

# Equal Treatment Agreements: Theory, Evidence & Policy

Caley Petrucci<sup>†</sup>

*While the rise of dual-class companies—companies like Facebook, Google, and Visa, which have two or more classes of common stock that differ in voting rights—has been widely observed over the past decade, prior commentators have largely overlooked the important “equal treatment” agreements that are embedded in many dual-class charters. Equal treatment agreements require that stockholders are treated equally, for example by ensuring that all stockholders receive the same consideration per share in the sale of the company, thereby potentially taking away one of the most important benefits of holding the high-vote shares. Using an original database of 312 dual-class charters and their equal treatment agreements, this Article is the first to conduct a robust empirical analysis of equal (and unequal) treatment agreements in dual-class companies. As a policy matter, the Article identifies when such structures are desirable and efficient from a law-and-economics perspective. In doing so, this Article highlights certain agreements (which I term “unequal treatment agreements”) that require equal treatment except for a fixed proportion of disparate consideration as promising structures to facilitate efficient deals, deter inefficient deals, and manage moral hazard. Based on this analysis, the Article provides implications for stakeholders including founders, investors, practitioners, and courts.*

*For founders and investors, who often hold the high-vote and low-vote shares, respectively, and issuers, who create and sell the dual-class stock, this Article examines the importance, features, and power of equal treatment agreements, and the impact of the current doctrinal landscape on their utility. For practitioners, who draft and negotiate these agreements, this Article analyzes the interaction of multiple equal treatment agreements within the same charter and identifies nuances in the scope and degree of equality afforded under various formulations of purportedly “equal” treatment. For courts, who interpret and apply equal treatment agreements, this Article argues that because of the impact of recent doctrine on corporate practice, many equal treatment*

---

<sup>†</sup> Climenko Fellow and Lecturer on Law, Harvard Law School. Comments welcome at [cpetrucci@law.harvard.edu](mailto:cpetrucci@law.harvard.edu). For thoughtful comments and discussion, I thank John Coates, Jill Fisch, Jesse Fried, Jeff Gordon, Louis Kaplow, Holger Spamann, Leo Strine, Guhan Subramanian, Eric Talley, and participants from the American Law and Economics Association Annual Meeting, the Columbia Law and Economics Seminar, the Harvard Law and Economics Seminar, the National Business Law Scholars Conference, and the Winter Deals Conference. For valuable feedback on earlier drafts, I thank Susannah Barton Tobin, Caitlin Millat, and the members of Harvard Law School’s Climenko Fellowship Program. I also thank Alexander Johnson for his valuable research assistance.

## Equal Treatment Agreements

*agreements fail to fully protect low-vote stockholders from disparate treatment. Accordingly, the Article proposes normative recommendations for approaching equal treatment agreements and contends that unequal treatment agreements may have a broader role to play in dual-class charters.*

Introduction .....	622
I. Background.....	630
A. The Rise and Controversy of Dual Class .....	631
B. The Sunset Compromise .....	636
C. Equal Treatment Case Law and Literature Review .....	639
II. New Evidence on Equal Treatment Agreements.....	648
A. Methodology .....	648
B. General Equal Treatment Agreements .....	655
C. Specific Equal Treatment Agreements.....	657
1. Covered Transactions.....	658
2. Degree of Equality .....	659
3. Exceptions .....	660
4. Other Forms: Liquidation & Dividends.....	664
III. Implications.....	664
A. For Founders, Investors, and Issuers .....	666
B. For Practitioners .....	669
C. For Courts.....	680
Conclusion.....	685

#### List of Tables

Table 1. Industry Classification, Market Capitalization, and Incorporation... 649
Table 2. Equal Treatment Agreements by Industry .....
Table 3. The Efficiency of Equal Treatment .....

#### List of Figures

Figure 1. Proportion of Equal Treatment Agreements by IPO Year (2002-2021) .....	651
Figure 2. Proportion of Equal Treatment Agreements by Type (2002-2021). 652	
Figure 3. General Equal Treatment Agreements: Proportion of Objects.....	657
Figure 4. Specific Equal Treatment Agreements: Proportion of Transaction Types .....	659
Figure 5. Specific Equal Treatment Agreements: Proportion of Objects .....	660
Figure 6. Specific Equal Treatment Agreements: Proportion of Exceptions..	661
Figure 7. Specific Equal Treatment Agreements: Prevalence of Exceptions by Time (Pre- and Post- <i>Delphi</i> ).....	662
Figure 8. General vs. Specific Equality .....	671

JEL Classification: G34, K12, K22

## Introduction

On August 19, 2004, Google, with a market capitalization among the top thirty worldwide, held its highly anticipated initial public offering (IPO).<sup>1</sup> In the IPO, Google offered two classes of common stock: Class A common stock with one vote per share and Class B common stock with ten votes per share.<sup>2</sup> The Class A stock would be held by public stockholders and the Class B stock, with ten times the voting power, would be held by the founders and executives.<sup>3</sup> The rights of each class were identical, except with respect to voting and conversion.<sup>4</sup>

In a founders' letter to shareholders, Larry Page and Sergey Brin emphasized that this dual-class structure would "make it harder for outside parties to take over or influence Google" and "easier for [Google's] management team to follow [a] long term, innovative approach."<sup>5</sup> Moreover, Page and Brin highlighted that "a dual class voting structure [would] enable Google, as a public company, to retain many of the positive aspects of being private."<sup>6</sup> After all, control is valuable and a dual-class structure would allow the founders to maintain it. As a result of this structure, after the IPO, the executive management team and directors would control 61.4% of Google's voting power.<sup>7</sup>

Unsurprisingly, some investors were concerned with Google's plan to preserve managerial control by issuing Class B common stock to the founders that had significantly more voting power per share than the ordinary Class A shares that would be sold to the public.<sup>8</sup> However, there was a promising private ordering solution: the rights and benefits of control could be negotiated away through contractual provisions in the charter that require the equal treatment of each class of common stock.<sup>9</sup> To allay stockholder concern that, for example, the high-vote Class B stockholders would receive greater consideration in a merger

---

1. See Steve Gelsi, *Google IPO Prices for Thursday Debut*, MARKETWATCH (Aug. 19, 2004, 11:22 AM), <https://www.marketwatch.com/story/google-prices-166-bln-ipo-at-85-a-share> [<https://perma.cc/KH2G-PMP3>]; Larry Page & Sergey Brin, *2004 Founders' IPO Letter*, ALPHABET INV. RELS. (Apr. 29, 2004), <https://abc.xyz/investor/founders-letters/2004-ipo-letter> [<https://perma.cc/GVC4-Y8LG>].

2. Google Inc., Registration Statement (Form S-1) (Aug. 18, 2004); Adam Hayes, *Dual Class Stock: Definition, Structure, and Control*, INVESTOPEDIA (Apr. 5, 2022), <https://www.investopedia.com/terms/d/dualclassstock.asp> [<https://perma.cc/HX2A-HKDF>].

3. See Page & Brin, *supra* note 1.

4. Google Inc., Registration Statement (Form S-1), at 86 (Apr. 29, 2004).

5. See Page & Brin, *supra* note 1.

6. *Id.*

7. *Id.* Page, Brin, and the CEO would own 37.6% of Google's voting power. *Id.* See generally Jesse M. Fried & Ehud Kamar, *Alibaba: A Case Study of Synthetic Control* (Eur. Corp. Governance Inst., Working Paper No. 533/2020, 2021) (discussing how "corporate control can be created synthetically with little or no equity ownership via a web of employment and contractual arrangements").

8. See *Web Leader Google Files to Go Public in Unusual IPO*, WALL ST. J. (Apr. 29, 2004, 7:33 PM), <https://www.wsj.com/articles/SB108302617400094273> [<https://perma.cc/V9V3-AJ79>] ("Some big institutional investors have complained that the so-called dual-class structures make companies less responsive to shareholders.").

9. See *In re Delphi Fin. Grp. S'holder Litig.*, C.A. No. 7144-VCG, 2012 WL 729232, at \*1-2 (Del. Ch. Mar. 6, 2012).

than the low-vote Class A stockholders, Google included a general equal treatment agreement in its charter.<sup>10</sup>

This agreement provided that Class A common stockholders and Class B common stockholders must be treated equally in most circumstances:

Equal Status. Except as expressly provided in this Article IV, Class A Common Stock and Class B Common Stock shall have the same rights and privileges and rank equally, share ratably and be identical in all respects as to all matters.<sup>11</sup>

Google’s “equal status” provision is a textbook example of a general equal treatment agreement.<sup>12</sup> Like many dual-class companies, Google included this agreement in its charter to protect Class A (low-vote) stockholders from differential treatment, except to the extent provided otherwise in the charter itself. Essentially, the high-vote and low-vote common stock must have the same rights and be treated identically in all respects unless otherwise provided in the charter. Once an equal treatment agreement is adopted in the charter, a majority vote of each class of stock is required to change it.<sup>13</sup>

While Google’s dual-class structure remained controversial, the agreement to treat the Class A and Class B stockholders equally provided some assurance (and protection) to hesitant investors. On Google’s first day of trading after the IPO, its stock jumped 18%.<sup>14</sup> Google would later introduce a third class of shares, Class C common stock, that came with no voting rights whatsoever.<sup>15</sup> Like Google’s original dual-class structure, the introduction of a third class with no voting rights was controversial.<sup>16</sup> After Google announced its intent to issue

10. As the Delaware Supreme Court has noted, corporate charters are contracts among a corporation’s shareholders, and therefore this Article refers to equal treatment provisions in such charters interchangeably as “equal treatment agreements.” *See, e.g.,* *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010) (“Corporate charters and bylaws are contracts among a corporation’s shareholders; therefore, our rules of contract interpretation apply.”).

11. Google Inc., Third Amended and Restated Certificate of Incorporation of Google Inc., art. IV §2(e) (Aug. 24, 2004) (emphasis added). At the time of the IPO, Google’s certificate of incorporation contained only this general clause.

12. Indeed, this articulation is one of the most common in the equal treatment sample studied. *See* discussion *infra* Section II.B.

13. *See* DEL. CODE ANN. tit. 8, § 242(b)(2) (2022) (“The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would . . . alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely.”).

14. Wayne Duggan, *This Day in Market History: The Google IPO*, YAHOO! NEWS (Aug. 19, 2020), <https://www.yahoo.com/news/day-market-history-google-ipo-105500069.html> [<https://perma.cc/XQA3-ZJQY>].

15. *See* Nick Summers, *Why Google Is Issuing a New Kind of Toothless Stock*, BLOOMBERG NEWS (Apr. 3, 2014), <https://www.bloomberg.com/news/articles/2014-04-03/why-google-is-issuing-c-shares-a-new-kind-of-powerless-stock> [<https://perma.cc/4ZKG-QKSU>]; *see also* Ken Bertsch, *Snap and the Rise of No-Vote Common Shares*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 26, 2017), <https://corpgov.law.harvard.edu/2017/05/26/snap-and-the-rise-of-no-vote-common-shares/> [<https://perma.cc/QKM2-WE8K>] (noting that with the rise of nonvoting stock for public shareholders “perhaps the bottom has been reached”).

16. Consistent with scholarly discourse on dual-class companies, this Article uses “dual class” to refer broadly to multi-class structures, including tripartite structures.

Class C shares, a shareholder, the Brockton Retirement Board, sued, claiming the plan gave founders Brin and Page added control without the need to pay for it.<sup>17</sup> Google would eventually settle a shareholder class action lawsuit on the matter, clearing the way for it to move forward with issuing Class C nonvoting stock.<sup>18</sup> Despite its controversial common stock structure, Google's stock value would continue to increase, averaging a 25% annual gain since its IPO.<sup>19</sup>

A decade later in 2015, Google implemented a corporate reorganization that created a new parent company, Alphabet Inc., with Google as a subsidiary.<sup>20</sup> In connection with the reorganization, Google amended and restated its certificate of incorporation.<sup>21</sup> This amendment preserved the language of the general equal treatment provision, but added an additional provision—a specific equal treatment agreement—on treatment for the high-vote and low-vote stockholders in mergers and other corporate transactions:

(i) [I]n the event of a merger, consolidation or other business combination . . . the holders of the Class A Common Stock shall have the right to receive, or the right to elect to receive, *the same form of consideration*, if any, as the holders of the Class B Common Stock and . . . *at least the same amount of consideration*, if any, on a per share basis as the holders of the Class B Common Stock, and (ii) *in the event of (x) any tender or exchange offer to acquire any shares of Common Stock by any third party pursuant to an agreement to which the Corporation is a party or (y) any tender or exchange offer by the Corporation to acquire any shares of Common Stock, pursuant to the terms of the applicable tender or exchange offer, the holders of the Class A Common Stock shall have the right to receive, or the right to elect to receive, the same form of consideration as the holders of the Class B Common Stock and . . . at least the same amount of consideration on a per share basis as the holders of the Class B Common Stock.*<sup>22</sup>

---

17. Tom Hals, *Google Settlement Clears Way for New Class C Stock*, REUTERS (June 17, 2013, 11:25 AM), <https://www.reuters.com/article/us-google-stockplan-settlement-idUSBRE95G0MU20130617> [<https://perma.cc/PZT3-7UMU>].

18. *In re Google Inc. Class C S'holder Litig.*, No. 7469-CS, 2013 WL 5949928 (Del. Ch. Nov. 6, 2013) (approving the settlement). While some companies, like Zillow, have likewise issued a class of nonvoting common stock, others have faced more investor resistance. Facebook, for example, withdrew its proposal to issue nonvoting common stock in response to a class action lawsuit by investors. See Mark Zuckerberg, FACEBOOK (Sept. 22, 2017, 4:05 PM), <https://www.facebook.com/zuck/posts/10104055333186581> [<https://perma.cc/98UA-SQA5>]; Michelle Castillo, *Facebook Cancels Plan to Change Ownership Share Structure*, CNBC (Sept. 22, 2017, 4:10 PM EDT), <https://www.cnn.com/2017/09/22/facebook-cancelled-plan-to-change-ownership-structure.html> [<https://perma.cc/4BYB-8ZCP>].

19. See Duggan, *supra* note 14.

20. See Google Inc., Current Report (Form 8-K) (Oct. 2, 2015); see also Jillian D'Onfro, *Google Is Now Alphabet*, BUS. INSIDER (Oct. 2, 2015, 10:56 AM), <https://www.businessinsider.com/google-officially-becomes-alphabet-today-2015-10> [<https://perma.cc/W5M7-N3FY>]. However, because the company is still largely known as and referred to as Google, this Article will refer to the company as Google.

21. See Google Inc., Current Report (Form 8-K) (Oct. 2, 2015).

22. See Google Inc., Fourth Amended and Restated Certificate of Incorporation (June 22, 2012) (emphasis added).

The inclusion of both general and specific equal treatment agreements in corporate charters is becoming the norm in the era of dual-class companies.<sup>23</sup> Like many specific equal treatment agreements, Google’s agreement clarifies that, for mergers and other similar transactions,<sup>24</sup> both classes of common stock must have the right to receive, or the right to elect to receive, at least the same amount and form of consideration.<sup>25</sup> While arguably the general provision alone would provide protection for the low-vote Class A stockholders, given the uncertainty among practitioners of whether the general provision would suffice, the inclusion of both provisions underscores the importance to practitioners and investors of equal treatment for stockholders in dual-class companies.

Google was not the first dual-class company.<sup>26</sup> However, it paved the way for other large companies to go public through a dual-class structure. Since Google went public in 2004, dozens of companies have gone dual class through an IPO.<sup>27</sup> While Google opened the floodgates for technology firms, including Facebook, LinkedIn, and Snap, to go public through an IPO with dual-class stock, dual-class structures have also been used by media companies, clothing manufacturers, grocery stores, and other companies across many industries.<sup>28</sup>

---

23. See discussion *infra* Part II. Because of their significance, specific equal treatment agreements relating to mergers and other similar transactions are the focus of specific agreements in this Article. However, specific equal treatment agreements take many forms and can also address dividend distributions or liquidation events.

24. There is a surprising variety in the types of corporate transactions to which specific equal treatment agreements relate. For example, while many specific equal treatment provisions expressly note that mergers are covered as applicable transactions, these provisions are often silent on tender offers or exchange offers. See, e.g., Zuora, Inc., Restated Certificate of Incorporation § 3.6 (Apr. 16, 2018) (imposing equal treatment requirements “upon the merger or consolidation . . . or in the case of any other transaction having an effect on stockholders substantially similar”). Other equal treatment agreements distinguish change of control transactions and non-change of control transactions. See, e.g., AppFolio, Inc., Amended and Restated Certificate of Incorporation, art. IV, § 2(c) (June 25, 2015) (discussing the required treatment for each class in change of control transactions and in non-change of control transactions).

25. See Google Inc., Amended and Restated Certificate of Incorporation, art. IV, § 2(e) (Oct. 2, 2015).

26. Prior to Google’s IPO in 2004, other entities including The New York Times Company, Berkshire Hathaway, Ford Motor Company, and The Washington Post Company went public with similar dual-class ownership structures. See generally *Dual Class Companies List*, COUNCIL OF INSTITUTIONAL INVS. [https://www.cii.org/dualclass\\_stock](https://www.cii.org/dualclass_stock) [<https://perma.cc/H539-UKDD>] (updated Jan. 2022) [hereinafter *CII Dual Class Companies List*]; see also discussion *infra* Part II.

27. For example, Facebook (Meta Platforms, Inc.), DoorDash, Airbnb, and Lyft all recently went public via an IPO with a dual-class structure. See *CII Dual Class Companies List*.

28. See Michael J. de la Merced, *Snap Prices I.P.O. at \$17 a Share, Valuing Company at \$24 Billion*, N.Y. TIMES (Mar. 1, 2017), <http://www.nytimes.com/2017/03/01/business/dealbook/snap-ipo-snapchat.html> [<https://perma.cc/6XSL-3JHV>]; Benjamin Robertson & Andrea Tan, *Dual Class Shares: Second-Class Investors?*, BLOOMBERG (Jan. 14, 2019, 9:25 PM), <https://www.bloomberg.com/quicktake/dual-class-shares> [<https://perma.cc/EVH2-EZEE>]; *CII Dual Class Companies List*, *supra* note 26; Jill Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, 99 B.U. L. REV. 1057, 1069-70 (2019); Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 595 (2017) (noting that “the use of dual-class stock is not limited to the tech industry”).

The Google case study and proliferation of dual-class IPOs since illustrate the ongoing rise of dual-class companies. While nearly nine out of ten U.S. public companies have a single class of voting stock, in the past five years more than one out of four U.S. public companies have gone public with a dual-class structure.<sup>29</sup> In addition, the total market capitalization of dual-class companies is increasing, accounting for a record 60% of the total IPO market value in 2020, a substantial increase from 2019 (22%) and 2018 (17%).<sup>30</sup> Moreover, while this Article focuses on entities that are dual class in form, there are many entities that are single class in form but, as a result of contractual control rights, arguably dual class in substance.<sup>31</sup>

Dual-class companies account for nearly \$6 trillion in market capitalization<sup>32</sup> and dual-class capitalization has been characterized as “[t]he most important issue in corporate governance today.”<sup>33</sup> Indeed, early versions of President Joe Biden’s tax plan contemplated taxing unrealized gains,<sup>34</sup> which would have made dual-class companies even more pervasive going forward by providing entrepreneurs with yet another reason to go public with a dual-class structure: namely, to sell the low-vote stock to pay the taxes on the unrealized gains, while still maintaining control through ownership of the high-vote stock.

---

29. See Jay R. Ritter, *Initial Public Offerings: Dual Class Structure of IPOs Through 2022*, WARRINGTON COLLEGE OF BUS. 2 tbl.23 (table last updated Jan. 24, 2023), <https://site.warrington.ufl.edu/ritter/files/IPOs-Dual-Class.pdf> [<https://perma.cc/YBV9-GPNT>] (listing the number of IPOs each year that have dual class shares); see also *Dual-Class IPO Snapshot: 2017-2020 Statistics*, COUNCIL OF INSTITUTIONAL INVS., <https://www.cii.org/files/2020%20IPO%20Update%20Graphs%20.pdf> [<https://perma.cc/JL6G-FNKB>]; *Newly Public Operating Companies Snapshot: 2022*, COUNCIL OF INSTITUTIONAL INVS., <https://www.cii.org/files/publications/dual-class/2022%20Dual%20Class%20Report.pdf> [<https://perma.cc/Q7T7-9UB4>]; *Newly Public Operating Companies Snapshot: 2021*, COUNCIL OF INSTITUTIONAL INVS., [https://www.cii.org/Files/issues\\_and\\_advocacy/Dual%20Class%20post%206-25-19/2022\\_1\\_19%20Dual%20class%20IPO%20Snapshot%202021\\_.pdf](https://www.cii.org/Files/issues_and_advocacy/Dual%20Class%20post%206-25-19/2022_1_19%20Dual%20class%20IPO%20Snapshot%202021_.pdf) [<https://perma.cc/V4R4-QUTZ>]; *Dual Class Stock*, COUNCIL OF INSTITUTIONAL INVS., [https://www.cii.org/dualclass\\_stock](https://www.cii.org/dualclass_stock) [<https://perma.cc/7ZCB-SV2M>]. Dual-class structures are also common outside of the United States. See generally, e.g., Renè Adams & Daniel Ferreira, *One Share-One Vote: The Empirical Evidence*, 12 REV. FIN. 51, 55 (2008) (noting that “[m]ultiple-voting shares are common in Sweden (59%), France (58%) and the Netherlands (41%)”); Anita Anand, *Governance Complexities in Firms with Dual Class Shares*, 3 ANNALS CORP. GOVERNANCE 184, 190 (2018) (“In Canada, the list . . . includes icons of the Canadian corporate establishment: Bombardier, Power Corp., Rogers Communications, Onex and Canadian Tire.”). However, an international analysis of dual-class entities is beyond the scope of this Article.

30. *Dual-Class IPO Snapshot: 2017-2020 Statistics*, *supra* note 29.

31. See generally Gladriel Shobe & Jarrod Shobe, *The Dual-Class Spectrum*, 39 YALE J. ON REGUL. 1343, 1359-70 (2022) (documenting this phenomenon).

32. See discussion *infra* Section II.A (discussing the market capitalization for the dual-class entities in the sample).

33. John C. Coffee, Jr., *Dual Class Stock: The Shades of Sunset*, CLS BLUE SKY BLOG (Nov. 19, 2018), <http://clsbluesky.law.columbia.edu/2018/11/19/dual-class-stock-the-shades-of-sunset/> [<https://perma.cc/Z5WM-ZBAA>].

34. See Laura Davison, *Biden Backs Tax on Billionaires’ Unrealized Investment Gains*, BLOOMBERG WEALTH (Sept. 24, 2021, 3:50 PM), <https://www.bloomberg.com/news/articles/2021-09-24/biden-backs-tax-on-billionaires-unrealized-investment-gains> [<https://perma.cc/7WHH-GBUY>]. But see Greg Iacurci, *The Rich Benefit as Democrats Retreat from Tax on Unrealized Capital Gains*, CNBC (Dec. 29, 2021, 3:02 PM), <https://www.cnbc.com/2021/12/29/the-rich-benefit-as-democrats-forgo-tax-on-unrealized-capital-gains.html> [<https://perma.cc/J7XF-696Z>].



Conversations with practitioners have indicated that this dynamic is already in play among certain companies considering public offerings.

While dual class is on the rise, the debate over whether dual-class structures increase or decrease corporate value remains hotly contested.<sup>35</sup> Some commentators have criticized dual-class structures for unequally distributing risk onto the public stockholders and leading to inadequate board oversight.<sup>36</sup> Other commentators have argued in favor of dual-class structures, emphasizing many of the benefits articulated in Google's founder letter: that these structures allow the founders and executives to run the company with a long-term perspective and pursue an innovative vision.<sup>37</sup>

This Article does not take a position on whether dual class is, at its core, value-enhancing; regardless of its value, dual class appears to be here to stay.<sup>38</sup> As a result, some scholars and practitioners have focused on a potential middle ground: time- and event-based sunset provisions that would automatically convert a dual-class structure to a single-class structure after a pre-determined amount of time or event.<sup>39</sup> This prior academic and practitioner literature has addressed dual-class structures at length, but by focusing on the role of sunset provisions, policy proposals often leave unaddressed the critical equal treatment provisions embedded in many dual-class charters. In practice, the overwhelming majority of dual-class companies have turned to equal treatment agreements to balance a founder's interest in control with the low-vote stockholders' interest in protection for the value of their shares. While the use—and complexity—of equal treatment agreements is increasing,<sup>40</sup> these agreements remain largely overlooked.

As this Article will show, many of the underlying rationales from scholarship on sunset provisions are applicable to equal treatment agreements. Like sunset provisions, equal treatment agreements offer a compromise between complete prohibition of dual-class structures and permitting high-vote controllers largely unrestricted freedom with their dual-class stock. Equal treatment agreements serve as another method of leveraging private ordering to create guardrails on a dual-class structure, balancing the benefits of dual class with the need to minimize its adverse consequences.

---

35. See, e.g., Anand, *supra* note 29, at 203-07 (summarizing empirical literature on the impact of dual-class structures).

36. See discussion *infra* Section I.A.

37. See *id.*

38. Indeed, even critics of one of the core justifications for dual class, to reduce short-termism and allow for a longer-term perspective, are reluctant to advocate for prohibition of dual class entirely. See, e.g., Michal Barzuza & Eric Talley, *Long-Term Bias*, 2020 COLUM. BUS. L. REV. 104, 184 (“[W]e are reluctant to advocate for a blanket prohibition on dual class stock . . . .”); *id.* at 119 (“While our strong intuition is to leave such capital-structure decisions up to the promoters (who must internalize the discount, after all), long-termism may well imply that at least some fraction of dual-class structures are unwise or inefficient.”).

39. See Fisch & Solomon, *supra* note 28, at 1079-91 (cataloguing and critically evaluating the use of time- and event-based sunsets); see also Bebchuk & Kastiel, *supra* note 28, at 619-22 (discussing how sunset clauses might be implemented).

40. See discussion *infra* Part II.

In situating equal treatment agreements in the broader corporate theory and doctrinal landscape, this Article calls into question whether the focus on sunset provisions alone is warranted. The Article also engages with the interaction between sunsets and equal treatment agreements by examining not only general equal treatment agreements, but also those equal treatment agreements related to mergers and other sales of control. When, for example, an event-based sunset provision commits a dual-class controller to exit through a merger or similar transaction, the equal treatment provisions effectively set out the terms of that merger and the sharing of the control premium.

This Article constructs a new database of 312 dual-class companies along with their equal treatment agreements—by far the most comprehensive database of such provisions that currently exists. By examining both general and specific equal treatment agreements, the Article documents the presence and features of such agreements, including their sharp rise in frequency. In doing so, this Article also illuminates previously undocumented patterns, distinctions, and nuances of equal treatment agreements, as well as the interaction between general and specific provisions. Through these empirical findings, the Article draws previously unidentified connections between doctrinal developments and shifts in the structure of equal treatment agreements.

With the findings from its empirical data, the Article identifies structures that are efficient and desirable from a law-and-economics perspective. Of course, the concern that arises from equal treatment agreements is precisely one of efficiency: that maximizing the overall merger consideration and likelihood of a deal does not necessarily mean treating stockholders equally. While equal treatment agreements may provide protection from a controller extracting disproportionate benefits at the cost of the minority shareholders and the corporation as a whole, a controller may credibly and in good faith veto deals that are value-enhancing for the company if the controller is subject to an equal treatment agreement. A controller may only be willing to sell if they receive a higher (control) premium, and a buyer may be unwilling to pay this higher premium to all the shareholders. The no-deal outcome may be less desired by all parties involved, including the minority shareholders who would prefer a deal at a slight premium over no deal. With regards to this dilemma, the Article argues that an important but relatively uncommon variation of equal treatment agreements, which I term “unequal treatment agreements,” presents one method of mitigating this concern. By using a similar structure to equal treatment agreements but expressly providing for a degree of disparate consideration (effectively, a control premium), these unequal treatment agreements can better align incentives and maximize corporate value.

This Article also informs founders, investors, issuers, practitioners, and courts. For founders, investors, and issuers, the data and analysis in the Article present a powerful argument in favor of carefully reviewing equal treatment agreements from the outset at the IPO stage. In doing so, the Article examines the importance, features, and power of equal treatment agreements, and also the impact of the current doctrinal landscape on their utility. This Article also

provides guidance for transaction planners and other practitioners in drafting and structuring equal treatment agreements, and in evaluating obligations under a corporate charter in the event of a transaction or other change of control. The Article also addresses the interaction of multiple equal treatment agreements within the same charter and identifies nuances in the scope and degree of equality afforded under various formulations of purportedly “equal” treatment. Lastly, for Delaware courts, this Article argues that because of the impact of recent doctrine on corporate practice, many equal treatment agreements fail to fully protect low-vote stockholders from disparate treatment. In conducting this empirical study and analysis, the Article highlights precisely why not all equal treatment agreements are created equal.

This Article proceeds in three parts. Part I introduces dual-class companies and equal treatment agreements, and surveys existing case law and literature on equal treatment agreements. Part II details the findings on equal treatment agreements from a database of 312 dual-class companies, with particular attention to the variation in objects within such provisions, exceptions to the provisions, and development over time in response to doctrinal and economic trends. Part III examines the implications for founders, investors, and issuers, practitioners, and courts in light of the findings.

## I. Background

Dual-class companies like Google that have two or more classes of common stock typically differ in voting rights, with one class having significantly more voting power than the other.<sup>41</sup> By providing voting control to a small subset of shareholders, a dual-class structure addresses the fundamental tension that arises when certain insiders want to preserve control while also accessing the public equity market for financing. When multiple classes of shares are issued, the low-vote (or no-vote) shares are ordinarily offered to the general public. In contrast, the high-vote shares typically are not publicly traded, and are instead offered to and held by company insiders, such as the founders, the founders’ families, and executives.

By using a dual-class structure, insiders are able to control a majority of the voting power while holding relatively little equity. For example, the dual-class structure at Ford allows the Ford family to control 40% of the voting power, despite owning a small percentage of the company’s equity.<sup>42</sup> As an even more noteworthy example, the CEO of EchoStar Communications controls over 90%

---

41. See Dorothy S. Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 STAN. L. REV. 687, 691 (2019) (“The traditional dual-class company offers low-voting stock for public investors to buy, keeping the high-voting shares (which typically have ten times as many votes as the low-voting shares) in the possession of the company’s insiders.”). Such classes may also differ by conversion rights, dividend rights, and other rights. These dual-class structures are distinct from single-class structures, which give shareholders equal equity and voting power.

42. Ben McClure, *The Two Sides of Dual-Class Shares*, INVESTOPEDIA (May 25, 2022), <https://www.investopedia.com/articles/fundamental/04/092204.asp> [<https://perma.cc/3U8T-GPY7>].

of the vote through his high-vote shares despite holding only 5% of the company's equity.<sup>43</sup>

This Part proceeds in two sections. First, the Article discusses the benefits and drawbacks of a dual-class structure, including how sunset provisions can mitigate the concerns that arise from this structure. Next, the Article canvases existing case law and scholarship on equal treatment provisions, documenting the leading cases on equal treatment agreements that have shaped the dual-class landscape, and noting the limited prior scholarship on equal treatment agreements.

While there is no required naming convention for the classes of stock in a dual-class structure, in most cases the classes are designated as Class A common stock and Class B common stock.<sup>44</sup> Typically, the Class A common stock are the low-vote shares and the Class B common stock are the high-vote shares,<sup>45</sup> and as such this Article uses "Class A" to refer to low-vote shares and "Class B" to refer to high-vote shares.

#### A. *The Rise and Controversy of Dual Class*

Dual-class structures have long been controversial, and the rise of dual-class companies has sparked further debate.<sup>46</sup> Despite long-standing attention to dual class, the value of dual-class companies remains contested. This Section describes the ongoing policy debate and its impact on the feasibility, and features, of dual-class structures.

For most of its history, the New York Stock Exchange (NYSE) did not permit dual-class structures to list on the exchange. In 1926, after public outcry over prominent companies like Dodge Brothers offering nonvoting shares, the NYSE banned dual-class entities.<sup>47</sup> The NYSE explained that its "one share, one vote" policy reflected its "long-standing commitment to encourage high standards of corporate democracy . . . corporate responsibility, integrity and accountability to shareholders."<sup>48</sup> For the next sixty years, the NYSE would continue to maintain this one-share, one-vote rule.<sup>49</sup>

---

43. *Id.*

44. *See* discussion *infra* Part II.

45. *See id.* (finding that the majority of dual-class companies in the data sample classify the high-vote stock as Class B stock).

46. *See, e.g.,* Coffee, *supra* note 33 (describing academics and practitioners as "polarized" over dual-class structures); Lund, *supra* note 41, at 708.

47. For additional discussion of the history of dual-class structures, see Bebchuk & Kastiel, *supra* note 28, at 596; Louis Lowenstein, *Shareholder Voting Rights: A Response to SEC Rule 19c-4 and to Professor Gilson*, 89 COLUM. L. REV. 979, 979-85 (1989); Joel Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687, 693-707 (1986); Steven M. Davidoff, *Regulating Listings in a Global Market*, 86 N.C. L. REV. 89, 102-14 (2007); Fisch & Solomon, *supra* note 28, at 1066.

48. Seligman, *supra* note 47, at 699 (quoting NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 301.00 (1983)).

49. *See* Bebchuk & Kastiel, *supra* note 28, at 596.

However, the NYSE's ban on dual-class companies could not hold in the face of competition. In 1985, amid increased competition from exchanges that permitted dual-class companies to list, and General Motors's threat to leave for Nasdaq, the NYSE proposed amending its listing requirements to permit dual-class structures.<sup>50</sup> This NYSE rule change required Securities and Exchange Commission (SEC) approval, and, rather than approve the rule change, in 1988 the SEC adopted Rule 19c-4, which generally prohibited dual-class structures.<sup>51</sup> While the Court of Appeals for the D.C. Circuit struck down the rule shortly thereafter as beyond the SEC's rulemaking authority,<sup>52</sup> the SEC persuaded the major stock exchanges to prohibit dual-class recapitalizations.<sup>53</sup> Despite this prohibition of dual-class *recapitalizations*, stock exchanges permitted dual-class structures at the IPO stage by adopting rules allowing companies to *go public* with a dual-class structure.<sup>54</sup>

In the following years, dual-class structures were used by businesses such as media companies seeking to preserve journalistic editorial independence, and various other companies led by a strong group of insiders.<sup>55</sup> Google's widely discussed IPO not only led other technology companies to adopt a dual-class structure,<sup>56</sup> but also rekindled the debate about dual-class companies more generally.

---

50. *See id.*; *see also* Ronald J. Gilson, *Evaluating Dual Class Common Stock: The Relevance of Substitutes*, 73 VA. L. REV. 807, 807 n.1 (1987) (discussing pressures on the NYSE to change its policy); Alison Smith, Paul J. Davies & Stephen Foley, *Exchanges Divided by Dual-Class Shares*, FIN. TIMES (Oct. 3, 2013), <https://www.ft.com/content/e18a6138-2b49-11e3-a1b7-00144feab7de> [https://perma.cc/6A98-5F43].

51. Voting Rights Listing Standards; Disenfranchisement Rule, 53 Fed. Reg. 26,376 (July 12, 1988) (codified at 17 C.F.R. § 240.19c-4 (2022)).

52. *See* Bus. Roundtable v. SEC, 905 F.2d 406, 407, 417 (D.C. Cir. 1990); *see also* Bebchuk & Kastiel, *supra* note 28, at 596; Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19c-4*, 69 WASH. U. L. Q. 565 (1991) (providing an overview of Rule 19c-4's history); Jeffrey N. Gordon, *Ties that Bind: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CALIF. L. REV. 1, 69-75 (1988) (discussing potential consequences and policy responses to NYSE's abandonment of the one share, one vote rule).

53. Bebchuk & Kastiel, *supra* note 28, at 596-97; *see, e.g.*, NYSE Listed Company Manual § 313.00 (1992) (prohibiting dual-class recapitalizations for listed companies but permitting the listing of multiple classes of shares); NASDAQ, INC. NASDAQ STOCK MARKET RULES § 5640 (limiting the ability to reduce the voting rights of common stockholders but noting that “[c]ompanies with existing dual class capital structures would generally be permitted to issue additional shares of the existing super voting stock”).

54. *See* Proposed Rule Changes by NYSE, AMEX and National Association of Security Dealers, Inc., Relating to the Exchanges' and Association's Rules Regarding Shareholder Voting Rights, 59 Fed. Reg. 42,614 (Aug. 11, 1994); Fisch & Solomon, *supra* note 28, at 1066.

55. *See id.*; David J. Berger & Laurie Simon Hodrick, *Are Dual-Class Companies Harmful to Stockholders? A Preliminary Review of the Evidence*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 15, 2018), <https://corpgov.law.harvard.edu/2018/04/15/are-dual-class-companies-harmful-to-stockholders-a-preliminary-review-of-the-evidence/> [https://perma.cc/WW5X-FDWF].

56. *See* Steven Davidoff Solomon, *Shareholders Vote with Their Dollars to Have Less of a Say*, N.Y. TIMES: DEALBOOK (Nov. 4, 2015), <https://www.nytimes.com/2015/11/05/business/dealbook/shareholders-vote-with-their-dollars-to-have-less-of-a-say.html> [https://perma.cc/Z2J6-QMNC] (noting that in 2015 “[a]bout half the companies choosing the [dual-class] structure were in the technology industry”).

Dual class has many critics. Institutional investors, proxy advisors, and shareholder-rights advocates have denounced dual-class stock and urged U.S. exchanges to limit dual-class structures.<sup>57</sup> Mutual funds including Vanguard, Fidelity, and T. Rowe Price have also opposed dual class.<sup>58</sup> Leading pension funds, such as the California State Teachers' Retirement System, the California Public Employees' Retirement System, and the Florida State Board of Administration have likewise expressed opposition to dual-class structures.<sup>59</sup> Former SEC Commissioner Kara Stein has characterized these structures as “inherently undemocratic, disconnecting the interests of a company’s controlling shareholders from its other shareholders.”<sup>60</sup> Certain major stock index providers have even excluded dual-class shares in response to concerns over these structures.<sup>61</sup>

Opponents of dual-class structures often point to the mismatch of ownership and risk allocation: dual-class structures distribute risk unequally onto the public (Class A) stockholders, who provide the majority of the capital but

---

57. See *United States—Proxy Voting Guidelines, Benchmark Policy Recommendations*, INSTITUTIONAL S’HOLDER SERVS. 35 (effective Feb. 1, 2023), <https://www.issgovernance.com/file/policy/latest/americas/US-Voting-Guidelines.pdf> [<https://perma.cc/RC7T-AYLM>] (noting that ISS’s policy is generally to vote against creation of dual-class structures absent “a compelling rationale”); Bebhuk & Kastiel, *supra* note 28, at 597; Fisch & Solomon, *supra* note 28, at 1075; Blair Nicholas & Brandon Marsh, *Dual-Class: The Consequences of Depriving Institutional Investors of Corporate Voting Rights*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 17, 2017), <https://corpgov.law.harvard.edu/2017/05/17/dual-class-the-consequences-of-depriving-institutional-investors-of-corporate-voting-rights/> [<https://perma.cc/HK2R-AW2A>].

58. See *Vanguard’s Proxy Voting Policy for U.S. Portfolio Companies*, VANGUARD 16 (effective Feb. 1, 2023), [https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/us\\_proxy\\_voting\\_2023.pdf](https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/us_proxy_voting_2023.pdf) [<https://perma.cc/SWB3-WUW4>]; *Proxy Voting Guidelines*, FID. INVS. § VIII.B (Feb. 2023), [https://www.fidelity.com/bin-public/060\\_www\\_fidelity\\_com/documents/Full-Proxy-Voting-Guidelines-for-Fidelity-Funds-Advised-by-FMRCo-or-FDS.pdf](https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/Full-Proxy-Voting-Guidelines-for-Fidelity-Funds-Advised-by-FMRCo-or-FDS.pdf) [<https://perma.cc/XDJ9-3WMF>]; *Proxy Voting Guidelines*, T. ROWE PRICE (2021), [https://www.troweprice.com/content/dam/trowecorp/Pdfs/55304\\_TRP\\_Proxy\\_Voting\\_Guide\\_EN\\_PE\\_0221\\_HR.pdf](https://www.troweprice.com/content/dam/trowecorp/Pdfs/55304_TRP_Proxy_Voting_Guide_EN_PE_0221_HR.pdf) [<https://perma.cc/48P2-Q37Y>].

59. See *Corporate Government Principles*, CAL. STATE TCHRS.’ RET. SYS. 15 (Jan. 27, 2021), <https://www.calstrs.com/files/c8999b7f1/CorporateGovernancePrinciples.pdf> [<https://perma.cc/KSC7-V8D4>]; *Statement of Investment Policy and Global Governance Principles*, CAL. PUB. EMPS.’ RET. SYS. 12 (Mar. 14, 2016), <https://www.calpers.ca.gov/docs/board-agendas/201702/pension/item7-02.pdf> [<https://perma.cc/8PKD-RFXD>]; *Corporate Governance Principles: Proxy Voting Guidelines*, FLA. STATE BD. OF ADMIN. 29 (2022), <https://www.sbafla.com/fsb/Portals/FSB/Content/CorporateGovernance/ProxyVoting/2022%20SBA%20Corporate%20Governance%20Voting%20Guidelines.pdf> [<https://perma.cc/8T2C-9BFZ>].

60. Kara M. Stein, Comm’r, Sec. & Exch. Comm’n, Remarks at Stanford University: Mutualism: Reimagining the Role of Shareholders in Modern Corporate Governance (Feb. 13, 2018), <https://www.sec.gov/news/speech/speech-stein-021318> [<https://perma.cc/8QBA-WW8Y>]. Former SEC Commissioner Robert Jackson once compared dual-class shares to “corporate royalty.” Robert J. Jackson, Jr., Comm’r, U.S. Sec. & Exch. Comm’n, Address at Univ. Cal. Berkeley Sch. of Law: Perpetual Dual-Class Stock: The Case Against Corporate Royalty (Feb. 15, 2018), <https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty> [<https://perma.cc/N64P-RN33>].

61. See, e.g., Nicole Bullock, *Companies with Multiple Share Classes Blocked from Joining S&P 500*, FIN. TIMES (July 31, 2017), <https://www.ft.com/content/993e4c11-8729-3168-a280-69e1d400b1bc> [<https://perma.cc/3Y6P-SLKR>] (noting S&P Dow Jones Indices’s decision to prevent companies with multiple share classes from joining the S&P 500); *S&P Dow Jones Indices Announces Decision on Multi-Class Shares and Voting Rules*, S&P GLOBAL (July 31, 2017), <https://press.spglobal.com/2017-07-31-S-P-Dow-Jones-Indices-Announces-Decision-on-Multi-Class-Shares-and-Voting-Rules> [<https://perma.cc/QA94-DHVD>].

have little to no control over the running of the company.<sup>62</sup> Instead of each stockholder sharing equally in the risk, a small, privileged group of insider stockholders (Class B) are able to maintain control while accessing capital from public markets with little economic risk. When, as in dual-class structures, voting rights are divorced from economic interests, controlling shareholders with high-vote shares can obtain private benefits while imposing disproportionate costs on the broader shareholder base and the public at-large.<sup>63</sup> Furthermore, dual-class structures may lack adequate board oversight because the high-vote controlling stockholder effectively selects the board.<sup>64</sup> They may also facilitate managerial entrenchment<sup>65</sup> and exacerbate managerial agency costs.<sup>66</sup> High-vote controlling

---

62. See *Dual-Class Stock*, COUNCIL OF INSTITUTIONAL INVS., [https://www.cii.org/dualclass\\_stock](https://www.cii.org/dualclass_stock) [<https://perma.cc/A92C-A4SF>] (“‘One share, one vote’ is a bedrock principle of good corporate governance. When a company taps the capital markets to raise money from public investors, those investors should have a right to vote in proportion to the size of their holdings.”); see also, e.g., Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453, 1460 (2019) (“[S]mall-minority controllers can be expected to distort corporate decisionmaking, including decisions regarding the allocation of opportunities and talents, strategy and company scale, related-party transactions, responses to acquisition offers, and whether to remain as CEO.”); Bebchuk & Kastiel, *supra* note 28, at 604-05 (“Therefore, supporters of dual class often argue that it is preferable to let such a talented controller remain in control long after the IPO.”); Gordon, *supra* note 52, at 10-39 (arguing against the “implausible case for dual-class common stock recapitalizations”); Lund, *supra* note 41, at 693 (“Critics of dual-class structures argue that issuing nonvoting or low-voting shares increases agency costs and results in suboptimal decisionmaking.”).

63. A high-vote controlling stockholder may obtain private benefits through private dealing at the expense of the minority or by being rewarded for monitoring the corporation to the benefit of the minority. See Michael J. Barclay & Clifford G. Holderness, *Private Benefits from Control of Public Corporations*, 25 J. FIN. ECON. 371, 374 (1989); Ronald J. Gilson & Jeffery N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785 (2003) (discussing the agency-related considerations).

64. See generally Andrew Ross Sorkin, *Stock Split for Google that Cements Control at the Top*, N.Y. TIMES DEALBOOK (Apr. 16, 2012, 9:14 PM), <http://dealbook.nytimes.com/2012/04/16/stock-split-for-google-that-cements-control-at-the-top> [<https://perma.cc/FYV4-EGKF>] (reporting on Larry Page’s self-interested efforts to pressure Google’s board to split stocks).

65. See *id.*; Andrei Shleifer & Robert W. Vishny, *Management Entrenchment: The Case of Manager-Specific Investments*, 25 J. FIN. ECON. 123 (1989); Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUD. 1051, 1051-54 (2010) (examining entrenchment and firm value).

66. See, e.g., Lucian Arye Bebchuk, Reinier Kraakman & George G. Triantis, *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights*, in CONCENTRATED CORP. OWNERSHIP 295, 301-02 (Randall K. Morck ed., 2000) (discussing agency costs); Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 581-83 (2016) (discussing the impact of agency costs on investors); Andrew William Winden, *Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures*, 2018 COLUM. BUS. L. REV. 852, 894 (“Leaving founders in control of companies post-IPO presents risks of two kinds of agency costs: management agency costs and control agency costs. Management agency costs arise from *mismanagement*—including reduced commitment, shirking, and pursuit of acquisitions to increase size or achieve diversification without generating value. Control agency costs involve *takings*—directly diverting pecuniary private benefits to the controller through excessive pay, related-party transactions, and other methods of diverting corporate value to the controller.”); Jeffrey N. Gordon, *Dual Class Common Stock: An Issue of Public and Private Law*, CLS BLUE SKY BLOG (Jan. 2, 2019), <https://clsbluesky.law.columbia.edu/2019/01/02/dual-class-common-stock-an-issue-of-public-and-private-law/> [<https://perma.cc/SMT2-8J5S>] (“Mismatches between control rights and cash flow rights give rise not only to private agency costs, the focus of much corporate governance theorizing, but what might be called ‘public’ agency costs. These refer to our concerns about unaccountable power in the socio-political realm.”). *But see* Rimona Palas, Dov Solomon, Dalit Gafni & Ido Baum, *Does Wedge Size Matter? Financial Reporting Quality and Effective Regulation of Dual-Class Firms*, FIN. RES.

stockholders may also “have perverse incentives to retain dual-class structures even when those structures become substantially inefficient.”<sup>67</sup>

Advocates of dual-class structures emphasize that such structures allow the founders and executives to run the company with a long-term perspective, rather than enabling diffuse public stockholders to focus on short-term financial gains.<sup>68</sup> Such structures may also make logical sense given information asymmetry between the founders and insiders, on one hand, and the public investors, on the other hand.<sup>69</sup> The founders and insiders may have special skills and knowledge that better position them to control the direction of the company going forward.<sup>70</sup> Further, dual-class structures can protect companies from takeovers and activist pressure.<sup>71</sup> They also provide industry-specific benefits, such as for media companies seeking to preserve journalistic editorial

---

LTRS. (forthcoming 2023) (finding that the larger the wedge between voting and equity rights, the better the quality of financial reporting). The wedge is greatest when the founders have stronger bargaining power, for example because of greater availability of private capital and reduced need for external financing. See Dhruv Aggarwal, Ofer Eldar, Yael V. Hochberg & Lubomir P. Litov, *The Rise of Dual-Class Stock IPOs* (Eur. Corp. Governance Inst., Working Paper No. 806/2021, 2021).

67. See Bebchuk & Kastiel, *supra* note 28, at 630. Note, however, that the movement against dual-class stock has been rejected by many international markets, which are trending towards allowing greater use of these structures. See *id.* at 595 (“A well-known survey of 464 companies in sixteen European countries . . . in 2007 revealed that 24% of sampled companies had dual-class shares.”); Fisch & Solomon, *supra* note 28, at 1076-77; see also *Proposal for a Directive of the European Parliament and of the Council on the Exercise of Voting Rights by Shareholders of Companies Having Their Registered Office in a Member State and Whose Shares Are Admitted to Trading on a Regulated Market and Amending Directive 2004/109/EC*, COM (2005) 685 final (Jan. 5, 2006), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005PC0685> [<https://perma.cc/8MGC-BDY7>] (containing the European Commission’s recently introduced substantial package of reforms (the Listing Act) that includes a proposal relating to multiple voting rights).

68. See Fisch & Solomon, *supra* note 28, at 1085; Goshen & Hamdani, *supra* note 66, at 577-79, 595; Andrew Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 777-83 (2012) (arguing that a corporate entity’s perpetual existence calls for a fiduciary mandate of long-term value maximization for the benefit of the shareholders). While many scholars and practitioners have expressed concern about short-termism, see, e.g., Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1885 (2017) (arguing that “a short-term increase in productivity and stock price at the expense of long-term reinvestment and wage growth will likely harm the overall ‘portfolio’ of the human investor”), others have challenged the discussion of short-termism as overstating its magnitude, failing to account for the influence of efficient markets, and overlooking the negative effects of a long-term bias, see, e.g., Barzuza & Talley, *supra* note 38, at 184 (providing that “when the embrace of dual class structure is the product of managerial optimism with respect to long-term investments the decision may be wasteful”); *id.* (noting that a dual-class structure “may be due to overconfidence (and thus value-eroding), but it could just as easily be due to a founder’s genuine desire to protect a project that is inherently difficult for outsiders to assess” or a founder’s “idiosyncratic value on maintaining control”). More recently, some commentators argue that because institutional investors are portfolio-value-maximizing (rather than firm-value-maximizing), dual-class shares play a critical role in silencing these shareholders and mitigating the anticompetitive effects of common ownership. See Vittoria Battocletti, Luca Enriques & Alessandro Romano, *Dual Class Shares in the Age of Common Ownership* (Eur. Corp. Governance Inst., Working Paper No. 628/2022, 2023), [http://ssrn.com/abstract\\_id=4046244](http://ssrn.com/abstract_id=4046244) [<https://perma.cc/TVS2-RGMF>].

69. See, e.g., Goshen & Hamdani, *supra* note 66, at 592-93.

70. Bebchuk & Kastiel, *supra* note 28, at 604.

71. Goshen & Hamdani, *supra* note 66, at 590 (arguing that dual-class structures allow entrepreneurs to pursue their idiosyncratic visions but expose minority shareholders to substantial agency costs).



independence.<sup>72</sup> Additionally, the ability to go public with a dual-class structure may incentivize founders to take their companies public, mitigating the declining number of public companies and facilitating otherwise ambivalent founders to enter public markets.<sup>73</sup> As a result of entering the public markets, these companies would then become subject to additional regulation and disclosure obligations.<sup>74</sup> Limiting the voting rights of public investors may also enhance productivity.<sup>75</sup>

### B. The Sunset Compromise

As the debate above illustrates, dual-class structures have long been controversial. The empirical evidence on the economic effects of dual-class stock is inconclusive, leaving theory and policy debates to run rampant.<sup>76</sup> Some indexes have followed the NYSE and excluded dual-class companies in order to discourage the use of such structures.<sup>77</sup> Nevertheless, various private ordering solutions offer a compromise between outright prohibition of dual-class structures and allowing free, perpetual, and largely unrestricted use of them. In particular, the duration of a company's dual-class structure and the rights of its controlling shareholder can be negotiated away through contractual agreements in the company's charter.<sup>78</sup>

---

72. See David J. Berger & Laurie Simon Hodrick, *Are Dual-Class Companies Harmful to Stockholders? A Preliminary Review of the Evidence*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 15, 2018), <https://corpgov.law.harvard.edu/2018/04/15/are-dual-class-companies-harmful-to-stockholders-a-preliminary-review-of-the-evidence/> [<https://perma.cc/YW9U-X8QJ>]; Fisch & Solomon, *supra* note 28, at 1066.

73. See Emily Stewart, *SEC Chair Highlights Need for More Public Companies in First Public Speech*, THESTREET (July 13, 2017, 12:20 AM), <https://www.thestreet.com/story/14224963/1/sec-chair-highlights-need-for-more-public-companies-in-first-public-speech.html> [<https://perma.cc/57N9-YEYX>] (quoting SEC Chair Jay Clayton as saying that the decline in U.S.-listed public companies is a “serious issue for our markets and the country more general[ly]”); Coffee, *supra* note 33 (“[P]ractitioners point to recent examples of dual class IPOs, which in 2018 included Dropbox, Inc., GreenSky, Inc., Pivotal Software, Inc., Pluralsight, Inc., and SmartSheet, Inc., to argue that these issuers would have remained outside the public markets if they could not have used a dual class capitalization.”); Fisch & Solomon, *supra* note 28, at 1061 (“In addition, dual class structures may increase the willingness of founders to take their companies public.”).

74. See Coffee, *supra* note 33; Fisch & Solomon, *supra* note 28, at 1061.

75. Fisch & Solomon, *supra* note 28, at 1061.

76. See generally *id.* at 1061-62; *id.* at 1078 (“In sum, the shifting policy debate over dual class mimics the conflicting empirical evidence: no definitive and known truth has yet emerged as to whether and when dual class stock is desirable.”).

77. While the NYSE permits dual-class structures, several other stock indexes such as the S&P 500 and FTSE Russell have stopped including companies with dual-class structures. See Adam Hayes, *Dual Class Stock: Definition, Structure, and Controversy*, INVESTOPEDIA (Apr. 5, 2022), <https://www.investopedia.com/terms/d/dualclassstock.asp> [<https://perma.cc/72Y2-ZXF7>].

78. It is well-established that “[c]orporate charters and bylaws are contracts among a corporation’s shareholders.” *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010); *In re Delphi Fin. Grp. S’holder Litig.*, No. 7144-VCG, 2012 WL 729232, at \*1-2 (Del. Ch. Mar. 6, 2012). The proliferation of these contractual solutions, however, depends heavily on the bargaining power of the controller. See Aggarwal et al., *supra* note 66 (finding that stronger bargaining power is associated with a lower likelihood of sunset provisions). This Article uses “charter” and “certificate of incorporation” interchangeably.

As a result, many scholars and commenters have advocated for sunset provisions in dual-class charters.<sup>79</sup> Time-based sunset provisions automatically convert the dual-class structure to a single-class structure after a predetermined amount of time, typically seven to ten years.<sup>80</sup> Such sunset provisions are appealing as a means of “balancing the protection of the founder’s ability to innovate with the need to minimize agency costs,”<sup>81</sup> and to “blunt the impact” of dual-class stock.<sup>82</sup> Underlying such sunsets is the idea that, while a dual-class structure may initially increase the firm value, the utility of dual class declines over time. Time-based sunsets have received widespread support in scholarship and practice, often characterized as a best practice for dual-class companies.<sup>83</sup> Former SEC Commissioner Robert Jackson reports empirical evidence that “[s]even or more years out from their IPOs, firms with perpetual dual-class stock trade at a significant discount to those with sunset provisions.”<sup>84</sup> Similarly, scholars often emphasize the “real possibility that the founder’s superiority as the company leader will erode or even disappear.”<sup>85</sup> Professors Lucian Bebchuk and Kobi Kastiel present empirical evidence precisely to this point, finding that the adverse effects of dual-class stock increase over time.<sup>86</sup> Even long-time opponents of dual-class structures like CII have taken the position that, if such structures are permissible, they should be subject to mandatory time-based sunsets.<sup>87</sup> In response, dual-class companies are increasingly going public with time-based sunsets.<sup>88</sup>

Of course, a bright-line time limit determined at the IPO stage that does not reflect company-specific (and founder-specific) nuance faces some criticism. For starters, there is “no evidence” that each company is selecting an optimized time period for that individual entity or its founders; the particular length of such

---

79. See, e.g., Bebchuk & Kastiel, *supra* note 28, at 630; Winden, *supra* note 66, at 870 (describing time-based sunsets as “presumably what most institutional investors and proxy advisors are referring to when they insist that dual-class companies must adopt reasonable sunset provisions”); Fisch & Solomon, *supra* note 28, at 1062, 1079.

80. See, e.g., Fisch & Solomon, *supra* note 28, at 1062 (“The debate over sunset provisions has focused primarily on time-based sunset provisions that eliminate higher voting rights after a designated period of time—commonly seven to ten years.”); Press Release, Council of Institutional Invs., Investors Petition NYSE, NASDAQ to Curb Listings of IPO Dual-Class Share Companies (Oct. 24, 2018); Bebchuk & Kastiel, *supra* note 28, at 617-20. See generally Kosmas Papadopoulos, *Dual-Class Shares: Governance Risks and Company Performance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 28, 2019), <https://corpgov.law.harvard.edu/2019/06/28/dual-class-shares-governance-risks-and-company-performance/> [<https://perma.cc/UNK5-Z6G9>] (noting sunset provisions).

81. Fisch & Solomon, *supra* note 28, at 1062.

82. *Id.* at 1079.

83. See, e.g., Anand, *supra* note 29, at 234-37.

84. Jackson, *supra* note 60.

85. See Bebchuk & Kastiel, *supra* note 28, at 605.

86. See *id.* at 630 (discussing, among other things, that agency costs can be expected to increase over time and that the controller is incentivized to preserve control even if a sale would be value enhancing).

87. See Council of Institutional Invs., *supra* note 80.

88. See Winden, *supra* note 66, at 871-72 (finding that the prevalence of time-based sunsets has increased from 3% prior to 2010 to 35% for companies that went public in 2010-2017).

sunsets appears to be arbitrary.<sup>89</sup> Founders, and their visions, change over time, as do companies from the IPO stage. It is difficult for a time-based sunset to predict this optimal time point from the IPO. In addition, by specifying a date at which the founder will lose control (referred to by some as a “sharp cliff”<sup>90</sup>), time-based sunsets create perverse incentives for founders to strategically maximize the value of their position, even at the expense of the minority shareholders, before the sunset goes into effect. For example, founders may engage in short-termism through excessive risk taking (or excessive conservatism), self-dealing, or other opportunistic behavior, particularly as the sunset trigger date approaches.<sup>91</sup>

Supporters of time-based sunsets argue that an optional shareholder retention vote can mitigate the concerns relating to the provision’s automatic trigger. This retention vote would allow existing shareholders, with one vote per share, to vote on whether to retain or extend the dual-class structure prior to its expiration.<sup>92</sup> Nevertheless, a shareholder retention vote is subject to criticism, including uncertainty on whether it will result in efficient shareholder decisionmaking. Control is a valuable commodity in corporate law.<sup>93</sup> Regardless of the merits of the particular controller retaining control, minority shareholders have strong incentives to eliminate dual class because doing so will have the effect of transferring control from the founders to the minority shareholders.<sup>94</sup>

In addition, a retention vote appears to be in tension with the basic premise of dual-class structures—that dual class is necessary because public shareholders cannot properly evaluate the founder’s vision and long-term business strategy.<sup>95</sup> After the company goes public, there are of course some important differences in shareholder knowledge. The public shareholders at the retention vote stage have the benefit of knowing the firm’s performance and public disclosures post-

---

89. Fisch & Solomon, *supra* note 28, at 1081; *see id.* at 1082 (“The timeframe necessary for realizing a company’s goals is likely to vary depending on the company, based on factors like the company’s maturity at the IPO stage, the duration of its business model, and the time required to develop its products or services and bring them to market.”).

90. Coffee, *supra* note 33.

91. *See* Fisch & Solomon, *supra* note 28, at 1083 (“Founders may seek to divert valuable opportunities to other firms, or to reduce the degree to which they invest energy and innovative ideas in an issuer at which they will soon lose control. A particular risk is that founders will enter into transactions that enable them to sell their control block at a premium or that provide them with other private benefits.”).

92. *See* Letter from Ash Williams, Chair, Council of Institutional Invs., Ken Bertsch, Exec. Dir., Council of Institutional Invs., & Jeff Mahoney, Gen. Counsel, Council of Institutional Invs., to John Zecca, Chief Regul. Officer, Intercontinental Exch. Inc. 1 (Oct. 24, 2018), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2018/20181024%20NASDAQ%20Petition%20on%20Multiclass%20Sunsets%20FINAL.pdf) [<https://perma.cc/CQL8-SHMW>] (arguing in favor of mandatory sunset provisions “subject to extension by additional terms . . . by vote of a majority of outstanding shares of each share class, voting separately, on a one-share, one-vote basis”); Fisch & Solomon, *supra* note 28, at 1084.

93. *See, e.g.,* Paramount Commc’ns Inc. v. QVC Network Inc., 637 A.2d 34, 47 (Del. 1994) (“The existence of a control block . . . does have real consequences to the financial value of ‘minority’ stock.” (quoting Paramount Commc’ns Inc. v. Time Inc., No. 10,866, 1989 WL 79880, at \*23 (Del. Ch. July 14, 1989))).

94. Fisch & Solomon, *supra* note 28, at 1084-85.

95. *Id.*

IPO. However, it is unclear whether these differences meaningfully impact the shareholders' ability to reliably evaluate the value of the founder's long-term vision and dual-class structure going forward.<sup>96</sup>

Rather than rely on time-based sunsets, some scholars and issuers have turned to event-based sunsets as a proxy for the desirability of a dual-class structure.<sup>97</sup> These event-based sunsets are linked to specific developments that are more likely to reduce the attractiveness of dual class.<sup>98</sup> Relevant events may include dilution of the founder's interest, the founder's death, incapacitation or departure, and the transfer of voting rights to heirs or other third parties.<sup>99</sup> However, while event-based sunsets may offer a more promising approach than their time-based counterparts, their costs and benefits are untested, and it is unclear whether they can be designed in a way to overcome the limitations of time-based sunsets.<sup>100</sup>

This focus on sunset provisions leaves unaddressed the interim period between the dual-class structure being instituted and the sunset provision going into effect (whether by time or event) and diminishes the longer-term value that dual-class structures may provide. Moreover, a sunset provision can lead to perverse incentives to maximize the benefits of a voting disparity in the short term by pursuing economically inefficient corporate action before the sunset provision is triggered (regardless of the suboptimal timing or inadequate transaction price).

Furthermore, most dual-class charters have an event-based sunset that converts high-vote shares to low-vote shares upon the transfer or sale of the high-vote shares. Because of such sunsets, a controller cannot simply sell their controlling stake for a premium on the market like an ordinary stockholder. Rather, event-based sunsets that convert the stock to low-vote stock upon the sale or transfer effectively commit the controller to exit through a sale of the company—the terms of which are set out by an equal treatment agreement. Yet, despite the proliferation of scholarship and case law on dual-class structures and sunsets, equal treatment agreements remain largely overlooked. But these equal treatment agreements can provide an attractive solution alone, and in connection with any sunset provision.

### C. Equal Treatment Case Law and Literature Review

While the Delaware courts have rejected a *per se* equal treatment requirement, a controller's ability to receive disparate treatment, for example, in

---

96. *See id.*

97. *See generally id.*; Marc T. Moore, *Designing Dual-Class Sunsets: The Case for a Transfer-Centered Approach*, 12 WM. & MARY BUS. L. REV. 93 (2020) (comparing time and event-based sunsets, arguing in favor of transfer-centered models of sunset provisions); Winden, *supra* note 66, app. at 943-49 (providing data on use and forms of event-based sunsets).

98. Fisch & Solomon, *supra* note 28, at 1086.

99. *Id.*

100. *Id.*

the sale of a company, can of course be negotiated away through contractual agreements in a charter that require equal treatment for all classes of common stock.<sup>101</sup> Absent a requirement that the low-vote Class A stockholders and high-vote Class B stockholders be treated equally, any merger consideration can be disproportionately distributed among the Class A and Class B stockholders. The Class B stockholders, who control the vote, will likely benefit from a heightened per share consideration. In contrast, other stockholders, like low-vote Class A stockholders (or no-vote Class C stockholders), will receive less than their pro rata share of consideration.

The most notable case, *In re Delphi Financial Group Shareholder Litigation*,<sup>102</sup> sheds some light on these agreements. Defendant Robert Rosenkranz, founder of Delphi Financial Group, Inc. (Delphi), a financial services holding company, took Delphi public in 1990 through an IPO with a dual-class structure.<sup>103</sup> Class A stock was held by the public and Class B stock was held by Rosenkranz and his affiliates.<sup>104</sup> The Class A stockholders were entitled to one vote per share and the Class B stockholders were entitled to ten votes per share.<sup>105</sup> As a result of this dual-class structure, Rosenkranz held only 12.9% of the outstanding shares, but retained effective control over the company through controlling 49.9% of the Delphi vote.<sup>106</sup>

Notably, the charter contained an equal treatment agreement providing that, upon the sale of the company, each share of Class B stock would be converted to Class A stock and entitled to the same consideration as the Class A stock.<sup>107</sup>

[I]n the case of any distribution or payment . . . on Class A Common Stock or Class B Common Stock upon the consolidation or merger of the Corporation with or into any other corporation . . . such distribution payment shall be made ratably

---

101. See JAMES D. COX & THOMAS LEE HAZEN, 2 TREATISE ON THE LAW OF CORPORATIONS § 12:1 (3d); *In re Delphi Fin. Grp. S'holder Litig.*, No. 7144-VCG, 2012 WL 729232, at \*1-2 (Del. Ch. Mar. 6, 2012) (noting that the controlling stockholder “could retain or bargain away th[e] right” to seek a control premium, and that by providing for equal consideration in the charter, the controller bargained away his right, which “resulted, presumably, in a higher purchase price for [minority] stock than would have been the case without the [charter] provision”).

102. No. 7144-VCG, 2012 WL 729232 (Del. Ch. Mar. 6, 2012).

103. *Id.* at \*1-3.

104. *Id.*

105. *Id.* at \*1.

106. *Id.* at \*1, \*3. Through the Delphi charter and a voting agreement with Delphi, Rosenkranz’s total voting power, regardless of his stock ownership, was capped at 49.9%. It is well-established in Delaware that a stockholder can control the company with a significant nonmajority stake. See, e.g., *In re Cysive, Inc. S'holder Litig.*, 836 A.2d 531, 551-52 (Del. Ch. 2003) (finding a 35% stockholder a controlling stockholder); *Delphi Fin. Grp.*, 2012 WL 729232, at \*14 (“Rosenkranz can effectively block any merger or similar transaction that is not to his liking.”); see also Note, *Controller Confusion: Realigning Controlling Stockholders and Controlled Boards*, 133 HARV. L. REV. 1706, 1707 (2020) (“[I]n recent years, a proliferation of Delaware cases has muddled the [controlling shareholder] inquiry, de-emphasizing substantiality of share ownership and holding that stockholders with as little as 15% ownership and no effective voting power are controlling stockholders.”).

107. *Delphi Fin. Grp.*, 2012 WL 729232, at \*1.

## Equal Treatment Agreements

on a per share basis among the holders of the Class A Common Stock and Class B Common Stock as a single class.<sup>108</sup>

In 2011, Tokio Marine Holdings, Inc. (TMH), a Japanese holding company, contacted Rosenkranz about purchasing Delphi.<sup>109</sup> In negotiations, Rosenkranz made it clear to Delphi's board of directors that, despite the equal treatment agreement, he would not consent to the sale without a premium for his Class B stock.<sup>110</sup> Rosenkranz was prepared to forego the deal entirely, credibly asserting "that if his demands were not met, he would have no qualms about walking away from the deal and continuing the status quo of running Delphi on a standalone basis."<sup>111</sup> While the Delphi board was reluctant to recommend differential consideration for Class A and Class B stock,<sup>112</sup> it recognized that the premium TMH was willing to pay over the market value was large enough to be attractive to the stockholders as a whole.<sup>113</sup> Thus, in light of Rosenkranz's demands, the Delphi board concluded that an amendment to the charter's equal treatment provision was in the best interests of the Class A stockholders because it was the only way to obtain a substantial premium on the Class B shares and therefore secure the Class B stockholders' approval of the deal.<sup>114</sup> Accordingly, the Delphi board set up a committee of independent directors to negotiate differential consideration for the Class B stock and Rosenkranz continued to negotiate with TMH on Delphi's behalf.<sup>115</sup> TMH ultimately agreed to pay \$46 per share for Delphi, and was then informed this consideration would constitute \$44.875 per share for the Class A shares and \$53.875 per share for the Class B shares.<sup>116</sup> The \$2.7 billion deal was conditioned on approval by a majority of the disinterested Class A shares and a successful vote to amend the equal treatment provision in the Delphi charter to allow Rosenkranz to receive the disparate consideration.<sup>117</sup>

Shortly thereafter, Delphi stockholders sued to enjoin the transaction, arguing in part that Rosenkranz was not entitled to the stock-price differential, that the Delphi board breached its duty to the stockholders in structuring the deal

---

108. *Id.* at \*3 (discussing Section 7 of the Delphi charter).

109. *Id.* at \*1, \*3.

110. *Id.* at \*1.

111. *Id.* at \*7.

112. Indeed, Delphi reviewed comparable acquisitions of companies with dual-class stock, heard from its financial and legal advisors that disparate consideration in such cases is unusual and problematic, and attempted to persuade Rosenkranz to accept the same price as the Class A stockholders. *Id.* Nevertheless, Rosenkranz insisted on some level of disparate consideration. *Id.*

113. *Id.* at \*1.

114. *Id.* ("The differential was necessary to secure Rosenkranz's approval of the deal, and [a] Charter Amendment was necessary to allow that differential.")

115. *Id.*

116. *Id.*

117. *Id.* at \*1, \*9 ("In other words, the Merger must receive majority approval from a group of Class A shares that excludes Class A shares owned directly or indirectly by Class B stockholders (Rosenkranz), Delphi officers or directors, TMH, or any of their affiliates."); see *Tokio Marine Holdings to Acquire Delphi Financial Group in \$2.7 Billion Transaction*, BUS. WIRE (Dec. 21, 2011, 2:15 AM), <https://www.businesswire.com/news/home/20111220006644/en/Tokio-Marine-Holdings-to-Acquire-Delphi-Financial-Group-in-2.7-Billion-Transaction> [<https://perma.cc/DY8W-66D3>].

to include differential treatment, and that TMH aided Rosenkranz and the Delphi board's breaches of fiduciary duty.<sup>118</sup> Rosenkranz argued that because he was "generally unconstrained by fiduciary duties when deciding whether to sell his stock, he [was] permitted to condition his approval of a sale on both a restoration of his right to receive a control premium and on actually receiving such a premium."<sup>119</sup> The Delaware Court of Chancery rejected that argument, finding it reasonably likely that the plaintiff stockholders would be able to show at trial that "in negotiating for disparate consideration and only agreeing to support the merger if he received it, Rosenkranz violated duties to the stockholders."<sup>120</sup>

In doing so, the *Delphi* court emphasized that "[a]mong the rights associated with control is the ability to seek a control premium should [the company] be sold."<sup>121</sup> The court noted that, while "a controlling stockholder is, with limited exceptions, entitled under Delaware law to negotiate a control premium for its shares" and "is free to consider its interests alone in weighing the decision to sell its shares or . . . evaluating the adequacy of a given price,"<sup>122</sup> the *Delphi* charter contains an equal treatment agreement.<sup>123</sup> Therefore, when Rosenkranz initially chose to sell to the Class A stockholders, the provision served as a "concession to the Class A stockholders [that] resulted, presumably, in a higher purchase price for Class A stock than would have been the case without the provision."<sup>124</sup> Thus, though Rosenkranz retained voting control, "he sold his right to a control premium to the Class A stockholders via the [Delphi] Charter."<sup>125</sup> That is to say, the equal treatment agreement in the *Delphi* charter "exists so that if a merger is proposed, Rosenkranz cannot extract a *second* control premium for himself at the expense of the Class A stockholders."<sup>126</sup>

In response to Rosenkranz's argument that the *Delphi* charter permitted amendment (and that therefore an amendment to allow disparate treatment was permissible), the court was critical, noting:

[T]o accept Rosenkranz's argument and to allow him to coerce such an amendment here would be to render the Charter rights illusory and would permit

---

118. *Delphi Fin. Grp.*, 2012 WL 729232, at \*2, \*11 (contending that, from the outset, Rosenkranz "intended . . . to receive a premium on his Class B shares at the expense of the Class A shares, and is attempting, by tying the vote on the Charter Amendment with the vote on the Merger, to coerce the Class A stockholders into amending the provisions of Delphi's Charter that prohibit such disparate consideration"); *id.* at \*12 (arguing that "Rosenkranz breached his fiduciary and contractual obligations to the stockholders by seeking disparate consideration . . . as the Delphi Charter requires equal treatment of Class A and Class B shares in the distribution of merger consideration").

119. *Id.* at \*16.

120. *Id.* at \*17.

121. *Id.* at \*1-3.

122. *Id.* at \*15; *see also* *Abraham v. Emerson Radio Corp.*, 901 A.2d 751, 753 (Del. Ch. 2006) ("Under Delaware law, a controller remains free to sell its stock for a premium not shared with the other stockholders except in very narrow circumstances.").

123. *Delphi Fin. Grp.*, 2012 WL 729232, at \*15.

124. *Id.* at \*1.

125. *Id.* at \*16.

126. *Id.*

## Equal Treatment Agreements

Rosenkranz, who benefited by selling his control premium to the Class A stockholders at Delphi's IPO, to sell the same control premium again in connection with this Merger. That would amount to a wrongful transfer of merger consideration from the Class A stockholders to Rosenkranz.<sup>127</sup>

While sympathetic to the plaintiff stockholders' claim and likelihood of success on the merits, the court nevertheless denied the plaintiffs' request for a preliminary injunction.<sup>128</sup> In doing so, the court emphasized the large deal premium over the market price,<sup>129</sup> the availability of damages as a remedy,<sup>130</sup> and the lack of alternative purchasers to match or exceed the current deal price.<sup>131</sup> Given these factors, the court could not "find that the balance of the equities favors an injunction over . . . allowing the Plaintiffs to pursue damages."<sup>132</sup> Perhaps as a result of the court's sympathy for the plaintiff stockholders' control premium claim, Delphi would eventually announce a settlement agreement with its stockholders regarding the \$55 million control premium paid to Rosenkranz.<sup>133</sup>

In addition to addressing the use of a charter amendment to allow disparate treatment, *Delphi* also highlighted the importance of careful evaluation of compensation-related agreements. In *Delphi*, buyer TMH was also considering acquiring Rosenkranz Asset Management, LLC (RAM) immediately before the closing for \$57 million.<sup>134</sup> As the name implies, this company was founded by Rosenkranz and had been providing consulting services to Delphi for decades.<sup>135</sup> The Delphi board was concerned that the \$57 million payment for RAM could be seen as additional merger consideration being allocated to Rosenkranz, rather than as compensation for consulting services.<sup>136</sup> Given these concerns, the board successfully pressured Rosenkranz and TMH to postpone their negotiations on

---

127. *Id.* See generally Albert H. Choi & Geeyoung Min, *Contractarian Theory and Unilateral Bylaw Amendments*, 104 IOWA L. REV. 1, 42, 42 n.177 (2018) (noting that, especially given the rise of dual class, there is increased concern that "preserv[ing] the fidelity to the contractarian principle with little judicial oversight" may mean that there is "very little that directors or minority shareholders can do to police controlling shareholders' or block-holders' abuse").

128. *Delphi Fin. Grp.*, 2012 WL 729232, at \*16-20.

129. *Id.* at \*20 ("The price offered by TMH for the Class A shares, even though less than what Rosenkranz will receive in the Merger, is 76% above Delphi's stock price on the day before the Merger was announced.")

130. *Id.* at \*21 (noting that "the available damages remedies, particularly in this case where damages may be easily calculated, will serve as a sufficient deterrent for the behavior").

131. *Id.* at \*2, \*12.

132. *Id.* at \*2; *id.* at \*12 (providing "that injunctive relief here is inappropriate" because "[t]he threatened harm here is largely, if not completely, remediable by damages, and because the value of injunctive relief to the stockholder class seems likely to be overwhelmed by the concomitant loss").

133. Transcript of Settlement Hearing, *In re Delphi Fin. Grp.*, 2012 WL 729232 (No. 7144-VCG), 2012 WL 5249055. The settlement agreement provided \$49 million to the stockholders as compensation for the disparate treatment, less any fees and expenses paid to their counsel, taxes, and notice and administration expenses. *Id.*

134. *Delphi Fin. Grp.*, 2012 WL 729232, at \*9.

135. *Id.* at \*4.

136. *Id.* at \*9.



the RAM contracts until after the merger agreement was signed.<sup>137</sup> In light of this postponement, the court held that the plaintiffs did not “demonstrate[] a reasonable probability that a post-Merger contract involving RAM . . . will net Rosenkranz any disparate consideration in violation of Delphi’s Charter.”<sup>138</sup>

While *Delphi* remains the most well-known equal treatment agreement case, it is not the only one that provides insight into equal treatment agreements for dual-class companies. For example, in *Southeastern Pennsylvania Transport Authority v. Volgenau*,<sup>139</sup> as part of a merger, holders of the low-vote class received \$31.25/share exclusively in cash whereas the holder of the high-vote class received other forms of consideration (e.g., stock) for some of his shares.<sup>140</sup> Stockholders in the low-vote class subsequently alleged that this arrangement violated the requirement in the corporation’s charter that “[u]pon the merger . . . holders of each class of Common Stock will be entitled to receive equal per share payments or distributions.”<sup>141</sup> However, the Delaware Court of Chancery rejected this argument, as the charter’s plain language allowed for different forms of consideration (e.g., \$31.25/share in cash versus \$31.25/share in equity), and the merger was structured such that the noncash consideration received by the holder of the high-vote class equaled \$31.25/share.<sup>142</sup>

Several years later, the Delaware Court of Chancery would again consider the equality of per share merger consideration in *Brokerage Jamie Goldenberg Komen Rev Tru (Komen)*.<sup>143</sup> In March 2019, Twenty-First Century Fox, Inc. (Old Fox) spun off its news, sports, and broadcasting businesses to a newly listed public company, Fox Corporation (New Fox), and sold the rest of its businesses the next day to The Walt Disney Company for \$71.6 billion.<sup>144</sup> As part of a company-wide compensation program for Old Fox’s senior executives in anticipation of the transaction, the Old Fox board approved a grant of \$82.4 million in stock awards to Old Fox’s three top executives, Rupert Murdoch and his two sons.<sup>145</sup> The Murdoch family, through its ownership of high-vote Class B common stock, controlled 38.9% of the voting power on matters for which the Class A common stock possessed no voting rights.<sup>146</sup>

Perhaps unsurprisingly, an Old Fox stockholder sued, challenging the \$82.4 million in stock awards granted to the Murdoch family as a violation of the equal

---

137. *Id.* at \*10. The plaintiff shareholders in *Delphi* unsuccessfully argued that “the agreement discussed between TMH and Rosenkranz to retain the RAM Contracts for a term of years, or to buy RAM outright, really involved disguised consideration for Rosenkranz’s assent to the Delphi/TMH deal, which therefore constituted additional consideration that should belong to the stockholders.” *Id.* at \*2.

138. *Id.* at \*17.

139. No. 6354-VCN, 2013 WL 4009193 (Del. Ch. Aug. 5, 2013).

140. *Id.* at \*1.

141. *Id.* at \*24 (emphasis added).

142. *Id.* at \*25-26.

143. *Brokerage Jamie Goldenberg Komen Rev Tru U/A 06/10/08 Jamie L Komen Tr. for Komen v. Breyer*, No. 2018-0773-AGB, 2020 WL 3484956, at \*1 (Del. Ch. June 26, 2020).

144. *Id.*

145. *Id.*

146. *Id.* at \*2.

## Equal Treatment Agreements

treatment agreement in Old Fox’s certificate of incorporation.<sup>147</sup> Despite the Murdoch family “nominally” receiving the same per share consideration, the plaintiff stockholder argued that because of this grant, “the Murdochs, as holders of Class B Common Stock, received disparate consideration in connection with the [transaction], which increased their return above that received by the holders of Class A Common Stock.”<sup>148</sup>

The equal treatment clause provided, in part, that:

In the event of any merger or consolidation . . . the holders of the Class A Common Stock and the holders of the Class B Common Stock shall be entitled to receive substantially identical per share consideration as the per share consideration, if any, received by the holders of such other class.<sup>149</sup>

In finding that the Old Fox stockholder failed to plead facts that support a violation of the equal treatment agreement, the court emphasized that the stock awards “were implemented as part of a Company-wide compensation program to retain senior executives.”<sup>150</sup> Thus, because the plaintiff failed to explain how stock awards can be considered per share consideration, the court found that both classes of stock received the same consideration.<sup>151</sup> In doing so, the court took care to distinguish this case from *Delphi*, emphasizing that the Murdochs did not attempt to extract a control premium by amending the equal treatment clause.<sup>152</sup>

Just months later, the Delaware courts were faced with another challenge to an equal treatment agreement. On June 27, 2021, QAD, Inc. (QAD), a software company, agreed to merge with Thoma Bravo.<sup>153</sup> QAD is a dual-class company with two classes of common stock: Class A shares with 1/20th of one vote per share, and Class B shares with one vote per share.<sup>154</sup> Pamela Lopker, QAD’s founder and president, controlled QAD through owning 77% of the Class B shares.<sup>155</sup> While the merger generally provided for \$87.50 in cash per QAD share,<sup>156</sup> Lopker entered into a side agreement that allowed her to exchange over 40% of her QAD shares for equity in the post-close company.<sup>157</sup> The Class A stockholders and other Class B stockholders did not receive the same opportunity.<sup>158</sup>

---

147. *Id.* at \*1.

148. *Id.* at \*13, \*5-6.

149. Old Fox’s Certificate of Incorporation § 4(c); *Komen*, 2020 WL 3484956, at \*13.

150. *Komen*, 2020 WL 3484956, at \*13.

151. *Id.*

152. *Id.*

153. Verified Stockholders Class Action Complaint ¶ 4, Nantahala Cap. Partners II Ltd. P’ship v. QAD Inc., No. 2021-0573 (Del. Ch. filed June 2, 2021) [hereinafter QAD Complaint].

154. *Id.* ¶¶ 2, 22.

155. *Id.* ¶ 2. Lopker beneficially owns 77% of the Class B shares and 35% of the Class A shares. *Id.* ¶ 23. Lopker controls 67% of the vote of QAD. *Id.*

156. *Id.* ¶¶ 4, 38.

157. *Id.* ¶ 4.

158. *Id.*

QAD's amended and restated certificate of incorporation expressly prohibited preferential treatment of Class B stockholders in the event of a merger:

The holders of Class A Common Stock shall be entitled to receive an *amount and form of consideration per share no less favorable* than the per share consideration, if any, received by *any* holder of the Class B Common Stock in any merger, business combination or consolidation of the Corporation (whether or not the Corporation is the surviving entity . . . [and] whether or not executed *by way of a single transaction or a series of related transactions*).<sup>159</sup>

A stockholder brought suit to enjoin the closing, arguing that the merger violated the charter's equal treatment agreement by providing more favorable consideration to Lopker, a Class B stockholder, than to Class A stockholders.<sup>160</sup> Despite the presence of an equal treatment agreement, and the importance the company had previously placed on it,<sup>161</sup> QAD agreed to a merger that provided Lopker, a Class B stockholder, with disparate consideration.<sup>162</sup> In particular, the consideration for Lopker (equity in the surviving company) differs from the consideration for the Class A stockholders and other Class B stockholders (cash).<sup>163</sup> This difference matters: equity consideration allows Lopker to share in the upside of the company going forward, and is particularly more favorable if, as the plaintiff alleges, the merger undervalues QAD and the combined company is "poised for future growth."<sup>164</sup> The transaction was approved by QAD's stockholders on November 2, 2021 and closed on November 5, 2021.<sup>165</sup> Following "extensive negotiations," QAD announced on June 2, 2022 an agreement to pay \$2.45 million in legal fees and expenses to the shareholders

---

159. *Id.* ¶ 25 (emphasis added).

160. *Id.* ¶¶ 5-6.

161. QAD's dual-class structure and its equal treatment agreement are the result of a recapitalization in 2010, where the associated proxy to solicit stockholder votes "makes clear" that the equal treatment agreement was a "negotiated provision[]" and critical to the decision of the special committee . . . to approve the [r]ecapitalization." *Id.* ¶¶ 28-29. In QAD's proxy statement, the special committee highlighted several "material positive factors regarding the Recapitalization," including that the Class A common stockholders will "receive an amount and form of consideration per share no less favorable than the per share consideration, if any, received by any holder of Class B Common Stock in any merger, business combination or consolidation." QAD Inc., Proxy Statement (DEF 14A) (Nov. 22, 2010), at 8-9.

162. QAD Complaint ¶ 37.

163. *Id.* ¶ 42.

164. *Id.* ¶¶ 44, 42 ("The ability to maintain equity post-closing is more favorable consideration than receiving cash for numerous reasons, including because it will allow Lopker, and not Class A stockholders, to share in the upside of the Company going forward. For example . . . the Merger is opportunistically timed and undervalues the Company, and therefore retaining equity in the post-close Company is more favorable than being cashed out."). Equity consideration can also provide tax-deferral benefits that public stockholders would not receive. *Id.* ¶ 42.

165. See *Thoma Bravo Completes Acquisition of QAD*, THOMA BRAVO (Nov. 5, 2021), <https://www.thomabravo.com/press-releases/thoma-bravo-completes-acquisition-of-qad> [<https://perma.cc/27KB-77SA>].

who had sued to stop the acquisition.<sup>166</sup> The case is still pending in the Delaware Court of Chancery.<sup>167</sup>

The floodgates for dual-class litigation have started to open; *QAD* is not the only pending case to address dual-class stock,<sup>168</sup> and many more are sure to follow. However, despite recent (and growing) attention in the courts, few commentators have considered the role that equal treatment provisions can play in the sale of a company. In one recent article, Professor Geeyoung Min examined the treatment of stockholders when dual-class companies issue stock dividends.<sup>169</sup> Min used a sample of 237 dual-class companies in her analysis and argued for more clear charter provisions, more useful default provisions under state corporate law statutes, and judicially restricting the application of business-judgment review to narrowly defined pro rata stock dividends (proportional, in-class dividends) and non-pro rata stock dividends approved by each class, voting separately.<sup>170</sup> However, the literature is sparse for equal treatment agreements in corporate transactions.

In a recent essay, Kirby Smith argued under various theories of corporate control that specific equal treatment agreements create agency costs and disincentivize the controller from selling the company.<sup>171</sup> Because the controller might extract value from the company at the minority's expense through private benefits and self-dealing,<sup>172</sup> receive rewards from the minority in exchange for

166. See, e.g., *QAD Announcement*, BUS. WIRE (June 2, 2022), <https://www.businesswire.com/news/home/20220602005840/en/> [<https://perma.cc/L8GH-V6YQ>]; Jorge Mercado, *QAD to Pay \$2.45M in Legal Fees from Dispute over Acquisition*, PAC. COAST BUS. TIMES (June 2, 2022), <https://www.pacbiztimes.com/2022/06/02/qad-to-pay-2-45m-in-legal-fees-from-dispute-over-acquisition/> [<https://perma.cc/XU2S-8X3J>]. The Delaware Court of Chancery was not asked to review these fees and expenses or their reasonableness. *Id.*

167. *Id.*

168. For example, in early August, a shareholder class action was filed against Snap Inc., alleging in part that Snap's cofounders, Evan Spiegel and Robert Murphy, who hold 22% of the economic interest in the company but control 99.5% of the vote, improperly amended the charter to entrench their control. See Verified Stockholders Class Action Complaint ¶¶ 1-2, City of Warwick Ret. Sys. v. Snap Inc., No. 2022-0679 (Del. Ch. filed Aug. 2, 2022). Snap has nonvoting shares (Class A) and nonpublic voting shares (Class B and Class C). *Id.* ¶ 3. Snap's charter provided that when Spiegel and Murphy die, or sell or donate their Class C shares, Snap would become a single-class structure with one vote per share. *Id.* ¶ 4. However, while the charter originally provided that Class A shareholders would receive voting rights once there were no longer any Class C shares outstanding, Spiegel and Murphy amended the charter to give Class A shareholders voting rights only when there are no longer any Class C or Class B shares outstanding. *Id.* ¶¶ 4-8. The complaint also alleges that the charter was amended to allow the cofounders to donate more of their Class C shares to charities (including their own) without giving up control of Snap. See *id.*

169. See Geeyoung Min, *Governance by Dividends*, 107 IOWA L. REV. 117, 171 (2021).

170. See *id.*

171. Kirby Smith, *The Agency Costs of Equal Treatment Clauses*, 127 YALE L.J.F. 543, 551 (2017).

172. *Id.* at 549. Although outright self-dealing may breach a controller's duty of loyalty under Delaware law, see *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 723 (Del. 1971) (finding self-dealing where a controller prevented the company from enforcing contract rights with its dominated subsidiary), a controller may extract benefits from more subtle forms of self-dealing, like business decisions that a company might not otherwise pursue or directing benefits to parties the controller prefers, like donations to a controller's preferred charity. See Ronald J. Gilson & Alan Schwartz, *Corporate Control and Credible Commitment*, 43 INT'L REV. L. & ECON. 119, 125 (2015) (conducting a review of the literature); Smith, *supra* note 171, at 549.

monitoring management,<sup>173</sup> or seek to maintain control to pursue long-term visions that the market would not otherwise permit,<sup>174</sup> a controller is reluctant to sell and the minority shareholders are deprived of maximizing the value of their interests.<sup>175</sup> Smith argues that equal treatment agreements can exacerbate this controller lock-in effect<sup>176</sup> and sets forth two possible approaches for confronting the distortive effects of equal treatment agreements: relying on Delaware's existing entire fairness framework for transactions with differential consideration<sup>177</sup> or embedding a control premium in the charter.<sup>178</sup> In doing so, Smith canvasses a sample of thirteen equal treatment agreements.<sup>179</sup>

## II. New Evidence on Equal Treatment Agreements

In this Part, the Article presents empirical evidence on equal treatment agreements. First, Section II.A provides an overview of the methodology. Next, Section II.B analyzes the objects in general equal treatment agreements. Lastly, Section II.C examines the objects and exceptions to specific equal treatment agreements.

### A. Methodology

This Article used the Council of Institutional Investors' (CII) Dual Class Companies List and FactSet to identify entities incorporated in the United States with at least \$200 million in market capitalization, at least two outstanding classes of common stock, and unequal voting rights that create a divide between equity ownership and voting interests.<sup>180</sup> After eliminating entities that are no

---

173. Minority shareholders have weak incentives to monitor management because the costs of monitoring may be high relative to the minority's smaller stake. See Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641, 1651 (2006) (providing that "a controlling shareholder may police the management of public corporations better . . . when shareholdings are widely held"); Smith, *supra* note 171, at 550. In contrast, while control comes with associated costs (like monitoring and illiquidity), a controller has significant incentive to monitor management because of their substantial stake in the venture. Gilson, *supra* note 173, at 1652 (noting that "[b]ecause controlling shareholders must bear the direct costs of monitoring, liquidity, and nondiversification from holding a concentrated position, some private benefits of control likely are necessary to induce a party to play that role"); Smith, *supra* note 171, at 550 (providing that "Warren Buffet's control of Berkshire Hathaway epitomizes this type of arrangement" because "[a]n individual would find it nearly impossible to understand the myriad businesses Berkshire is engaged in, but Buffet has every incentive to monitor each investment, as most of his wealth is tied up in Berkshire stock").

174. See Goshen & Hamdani, *supra* note 66, at 590; Smith, *supra* note 171, at 550 (pointing to "[t]he founders' maintenance of control at companies such as Google, Facebook, and Snapchat" as examples).

175. Smith, *supra* note 171, at 550.

176. *Id.* at 552.

177. *Id.* at 558-61. Of course, the entire fairness standard of review is an onerous one, requiring that the board demonstrate both fair price and fair dealing in the transaction, and may result in overloading (and slowing down) the judicial system, in addition to uncertainty and unpredictability in dealmaking.

178. *Id.* at 561-63.

179. *Id.*

180. See *CII Dual Class Companies List*, *supra* note 26 ("The following US-incorporated companies have at least \$200 million in market capitalization, at least two outstanding classes of common stock, and unequal voting rights that create a wedge between ownership and voting interests.").

## Equal Treatment Agreements

longer publicly traded, the resulting sample contained 312 entities (the “Sample”), which have an aggregate market capitalization of \$5.6 trillion.<sup>181</sup>

Each entity in the Sample was classified according to the FactSet Revere Business and Industry Classification System (RBICS) into one of 12 sectors: Business Services, Consumer Services, Consumer Cyclical, Energy, Finance, Healthcare, Industrials, Non-Energy Materials, Consumer Non-Cyclical, Technology, Telecommunications, and Utilities.<sup>182</sup> Technology makes up the largest share of the Sample, representing 27% of the Sample and approximately half (45%) of the Sample’s market capitalization (\$2.5 trillion), followed by Finance representing 15% of the Sample and 24% of the market capitalization (\$1.3 trillion). A breakdown of the prevalence, market capitalization, and proportion incorporated in Delaware for each sector in the Sample is identified in Table 1 below:

Table 1. Industry Classification, Market Capitalization, and Incorporation

<i>Industry</i>	<i>Number in Sample</i>	<i>Proportion of Sample</i>	<i>Total Market Cap. (\$M)</i>	<i>Avg. Market Cap. (\$M)</i>	<i>Proportion Incorporated in Delaware</i>
Business Services	10	3%	\$41,124	\$6,789	70%
Consumer Services	41	13%	\$278,352	\$6,789	76%
Consumer Cyclical	37	12%	\$376,620	\$10,179	78%
Energy	2	1%	\$4,205	\$2,103	100%
Finance	47	15%	\$1,330,219	\$28,303	66%
Healthcare	22	7%	\$160,357	\$7,289	91%
Industrials	25	8%	\$222,616	\$8,905	68%
Non-Energy Materials	2	1%	\$15,629	\$7,815	100%

181. While CII does not disclose how the market capitalization for their Dual Class Companies List was calculated, the aggregate market capitalization for the Sample was calculated using Yahoo! Finance on May 26, 2022. See generally *Yahoo Finance*, <https://finance.yahoo.com/lookup> [<https://perma.cc/R8AH-4RG6>].

182. The Revere Business and Industry Classification System (RBICS) contains a total of fourteen top-level sectors, including “Other” and “Non-Corporate”; however, none of the entities in the Sample fell within these two categories. For a detailed guide on the RBICS classification system, information on the categories, and benefits of the system, see *FactSet Revere Business and Industry Classification System (RBICS) Data and Methodology Guide*, FACTSET, <https://open.factset.com/api/public/media/download/products/documents/141b120b-0982-450f-8286-81e7ec387880> [<https://perma.cc/K7YR-P7VX>]. While the overwhelming majority of entities in the Sample had an RBICS classification provided through FactSet, fifteen entities (4.8%) did not and were classified by hand into their RBICS categories through an evaluation of the products or services they provide.

<i>Industry</i>	<i>Number in Sample</i>	<i>Proportion of Sample</i>	<i>Total Market Cap. (\$M)</i>	<i>Avg. Market Cap. (\$M)</i>	<i>Proportion Incorporated in Delaware</i>
Consumer Non-Cyclicals	29	9%	\$326,014	\$11,242	72%
Technology	84	27%	\$2,538,641	\$30,222	92%
Telecommunications	10	3%	\$329,590	\$32,959	70%
Utilities	3	1%	\$7,556	\$2,519	100%
<i>Total</i>	312	100%	\$5,630,923	\$18,048	79%

For each entity in the Sample, the certificate of incorporation was downloaded and the equal treatment agreements within the charter were identified and coded for various objects and exceptions. To my knowledge, the Sample represents the most comprehensive, detailed, and accurate sample of equal treatment agreements for dual-class companies currently available among either academics or practitioners.

Within this Sample, the classification method for the common stock of each entity was also coded. Consistent with the research on dual-class companies more generally, the majority (79%) of companies designate their high-vote stock as Class B stock and use Class A (or a similar articulation)<sup>183</sup> to refer to their low-vote stock. A minority (9%) of companies in the Sample refer to their high-vote stock as Class A stock. The remaining companies (12%) designate their high-vote stock in another manner.<sup>184</sup>

It should be noted, however, that some entities in the Sample have more than just two classes of common stock. While these additional classes of common stock can take various forms, in recent years there has been a rise in Class C common stock with no voting rights whatsoever. Recently, Airbnb, BuzzFeed, DoorDash, and Match, among others, went public with a tripartite class structure that included a class of common stock without voting rights.<sup>185</sup>

---

183. Other articulations include “Common Stock and Class B Common Stock” or “Series A and Series B Common Stock.”

184. For example, some charters use “Voting Common Stock” (Brady) or “Class X” (Beachbody) to refer to the high-vote stock. Others use a time-based approach by providing disparate voting rights for Common Stock held for more than four years (Aflac).

185. Other instances include Robinhood Markets, Inc. (Class A with one vote per share, Class B with ten votes per share, and Class C with no voting rights); Blend Labs, Inc. (Class A with one vote per share, Class B with forty votes per share, and Class C with no voting rights); Beachbody Co. (Class A with one vote per share, Class X with ten votes per share, and Class C with no voting rights); and AppLovin Corporation (Class A with one vote per share, Class B with twenty votes per share, and Class C with no votes per share). For a discussion of nonvoting common stock, and proposals to better protect nonvoting shareholders, see Dov Solomon, *The Importance of Inferior Voting Rights in Dual-Class Firms*, 2019 BYU L. REV. 533 (2020) (suggesting that SEC disclosure requirements and stock exchange rules may have a role to play in protecting holders of nonvoting stock).

Figure 1 provides the proportion of dual-class charters with an equal treatment agreement (general, specific, or both) in the Sample by IPO year over the past twenty years.<sup>186</sup> Given the relatively small number of companies in the Sample that went public in the earlier portion of this time period, and the significant year-to-year variation in the early 2000s as a result, Figures 1 and 2 aggregate the IPO years into four-year periods. The proportion of IPOs with equal treatment agreements reflects the proportion of companies in each four-year period that contain an equal treatment agreement.

Figure 1. Proportion of Equal Treatment Agreements by IPO Year (2002-2021)

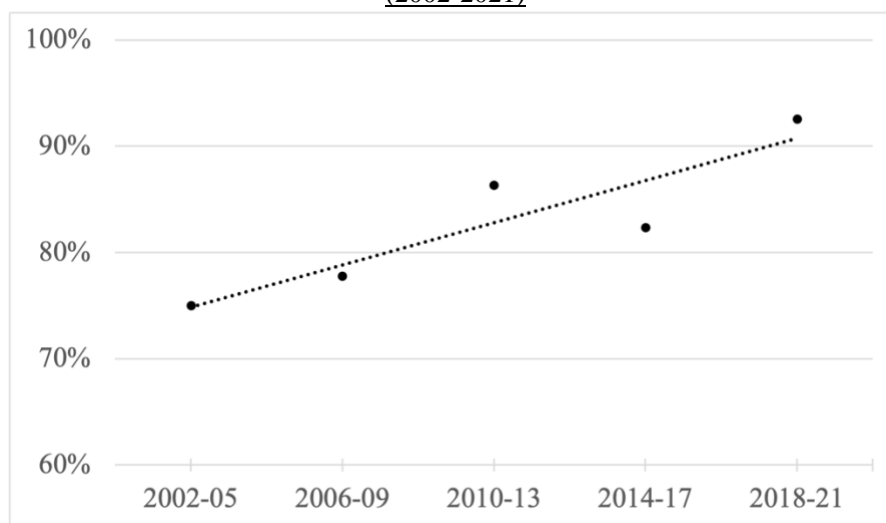


Figure 1 indicates that the proportion of dual-class charters with an equal treatment agreement<sup>187</sup> has been increasing over the past few decades. Contrary to estimates in conversations with academic and practitioner audiences that equal treatment agreements are relatively uncommon, across the entire Sample approximately 84% of dual-class charters have an equal treatment agreement.

186. Of course, a number of companies in the Sample went public prior to 2002, the earliest of which was Coca-Cola in 1919. See James Quincey, *A Pause to Reflect: 100 Years as a Public Company*, COCA-COLA (Dec. 16, 2019), <https://www.coca-colacompany.com/news/a-pause-to-reflect-100-years-as-a-public-company> [<https://perma.cc/E32F-CQ3N>]. After Coca-Cola went public in 1919, decades passed before the next company in the Sample went public. Before 2002, there were many years with no dual-class company IPOs in the Sample, and several years with just one or two dual-class companies in the Sample. However, the substantial majority of dual-class companies in the Sample went public in the past twenty years. The exception to this pattern of dual-class IPO activity in the Sample is 1978, which saw fifteen dual-class companies go public, over half (53%) of which had an equal treatment agreement.

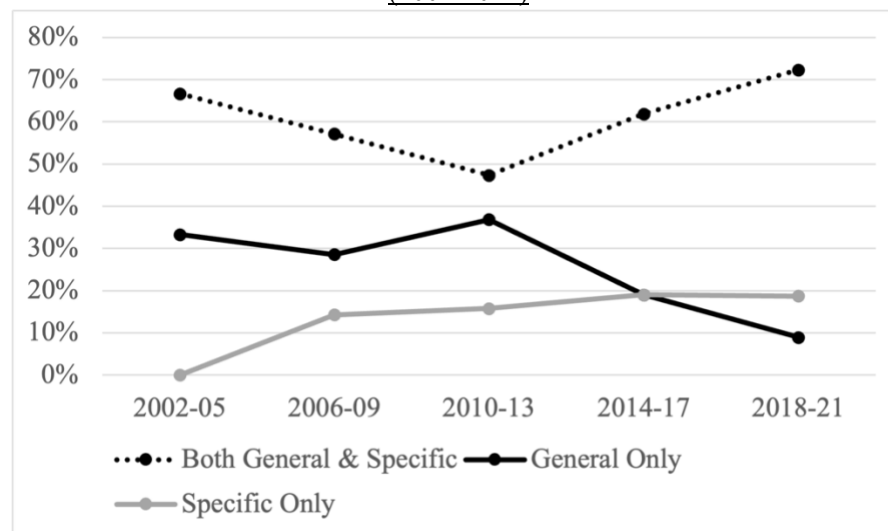
187. An equal treatment agreement for purposes of this figure includes those with a general provision, specific provision relating to a transaction (e.g., M&A, change of control) or combination of the two.



Moreover, that proportion has been rising, with equal treatment agreements in 92% of the charters in 2021.<sup>188</sup>

Companies are also trending towards more complex equal treatment agreements that incorporate both general and specific provisions.<sup>189</sup> That is to say, the rise in equal treatment agreements is driven primarily by an increase in charters containing *both* provisions. Relatedly, there has been a decline in charters with only a general, catch-all provision. Figure 2 details the development of charters with only a general provision, only a specific provision, and both a general and specific provision over each four-year period since 2002.

Figure 2. Proportion of Equal Treatment Agreements by Type (2002-2021)



From the review of equal treatment agreements in corporate charters in the Sample, provisions were classified into two categories: general equal treatment provisions and specific equal treatment provisions.<sup>190</sup>

188. For illustrative purposes of this trend, Figures 1 and 2 aggregate the findings into four-year periods. Because there were often only one or two entities each year for earlier IPOs in the Sample, the proportions fluctuated significantly year-to-year and have been aggregated for these figures.

189. This trend towards longer and more complex provisions is reflective of corporate contracting more generally. See, e.g., John C. Coates IV, *Why Have M&A Contracts Grown? Evidence from Twenty Years of Deals* (Harv. L. Sch., John M. Olin Ctr. for Law, Econ. & Bus. Working Paper No. 333, 2016), <https://ssrn.com/abstract=2862019> [<https://perma.cc/XYN5-EUGT>]; Cathy Hwang & Matthew Jennejohn, *Deal Structure*, 113 NW. U. L. REV. 279 (2018); Guhan Subramanian & Caley Petrucci, *Deals in the Time of Pandemic*, 121 COLUM. L. REV. 1405 (2021).

190. There is some debate in corporate practice as to whether the general provision, in the absence of a specific provision, would provide protection from disparate treatment in a merger, change of control, or other corporate transaction. To conduct a more comprehensive review, each equal treatment agreement was coded in the Sample as general only, specific only, or both, as applicable. For a discussion of whether the general provision should, unless expressly limited, cover a merger or other transaction, see discussion *infra* Part III.

## Equal Treatment Agreements

A general provision was categorized as one not tied to a particular transaction or event. Instead, these provisions serve as a catch-all for treating the classes of stockholders equally except as expressly provided in the charter or as required by law. Typically, a general equal treatment provision takes the following form:

Except as otherwise expressly provided herein or required by applicable law, shares of Class A Common Stock, Class B Common Stock and Class F Common Stock shall have the *same rights and privileges and rank equally, share ratably and be identical* in all respects as to all matters.<sup>191</sup>

In contrast, a specific equal treatment provision is one tied to a particular transaction or similar event. For the purposes of this Article, the focus was on corporate transactions such as mergers, acquisitions, tender offers, asset sales, and other business combinations or changes in control because of their significance as one of the most important corporate events for a typical controller.<sup>192</sup> An example—concerning a potential merger—follows:

In the event of any Combination Transaction . . . each share of Common Stock shall be entitled to receive Equivalent Consideration (as defined herein) on a per share basis, unless different treatment of the shares of each such class is approved by the affirmative vote of the holders of a majority of the outstanding shares of Class A Common Stock and . . . Class B Common Stock, each voting separately as a class.<sup>193</sup>

Interestingly, there is some division within the charters on what is classified as a “liquidation event.” On one hand, a surprising number of charters expressly define a “liquidation event” to include a merger or acquisition.<sup>194</sup> However, many charters expressly provide that a liquidation event does *not* include mergers or other similar transactions.<sup>195</sup> For the purposes of coding specific equal treatment

---

191. Palantir Technologies, Inc., Amended and Restated Certificate of Incorporation, art. IV.D.2 (Sept. 22, 2020) (emphasis added).

192. While the transaction-related specific provision is likely the most significant, other charter provisions can provide for equal treatment in specified situations, particularly liquidation and dividends. These could arguably be classified as other types of specific equal treatment agreements. For simplicity, this Article refers to transaction-related equal treatment agreements when discussing “specific equal treatment agreements” unless expressly stated otherwise.

193. EverQuote, Inc., Restated Certificate of Incorporation § 1.3 (July 2, 2018) (emphasis added).

194. *See, e.g.*, Smartsheet, Inc., Amended and Restated Articles of Incorporation § 5(f) (Apr. 17, 2018) (defining a liquidation to include “any Asset Transfer, or any Acquisition”); Datadog, Inc., Amended and Restated Certificate of Incorporation § 1(i) (Sept. 23, 2019) (defining a liquidation event to include “any Asset Transfer or Acquisition in which cash or other property is, pursuant to the express terms of the Asset Transfer or Acquisition, to be distributed to the stockholders in respect of their shares of capital stock in the Company”).

195. *See, e.g.*, Graham Holdings Co., Restated Certificate of Incorporation art. IV, § A(3) (Nov. 13, 2003) (noting that “a consolidation or merger . . . shall not be deemed to be a liquidation, dissolution or winding up, voluntary or involuntary”); Nike, Inc., Restated Articles of Incorporation, art. IV.A(3)

agreements, when “liquidation event” was not further defined, it was not assumed to encompass a merger, acquisition, or other change of control or transaction, and therefore not included as a transaction-specific equal treatment provision. In the event that “liquidation event” was defined to include a merger or other similar transaction, it was included as a transaction-specific equal treatment provision in the Sample.

Accordingly, each charter was examined for the presence of either a general equal treatment provision, specific equal treatment provision in the context of a merger or other similar transaction, or both a general and specific provision. In the Sample, the substantial majority of the companies (84%) have an equal treatment agreement in their corporate charter. By far the most common approach to equal treatment agreements was including both a general and specific agreement in the charter, which was the approach in half (50%) of the Sample’s charters. Approximately one-fifth (21%) of the Sample contains only a general equal treatment provision and just 13% includes only a specific equal treatment provision.<sup>196</sup> There is some variation by industry on the presence and type of equal treatment agreements, as highlighted in Table 2, which details the proportion of each industry that uses a general equal treatment provision, specific equal treatment provision, or both general and specific equal treatment provisions:

Table 2. Equal Treatment Agreements by Industry

<i>Industry</i>	<i>General Only</i>	<i>Specific Only</i>	<i>Both</i>	<i>Total</i>
Business Services	0%	0%	70%	70%
Consumer Services	24%	20%	37%	80%
Consumer Cyclical	22%	11%	57%	89%
Energy	0%	0%	0%	0%
Finance	21%	11%	40%	72%
Healthcare	41%	9%	32%	82%
Industrials	20%	20%	40%	80%
Non-Energy Materials	50%	0%	0%	50%
Consumer Non-Cyclical	34%	14%	41%	90%

(Sept. 25, 2015) (“Neither the merger nor consolidation . . . nor a sale, transfer or lease of all or any part of the assets of the Corporation shall be deemed to be a liquidation, dissolution or winding up of the Corporation within the meaning of this paragraph.”).

196. Only a few of the equal treatment agreements in the Sample provided for some form of *unequal* treatment in a merger or other similar transaction. *See, e.g.*, The Cato Corp., Amended and Restated Certificate of Incorporation, art. IV.B(6) (May 21, 2020) (noting that in the event of a merger or consolidation “Class A Common Stock shall be entitled to receive . . . the amount of \$1.00 per share, prior to any distribution to be made with respect to Class B Common Stock,” after which “the holders of Class A Common stock and the holders of Class B Common Stock shall be entitled to share ratably (i.e., an equal amount of assets for each share of either Class A Common Stock or Class B Common Stock) in the remaining assets of the Corporation”). While these “equal treatment” agreements provide for some unequal treatment, they were coded as general, specific, or both, as applicable, in the same manner as provisions exclusively for equal treatment.

## Equal Treatment Agreements

<i>Industry</i>	<i>General Only</i>	<i>Specific Only</i>	<i>Both</i>	<i>Total</i>
Technology	10%	15%	71%	96%
Telecommunications	20%	0%	40%	60%
Utilities	33%	0%	33%	67%
<i>Average</i>	21%	13%	50%	84%

Notably, the Technology industry, which represents the highest market capitalization and largest number of companies in the Sample, has the highest proportion of companies with equal treatment agreements (96%) and also the highest proportion of entities that include both general and specific equal treatment agreements in their charters (71%). Yet, this trend is not universal within the Sample. For example, Finance has the second highest market capitalization in the Sample, but nevertheless performs below average in terms of equal treatment agreements (72%). However, the three least represented industries, Energy, Non-Energy Materials, and Utilities, all perform well below average on the use of equal treatment agreements.

Each general and specific provision was then analyzed to determine the degree of equality afforded to the classes of stockholders (the “objects”). The provisions were coded on each of the most common objects within each type of provision. General equal treatment provisions were coded for the presence of the following objects: same rights, powers, and/or privileges; equal rights, powers, and/or privileges; equal priority and/or rank; sharing ratably or proportionately; and identical treatment. There was little variation from these categories for general provisions, and many general provisions contained a combination of them.

In contrast, the specific equal treatment provisions contained more variety. These provisions were coded for whether they provided identical consideration; equal consideration; same form, kind, or type of consideration; same amount or value of consideration; same consideration (not further specified); and ratably or proportionate treatment. Like with the general equal treatment provisions, most specific provisions contained a combination of these objects.

Specific equal treatment agreements also often include exceptions to when they require equal treatment. Each provision was also coded for the most common exceptions: approval by each class (or by the low-vote class); all differences provided in the charter; differences in voting rights in the charter; differences in conversion rights in the charter; employment, severance, and other compensation-related agreements; tax agreements; and elections to receive alternative consideration.

### *B. General Equal Treatment Agreements*

This Section examines the general equal treatment agreement objects. These general agreements are typically shorter and broader than the specific agreements. A typical general equal treatment agreement requires the classes

“have the same rights and powers, rank equally . . . share ratably and [are] identical in all respects as to all matters.”<sup>197</sup>

Some general provisions highlight particular instances where they apply. For example, the charter for Entravision Communications provides that the classes will be treated identically “*including* with respect to dividends and upon liquidation.”<sup>198</sup> When, like in the charter for Entravision Communications, the provision enumerates a nonexhaustive list of examples, it was coded as a general equal treatment agreement (rather than specific).

In contrast, some provisions that were framed or structured like “general” provisions were limited to enumerated categories. For example, Reading International’s charter provides: “[Each class] shall have the same rights, preferences and privileges *with respect to dividends, distributions, or any liquidation or dissolution of the Corporation.*”<sup>199</sup> These provisions were not coded as general provisions in the Sample. Rather, they were considered provisions on liquidation and/or dividends (as applicable).

For general equal treatment agreements, I find that these require (in descending order of incidence): identical treatment (95%); same rights, powers, or privileges (72%); equal priority or rank (62%); sharing ratably or proportionately (61%); and equal rights, powers, or privileges (8%). Surprisingly, even though a requirement that stockholders be treated “identical[ly]” (often “in all respects and matters”) is virtually ubiquitous in the Sample, a majority of charters include at least one further requirement in the general equal treatment provision. Figure 3 identifies the frequency with which each exception occurs (n=220):

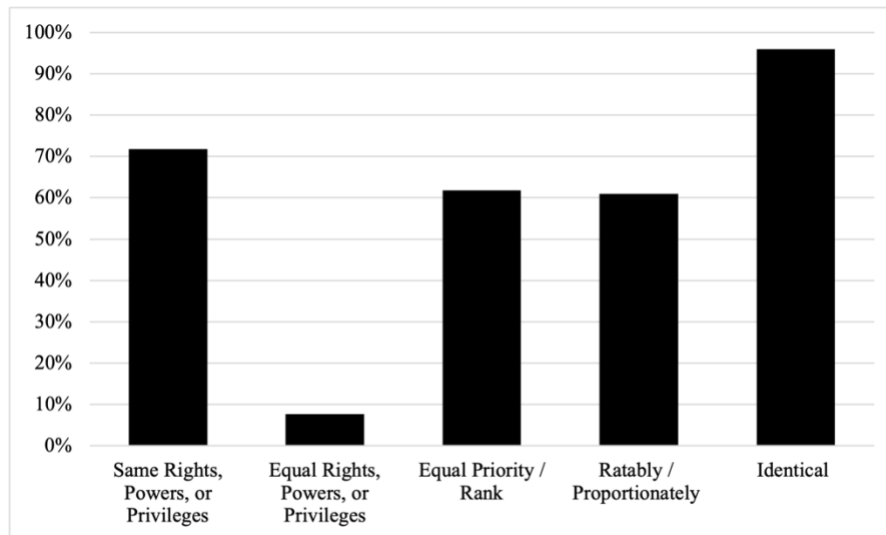
---

197. See, e.g., Levi Strauss & Co., Amended and Restated Certificate of Incorporation § 2 (Mar. 25, 2019).

198. Entravision Communications Corp., Second Amended and Restated Certificate of Incorporation § 4.3 (May 26, 2004) (emphasis added). Entravision Communications is not alone in this approach. See, e.g., IDT Corp., Third Amended and Restated Certificate of Incorporation § 2(a) (Apr. 4, 2011) (providing that each class “shall have the same rights and privileges and shall rank equally, share ratably and be identical in respects as to all matters, including rights in liquidation”); Ingles Markets, Inc., Composite Articles of Incorporation § 3 (Mar. 31, 2022) (providing that each class “shall have identical powers, preferences and rights, including rights in liquidation”).

199. Reading International, Inc., Amended and Restated Articles of Incorporation § 4.4 (June 27, 2014) (emphasis added).

Figure 3. General Equal Treatment Agreements: Proportion of Objects



*C. Specific Equal Treatment Agreements*

This Section examines the objects and exceptions for specific equal treatment agreements, that is, those relating to a merger, acquisition, or other transaction or change of control. Unlike general equal treatment agreements, specific equal treatment agreements take many forms. These forms vary in several ways, including with regards to the covered transactions, degree of equality provided, and exceptions. As an illustrative example, compare the specific provision for ZipRecruiter with the specific provision for Coca-Cola, each of which is noted below:

**Zip Recruiter:**

[U]pon the merger or consolidation of the Corporation with or into any other entity, or in the case of any other transaction having an effect on stockholders substantially similar . . . consideration shall be paid, ratably on a per share basis among the holders of the Class A Common Stock and Class B Common Stock as a single class; provided, however, that shares of one such class may receive different or disproportionate distributions, payments, or other consideration in connection with such merger, consolidation or other transaction if (i) the only difference . . . is that any securities that a holder of a share of Class B Common Stock receives . . . shall have twenty (20) times the voting power of any securities that a holder of a share of Class A Common Stock receives . . . or (ii) such merger, consolidation or other transaction is approved by the affirmative vote of the holders of a majority of the voting power of all of the then-outstanding shares of

Class A Common Stock and Class B Common Stock, each voting separately as a class.<sup>200</sup>

#### Coca-Cola:

In the event of . . . a merger or consolidation of the Corporation, after payment or provision for payment of the debts or liabilities of the Corporation and the amounts to which holders of the preferred stock shall be entitled, holders of Common Stock and Class B Common Stock shall be entitled to share ratably (i.e., an equal amount of assets for each share of either Common Stock or Class B Common Stock) in the remaining assets of the Corporation.<sup>201</sup>

The common ways in which specific equal treatment agreements vary are examined at greater length in this Section.

#### 1. Covered Transactions

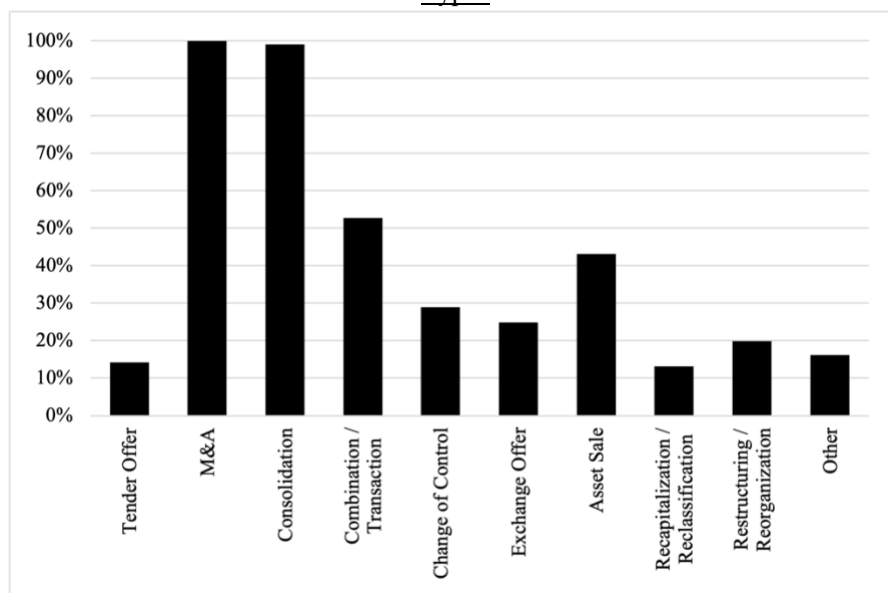
One of the most important features of a specific equal treatment agreement is the transactions to which it applies. Typically, a specific agreement specifies several transactions, sometimes accompanied by a catch-all term like “all similar transactions.” Figure 4 provides the frequency of each covered transaction in the Sample’s specific equal treatment agreements (n=197):

---

200. ZipRecruiter, Inc., Sixth Amended and Restated Certificate of Incorporation § 3.6 (May 14, 2021) (emphasis added).

201. Coca-Cola Bottling Co., Restated Certificate of Incorporation, art. IV(b)(6) (Aug. 4, 2017) (emphasis added).

Figure 4. Specific Equal Treatment Agreements: Proportion of Transaction Types



I find that specific equal treatment agreements cover (in descending order of incidence): mergers/acquisitions (100%); consolidations (99%); other business combinations or transactions (not defined) (53%);<sup>202</sup> asset sales or transfers (43%); changes of control (29%);<sup>203</sup> exchange offers (25%); restructuring or reorganizations (20%); tender offers (14%); and recapitalizations or reclassifications (13%).<sup>204</sup>

## 2. Degree of Equality

Like the general provisions, many specific provisions contain common objects. Typically, multiple objects are present in each specific provision, with a requirement for ratable/pro rata treatment present in the majority of the provisions. Figure 5 details the frequency of each object in specific equal treatment provisions (n=197):

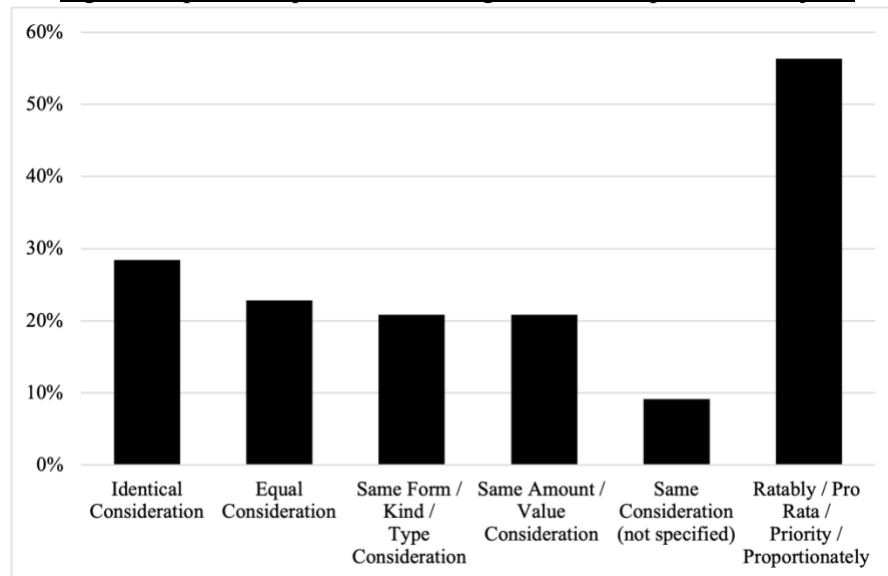
202. Many charters enumerate a list of specific transactions like mergers and consolidations, then end with catch-all language like “other similar transactions,” “substantially similar business combinations,” or “having an effect substantially similar.” These were coded as Combination/Transaction in the sample in addition to whichever enumerated transactions (mergers, etc.) were included.

203. Some charters used a defined term for “change of control” and others included the language without further guidance. Both were coded as “Change of Control.”

204. Approximately 16% of the Sample contained transactions that did not fit neatly into the other enumerated categories, which were coded as “Other.” For example, Altice USA’s charter includes a specific category of sales involving a particular entity.



Figure 5. Specific Equal Treatment Agreements: Proportion of Objects



I find that specific equal treatment agreements require (in descending order of incidence): consideration distributed ratably or proportionately (56%); identical consideration (28%);<sup>205</sup> equal consideration (23%); same form, kind, or type of consideration (21%); same amount or value of consideration (21%); and “same consideration” (not further specified as same type, form, amount, etc.) (9%).

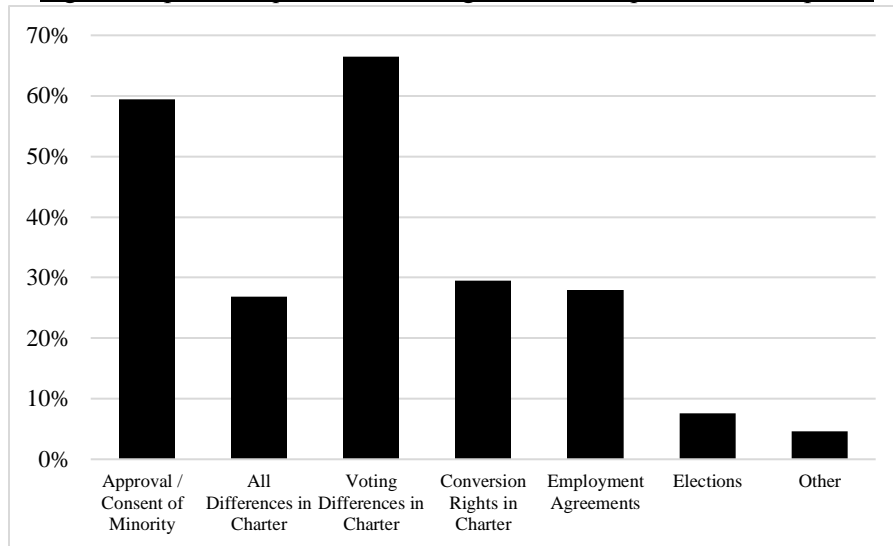
### 3. Exceptions

Each provision was also coded for a series of exceptions. Figure 6 details the frequency of the most common exceptions:

---

205. A few charters provided for “substantially identical” consideration. This was coded as “identical consideration.”

Figure 6. Specific Equal Treatment Agreements: Proportion of Exceptions



In accordance with Figure 6 above, I find that specific equal treatment agreements contain express exceptions for (in descending order of incidence): voting differences in the charter (66%);<sup>206</sup> approval by each class or by the minority shareholders (59%); conversion rights in the charter (29%); employment, consulting, severance, or similar agreements (28%); all differences in the charter (27%);<sup>207</sup> stockholder elections (8%);<sup>208</sup> and other (5%).<sup>209</sup>

206. Provisions were coded under this exception when they expressly identified voting differences. In addition, when a general catch-all “all differences in the charter” or “as otherwise provided in the charter” was used, it was coded as “voting differences in charter,” “conversion rights in charter,” and “all differences in the charter.”

207. Some charters used other articulations for this exception, like when shares received in a transaction have “identical rights” to Class A and Class B. These exceptions were coded as all differences in the charter. While many charters include this exception as a broad, catch-all exception not qualified in any way, many other charters provide an exception just for voting rights and/or conversion rights in accordance with the charter.

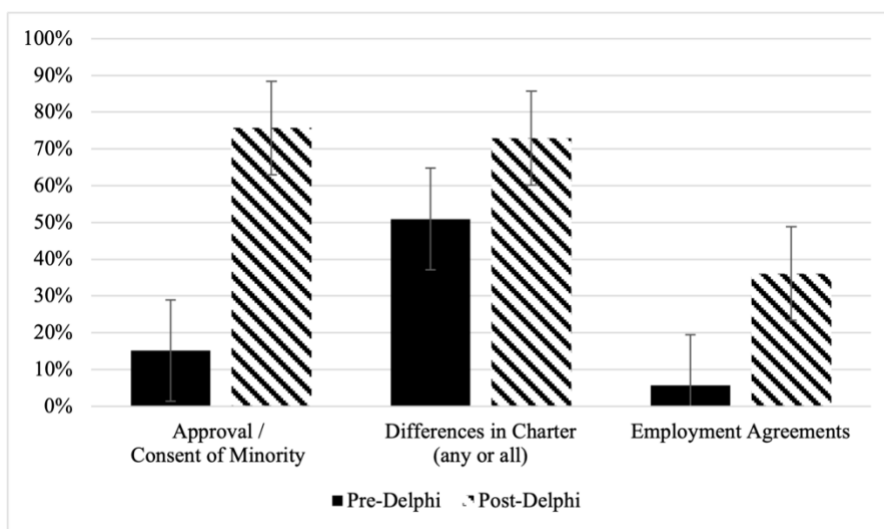
208. Stockholder elections occur when the merger agreement gives each stockholder the ability to choose (or “elect”) the form of consideration they would prefer to receive in the deal (e.g., stock, cash, or a mix of stock and cash). For sample language on exceptions for stockholder election, see, for example, Amplitude, Inc., Restated Certificate of Incorporation, art. IV(C)(6) (Sept. 21, 2021) (“In the event that the holders of shares of Class A Common Stock or Class B Common Stock are granted rights to elect to receive one of two or more alternative forms of consideration in connection with such merger, consolidation or other transaction, then such consideration shall be deemed to have been made ratably on a per share basis among the holders of the Class A Common Stock and Class B Common Stock as a single class if the holders of all of such shares are granted identical election rights.”); Duolingo, Inc., Amended and Restated Certificate of Incorporation, art. IV(A)(9) (July 30, 2021) (“[I]f the holders of any series of Common Stock are granted the right to elect to receive one of two or more alternative forms of consideration, the foregoing [equal treatment] provisions shall be deemed satisfied if holders of the other series of Common Stock are granted corresponding election rights.”). Theoretically, without an exception for elections, any merger agreement that allows stockholder elections would likely lead to a violation of an equal treatment agreement.

209. “Other” includes tax agreements and any other exceptions.

The Technology industry, unlike any other industry in the Sample,<sup>210</sup> incorporates exceptions to equal treatment agreements at a significantly heightened rate relative to its representation in the Sample. Despite representing only 27% of the Sample, the Technology industry accounts for more than its pro rata share in nearly all of the exceptions. The Technology sector represents 60% of employment-agreement exceptions; 46% of approval by each class/minority exceptions; 35% of voting-differences exceptions; 30% of other exceptions; 28% of conversion-differences exceptions; and 26% of all differences in the charter exceptions.<sup>211</sup>

Moreover, the proportion of specific equal treatment agreements with exceptions is also on the rise. As equal treatment provisions become more complex and nuanced, litigation highlights the significance of these provisions, and practitioners gain greater experience with dual-class IPOs, it is unsurprising that there has been a growth in specific equal treatment agreement exceptions. What is most noteworthy about this rise in exceptions to specific agreements is the development after *Delphi* in 2012, as shown in Figure 7:

Figure 7. Specific Equal Treatment Agreements: Prevalence of Exceptions by Time (Pre- and Post-*Delphi*)



Notably, in the wake of *Delphi*, which was decided in March 2012, the use of exceptions to specific equal treatment provisions has substantially increased

210. The other industries incorporated exceptions that were approximately (within a few percentage points), on average, aligned with their representation in the Sample.

211. An explanation of this disproportionate use of exceptions can likely be found in the timing of Technology IPOs in the Sample. The majority of companies in the Technology industry (73 of the 84) had their IPO in 2012 or later. Following *Delphi* in 2012, there was a rise in each of the exceptions for specific equal treatment agreements. See discussion *infra* accompanying Figure 7.

across the board. Most striking is the rise in exceptions for minority stockholder approval. Prior to *Delphi*, a minority (15%) of specific equal treatment provisions included an exception for minority stockholder approval. After *Delphi*, the majority (76%) of specific equal treatment provisions included an exception for minority stockholder approval. *Delphi* illustrated the ability of a controlling, high-vote stockholder to pressure the minority to approve disparate treatment (in *Delphi*, in the form of compelling an amendment to the charter to remove an equal treatment provision). While the *Delphi* court was critical of a charter amendment, and the controller had to compensate the low-vote stockholders for damages, practitioners and controllers post-*Delphi* pursued other avenues for disparate treatment. Savvy controllers now have a roadmap if they wish to compel shareholder consent to unequal treatment by structuring equal treatment agreements to take advantage of that ability.<sup>212</sup>

Similarly, as practitioners and issuers become more familiar with dual-class structures, the use of other common equal treatment agreement exceptions has risen. Exceptions for differences already provided in the charter (such as voting or conversion rights) have increased from 51% of specific equal treatment agreements pre-*Delphi* to 73% of equal treatment agreements post-*Delphi*.<sup>213</sup> Likewise, the prevalence of exceptions to specific equal treatment agreements for employment, consulting, severance, or other compensatory arrangements has increased from 6% pre-*Delphi* to 36% post-*Delphi*.

This growth is unsurprising given the attention brought to such exceptions by the rise in dual class (and resulting increased expertise of practitioners) and cases like *Delphi* (2012) and *Komen* (2020). As discussed in Section I.C, in *Delphi*, the court was faced with the question of whether a post-merger contract between RAM, a company founded by Rosenkranz that provided consulting services to Delphi, and TMH, the buyer, constituted disparate consideration in the merger.<sup>214</sup> Likewise, in 2020, the *Komen* court addressed compensation-related agreements, and held that the stockholders challenging \$82.4 million in stock awards granted to senior executives failed to explain how the stock awards could be considered per share consideration under a transaction.<sup>215</sup> Perhaps in part because of the attention these cases have brought to the ambiguity (and litigation risk) of specific equal treatment agreements, there has been an increase in the proportion of contractual exceptions.

---

212. For a discussion of the post-*Delphi* landscape, see *infra* Part III.

213. As illustrated in Figure 7, however, the increase of this particular exception is not statistically significant.

214. *In re Delphi Fin. Grp. S'holder Litig.*, No. 7144-VCG, 2012 WL 729232, at \*8-10 (Del. Ch. Mar. 6, 2012). For a discussion of the facts, reasoning, and outcome of the case, see *supra* Section I.C.

215. See discussion *supra* Section I.C; see also *Brokerage Jamie Goldenberg Komen Rev Tru U/A 06/10/08 Jamie L Komen Tr. for Komen v. Breyer*, No. 2018-0773-AGB, 2020 WL 3484956, at \*1, \*13 (Del. Ch. June 26, 2020).

#### 4. Other Forms: Liquidation & Dividends

While the data above and discussion herein on specific equal treatment agreements focus on transactions because the sale of the company (and any premium received) is one of the most important events for a shareholder, the same general trends are present in other types of specific equal treatment agreements. A substantial majority (88%) of the charters in the Sample contained a provision for a degree of equal treatment in a liquidation or similar event. The most common of these events are liquidation (99.6%); dissolution (98%); and winding up (88%). The majority of charters expressly cover both voluntary and involuntary liquidation events (74%), while a minority cover “any” liquidation (11%), and some do not specify (15%). The objects are similar to those in transaction-related equal treatment agreements, but with significantly less frequency. The most frequent objects were: ratably, pro rata, or proportionately (82%); equal consideration (26%); and identical consideration (14%).<sup>216</sup> Likewise, the exceptions are also similar to the transaction-specific equal treatment agreements, although again with less frequency: approval by each class or by the minority shareholders (39%); employment and other similar agreements (18%); and voting differences under the charter (7%).

Dividends are another venue for equal treatment agreements and have similar objects to transaction-specific equal treatment agreements. Nearly all (97%) of the charters in the Sample provided for some degree of equal treatment for dividends or distributions. The agreements provided that dividends must be: equal (49%); ratable, pro rata, or proportionate (48%);<sup>217</sup> identical (22%); *pari passu* (16%); same form, kind, or type (10%); on the same payment date (10%); on the same record date (8%);<sup>218</sup> same (not further clarified) (8%); for the same value or amount (7%); or share for share (4%). The most common exceptions are for dividends payable in Class A or Class B stock (86%) and approval by each class or by the minority shareholders (36%).

### III. Implications

The findings in this Article provide critical guidance for dual-class companies in today’s corporate landscape. Moreover, while the analysis in this Article focuses on companies that are dual class in form, because single-class companies can contractually grant special control rights to their insiders

---

216. Several other objects were coded for and occurred in the Sample with 1% or lower frequency, including *pari passu* (1%); same consideration (not further specified) (1%); and share-for-share consideration (1%). Unlike with the specific equal treatment agreements relating to transactions, none of the liquidation provisions provided for the same form, kind, or type of consideration.

217. See generally Min, *supra* note 169 (discussing the meaning of pro rata in dividends).

218. Provisions that used language like “concurrently” and “simultaneously” were coded as being on the same record date.

(resulting in structures that are functionally dual class),<sup>219</sup> many of the implications in this Article extend more broadly to these companies as well. In addition, while this Part examines the implications for a number of corporate players who are subject to equal treatment agreements (or involved in the drafting, enforcement, or interpretation thereof), the impact of these implications extends to a wide range of corporate stakeholders beyond those directly involved with the agreement.<sup>220</sup>

In this Part, the Article turns to the implications of the findings for founders, investors, and issuers, practitioners, and courts. First, for founders, investors, and issuers, this Part highlights the importance, nuance, and power of equal treatment agreements, and also the impact of the current doctrinal landscape on contractual language. These players should take careful note of such factors in evaluating the strength of equal treatment agreements and, ultimately, whether to invest or take a company public under such terms. Next, this Part turns to practitioners, providing insight on which objects and exceptions are critical to include for effectiveness of the agreements and the implications of drafting choices for these provisions. Lastly, this Part turns to courts, arguing that as a result of recent doctrinal developments, sophisticated high-vote stockholders (and their counsel) have an avenue for disparate treatment despite agreeing to equal treatment. Effectively, practitioners and controllers have found a pathway forward to circumvent the protections the Delaware Court of Chancery established in *Delphi*.

Whether equal treatment (and its circumvention) is beneficial or harmful to a company and its minority shareholders of course depends on the particulars of each transaction. In some transactions, an equal treatment agreement will be value-creating. In others, it may prevent a deal, even one that would be favorable to the minority and company, from occurring. Thus, equal (and unequal) treatment agreements are well-suited for individual company- and founder-specific tailoring rather than a one-size-fits-all approach bluntly imposed through regulation or otherwise.<sup>221</sup> Market participants should also develop market norms that vary by industry, maturity, and business model, among other things; indeed, the creation of market norms for greater use of these provisions is underway.<sup>222</sup> The emergence of best practices and consideration of equal (or unequal)

---

219. Recent scholarship examines the ways in which single-class companies grant disproportionate control rights to their insiders through contractual mechanisms. See Shobe & Shobe, *supra* note 31.

220. Proponents of stakeholder governance would add that stakeholder interests are important now more than ever. See, e.g., Martin Lipton, *Further on the Purpose of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 20, 2021), <https://corpgov.law.harvard.edu/2021/07/20/further-on-the-purpose-of-the-corporation/> [<https://perma.cc/7EYX-UN3V>] (arguing that the consideration of shareholders, employees, customers, communities, and other stakeholders is fundamental to the governance and purpose of corporations).

221. See Fisch & Solomon, *supra* note 28, at 1086 (arguing for a tailored approach to sunset provisions for similar reasons). However, without further research even savvy investors and issuers may lack adequate information about equal treatment agreements to fully and accurately price in their features.

222. See discussion *infra* Section III.A (discussing current market practice).

treatment agreements on a case-by-case basis will better align party expectations to outcomes, facilitate efficient deals, and manage moral hazard.

*A. For Founders, Investors, and Issuers*

At the highest level, the variation in the scope and forms of equal treatment agreements in corporate charters indicates the importance of these provisions, particularly given their interaction with economic terms, such as price in the IPO and subsequent transactions.<sup>223</sup> Founders and pre-IPO leadership should carefully consider the benefits of an equal treatment provision, including attracting additional investors at the IPO stage, against its drawbacks. Robust equal treatment agreements are increasingly becoming the norm for dual-class companies, and founders and pre-IPO leadership may have to contend with changing investor expectations as a result. Given the increasing prevalence of equal treatment agreements—over 84% of dual-class companies in the Sample have a general provision, specific provision, or combination of the two—founders and pre-IPO leadership may need a compelling reason to depart from what is now standard market practice. Departure from these norms and “best practices” may be warranted, but it will be up to the issuer (and the investors) to determine whether it is justified and the appropriate price as a result.

Without a provision in the charter that protects low-vote stockholders from disparate treatment in a corporate transaction, the minority stockholders and post-IPO boards of directors are likely to find themselves between a rock and a hard place when a transaction is favorable as a whole, but the high-vote controllers insist on disparate treatment at the minority’s and firm’s expense. Indeed, this precise issue arose in *Delphi* when Rosenkranz credibly threatened to veto the deal if he did not receive additional consideration.<sup>224</sup> And in the wake of *Delphi*, founders may emphasize that companies and low-vote stockholders are on notice of the potential for such actions.

While controllers may still attempt to force unequal treatment, the mere presence of an equal treatment agreement can afford the low-vote stockholders some remedy. Thus, controllers should take care to not construe the ability to amend the charter<sup>225</sup> as a risk-free means of escaping equal treatment obligations. For example, in *Delphi*, the Delaware Court of Chancery noted that the low-vote stockholders would likely have been successful in pursuing post-close damages

---

223. When a controller sells their right to a control premium to the low-vote Class A stockholders through an equal treatment agreement, one would expect the Class A stockholders to pay more than they would have without the equal treatment protections. Accordingly, the presence of an equal treatment agreement can affect not only the IPO price but also the subsequent value of the Class A (and Class B) shares. *See generally In re Delphi Fin. Grp. S’holder Litig.*, No. 7144-VCG, 2012 WL 729232, at \*1, \*16 (Del. Ch. Mar. 6, 2012) (noting that when there is an equal treatment agreement, a controller “[sells] his right to a control premium to the Class A stockholders via the Charter” and therefore “cannot extract a second control premium” in a later transaction “at the expense of the Class A stockholders”).

224. *Id.* at \*1.

225. *See generally* DEL. CODE ANN. tit. 8, § 242 (b)(1) (2022) (provision on amending a corporate charter).

at trial.<sup>226</sup> Accordingly, while the court may be reluctant to enjoin a transaction, there is a possibility of remedies post-close when low-vote shareholders have contractual rights to equal treatment.<sup>227</sup> Moreover, a controller may be incentivized to settle, as Rosenkranz did in *Delphi*, when there is an equal treatment agreement at play.<sup>228</sup>

Founders, investors, and post-IPO boards should also be cognizant of the bounds of any general *and* specific equal treatment agreement. In a transaction context, sell-side boards should evaluate what actions are prohibited under the equal treatment agreement. For example, boards should consider not only if there is a requirement to treat classes of common stock “equally,” but also more nuanced distinctions on permissible forms of disparate treatment, like whether issuing stock to one class and cash to another is allowed under the particular equal treatment provision in question.<sup>229</sup> Boards of directors should also carefully evaluate whether it makes best business sense to structure a deal to fall within an exception to the equal treatment agreement, or whether it would be better as a business matter to structure a transaction so that all stockholders are treated equally.

One of these means of circumventing equal treatment obligations, a minority-consent exception, remain untested but has been embraced as a promising alternative for founders and other high-vote holders.<sup>230</sup> By including an exception in the charter for when the minority approves of unequal consideration, founders have effectively found a way to circumvent *Delphi*. They have simply done so in the charter *ex ante* rather than through a carveout added

226. *See id.* at \*21.

227. In many states, including Delaware, investors may also benefit from appraisal rights, a statutory remedy available to stockholders who object to mergers or certain other corporate transactions. This remedy typically allows dissenting stockholders to require that the corporation buys their stock at its “fair value” immediately before the transaction or other corporate action. *See, e.g.*, DEL. CODE ANN. tit. 8, § 262 (2022). However, Delaware courts remain largely ambivalent to the value of control, and appraisal litigation has been decreasing recently due to developments in Delaware case law that often determine the “fair value” as at or below the negotiated deal price. *See, e.g.*, DFC Glob. Corp. v. Muirfield Value Partner’s, L.P., 172 A.3d 346, 349 (Del. 2017); Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 6 (Del. 2017); *In re* Appraisal of SWS Grp., Inc., 2017 WL 2334852, at \*1 (Del. Ch. May 30, 2017), *aff’d*, Merlin Partners, LP v. SWS Grp., Inc., 181 A.3d 153 (Del. 2018); ACP Master, Ltd. v. Sprint Corp., 2017 WL 3421142, at \*1 (Del. Ch. Jul. 21, 2017), *aff’d*, 184 A.3d 1291 (Del. 2018). Furthermore, not all stockholders are entitled to appraisal and, even when a stockholder is statutorily entitled to such right, the Delaware Court of Chancery has held that stockholders can contractually waive their statutory right to bring an appraisal action. *See, e.g.*, Manti Holdings, LLC v. Authentix Acquisition Co., 2018 WL 4698255, at \*3 (Del. Ch. Oct. 1, 2018). Appraisal rights are also subject to exceptions, including a “market-out” exception and *de minimis* exception. *See* DEL. CODE ANN. tit. 8, § 262b(1)-(2) (2022); *id.* § 262(g). Appraisal risk resulting from statutory provisions like § 262 may contribute to the appeal and frequency of pro rata consideration in corporate transactions.

228. In the wake of *Delphi*, for example, controller Rosenkranz had to return a portion of the disparate consideration to the low-vote stockholders. *See* Transcript of Settlement Hearing, *In re* Delphi Fin. Grp. S’holder Litig., 2012 WL 729232 (No. 7144-VCG), 2012 WL 5249055. For a discussion of the adequacy of the damages following *Delphi*, see *infra* text accompanying notes 294-298.

229. Compare The Estee Lauder Companies Inc., Restated Certificate of Incorporation § 4.2(g) (Nov. 16, 1995) (providing for an “equal” amount per share), with Cal-Maine Foods, Second Amended and Restated Certificate of Incorporation, art. IV (July 20, 2018) (providing for the right to “the same form and amount of consideration on a per share basis”).

230. *See* discussion *supra* Section II.B.3.



ex post, but the same kind of shareholder approval is required to sanitize the unequal consideration in each case.

The exception for disparate treatment of Class A (low-vote) and Class B (high-vote) stock when each class of stock, voting separately, approves such treatment seems appealing at first glance. Indeed, in many other facets of corporate law, minority approval can function as a cleansing mechanism.<sup>231</sup> However, such provisions can fail to protect minority investors in a dual-class entity. As Rosenkranz illustrated in *Delphi*, a class with greater voting power can compel the minority to choose between a favorable deal with disparate deal price allocation or no deal at all. Just as Rosenkranz compelled the low-vote stockholders to amend the charter to remove an equal treatment agreement, so too could high-vote stockholders compel low-vote stockholders to vote in favor of unequal treatment. Recall that in Delaware, amending the charter requires a majority vote of each class of stock.<sup>232</sup> As a result, an exception in the equal treatment agreement is susceptible to the same issues as permitting a charter amendment to remove an equal treatment agreement. Effectively, when minority consent is sought in the context of a threat to prevent a deal, the minority investors have little choice but to approve disparate treatment so long as the transaction is not less desirable than no deal at all. Thus, when reaching an investment decision, low-vote minority investors should be skeptical of exceptions for approval by each class voting separately.

In considering exceptions besides those relating to approval by the low-vote stockholders, investors may look to corporate charters that have an exception for differential treatment that reflects disparate rights already established under the charter. For example, permitting consideration that consists of stock with voting rights that match a pre-merger charter would preserve stockholder expectations (by reflecting the same provisions the stockholder agreed to when purchasing their shares) and provide a degree of flexibility to preserve the high-vote stockholders' ability to influence the future direction of the company. In addition, an exception for when a merger agreement gives each stockholder the ability to elect the form of consideration they would prefer to receive in the deal (e.g., stock, cash, or a mix of stock and cash) may benefit all stockholders, including founders and low-vote stockholders. These exceptions are surprisingly uncommon, present in less than 10% of dual-class charters. Theoretically, without an exception for elections, any merger agreement that allows stockholder elections would almost certainly lead to a violation of an equal treatment agreement when stockholders of each class invariably make different elections. Thus, an exception for elections plays an important role in providing flexibility in structuring transactions, promoting freedom of shareholder choice, and minimizing unnecessary litigation risk.

---

231. For example, in one of the Delaware Supreme Court's landmark decisions, the court established that certain transactions would be reviewed under the highly deferential business judgment standard of review only when conditioned, in part, on a majority-of-the-minority vote. *See Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014).

232. DEL. CODE ANN. tit. 8, § 242(b)(2) (2022).

Lastly, the Sample illustrates how companies in different industries adopt different—or fewer—equal treatment agreements. Variation in equal treatment agreements, both in frequency and kind, may be explained by the relative experience of each industry (and its issuers and investors) or by the unique features of the industry. The Technology sector, for example, may have an outsized representation of highly involved founders with strong idiosyncratic visions.<sup>233</sup> Some support for this idea may come from the proliferation of Class C nonvoting stock in technology companies like Google. Heightened frequency of dual-class IPOs leads to more experience (among issuers, investors, and practitioners) and more robust charters. Of course, because a difference in the quality of legal services provided by practitioners may explain part of the variation in equal treatment agreements,<sup>234</sup> this Article also provides guidance for practitioners.

### *B. For Practitioners*

As a threshold matter, practitioners should carefully evaluate the impact of any general and specific equal treatment agreement in drafting charters and advising clients. There is some debate among practitioners on whether a general provision, on its own, would require equal treatment in the context of a merger or other similar transaction. Perhaps contributing to this uncertainty is that scholars and practitioners tend to use the phrase “equal treatment agreements” (without a general or specific classification) to refer only to specific equal treatment agreements.<sup>235</sup> But most charters have a general equal treatment agreement.<sup>236</sup> Moreover, in over a fifth of dual-class charters there is no specific equal treatment agreement whatsoever; the general equal treatment agreement stands alone.

In the absence of a specific equal treatment agreement, a general equal treatment agreement should be read as capturing an inclusive set of events, including mergers and other transactions. A general equal treatment agreement typically requires that: “*Except as provided in [the charter], the Class A Common Stock and the [Class B] Common Stock shall have the same rights and privileges and shall rank equally, share ratably and be identical in all respects as to all matters.*”<sup>237</sup> There are two particularly noteworthy features about a

---

233. See Goshen & Hamdani, *supra* note 66.

234. An inquiry into the sufficiency of the market for legal services in contractual protections of dual-class companies warrants further exploration. The use and strength of limitations like sunsets and equal treatment agreements may vary by the size of the law firm, the firm’s location, or other factors. See generally John C. Coates, IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CAL. L. REV. 1301 (2001) (discussing law firm size and experience to explain, in part, the variation in takeover defenses and addressing its implications).

235. In Kirby Smith’s essay, for example, Smith states that “the equal treatment clause [is] a clause that requires all share classes to receive equal consideration in the event of an acquisition.” Smith, *supra* note 171, at 543.

236. See discussion *supra* Section II.A.

237. A.O. Smith Corp., Restated Certificate of Incorporation § 4(A) (Apr. 11, 2016) (emphasis added).

typical general agreement. First, the scope is broad—it applies to “all matters.” Second, it provides for a high degree of equality—“identical in all respects.” Reading the general equal treatment provision to require equal treatment in a transaction context is aligned with both the plain language and plain meaning of the term. “Identical” means just that: the classes of stock must be treated exactly the same,<sup>238</sup> and “all respects and all matters” could hardly be more inclusive. Thus, to the extent an equal treatment agreement is not value-maximizing in a transaction, having the specific agreement is typically more beneficial than not, at least insofar as the charter contains a general agreement that would capture all events that might otherwise be in the specific agreement.<sup>239</sup>

When a charter contains both a general and specific provision that conflict with one another, a question may arise as to which governs the equal treatment requirements in, for example, a merger. It is well-established under principles of contract drafting and interpretation that the specific language in a contract controls over general language; when there is an inconsistency between the general and specific provisions, the specific provisions qualify the general one because the specific provisions are assumed to more exactly express the parties’ intent.<sup>240</sup> Moreover, general provisions typically contain an exception for “as otherwise provided” in that article or the charter as a whole. Thus, when a charter has relevant terms provided elsewhere (e.g., a specific provision), the specific provision governs in the event of any conflict. Because of both standard principles of contract interpretation and an express exception included in the general provision, when a charter contains a general and specific provision in conflict with one another, the specific provision would control.

However, the question is more nuanced when the general and specific provisions interact without such a direct conflict.<sup>241</sup> Recall the two features of note in the general equal treatment agreement: the broad scope (“all matters”) and the high degree of equality (“identical in all respects”). This requirement for “identical” treatment is present in 95% of general equal treatment agreements. In contrast, specific provisions require the exacting level of identical consideration in only 28% of cases. Moreover, as highlighted in Section II.C, the specific equal treatment agreement typically covers only a handful of specified transactions. While these specific agreements nearly always cover M&A (100%) and consolidations (99%), they less frequently mention asset sales (43%), other

---

238. While “identical” is arguably the most demanding of all equality qualifiers, to the extent a party thinks otherwise, the general provision typically contains the additional qualifiers of “same rights and privileges,” “rank equally,” and “share ratably.”

239. Despite the proliferation of exceptions in specific agreements, the general agreements by and large contain no exceptions other than one for differences specified in the charter. One avenue to address this general provision dilemma is to simply add an exception to the general provision for consideration in transactions.

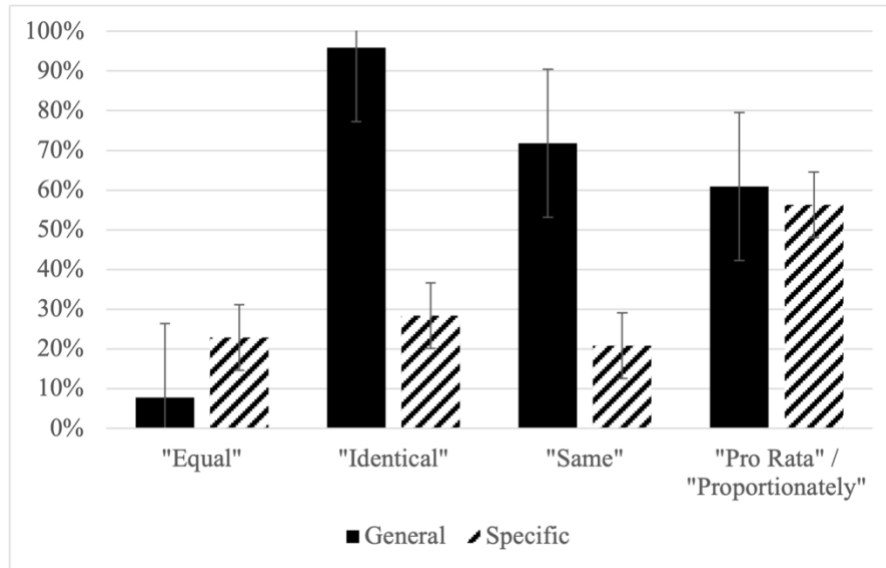
240. See, e.g., *Stasch v. Underwater Works, Inc.*, 158 A.2d 809, 812 (Del. 1960).

241. This increasing importance of the interaction *between* contractual provisions is reflective of corporate contracting more generally. See, e.g., Subramanian & Petrucci, *supra* note 189; Hwang & Jennejohn, *supra* note 189

changes of control (29%), or tender offers (14%).<sup>242</sup> Thus, the typical specific equal treatment agreement provides for a narrower scope of events and lower degree of equality.

Figure 8 provides a side-by-side comparison of the most common terms of equality between the general and specific provisions in light of the data in Part II:

Figure 8. General vs. Specific Equality



When a type of transaction is not provided for in the specific provision, it would appear to fall within the more exacting equality requirements of the general provision. As a result of these structures, a typical charter may be unintentionally providing for two distinct standards of treatment depending on the transaction structure: one less onerous standard under a specific equal treatment agreement for a transaction like a merger (“equal consideration”), and one more stringent standard under a general equal treatment agreement (“identical in all respects”) for all matters not otherwise specified in the charter. A tender offer or asset sale, intentionally or unintentionally, would not fall within the specific provision because it was not enumerated. Rather, it would fall under the general provision that applies to everything else. As a result, despite being

242. Some of these transaction types, like tender offers, raise an interesting question on the purpose and intent behind the provisions. In a tender offer scenario, a third-party offeror is not party to the charter, and therefore cannot be directly bound by the provision. However, as provided in some charters, the inclusion of tender offers may be targeting self-tenders and tender offers by a third party pursuant to an agreement to which the company is a party. See Google Inc., Amended and Restated Certificate of Incorporation (Oct. 2, 2015).

excluded from the specific provision, tender offers and asset sales would require the heightened “identical” treatment standard while a merger would require “equal” treatment. The Sample reflects this real risk: a minority of specific equal treatment agreements expressly cover tender offers and asset sales, and a minority (28%) of specific provisions require identical consideration. In contrast, nearly all (95%) of the general agreements require identical treatment.

The dilemma that arises due to this interaction between the general and specific equal treatment provisions has several takeaways for practitioners. First, to the extent a specific provision is meant to encompass all transactions, practitioners should specify an inclusive set of transactions covered by the specific provisions and include a catch-all term for other similar transactions. Using defined terms for “Change of Control” or “Transaction,” along with these catch-all terms, are tactics that can help with inclusivity. This inclusion would help avoid imposing differing standards of equality under a general versus specific provision, and would be critical if the specific agreement stands alone as the sole provision for equal treatment. When a specific provision operates without a general provision, the hazards of underinclusive coverage are magnified. Underinclusivity provides a backdoor for disparate treatment under certain types of transactions. It also creates perverse incentives for the controller to withhold support for certain transaction structures purely to avoid running afoul of the equal treatment provision, even if such structures are more desirable or efficient for the company and other shareholders. Second, to the extent a transaction is intended to be excluded from equal treatment, it should be accounted for in the specific provision (by excluding it explicitly or implicitly from the list of transactions) *and* the general provision (by excluding it explicitly). Third, practitioners should evaluate whether there are differing standards between the general and specific provisions, and if that difference is intentional.

With regards to this third point, there is some ambiguity on the hierarchy of equality. As such, practitioners should select the terminology with care. The terms “identical,” “equal,” “pro rata,” and “same” are all common in equal treatment agreements but not further defined in corporate charters. These could simply be construed as synonyms for one another,<sup>243</sup> providing precisely the same protection. After all, *Merriam-Webster’s* defines “identical” as “being the same”<sup>244</sup> and “same” as “resembling in every relevant respect.”<sup>245</sup> There is room for such terms to be interpreted interchangeably, and some courts have equated their definitions in contractual, statutory, and other contexts.<sup>246</sup> In contrast,

---

243. For example, *Merriam-Webster’s* thesaurus provides that “same” and “equal” can both be considered synonyms of “identical.” See *Identical*, MERRIAM-WEBSTER (2022).

244. See *id.*

245. See *Same*, MERRIAM-WEBSTER (2022). The second listed definition uses “identical.”

246. See, e.g., *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 632 (4th Cir. 2015) (citing a dictionary defining “same” as “[i]dentical or equal; resembling in every relevant respect”); *Miss. Poultry Ass’n v. Madigan*, 992 F.2d 1359, 1364 (5th Cir. 1993) (stating that “any fair reading of the dictionary definition

“equal” is defined as “of the same measure, quantity, amount, or number.”<sup>247</sup> While a term like “identical” suggests the same amount *and form* of consideration (among other features, such as the same timing of receiving the consideration), “equal” may be read as simply a comparable amount of consideration (e.g. \$100 in cash per share vs. \$100 in acquirer stock per share). Indeed some courts have done precisely this by relying on a dictionary defining “equal” as “of the same measure, quality, amount, or number as another” when determining that a charter’s plain language (“equal per share payments”) allowed for different *forms* of consideration.<sup>248</sup>

“Pro rata” is defined by *Merriam-Webster* as “proportionately according to an exactly calculable factor” (which is in turn defined as “corresponding in size, degree, or intensity” or “having the same or a constant ratio”).<sup>249</sup> As scholars have noted in the stock dividend context, the meaning of terms like “pro rata” is ambiguous.<sup>250</sup> When stock is distributed pro rata, a question arises as to whether pro rata distribution of stock requires the same amount, form, and timing. The ambiguity turns on whether the type of stock distributed must be the same to all stockholders (e.g., Class A distributed to both Class A and Class B stockholders) or instead whether it should correspond to the class receiving the stock (e.g., Class A distributed to Class A stockholders and Class B distributed to Class B stockholders).<sup>251</sup> The outcome of this inquiry can have a meaningful impact on the voting power of the respective stockholders.<sup>252</sup> Stock or mixed-consideration deals raise similar inquiries under equal treatment agreements that require pro rata treatment. Practioners might simply define or clarify these terms to resolve

---

of ‘the same’ overwhelmingly demonstrates that ‘the same’ is congruent with ‘identical’”); *United States ex rel. Holloway v. Heartland Hospice, Inc.*, 960 F.3d 836, 850 n.11 (6th Cir. 2020) (explaining that “[s]ame’ means identical”); *United States v. Washington*, 994 F.3d 994, 1005 (9th Cir. 2020) (Collins, J., dissenting) (defining “same” as “[i]dential or equal; resembling in any relevant respect”), *rev’d and remanded*, 142 S.Ct. 1976 (2022); *Catalyst Pharms., Inc. v. Becerra*, 14 F.4th 1299, 1307-08 (11th Cir. 2021) (defining “same” as “being one without addition, change, or discontinuance: identical; being the one under discussion or already referred to”); *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382-83 (Fed. Cir. 2001) (noting that the ordinary meaning of “identical” is either “exactly the same or the same with minor differences” and opting for the latter).

247. *See Equal*, MERRIAM-WEBSTER (2022).

248. *See, e.g., Se. Pa. Transp. Auth. v. Volgenau*, No. 6354-VCN, 2013 WL 4009193, at \*24-26, \*25 n.194 (Del. Ch. Aug. 5, 2013) (emphasis added).

249. *See Pro Rata*, MERRIAM-WEBSTER (2022); *Proportional*, MERRIAM-WEBSTER (2022).

250. *See Min*, *supra* note 169, at 147. In addition, the Delaware Supreme Court has suggested “that an unequal *effect* without an upfront unequal *treatment* can still be fair.” *Id.* at 148 (discussing *Williams v. Geier*, 671 A.2d 1368, 1370 (Del. 1996)); *see James D. Cox, Equal Treatment for Shareholders: An Essay*, 19 CARDOZO L. REV. 615, 619-20 (1997).

251. *See Min*, *supra* note 169, at 152-53.

252. In the dividend context, for example, the CBS board recently took an unprecedented approach to stock dividends to undermine a controlling shareholder’s control by distributing voting stock to all shareholders. *See Matt Levine, CBS Wants to Get Rid of a Shareholder*, BLOOMBERG (May 15, 2018, 9:36 AM), <https://www.bloomberg.com/view/articles/2018-05-15/cbs-wants-to-get-rid-of-a-shareholder> [<https://perma.cc/H3J3-UENW>]; Jessica Dye, *CBS Board Seeks Court Approval for Special Dividend*, FIN. TIMES (May 17, 2018), <https://www.ft.com/content/81db7e00-5a26-11e8-b8b2-d6ceb45fa9d0> [<https://perma.cc/WE3W-SGLY>]; *Min*, *supra* note 169, at 119-21.

the ambiguous spectrum of equality. Doing so may reduce or avoid entirely costly disputes resulting from vague charter language.<sup>253</sup>

When the degree of equality is narrow or ambiguous, sophisticated controllers may attempt to extort disparate treatment in ways other than differences in the amount of consideration per share. Indeed, this was precisely the conduct at issue in *QAD*, where Class B (high-vote) stockholder Lopker entered into a side agreement that allowed her to exchange over 40% of her QAD shares for equity (rather than cash) in the post-close company.<sup>254</sup> Receiving equity consideration would provide Lopker with many benefits that the low-vote stockholders would not receive, including sharing in the future growth of the surviving company and tax-deferral benefits.<sup>255</sup>

Practitioners should pay close attention not only to the “same amount” and “same form” objects of equal treatment provisions, but also to any language that permits unintended disparate treatment. For example, even a provision establishing the same form and type of consideration may fall short of “identical consideration,” if, for example, the timing differs. Indeed, while exceedingly rare, charters can contemplate this distinction in timing. Berkshire Hathaway’s charter, for example, discusses whether the “consideration to be received by holders of Class B Common Stock [is] paid in the same form *and at the same time* as that received by holders of Class A Common Stock.”<sup>256</sup> Practitioners can also leverage higher thresholds of equality like “identical in all respects” to avoid unintentional loopholes in language and unwieldy length of equal treatment provisions.

Also of note linguistically is the framing of the classes and whether the parties subject to the equal treatment agreements are referenced collectively or individually. For example, compare “the Class A stockholders will receive no less per share than the Class B stockholders” with “the Class A stockholders will receive no less per share than *any* Class B stockholder.” The use of “any” puts pressure on the exceptions, which become critical to ensure standard day-to-day agreements like employee-compensation arrangements and stock awards for executives do not run afoul of the equal treatment agreement. This dilemma is

---

253. Of course, parties may draft such ambiguous or “incomplete” contracts that result in litigation and later uncertainty for a variety of reasons. Parties may prioritize the goal of decreasing front-end contracting costs, the power of informal reputational sanctions on a party’s actions, and the “collaborative intent” of multiple internal constituencies involved in consolidating ideas into terms reflective of the company’s position. *See generally* Cathy Hwang, *Collaborative Intent*, 108 VA. L. REV. 657 (2022); *see also, e.g.*, Stewart Macaulay, *Freedom from Contract: Solutions in Search of a Problem?*, 2004 WIS. L. REV. 777; Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003). While factors like these may be driving some of the contractual ambiguity in equal treatment agreements, unlike many other types of agreements, much of the equal treatment language is consistent between charters drafted by the same firm, suggesting that merely refining a template agreement may have a powerful ripple effect with relatively little increased front-end contracting costs.

254. *QAD Complaint* ¶ 4 (emphasis added).

255. *Id.* ¶¶ 44, 42.

256. Berkshire Hathaway Inc., Restated Certificate of Incorporation § 4.2(E) (Feb. 24, 2010) (emphasis added).

not entirely hypothetical. Recall that in *QAD*, Lopker entered into a side agreement providing for a different form of consideration despite a charter provision requiring that the amount and form received by Class A be “no less favorable than the per share consideration, if any, received by *any* holder of the Class B Common Stock.”<sup>257</sup> This equal treatment provision prohibits disparate treatment in favor of “any” holder of Class B common stock, not merely unequal treatment in favor of Class B common stock *as a whole class*. Thus, while the benefit received in *QAD* appears to be individual to Lopker and not for the class at-large, the broader qualifier increases the risk that conduct could fall within the provision.

Of course, one of the primary considerations of any equal treatment agreement is its economic efficiency (or lack thereof), which is perhaps best illustrated with a hypothetical. Let us assume that a dual-class company is worth \$100, and the controller owns 20% of the company but controls its operations through holding the high-vote stock. Traditionally, the controller’s stake would be worth 20% of the company’s value, or \$20. However, it is necessary to also account for control as a valuable commodity. By virtue of having control of the company, high-vote controllers can, among other things, extract value at the minority’s expense through private benefits and self-dealing.<sup>258</sup> *Delphi* provides an illustrative example of a controller’s ancillary benefits of control. Recall in *Delphi* that RAM, a company founded by Rosenkranz, had been providing consulting services to Delphi for decades.<sup>259</sup> Delphi’s stockholders have characterized these contracts as “nothing but a device for Rosenkranz to skim money from Delphi for work Delphi could have provided for itself at lower cost” and a usurped corporate opportunity.<sup>260</sup> The Delaware Court of Chancery also highlighted the questionable nature of the contracts, noting that even Delphi’s and Rosenkranz’s counsel “seemed unclear as to exactly what tangible value the RAM Contracts bring to Delphi” perhaps because they are “sham agreements through which Rosenkranz has [been] skimming money from Delphi since the Company’s inception.”<sup>261</sup> It is doubtful that a disinterested board would continue to facilitate such contracts; thus, a controller like Rosenkranz could not be guaranteed these benefits once no longer in control of the corporation.<sup>262</sup>

What does this mean for our hypothetical \$100 company? Because of the value of control, theoretically the sale of a controlling stake in a company should yield more than its pro rata share, while the sale of a minority stake should yield less than its pro rata share. While ordinarily a 20% equity stake would be worth

---

257. *QAD* Complaint ¶ 4 (emphasis added).

258. For a discussion of the value of control to controlling shareholders, *see supra* Part I; *see also* Goshen & Hamdani, *supra* note 66; Smith, *supra* note 171, at 550.

259. *In re Delphi Fin. Grp. S’holder Litig.*, No. 7144-VCG, 2012 WL 729232, at \*8-10 (Del. Ch. Mar. 6, 2012).

260. *Id.* at \*2.

261. *Id.* at \*4.

262. The RAM contracts were easily terminable upon thirty days’ notice from either RAM or Delphi. *Id.* at \*1.



\$20, a controller would value this stake higher than that amount because of control benefits like these. As such, let us assume that our controller extracts \$10 of company value through self-dealing behavior. To the controller, their 20% stake is now worth \$28, while the low-vote stockholders' stake is worth \$72.<sup>263</sup> For simplicity, assume the controller or minority would sell for any value over \$28 or \$72 respectively.

Now, let us assume that there are two competing offers for the firm and no equal treatment agreement. Generally speaking, the controller's incentives are to maximize the controller's share rather than enlarge the total consideration received.<sup>264</sup> Between an offer of \$175 for the firm shared pro rata among the stockholders (i.e., \$35 for the controller and \$140 for the minority), and an offer of \$125 for the firm with a higher proportion going to the controller (for example, \$40 to the high-vote controller and \$85 to the public stockholders), the controller will be inclined to support the lower offer. Both offers provide a premium above the market value of the shares, even accounting for the controller's valuation of their shares. Accordingly, both classes of shareholders and the company would favor either option over going forward without a deal. Yet, because the controller has an effective veto over any proposed transaction,<sup>265</sup> they can vote down the higher offer to the detriment of the minority and company as a whole. An equal treatment agreement, by requiring that the classes be treated the same, would incentivize all stockholders, including the controller, to negotiate for and accept the highest overall price (here, \$175). In this scenario, an equal treatment agreement would be value-maximizing.

However, the absence of an equal treatment agreement can be more efficient in other scenarios. After all, the "sizable private benefits of control can also lead to an inefficient lock-in, where a more efficient buyer (who can generate a higher stream of cash-flows) is unable to purchase the control block from the controlling shareholder."<sup>266</sup> This lock-in effect can be magnified in an equal treatment context. Assume that there is only one offer of \$125 for the company. Because this offer exceeds the value of the company, the board would prefer this offer over going forward without a deal. If there were an equal treatment agreement, the high-vote controller would receive 20% of this offer (\$25) and the low-vote stockholders would receive 80% of the offer (\$100). Because the controller values their stake at \$28, the controller would credibly

---

263. The company is now valued at only \$90 because the controller has extracted \$10 of value. The controller owns \$10 plus 20% of the company's value ( $0.2 \times \$90$ ).

264. Some controllers, of course, have unique emotional connections to the company that may also necessitate a higher price for them to be willing to alienate their stock. *See generally* Thomas M. Zellweger & Joseph H. Astrachan, *On the Emotional Value of Owning a Firm*, 21 FAM. BUS. REV. 347, 347 (2008) (discussing the impact of the emotional value in ownership).

265. Under Delaware law, a merger requires approval of "a majority of the outstanding stock of the corporation entitled to vote." DEL. CODE ANN. tit. 8, § 251(c) (2022). Because of the dual-class structure, a controller has effective control of the vote.

266. Albert H. Choi, *Concentrated Ownership and Long-Term Shareholder Value*, 8 HARV. BUS. L. REV. 53, 76-77 (2018).

## Equal Treatment Agreements

and in good faith vote down this deal.<sup>267</sup> If subject to an equal treatment agreement, this offer would result in no deal because the amount paid to the controller (\$25) is below the controller's valuation of their shares (\$28). This is a lose-lose-lose situation for the company, controller, and minority shareholders, who could all benefit from the overall above market price. If there were no equal treatment requirement, the "fix" here would be simple: by slightly adjusting the consideration (for example, \$30 to the controller and \$95 to the minority), the deal would go through. The controller and minority receive a premium on the value of their shares, and the minority would prefer this premium to the alternative of no deal. As long as the minority receives a premium, a deal on unequal terms is a more favorable outcome.

Unequal treatment agreements can offer a middle ground between rigid equality and allowing the controller free rein to act to the detriment of the minority. These agreements, while exceedingly rare, are structured nearly identically to specific equal treatment agreements except that they provide for a precise amount of unequal treatment with regards to the consideration received. For example, Biglari Holdings's charter, which designates the Class A stock as the high-vote stock, provides, in part:

[I]n the event of a merger, consolidation or other business combination . . . the holders of the [nonvoting] Class B Common Stock shall receive the same form of consideration and one-fifth (1/5) of the amount, on a per share basis, as the consideration, if any, received by holders of the [voting] Class A Common Stock in connection with such merger, consolidation or combination.<sup>268</sup>

At first glance, an unequal treatment agreement may seem problematic for many of the same reasons as equal treatment agreements. Indeed, the approach to unequal treatment agreements in some charters would likely decrease a controller's willingness to alienate their shares, for example by providing for a fixed value (rather than proportion) paid to one class.<sup>269</sup> But when properly drafted and implemented to align incentives and provide for a sufficient unequal treatment ratio, such unequal treatment agreements can be beneficial for a number of reasons. When bargained-for inequality is included from the outset, the low-vote stockholder is on notice about potential unequal treatment and can

---

267. For Rosenkranz to be incentivized to vote in favor of the transaction, he would not only need to receive a premium on his shares, but also compensation for potential loss of benefits like the RAM contracts—perhaps in part why his threat to vote against the transaction was so credible. *Delphi Fin. Grp.*, 2012 WL 729232, at \*1.

268. Biglari Holdings, First Amended and Restated Articles of Incorporation, art. IV.(3) (Feb. 5, 2018). In some instances, the unequal treatment provision favors the *low-vote* stockholders and decreases a controller's willingness to alienate. *See, e.g.*, The Cato Corp., Amended and Restated Certificate of Incorporation, art. IV.B(6) (May 21, 2020) ("In the event of . . . a merger or consolidation of the Corporation . . . holders of Class A Common Stock [low-vote stock] shall be entitled to receive out of the net assets of the Corporation, the amount of \$1.00 per share, prior to any distribution to be made with respect to Class B Common Stock [high-vote stock].").

269. *See, e.g.*, The Cato Corp., Amended and Restated Certificate of Incorporation, art. IV.B(6) (May 21, 2020).

adjust the value they are willing to pay per share accordingly. As a result, adhering to the provision will align with stockholder expectations for both the high-vote stockholders and low-vote stockholders. Furthermore, when a provision, like Biglari's, ties the compensation of the high-vote shares to a fixed proportion of the total compensation, the controller has an incentive to maximize the consideration as a whole. Moreover, the high-vote stockholder is incentivized to pursue and accept transactions that they would not be willing to support if receiving only their pro-rata share. By connecting the consideration of each class to one another without mandating complete equality, an unequal treatment agreement can function as a value-maximizing provision.

Let us return to the dilemma of the \$125 offer for our dual-class company. Recall that a traditional equal treatment agreement is economically inefficient here, as the controller must receive at least \$28 to sell and the buyer is unable to compensate all shareholders at that control-premium price.<sup>270</sup> However, an unequal treatment agreement can lead to an efficient outcome in both the high- and low-offer scenarios. Assume that our dual-class company is subject to an unequal treatment agreement that requires that the high-vote class receives the same form and 2/5 the total amount of consideration in any transaction. As a result, the controller would receive \$50, and the low-vote stockholders would receive \$75. Because both classes are receiving a premium on the value of their shares, each will vote in favor and the deal will go through. Accordingly, unequal treatment agreements can facilitate economically efficient deals that may not occur if all stockholders were compelled to receive the same consideration per share.

Of course, the efficiency and utility of unequal treatment agreements rest on a variety of assumptions, including the adequacy of any unequal treatment ratio and the perception of them at the IPO stage. The challenges that arise with unequal treatment agreements are not dissimilar to sunsets, which are typically implemented at the IPO stage but depend on factors that will vary subsequent to the IPO.<sup>271</sup> The appropriate control premium in light of the benefit accrued by and from the controller will often not be apparent at the IPO stage. That is not to say that there are no checks on the unequal treatment allocation. The degree of inequality is subject to negotiation by investors, the controller, and underwriters, with input from expert advisers and practitioners. While the market can function as a litmus test of what is appropriate for the unequal treatment ratio, it may also inadequately price the value an unequal treatment can provide. The market may undervalue an unequal treatment agreement in part because its terms expressly provide for the low-vote shareholders to receive less than their pro rata share. In contrast, an equal treatment agreement, which would presumably result in a higher price at the IPO stage, purports to assure complete equality. (This is despite the reality of the post-*Delphi* landscape, in which most equal treatment

---

270. The buyer would need to pay a total of \$140 for the firm (\$28 for the 20% controller's stake and \$112 for the remaining 80%), which exceeds the \$125 price the buyer is willing to pay.

271. See Fisch & Solomon, *supra* note 28, at 1063, 1082.

## Equal Treatment Agreements

agreements have a minority-consent exception rendering them significantly less potent, if not illusory, and language that falls far short of establishing absolute equality.) Even a charter with no equal treatment agreement, which would theoretically permit even more disparate consideration allocation, may be perceived as a more minority-favorable approach simply because a shareholder would expect to be treated equally as the default.

Importantly, some of these concerns can be mitigated to an extent through amending the charter. Amendment of unequal treatment agreements should not be prohibited *per se*. If an unequal treatment agreement ratio is inadequate (either at conception or from changes over time), charter amendments provide one avenue of recourse. An amendment that is not implemented in connection with a particular transaction presents a lesser threat of pressuring (or coercing) the minority into consenting for reasons other than the merits.<sup>272</sup>

Table 3 illustrates the outcomes discussed above of the low- and high-offer scenarios for companies without an equal treatment agreement, with an equal treatment agreement, and with an unequal treatment agreement:

Table 3. The Efficiency of Equal Treatment

	No Equal Treatment Agreement	Equal Treatment Agreement	Unequal Treatment Agreement
High-Offer Scenario	Inefficient (moral hazard)	Efficient (value-maximizing)	Efficient (value-maximizing)
Low-Offer Scenario	Efficient (deal-maximizing)	Inefficient (no deal)	Efficient (deal-maximizing)

While equal and unequal treatment agreements may offer a promising approach for dual-class charters, their costs and benefits are largely untested. As a result, this Article does not argue for mandatory equal or unequal treatment agreements, but instead for careful consideration and tailoring by practitioners. Ultimately, it is overly simplistic to take a one-size-fits-all approach when determining which of these options to implement. Equal treatment may be desirable for some companies or industries, and undesirable for others. Practitioners must take a nuanced approach in advising their clients on the structure most optimal for the attributes of the particular company (and controller) in question.

---

<sup>272</sup> Indeed, the Delaware Court of Chancery has already recognized that charter amendments, even when they increase a dual-class controller's rights or powers, can be permissible. *See City Pension Fund for Firefighters & Police Officers in City of Miami v. The Trade Desk, Inc.*, No. CV 2021-0560-PAF, 2022 WL 3009959 (Del. Ch. July 29, 2022) (granting a motion to dismiss when a stockholder challenged an amendment to the charter that would extend the duration of the company's dual-class stock (and thus the duration of the co-founder and CEO's control)).

*C. For Courts*

In general, courts should take care to interpret equal treatment agreements by their plain meaning to provide guidance in what is currently a murky governance landscape. With regards to specific equal treatment agreements, courts should also carefully evaluate any efforts to remove or circumvent them. The practitioner response in the wake of *Delphi*—the sharp rise in minority-consent exceptions—may indicate that many practitioners (and their corporate clients) believe the case was wrongly decided. Indeed, practitioners dissatisfied with the outcome in *Delphi* (which effectively prohibited using a charter amendment to remove an equal treatment agreement in connection with a transaction) have leveraged minority consent exceptions as a workaround in 76% of cases post-*Delphi*, an increase from 15% pre-*Delphi*. By circumventing *Delphi*'s prohibition on amending the charter (which requires low-vote stockholder approval<sup>273</sup>) but providing an exception for minority consent (which also requires low-vote stockholder approval), savvy founders and practitioners can effectively reach the same outcome through a nominally different avenue.

While equal treatment agreements with exceptions for minority consent or amendment may sound attractive in theory, allowing consent or removal at an opportunistic time guts an equal treatment agreement's power. This is because the high-vote controller now has the right to make a take-it-or-leave-it offer to stockholders. By unambiguously making a commitment to forego the deal entirely unless the high-vote class receives disparate treatment, the high-vote controller can compel the company and low-vote stockholders to consent to unequal treatment.<sup>274</sup> This was precisely the case in *Delphi*. Equal treatment agreements would lose significant meaning if one class of stockholders could extract multiple control premiums at the expense of the low-vote stockholders despite the presence (and bargained-for-exchange) of the initial provision.<sup>275</sup> Of course, the concern with this decreased potency of equal treatment agreements turns on whether these agreements are, at their core, beneficial.<sup>276</sup>

Pressures unrelated to the merits of a proposal can distort the low-vote stockholders' choice in whether to approve a transaction or amendment to the charter. Low-vote stockholders may vote in favor for a variety of reasons despite viewing the offer as inequitable and in direct breach of an equal treatment agreement. For example, a stockholder might reasonably fear that, even if they were to succeed in preventing (or delaying) the transaction from closing, such

---

273. DEL. CODE ANN. tit. 8, § 242(b)(2) (2022) (requiring class-specific approval of a charter amendment if, like with removal of an equal treatment agreement, the change would “alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely”).

274. See THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 24 (1960) (noting that “if the buyer can accept an irrevocable commitment, in a way that is unambiguously visible to the seller, he can squeeze the range of indeterminacy down to the point most favorable to him”) (emphasis omitted).

275. See *In re Delphi Fin. Grp. S'holder Litig.*, No. 7144-VCG, 2012 WL 729232, at \*16 (Del. Ch. Mar. 6, 2012).

276. As illustrated in Section III.B, this circumvention is risky as it can be value-maximizing or to the detriment of the minority and company.

result would negatively impact the value of the target company and harm the company's prospects.<sup>277</sup> In addition to facilitating deals that favor one group of stockholders potentially at the expense of the other and the company as a whole, such pressures may hinder the protection of the stockholders' property rights in their stock.<sup>278</sup>

A number of concerns arise when stockholder choice is distorted. From an economic standpoint, for example, distorted choice may lead to stockholders approving economically inefficient deals. Distorted choice may also threaten corporate legitimacy by undermining the effectiveness shareholder voting and decisionmaking. Protection from coercive pressures at opportunistic times also arguably serves broader societal goals of fairness and equity, and helps safeguard less sophisticated investors who may lack adequate resources, time, or experience.<sup>279</sup>

An increased need for guardrails in transactions involving coercion is also aligned with other areas of corporate law that afford greater protection when coercion is at play. Indeed, the Delaware courts have acknowledged similar coercive pressures in related corporate contexts. For example, in *Sciabacucchi v. Liberty Broadband Corporation*,<sup>280</sup> Vice Chancellor Glasscock held that a stockholder vote to approve stock issuances *and* a voting proxy to the company's largest stockholder was "structurally coerced" because the stockholders were essentially forced to approve *both* transactions to avoid a detriment.<sup>281</sup> As a result, their decision was due to the structural combination of transactions on the ballot, rather than benefit of the transaction alone.<sup>282</sup>

Likewise, when a charter contains an equal treatment agreement, any support by a low-vote stockholder of unequal treatment in a transaction should be because of their evaluation that such treatment would be value-maximizing for that low-vote stockholder. It can be difficult to find support for this proposition in practice, given that the timing of any amendment or waiver of such provisions is often linked to the approval of the transaction itself. As the Delaware Court of Chancery has emphasized, allowing minority approval as an exception to an equal treatment agreement greatly weakens the agreement. In response to Rosenkranz's argument that the Delphi charter permitted amendment, the court stated:

[T]o accept Rosenkranz's argument and to allow him to coerce such an amendment here would be to render the Charter rights illusory and would permit Rosenkranz, who benefited by selling his control premium to the Class A

---

277. See generally Lucian Arye Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1695, 1696 (1985) (discussing the problem of distorted choice in shareholder decision making in the context of tender offers).

278. See *id.* at 1764 n.154.

279. Of course, with regards to large, sophisticated investors, concern with protecting low-vote stockholders may seem paternalistic and a sub-optimal allocation of societal and judicial resources.

280. No. 11418-VCG, 2017 WL 2352152 (Del. Ch. May 31, 2017).

281. *Id.* at \*15.

282. *Id.*

stockholders at Delphi's IPO, to sell the same control premium again in connection with this Merger. That would amount to a wrongful transfer of merger consideration from the Class A stockholders to Rosenkranz.<sup>283</sup>

While "illusory" may be too strong of a characterization (after all, the controller would need to negotiate with the low-vote stockholders and convince them to approve the amendment, which is an additional step that would not be required if there were no equal treatment agreement to begin with), the fact remains that the low-vote stockholders will be left with consideration that falls short of the equal treatment they were originally promised. Accordingly, permitting the Class B (high-vote) stockholders to amend a certificate of incorporation to remove an equal treatment provision, or allowing Class A (low-vote) stockholders to consent to unequal treatment in accordance with an exception to an equal treatment provision, may frustrate fundamental principles of fairness.<sup>284</sup>

A high-vote controlling stockholder is generally entitled under Delaware law to negotiate a control premium for their shares, and free to consider their interests alone in deciding to sell their shares or evaluating the adequacy of a given price.<sup>285</sup> However, a controller foregoes that right when agreeing to a provision that each class must be treated equally.<sup>286</sup> Under a law-and-economics theory, investors consider the benefits and costs at the time of the IPO.<sup>287</sup> Thus, investors will pay more for stock at the IPO if they are provided with protections in the form of an equal treatment agreement. In contrast, when a company goes public without an equal treatment agreement in its charter, an investor would pay less precisely because of the risk of disparate treatment: the stock is less attractive to investors given the absence of such protections. In both cases, the equal treatment agreement (or absence thereof) is priced into the amount an investor is

---

283. *In re Delphi Fin. Grp. S'holder Litig.*, No. 7144-VCG, 2012 WL 729232, at \*16 (Del. Ch. Mar. 6, 2012). See generally Choi & Min, *supra* note 127, at 42 n.177 ("Especially due to the recent rise of dual class stock with concentrated ownership, this [concern with limited judicial oversight and ability to restrict controller abuse] has become much more salient.").

284. See *Delphi Fin. Grp.*, 2012 WL 729232, at \*16 (noting that a controller sells the right to a control premium under an equal treatment agreement, which precludes the controller from extracting a second premium in a later transaction). As the Delaware courts have also noted, the certificate of incorporation is a contract, subject to the implied covenant of good faith and fair dealing. See, e.g., *id.* at \*17; *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010); *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441-42 (Del. 2005) ("Recognized in many areas of the law, the implied covenant attaches to every contract.") (citations omitted). As such, entering into an equal treatment agreement in the form of a provision in the charter, then compelling one class of stockholders to accept an amendment or forego their rights thereunder, is in direct breach of this implied covenant.

285. See *Delphi Fin. Grp.*, 2012 WL 729232, at \*15; see also *Abraham v. Emerson Radio Corp.*, 901 A.2d 751, 753 (Del. Ch. 2006) ("Under Delaware law, a controller remains free to sell its stock for a premium not shared with the other stockholders except in very narrow circumstances.").

286. See *Delphi Fin. Grp.*, 2012 WL 729232, at \*16.

287. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 17-19 (1991) (noting that terms in corporate governance "are fully priced in transactions among the interested parties"); Fisch & Solomon, *supra* note 28, at 1070 ("Under a traditional law and economics analysis, rational investors will take into account the potential costs and benefits of dual class at the time of the IPO.").

willing to pay for the entity's stock.<sup>288</sup> Essentially, when an equal treatment agreement is included in the charter but later amended or rendered obsolete due to subsequent approval of disparate treatment by the low-vote stockholders, the high-vote controller would receive a *second* control premium in a later merger or other transaction. When the high-vote controller gets a second bite of the control-premium apple, it can be both economically inefficient and unfair to the low-vote stockholders.

In addition, an equal treatment agreement creates a contractual (rather than merely moral) imperative for fair treatment: each class must be treated equally, identically, and/or ratably. If behavior that renders equal treatment agreements “illusory” is permissible, the benefits provided by these agreements—and the role they play in facilitating IPOs with dual-class structures—are decreased, if not rendered obsolete entirely. For all these reasons, courts should view a party's efforts to escape their contractual obligations under equal treatment agreements, including when compelling consent from low-vote stockholders in connection with a transaction, with a degree of skepticism.

When it comes to employment and other ancillary agreements, however, such agreements should generally not be construed to fall within an equal treatment agreement. In connection with transactions and as part of the day-to-day management of a company, certain individuals enter into a variety of agreements that provide for some compensation or other benefits. These agreements may include consulting agreements, severance agreements, and noncompetition agreements. In *Komen*, the Delaware Court of Chancery addressed a challenge to compensation paid to executives in the form of stock awards, finding that stock received by certain Class B holders as part of a company-wide compensation program for senior executives was not “per share consideration” in the merger that would fall under the equal treatment agreement.<sup>289</sup> Doing so recognizes the fundamentally different nature of compensation for services rendered or work performed that *happens to be* paid to a Class B stockholder and consideration that is paid *because* an individual is a Class B stockholder. The court in *Komen* aptly noted that the consideration was unrelated to the Class B holders' status as Class B holders—instead, the compensation was tied to their role as senior executives.<sup>290</sup>

Despite the proliferation of exceptions for compensation-related employment and other agreements in the wake of *Delphi* and *Komen*, these exceptions do not present the same concerns as the minority-approval exceptions

---

288. Of course, this analysis presumes that investors are sophisticated and determine their willingness to pay accordingly. This presumption is susceptible to criticism, and may be called into question in particular with regards to charters containing only general equal treatment provisions given the uncertainty on the scope of such provisions. As some commentators have noted, “[a]n extensive literature argues that the IPO market is not efficient in pricing governance terms.” Fisch & Solomon, *supra* note 28, at 1070; see, e.g., Robert Daines & Michael Klausner, *Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs*, 17 J.L. ECON. & ORG. 83, 86-113 (2001).

289. Brokerage Jamie Goldenberg Komen Rev Tru U/A 06/10/08 Jamie L Komen Tr. for Komen v. Breyer, No. 2018-0773-AGB, 2020 WL 3484956, at \*13 (Del. Ch. June 26, 2020).

290. *Id.*



in the wake of *Delphi*. When an agreement is tied to services rendered, it would be illogical to construe that as “per share consideration” in a merger or similar transaction. Doing so would make day-to-day governance impractical and effectively prohibit dual-class companies from employing any stockholder in any capacity, which would challenge the compensation structure used by companies that offer employees stock as part of a compensation package.

Thus, courts should continue to construe per share consideration narrowly but nevertheless keep a watchful eye for any opportunistic behavior where a high-vote stockholder attempts to characterize disparate per share consideration as an employment or compensation-related agreement. For example, in *Delphi*, buyer TMH was considering acquiring RAM, a company founded by Rosenkranz that had provided consulting services to Delphi for decades, for \$57 million prior to closing.<sup>291</sup> Concerned that this payment could be seen as additional merger consideration being allocated to Rosenkranz, rather than as compensation for consulting services, the board aptly pressured Rosenkranz and TMH to postpone their negotiations on the RAM contracts until after the merger agreement was signed.<sup>292</sup> As a result, the court held that it was unlikely a post-merger contract would “net Rosenkranz any disparate consideration in violation of Delphi’s Charter.”<sup>293</sup> Accordingly, in evaluating ancillary compensation-related agreements post-*Delphi* and *Komen*, courts will likely find it helpful to look to the timing of agreement (and indeed, whether any agreement was actually reached), the recipients of the benefits, and the purported rationale for the compensation.

Lastly, courts should proceed with caution when ordering post-close damages rather than enjoining a transaction. Relying on post-close damages can inadequately compensate low-vote stockholders and fail to have the intended deterrent effect on similar behavior from high-vote controllers. *Delphi* provides an illustrative example of the shortcomings of a post-close remedy. First, despite the relatively high settlement amount<sup>294</sup> in *Delphi* (\$49 million out of the \$55 million control premium), this amount represented only 90% of the differential, not the full 100% of the control premium.<sup>295</sup> Rosenkranz thus retained a portion of the ill-gotten gains. Second, the settlement amount (\$49 million) was subject to attorneys’ fees reaching \$12 million (approximately 25% of the settlement

---

291. *Delphi Fin. Grp.*, 2012 WL 729232, at \*8-10.

292. *Id.* at \*10. The plaintiff shareholders in *Delphi* argued that “the agreement discussed between TMH and Rosenkranz to retain the RAM Contracts for a term of years, or to buy RAM outright, really involved disguised consideration for Rosenkranz’s assent to the Delphi/TMH deal, which therefore constituted additional consideration that should belong to the stockholders.” *Id.* at \*2. This claim from the plaintiffs may indeed be true—it is not immediately clear why TMH would be interested in paying \$57 million for an entity with years of contracts that provide no clear benefit (if not being outright “sham agreements”). *See id.* at \*4.

293. *Id.* at \*17.

294. This relatively high settlement amount (90%) in *Delphi* may be partially explained by Delaware’s appraisal statute and the resulting appraisal risk the company faced. For a discussion of appraisal rights, see *supra* note 227.

295. Transcript of Settlement Hearing, *Delphi Fin. Grp.*, 2012 WL 729232 (No. 7144-VCG), 2012 WL 5249055.

amount) and expenses exceeding \$200,000 paid to the plaintiff's counsel, in addition to taxes, and notice and administration expenses.<sup>296</sup> These various fees and expenses represent a substantial portion of disparate consideration that, despite belonging to the low-vote stockholders under the equal treatment agreement, they would never receive.<sup>297</sup> Third, and perhaps most notably, it is unclear which entities or individuals were the source of these settlement funds. Delphi, TMH, and Rosenkranz, among others, were parties to the settlement agreement. While Vice Chancellor Glasscock noted in a settlement hearing that he was informed "a significant portion came from Mr. Rosenkranz himself in a readjustment of the deal with [TMH]," he was "not privy to [the] exact number."<sup>298</sup> Thus, refusing to enjoin a transaction will likely fail to deter controllers and fail to fully compensate the low-vote stockholders for disparate treatment. While in the wake of *Delphi* high-vote stockholders have turned to other, tacitly permitted means of extracting additional premiums (for example, by incorporating a minority-consent exception in an equal treatment agreement), it remains necessary for the courts to consider the impact and sufficiency of post-close damages.

### Conclusion

As dual-class companies continue to increase in prevalence and market capitalization, the role that equal and unequal treatment agreements can play has never been of greater importance. Dual-class structures have many benefits, such as enabling companies to operate with a long-term perspective, incentivizing founders to take their companies public, and allowing founders and insiders to leverage their special skills and knowledge of the industry to most efficiently control the direction of the company going forward. However, as a result of these structures, instead of each stockholder sharing equally in the risk, a small, privileged group of high-vote stockholders is able to maintain control while accessing capital from public markets with little economic risk. When, as in dual-class structures, voting rights are disaggregated from the economic interests of the stockholders, controlling stockholders with high-vote shares can obtain private benefits while imposing disproportionate costs on the broader stockholder base and the public at-large.

Equal treatment agreements can function as a means of mitigating these risks and consequences of a dual-class structure. Using an novel database, this Article has uncovered various patterns and features of equal treatment agreements, including their use over the past century and rise in frequency and complexity. In doing so, the Article classifies equal treatment agreements into general equal treatment agreements, which require that each class of stock be treated equally in all matters, and specific equal treatment agreements, which

---

296. *Id.*

297. *Id.*

298. *Id.*

require that each class of stock be treated equally in mergers and other similar transactions. Despite a substantial degree of similarity in general equal treatment agreements, the Article observes a surprising and meaningful variation in specific equal treatment agreements and their exceptions.

The findings in this Article illuminate two critical features of equal treatment agreements: their scope and the degree of equality they require. By deploying both a general and specific equal treatment agreement with differing standards of equality, a typical charter may unintentionally provide for two distinct standards of treatment depending on a transaction's structure: one less onerous standard under a specific agreement for a transaction like a merger ("equal consideration"), and one more stringent standard under a general agreement for all matters not otherwise specified in the charter, like a tender offer ("identical in all respects"). Drafters and interpreters of equal treatment agreements should carefully review where these provisions fall along each axis to ensure the agreements are covering (or excluding) the particular transaction with the intended degree of equality.

In addition to highlighting the risk of unintentional exclusions from a specific agreement, this Article has also provided insight on the rise in exceptions to equal treatment. Perhaps most striking is the proliferation of exceptions post-*Delphi*, including for minority consent. As *Delphi* illustrated, an equal treatment agreement does not always guarantee equality. A high-vote controller is capable of extorting concessions from low-vote stockholders by threatening to hold up a deal unless the low-vote stockholders consent to disparate treatment despite a charter's equal treatment agreement. Following *Delphi*, a majority of equal treatment agreements have included an exception to permit a controlling high-vote stockholder to do just that. To the extent issuers are concerned with ensuring equal treatment for the minority, and investors are factoring the equal treatment agreement into the value of their shares, an agreement with a minority consent exception should be viewed with a great degree of skepticism.

Moreover, while ordinary equal treatment agreements can be a value-maximizing approach, this Article argues that their unequal treatment variants are, at times, a more promising avenue for facilitating efficient deals, deterring inefficient deals, and promoting fairness and equity in dual-class structures. Unequal treatment agreements serve as a relatively unexplored but promising avenue for the relational treatment of each class. Because this form of disparate treatment is precisely provided for in the charter, an unequal treatment agreement better aligns with stockholder expectations than the absence of an equal treatment agreement. By connecting the compensation of the high-vote shares to a fixed proportion of the total compensation, unequal treatment agreements create a powerful incentive for the controller to maximize the consideration as a whole. And by not mandating absolute equality, unequal treatment agreements incentivize controllers to pursue and accept transactions that they would not be willing to support if receiving only their pro-rata share. In effect, an unequal treatment agreement can function as a value-maximizing (and deal-maximizing) provision.

## Equal Treatment Agreements

In the era of dual-class companies and equal treatment agreements, it is critical now, more than ever, that stockholders, issuers, practitioners, and courts carefully consider the role of equal and unequal treatment agreements in the years to come. This Article has not only provided empirical evidence on these agreements, but also advanced normative recommendations to bring equal and unequal treatment agreements to the forefront as promising solutions to the dual-class dilemma.