

TOP TAKEAWAYS

Trends in Shareholder Rights Bylaws and Other Hot Corporate Governance Topics

1. **Prohibition of Fee-Shifting Bylaws.**

Recently enacted amendments to the Delaware General Corporation Law (the “DGCL”) prohibits the certificates of incorporation and bylaws of Delaware corporations from including “loser pays” litigation provisions with respect to internal corporate claims, including claims with respect to breaches of directors’ fiduciary duties. Although fee-shifting is possible in other states, prominent proxy advisor firms, Institutional Services, Inc. (“ISS”) and Glass Lewis recommend a vote against provisions that mandate fee-shifting whenever plaintiffs are not completely successful on the merits (i.e., in cases where the plaintiffs are partially successful).

2. **Authorization of Exclusive Forum Selection Provisions in Delaware.**

In contrast to expressly prohibiting fee-shifting litigation provisions, recent amendments to the DGCL expressly permit certificates of incorporation and bylaws require internal corporate claims be brought exclusively in the courts of Delaware.

3. **Selection of Additional Forums.**

Recent amendments to the DGCL do not prohibit charter or bylaw provisions that select a forum other than the Delaware courts as an additional forum in which an internal corporate claim may be brought, but they do generally prohibit charter or bylaw provisions which specify exclusive forums outside of Delaware. In addition, shareholders retain the right to challenge the specific application of an exclusive forum bylaw if it is used inequitably or for an improper purpose in a particular case. Outside directors will take the position seriously.

4. **Development of Minimum-Stake-to-Sue Bylaws.**

Three companies have adopted a restrictive bylaw provision requiring consent of a minimum threshold (generally 3%, unless a lower percentage is authorized by an applicable statute) of the company’s shareholders before a derivative lawsuit or class action could be filed. The viability of such a bylaw provision has survived shareholder challenge but has not been judicially approved.

5. **Controversy Surrounding Minimum-Stake-to-Sue Bylaws.**

Phillip Goldstein, a noted activist, has spearheaded the movement for adoption of minimum-stake-to-sue bylaws to deter frivolous shareholder claims without unduly impeding meritorious representative lawsuits. However, some proponents of shareholder rights have voiced their concern about the broad spectrum of claims which potentially may be deterred under this provision.

6. **Ownership Threshold Trends in Proxy Access Bylaws.**

The majority of the proxy access bylaws in 2015 have proposed ownership of 3% of the outstanding shares for 3 years for making a director nomination.

7. **Maximum Number of Nominees in Proxy Access Bylaws.**

The majority of the proxy access bylaws in 2015 have allowed shareholders to nominate candidates for up to 20% to 25% of the board of directors.

8. **Recent Trends in Advance Notice Bylaws.**

Most advance notice bylaws require notice to be delivered 60 to 90 days prior to the anniversary of the prior year's annual meeting date. Many of such bylaws require disclosure of funding arrangements between the nominee and any other party. ISS has a case-by-case policy which favors advance notice bylaws only in specific circumstances. Glass Lewis is usually opposed to advance notice bylaws.

9. **New Turn in M&A Litigation.**

Plaintiff's attorneys can no longer rely on the Delaware Chancery Court's routinely approving disclosure-only settlements with global releases. In *re Aruba Networks, Inc. Stockholder Litigation* (Del. Ch. October 9, 2015), the court rejected the proposed disclosure-only settlement litigation, and concluded that the plaintiffs' proposed release to the defendants was expansive and one-sided.

10. **One Size Does Not Fit All.**

Each company needs to consider tailoring any of these new bylaws to their particular facts and circumstances.

For more information

For more information on Trends in Shareholder Rights Bylaws and Other Hot Corporate Governance Topics, please feel free to contact the moderators directly:

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