THE CASE FOR NON-BINARY, CONTINGENT, SHAREHOLDER ACTION

Mira Ganor*

ABSTRACT

Shareholder action is exercised mainly through a binary system: for example, the shareholders vote either to approve a proposal or to reject it. They either follow the recommendation of management and vote with management or vote against it. In case of contention between incumbents and insurgents, shareholders need to determine whom to trust. Disclosures and proxy advisory firms' recommendations add to the information the

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shareholders might consider before casting their binary vote. However, retail investors as well as small investors are generally underequipped and restricted economically from reaching an informed and educated shareholder decision, and thus vote infrequently. Abuse of insider information further disadvantages retail investors. Yet, corporate decisions are based on the choice of the majority of the shareholder vote, and retail investors are assumed to rely on disclosed information when making investment decisions.

The new generation of Special Purpose Acquisition Companies (SPACs), currently representing about half of the U.S. going-public transactions, is one example that illustrates the weakness of the binary system and the consequent vulnerability of small and unsophisticated shareholders. Remarkably, investors in SPACs can vote "yes" on management proposed acquisition transactions and nonetheless, simultaneously choose to redeem their shares. Unsophisticated retail investors may not realize that they will also be better off if they redeem their shares even though the transaction received the approval of the majority of the shareholder vote.

This Article puts forward a proposal to amend the law and allow shareholders to act in a way that is contingent on a simultaneous non-contingent action by other shareholders. For example, a shareholder of a SPAC should be able to choose to redeem her shares if and only if at least a specified percentage of redemption rights are exercised unconditionally. Similarly, a shareholder who has preemptive rights should have the right to exercise her rights with a limit that caps her participation and maintains her percentage holdings in the company.

Generally, shareholders should have the option to act contingently when they are exercising a shareholder right, such as preemptive rights or appraisal rights, and when they are given a choice to participate in transactions such as tender offers and stock-buybacks. Unlike mandatory disclosure rules imposed on insiders, the proposed non-binary, contingent, shareholder action treats all shareholders equally and increases the power of the shareholder's action without incurring high costs of collaboration and communication among the shareholders.

INTRODUCTION

Shareholder action is mostly binary: the shareholders are required to take a side, in favor of or against a proposed action.[1] However, the apparent

1. DEL. CODE ANN. tit. 8, § 212(b) (2020) ("Each stockholder entitled to vote at a

benefit of having a simple system with only two choices is illusory.[2] Shareholders may be rationally passive, especially when it involves small individual investors, which may present a major challenge to corporations and corporate governance.[3] The average shareholder of a public company may find it prohibitively expensive to make an educated, informed decision on how to use their shareholder power.[4] On the other hand, controlling shareholders, insiders, and management may abuse the rational ignorance and inaction of the retail shareholders.[5]

This Article proposes a novel solution to mitigate the risk of shareholder abuse and shareholder collective action problems – contingent shareholder action. The proposal borrows from ancient democracy, when the voting process was open to the public and citizens could see how everyone votes in the people's assembly and adjust their own vote based on the observed behavior of the group.[6] Contingent shareholder action allows shareholders to act based on the simultaneous actions of other shareholders. Specifically, the proposal allows shareholders to follow the acts of shareholders who act unconditionally. For example, under the proposal, a shareholder may choose to vote "yes" on a shareholder resolution, provided that the majority of the unconditional votes were cast in favor of the resolution. The contingent vote may also incorporate a specified threshold of percentage of votes that the shareholder chooses to follow. For example, the shareholder may vote "yes" provided that at least 30% of the total shareholder votes are cast "yes" unconditionally.

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meeting of stockholders or to express *consent or dissent* to corporate action in writing without a meeting may authorize another person or persons to act for such stockholder by proxy. . . ."). (emphasis added).

2. *Cf. generally* Saul Levmore, *Probabilistic Disclosures for Corporate and Other Law* (Univ. Chi. Coase-Sandor Inst. L. & Econ., Research Paper No, 884, 2019) (analyzing the efficiency of binary rules and demonstrating the often impracticality of legal discontinuities).

3. *See generally* Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520 (1990) (describing and analyzing shareholder collective action and passivity and the related incentives).

4. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1443 (1989) ("Investors are rationally uninterested in votes, not only because no investor's vote will change the outcome of the election but also because the information necessary to cast an informed vote is not readily available.").

5. For an analysis of the interaction and tradeoff between a controlling shareholder policing management on the one hand and extracting private benefits of control on the other hand, see generally Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785 (2003).

6. *Cf.* Lisa M. Fairfax, *Virtual Shareholder Meetings Reconsidered*, 40 SETON HALL L. REV. 1367, 1391–94 (2010) (suggesting that actual shareholder presence in shareholder meetings, rather than virtual and remote meetings, allows for interaction and dialogue between managers and shareholders, and among shareholders).

Shareholder vulnerability to insiders may not always be cured by mandatory prior disclosure of the insiders' votes or their approval of a corporate action. To be sure, insiders' votes may serve as an important signal to retail investors. Yet, a vote in favor of, or an approval and support of, a corporate action, is often separate and distinct from the choice to participate and exercise one's right as a shareholder. This Article analyzes two examples that demonstrate this distinction. The case of shareholder redemption rights in Special Purpose Acquisition Companies (SPACs) is the first example. The case of shareholder preemptive rights is the second example.

In the last couple of years, SPACs have gained increased popularity and importance, especially in the energy sector.[7] During this short period, SPACs have raised a significant amount of funds as they have enjoyed the support of well-known professionals, as well as private equity funds.[8] In fact, in 2019, about one in three U.S. going-public transactions were SPACs,[9] and that ratio grew dramatically to one in two transactions following the declaration of the coronavirus pandemic.[10] However, unsophisticated

7. *See infra* notes 73-79 and accompanying text.

8. *Id.*; James Thorne, *SPAC Surge Points to Shifting IPO Landscape*, PITCHBOOK (May 26, 2020), https://pitchbook.com/news/articles/spac-surge-points-to-shifting-ipo-landscape-and-video [https://perma.cc/X986-NEA2] ("[P]rivate equity giants TPG Capital and The Carlyle Group as well as investment banks such as Goldman Sachs have sponsored SPACs."); Nicholas Jasinski, *Bill Ackman's Pershing Square Files for Largest-Ever SPAC IPO*, BARRON'S (June 22, 2020), https://www.barrons.com/articles/bill-ackmans-pershing-square-files-for-largest-ever-spac-ipo-51592857837 [https://perma.cc/G49B-MMME] ("Goldman Sachs, Credit Suisse, Deutsche Bank, and Citigroup have all underwritten SPAC IPOs in recent years. TPG Capital, Apollo Global Management, Third Point, and Blackstone have each acted as SPAC sponsors.").

9. *See, e.g.*, *2019 Annual Capital Markets Watch*, PWC, https://www.pwc.com/us/en/services/deals/library/us-capital-markets-watch.html?WT.mc_id=CT3-PL300-DM1-TR1-LS40-ND40-TTA1-CN_Deals-Capital-Market-2020-Google&eq=CT3-PL300-DM1-CN_Deals-Capital-Market-2020-Google&gclid=EAIaIQobChMI-ai84tOX5wIVf__jBx3GYwdSEAAYASAAEgJW6fD_BwE [https://perma.cc/26BM-DYXK] (last updated Feb. 11, 2020, 23:15:14 UTC) ("The number of SPACs continued to increase in 2019 . . . to 30% . . . in terms of the total share of annual IPOs. SPACs led in volume three out of four quarters in 2019."); Jacob Rund, *Surge in SPAC Listings Offers Big Business to Select Law Firms*, BLOOMBERG LAW (Dec. 6, 2019, 4:30 AM), https://www.bloomberglaw.com/document/X4VALQOC000000?bna_news_filter=securities-law&jcsearch=BNA%252000000016e4cb9de8ca77e6df979d20001#jcite [https://perma.cc/DJ72-F5L8]. Blackstone, for example, chose a $5.6 billion SPAC deal, rather than a traditional IPO, for Vivint. Crystal Tse & Liana Baker, *'Blank-Check' Deals Get New Look After High-Profile IPO Flops*, BLOOMBERG (Dec. 23, 2019, 1:44 PM CST), https://www.bloomberg.com/news/articles/2019-12-23/spacs-get-a-shiny-new-look-after-high-profile-ipo-flops [https://perma.cc/SA9E-LL3T].

10. *See, e.g.*, Melia Russell, *Inside the Unstoppable Rise of 'Blank-Check Companies,' a Type of Business that has No Operations and Can Still Float an IPO Amidst a Recession*,

investors in SPACs might be misguided by a favorable shareholder vote that includes the sophisticated investors' votes in support of transactions promoted by the management of the SPAC. As this Article shows, sophisticated investors may well decide to vote for the transaction and, nonetheless, exercise their redemption rights, returning their shares to the SPAC for a refund.[11]

Similarly, preemptive rights are special shareholder rights that may mitigate the important problem of cheap stock tunneling transactions, transactions that insiders use to extract value to themselves and away from the company by allowing the right-holder to participate in new issuances of stock.[12] However, as Jesse Fried and Holger Spamann show, insiders might take advantage of uninformed outside investors who are faced with the decision whether to exercise their preemptive rights.[13] While the issuance of new stock may not even require a shareholder vote,[14] it is not the approval of the new shares but rather the insider's choice whether to participate in the new issuance that is informative for the outside shareholders.[15]

Mandatory disclosure rules that require insiders to reveal their chosen action may help reduce shareholder vulnerability to insiders.[16] The proposed contingent shareholder action is similar to mandatory disclosure rules in that both allow the retail shareholders to benefit from the choices made by other

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BUSINESS INSIDER (May 16, 2020), https://www.businessinsider.com/spac-blank-check-companies-explained-2020-5?utm_source=dowjones&utm_medium=ingest [https://perma.cc/NM9J-Q7T5] ("Since the coronavirus outbreak was declared a pandemic on March 11, 13 of the 24 companies that entered the public market through an IPO have been blank-check companies."); Thorne, *supra* note 8 ("SPACs are dominating the IPO scene—and some investors believe a recession could lead to more of them.").

11. *See infra* Part III.A.

12. Jesse M. Fried, *Powering Preemptive Rights with Presubscription Disclosure*, *in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 79, 80–81 (Luca Enriques & Tobias H. Tröger eds., 2019); Jesse M. Fried & Holger Spamann, *Cheap-Stock Tunneling Around Preemptive Rights* 2–3 (Eur. Corp. Governance Inst. Law Working Paper No. 408/2018, 2019).

13. Fried, *supra* note 12 ("[P]reemptive rights can prevent cheap-issuance tunneling when outsiders know that the offered securities are cheap. However, I show that preemptive rights fail to prevent such tunneling when outsiders cannot tell whether the offered securities are cheap or overpriced.").

14. Mira Ganor, *The Power to Issue Stock*, 46 WAKE FOREST L. REV. 701, 702 (2011).

15. Jesse M. Fried, *Reducing the Profitability of Corporate Insider Trading Through Pretrading Disclosure*, 71 S. CAL. L. REV. 303, 323–25 (1998).

16. *Cf. Id.* at 348–64 (proposing a mandatory advance disclosure requirement on trading by insiders); Jesse M. Fried, *Insider Signaling and Insider Trading with Repurchase Tender Offers*, 67 U. CHI. L. REV. 421, 470–73 (2000) (proposing a mandatory advance disclosure requirement on controlling shareholders in the case of Repurchase Tender Offers); Fried, *supra* note 12, at 96–103 (proposing a mandatory advance disclosure requirement on controlling shareholders in the case of preemptive rights).

shareholders and follow these choices. Contingent shareholder action, however, is superior to disclosure requirements in that it does not require advanced disclosure by select shareholders. Contingent shareholder action treats all shareholders equally and allows for simultaneous action by all shareholders, while letting shareholders follow those who decide to act unconditionally.

Another form of contingent shareholder action is a shareholder action that includes a limit on the participation of the shareholder. Where the shareholder has the right to participate in rights offers and buyback offers, for example, exercising the shareholder right with a limit ensures that the shareholder maintains her percentage holding in the company. Thus, the shareholder can prevent economic dilution of her investment.

In addition to solving issues of abuse of insider information, contingent shareholder action can solve problems of coordination among shareholders and of collective action. For example, shareholders can tender shares contingent on the tender offer receiving a sufficient number of shares to close the offer without counting shares that are tendered contingently. Such a contingent act could eliminate coercive aspects of a tender offer.[17] In the case of a hostile offer, the contingent action could eliminate the reliance on management to apply defensive tactics to protect shareholders from a low, coercive bid and might also prevent management from using the tender offer as an excuse to implement excessive defenses to protect the shareholders.

The Article proceeds as follows. Part I offers a concise discussion on the current regime governing shareholder action. Part II puts forward the contingent shareholder action proposal as an alternative to the binary regime. The proposed contingent shareholder action regime is enabling—it allows each shareholder to choose whether to follow other shareholders but does not require shareholders to do so. This Part also compares and contrasts contingent shareholder action with shareholder abstention. Finally, this Part explores the desirability of the proposed contingent shareholder action

17. For an example of claims of coercion in the context of controlling shareholder tender offers, see Supplement to the Consolidated Class Action Complaint at 12, *In re Genentech, Inc. S'holders Litig.*, C.A. No. 3911-VCS (Del. Ch. Feb 19, 2009), https://www.sec.gov/Archives/edgar/data/318771/000095010309000440/dp12679_ex-a5xxxxii.htm [https://perma.cc/HS63-GJEX] ("Roche attempts to coerce Genentech's minority stockholders into tendering their shares . . . by failing to provide certainty about the process by which the second-step merger will be accomplished and at what price. . . . Roche simply cannot know the price at which a second-step merger can be effected following the Offer, prior to the process required by the Affiliation Agreement, rendering the Offer coercive and subject to entire fairness scrutiny. Moreover, the Offer is subject to a financing condition, and Roche needs $42.1 billion to finance the Offer and the second-step merger. Roche has not demonstrated that it will have enough money even to finance the second-step merger.").

regime from the perspective of investors who act unconditionally, without regard to the choices of the other investors. Part III demonstrates the potential benefit of a contingent shareholder action regime in two distinct cases. The first case is that of redemption rights, especially in the context of the new generation of SPACs. The second case explored in Part III, as an example for the efficacy of a contingent shareholder action regime, is the case of preemptive rights. The following Part IV compares and contrasts the contingent shareholder action regime and mandatory disclosure rules. In Part V, the Article considers strategic circumvention of the contingent shareholder action regime and ways to prevent it. A conclusion follows.

I. SHAREHOLDER ACTION

Shareholder action is generally binary: ultimately a "yes" or a "no" decision. Shareholders face binary choices such as whether or not to exercise their appraisal rights, redeem their shares, participate in a tender offer,[18] sell shares back to the company, and vote "yes" or "no" on a shareholder proposal.[19] Shareholder action requires the approval of the holders of the majority of the votes, a supermajority, or in special cases, the majority of the minority.[20] A unanimous vote is seldom required, except for extreme transactions such as liquidation without board approval[21] and corporate waste.[22] A majority vote, rather than a unanimous vote requirement, may

18. *See, e.g.*, *Tender Offer*, INVESTOR.GOV, https://www.investor.gov/introduction-investing/investing-basics/glossary/tender-offer [https://perma.cc/PGS8-MEV2] (last modified Jan. 16, 2013) ("A tender offer is a widespread solicitation by a company or third party to purchase a substantial percentage of the company's securities . . . for a limited period of time.").

19. The option to withhold vote in the plurality voting system is the second choice available to shareholders. Abstaining from voting, on the other hand, may be viewed as a third option, which has similar results to a "no" vote in case a majority of votes of the outstanding shares is required. For further discussion on abstaining from voting and vote withholding, see *infra* text accompanying notes 49–53.

20. The affirmative vote of the majority of the minority shareholders may be required in order to avoid the entire fairness standard of review in the case of a transaction with a controlling shareholder. *E.g.*, Kahn v. M&F Worldwide Corp., 88 A.3d 635, 646 (Del. 2014); Olenik v. Lodzinski, 208 A.3d 704, 706 (Del. 2019). Fundamental transactions, such as mergers and sales of all or substantially all of the assets of the corporation, require approval of the holders of the majority of the outstanding shares, rather than merely the majority of the vote cast. DEL. CODE ANN. tit. 8, §§ 251, 271 (2020); *see also In re* PNB Holding Co. S'holders Litig., No. Civ.A. 28-N, 2006 WL 2403999, at *15 (Del. Ch. Aug. 18, 2006) (explaining that a shareholder who abstains from voting on a merger is casting a "*de facto* no vote" and can be viewed as part of a "passive dissent" rather than part of "a 'silent affirmative majority of the minority'").

21. DEL. CODE ANN. tit. 8, § 275(c) (2020).

22. *E.g.*, Lewis v. Vogelstein, 699 A.2d 327, 335 (Del. Ch. 1997) ("[S]hareholders may

prevent holdout costs, a situation in which a shareholder with minimal interest in the firm extracts disproportionate benefits in exchange for her consent.

However, shareholders may not know how to cast their votes. The shareholders may have to choose between incumbents and insurgents competing for their votes. Even where there is no opposition to management, the shareholders may be faced with a difficult choice of whether or not to acquiesce to management's request. Sophisticated shareholders may invest in research about the requested shareholder action. In addition, proxy advisory firms, such as Institutional Shareholder Services (ISS) and Glass-Lewis, are likely to advise institutional investors how to vote their shares, while retail investors will not receive such advice.[23] The benefit of such advice might be limited, however, as proxy advisory firms were recently criticized for lack of adequate oversight.[24]

Unsurprisingly, since making an educated shareholder decision will likely entail additional costs, most retail investors, who own small personal stakes in corporations, do not participate in corporate elections[25] and are blamed for being apathetic.[26] Nonetheless, their votes may be pivotal for the future of the company, especially where there is disagreement between management and insurgents, or among different groups of sophisticated investors, or when a high percentage of the votes is required.[27] Brokers

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not ratify a waste except by a unanimous vote.").

23. *Cf.* Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11, 21–22 (2017) ("ISS is perhaps best known for its advisory services; it provides its investor-subscribers with information about issues on which they are being asked to vote, as well as recommendations as to how to vote.").

24. *E.g.*, Ted Knutson, *Proxy Advisory Firms Get Shotgun Treatment From Wall Street*, FORBES (Apr. 26, 2018, 4:28 PM), https://www.forbes.com/sites/tedknutson/2018/04/26/proxy-advisory-firms-get-shotgun-treatment-from-wall-street/#36931321366c [https://perma.cc/4L5L-F9DY] ("The study charged the services are fraught with poor transparency, conflicts of interest and a lack of communication with the companies they're reviewing."); Stephen J. Choi, Jill E. Fisch & Marcel Kahan, *Director Elections and the Role of Proxy Advisors*, 82 S. CAL. L. REV. 649, 650 (2009) ("Proxy advisors are depicted as powerful, yet unaccountable, institutions that can sway the outcome of corporate votes without any of their own money at stake.").

25. Christopher P. Skroupa, *Retail Shareholders – They're Not Voting, And It's An Issue,* SKYTOP STRATEGIES (May 16, 2018), https://www.skytopstrategies.com/retail-shareholders-theyre-not-voting-issue/ [https://perma.cc/T36J-FEWR] ("Less than a third of retail shareholders vote in corporate elections.").

26. *Id.* at 3. ("We work on campaigns for companies and mutual funds where retail investors dominate the share registry yet are apathetic about voting.").

27. *Id.* ("Retail shareholders need to [be] aware that their votes matter . . . there are issues where . . . institutional investors may be divided and the retail vote could impact the outcome. This impact is especially true for proposals relating to say-on-pay and director elections. . . . Moreover, retail votes can determine the outcome of a proxy contest, often deciding the

cannot step in and mitigate the problem by voting on behalf of the retail shareholders who did not send them voting instructions.[28] In the case of material issues, issues which are not defined as "routine items," the beneficial shareholders have to instruct their brokers how to vote on their behalf.[29]

Thus, we rely on the holders of the majority of the votes, who include retail investors, "mom and pop" investors, who are usually unsophisticated, and who lack the incentive or financial ability to invest in acquiring relevant information and conduct research to guide their vote.[30] Sophisticated investors' votes are assigned the same weight as the retail investors' votes,

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composition of the board and the direction of a company."). The importance of shareholder participation is growing; lately, there have even been calls to raise the threshold needed for resubmission of precatory shareholder resolutions. *E.g.,* Lydia DePillis, *Shareholder Activism is on the Rise, But Companies are Fighting Back*, CNN, https://www.cnn.com/2019/01/30/investing/activist-shareholders/index.html [https://perma.cc/WTM6-KQRG] (last updated Jan. 31, 2019, 4:04 AM ET) ("Along with Nasdaq, the Business Roundtable, and the Chamber of Commerce's longstanding Center for Capital Markets Competitiveness, the coalition has been pushing for legislation that would raise the threshold of support needed to re-submit a resolution that failed previously."); *see also* Fisch, *supra* note 23, at 12–13 (pointing to the 2015 proxy contest at DuPont as an example for the power of retail investors to "have a meaningful effect on the outcome of a shareholder vote."); Michael Flaherty, *P&G, Peltz Vie for Small Investor Votes in Biggest-Ever Proxy Fight*, REUTERS (Sept. 25, 2017, 6:13 AM), https://www.reuters.com/article/us-procter-gamble-trian-investors/pg-peltz-vie-for-small-investor-votes-in-biggest-ever-proxy-fight-idUSKCN1C01CW [https://perma.cc/EG9T-87XN] ("The largest corporate proxy fight in history, between Procter & Gamble Co . . . and activist investor Nelson Peltz, may ultimately be decided by small shareholders. . . . The majority of votes for or against the nomination of Peltz . . . to P&G's board will be cast by massive index investors such as Vanguard Group Inc. . . . But small shareholders could tip the balance in a tight vote."); Scott Hirst, *Frozen Charters*, 34 YALE J. ON REGUL. 91, 112–16 (2017) (highlighting the challenges of securing sufficient shareholder votes to facilitate charter amendments).

28. Hirst, *supra* note 27, at 99–122 (describing and analyzing the broker voting process, the broker voting rules, and the challenges that they raise); Fisch, *supra* note 23, at 13 ("By January 2012, brokers were barred from exercising discretionary voting authority with respect to uncontested director elections, say-on-pay, and charter and bylaw amendments.").

29. *Investor Bulletin: Voting in Annual Shareholder Meetings - What's New in 2012*, U.S. SEC. & EXCH. COMM'N 2 (Mar. 2012), https://www.sec.gov/investor/alerts/votinginannualshareholdersmeetings.pdf [https://perma.cc/9HFD-86WH] ("Brokers are only allowed to cast uninstructed broker votes on 'routine' items, and the scope of routine items has narrowed over the years.").

30. *Cf.* John Armour, Luca Enriques, Henry Hansmann & Reinier Kraakman, *The Basic Governance Structure of Public Corporations: The Interests of Shareholders as a Class*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 49, 49 n.1 (Oxford Univ. Press, 3d ed. 2017) ("Shareholder 'coordination and information costs' can be understood as the costs of actually making decisions among multiple shareholders (i.e. of getting informed and forging a majority preference), combined with the costs flowing from such decisions being suboptimal (because shareholders are uninformed or conflicted).").

unless the company's capital structure includes a separate class of shares with superior voting rights.[31] Such dual class capital structures can delegate the decision-making power to those who may know more, as in the case of Google.[32] To be sure, a wealthy individual may own a larger stake of a company than a less wealthy individual and because of the larger stake may have a larger influence on the company; however, the stake of the company of the less wealthy individual may represent a higher percentage of her wealth and thus, she may be more vested in the success of the company than the wealthier individual.[33] Wealth may be associated with financial skills, or at least allows an investor to hire financial advisors.[34] Potentially, wealth may also increase the likelihood of a conflict of interest as sophisticated advisors of the wealthy investor are likely to encourage diversification and the use of various hedging techniques to lower the investment risk.[35]

Nonetheless, generally, under the default rule, the majority of the

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31. *See, e.g.*, Mira Ganor, *Why Do Dual-Class Firms Have Staggered Boards?,* 10 OHIO ST. BUS. L.J. 147, 154 (2016) (explaining the structure and advantages of a dual-class capital structure).

32. *See, e.g.*, Google, Inc., Registration Statement (Form S-1), at iii (Apr. 29, 2004), https://www.sec.gov/Archives/edgar/data/1288776/000119312504073639/ds1.htm [https://perma.cc/ZE4D-3DT9] ("The main effect of this [dual class voting] structure is likely to leave our team, especially Sergey [Brin] and me [Larry Page], with significant control over the company's decisions and fate, as Google shares change hands. New investors will fully share in Google's long-term growth but will have less influence over its strategic decisions than they would at most public companies.").

33. Even if both invest the same percentage of their wealth in the company, the importance (or utility value) that the less wealthy investor assigns to her stake in the company may well be higher than the one that the wealthier investor assigns because of decreased marginal utility. In addition, wealth may be negatively correlated with risk aversion. *Cf.* Mira Ganor, *Agency Costs in the Era of Economic Crisis – The Enhanced Connection Between CEO Compensation and Corporate Cash Holdings*, 55 ARIZ. L. REV. 105, 108 (2013) ("[F]ollowing the economic crisis, managerial behavior changed to correspond to adjustments in the manager's level of risk. And the manager's level of risk is positively correlated with her compensation.").

34. *Cf.* The federal securities law allows accredited investors, investors whose annual income or net worth are above specified thresholds, to participate in securities offering that are considered risky and thus not open to the public at large, because the wealth of accredited investors is viewed as an indication of them being "financially sophisticated and able to fend for themselves or sustain the risk of loss, thus rendering unnecessary the protections that come from a registered offering." *Updated Investor Bulletin: Accredited Investors*, INVESTOR.GOV (Jan. 31, 2019), https://www.investor.gov/additional-resources/news-alerts/alerts-bulletins/updated-investor-bulletin-accredited-investors [https://perma.cc/J3WA-N78H].

35. *See generally* Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 823–49 (2006) (showing through case studies that investment advisors employed various exotic trading strategies such as zero-cost collar options, record date capture, and equity swaps, to either increase voting rights or to deny voting rights through more complex investment vehicles).

shareholder vote is required for a shareholder action. This rule may be efficient if a large number of shareholders voting on an action increases the likelihood of a better decision.[36] This argument is analogous to the common rationale behind democratic voting. It is also similar to the requirement of a number of judges sitting on a panel in appeal cases rather than a single judge in trial cases, and to the use of an *en banc* session of the court rather than fewer judges in a panel session. Based on the law of large numbers, this may help reach a correct decision in higher likelihood.[37] However, in contrast to fairly equally sophisticated and trained judges, the shareholder base of a company typically includes investors with varied levels of sophistication, including retail investors who might lack any business acumen or financial means to hire educated advisors. Furthermore, the sophistication of certain shareholders may well come with an extraordinary cost of a conflict of interest.[38]

In addition, while it is assumed that the deliberation of a panel of judges will increase the court's capacity to reach a correct outcome, generally when the size of a group is excessively increased, this effect is decreased and in fact, may become a disadvantage. For comparison, studies of the size of the board of directors of companies suggest a declined efficiency with the increase in the number of directors serving on the board.[39] Empirical evidence links the size of the board with reduced monitoring and reduced firm profitability.[40] Similarly, the size of the shareholder body of a public

36. *See, e.g.*, Zohar Goshen, *Controlling Strategic Voting: Property Rule or Liability Rule?*, 70 S. CAL. L. REV. 741, 745 (1997) ("Preference accorded to the majority's opinion is not based on ideological factors but on simple probability. The majority view is preferable because it is more likely to be correct.").

37. *E.g.*, Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 116 (1986) ("Our analysis of the relationship between court size and accuracy is not definitive, but it does indicate that adding judges improves accuracy under plausibly optimistic assumptions about the general capacity of judges to reach correct outcomes and about the impact of deliberation on this capacity.").

38. *See* Hu & Black, *supra* note 35, at 823–49 ("On the one hand, insider hedging may mitigate the risk-taking conflict between managers and diversified shareholders. But the same technology could allow insiders to boost their voting control at little economic risk, thus weakening the market for corporate control as a disciplining mechanism.").

39. *See generally* Michael C. Jensen, *The Modern Industrial Revolution, Exit and the Failure of Internal Control Systems*, 6 J. APPLIED CORP. FIN. 4, 19–20 (1994) (suggesting that larger boards are more easily controlled by the CEO because of coordination and process problems).

40. *E.g.*, Benjamin E. Hermalin & Michael S. Weisbach, *Boards of Directors as an Endogenously Determined Institution: A Survey of the Economic Literature*, 9 ECON. POL'Y REV. 7, 13 (2003) ("The data therefore appear to reveal a fairly clear picture: board size and firm value are negatively correlated."); David Yermack, *Higher Market Valuation for Firms with a Small Board of Directors*, 40 J. FIN. ECON. 185, 186 (1996) (summarizing the literature

company prohibits deliberation among the shareholders even if they physically attend the shareholder meeting. Since the shareholder body is comprised of a much larger number of members than that of the board, the problem of coordinating and collaborating among the shareholders and overcoming each single member's rational incentive to freeride and rely on the others' actions is more pronounced. On the other hand, following the herd allows unsophisticated investors to learn from those who are sophisticated and better informed.

II. CONTINGENT SHAREHOLDER ACTION (CSA)

This Article refers to a shareholder's choice between two options that is decisive and unrelated to the choices of the other shareholders as a binary shareholder action. For example, a binary shareholder voting system allows the shareholder to either vote in favor of or against a proposal. To be sure, the shareholder may choose not to vote, or generally not to act, but if she chooses to vote (or to act) then the vote has to be either in favor or against. In contrast to binary shareholder action, this Article puts forward a contingent shareholder action (and voting) system. This system allows the shareholder to vote, or act, based on the actions of others. Under the proposed contingent system, shareholders may still choose to cast a decisive vote of "yes" or "no", but they may also choose to vote contingently: vote "yes" if, and only if, the aggregate non-contingent "yes" vote represents at least a specified percentage of the shareholder votes, otherwise their vote is "no." To clarify, if no shareholder casts a decisive vote, then the condition is not met, because less than the specified percentage of the votes were a "yes" vote, and the contingent votes are treated as a "no" vote.

A contingent shareholder action regime may be flexible and allow the condition to take various forms. The basic condition simply follows the majority of non-contingent action. However, the condition can follow a different threshold than a simple majority. For example, a shareholder action can be contingent on at least 30% of the votes being cast unconditionally in favor of the proposed shareholder action.

Consider the scenario in which a group of people is voting by show of hands.[41] The sequence starts with a few people who raise their hands first,

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that suggests limiting the size of the board to about eight members in order to increase the board's effectiveness and describing supportive empirical evidence). *But see* Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long Term Firm Performance,* 27 J. CORP. L. 231, 261 (2002) (finding only "hints" to support the negative connection between the board size and firm performance).

41. Historically, English common law provided that the default rule for voting at

which reveals who supports the proposal strongly, and thus votes immediately with no hesitation. After a short delay, additional hands are raised following the lead of those who voted first. However, participating in a shareholder meeting in person is costly, so shareholders may refrain from doing so, and thus will not be able to follow the lead of those who raise their hand first. In contrast, a shareholder meeting can be replaced by a vote by written consent,[42] or the shares can be voted by proxy,[43] where the proxy is instructed how to vote in advance of the meeting. In these scenarios, the strong sentiments of shareholders who vote first is not revealed, the shareholders lose the ability to inexpensively coordinate, exchange information, and act as a group, thus requiring other means of communication, such as proxy solicitation material or mandatory prior disclosure, to disseminate the information to the shareholders.[44] Conversely, contingent shareholder action can be by proxy or in writing and still account for the information about the simultaneous votes of other shareholders even without attending the meeting in person. Contingent shareholder action can help the shareholders achieve similar benefits of acting as a group at a lower cost.[45]

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shareholder meetings is by show of hands. *See In re* Horbury Bridge Coal, Iron & Waggon Co., 11 Ch. D. 109, 109–10 (Del. Ch. 1879). A vote by show of hands counts the individual shareholders that raise their hands, rather than their shares or the votes assigned to their shares, and thus the votes are disproportionate to the equity holding of the shareholders. A vote by show of hands, however, facilitates a quick voting result as the counting of the shareholder votes is simplified. This common law has persisted, and currently, several countries, such as Chile, India, Malaysia, New Zealand, Singapore, Sweden, Taiwan, and the United Kingdom have laws that provide for shareholder voting by show of hands in certain situations. *See* INSTITUTIONAL S'HOLDER SERVS., MARKET MECHANICS GUIDE 3, 5, 7, 8, 9 (2020), https://www.issgovernance.com/file/faq/market-mechanics-guide.pdf [https://perma.cc/RTX3-EB7E].

42. *See* DEL. CODE ANN. tit. 8, § 228 (2020) (allowing action by written consent); MODEL BUS. CORP. ACT § 7.04 (AM. BAR ASS'N 1984) (current version at MODEL BUS. CORP. ACT § 7.04 (AM. BAR ASS'N 2016)) (requiring a unanimous vote for an action in writing rather than in a meeting). The 2006 amendment of the Model Act followed Delaware and included a new Section 7.04(b), which allows a corporation to add an article provision that departs from the unanimous vote requirement. MODEL BUS. CORP. ACT § 7.04(b) (AM. BAR ASS'N 2006) (current version at MODEL BUS. CORP. ACT § 7.04(b) (AM. BAR ASS'N 2016)).

43. *See* DEL. CODE ANN. tit. 8, § 212 (2020) (covering the Delaware proxy system); Regulation 14A of the Securities Exchange Act of 1934, 17 C.F.R. §§ 240.14a-1 to 240.14b-2 (2019) (setting forth the federal proxy rules).

44. Requiring certain shareholders to disclose their votes in advance so that other investors could follow them is similar to Jesse Fried's proposals to use mandatory advance disclosure rules to allow shareholders to follow the lead of insiders and controlling shareholders in the context of preemptive rights, repurchase tender offers, and insider trading, *see supra* note 16.

45. To be sure, the large shareholders may have different risk tolerance profiles or

The herd behavior incorporates the information disclosed by the leaders. Since shareholder meetings are mostly attended by proxy,[46] rather than by retail investors,[47] to replicate the scenario of being present in person and being able to observe others and vote with a short delay, I suggest adopting contingent voting. Contingent shareholder action is nondiscriminatory because every shareholder may choose to follow rather than to lead, or vice versa. Shareholders may still abstain, so the proposed contingent shareholder action regime does not necessarily increase the weight of the vote of those who lead and vote decisively and unconditionally; each shareholder is free to choose not to follow the lead of those who vote unconditionally.

A contingent shareholder vote can be dependent on the majority of the vote cast. This simple condition is similar to abstaining when a simple majority of the vote cast is required. Whether the vote is cast in favor of the majority or not, the outcome of the shareholder vote is the same: the majority will prevail. Unlike a contingent shareholder vote, other contingent shareholder actions, however, are different from shareholder abstention since an action is actually required to exercise the right. For example, abstention does not trigger preemptive rights,[48] rather abstention is treated as if the shareholder chose not to exercise her preemptive right, even if the majority chose to do so.

If the proposed shareholder action is a fundamental transaction, which can be, for example, a statutory merger,[49] a sale of all or substantially all of

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restrictions on investing, such as diversification requirements, which do not relate to their nonpublic information about the stock price, and thus the retail investors should not necessarily always blindly mimic the large shareholders' behavior.

46. ERNST & YOUNG LLP, SEC FINANCIAL REPORTING SERIES: 2020 PROXY STATEMENTS 1 (2019), https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/assurance/accountinglink/ey-sec07903-191us-12-09-2019-v2.pdf [https://perma.cc/U58R-3LCC] ("Most shareholders do not attend shareholders' meetings. Instead, they vote their shares on director elections, major transactions and other matters via solicited proxies.").

47. Physically attending such meetings might be prohibitively expensive for retail investors.

48. Preemptive rights are rights to participate in future issuances of shares pro rata to a shareholder's percentage holding. For an analysis of preemptive rights and of their shortcoming in protecting shareholders against cheap-stock tunneling by controlling shareholders, see generally Fried & Spamann, *supra* note 12, at 6–24 (explaining that preemptive rights cannot prevent cheap-stock tunneling when asymmetric information about the value offered shares makes it impossible for the minority to know whether the shares are cheap or overprices).

49. DEL. CODE ANN. tit. 8, § 251 (2020).

the assets of the company,[50] an amendment of the charter,[51] or dissolution,[52] then the action will require the approval of the majority of the votes assigned to the outstanding shares. If the shareholder action requires the majority of the votes assigned to the outstanding shares, then abstaining is tantamount to voting against the proposed shareholder resolution. This is because the proposal requires the support of at least the majority (above 50%) of the shareholder votes, regardless of the breakdown between votes cast against the proposal and abstained votes. For example, if 100 votes are assigned to the outstanding shares, 51 votes in favor of the shareholder action are required to pass the proposal regardless of whether the remaining 49 votes are cast against the proposal or not voted at all. To be sure, a large shareholder opposition may affect the company due to negative publicity and fear of future shareholder action,[53] but the resolution will pass once it receives the required 51 votes despite 49 votes in opposition. Similarly, if only 50 votes are cast in favor of the resolution, then the resolution will fail regardless of whether the remaining 50 votes are cast against the proposal or are abstained; the resolution does not receive the required 51 "yes" votes, and thus abstaining has the same effect as voting against the resolution. On the other hand, if shareholders are allowed to vote contingently, 50 votes are cast in favor of the resolution unconditionally and one vote is cast in favor of the resolution contingent on the proposed resolution receiving more unconditional "yes" votes than "no" votes, then this one vote will be added to the "yes" votes. Thus, in this example, and the contingent vote will help the proposal reach the required 51 votes.

On the other hand, if a plurality vote or a simple majority of the votes cast is required for a shareholder action, then an "abstain" vote supports the majority of those who voted, which could be either in favor of or against the action. For example, if 100 votes are assigned to the outstanding shares and 30 votes are cast in favor of and 20 votes against the resolution, then whether the remaining 50 votes are cast in favor of the resolution or are not voted at all, the result is the same as long as they do not vote against the resolution.

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50. DEL. CODE ANN. tit. 8, § 271 (2020).

51. DEL. CODE ANN. tit. 8, § 242(b)(1) (2020).

52. DEL. CODE ANN. tit. 8, § 275 (2020).

53. Mira Ganor, *Why Do Managers Dismantle Staggered Boards?*, 33 DEL. J. CORP. L. 149, 152, 155 (2008) ("My study suggests shareholders are more potent than might appear from a simple study of their formal rights . . . the shareholders may be able to steer the board in informal ways toward the position they favor. For example, shareholders may use the withholding vote mechanism and the media to pressure the board."). *See* Floyd Norris, *Corporate Democracy and the Power to Embarrass*, N.Y. TIMES, Mar. 4, 2004, at C1 for an example of a successful vote-withholding tactic that cost Michael Eisner his chairman seat on Disney's board.

Similarly, if 100 votes are assigned to the outstanding shares and 30 votes are cast against and 20 votes in favor of the proposed resolution, then whether the remaining 50 votes are cast against the resolution or abstain the result is the same, as long as they do not vote for the resolution. A simple contingent shareholder action that tracks the majority of the unconditional vote cast is similar to abstaining from voting in these types of situations, as it does not affect the outcome of the proposal. However, a contingent shareholder action can be tailored in a way that *does* affect the outcome of the resolution. For example, in the last scenario, where 30 votes are cast against and 20 votes are cast in favor, if a shareholder who has 11 votes decides to vote "yes" conditioned on at least 20 votes cast unconditionally for the proposal, the 11 votes are added to the 20 votes for a total of 31 votes in favor and only 30 against. This time the outcome is reversed and the resolution passes.

From the point of view of the shareholders who have decided how to vote regardless of the other shareholders' actions (i.e., unconditionally), contingent shareholder action is a regime that may be either welcomed or disliked depending on the circumstances. There are scenarios in which sophisticated investors would like other shareholders to follow their lead and act in the same way as they do. For example, in situations where sophisticated investors own less votes than are required to pass a shareholder resolution or are needed to elect candidates to the board of directors in a contested election or where the default plurality voting rule[54] was replaced by a majority requirement, the sophisticated investors require the support of other shareholders to facilitate such shareholder action. Similarly, in the case of appraisal rights, under the new Delaware *de minimis* exception, the appraisal remedy is not available to shareholders of a public company if the total appraisal claims represent only 1% or less of the outstanding shares and the merger consideration for the shares whose owner seeks appraisal is only $1 million or less.[55] Thus, a small, sophisticated shareholder who seeks

54. DEL. CODE ANN. tit. 8, § 216(3) (2020). A Delaware corporation can opt out of the plurality default rule for the election of directors and replace it with a majority rule that could require the majority of the votes cast, the majority of the votes present, the majority of the votes outstanding, or a super-majority. And while fundamental transactions require approval of the holders of the majority of the outstanding shares, other shareholder resolutions require the approval of the holders of the majority of shares present in a meeting either in person or by proxy. A charter provision can increase the majority required to pass a shareholder resolution. DEL. CODE ANN. tit. 8, §§ 102(b)(4), 216, 251, 271 (2020).

55. DEL. CODE ANN. tit. 8, § 262(g) (2020). *See*, COUNCIL OF THE CORP. LAW SECTION OF THE DEL. STATE BAR ASS'N, SECTION 262 APPRAISAL AMENDMENTS 3 (Mar. 6, 2015), https://www.appraisalrightslitigation.com/files/2015/03/DGCL-262-Proposal-3-6-15-Explanatory-Paper-1.pdf [https://perma.cc/STB3-KS9S] ("If 99% of the stockholders accept

appraisal, but does not reach the threshold set in the *de minimis* rule, may benefit from other shareholders imitating her actions. Since the sophisticated investors believe that the specific shareholder action is in their best interest *qua* shareholders of the company, it is likely that it is also in the best interest of the other unsophisticated shareholders.[56] Thus, a small shareholder who is entitled to appraisal rights can opt to exercise the right contingent on at least another shareholder doing so unconditionally. In this case, contingent voting can lead to an efficient outcome by lowering, or even obviating, the solicitation and communication costs.

Conversely, in certain situations sophisticated investors would benefit from going against the tide. For example, appraisal-arbitrage hedge funds[57] invest in companies that are about to merge in order to benefit from the relatively high pre-judgment interest rate, which they hope to receive in appraisal proceedings.[58] However, only if the holders of the majority of the shares approve the merger, and thus will not be entitled to the appraisal remedy themselves, will the hedge funds be eligible to ask the court to appraise their shares.[59] Another example is the case of a company that offers to sell shares to its current shareholders for a price that reflects a higher company valuation than the intrinsic value of the company (which can be part of a public offering in which existing shareholders exercise preemptive

the merger consideration . . . it is difficult to justify the use of judicial and party resources to provide a judicial determination of value.").

56. To be sure, that may not always be the case. For example, the sophisticated shareholders, especially those who own a relatively small stake in the company, might simultaneously own a larger position in an investment that is negatively correlated with the interests of the shareholders, such as shorting the company, owning shares of the competition, or of a party on the other side of a transaction with the company. *E.g.*, Ian Ayres & Joe Bankman, *Substitutes for Insider Trading*, 54 STAN. L. REV. 235, 241–51 (2001) (analyzing investments in rivals, suppliers, and customers based on material non-public information, instead of direct investments in the corporation, in order to avoid insider trading); Bruce H. Kobayashi & Larry E. Ribstein, *Outsider Trading as an Incentive Device*, 40 U.C. DAVIS L. REV. 21, 48–51 (2006) (discussing shorting dominating competitors as mitigating the risks of market entry).

57. Audra L. Boone, Brian J. Brougham & Antonio J. Macias, *Merger Negotiations in the Shadow of Judicial Appraisal* 1 (Ind. Legal Studies, Research Paper No. 381, 2019), http://www.shareholderforum.com/appraisal/Library/20170919_Boone-Broughman-Macias.pdf [https://perma.cc/KS5D-87B8] (noting that the practice of hedge funds "purchas[ing] shares in the target firm after a merger is announced and then perfect[ing] their right to appraisal on the eve of the shareholder vote . . . [is] known as appraisal arbitrage").

58. *Cf.* Scott Callahan, Darius Palia & Eric Talley, *Appraisal Arbitrage and Shareholder Value*, 3 J. L. FIN. & ACCT. 147, 149 (2018) ("[I]n August of 2007, § 262(h) of the Delaware code was amended to award presumptive pre-judgment interest in appraisal proceedings pegged at the Federal Reserve discount rate plus five percent (5%), compounded quarterly.").

59. Only shareholders who either abstained or voted against the transaction have appraisal rights. DEL. CODE ANN. tit. 8, § 262(g) (2020).

rights),[60] or offers to buy shares from its shareholders (stock buybacks or self-tenders) for a price that is too low.[61] The shareholders who choose not to participate in these offers gain from the company's actions at the expense of the shareholders who do transact with the company (sell to or buy shares from the company).[62] Likewise, in the opposite situation, if the price is low when the company issues shares, or high when it buys back shares, sophisticated shareholders would like to benefit from dealing with the company but would prefer that the other shareholders will not do the same, in order to increase their own gain.[63] Thus, the sophisticated investors would not like the other shareholders to follow their buy/sell choices.[64] The unsophisticated investors, however, would benefit from mimicking the sophisticated investors, who might be acting on insider information.[65] As a result, contingent voting may protect retail investors from abuse by insiders.

In a third set of cases, the sophisticated investors are generally indifferent about the choices of the other shareholders. In these cases, choices made by one shareholder do not affect the value of the other shareholders; and thus, the sophisticated investors neither gain nor lose from the other shareholders' choices. For example, sophisticated shareholders of a SPAC[66] who exercise their right to redeem their shares on the eve of a proposed acquisition transaction are, generally, not affected by the redemption decision of the other shareholders of the SPAC.[67] This is because

60. *See, e.g.*, Fried & Spamann, *supra* note 12, at 3 (showing that preemptive rights cannot prevent cheap stock tunneling when asymmetric information about the value of the offered shares makes it impossible for the minority to know whether the shares are cheap or overpriced).

61. *See,* e.g., Fried, *supra* note 16, at 453 (explaining that insiders can achieve substantially the same result as tendering by selling their stock in the market after the RTO is announced).

62. *See* Fried & Spamann, *supra* note 12, at 8 (showing that preemptive rights cannot prevent cheap-stock tunneling when asymmetric information about the value of the offered shares makes it impossible for the minority to know whether the shares are cheap or overpriced); Fried, *supra* note 16, at 453–69 (explaining that insiders can achieve substantially the same result as tendering by selling their stock in the market after the RTO is announced).

63. This assumes that the total number of shares the company will sell/buy can be lower than the total amount offered by the company; if the total amount cannot be lowered, then the assumption is that the sophisticated shareholders can buy/sell shares in excess of their percentage holding in case of undersubscription.

64. Another example where the actions of one investor may affect the other investors is the case of reverse Dutch auction IPOs, such as the Google IPO. *Cf.* Mira Ganor, *Manipulative Behavior in Auction IPOs*, 6 DEPAUL BUS. & COM. L.J. 1, 5, 8 (2007).

65. *See* Fried, *supra* note 12, at 98 (discussing the widely held belief that preemptive rights can thwart cheap issuance tunneling by a controller).

66. For further discussion about SPACs, see *infra* Part III.A.

67. For situations where the sophisticated shareholders are affected nonetheless, see *infra*

the SPAC funds that may be subject to redemption are held in escrow and thus secure the ability of all the shareholders to redeem their shares simultaneously.[68] Remarkably, however, investors in SPACs can vote "yes" on a management-proposed acquisition transaction and, nonetheless, simultaneously choose to redeem their shares.[69]

To be sure, if the shareholders also own warrants of the SPAC, which are not redeemable, the sophisticated investors would prefer that the other shareholders did not redeem their shares and that the De-SPAC transaction is effectuated, since it will increase the value of these warrants.[70] Nevertheless, even if they do not have a direct interest in the transaction, such as owning warrants, the shareholders may still wish to maintain a good working relationship with the promoters and founders of the SPAC, who seek to De-SPAC and advocate the transaction.[71] Aiming to appease the SPAC's management, the sophisticated investors may refrain from publicizing their plan to redeem their own shares and may well vote for the transaction. Unsophisticated retail investors may not realize that they, as well, will be better off if they redeem their shares even though the transaction received the approval of the majority of the shareholder vote. Contingent shareholder action will allow unsophisticated shareholders to see through the shareholder approval of the merger transaction and follow the sophisticated investors' choice to redeem their shares, nonetheless.

To generalize, as seen in the scenarios above, the unsophisticated shareholders can benefit from contingent action, while the sophisticated shareholder may use the contingent action as an inexpensive yet credible means of communication with the other shareholders.[72]

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note 70 and accompanying text.

68. *See infra* note 86 and accompanying text (discussing the transactional basics of SPACs).

69. *See infra* note 85 and accompanying text (providing the registration statement for a SPAC advised by Pershing Square Capital Management, L.P.).

70. SPAC Research, *A Primer on SPACs*, SEEKING ALPHA (Apr. 25, 2018), https://seekingalpha.com/article/4165641-primer-spacs?page=5 [https://perma.cc/4AK7-FD7A] ("[W]arrants will also expire worthless if no business combination is achieved."). Initially, investors purchase units, which include a combination of shares and warrants. However, following the IPO, the shares and warrants usually trade separately on the stock exchange. *See infra* notes 92–93 (discussing the approved Rule 19b-4 change and special purpose acquisition companies).

71. *See infra* note 87 and accompanying text (discussing 2017 and 2018 SPAC market trends).

72. To clarify, in VC-backed companies, the VC funds typically negotiate for various contractual provisions such as tag along, drag along, co-sale, and oversubscription rights. The scope and nature of these rights are based on the acts of the other shareholders. For example, oversubscription rights allow the investors to purchase more shares in a round of financing if other investors did not exhaust their preemptive rights. Contingent shareholder action, on the

III. APPLYING CONTINGENT SHAREHOLDER ACTION

In the following subsections, I will apply contingent shareholder action to two distinct situations to demonstrate how shareholders may benefit from acting contingently. Subsection A will focus on the redemption rights, or the rights to sell back the shares to the company, in the context of the new generation of SPACs, and Subsection B will look at shareholder preemptive rights, the right to participate in future issuances of stock by the company.

A. SPACs

Special purpose acquisition companies (SPACs) are vehicles used for raising funds in initial public offerings (IPOs) to finance future acquisitions of operating businesses that will be identified only after the IPO.[73] Fittingly, SPACs are also called "blank check" companies.[74] SPACs' importance has increased in the last couple of years.[75] In 2018, SPACs raised more than $10

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other hand, is a method of exercising the shareholders' rights based on the acts of the other shareholders without changing the rights themselves.

73. Self-Regulatory Organizations, Exchange Act Release No. 80,199, File No. SR-NYSE-2016-72, at 2 (Mar. 10, 2017), https://www.sec.gov/rules/sro/nyse/2017/34-80199.pdf [https://perma.cc/5HVU-YCG4] [hereinafter Exchange Act Release No. 80,199] ("A SPAC is a special purpose company that raises capital in an initial public offering ('IPO') to enter into future undetermined business combinations through mergers, capital stock exchanges, assets acquisitions, stock purchases, reorganizations or similar business combinations with one or more operating businesses or assets."). *Special Purpose Acquisitions Companies (SPACs)*, INTERCONTINENTAL EXCHANGE, https://www.nyse.com/spac [https://perma.cc/GZZ4-BKRQ] (last visited Feb. 15, 2020) ("A special purpose acquisition company (SPAC) is formed for the purpose of raising capital through an IPO and using those funds to acquire an operating business."); *see* Steven M. Davidoff, *Black Market Capital*, 2008 COLUM. BUS. L. REV. 172, 224–28 (studying the SPACs phenomenon in the years 2003 through 2007); *see generally,* Usha Rodrigues & Mike Stegemoller, *Exit, Voice, and Reputation: The Evolution of SPACs,* 37 DEL. J. CORP. L. 849 (2013) (describing the evolution of SPACs until 2013); *see generally,* Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs,* (Stan. L. & Econ. Olin Working Paper No. 559, 2021) (studying SPACs that merged between 2019 and June 2020 and critiquing the structure and associated high transaction costs).

74. Rodrigues & Stegemoller, *supra* note 73, at 871.

75. Vincent G. Piazza, Evan Lee & Nathan R. Dean, *SPACs Revisited: We Said It Wouldn't Be Any Different*, BLOOMBERG PROF. SERVS. (Nov. 30, 2017), https://www.bloomberg.com/professional/blog/spacs-revisted-said-wouldnt-different/ [https://perma.cc/NNY7-LAW7] ("The importance of special purpose acquisition companies (SPACs) in the capital-raising value chain has grown significantly over the past year. Private equity is lending strong backing to the investment vehicle, especially in the energy sector."); Tse & Baker, *supra* note 9 ("[SPACs have] become more mainstream.").

billion,[76] and over $13 billion in the following year.[77] SPACs may offer varied benefits to a company that seeks to go public, such as shortening the approval process to get listed on the stock exchanges.[78] SPACs are traded on the most prominent stock exchanges, including both Nasdaq and the New York Stock Exchange (NYSE).[79]

Once the managers of the SPAC identify an acquisition target, they need to obtain the shareholder approval to proceed with the transaction, called a De-SPAC transaction.[80] In accordance with the exchange listing rules, shareholders who vote against the transaction have the right to redeem their shares.[81] Similarly, under Delaware law, a shareholder is entitled to appraisal rights only if it "has neither voted in favor of the merger or consolidation nor consented thereto in writing."[82] A shareholder who

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76. Alexander Osipovich, *Hot IPOs Present Pitfalls for Investors*, WALL ST. J., Feb. 27, 2019, at B1 ("SPACs . . . rais[ed] more than $10 billion in new listings last year.").

77. Tse & Baker, *supra* note 9. The upward trend continues in 2020. *See, e.g.*, Thorne *supra* note 8 ("In 2020, SPACs have accounted for 38% of US IPO filings and raised $6.5 billion as of May 20—more than the total capital raised by institutionally-backed IPOs during the period.").

78. Tse & Baker, *supra* note 9 ("Merging with a SPAC can save a listing candidate months or even a year compared with a regular IPO."); *SPAC Momentum Charges on with Nikola*, NASDAQ, (Jun 5, 2020) https://www.nasdaq.com/articles/spac-momentum-charges-on-with-nikola-2020-06-05 [https://perma.cc/VD98-VWQJ] ("A SPAC can offer a business a faster process to going public with guidance from an experienced partner.").

79. Osipovich, *supra* note 76, at B12 ("Since 2010, they have enjoyed another resurgence, as well as increased acceptance on Wall Street. . . . Goldman Sachs Group Inc. underwrote its first SPAC IPO in 2016. The New York Stock Exchange welcomed its first blank-check company to the Big Board the next year. . . . Nasdaq Inc. has listed them since 2008."); *Special Purpose Acquisitions Companies (SPACs)*, *supra* note 73.

80. Exchange Act Release No. 80,199, *supra* note 73, at 3 ("Until the SPAC has completed a business combination, or a series of business combinations, representing at least 80% of the trust account's aggregate fair market value, the SPAC must, among other things, submit the business combination to a shareholder vote. Any public shareholders who vote against the business combination have a right to convert their shares of common stock into a pro rata share of the aggregate amount then in the trust account, if the business combination is approved and consummated."). Alternatively, the SPAC may conduct a tender offer in lieu of a shareholder vote, in order to prevent greenmail. NYSE, INC., LISTED COMPANY MANUAL § 102.06(c) (2017) [hereinafter NYSE MANUAL].

81. Ramey Layne & Brenda Lenahan, *Special Purpose Acquisition Companies: An Introduction*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 6, 2018), https://corpgov.law.harvard.edu/2018/07/06/special-purpose-acquisition-companies-an-introduction/ [https://perma.cc/AT7N-GULE] ("Under stock exchange listing rules, if a shareholder vote is sought, only shareholders who vote against the De-SPAC transaction are required to be offered the ability to redeem their public shares, but SPAC charter documents typically require the offer to be made to all holders.").

82. DEL. CODE ANN. tit. 8, § 262(a) (2020).

approves a merger transaction is not entitled to the appraisal remedy.[83] Thus, the law protects the shareholders who did not approve the transaction by giving them redemption rights and appraisal rights.

However, while the listing rules require SPACs to give transaction opponents the right to redeem their shares, the rules do not prohibit transaction supporters from redeeming their shares as well.[84] Typically, the charter of the SPAC extends the redemption rights to all the common shareholders, regardless of their vote.[85] Thus, investors who opt to redeem their shares and nonetheless vote in favor of the transaction have power over the company, even though they choose to separate themselves from the ownership interest that gives rise to these control rights *a priori*.

This practice of granting redemption rights regardless of the vote severs the connection between the redemption request and the disapproval of the proposed acquisition transaction. A shareholder is allowed to simultaneously vote for the transaction and ask for redemption, thus not subjecting her own equity stake to the transaction she chose to support. It seems to be a contradictory behavior for an investor to both ask to redeem her investment at cost and, at the same time, approve the proposed acquisition. Clearly, shareholders who choose to redeem their shares are not optimistic about the prospects of the transaction, and yet they approve it.

One reason why sophisticated shareholders may vote for an acquisition, yet choose to redeem their shares, is that everything else being equal, they have nothing to gain from voting against the transaction and are likely to upset its promoters if they do. Voting in favor of or against the De-SPAC transaction will not affect the redemption value of the shares, since the money is held in escrow, a trust that accumulates interest, and thus is secured.[86] However, if the sophisticated investors vote against the De-

83. *But see In re* Cyan, Inc. Stockholders Litig., No. CV 11027–CB, 2017 WL 1956955 at *17 (Del. Ch. May 11, 2017) (describing quasi-appraisal, a special remedy that the Chancery Court gave shareholders who were misinformed, so that their approval was treated as if not given because of the disclosure violation).

84. CHRISTIAN O. NAGLER & DAVID A. CURTISS, KIRKLAND & ELLIS, MARKET TRENDS 2017/18: SPECIAL PURPOSE ACQUISITION COMPANIES (SPACS), LEXISNEXIS 3 (2018), https://www.kirkland.com/siteFiles/Publications/LexisNexis%20(SPAC%20-%20Nagler_Curtiss)%20Aug%202018.pdf [https://perma.cc/SGH2-2DTC] ("[S]tockholders may seek to have their shares redeemed (regardless of whether they vote for or against the initial business combination). . . .").

85. *Id.*; *see, e.g.*, Pershing Square Tontine Holdings, Ltd., Registration Statement (Form S-1) at 33 (Jun. 22, 2020) [hereinafter Pershing Square Registration Statement], https://www.sec.gov/Archives/edgar/data/1811882/000119312520175042/d930055ds1.htm [https://perma.cc/2MWM-4E92] ("Each public stockholder may elect to redeem its shares of Class A common stock irrespective of whether they vote for or against the proposed transaction.").

86. WINSTON & STRAWN LLP, SPAC 101 TRANSACTION BASICS AND CURRENT TRENDS

SPAC, their reputation in the market may suffer. Typically, the sponsors of the SPAC are individuals with whom sophisticated shareholders would like to maintain an amicable business relationship.[87] The sponsors of the SPAC own shares and warrants in the SPAC that are not redeemable and that will be worthless if the SPAC does not consummate the De-SPAC transaction.[88] Thus, retail investors cannot rely on the sophisticated investors' vote and are more vulnerable to management.

Alternatively, sophisticated shareholders may vote for an acquisition because they want to redeem their shares without delay. The shareholders have the right to redeem their shares in three events: (1) a consummation of the De-SPAC transaction,[89] (2) an extension of the period allotted for the consummation of a De-SPAC transaction,[90] and (3) a liquidation of the company.[91] If the sophisticated shareholders have lost confidence in the SPAC, and the redemption value of their shares is higher than the price they could receive for their shares in the market, then they may vote in favor of the transaction. Failure to consummate the De-SPAC transaction will delay

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13 (2018), https://www.winston.com/images/content/1/3/v2/135061/Winston-Strawn-SPAC-Basics-Presentation-2018.pdf [https://perma.cc/PWZ6-ENK9].

87. *See* NAGLER & CURTISS, *supra* note 84, at 2 ("A SPAC is most often sponsored by either (i) well known professionals in the specific industry or geography of focus for the SPAC or (ii) private equity funds seeking acquisitions outside the focus of their general funds."); Osipovich, *supra* note 76, at B12 ("Wilbur Ross, the billionaire investor turned commerce secretary, and entertainment entrepreneur Haim Saban . . . are among the executives who have launched SPACs to seek acquisitions in recent years."); Tse & Baker, *supra* note 9 ("[W]ell-known backers like blue-chip private equity firms and former public company CEOs involved also has rehabbed the image of SPACs. . . . [B]illionaire Richard Branson did [a SPAC deal] too.").

88. WINSTON & STRAWN LLP, *supra* note 86, at 20 ("If unable to complete a business combination within a specified timeframe, often 24 months from the closing of the IPO, it must return all money in the trust account to the SPAC's public shareholders, and the founder shares and warrants will be worthless.").

89. NYSE MANUAL, *supra* note 80, § 102.06(a) ("[I]f a shareholder vote on a Business Combination is held, each public shareholder voting against the Business Combination will have the right ('Conversion Right') to convert its shares of common stock into a pro rata share of the aggregate amount then on deposit in the trust account (net of taxes payable, and amounts disbursed to management for working capital purposes), *provided that the Business Combination is approved and consummated*.") (emphasis added).

90. Layne & Lenahan, *supra* note 81 ("[I]f the SPAC . . . seeks to amend its charter documents to permit an extended period to consummate the De-SPAC transaction, it will . . . offer to redeem."); WINSTON & STRAWN LLP, *supra* note 86, at 20 ("In connection with any extension, must offer public shareholders right to redeem shares for a pro rata portion of the cash held in the trust account.").

91. Layne & Lenahan, *supra* note 81 ("SPACs are required to either consummate a business combination or liquidate within a set period of time after their IPO. Stock exchange rules permit a period as long as three years, but most SPACs designate 24 months from the IPO closing as the period.").

the redemption of the shares until another redemption opportunity materializes.

In addition, it may be in the sophisticated investors' interest to De-SPAC even if it is better for them to redeem their SPAC shares. In the IPO, the SPAC issues units that include both common stock and warrants to purchase common stock.[92] These units trade separately shortly after the IPO.[93] While it may be that from the perspective of a shareholder the deal is undesirable, it still may be that for an option holder, the economics is different.[94] Unlike the shares, the warrants are not assigned redemption rights, and rejection of the De-SPAC transaction may trigger a liquidation of the SPAC, which will erase the value of the warrants. On the other hand, approval of the De-SPAC transaction preserves the option value of the warrants. Thus, as a shareholder, the investor is not in favor of the transaction, but as a warrant holder, she stands to gain from the De-SPAC transaction. While the voting rights are assigned to the shares, and the warrants do not confer voting rights on their owners, the investors may use their votes to increase the value of their warrants.[95]

Another explanation of this seemingly contradictory behavior of a shareholder who both votes in support of the transaction and exercises her redemption rights may be that she has a conflicting interest, such as owning shares of the target of the SPAC acquisition.[96] It may also be that the investors who wish to redeem their shares believe that they will be paid faster if fewer investors ask to exercise their redemption right. All the funds subject to the redemption right are held in escrow, thus the investors should not be concerned with a "run for the bank" situation that may leave them

92. Exchange Act Release No. 80,199, *supra* note 73 ("[I]n the IPO, a SPAC typically sells units consisting of one share of common stock and one or more warrants (or fraction of a warrant) to purchase common stocks. The units are separable at some point after the IPO.").

93. Layne & Lenahan, *supra* note 81 ("Following the IPO, the units become separable, such that the public can trade units, shares, or whole warrants, with each security separately listed on a securities exchange."). Interestingly, in the case of Bill Ackman's hedge fund's proposed $3 billion SPAC IPO of Pershing Square Tontine Holdings, Ltd., the shares include in addition to detachable warrants, rights for special warrants that are not detachable and cannot be traded separately from the shares and will be cancelled if the shares are redeemed, clearly giving the investors some economic incentive not to redeem the shares. *See* Pershing Square Registration Statement, *supra* note 85, at 15.

94. *Cf.* Hu & Black, *supra* note 35 (describing situations in which shareholders have voting rights though they have interests that are foreign to the interests of the shareholders as a whole, for example because they have shorted the stock of the company).

95. *Cf.* Hu & Black, *supra* note 35.

96. *Cf.* Hu & Black, *supra* note 35, at 830 ("Empty voting on the acquirer's side by the target's shareholders, employed if the vote is likely to be close, could reduce whatever constraint the vote requirement now instills on the acquiring firm.").

with less than their rightful claim.[97] However, a distribution to numerous investors, and especially a failure to approve the De-SPAC that might trigger a dissolution of the SPAC, may delay the distribution of funds for the redeemed shares.

The unsophisticated investors, however, may misinterpret the approval of the transaction by the majority of the shareholders' vote as a sign that the sophisticated investors support the transaction because they believe it is in their best interest as shareholders, and thus the unsophisticated investors may choose not to redeem their shares. And where the shareholder vote decreases in its significance, or even becomes meaningless, as in the case of some dual class capital structures,[98] the retail shareholders who need to decide whether to redeem their shares are left vulnerable and ill-equipped. Even if they understand that the vote of the shareholders cannot be interpreted as a clear indication in favor of the transaction, the unsophisticated shareholders lose the signal that such shareholder vote is supposed to confer and are left vulnerable to transactions that benefit the SPAC sponsors at the expense of the unsophisticated shareholders.

An alternative explanation of the shareholders' choice to redeem their shares and vote for the transaction may be unrelated to their personal sentiment about the De-SPAC transaction. The shareholders may realize that different investors may have different risk tolerance levels and may favor more risk than they do. Thus, they may refrain from blocking the transaction and enable the other shareholders to proceed with the acquisition.[99] To be sure, a shareholder may choose to abstain from voting on the transaction, rather than voting in favor, once she decides to exercise her right to redeem her shares because at this time the decision no longer affects her.

Interestingly, the old exchange listing rules prohibited De-SPAC transactions that accompanied redemption requests representing 40% or more of the common stock.[100] In 2010, Nasdaq, with the SEC's approval,

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97. *See supra* note 86 and accompanying text (describing the basics of SPAC structure and current trends).

98. *See, e.g.*, Pershing Square Registration Statement, *supra* note 85, at 32 (noting that to approve a transaction, the sponsor will need less than 38% of the votes assigned to the shares proposed to be issued in the public offering).

99. *Cf.* Piazza, Lee & Dean, *supra* note 75 ("[T]he risk of liquidation of the structure is driven by equity redemption and the hurdle of completing an acquisition.").

100. Exchange Act Release No. 80,199, *supra* note 73, at 4 ("[T]he Exchange is proposing to eliminate the provision that prevents a business combination if public shareholders owning a threshold amount (not to exceed 40%) of the shares of common stock issued in the IPO exercise their conversion rights in connection with the business combination.").

repealed this prohibition.[101] The NYSE did the same in 2017.[102] Perhaps not coincidentally, an increase in SPAC IPOs followed these repeals.[103] However, after the De-SPAC transaction, the company will still be subject to the exchange continued listing rules, including the minimum number of shareholders requirement,[104] thus increasing the importance of the number of redeeming shareholders.

The various explanations of shareholder behaviors described above demonstrate why the vote of the sophisticated investors on the De-SPAC transaction cannot be taken as a signal for the merit of the transaction, nor does it necessarily reflect the best interest of the shareholders as a whole. For this reason, we may not want retail investors to mimic the sophisticated investors' votes about the De-SPAC. However, mimicking the sophisticated investors' decision regarding the exercise of their redemption rights may serve to benefit the retail investors.

Contingent shareholder action may protect retail investors of SPACs.[105] They may choose to redeem their shares if a certain percentage of

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101. Exchange Act Release No. 80,199, *supra* note 73 at 11, n.28 ("Further, the Exchange has also proposed to eliminate the provision that a business combination cannot be consummated by the SPAC if the public shareholders owning in excess of a threshold amount (to be set no higher than 40%) of the shares of common stock exercise their conversion rights. The Commission notes that we have approved SPAC listing rules on other markets that do not contain a similar requirement. The Commission notes that it has previously approved a substantially similar rule concerning this portion of the Exchange's proposal for other national securities exchanges.") (citations omitted).

102. Exchange Act Release No. 80, 199, *supra* note 73 at 11, n.28.

103. *See* Piazza, Lee & Dean, *supra* note 75.

104. NYSE MANUAL, *supra* note 80, §§ 102.01A, 802.01B. These sections require at least 400 round lot holders, excluding holders who serve as officers or directors (i.e., 400 holders of at least 100 shares each) following the De-SPAC transaction. It should be noted that the SEC recently rejected a NYSE's proposed rule that would have given the exchange:

> discretion to allow SPACs a reasonable time period following a business combination to demonstrate compliance with the applicable quantitative listing standards . . . rather than requiring SPACs to immediately comply with such standards . . . including the requirement to maintain a minimum of 400 round lot holders.

Self-Regulatory Organizations, Exchange Act Release No. 34-86117, File No. SR-NYSE-2018-46, at 4 (June 14, 2019), https://www.sec.gov/rules/sro/nyse/2019/34-86117.pdf [https://perma.cc/MVW5-JJAS].

105. An additional solution may be to prohibit shareholders from redeeming the shares that voted for the transaction, similar to the appraisal rights rules, which link the shareholders' rights to their actions. *See supra* text accompanying note 59; *Cf.* Scott Edward Walker, *Demystifying the VC Term Sheet: Pay-to-Play Provisions*, VENTUREBEAT (May 9, 2011, 6:00 AM), https://venturebeat.com/2011/05/09/demystifying-the-vc-term-sheet-pay-to-play-provisions/ [https://perma.cc/U8EL-866R] (describing pay-to-play rights, whereby if an investor does not participate in future rounds of investments, then she loses voting rights).

shareholders choose to redeem shares unconditionally, thus withdrawing their support for the company regardless of the outcome of the shareholder vote about the De-SPAC transaction. Contingent shareholder action allows retail investors to piggyback on the sophisticated investors' knowledge and research. To be sure, unless the sophisticated investors are abusing insider information, the contingent action allows the retail investor to free ride on the legitimate efforts of the sophisticated investors. This is similar to the free riding that occurs as a result of mandatory disclosure requirements that are imposed on insiders or large investors.[106]

The contingent shareholder action can take many forms and use different thresholds. For example, the shareholder may decide that if holders of at least 30% of the shares redeem their shares unconditionally, then she too will redeem all of her shares; and if less than 30% redeem their shares, but more than 20% choose to redeem their shares unconditionally, then she will redeem only half of her shares; and finally, if less than 20% redeem their shares, she will not redeem any of her shares. This can be achieved, technically, by dividing the shares and using different thresholds: a 20% threshold for one-half of the shares and a 30% threshold for the other half of the shares.[107]

B. Preemptive Rights

Preemptive rights are shareholder rights to participate in new issuances of stock by the company.[108] In one of his seminal contributions to the literature on corporate governance and preemptive rights, Jesse Fried shows that these rights are not as protective as they may seem in preventing dilution of shareholders.[109] In fact, insiders may exploit their non-public information about the company to extract value from the shareholders, by strategically

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106. Generally, it might be efficient if large shareholders invest in private research and analysis based on publicly available information as part of their monitoring activities, which cost they solely internalize. Being able to benefit disproportionally from the results of the analysis might incentivize the large investors to conduct such research.

107. For example, suppose a shareholder owns 100 shares. She can divide her shares into two, place a contingent redemption call with a threshold of at least 30% of shares being redeemed unconditionally on 50 of her shares, and place a contingent redemption call with a threshold of 20% on the other 50 shares.

108. Ganor, *supra* note 14, at 738–39; *see also* DEL. CODE ANN. tit. 8, § 102(b)(3) (2020) (permitting the grant of preemptive rights in the certificate of incorporation under Delaware law).

109. Fried, *supra* note 12, at 81; *see also* Fried & Spamann, *supra* note 12, at 1 (explaining that preemptive rights can make "cheap-stock tunneling" more difficult, the rights cannot prevent cheap stock tunneling when asymmetric information makes it impossible for the minority to know the true value of the stock).

participating in buybacks or in new issuances (exercising preemptive rights) only when the price the company offers is favorable to them and refraining from doing so in other times.[110] On the other hand, due to the inability to determine the real value of the stock, outside shareholders may make the wrong decision when choosing whether to participate in these transactions.[111] Fried further shows that a mandatory disclosure requirement can solve this problem by forcing the insiders to make public their plans to participate or to refrain from participating in the company's proposed sale, thus allowing the rest of the shareholders to mimic the insiders' decisions.[112]

However, while mandatory disclosure may solve the abuse of insider information by controlling shareholders, it creates a set of new challenges. For one, mandatory disclosure comes with a cost: it requires the actual dissemination of the disclosed information to the shareholders and the processing of the information by the outsiders, if they decide to incorporate the new information in their decision-making process. Mandatory disclosure requirements may also discourage potential investors from accumulating a sizeable stake in a company to avoid triggering disclosure requirements that make their choices public. The contingent shareholder action, on the other hand, can be used as an alternative instrument to mandatory disclosure rules that does not entail the same costs as mandatory disclosure rules, though contingent shareholder action may also be used as a complementary tool.[113]

Applying contingent shareholder action to preemptive rights cases could take the form of a pro rata limit subscription commitment. This means that the holders of the preemptive rights may choose to buy up to a certain amount of shares in the offering, provided that the actual number of shares bought by them will not represent a higher percentage of the total aggregate commitments than the holders' *ex-ante* stake in the company.[114] For

110. Fried, *supra* note 12, at 91.

111. Fried, *supra* note 12, at 81 ("[F]ear of buying overpriced securities will cause some outsiders to rationally refrain from purchasing, and these refraining outsiders will suffer losses if the securities are, in fact, cheap. On the flip side, participating outsiders will suffer losses . . . when the securities' price is, in fact, high.").

112. Fried, *supra* note 12, at 98.

113. *See infra* Part IV for a comparison of mandatory disclosure rules and contingent shareholder actions.

114. A pro rata limit subscription commitment is similar to using a limit order to buy stock through a brokerage firm. While the limit order focuses on the price, the pro rata limit subscription commitment focuses on the number of shares. Both help protect the investor by restricting the purchase order in response to the market. *See, e.g.*, *Investor Bulletin: Trading Basics, Understanding the Different Ways to Buy and Sell Stock*, U.S. SEC. & EXCH. COMM'N 1 (Mar. 2011), https://www.sec.gov/files/trading101basics.pdf [https://perma.cc/3TA4-PYBR] ("A buy limit order can only be executed at the limit price or lower. . . . While limit orders do not guarantee execution, they help ensure that an investor does not pay more than a

example, if the shareholder owns 10% of the company, under contingent shareholder action, the shareholder may choose to exercise her preemptive rights and commit to purchasing a specified number of shares in the offering, but with a ceiling of no more than 10% of the total actual issuance. Placing a pro rata limit subscription commitment means that the shareholder commits to purchase the lesser of the specified number of shares and the limit. The limit protects the outsider shareholder by adjusting her commitment to reflect the size of the actual number of shares issued in the rights offering.

If all the outsiders put a pro rata limit on their commitment that matches their pro rata share of the company prior to the new issuance, and the controlling shareholder does not participate in the offering, without new investors, the rights offering will not close. For example, if the controlling shareholder owns 30% of the company[115] and the company receives an aggregate commitment for only 70% of the offering, but with a limit that it will represent not more than 70% of the total issuance, then this is equivalent to a commitment contingent on actually selling 100% of the offer, and thus the offer fails.

To be sure, the limit to the commitment can be set higher than the actual pro rata share of the preemptive right holder. In the previous example, this can be a commitment to purchase 70% of the offered shares provided that the purchased shares will represent not more than 80% of the total commitments. Setting a higher limit may account for nonparticipating outsiders and accommodate outsiders who wish to increase their holdings, regardless of the controlling shareholder's actions.

Investors may decide to purchase shares even if they learn that the controlling shareholder or other insiders will not participate in the offering. The fact that the insiders are already invested in the company may carry sufficient weight and influence enough investors who attribute the nonparticipation of the insiders to portfolio diversification needs and liquidity constraints rather than negative insider information. In addition, if underwriters agree to a firm commitment rights offering, then even if the controlling shareholder does not participate or only partially participates, the

predetermined price for a stock.").

115. A shareholder can control the company despite owning less than 50% of the equity of the company. A dual class capital structure, for example, may confer direct control to a shareholder who owns less than the majority of the shares through the ownership of superior voting rights. *See generally* Lucian Arye Bebchuk, Reinier Kraakman & George Triantis, *Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights*, *in* CONCENTRATED CORPORATE OWNERSHIP 445, 445–60 (Randall K. Morck, ed., 2000). Similarly, a shareholder may gain *de facto* control over the company, despite controlling less than 50% of the votes, if the shareholder base is dispersed. Ganor, *supra* note 31, at 181.

underwriters will make sure that the rights offering closes and buy any unsubscribed shares.[116] Thus, despite the use of a pro rata limit subscription commitment, with the help of underwriters and new investors, the offering may still close without insider participation. Nonetheless, the existing outsider shareholders who use contingent shareholder action to maintain their percentage holding in the company after a rights offering are neither better nor worse off, regardless of whether the controlling shareholder participates in the offering, and even if the offering is underpriced.[117] It may be though, that the existing outsider shareholders will incur liquidity and diversification costs in order to maintain their percentage holding and participate in the offering.[118]

In a contingent shareholder action regime, the accepted commitments are the commitments that result in the highest accepted commitment subscription without violating the limit restrictions. We might end up with no solution, in which case the offer will not close. This is similar to a mandatory disclosure regime and a scenario where the controlling shareholder does not participate, and the outsiders, mimicking the controlling shareholder, also do not participate, and thus the offer does not

116. If the underwriting is a firm commitment, then the underwriter undertakes to step in and purchase any shares that are not bought in the offering. *Firm Commitment Underwriting*, NASDAQ: GLOSSARY OF STOCK MARKET TERMS (2018), https://www.nasdaq.com/investing/glossary/f/firm-commitment-underwriting [https://perma.cc/RR6N-N8ER] ("An underwriting in which an investment banking firm commits to buy and sell an entire issue of stock and assumes all financial responsibility for any unsold shares.").

117. To the extent that the shareholder maintains her percentage holding in the company, the gains and losses will offset each other: if the rights offering is overpriced, then she will win from the increase in value of the old, pre-offer purchased shares and lose from purchasing the new over-priced shares. Alternatively, if the rights offering is underpriced, then she will lose from the decreased value of the old shares and win from participating in the underpriced rights offering. For example, to demonstrate the offsetting effect of using preemptive rights to maintain the percentage holding of the shareholder, consider a company that has 100 shares issued and outstanding and is worth $100, which means that each share is worth $1. Shareholder A owns 10 shares, which are worth $10 total. The company issues 100 new shares for the low price of $0.50 a share. The total proceeds from the new issue of shares is $50, so the new value of the company is now $150 and the capital of the company is divided into 200 shares with each share worth $0.75. Following the new issue of shares, Shareholder A's old 10 shares are worth $7.50, which reflects a loss of $2.50 in the value of the shares before the new issue of shares. However, if Shareholder A participates in the share offer *pro rata* to her percentage holding in the company and buys 10% of the new issue, or 10 new shares, for a total of $5, then these new shares will be worth $7.50 immediately after the closing of the offer, incorporating a gain of $2.50, which offsets the loss on the old shares.

118. Ganor, *supra* note 14, at 739 ("[P]reemptive rights give only the right to participate in future issuances of shares, but the shareholders' ability to participate in the issuance of shares may in itself be limited. . . . A shareholder may not want or be able to invest more in the company. . . .").

close.[119]

The following example illustrates the process for determining the size of the total accepted subscription commitments in a contingent shareholder action regime. Suppose the company is offering to sell up to 100 shares. X is defined as the highest aggregate accepted commitments that do not violate the limit-subscriptions. Generally, there can be three types of subscription commitments under the limit rule, regardless of whether they are made by an insider or outsider. The first type is a no-limit subscription commitment. As an example, for this type of commitment, consider Shareholder A who makes a commitment to buy up to 30 shares unconditioned on the behavior of the other shareholders.

The second type is a limit subscription commitment with a limit set at or below the subscription. For example, Shareholder B commits to buy up to 20 shares, provided that she will not end up buying more than 20% of the total accepted commitments. This means that if 20 is more than the limit, $20\% * X$, then Shareholder B buys only $20\% * X$ shares. Given that the total offer is only 100 shares, then this type of offer can be simply rewritten as $20\% * X$.

The third type of commitment is a limit subscription commitment with a limit set above the subscription. Consider, for example, Shareholder C who wants to buy up to 15 shares, provided that she does not end up buying more than 20% of the total accepted commitments. In other words, if 15 is greater than $20\% * X$ then the subscription is in the size of $20\% * X$, otherwise the subscription will be for 15 shares. This condition means that as long as $X \geq 75\, shares$, $(15 < 20\% * X \rightarrow X > 15/20\%)$, then Shareholder C's commitment is 15 shares; and if $X < 75$, $(15 > 20\% * X)$, then Shareholder C's commitment is $20\% * X$ shares. We calculate the critical value, 75 in this example, for each commitment of the third type. The following table summarizes the subscription commitments of the three shareholders.

119. *Cf.* Fried, *supra* note 12, at 98–99 (indicating in a mandatory disclosure regime, if a controlling shareholder refrains from purchasing any securities, there can be no cheap-issuance tunneling, as the controller will not acquire any securities, while overpriced issuance tunneling will be curbed as outside investors will infer the securities are not cheap if the controlling shareholders refrain from purchasing them).

Table 1. Summary of Subscription Commitments

Shareholder	*Commitment Type*	*Subscription Commitment*
A	Type I: no-limit subscription	30
B	Type II: limit below subscription amount	$20\% * X$
C	Type III: limit above subscription amount	Min (15; 20%*X) Critical Value: 75

Now we can aggregate the total subscription commitments for every given X and try to solve for the highest X that satisfies the limit commitments. For $X > 75$ the equation is $30 + 20\% * X + 15 = X \rightarrow X = 56.25$, which does not satisfy the $X > 75$ requirement, so this is not a valid solution. For $X < 75$ the equation is $30 + 20\% * X + 20\% * X = X \rightarrow X = 50$. $X = 50$ is the solution in this example.[120] If we had more critical values, we would stop at the highest X that solves the equations.

This example shows how contingent shareholder action can be used to solve the problem of tunneling, the act of insiders extracting value from the company,[121] and protect the outside shareholders even without mandatory disclosure in the context of preemptive rights, by allowing the shareholder to place a limit on her subscription commitment and thus maintain her percentage holding in the company and prevent dilution.

IV. CONTINGENT SHAREHOLDER ACTION V. MANDATORY DISCLOSURE RULES

While the two measures, contingent shareholder action and mandatory disclosure rules, may be viewed as alternative mechanisms, they are not mutually exclusive. With rules allowing them to opt into these regimes, a company could have both a mandatory disclosure requirement and a contingent shareholder action system. In fact, the two mechanisms can serve as complementary mechanisms. With mandatory disclosure rules, contingent shareholder action can provide further benefits. For example, contingent shareholder action may capture information about additional, unknown players who are not subject to the disclosure rules. Contingent

120. *A* will buy 30 shares while *B* and *C* will buy 10 shares each.

121. Simon Johnson, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Tunneling*, 90 AM. ECON. REV. 22, 22 (2000); Vladimir Atanasov, Bernard Black & Conrad S. Ciccotello, *Law and Tunneling*, 37 J. CORP. L. 1, 8–9 (2011); Fried, *supra* note 12, at 80–81 (defining "cheap-issuance tunneling" as the sale of underpriced securities to controlling shareholders and "overpriced-issuance tunneling" as the sale of securities to the outside shareholders when the price is high).

shareholder action may allow a shareholder to follow groups of investors, not just an individual insider who is subject to the mandatory disclosure requirement. Contingent shareholder action may help an individual retail investor to decide what to do with the information from the mandatory disclosure. Contingent shareholder action may help avoid the cost associated with reviewing the disclosures made pursuant to a mandatory disclosure requirement, gleaning additional information about the disclosing party, and reaching an educated decision based on this information. The following subsections outline a few differences between contingent shareholder action and mandatory disclosure rules from a cost-benefit perspective.

A. Equal Treatment

Similar to contingent shareholder action, mandatory disclosure rules allow the shareholders to follow those shareholders who are targeted by the disclosure requirement under a mandatory disclosure regime.[122] However, contingent shareholder action's significant advantage over a disclosure requirement regime is that the former treats all the shareholders equally and does not impose a special obligation on any specific, targeted shareholders. If the intent of the disclosure is to allow the minority shareholders to mimic a controlling shareholder's actions,[123] then a contingent action that is structured as a choice to exercise the shareholder's rights, if the majority of the shareholder rights are exercised unconditionally, achieves the same result. In other words, a mandatory disclosure rule targets specific, but not all, shareholders and requires them to disclose their choices. On the other hand, a contingent action regime treats all shareholders equally and does not require disclosure by any shareholder. And yet, a similar result is achieved by allowing the shareholders to follow those who choose to exercise their rights unconditionally.

To be sure, transparency is valuable in certain situations and may be beneficial to management, as it increases confidence in the governance of the firm and contributes to a perception of fairness, especially when it is applied equally. Unequal treatment of shareholders may be justifiable where it is needed to protect the shareholders from abuse of a fiduciary position and from trading based on insider information. On the other hand, both equal treatment of shareholders and confidential shareholder action (including confidential voting) benefit the firm by attracting investment from shareholders who may not wish to expose their choices. Contingent

122. Fried, *supra* note 12, at 81.
123. Fried, *supra* note 12, at 81.

shareholder action may also encourage voting and enable management to gauge the real sentiments of the shareholders and expose potential opposition early on, before a crucial vote is needed. Before a vote is crucial, the shareholders may just vote with management to avoid friction that may arise in case the identity of those who voted against is disclosed. Alphabet Inc., Google Inc.'s parent company, for example, assures its shareholders that it maintains their vote confidentially within the organization as well as vis-a-vis third parties.[124] It should be noted that Alphabet Inc. is controlled by its founders, who own the majority of the vote through a dual class capital structure.[125] Nonetheless, favorable shareholder vote is still important, even where the management enjoys effective control,[126] in order to avoid bad publicity due to lack of support from investors[127] and in cases where a majority of the minority vote[128] or a class vote[129] is required.

Furthermore, shareholders who are targeted by a mandatory disclosure regime can also benefit, like the rest of the shareholders, from a contingent shareholder action regime and should be allowed to act contingently on the choices of the other shareholders. Even though the mandatory disclosure regime singles out the targeted shareholders and forces them to disclose their actions in advance, for example, because of the size of their holding,[130] they too should be able to use a contingent shareholder action. For example, the regime should allow the targeted shareholders to use contingent shareholder

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124. Alphabet Inc., Proxy Statement (Schedule 14A), at 14 (Apr. 27, 2018), https://www.sec.gov/Archives/edgar/data/1652044/000130817918000222/lgoog2018-def14a.htm [https://perma.cc/8QES-UEM7] ("Proxy instructions, ballots, and voting tabulations that identify individual stockholders are handled in a manner that protects your voting privacy. Your vote will not be disclosed either within Alphabet or to third parties, except: (1) as necessary to meet applicable legal requirements, (2) to allow for the tabulation of votes and certification of the vote, and (3) to facilitate a successful proxy solicitation."). It should be noted, however, that the term "successful proxy solicitation," in the context it is used in Alphabet's voting privacy notice above, is rather vague and potentially weakens the ability of the notice to assure shareholders.

125. Google, Inc., Registration Statement (Form S-1), *supra* note 32, at iii. For a description and analysis of the use of a dual class capital structure by Google Inc., see Ganor, *supra* note 31, at 169–70.

126. *See* Ganor, *supra* note 31, at 182.

127. *See supra* text accompanying note 53.

128. *See* cases cited *supra* note 20 (identifying Delaware case law where a vote of the majority of the minority was required to avoid entire fairness judicial review).

129. *See, e.g.,* DEL. CODE ANN. tit. 8, § 242(b)(2) (2020) (requiring the approval of the holders of the majority of a class for changing the number of authorized shares of the class).

130. *See infra* note 133 and accompanying text (explaining that under 17 C.F.R. § 240.13d-1(a), a targeted investor that holds more than five percent of a company must file a Schedule 13D with the SEC and disclose their position within ten days of reaching the five percent threshold).

action in order to maintain their percentage holding in the company in case of a rights offering and place a pro rata limit subscription commitment.[131]

B. Simultaneous Action, Cost, and Delay

In addition to avoiding discriminating against a group of shareholders, the contingent system is advantageous in comparison to a mandatory disclosure rule because it saves time and expenses. The mandatory disclosure rule requires an early action by the insider or controlling shareholder, which is in turn followed by the distribution of the information to the shareholders who then are requested to act. The contingent system, on the other hand, asks all the shareholders to exercise their rights simultaneously, and there is no need to inform the shareholders about the actions of the insider prior to their own. The contingent system allows the shareholders to factor in the insider's actions without actually learning about it in advance.

Requiring the insider to disclose her choices ahead of time, in order to allow the outsiders to mimic her actions, has a built-in delay: first the insider discloses her chosen action, then the outsiders, after learning about the insider's choice, decide whether or not to mimic the insider's action. This delay may come with a cost to the company, for example, of disseminating the insider's choice to the rest of the shareholders, and a cost to the insider having less time to make the decision. On the other hand, a shareholder contingent action can be done simultaneously, with no delay, because there is no need to tell the other shareholders what the insiders are doing ahead of time. Both the insiders and the outsiders submit their choices at the same time.

A retail investor may choose to follow the majority of the decisive action, saving the cost of educating herself about who the insiders are, who the sophisticated investors are, what each of them is doing, what action management recommends, and so on. Choosing to follow the majority of the non-contingent vote is an easy, fast, and costless solution that may lead to the same favorable result for the retail investor as following a previously disclosed insider action.

131. *See supra* note 117 and accompanying text (providing a quantitative example of how existing shareholders can use contingent shareholder action to maintain their percentage holding).

C. Insider Identity, Multiple Insiders, and Capture of Unknown Players

Mandatory disclosure rules focus on the identity of the shareholder. However, if we knew that a shareholder is an insider and owns, for example, 30% of the shares, then we could design our contingent action accordingly and follow the acts of at least a 30% decisive action. This action should lead to the same result as following the mandatorily disclosed actions of insiders. To be sure, a mandatory disclosure requirement is important in the case of a very small insider, such as an officer who does not own a significant percentage of the equity of the company, because her acts might fall off the radar of a contingent shareholder action regime.

If there are multiple insiders and each act differently, the unsophisticated investors who learn about the behavior of the insiders may be puzzled and incapable of deciding whom to follow. In the case of preemptive rights, for example, contingent shareholder action allows the shareholders to protect their investment, without picking sides, by maintaining their percentage holding in the company, and thus neither winning nor losing from the share offering.[132] Adding a pro rata limit option to the shareholder action lets the outsiders maintain their percentage holding in the face of varied and confusing insider behavior.

Additional information can be gleaned from the actions of shareholders who choose to act non-contingently. A contingent regime allows for the capture of non-contingent actions of players who are unidentified by the market at the time. For example, the securities laws allow a delay of up to ten days for disclosure after a person acquires more than 5% of the company.[133] Similarly, investors may purposefully stay below the 5% threshold in order to avoid triggering disclosure requirements.[134] A contingent regime allows less sophisticated shareholders to follow the

132. *See supra* notes 117–118 and accompanying text.

133. Filing of Schedules 13D and 13G, Exchange Act Rule 13d-1, 17 C.F.R. § 240.13d-1(a) (2019); *see also* Form of Schedule 13D, 17 C.F.R. § 240.13d-101 (2019) (promulgating the information to be included in Rule 13d-1 disclosures).

134. Maintaining anonymity may be beneficial for investors for a myriad of reasons, including avoiding a premature price increase that will follow such disclosure. Lucian A. Bebchuk & Robert J. Jackson, Jr., *The Law and Economics of Blockholder Disclosure*, 2 HARV. BUS. L. REV. 39, 50 (2012) ("Once the presence of an outside blockholder is publicly disclosed, prices rise to a level reflecting [the] expected benefits" of "the blockholder's [future] monitoring and engagement activities."). *But see* Mira Ganor, *Toehold Collaborations Beyond Insider Trading*, 14 N.Y.U. J. L. & BUS. 187, 227–28 (2017) (analyzing special toehold collaborations that are strategically disclosed to the public in order to deter competing bidders).

actions of shareholders who are not yet subject to mandatory disclosure requirements.

If we do not know that a shareholder has insider information, she may not be subject to mandatory disclosure rules. However, the contingent shareholder action regime will nonetheless allow the shareholders to follow the unconditional acts of shareholders without knowing the identity or relationship of the shareholder who acted decisively. A sophisticated investor may have information that is unknown to the public as a whole but does not fall within the scope of insider information as defined. Thereby, acting upon it does not violate the securities rules, and in which case, it is beneficial for the unsophisticated investors to follow the acts of the sophisticated investor even if they do not know her identity.[135]

V. PREVENTING CIRCUMVENTION

Subsection II describes a few scenarios in which a shareholder does not want the other shareholders to follow her actions[136] because generally, acting differently from the other shareholders allows her to reap extraordinary profits, usually at the expense of the company and the other shareholders. Both contingent shareholder action and mandatory disclosure allow the other shareholders to follow the lead of the resolute shareholder and act similarly towards her.

Thus, shareholders may strategically camouflage their actions in order to attempt to prevent the other shareholders from following them. One such strategy may be to collaborate with other investors rather than act as a single large shareholder, and thus try to avoid triggering disclosure rules and regulatory focus.[137] However, under the securities regulations, if the investors act as a group, they will be viewed as a single person, thus subjecting the group to the disclosure requirements.[138] Similarly, contingent

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135. On the other hand, from the sophisticated investor's point-of-view, being followed may or may not be desirable, depending on the case. *See supra* text accompanying notes 54–64.

136. *See supra* text accompanying notes 57–64.

137. John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 562 (2016) ("Avoiding joining a 'group' protects those activist investors who individually own less than 5% of the target's stock, because the target will usually not know of their existence. Unless these investors declare themselves part of a group, they are basically invisible so long as they individually stay below the 5% ownership level.").

138. 15 U.S.C. § 78m(d)(3) (2012) ("When two or more persons act as a . . . group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for the purposes of this subsection.").

shareholder action tracks aggregate non-contingent action, and thus is indifferent to the formal split of the ownership among group members.

In an attempt to circumvent the ability of the shareholders to mimic her action in a corporation that allows for contingent shareholder action, the shareholder can choose to use a significantly low contingency threshold and split her action. To see how this strategy may work, consider a shareholder who owns 5% of the shares of the company. The shareholder can use a small fraction of her shares, for example only 0.01% of the shares, unconditionally. She will use her other 4.99% of shares to act contingently on at least 0.01% non-contingent shareholder action—a low bar that she herself clears. This will result with seemingly only 0.01% determined non-contingent action. Such low percentage of unconditioned action may be dismissed and not followed by any shareholders, as it may appear to reflect an insignificant interest in the company.

To prevent this strategic shareholder action from camouflaging her real action, low bar contingent action should be treated as non-contingent action. To avoid circumventing the contingent shareholder action regime, an action should be considered non-contingent if it is contingent on a significantly low percentage, so that the insiders cannot partially act unconditionally and partially act contingently based on a low percentage that tracks their own actions.

CONCLUSION

Retail shareholder power to act is often illusory, and without the knowledge how and when to use it, it might be worthless. The law deals with this problem mainly by imposing mandatory disclosure requirements and by relying on fiduciaries that owe the duty to promote the shareholders' best interests through guidance and active abuse prevention. This Article puts forward a different solution—the contingent shareholder action, which enables shareholders to follow sophisticated investors without the expense of processing disclosed information and is particularly useful in cases such as redemption decisions in SPACs.

Contingent shareholder action does not rely on potentially conflicted fiduciaries to promote shareholder interests. By enabling shareholders to place a cap on their actions, such as a pro rata limit for example, it can prevent dilution in situations where shareholders face choices such as whether to exercise preemptive rights or whether to participate in stock buybacks. In addition, contingent shareholder action can solve structural coercion situations where shareholders are coerced to vote against their better judgement in fear of ending up worse off in case of collective action failures.

While an investor might be able to give her broker proxy instructions to vote in a contingent way, such contractual arrangement will not have the same desired effects as the contingent shareholder action regime proposed in this Article. To carry out contingent voting instructions, the broker should be able to see how the other shareholders are voting. While the broker knows how her other clients instructed her to vote their shares, she does not see how all the company's shareholders, including shareholders who are not her clients, are voting. Thus, a contingent shareholder action regime should be permitted by law and administered on a company-wide level.

Further study should look into the effects of contingent shareholder action on ancillary rights of shareholders. For example, shareholders who have the right to vote on a merger transaction may have statutory appraisal rights, but only if they do not vote in favor of the merger. In a contingent shareholder action regime, the shareholder may use her right to vote contingently. One may look at this choice similarly to a decision to abstain from voting, and thus the shareholder should maintain her appraisal rights. On the other hand, as the Article shows, in certain scenarios, a contingent action is different from abstention, and thus one might look at the choice of voting contingently as a delegation of the decision to other shareholders and as a step closer to approval of the merger than merely abstaining, which may justify the loss of appraisal rights.