. REV. 1437 (discussing the impact of management fees on private equity general partners' decision making).

199. *See supra* Part II.

200. Another possible explanation, which would require further empirical examination, is that the use of dual-class stock is more salient than contractual control rights and that contractual control rights may therefore create less of a negative pricing impact than the more salient dual-class stock.

It thus appears that, as repeat players in the IPO market, private equity funds prefer bespoke arrangements that give them the specific types of control they believe they need to maximize their returns during their planned sell down soon after IPO. In many respects, these arrangements allow private equity funds that own a privately held portfolio company to maintain granular control over that company's operations even after they take it public.[201] Founders, by contrast, are not typically repeat players in the IPO market and generally retain a relatively long-term economic interest in the companies they take public. The long-term nature of founders' interests could explain why, according to our data, founders are much less likely to seek out contractual control rights, instead opting to use high-vote dual-class structures to maintain control for the long term.[202]

2. The Implications of Private Equity Control

i. Potential Concerns Raised by Conflicts of Interest

When a private equity fund holds contractual control rights in a public company, it creates a basic conflict of interest. At the time of IPO, the private equity fund will often qualify as a controlling stockholder under Delaware law, which means that it owes fiduciary duties to the public stockholders of the company.[203] Even if the fund itself is not a controlling stockholder, it will often nominate directors to work on the board of the public company, and those nominees will have fiduciary duties to the company's public stockholders. However, private equity firms also owe duties to investors (also called "limited partners") in their funds that put up the money for the fund's investments.[204] This raises difficult questions about how private equity firms will use contractual control rights and for whose benefit.

In navigating this conflict, private equity funds have certain financial incentives to favor the interests of fund limited partners over the interests of public stockholders. Private equity managers typically get to keep 20% of the profits that get returned to the limited partners in their fund,[205] but there are no extra rewards for increasing the profits of the stockholders who are invested alongside the fund in the post-IPO company. In addition, when private equity firms want to raise their next fund, they typically rely

201. For a discussion of the use of shareholder agreements in the private-company context, see generally Fisch, *supra* note 33.

202. *See* Bebchuk & Kastiel, *The Untenable Case*, *supra* note 4, at 620.

203. *See* J. Travis Laster, The Distinctive Fiduciary Duties that Stockholder Controllers Owe 1 (Oct. 28, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4960206 [https://perma.cc/D5WH-A4XK].

204. *See, e.g.*, William W. Clayton, *The Private Equity Negotiation Myth*, 37 YALE J. ON REGUL. 67, 73-77 (2020).

205. *See* Vic Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1, 2 (2008).

on the track record of their prior funds (as represented by the net returns that their limited partners enjoyed) to convince new investors to invest.[206] No such attention is given to the returns of the minority investors in the post-IPO companies. Given that anyone can invest in a public company regardless of sophistication or net worth,[207] this conflict could be a cause for concern.

One way this conflict could harm public-company stockholders is if the private equity fund uses its control rights to maximize the company's short-term profits at the expense of long-term profits. For example, a private equity fund could use contractual veto rights to block investments in research and development or other investments that would increase long-term performance and instead focus only on maximizing short-term revenue. Private equity funds might also attempt to use control rights to siphon off money from public investors in more direct ways. For example, a private equity fund could use complex contracting arrangements to cause the public company to enter into contracts with affiliates of the fund and charge above-market prices—something that would enrich the fund but decrease the profitability of the company. Or a fund might use inside information that it obtains through positions on the board of directors to sell company stock when it is overvalued, which would enrich the fund and its managers and investors but harm the public stockholders on the other side of those sales.

In fact, there are multiple recent lawsuits accusing private equity funds of engaging in precisely this kind of self-dealing. In the derivative suit *In re Bumble Inc. Stockholder Derivative Litigation*,[208] plaintiffs accused Bumble Inc.'s board of directors of providing controlling private equity stockholder Blackstone Inc. with information that allowed it to sell shares ahead of unfavorable news about Bumble's sales hitting the market, generating a $328 million gain for the Blackstone fund that was invested in

206. *See* Ji-Woong Chung, Berk A. Sensoy, Léa H. Stern & Michael S. Weisbach, *Pay for Performance from Future Fund Flows: The Case of Private Equity*, 25 REV. FIN. STUD. 2359, 2361 (2012) (finding that fund flows in the private equity industry reflect learning about ability over time as reflected in a general partner's track record); Marina Balboa & José Martí, *Factors that Determine the Reputation of Private Equity Managers in Developing Markets*, 28 J. BUS. VENTURING 489, 489 (2007) (finding that prior track record influences fund managers' reputations in the eyes of new investors).

207. The investors in a private equity fund, by contrast, are required to satisfy substantial net-worth standards before they are allowed to invest in the fund. To be exempt from the registration requirements of the Securities Act of 1933, investors in a private equity fund are generally required to be an "accredited investor" as defined by Rule 501 of Regulation D, which means that entities must have at least $5 million in net assets and individuals must have at least $1 million in net assets. *See* 17 C.F.R. § 230.501(a) (2021). One of the most common exemptions from the registration requirements of the Investment Company Act of 1940 goes much further, requiring that entities have at least $25 million in net assets and individuals have at least $5 million. *See* Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(51)(A).

208. Verified Consolidated Stockholder Derivative Complaint for Breach of Fiduciary Duty and Unjust Enrichment at 7, *In re* Bumble Inc. S'holder Derivative Litig., No. 2023-0130-JTL (Del. Ch. Apr. 14, 2023), 2023 WL 3034426.

Bumble Inc. Similarly, in *Scarantino v. Vista Equity Partners Management, LLC*,[209] plaintiffs accused private equity investor Vista Equity Partners Management LLC and five Vista-appointed board members of insider trading. Like the *Bumble* case, it is alleged that Vista Equity Partners used inside information to trade shares before the disclosure of price cuts triggered by competition, thereby selling their shares for nearly $270 million more than they would have if the price cuts were public at the time of the sale.

Private equity firms have also long faced allegations of using their control over private portfolio companies to redirect money out of those portfolio companies and into their own pockets, thereby lowering their investors' returns.[210] After performing an industry-wide examination sweep of the private equity industry following the global financial crisis of 2008, the SEC described private equity in 2014 as an environment where private equity funds were frequently "charging hidden fees that [were] not adequately disclosed to investors" and shifting expenses to investors "without proper disclosure that [those] costs [were] being shifted to investors."[211] In fact, they announced at the same time that they found what they believed to be violations of law or material weaknesses in controls relating to the payment of fees and expenses in over 50% of the fund managers they examined.[212] Importantly, these hidden transfers of value were made possible by the funds' control over the portfolio companies they held. With that control, private equity funds were accused of causing portfolio companies to hire the funds' affiliates to perform "services" and subsequently pay them far in excess of market rates.[213] And because investors did not have access to robust portfolio-company disclosures, it was extremely difficult for them to detect payments made at this level.[214] Recurring "risk alert"

209. Verified Stockholder Derivative Complaint at 2-6, Scarantino v. Vista Equity Partners Mgmt., LLC, No. 2024-1103-JTL (Del. Ch. Nov. 1, 2024), 2024 WL 4692231.

210. *See* William W. Clayton, *High-End Bargaining Problems*, 75 VAND. L. REV. 703, 728-47 (2022) (discussing instances where private equity funds have been accused of self-dealing and other problematic conduct and setting forth a list of potential drivers of suboptimal contracting in private equity funds).

211. *See* Andrew J. Bowden, Dir., Off. Compliance Inspections & Examinations, SEC, Address at the Private Equity International Private Fund Compliance Forum: Spreading Sunshine in Private Equity (May 6, 2014), https://www.sec.gov/newsroom/speeches-statements/2014-spch05062014ab [https://perma.cc/EZM3-A9X6] ("When we have examined how fees and expenses are handled by advisers to private equity funds, we have identified what we believe are violations of law or material weaknesses in controls over 50% of the time.").

212. *Id.*

213. *Id.*

214. For a discussion of recent efforts by the SEC to pass a rule designed to mandate disclosure to investors, see generally William W. Clayton, *High-End Securities Regulation: Reflections on the SEC's 2022-23 Private Funds Rulemaking*, 14 HARV. BUS. L. REV. 71 (2024).

reports by the SEC over the years suggests that many of these practices have been ongoing.[215]

The private equity industry's widespread use of the complex Up-C IPO structure is another example. Our findings show that private equity firms very commonly use the Up-C structure to grant themselves disproportionate economic rights in addition to contractual control rights.[216] Recent research shows that the stock of Up-C companies generally performs worse after IPO than the stock of comparable non-Up-C companies.[217] But, interestingly, this inferior performance is not because Up-C companies have disappointing post-IPO operating performance—the reality is that Up-C companies have even *better* operating performance than non-Up-C companies. Instead, it appears that the earnings of Up-C companies are simply not finding their way to the other stockholders because the pre-IPO owners use their control to direct it disproportionately to themselves. This research concludes that it is the "complex organizational structure" of Up-C IPOs that provides private equity pre-IPO owners with "both the motive and ability . . . to extract value" from these companies on a large scale and to keep it hidden from public stockholders who underestimate this kind of self-dealing when they price the offering.[218]

All of these examples indicate that private equity firms are, unsurprisingly, willing to act aggressively to maximize their economic returns because of the incentives inherent in private equity fund structures. To the extent that private equity funds can take advantage of complexity and opacity to maximize their profits at the expense of other stockholders and/or their fund limited partners, history suggests that at least some of them will do so.

215. *See, e.g.*, Off. of Compliance Inspections & Examinations, *Risk Alert: The Five Most Frequent Compliance Topics Identified in OCIE Examinations of Investment Advisers,* SEC (Feb. 7, 2017), https://www.sec.gov/ocie/Article/risk-alert-5-most-frequent-ia-compliance-topics.pdf [https://perma.cc/95MN-JNUP]; Off. of Compliance Inspections & Examinations, *Risk Alert: Observations from Examinations of Investment Advisers Managing Private Funds,* SEC (June 23, 2020), https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf [https://perma.cc/KAU9-9UH9]; Off. of Compliance Inspections & Examinations, *Risk Alert: Observations from Examinations of Private Fund Advisers,* SEC (Jan. 27, 2022), https://www.sec.gov/compliance/risk-alerts/observations-examinations-private-fund-advisers [https://perma.cc/4GA3-9BUS].

216. Our findings show that Up-C companies are mostly private equity backed, with seventy-seven of the ninety-three Up-C companies in our sample granting tax-receivable-agreement economic rights to a private equity firm alone or in conjunction with a founder.

217. *See generally* Mary Brooke Billings, Kevin Hsueh, Melissa F. Lewis-Western & Gladriel Shobe, *Innovations in IPO Deal Structure: Do Up-C IPOs Harm Public Shareholders?*, 69 MGMT. SCI. 3048 (2023) (showing that while Up-C operating performance is similar to the operating performance of other public companies, their Class A shares underperform compared to the share value in other public companies).

218. *Id.* at 3050.

ii. What Existing Studies Tell Us, and Where They Fall Short

The conflicts described above raise legitimate potential concerns. But understanding how these conflicts impact the performance of private equity-backed IPOs (and the implications for public stockholders) is a complex question. Even though private equity funds have a much shorter time horizon than the other stockholders in a public company, it is still possible that the net effect of private equity control on the company's long-term performance could be neutral or positive. This could happen if, for example, the company's board of directors is significantly less motivated than the private equity firm to increase the company's share price or is less capable of doing so.[219] Giving control rights to a stockholder who is highly motivated and incentivized to increase the value of the company—even if that stockholder has a shorter time horizon than most other investors—might be better than leaving complete control to a board that is less motivated by comparison.

It could also be the case that private equity funds' incentives to engage in self-dealing are overwhelmed by concerns about reputational risks from engaging in such activity. To the extent that private equity funds are worried about their ability to keep self-dealing out of public view, they may not want to take the risk even if the environment is relatively opaque.

This leads to an important question: do private equity firms use their contractual control rights in a way that harms public stockholders, or do public stockholders benefit from their use of contractual control rights? Interestingly, the literature generally shows evidence that companies that have undergone a private equity-backed IPO tend to *outperform* the shares of IPOs that are not private equity-backed. For example, Cao and Lerner find that private equity-backed IPOs perform as well as or better than other IPOs and the stock market as a whole in the five years following the relevant IPO.[220] Bergstrom, Nilsson, and Wahlberg also find outperformance by private equity-backed IPOs in the five years after IPO;[221] Levis finds positive and significant abnormal returns in the three years after

219. Outside the private equity-backed IPO context, several studies find evidence that private equity-controlled firms improve profitability and productivity. *See, e.g.*, Steven Kaplan, *The Effects of Management Buyouts on Operating Performance and Value*, 24 J. FIN. ECON. 217, 217 (1989) (finding that operating improvements are "due to improved incentives rather than layoffs or managerial exploitation of shareholders through inside information"); Frank R. Lichtenberg & Donald Siegel, *The Effects of Leveraged Buyouts on Productivity and Related Aspects of Firm Behavior*, 27 J. FIN. ECON. 165, 192 (1990) (finding strong improvements in productivity in the years following buyouts, with mixed effects on employment).

220. Cao & Lerner, *supra* note 69 (finding that reverse leveraged buyouts outperform, especially in the first, fourth, and fifth years after the IPO).

221. Bergstrom et al., *supra* note 69, at 40 ("Private-equity-backed IPOs tend to show lower degrees of underpricing and exhibit relatively better long-run performance than non-private-equity-backed IPOs.").

IPO;[222] and Matanova, Steigner, Sutton, and Thompson find that private equity backing at the time of the IPO positively impacts long-run performance in the aftermarket.[223] Looking at operating performance in the years after the private equity fund has exited the company, Dong, Slovin, and Sushka find that there is strongly positive average operating performance in each of the three years following a private equity secondary offering compared to benchmark firms having similar characteristics.[224]

These results have interesting parallels with the literature on activist hedge funds. In that literature, there is general agreement that firms subject to hedge fund activism outperform other firms in the short run. The difficult question—and the one that has been the main driver of policy discussions in that space—is identifying what causes this outperformance. Is it driven by superior management of the firm,[225] or do activists merely put pressure on management to sacrifice long-term profitability for short-term increases in the stock price?[226] Influential research has shown evidence that companies subject to activism outperform other firms in the long run,[227] but the results are mixed,[228] and skeptics remain unpersuaded for various reasons.[229] Moreover, one study reveals an important nuance by showing

222. Levis, *supra* note 69, at 274 ("PE-backed IPOs achieve positive and significant cumulative abnormal returns, both in equal- and value-weighted terms, through the entire 36-month period in the aftermarket.").

223. Matanova et al., *supra* note 69, at 1 ("Acquirers with PE- or VC-backing at the time of the IPO perform better long-term than acquirers without such backing.").

224. Dong et al., *supra* note 69, at 2. Importantly, Cao finds a weak pattern of deterioration of operating performance following the private equity investor's full post-IPO exit. Cao, *supra* note 69, at 1001.

225. *See generally* Paul Rose & Bernard S. Sharfman, *Shareholder Activism as a Corrective Mechanism in Corporate Governance*, 2014 BYU L. REV. 1015 (arguing that shared authority between the board and activist shareholders serves as a beneficial corrective mechanism).

226. *See, e.g.*, William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 657-58 (2010) (discussing the prioritization of short-term profitability by activist shareholders); Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 790 (2007) (same); Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 269 (2011) (same).

227. *See generally* Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085 (2015) (demonstrating that hedge fund activism does not have a detrimental effect on long-term performance of public companies).

228. *See* John C. Coffee Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 550-51 (2016) ("All studies have found that activist campaigns result, *on average*, in short-term gains for shareholders, but the evidence . . . is decidedly more mixed with respect to long-term gains."); Ajay Khorana, Elinor Hoover, Anil Shivdasani, Gustav Sigurdsson & Mike Zhang, *Rising Tide of Global Shareholder Activism*, CITI CORP. & INV. BANKING 7 (Oct. 2013), https://thetyee.ca/Documents/2014/08/06/Citi-FSG-Shareholder-Activism-November-2013.pdf [https://perma.cc/7KH6-HSW7] (finding that a majority of target firms earn negative abnormal returns in the one month before to one year after the campaign).

229. *See, e.g.*, Coffee & Palia, *supra* note 228, at 551 ("Although we think [Professors Bebchuk, Brav and Jiang] have largely discredited the 'pump and dump' theory that a stock drop automatically follows once activists exit the firm, they have not shown convincingly that activist interventions improve operating performance at target firms."); Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange*

that the impact of an activist campaign depends in large part on what kind of intervention the hedge fund sought. For example, whereas successful takeover campaigns produced abnormal returns averaging 9.7%, successful campaigns seeking payout changes resulted in negative abnormal returns of -0.2%.[230] The same study showed that when one considers the impact of unsuccessful activist campaigns, the long-term effects of hedge fund activism are much less attractive.[231]

Hedge fund activism in a public company is, to be sure, a very different form of intervention than the control wielded by a private equity fund after it takes a portfolio company public. But the finding that different forms of hedge fund activism lead to different outcomes offers a possible lesson for our analysis of the use of contractual control rights by private equity funds. It would be helpful to know how the content of contractual control rights affects performance—for example, how do private equity-backed IPOs perform when the fund has aggressive pre-approval rights versus when the fund has only board-nomination rights or no rights at all? Knowing how the location of control rights affects performance, including how performance is affected when rights are granted in the company's charter versus a stockholder agreement or other contract, would also be useful and help determine if self-dealing is more likely when control rights are less visible. It would also be helpful to know how the sunsetting of these rights affects performance. For example, after a certain right has sunset and become inoperable, how long does it take for any impact on the company's profitability or stock price to be observed?

These kinds of details would allow us to have a much more informed and nuanced conversation about whether *Moelis*-type limitations are beneficial because they would allow us to see how each of these rights actually impact public stockholders. Yet because researchers have not focused on the details of contractual control rights, and the dominant role private equity plays in using these rights, there are no existing studies that can answer these questions. This Article has taken an essential step towards unlocking this kind of analysis by providing an empirical accounting of these rights and who holds them.

Engaging in this kind of detailed analysis is further recommended by the fact that private equity funds holding certain kinds of contractual control rights can wield much more powerful influence over a public company than an activist hedge fund. This is true in two respects. First, because

Corporate Governance System, 126 YALE L.J. 1870, 1934 (2017) (noting that "both proponents and skeptics of hedge funds agree that the influence of activist hedge funds goes beyond the companies they specifically target because the potency of hedge fund activism has an effect on the policies of companies not yet facing the wolf pack's direct attack," which makes it impossible to measure the true impact of activism).

230. *See* Marco Becht, Julian Franks, Jeremy Grant & Hannes F. Wagner, *Returns to Hedge Fund Activism: An International Study*, 30 REV. FIN. STUDS. 2933, 2935 (2017) (discussing the success of hedge fund activist campaigns across nations).

231. *Id.*

activist hedge funds hold common voting stock, they have control only over matters that are subject to stockholder voting. As a result, they cannot exercise the same kind of control over specific, executive-level decisions that private equity funds can exercise when they have aggressive contractual control rights like pre-approval rights and veto rights.[232] Second, while the voting positions that activist hedge funds hold can sometimes be substantial, they are usually minority positions, typically somewhere between 5% and 10%.[233] This means that, in addition to having a narrower scope of matters over which they can exert influence, activist hedge funds typically must persuade other institutional investors to follow their lead to actually effect change.[234] These efforts to persuade are often carried out over public channels like public press releases and public dialogues with corporate management. When private equity funds exercise their contractual control rights, by contrast, it is typically done privately, and other stockholders in the company generally never know about it. Given these differences, we might reasonably be more concerned about the potential for private equity firms to use certain kinds of rights to engage in opportunistic behavior.

Conclusion

When the Market Practice Amendments were passed into law in 2024, a lack of empirical information stifled the normative debate over the optimal role of contractual control rights from the start. This Article seeks to transform this important debate by providing a much more detailed account of the content of contractual control rights and by identifying who actually holds them. It shows that private equity is a critical, yet underappreciated, part of the story and offers insights into the distinctive goals and incentives that likely influence the behavior of private equity firms when they negotiate for these rights and exercise them.

With these insights in mind, we argue that two important research areas that have until now operated in isolation of each other need to be merged. On one hand, while there is a substantial corporate-finance literature on private equity-backed IPOs, this research has largely focused on analyzing the ability of private equity funds to time the market and has given very little attention to the contractual control rights held by private

232. *See supra* Section III.C.1.

233. *See* Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1729 (2008) ("Hedge funds seldom seek control and in most cases are nonconfrontational. The abnormal return around the announcement of activism is approximately 7%, with no reversal during the subsequent year.").

234. *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 897 (2013) ("While activist investors frame and seek to force governance/performance changes, they are successful only if they can attract broad support from institutional investors capable of assessing alternative strategies presented to them, even if they will not formulate the strategies themselves. In effect, activists must make their case to sophisticated but not proactive governance rights holders.").

equity. On the other hand, we have recently seen the rise of legal scholarship on contractual control rights in public companies,[235] but this research and commentary has almost entirely missed the central role of private equity, and the empirical rigor in this space has been insufficient to answer the profoundly important questions raised by *Moelis* and the Market Practice Amendments.

This Article has demonstrated an important link between these two literatures. By failing to focus on contractual control rights, the private equity-backed IPO literature has missed what is arguably the most interesting and high-impact part of the story—how private equity managers could uniquely capitalize on *Moelis* and the Market Practice Amendments. At the same time, by failing to take a sufficiently robust empirical approach to contractual control rights and failing to consider the economic impact of each of these rights on public stockholders, the legal literature in this space has been of limited usefulness. Merging these lines of academic inquiry and these methodological approaches would put researchers in a better position to address some of the most profound and consequential—yet poorly understood—policy questions in corporate law today.

235. For examples of this scholarship, see generally Shaner, *supra* note 38; Shobe & Shobe, *supra* note 38; Fisch, *supra* note 33; Rauterberg, *supra* note 38; Tomer Stein, *The Merging of Ownership and Control*, 59 GA. L. REV. (forthcoming) (on file with authors).