EMPIRICAL STUDY

DETERMINING SHAREHOLDER ACCESS: EXAMINING SHAREHOLDER-MANAGEMENT RELATIONSHIPS THROUGH THE DIFFERING LENSES USED BY THE SEC AND THE "COMMON LAW" OF CORPORATE BYLAWS

INTRODUCTION

As the modern American corporation has exponentially expanded from the small, local firm, the roles of corporate actors have changed dramatically. Executives have seen their value skyrocket, earning in excess of $200 million in severance pay alone,[1] while directors have grown accustomed to pensions, health and life insurance, and significant charitable donations to organizations of their choosing.[2] While the decision-makers and overseers have experienced a boom in income and control, the corporation's true owners have had their voices hushed to a mere whisper. As Adolf Berle and Gardiner Means conclude, the shareholder's vote "is of diminishing importance as the number of shareholders in each corporation increases—diminishing in fact to negligible importance as the corporations become giants."[3] Mark Roe claims that the diminishing stockholder importance phenomenon "turns corporate law on its head: stockholders, the owners, become powerless."[4]

In early 2008, the SEC promulgated a final rule amending the meaning of Rule 14a-8(i)(8).[5] The Commission adopted the

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1. Home Depot Chairman and CEO Robert L. Nardelli received a severance package valued at $210 million after being ousted in 2006; Pfizer's Henry A. McKinnell's 2006 severance package was valued at $213 million. Eric Dash, *An Ousted Chief's Going-Away Pay Is Seen by Many as Typically Excessive*, N.Y. TIMES, Jan. 4, 2007, at C4.

2. Charles M. Elson, *Director Compensation and the Management-Captured Board—The History of a Symptom and a Cure*, 50 SMU L. REV. 127, 132 (1996).

3. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY xix (rev. ed., Adolf A. Berle 1968) (1932).

4. Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 12 (1991).

5. Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 56,914, 72 Fed. Reg. 70,450, 70,450 (Dec. 11, 2007) (to be

amendment to Rule 14a-8(i)(8) in order to clarify the meaning of the provision in response to a 2006 decision in the Second Circuit of the United States Court of Appeals.[6] Before the amendment, Rule 14a-8(i)(8) permitted a company to exclude a shareholder proposal if it "relate[d] to an election for membership on the company's board of directors or analogous governing body."[7] The new language of the rule provides an exemption "[i]f the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election."[8] Furthermore, the Commission elucidated that the term "procedure" relates to any procedure "that would result in a contested election," not only in the year the proposal is submitted, but in all subsequent years.[9]

The balance between the corporation's control of the proxy process and shareholders' desire for more participation in corporate governance has caused tension since the adoption of the first federal securities laws.[10] The SEC's role in the proxy process has historically been focused on disclosure in the proxy materials, while substantive corporate governance matters were left to the states.[11] However, it seems that the amendment to Rule 14a-8 has encroached upon the substantive corporate governance issue of shareholder nomination of directors. While "the SEC stated as a goal the development of possible changes to the proxy rules 'to improve corporate democracy,'"[12] what the agency has accomplished is to tip the control balance in favor of corporate management. As evidenced by our data, many public companies have procedures in their bylaws whereby shareholders can suggest nominations of directors.[13] However, in most, if not all, corporations, the ultimate decision to include the shareholder's nominee lies with the board of directors. And although most states grant shareholders the right to nominate a candidate for the board of directors, SEC rules only require that the names of persons nominated by the corporation—not the shareholders—appear in the corporation's proxy materials.[14]

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codified at 17 C.F.R. pt. 240).

6. *Id.*

7. 17 C.F.R. § 240.14a-8(i)(8) (2007).

8. Shareholder Proposals Relating to the Election of Directors, 72 Fed. Reg. at 70,453.

9. *Id.* at 70,454.

10. Frank G. Zarb, Jr., *SEC Proxy Reform Initiative Could Have Significant Impact on Corporate Governance*, LEGAL BACKGROUNDER, July 18, 2003, at 2, *available at* http://www.wlf.org/upload/071803LBZarb.pdf.

11. *Id.*

12. *Id.* at 3.

13. *See infra* Appendix.

14. Letter from Les Greenberg & James McRitchie, Editor, CorpGov.net, to Jonathan G. Katz, Secretary, Sec. & Exch. Comm'n, Request for Rulemaking to

In July 2007, the SEC voted 3-2 to submit two antithetical proposals for public comment, one that "would allow shareholders to include access proposals in the company's proxy statement," and one that would not.[15] At this meeting, then-SEC Chairman Cox expressed his support for shareholder access to director nominations and stated that shareholders have "an 'ironclad legal right to do one thing for themselves and that's to choose the company's directors.'"[16] When the final rule was voted on, however, Chairman Cox supported an amendment that would allow for the exclusion of access proposals.[17] The SEC's justifications for the amendment included the protection of shareholders from asset-stripping strategies, the desire to avoid uncertainty resulting from the decision in *AFSCME v. AIG*, disclosure concerns, and the ability of shareholders to use Rule 14a-8 to circumvent other proxy rules designed to ensure the integrity of director elections.[18]

The SEC's position, chiefly articulated through the amendment of Rule 14a-8, seems to indicate a view that shareholders do not need access to corporate management and that managers and SEC disclosure requirements sufficiently protect shareholder interests. It is this notion that inspired our study.

But what about the already-existing relationships between shareholders and management as set forth in the corporate bylaws? We understand that, in theory, shareholders are all but powerless. But in reality, exactly how powerless are shareholders of large corporations? To answer this question, we isolated certain aspects of corporate governance in which shareholders have the power to act independently of management or the board of directors: nominating directors for election, removing directors from their positions, and amending the corporation's bylaws. To get a representative sample of the "common law" of corporate bylaws as they relate to stockholder power, we selected the fifty-six corporations listed in the Standard & Poor's 500 industrials sector as a cross-section of giant, successful corporations.[19] We then combed the bylaws of each

Amend Rule 14a-8(i) to Allow Shareholder Proposals to Elect Directors (Aug. 1, 2002), *available at* http://www.sec.gov/rules/petitions/petn4-461.htm.

15. J. Robert Brown, Jr., *The SEC, Corporate Governance, and Shareholder Access to the Board Room* 36–37 (Univ. of Denver Legal Studies Research Paper, Working Paper No. 08-05, 2008), *available at* http://ssrn.com/abstract=1095032.

16. *Id.* at 38.

17. *Id.* at 38–39.

18. *Id.* at 40. In AFSCME v. AIG the Second Circuit ruled that proxy-access bylaw proposals could not be excluded under Rule 14a-8, giving shareholders more power in the board-selection process. The decision upset the prevailing balance of power between shareholders and management, thus meriting clarification, the SEC argued.

19. *See infra* Appendix.

corporation and recorded each one's individual rules regarding our three shareholder powers.[20]

Once we had this data, we identified the pro-shareholder provisions and pro-board provisions.[21] We then consulted the SEC rules and regulations regarding shareholder rights of access, Delaware corporate law statutes, and judicial decisions making up the Delaware common law as it pertains to shareholder access to assess the current enforcement authorities' positions on what level of access is acceptable.[22]

I. ELECTION OF DIRECTORS

The first means shareholders possess for exercising their power over the board is through nomination and election of directors.[23] Shareholders have always and unquestionably been able to nominate directors through sponsoring their own proxy solicitation.[24] However, absent staging their own proxy contest, what rights of access do a corporation's bylaws actually grant its shareholders?

Delaware corporate law statutes are considered enabling with regard to shareholder ability to nominate directors on the management proxy. Delaware's rules are default rules, specifically deferring to the individual corporation's bylaws governing the ability of shareholders to access the management proxy card.[25] Furthermore, shareholders' general voting power is also subject to the corporation's bylaws under Delaware law.[26] This great deference to the corporation's individual choices and structure makes the common law of corporate bylaws all the more important.

In expanding the position of the Delaware statutes, Delaware and federal corporate common law affirmatively grants shareholders election and nomination rights, although it does not guard against complicated notice requirements which can be used to curtail these

20. *See infra* Appendix.

21. Pro-board provisions insulate the board from shareholder action by creating rigorous, arbitrary requirements for notice of director nomination, reserving for the board the power to remove directors, and prohibiting shareholders from amending the corporation's bylaws. Pro-shareholder provisions do the opposite, allowing shareholders to nominate and elect directors, thus increasing corporate accountability.

22. We chose Delaware statutes and Delaware common law because Delaware is widely known as the foremost state authority on state corporate law. In addition, more corporations in our study were incorporated in Delaware than in any other state.

23. *See generally* JEFFREY D. BAUMAN ET AL., CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS 547–49 (6th ed. 2007).

24. *Id.* at 547.

25. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a), (b) (2001).

26. DEL. CODE ANN. tit. 8, § 211(a)(1)–(2) (2001).

powers.[27] Under Delaware common law, the courts consider a "stockholder's ability to participate in corporate governance through the election of directors . . . a fundamental part of . . . corporate law."[28] Furthermore, Delaware courts have stated a "'general policy against [shareholder] disenfranchisement.'"[29]

Federal law addresses the issue of shareholder nominations in relation to management proxies in Section 14 of the Securities Exchange Act of 1934 (the "Exchange Act").[30] Section 14(a) of the Exchange Act was originally promulgated in order to codify the congressional belief that "fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange."[31] In fact, while addressing the House of Representatives regarding the federal proxy regime in 1943, then-SEC Chairman Ganson Purcell stated that "[t]he rights that we are endeavoring to assure to the stockholder are those rights that he has traditionally had under State law to appear at the meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on."[32] Since the federal proxy regime was intended to reinforce shareholders' state-law rights, the SEC has tried to establish federal rules that do not conflict with states' roles in establishing corporate governance rights. One of the most important governance rights under state law is a shareholder's right to appear in person at the annual meeting to present his or her own proposals for a vote by the other shareholders.[33] However, since the majority of shareholders vote through proxy, "an important function of the proxy rules" is to provide shareholders with a meaningful method of presenting their proposals before the actual meeting and a way for shareholders "to instruct their proxy how to vote on these proposals."[34]

Rule 14a-8 does not explicitly require a company to include a shareholder's nominee for director in its proxy materials. However, Rule 14a-8 does require the company to include non-binding

27. *See infra* text accompanying notes 48, 50, and 53.

28. Seidman & Assocs. v. G.A. Fin., 837 A.2d 21, 26 (Del. Ch. 2003) (quoting Preston v. Allison, 650 A.2d 646, 649 (Del. 1994)).

29. *Id.* (quoting Centaur Partners v. Nat'l Intergroup, Inc., 582 A.2d 923, 927 (Del. 1990)).

30. *See* 17 C.F.R. § 240.14a-8(i)(8) (2007).

31. H.R. REP. NO. 73-1383, at 13 (1934).

32. Shareholder Proposals, 72 Fed. Reg. 43,466, 43,467 (Aug. 3, 2007) (to be codified at 17 C.F.R. pt. 240) (quoting *Sec. and Exch. Comm'n Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the H. Comm. on Interstate and Foreign Commerce*, 78th Cong. 172 (1943) (statement of Ganson Purcell, Chairman, Sec. & Exch. Comm'n)).

33. *See* Shareholder Proposals, 72 Fed. Reg. at 43,467 (Aug. 3, 2007) (to be codified at 17 C.F.R. pt. 240).

34. *Id.*

resolutions, unless the proposal falls into one of the thirteen exempted categories or the procedural requirements are not met.[35] Rule 14a-8 also provides that companies must notify the Commission if they intend to exclude a shareholder proposal.[36] In 2003, the SEC instructed the Division of Corporation Finance to review the procedures for shareholder nomination of directors and to recommend possible changes to the current proxy rules.[37] Although the staff recommended that shareholders receive access to the proxy statement for director nominations,[38] no proposal to that effect was ever adopted.

The issue remained relatively dormant until 2006 when the Second Circuit upheld a shareholder proposal that allowed a group of shareholders to submit a proposal in the management proxy materials relating to shareholder nomination power.[39] In deciding to uphold the shareholder proposal, the court narrowly construed SEC Rule 14a-8 to give shareholders more power, based on its interpretation of a 1976 SEC Statement regarding the rule's scope.[40] This decision seemed to tip the corporate power struggle in favor of shareholders. However, in 2007, the SEC decided to formally address the issue of shareholder nominations and held three roundtables to discuss possible amendments to the current federal proxy regime. During these discussions, "[r]oundtable participants argued that, in contrast to the current operation of the federal proxy rules, the federal role should be to facilitate shareholders' exercise of their fundamental state law and company ownership rights to elect the board of directors."[41]

Although SEC Exchange Act Release Number 56,160 claims that amendments to Rule 14a-8 will align the shareholder proposal rule more closely with the underlying state rights of shareholders,[42] its effect is essentially to strip the power from shareholders to nominate directors unless they receive approval by the corporation or are willing (and able) to bear the expense related to a proxy contest. Furthermore, the SEC claims that the amendment will help to fulfill a primary purpose of the federal proxy rules—disclosure—in relation to shareholders' voting rights.[43] However,

35. *Id.*
36. *Id.* at 43,468.
37. *Id.*
38. Security Holder Director Nominations, 68 Fed. Reg. 60,784, 60,784 (Oct. 23, 2003) (to be codified at 17 C.F.R. pt. 240).
39. Am. Fed'n of State, County & Mun. Employees v. Am. Int'l Group, Inc., 462 F.3d 121, 123 (2d Cir. 2006).
40. *Id.* at 128–31.
41. Shareholder Proposals, 72 Fed. Reg. at 43,468.
42. *Id.* at 46,469.
43. *Id.*

what the SEC fails to contemplate is that, although advanced disclosure might allow for better-informed voting decisions, shareholders are losing the ability to decide for whom they would like to vote.

The SEC also seems to ignore the fact that because the exemptions of 14a-8 are so broad, they nearly swallow the rule. The ability to nominate directors becomes one of the only ways for shareholders to directly affect the practices of management.[44]

In examining a different type of corporate common law—that which is expressed in practice through corporate bylaws—we found that corporations appear to align themselves more with the court's view of the shareholder-management relationship regarding board elections than the SEC's view.[45] However, although most bylaws purport to give shareholders the ability to submit nominees for director positions, many have confusing, detailed notice requirements that undercut shareholder access. Furthermore, even if shareholders conform to the notice requirements exactly, management may still exclude the shareholder's nomination from the management proxy without disclosure, thereby circumventing the alleged power given to shareholders in the corporation's bylaws.[46]

For this study, we looked not only at whether the bylaws expressly permitted shareholders to nominate directors, but whether the bylaws set forth complicated notice requirements—requirements that serve as an extra hurdle before shareholders can exercise their power. To qualify as containing a "complicated notice requirement," bylaws had to have a window for nominations of no longer than thirty days, have shifting dates from which to base the notice period, and grant no more than ten days for nominations following notice or public disclosure of the annual meeting date. Furthermore, these provisions only qualified as complicated notice requirements if management had the ability to exclude consideration of the nominations when shareholders failed to flawlessly comply with notice procedures.[47]

In our study, fifty-two of the fifty-four S&P industrial corporations had bylaws containing provisions concerning director nominations. Every provision allowed nomination by both the board and shareholders. These statistics show that, at a basic as well as a

44. Brown, *supra* note 15, at 21.

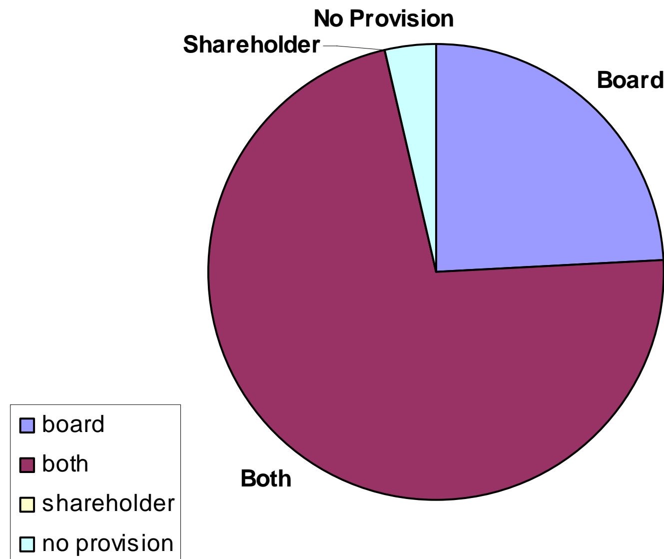
45. As the SEC has completely disenfranchised shareholders in the nomination process, Delaware common law has at least supported shareholder's ability to nominate, tempered by board authority in some cases to ultimately choose nominees. *See supra* notes 26–27 and accompanying text.

46. *See infra* Appendix.

47. *See infra* Appendix.

theoretical level, corporations evenly allocate the power to set the board of directors between the board and the shareholders.[48]

FIGURE 1
BENEFICIARIES OF COMPLICATED NOTICE REQUIREMENTS



Although the existence of bylaws granting equal power to nominate purports to create a level playing field for shareholders and management to control board composition, the presence of complicated notice requirements can tilt the field of play. In our study, thirty-nine corporations, or about 70% of the sample, had bylaws containing complicated notice requirements with which shareholders were required to comply in order to nominate directors on the management proxy card.[49] Thus, although shareholders in all of our study's corporations technically have the "power" to nominate directors to the board, more than 70% are required to go through complex, lengthy procedural steps and are at the mercy of the board if there is any question as to the validity of notice.

As they relate to conferred governance rights, the common law of corporate bylaws seems to conflict with the SEC's view of shareholder-management power relationships vis-à-vis board nominations. However, our study concludes that the common law of corporate bylaws sits in the middle of pseudo-equality between board and shareholders and the absolute board control model espoused by the SEC. It appears that, in practice, the shareholder-management power relationship is tilted toward management, but

48. *See infra* Appendix.
49. *See infra* Appendix.

still allows shareholders some voice, although at a much higher cost than management is required to absorb.[50]

II. REMOVAL OF DIRECTORS

The second area of governance in which shareholder-management power can be analyzed is in the ability to remove directors from their positions on the board. Serving as a "check" to nomination and election procedures, director removal procedures allow the board or shareholders to oust sitting board members from their positions and replace them with new directors. In making a determination about shareholder-management power relationships, it is necessary to look at which group has the right to remove directors (shareholders or directors or both), so as to assert their effective "veto power" over the election process.

Delaware corporate statutes authorize shareholders to remove, with or without cause, any director or the entire board with the votes of a majority of shares entitled to vote in director elections.[51] The statutes create exceptions to this rule, however, allowing removal only for cause in situations with cumulative voting or with classified boards.[52] Again, these rules appear to be enabling and not mandatory, deferring instead to corporations' own articles of incorporation to determine the procedure and enumerate which constituencies have the power to remove directors.[53]

However, Delaware courts have interpreted title 8, section 141(k) of the Delaware Code to be an express grant of removal power to shareholders *only*.[54] The courts reason that, considering the legislative history and absence of a clear mandate of removal power granted to boards, "directors do not have the authority to remove other directors" under the statute.[55] Thus, Delaware common law seems to tilt the power struggle toward shareholders regarding removal, granting them the power to remove directors and preventing management (or a management-controlled board) from exercising the power at all.

50. Shareholders would have to spend money on legal and consulting services to interpret the bylaws and develop nomination proposals in accordance with the notice requirements, whereas management may simply submit their nominations directly to the board for its approval.

51. DEL. CODE ANN. tit. 8, § 141(k) (2001).

52. § 141(k)(1)–(2).

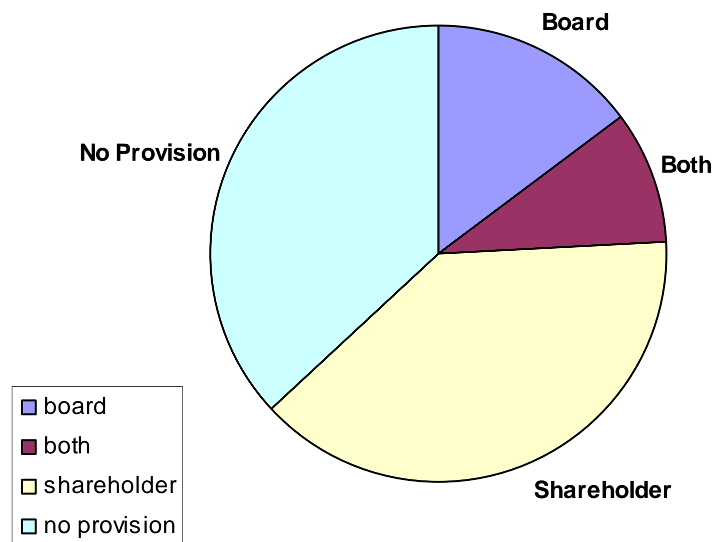
53. § 141(a).

54. *See, e.g.*, Stroud v. Milliken Enters., Inc., 585 A.2d 1306, 1309 (Del. Ch. 1988) ("Generally, directors do not have power under Delaware law to remove fellow directors.").

55. Rohe v. Reliance Training Network, Inc., 2000 WL 1038190, at *11 n.30 (Del. Ch. July 21, 2000) (quoting S. SAMUEL ARSHT & LEWIS S. BLACK, 1974 AMENDMENTS TO THE DELAWARE CORPORATION LAW 378 (1974)).

In our attempts to discern the common law of corporate bylaws vis-à-vis the power to remove directors, we isolated any provisions relating to removal and rated them based on who had been given removal power. Only thirty-four corporations had specific bylaw provisions regarding director removal. Of those thirty-four companies, more than 60% (or twenty-one total corporations) granted removal power to shareholders only. Five corporations split the power to remove between the shareholders and directors, while eight allocated removal power to the board only.[56]

FIGURE 2
DIRECTOR REMOVAL POWER



When we took all the removal provisions into account and assigned values based on which constituency was granted power,[57] we came up with a value of 1.382, indicating a moderately strong trend in bylaws giving shareholders the sole power to remove directors.[58] Thus, the common law of bylaws indicates that, contrary to nominating and election power, shareholders have some unilateral power to remove directors.

At this point in the study, management has an advantage in nominating and electing directors, but shareholders temper that power in their ability to "veto" these elections by removal. As such, the common law of corporate bylaws reveals a shareholder-

56. *See infra* Appendix.
57. A rating of "0" indicated power was allocated to the board only; a rating of "1" indicated that power was allocated to both the board and shareholders; a rating of "2" indicated that power was allocated to shareholders only.
58. *See infra* Appendix.

management relationship that resembles our federal government—a system of checks and balances (although with a weaker executive branch burdened by collective-action issues). However, it is still necessary to examine which constituency holds an advantage in the ultimate power that can absorb the previous two: amending the bylaws.

III. AMENDING THE BYLAWS

The third area in which the relationship between shareholder and management power can be analyzed is the ability to propose and adopt amendments to the corporation's bylaws. Since direct access to the nomination of directors is filled with many and often insurmountable hurdles, the most direct way to effect change in corporate-governance policies is for shareholders to amend or adopt new bylaws. Because the bylaw amendment power is such a far-reaching one, many corporations implement what we term "tied hands provisions" into the amendment sections of their bylaws. These provisions effectively restrict the constituency's ability to adopt new bylaws, making it more difficult to exact unilateral control over the board's governance decisions. To shareholders, a beneficial tied hands provision often takes the form of a provision stating that shareholder amendments cannot be changed or repealed by the board of directors once passed by shareholder vote. For the managers, a beneficial tied hands provision often takes the form of a provision that requires a supermajority shareholder vote to pass a bylaw amendment.

Delaware corporate law statutes purport to place the power to amend the bylaws squarely in stockholders' hands.[59] However, power to *create* the bylaws, as well as to amend them, is held by the incorporators before the corporation sells any of its stock.[60] Furthermore, section 109(a) states that "any corporation may . . . confer the power to adopt, amend or repeal bylaws upon the directors."[61] Moreover, section 109(a) does not contain specific provisions regarding the percentage of shareholders required to amend the bylaws, instead leaving that up to the individual corporations.[62] Thus, a scenario in which corporation leaders wrote bylaws before incorporation that conferred the power to amend the bylaws to a majority of directors—and conversely required a supermajority shareholder vote to amend the bylaws—would be completely permissible under Delaware statutory law. So although

59. DEL. CODE ANN. tit. 8, § 109(a) (2001).
60. *Id.*
61. *Id.*
62. *Id.*

the statute purports to give shareholders the upper hand in amendment power, it actually contains loopholes for an aggressive board to easily seize control: the statute makes it comparatively easy for shareholders to propose bylaws, but nearly impossible to get them passed.

Delaware common law accepts the dual grant of power to shareholders and directors for bylaw amendments.[63] However, when directors use their bylaw-granted power to make defensive changes in the bylaws to preserve their directorial positions, the directors do not receive protection under the business judgment rule.[64] Instead, these decisions by directors to amend the bylaws are evaluated under a duty of loyalty standard, protecting shareholders from entrenchment actions.[65] Delaware common law has not, however, invalidated any bylaws requiring a supermajority shareholder vote when implemented in good faith and in line with the board's fiduciary duties. Thus, it appears that, taking its statutes and common law into consideration, Delaware corporate law allows both shareholders and directors the power to amend bylaws. However, the Delaware statutes do not prohibit imposing hefty hurdles for shareholders to overcome (80% supermajority votes, for example) in their quest for actually passing their proposed amendments.

Another obstacle faced by shareholders proposing bylaw amendments is compliance with the SEC's rules allowing corporations to exclude proposals that are either improper or in violation of state law.[66] Whether bylaw amendment is allowed, and by whom, depends not only on state and federal law, but also on whether the corporation's certificate of incorporation or bylaws allow for such action. Therefore, the individual corporation's governance structure will determine the availability for such shareholder action.

In our study, forty-eight of the fifty-six corporations had specific provisions in their bylaws addressing the procedures for bylaw amendment.[67] Of the forty-eight corporations with provisions, only two corporations had bylaw provisions that allowed only shareholders to propose amendments to the corporation's bylaws, whereas fourteen of the corporations allowed only the board of directors to propose amendments.[68] Two-thirds of the corporations

63. *See, e.g.*, Chesapeake Corp. v. Shore, 771 A.2d 293 (Del. Ch. 2000) (holding that, although the defensive nature of new director-passed bylaws requiring a supermajority shareholder vote to amend future bylaws was invalid, directors and shareholders alike have the power to amend bylaws in good faith).

64. Blasius Indus. Inc. v. Atlas Corp., 564 A.2d 651, 660 (Del. Ch. 1988).

65. *Id.* at 663.

66. *See* 17 C.F.R. § 240.14a-8(i)(1)–(2) (2007).

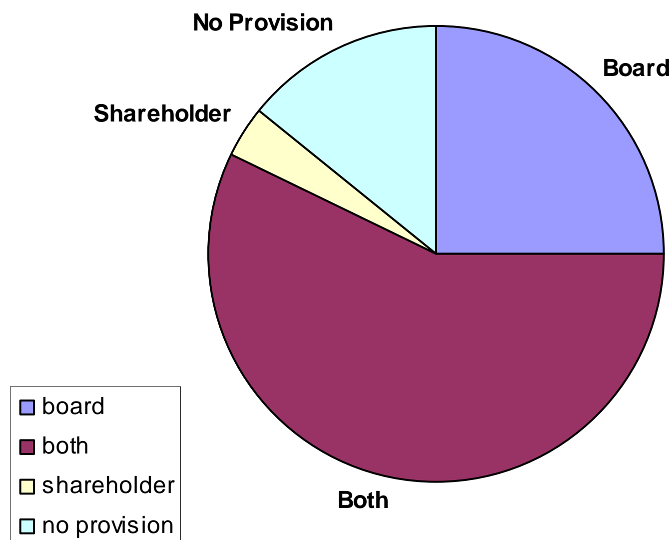
67. *See infra* Appendix.

68. *See infra* Appendix.

allowed amendment by either shareholders or the board of directors.[69]

However, a majority of corporations that allowed bylaw amendment proposals by shareholders also included provisions requiring a supermajority vote in order for the proposal to pass, seriously diluting the power of shareholders to effect reform.[70]

FIGURE 3
BYLAW AMENDMENT POWER



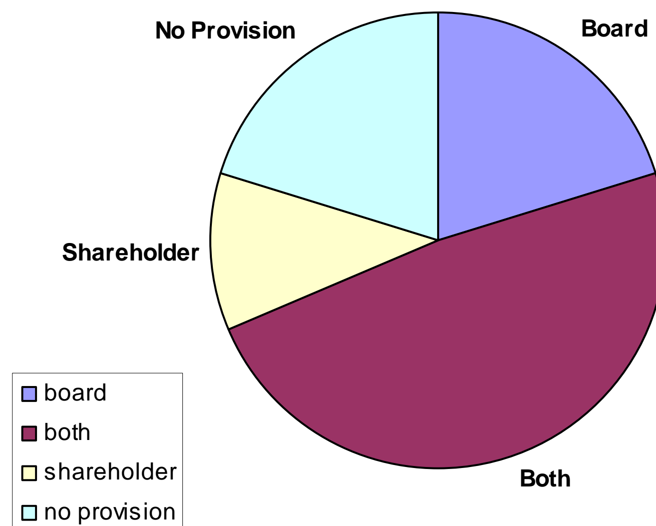
Our study also checked bylaws for tied hands provisions in order to evaluate exactly how meaningful the power to amend was in practice, and whether, like the "complicated notice requirements," amendment power was significantly tempered. Many of the corporations provided that a supermajority vote, often 75–80%, would be needed in order for the bylaw amendment to pass.[71]

Eleven of the fifty-four corporations did not have a tied hands provision. Eleven of the forty-three corporations with applicable provisions, essentially 25% of the corporations examined, had tied hands provisions that favored the board. These provisions either required a supermajority vote by the shareholders in order to amend, adopt, or repeal a bylaw or only allowed for shareholders to amend bylaws set in place by the board (not allowing shareholders to propose the adoption of a "new bylaw").[72] Twenty-six of the forty-

69. *See infra* Appendix.
70. *See infra* Appendix.
71. *See infra* Appendix.
72. *See infra* Appendix.

three corporations had bylaw provisions that could be classified as neutral. These provisions essentially provided for a shareholder "check" on board amendment proposals and vice versa.[73] Finally, only six corporations, or 14%, had tied hands provisions that clearly favored shareholders. Although these provisions varied by corporation, they either allowed for only shareholder amendment of the bylaws or no director amendment once shareholder bylaws were passed.[74]

FIGURE 4
BENEFICIARIES OF A TIED HANDS PROVISION



When we took all of the bylaw-amendment provisions into account and assigned values based on which constituency was granted more power, we came up with a value of .88.[75] This value indicates that the board has a slight advantage with regard to bylaw amendment power.

Since the power to amend, adopt, or repeal bylaws is unarguably one of the most important powers in relation to corporate governance and our data suggest that the control over the corporation is already tipped in the favor of management, it appears that the SEC's goal of protecting shareholders through the amendment of Rule 14a-8 is actually lessening shareholder protection.

73. *See infra* Appendix.
74. *See infra* Appendix. Some of the corporations allow no bylaw amendment by directors while others only restrict director amendment regarding certain bylaw provisions.
75. *See infra* Appendix.

CONCLUSION

The SEC, through amendment of Rule 14a-8(i)(8), has essentially nullified shareholders' ability to influence major corporate decisions by cutting off access to the nomination process. The SEC's justifications for the amendment of Rule 14a-8(i)(8) do not appear to be in line with the realities underlying the relationship between management and shareholders as demonstrated by corporate bylaws. Our data suggest that shareholders do not actually have access to nominations or the power to protect themselves, and with this new amendment, the SEC has removed one avenue shareholders could have used to regain power.

Corporate bylaws seem to demonstrate, even if only theoretically, that corporations still want shareholders to have some access to the nomination process. Although management seems to want to give shareholders limited access, as demonstrated through the complicated notice requirements, our study of the fifty-six bylaws reflects a willingness on the corporation's part to allow some level of shareholder participation in the nomination process. The SEC's explanation underlying the amendment also seems to contradict the goals it has espoused with regard to shareholder protection and democracy.

The SEC should reexamine its amendment in light of the "common law" of corporate bylaws and further amend it to reflect a greater appreciation of shareholder rights. As our study shows, individual corporations care about their shareholders' rights—the SEC should, as well.

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APPENDIX

Company Ticker	Nominations 0 = Board 1 = Both 2 = SH	Removal 0 = Board 1 = Both 2= SH	Amendments 0 = Board 1 = Both 2 = SH	Complicated Notice 0 = no 1 = yes	Tied Hands Clause 0 = pro-Board 1 = neutral 2 = pro-SH
MMM	1	N/A	1	1	N/A
AW	1	N/A	0	1	1
AVY	1	0	1	1	0
BA	1	2	1	1	1
BNI	1	2	0	1	1
CHRW	1	2	1	0	0
CAT	1	2	1	1	0
CTAS	1	N/A	1	0	N/A
CBE	1	1	2	N/A	0
CSX	1	2	1	1	1
CMI	1	N/A	0	0	N/A
DHR	1	N/A	1	1	N/A
DE	1	1	1	1	1
RRD	1	N/A	0	1	N/A
DOV	1	1	1	1	1
ETN					
EMR	1	0	0	1	1
EFX	1	N/A	0	1	2
EXPD	N/A	2	0	N/A	1
FDX	1	N/A	1	1	N/A
FLR	1	0	1	1	0
GD	1	0	1	1	1
GE	1	0	N/A	0	1
GR	1	2	1	1	2
GWW	1	2	0	1	0
HON	1	0	1	1	1
ITW	1	N/A	N/A	0	N/A
IR	1	N/A	0	1	2
ITT	1	N/A	1	1	1
JEC	1	0	1	1	0
LLL	N/A	N/A	1	1	0
LMT	1	2	0	1	1
MTW	1	N/A	0	0	1
MAS	1	N/A	1	N/A	0
MNST	1	2	1	1	1
NSC	1	N/A	0	0	1
NOC	1	2	N/A	1	N/A
PCAR	1	N/A	N/A	0	N/A
PLL	1	N/A	1	0	2
PH					
PBI	1	2	1	0	0

PCP	1	2	1	0	1
RTN	1	N/A	1	1	1
RHI	1	2	1	1	1
ROK	1	0	N/A	1	N/A
COL	1	N/A	N/A	1	N/A
R	1	2	1	0	1
LUV	1	2	1	1	1
TEX	1	2	2	1	0
TXT	1	2	1	1	1
TT	1	2	1	1	1
TYC	1	2	0	1	2
UNP	1	N/A	1	1	1
UPS	1	1	1	1	1
UTX	1	1	1	1	1
WMI	1	2	0	1	2
Total:	**52**	**34**	**48**	**51**	**43**
Average:	1	1.382352941	0.75	0.764705882	0.88372093
Conclusion:	Even Power	Advantage SH	Advantage Board	Advantage Board	Advantage Board