DIRECTOR NOMINATIONS

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"I don't care who does the electing, so long as I get to do the nominating."
—William M. ("Boss") Tweed

ABSTRACT

Shareholder election of directors is widely accepted as an important tool in corporate governance. As Boss Tweed's aphorism demonstrates, the shareholder's ability to nominate director candidates should therefore also be deemed important. With ever-increasing shareholder activism and increased sensitivity on the part of management to the prospect of director election contests, the scope of the right to nominate and the scope of permissible limitations of that right are likely to come under increasing scrutiny. Yet corporate statutes are largely silent on the subject of the right to nominate, and case law governing the ability to limit that right is likewise only primitively developed.

This Article explores that gap, concluding first that the shareholder right to nominate ought to be viewed as a facet of the statutory right to present proper business at the annual meeting of stockholders. As such, that right can be circumscribed through private ordering only in limited ways, to promote an orderly electoral process. With that principle in mind, this Article examines the validity and enforceability of a variety of actual and potential charter and bylaw provisions, including provisions requiring advance notice of nominations, eliminating the right to nominate altogether, or conditioning exercise of that right on minimum levels or duration of share ownership.

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I. INTRODUCTION

Famously described as "the ideological underpinning upon which the legitimacy of directorial power rests," the power of shareholders to elect the corporation's directors is widely viewed as an important disciplinary tool to limit agency costs and to facilitate beneficial changes in corporate control. Courts earnestly profess the need to protect the viability of the stockholder franchise against manipulation by directors, and federal proxy rules closely regulate the form and content of the process by which shareholders of publicly traded companies elect directors. Federal regulation, from multiple

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4See, e.g., MM Co. v. Liquid Audio, Inc., 813 A.2d 1118, 1127 (Del. 2003) ("This Court and the Court of Chancery have remained assiduous in carefully reviewing any board actions designed to interfere with or impede the effective exercise of corporate democracy by shareholders, especially in an election of directors."); Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1993) ("Because of the overriding importance of voting rights, this Court and the Court of Chancery have consistently acted to protect stockholders from unwarranted interference with such rights.").
5The federal proxy rules extensively define the content of disclosures that must accompany a solicitation of proxies to vote shares of a publicly traded U.S. issuer. 17 C.F.R. § 240.14a-3(a)
sources, also elevates the importance of the shareholder vote to the point that many persons who manage the equity investments of others are effectively required to see to it, at considerable cost and as a matter of fiduciary responsibility, that the portfolio shares they manage are voted, and voted prudently.\(^6\) Internationally accepted corporate governance principles stress the importance of the shareholder right to elect directors.\(^7\) And academics

\(^{(2008)}\). Less well recognized, perhaps, are the more substantive requirements of the proxy rules. For example, SEC Rule 14a-4(b)(2) requires that the issuer's form of proxy must provide a means to withhold, as well as grant, authority to vote for director candidates. 17 C.F.R. § 240.14a-4(b)(2). In substance, then, federal law requires the person soliciting management proxies to accept and exercise authority to which it would not otherwise independently assent. See id. State agency law, however, which governs the proxy relationship, does not compel such an unwilling exercise of authority. To the contrary, an agent (the proxy) must manifest agreement to act in accordance with the principal's instructions, and if a person solicits proxy authority to vote shares only in favor of the director candidates sponsored by the solicitor, the solicitor is not obligated to vote the shares in any other way than in accordance with the consent manifested by the solicitor. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."); see also Duffy v. Loft, Inc., 151 A. 223, 227 (Del. Ch. 1930), aff'd, 152 A. 849 (Del. 1930) ("[I]t cannot be held that the stockholders who gave proxies, notwithstanding the assumption of an intent on their part that the proxies would be acted upon, by the mere entertaining of such an intent can permanently fasten the relationship of agency upon those named in the proxies so that the latter cannot refuse to act. An agent can always abandon his agency at the expense of the assumption of responsibility if the circumstances are such that the law attaches liability."). But cf. Concord Fin. Grp., Inc. v. Tri-State Motor Transit Co., 567 A.2d 1, 9-12 (Del. Ch. 1989) (discussing the "Garrett proxy," a management form of proxy to which the stockholder added handwritten edits purporting to direct voting for the dissident candidates; because the proxy was never delivered to the named management proxies, the proxy was held ineffective to require a vote for the dissidents; the court stated, however, that the dissidents' proxy solicitor should have given the undated management proxy card to the management proxies prior to the closing of the polls and demanded that they vote for the Committee's Nominees, suggesting (incorrectly, it is submitted) that had the stockholder done so the management proxies would have been obligated to vote the shares for the dissidents).

\(^6\) See, e.g., Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974, 29 C.F.R. § 2509.08-2 (2008) ("The fiduciary obligations of prudence and loyalty to plan participants and beneficiaries require the responsible fiduciary to vote proxies on issues that may affect the value of the plan's investment."); Brian D. Stewart, Disclosure of the Irrelevant? - Impact of the SEC's Final Proxy Voting Disclosure Rules, 9 FORDHAM J. CORP. & FIN. L. 233, 235 (2003) (discussing an investment adviser's responsibility to vote the shares of its clients in a manner consistent with its fiduciary duties); Letter from Douglas Scheidt, Assoc. Dir. and Chief Counsel of the SEC Div. of Inv. Mgmt., to Kent S. Hughes, Managing Dir. At Egan-Jones Proxy Servs., (May 27, 2004), available at http://www.sec.gov/divisions/investment/noaction/egan052704.htm ("Rule 206(4)-6 under the Advisers Act requires an investment adviser to adopt and implement written policies and procedures that are designed to ensure that its clients' proxies are voted in the clients' best interests, to describe these policies and procedures to their clients . . . ").

\(^7\) See, e.g., ORG. FOR ECON. CO-OPERATION AND DEV., PEER REVIEW 4: BOARD NOMINATION AND ELECTION 10 (34 (2012), available at http://www.oecd.org/officialdocuments/pdf/0\textbackslash n20060615\textbackslash n20060413\textbackslash n10\textbackslash nfin\textbackslash ndoc\textbackslash content\textbackslash n104014001681915048642.pdf?\textbackslash nocite=DAF\textbackslash CA\textbackslash CG\textbackslash 2012\textbackslash 1\textbackslash FINAL\&\textbackslash doclanguage=\textbackslash En ("Chapter II states the key principles: principle II.A specifies that a basic shareholder right includes the right to elect and remove members of the board, and Principle II.C.3, calls for the 'facilitation' of 'effective'
claim to find significant economic consequences associated with differences in stockholders' entitlement to elect directors.

Reflecting the perceived importance of the right to vote on the election of directors, corporate statutes extensively define the stockholders' right to vote on the election of directors: invariably, those statutes confer, upon each share of capital stock, one vote on all matters, including the election of directors, on which stockholders may vote, subject only to modification or elimination in the articles or certificate of incorporation. Thus, for example, we know that for each share of stock held, the holder ordinarily casts one vote on each director position to be filled; that the articles or certificate of incorporation can permit shareholders to "cumulate" their votes and allocate them in whole or in part to one director position; that shares can have a greater or lesser vote than one vote per share, or can have no voting rights at all; that voting entitlement can be made dependent on duration of share ownership; and that voting entitlement can be graduated so that it

shareholder participation in key corporate governance decisions, such as the nomination and election of board members.


9CORP. LAWS COMM’N AND CORP. GOVERNANCE COMM’N, BUS. LAW SECTION, HANDBOOK FOR THE CONDUCT OF SHAREHOLDERS' MEETINGS 71 (2d ed. 2010) ("The Model [Business Corporation] Act and the corporate law of all 50 states provide that, unless otherwise set forth in a corporation's charter and except for [certain] categories of shares . . . each outstanding share is entitled to one vote on each matter presented for shareholder action.").

10See DEL. CODE ANN tit. 8, § 212(a) (2013); MODEL BUS. CORP. ACT § 7.21(a) (2010).

11See DEL. CODE ANN. tit. 8, § 214 (2013); MODEL BUS. CORP. ACT § 7.28(c) (2010).

12The Model Business Corporation Act expresses the requirement, most likely implicit even in state statutes that do not follow the Model Act, that whenever there are any outstanding shares, "one or more shares that together have unlimited voting rights and one or more shares that together are entitled to receive the net assets of the corporation upon dissolution must be outstanding." MODEL BUS. CORP. ACT § 6.03(c) (2010).

13Williams v. Geier, 671 A.2d 1368, 1372 (Del. 1996) (upholding a proposed charter amendment providing that shares would each have ten votes per share until transferred, and would thereafter be entitled to only one vote per share until held for thirty-six consecutive months).
diminishes as a stockholder's ownership increases,\(^{14}\) or can be conferred *per capita*, without regard to ownership level.\(^ {15}\)

From all of this attention to the subject, one might be forgiven for thinking that the nature of the shareholder's right to elect directors has been thoroughly articulated. There are aspects of the right to elect directors, however, which remain far less fully articulated, even though they may importantly affect the practical content of that right. For example, the statutory authority to establish qualifications for directors could significantly limit the stockholders' ability to choose and elect candidates to the board of directors,\(^ {16}\) yet the use of qualifications to limit the ability to elect directors has been only lightly examined.\(^ {17}\)

At least as unexplored, however, is the seemingly uncontroversial question of the right of stockholders to nominate candidates for election to the board of directors. One learned commentator not too long ago asserted,
without any citation or explanation, that "[s]tate law gives all shareholders equal power to nominate directors without regard to the quantity of stock they own or the period for which they have held it." At the same time, but again without citation, that commentator also pointed out (to some extent correctly, as argued below) that "state law grants issuers substantial power to determine the scope of shareholder nominating rights . . . ," and (only partly correctly) that "[s]tate law allows corporations to limit or eliminate shareholder nominating rights."  

The central thesis of this Article is that these beguilingly basic assertions gloss over important but largely unanswered questions. They include:

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18 Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L. J. 435, 454-55 (2011). This proposition is certainly commonly accepted: indeed, it has been advanced as an argument that, in the absence of express statutory authority, a bylaw cannot impose share-ownershio thresholds on a right to require inclusion of director nominees in company proxy materials. See, e.g., Citigroup, Inc., No-Action Letter, 2003 SEC No-Act. 2003 WL 1900802 (Jan. 31, 2002) (opinion of issuer counsel that a bylaw requiring 3% share ownership in order to place nominees in the company's proxy materials would contravene Delaware law by violating the doctrine of equal treatment of holders of the same class of shares of a corporation's stock); see also In re Sea-Land Corp., 642 A.2d 792, 799 n. 10 (Del. Ch. 1993) ("It has long been acknowledged that absent an express agreement or statute to the contrary, all shares of stock are equal." (citing Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584, 593 (Del. Ch. 1986))); Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584 (Del. Ch. 1986) ("At common law and in the absence of an agreement to the contrary all shares of stock are equal." (citing Shanghai Power Co. v. Del. Trust Co., 316 A.2d 589 (1974))).

19 Fisch, supra note 18, at 455-57. As urged in Part V.C below, the shareholder right to nominate directors cannot be eliminated entirely, at least as a matter of Delaware law. See infra Part V.C. Consistent with her contrary assessment, however, Professor Fisch says that the SEC was simply incorrect in asserting that the shareholder's right to nominate directors "is 'imposed by statute' and 'cannot be bargained away.'" Fisch, supra note 18, at 455. The SEC was referring, however, not to the power to nominate directors; rather, it was referring to completely different aspects of state corporate law, such as holding annual meetings of stockholders and stockholder entitlement to inspect corporate books and records. See Facilitating Shareholder Director Nominations, Securities Act Release No. 9136, Exchange Act Release No. 62,764, Investment Company Act Release No. 29,384, 75 FED. REG. 56,668, 56,672 (Sept. 16, 2010). In fact, a key premise of the SEC's proxy access rule release was that the federal right of "access" — inclusion of nominee's in the company's proxy materials — was distinct from and dependent on the existence of an underlying state law right on the part of the shareholder to nominate candidates for election to the board of directors, a right that the Commission did not purport to create or define, and did not purport to prevent states from restricting or eliminating. See id. at 56,673 ("The rules we adopt today provide individual shareholders the ability to have director nominees included in the corporate proxy materials if State law and governing corporate documents permit a shareholder to nominate directors at the shareholder meeting . . . ." (emphasis added)). Thus, Professor Fisch errs in describing Rule 14a-11 as an attempt "to create a federal nominating power . . . [and to] determin[e] which shareholders are eligible to exercise nominating power and under what conditions." Fisch, supra note 18, at 457.
• What is the legal source of the stockholder's right to nominate directors?
• Is this right solely the prerogative of shareholders, or can other persons (notably the board of directors or its nominating committee, as such) nominate candidates, and if so, on what legal basis?
• And perhaps most importantly, can the stockholder's right to nominate directors be curtailed or eliminated? If so, how, and to what extent?

Brief reflection should suffice to bring home the importance of these questions. If, as asserted, election of directors is a valuable element of the U.S. system of public company corporate governance, that value could be impaired to the extent that the shareholders' right to nominate is weak and vulnerable to limitation or elimination.\(^2\) And more specifically, to the extent that shareholders obtain the right to include their director nominees in company proxy materials pursuant to "proxy access" bylaws,\(^1\) it will become

\(^2\)See Verret, supra note 17, at 404.
\(^1\)The SEC's most recent effort to mandate such a right of access, in the form of Rule 14a-11 (17 C.F.R. § 240.14a-11 (2010)), has been invalidated. Bus. Roundtable v. SEC, 647 F.3d 1144, 1156 (D.C. Cir. 2011). Notwithstanding its clear statutory authority to adopt a proxy access rule (Securities Exchange Act of 1934 Section 14(a)(2), 15 U.S.C. § 78n(a)(2)), it is unclear whether or when the SEC will re-propose any such right. See Ted Allen, The SEC Has No Immediate Plans to Revive Proxy Access (Apr. 26, 2012), available at http://blog.issgovernance .com/gov/2012/04/sec-has-no-immediate-plans-to-revive-access-rule.html ("In terms of proposing a proxy access rule and putting it on the commission agenda, we just don't have the capacity right now," and "[w]e are just not going to be able to get to it." (quoting former Chairman Mary Schapiro to the House Financial Services Committee)). In the meantime, however, the laws of some states have been amended to clarify or establish that the bylaws of individual companies may confer such access rights. See, e.g., DEL. CODE ANN. tit. 8, § 112 (2013); VA. CODE ANN. § 13.1-624 (2010); see also MODEL BUS. CORP. ACT § 2.06(c)(1) (2010) ("A requirement that if the corporation solicits proxies or consents with respect to an election of directors, the corporation include in its proxy statement and any form of its proxy or consent, to the extent and subject to such procedures and conditions as are provided in the bylaws, one or more individuals nominated by a shareholder in addition to individuals nominated by the board of directors . . ."). Shareholders have not yet enacted such bylaws themselves unilaterally, but precatory resolutions urging adopting of such bylaws received majority support at Nabors Industries and Chesapeake Energy in 2012. See Catherine G. Dearlove and A. Jacob Werrett, Proxy Access by Private Ordering: A Review of the 2012 and 2013 Proxy Seasons, 69 BUS. LAW. 155 (2013); Lawrence A. Hamermesh, Proxy Access Votes – 2012, INST. OF DEL. CORP. AND BUS. LAW (May 21, 2012), available at http://blogs.law.widener.edu/delcorp/2012/05/21/proxy-access-votes-2012/. A few companies have adopted such bylaws by director action. See KSW, Inc., Amendment No. 1 to Amended and Restated Bylaws of KSW, Inc., (Form 8-K), Ex. 3.1 (Jan. 11, 2012); The W. Union Co., By-Laws of The Western Union Company (Form 8-K), Ex. 3.1(II) (Mar. 11, 2013) (reflecting the addition of Article II, Section 8); see also Lawrence A. Hamermesh, Proxy Access Votes in 2013: Anybody Out There?, INST. OF DEL. CORP. AND BUS. LAW (July 1, 2013), available at
important to evaluate any efforts to curtail use of such bylaws through limitations on the underlying right to nominate director candidates.

Accordingly, the balance of this Article analyzes the basic questions posed above. That analysis, however, will fall far short of providing comprehensive answers. Guidance from statutes and case law is scarce at best; much has been taken for granted, without analysis; and any response to the questions posed is necessarily provisional. It is hoped, however, that exposing the uncertainties involved might encourage transactional counsel and relevant policymakers to take at least limited steps to resolve those uncertainties, by statute, charter provision, bylaw or otherwise.

II. WHAT IS A NOMINATION?

The first step in the analysis is identifying our subject: what, actually, is a nomination? At a superficial level, this seems like a pedantic question: a nomination occurs when someone stands up at a meeting and says, "I nominate Han Solo for election as Galactic Senator," simple as that, and then electors can thereafter vote for Mr. Solo. This scenario certainly fits the dictionary definition of the term "nominate," as "to propose as a candidate for election to office," or "propose or formally enter as a candidate for election or for an honor or award." These definitions, however, suggest a difficulty in defining the subject of this Article: one could casually suggest ("propose") to a friend that someone should be elected as Galactic Senator, but is that a "nomination?" Or, somewhat more seriously, what if one systematically urged voters, before the meeting, to elect Han Solo as Galactic Senator, but never formally and explicitly put forward Mr. Solo's name as a candidate at the meeting at which the vote occurs? Would a "nomination" have been made? And could Mr. Solo nevertheless be elected? Despite the other-worldly character of the examples suggested above, these questions have significance on planet Earth, even in the obscure corner of it occupied by corporate law. Consider the century-old opinion of Wirth v. Fehlberg. In that proceeding to determine the outcome of a contested director election, one slate (complainants) was nominated, orally, at the stockholder meeting, but the competing slate (respondents) was not nominated at all, at least in the


sense that they were not expressly named as candidates at the meeting. Nonetheless, and because respondents had "their names written upon the ballots as candidates in opposition to those so orally nominated . . . [t]he respondents severally received a larger number of votes so cast at said election than did the complainants." In somewhat more modern English, the respondents won as write-in candidates, without having been nominated. The court upheld their election, in spite of a bylaw specifying election of directors "by nomination and ballot." Somewhat (but not much) more recently, the Pennsylvania Supreme Court similarly sustained a claim brought by a candidate seeking to elect himself as a director by submitting a ballot using a proxy he had received from a major shareholder, even though he had not been nominated before approval of a motion at the meeting to close nominations. The incumbent director who stood to be ousted challenged that candidate's election, invoking a bylaw provision specifying that "nominees" receiving the most votes would be elected, and arguing that therefore only someone "nominated" at the meeting could be elected. The court disagreed, noting first that "[i]t is gravely to be doubted whether the word 'nominees' was intended to be used in the technical sense of persons formally nominated for office." After ultimately concluding that the bylaw improperly conflicted

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21Id. at 438-39.
22Id. at 439. In describing this occurrence, the court colorfully describes the etymology of the word "ballot:"

The word "ballot" indicates a little ball, and it is common knowledge that little balls are used in social clubs and other society elections to determine whether a candidate for membership shall be admitted or not, and usually this is determined by the presence of one or more black balls, which are generally sufficient under the rules, to defeat the election.

Id.

27Id. at 438-39.
28Wirth, 76 A. at 439. A vigorous dissenting opinion invoked that provision ("[t]he election of directors shall be by nomination and ballot . . . "). Derisively responding to the majority's etymological flourish quoted in the previous footnote, the dissenting justice wrote:

Whatever may be the primary meaning of the word "ballot," it cannot be seriously urged that the stockholders . . . ever contemplated voting for their directors by little balls, or that a stockholder conceived, when he wrote the name of the person for whom he wished to vote upon a piece of paper and put that paper into the ballot-box, that he had both nominated and balloted for a director.

Id. at 440.
30Id.
31Id. at 494 ("We are loath to limit the fundamental right of shareholders to vote for whomsoever they please as directors of their enterprise, unless the limitation of their right is plainer than here appears." (citing Commonwealth ex rel. Grabert v. Markey, 190 A. 892, 893 (Pa. 1937))). Other cases, however, give effect to (presumably "plainer") bylaw provisions limiting election to
with the state constitutional provision that shareholders could vote for "candidates," and not just "nominees," the court noted that "many persons have been elected to office who were never nominated at all."

Thus, we learn that the right to nominate a candidate for election to the board of directors is conceptually and chronologically distinct from the right to vote on the election of such candidates: voting occurs only after candidates' names are placed in nomination. And we learn as well that, as noted by general authorities on parliamentary procedure, "[s]trictly speaking, nominations are not necessary when an election is by ballot or roll call, since each member is free to vote for any eligible person, whether he has been nominated or not." In short, one can have an election in which those with voting rights vote for whomever they choose to write on their ballots.

A nomination, then, is not casually proposing or campaigning for a candidate's election, and it is not voting for a candidate, whether by voice, by marking a pre-printed ballot, or by writing a candidate's name on a ballot. Rather, a nomination, at least in the sense used in this Article, involves formally placing the name of a candidate for office before the electorate at a meeting of the electorate to elect members of the governing body. As noted those nominated in accordance with bylaw requirements. See Susan W. Liebeler, A Proposal to Rescind the Shareholder Proposal Rule, 18 GA. L. REV. 425, 463 n.186 (1984).

Laughlin, 40 A.2d at 494 ("In all elections for directors or managers of a corporation each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer." (citing PA. CONST. OF 1945, ART. 16, §4)).

Id. at 494-95 (quoting Leonard v. Commonwealth, 4 A. 220, 224 (Pa. 1886)).

See, e.g., HANDBOOK FOR THE CONDUCT OF SHAREHOLDERS' MEETINGS, supra note 9, App. P at 164 (describing minutes of annual meeting in which the chair presents and invites nominations for election as director, and then declares that the polls are open for voting); see also HUGH CANNON, CANNON'S CONCISE GUIDE TO RULES OF ORDER 129-34 (1992) (describing, separately and in sequence, procedures for presenting nominations and conducting the election); SARA C. ROBERT ET AL., ROBERT'S RULES OF ORDER §46 425-26 (10th ed. 2001) (stating that in both types of election by ballot, casting of votes by ballot follows nominations).

ROBERT ET AL., supra note 34, at 416-17. This general statement does not adequately account for the possible validity of bylaw provisions conditioning election upon nomination in accordance with the bylaws. See infra Part V.E.

Write-in votes are a common voting mechanism in the U.S., at least in political elections. See, e.g., Angel v. Smith, 43 N.W.2d 871, 872 (Mich. 1950) ("The right of an elector to vote for a candidate whose name does not appear on any ticket on the ballot is expressly recognized by statute.").

See supra note 34 and accompanying text.

The modifier "at a meeting" certainly reflects the ordinary chronological occurrence of nominations in the context of meetings of stockholders to elect directors; that is, they are ordinarily considered to be made at the meeting itself. See Facilitating Shareholder Director Nominations, Securities Act Release No. 9136, Exchange Act Release No. 62,764, Investment Company Act Release No. 29,384, 75 Fed. Reg. 56,668, 56,702 n.342 (Sept. 16, 2010) ("[I]t is prevailing practice for the chairman to invite nominations of directors from the meeting floor."). One could conceive, however, of a system in which the core function of a nomination—bringing a candidate to the attention of the electorate—could be achieved through dissemination before the meeting. Thus, for
above, that formal placement may or may not be necessary to permit the
election of the candidate, depending on whether governing law or
instruments will be read to require that step. At a minimum, though, and
especially in the case of large and disaggregated groups of electors,
nomination brings the nominee's candidacy to the attention of the voters at
the meeting, and, especially when pre-printed on a written ballot, facilitates
the election of the nominee over any candidate not nominated but who might
otherwise be eligible for election through a write-in or equivalent
mechanism.

III. WHAT IS THE SOURCE OF THE RIGHT TO NOMINATE DIRECTORS?

As previously noted, corporate statutes explicitly define the voting
rights of shares; with rare exception, however, they say nothing about the
right to nominate director candidates. And while, as discussed below,
charter and bylaw provisions may limit the right of shareholders to nominate
directors, a provision affirmatively conferring that right as a general matter is
surely rare at best. Perhaps rarer or even non-existent is a charter or bylaw

effects particularly written to facilitate the election of a candidate or
otherwise make it easier to do so. See supra pp. 8-10.

40 Some empirical studies indicate that even the order of placement of candidates' names on a
written ballot affects voting outcomes. See generally David Brockington, A Low Information
Theory of Ballot Position Effect, 25 POL. BEHAV. 1 (2003) (suggesting that ballot order may be
particularly significant in elections of low salience); Jonathan G.S. Koppell & Jennifer A. Steen, The
position on the ballot favors a candidate, then mere presence on the ballot surely favors the candidate
substantially over a candidate whose name must be added to the ballot by the voter.

41 But see MD CODE ANN., CORPS. & ASSN'S § 2-504(f) (West 2011) ("The charter or
bylaws may require any stockholder proposing a nominee for election as a director or any other
matter for consideration at a meeting of the stockholders to provide advance notice of the
nomination or proposal to the corporation before a date or within a period of time specified in the
charter or bylaws."). Neither the Delaware General Corporation Law nor the Model Business
Corporation Act, in contrast, explicitly addresses the subject of nomination of directors.

42 In contrast, provisions conferring upon a specific stockholder or class of stock a right to
"nominate" one or more directors are not unprecedented. See, e.g., Harrah's Entm't Inc. v. JCC
Holding Co., 802 A.2d 294, 299 (Del. Ch. 2002) (rectifying charter provision conferring a "right to
nominate" one director). Consistent with the general inclination not to limit electoral rights in the
absence of a clear provision to that effect, the court in Harrah's did not read that specific nomination
right to preclude the holder of the right from nominating other directors in compliance with generally
applicable advance notice requirements in the bylaws. Id. at 310, 318. That reasonable conclusion
may have resulted in part from a suspicion that the provision of a right to "nominate" a director
really meant the right to request election of a director, and not just the right to make a nomination.
See id. at 304-05.
provision conferring upon the board of directors the right to nominate candidates for election to that body.

In the absence of specification in a governing statute or charter or bylaw provision, then, from what source does a right to nominate directors derive? On the rare occasion when courts have been asked this question, they have sometimes invoked the proposition that the right to nominate is an intrinsic element of the right to vote shares. A 1991 unreported opinion of the Delaware Court of Chancery states that "[t]he shareholders' right to vote includes the right to nominate a contesting slate." In support of this proposition, the court cited a 1985 federal appellate court opinion involving the voting and nomination rights of shareholders of a federally-chartered national bank, in which the court reasoned as follows in implying a right to nominate from a statute that prescribed voting rights but said nothing specific about the right to nominate directors. The 1985 court opinion stated:

We rest our holding as well on the common sense notion that the unadorned right to cast a ballot in a contest for office, a vehicle for participatory decisionmaking and the exercise of choice, is meaningless without the right to participate in selecting the contestants. As the nominating process circumscribes the range of the choice to be made, it is a fundamental and outcome-determinative step in the election of officeholders. To allow for voting while maintaining a closed candidate selection process thus renders the former an empty exercise. This is as true in the corporate suffrage context as it is in civic elections, where federal law recognizes that access to the candidate selection process is a component of constitutionally-mandated voting rights. Banks do not exist for the purpose of creating an aristocracy of directors and officers which can continue in office indefinitely, immune from the wishes of the shareholder-owners of the corporation. And there


44 Id. at *5.

45 Id.; see also 12 U.S.C. § 61 (2001) ("In all elections of directors, each shareholder shall have the right to vote the number of shares owned by him for as many persons as there are directors to be elected, or, if so provided by the articles of association of the national bank, to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal or to distribute them on the same principle among as many candidates as he shall think fit . . . . ").
is no more justification for precluding shareholders from nominating candidates for their board of directors than there would be for public officials to deny citizens the right to vote because of their race, poverty or sex.  

Several other federal decisions and secondary authorities accept this eminently plausible reasoning, and the idea that the right to nominate derives from the right to vote is corroborated by the proposition that holders of shares not entitled to vote on the election of directors most likely do not have the right to nominate directors either, if only because they ordinarily are not even entitled to notice of the meeting of stockholders.

It is important, however, to note some intriguing problems associated with the position that the right to nominate is an intrinsic element of the right to vote. First, that position invites inquiry into the meaning of the ubiquitous corporate statutes that enable charter provisions to depart from the default rule of one share/one vote. If the right to nominate is a part of the right to vote—a right that can be limited by charter provision—would it not be permissible for a charter to authorize shares with one vote per share but provide that those shares do not entitle the holder to nominate director candidates? In other words, is it permissible to have a charter provision that strips the putatively included right to nominate from shares that have the right to vote? Limiting the voting right in that fashion may indeed result in a right that is "unadorned," to use Durkin’s terminology, but is it illegal? If the right to nominate derives from the right to vote, and the governing statute provides that the right to vote can be circumscribed by charter provision, what is legally offensive about a charter provision that eliminates the right to nominate? This troublesome question suggests that the right to nominate

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47AHI Metnall, L.P. by AHI Kan., Inc. v. J.C. Nichols Co., 891 F. Supp. 1352, 1358 (W.D. Mo. 1995) (adopting the reasoning of the Durkin court); Melvin Aron Eisenberg, Access to the Corporate Proxy Machinery, 83 HARV. L. REV. 1489, 1505 (1970) ("As a corollary to their exclusive right to elect the board, the shareholders have the right to nominate candidates for directorships.").
48But see DEL. CODE ANN. tit. 8, § 221 (2013) ("Every corporation may in its certificate of incorporation confer upon the holders of any bonds, debentures or other obligations issued or to be issued by the corporation the power to vote in respect to the corporate affairs and management of the corporation . . . .")
49See, e.g., DEL. CODE ANN. tit. 8, § 214 (2013); Model Bus. Corp. Act § 7.28(c) (2010).
50See DEL. CODE ANN. tit. 8, § 221 (2013).
51Durkin, 772 F.2d at 59.
might benefit from a firmer, more fundamental underpinning than the explicitly modifiable right to vote. 52

A second oddity about locating the right to nominate in the right to vote is the proposition that, as previously noted, "nominations are not necessary when an election is by ballot or roll call, since each member is free to vote for any eligible person, whether he has been nominated or not." 53 In light of the admittedly theoretical possibility of having an election occur without any nominations for office being made, the right to nominate is not strictly necessary to give effect to the right to vote. 54 Of course, the disarray likely to ensue in an election system with an unrestrained ability to place candidates on the ballot (or present them to a roll call vote) makes the nomination process essentially indispensable—not indispensable to the right to vote, but indispensable to orderly process. 55 But the point remains: the right to vote can exist and be fully exercised without any subsumed right to nominate. 56 Indeed, under the Delaware statute, it is possible that directors can be elected year after year by majority stockholder written consent, where every stockholder would have the right to consent (or not) but would never have an opportunity to nominate directors. 57

Nomination is thus better viewed not as a form or element of the right to vote, but as a means to make voting rights more useful by limiting the informational and transaction costs of evaluating candidates, and permitting large electoral groups to vote on a limited number of viable candidacies—almost always two competing slates at most, at least in the context of corporate elections. 58

If not sourced in the right to vote, though, then where else does the right to nominate come from? The case law appears to supply limited help

52 See id. (stating that voting is meaningless unless there is the right to participate in selecting the contestants).

53 ROBERT ET AL., supra note 34, at 416-17.

54 See id.

55 Id. at 417 ("In most societies . . . it is impractical to proceed to an election without first making nominations.").

56 Id. at 416-17.

57 DEL. CODE ANN. tit. 8, § 211(b) (2013) (providing that in appropriate circumstances the election of directors by stockholder written consent permits the corporation to dispense with the annual meeting of stockholders).

58 See Robert B. Thompson & Paul H. Edelman, Corporate Voting, 62 VAND. L. REV. 129, 172 (2009) ("[T]he nomination process is less suited to a collective action vote than the election process itself, which has a more definitive and often a bimodal choice. . . . For a dispersed group of shareholders in an uncontested election, the incentives to gather information may be insufficient to offset the costs of the search. . . . The nomination process does not as easily permit shareholders to perform the error-correcting function they carry out in the contested election or removal of directors.").
in answering this question. On occasion, the courts have avoided tying nomination rights to the right to vote, using language sourcing nomination rights in the general, more amorphous, "right of shareholders to participate in the electoral process." Writings on the general subject of organizational meeting procedure seem to assume the existence of a member's basic right to nominate, but they likewise do not elaborate on the source of the right.

In suggesting, however, that "[a] nomination is, in effect, a proposal to fill the blank in an assumed motion 'that ______ be elected to the specified position[.]'" Robert's Rules of Order points the way to a different and more useful understanding of the grounding of the right to nominate: at a meeting at which an election is to occur, a motion to place a candidate before the body for election can readily be considered to be business properly conducted at the meeting. If nothing else, the various acts of nomination help frame the conduct of the election that follows, by identifying (write-in votes aside) what candidates may be voted for. Thus, the right to nominate finds a firm foundation in statutory language prescribing that at the annual meeting of stockholders at which directors are to be elected, all "proper business" may be transacted. In effect, a nomination is a piece of "proper" meeting business, distinct from the vote, which facilitates the subsequent exercise of collective choice in the form of voting.

At least two judicial opinions corroborate this approach, suggesting that the right to nominate is rooted in the statutory policy broadly defining

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59 See, e.g., Harrah's Entm't Inc. v. JCC Holding Co., 802 A.2d 294, 312 (Del. Ch. 2002) (noting that precedent at the time did not answer the question).
60 Id. at 310-11 (quoting Linton v. Everett, 1997 WL 441189, at *9 (Del. Ch. July 31, 1997)).
61 See CANNON, supra note 34, at 129 ("Every member in an assembly can nominate any other eligible member for office unless there is a bylaw provision that restricts this right.").
62 ROBERT ET AL., supra note 34, at 416.
63 Id. at 416-17.
64 Id. at 417; see also supra note 38 and accompanying text (discussing traditional norms for formal director nominations).
65 See, e.g., CAL. CORP. CODE § 600(b) (West 2007) ("Any other proper business may be transacted at the annual meeting."); DEL. CODE ANN. tit. 8, § 211(b) (2013) ("Any other proper business may be transacted at the annual meeting [in addition to the election of directors]"); MD. CODE ANN., CORPS. & ASS'NS § 2-501(d) (West 2013) ("[A]ny business may be considered at an annual meeting without the purpose of the meeting having been specified in the notice."); N.Y. BUS. CORP. LAW § 602(b) (McKinney 1998) ("A meeting of shareholders shall be held annually for the election of directors and the transaction of other business . . . ."). The Model Business Corporation Act has no similarly explicit foundation for transacting other proper business at the annual meeting, but its Official Comment indicates that this right inheres in the provision mandating that an annual meeting be held. MODEL BUS. CORP. ACT § 7.01 Official cmt. (2010) ("The principal action to be taken at the annual meeting is the election of directors . . . but the purposes of the annual meeting are not limited and all matters appropriate for shareholder action may be considered at that meeting.").
the scope of business to be conducted at the annual meeting.³⁶ Applying Maryland corporation law, a federal court declined to enforce a deadline for shareholder nominations set forth in the company's proxy statement but not in its charter or bylaws, in part because the purported deadline contravened the general statutory "policy to allow any business at annual meetings regardless of whether that business is specified in the notice . . . ."³⁶⁷ Similarly, the Delaware Court of Chancery has concluded, albeit with some hesitation, that "[t]he act of nominating someone as a candidate for election as a director is an 'affair' or 'matter'—or, in the wording of [the bylaw governing stockholder proposals], 'business'-to be considered at the stockholders' meeting."³⁶⁸

In sum, identifying the formal source of the right to nominate directors is a work in progress. Limiting that right by defining it as an element of the right to vote, however, exposes some unsettling inconsistencies.³⁶⁹ More important, and as developed further below, that definition may less-fully protect the right to nominate than the alternative view that nomination of candidates should be understood as a matter of ordinary and proper business, separate from voting, at the meeting to elect directors.³⁷⁰

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³⁶⁷Goldstein, 140 F. Supp. 2d at 439 "Except as this article provides otherwise, any business may be considered at an annual meeting without the purpose of the meeting having been specified in the notice." MD. CODE ANN., CORPS. & ASS'NS § 2-501(d). The court also found support for its ruling in the explicit statutory authorization for advance notice bylaws, and the negative implication from that provision that an advance notice requirement could not be established merely in a company's proxy statement. Goldstein, 140 F. Supp. 2d at 439 ("The Court interprets [MD. CODE ANN., CORPS. & ASS'NS § 2-504(f)] (West 2013]) to mean that . . . corporations could restrict shareholder proposals or nominations by including an advance notice provision in the corporation's charter or bylaws, but in no other way."). But cf. Goggin v. Vermillion, Inc., 2011 WL 2347704, at *3-*5 (Del. Ch. June 3, 2011) (finding that a proxy statement notice of a deadline for submitting shareholder proposals was likely to be sufficient to justify enforcement of a bylaw notice requirement adopted after the stockholder plaintiff requested that the board convene an emergency stockholder meeting).

³⁶⁸Levitt Corp., 2008 WL 1724244, at *5 n.33, *6, reprinted in 33 DEL. J. CORP. L. at 586-87 n.33. The court noted but rejected the argument that the term "business" "refers only to actions to be taken by the stockholders as a whole at the annual meeting," and would therefore not include a nomination by an individual stockholder. Id. at *5 n.33, *6, reprinted in 33 DEL. J. CORP. L. at 586-87 n.33, 589.

³⁶⁹See supra note 17 and accompanying text.

³⁷⁰See infra Part V.
IV. WHO HAS THE RIGHT TO NOMINATE DIRECTORS?

The next question is who can exercise the right to nominate directors. On this point, corporate statutes are totally silent, with the exception of the previously noted Maryland statute, which permits bylaws to require that shareholders provide advance notice of nominations or other matters to be presented at the meeting of stockholders.71 Like other states' corporation statutes, however, the Maryland statute does not purport to define who else can or cannot nominate directors, or how they may or must do so, unless that statute's explicit reference to shareholder nominations can be read to imply that no other person or group has the power to nominate—a highly dubious inference.72

Statutory silence, however, does not necessarily preclude an answer to the question of who can nominate a candidate for election as a director.73 We have already seen that members of the electing body (shareholders, in the case of corporations) are understood to have the right to nominate members of the governing body, at least if they have the right to vote in elections of such members.74 In the case of corporations, we have tentatively traced that right to the right to bring up proper business at the annual meeting of stockholders.75 But does that right belong to stockholders exclusively?

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71 MD. CODE ANN., CORPS. & ASS'NS § 2-504(f).
72 See infra note 162 (discussing one court's unwillingness to apply the principle of expressio unius est exclusio alterius to limit the right to nominate directors).
73 See supra notes 17-18 and accompanying text (discussing the use of statutory qualifications to limit the ability of shareholders to elect directors and suggesting that such a right is implicit in a shareholder's right to vote).
74 It seems unlikely that holders of shares which are not entitled to vote on the election of directors have a general right to nominate directors. It is explicit under section 7.05(a) of the Model Business Corporation Act that absent some supervening provision in the statute or the corporation's governing documents, "the corporation is required to give notice [of the meeting of shareholders] only to shareholders entitled to vote at the meeting . . ." MODEL BUS. CORP. ACT § 7.05(a) (2010). By its specific requirement that notice of a meeting to vote on a merger be "mailed to each holder of stock, whether voting or nonvoting," Delaware law by negative implication appears to adopt the same position as the explicit Model Act provision. Compare Del. Code Ann. tit. 8, § 251(c) (2001) (expressly requiring notice to holders of nonvoting shares in connection with the meeting to vote on the merger) with Del. Code Ann. tit. 8, § 222(b) (2000) (generally requiring written notice of meetings to be sent to each stockholder permitted to vote at the meeting). Given that holders of nonvoting stock are not ordinarily entitled to notice of regular annual meetings to elect directors, it would be anomalous to assert that such holders have a right to nominate directors.
The answer is surely no.\textsuperscript{76} One could reasonably surmise, for example, that the right to nominate directors may in some situations belong to bondholders and other corporate creditors.\textsuperscript{77} If the corporation's charter confers upon bondholders or other corporate creditors the right to vote in the election of directors, as permitted by statutes like section 221 of the Delaware General Corporation Law,\textsuperscript{78} those creditors would likely enjoy the right to nominate director candidates as well, especially if the pertinent charter provision were to provide, as permitted by statute, that such creditors "shall be deemed to be stockholders."\textsuperscript{79}

In any event, and much more importantly as a practical matter, there is a long-standing, widespread system by which the board of directors or its nominating committee, as such, nominates candidates for election at the annual meeting.\textsuperscript{80} That the board of directors itself has the power to nominate candidates is consistent with the overall legal framework of the U.S. corporate governance system: given the dominant managerial position of the board of directors in U.S. corporation law,\textsuperscript{81} it would be truly surprising to find that the board of directors lacked the power to place candidates of its choice before the stockholder meeting for election as

\textsuperscript{76}See supra pp. 12-13 (suggesting status as shareholder is sufficient but not necessary for nomination).

\textsuperscript{77}See infra note 163 (discussing ownership requirements for nominations in the context of non-profit organizations).

\textsuperscript{78}Del. Code Ann. tit. 8, § 221 (2013) ("Every corporation may in its certificate of incorporation confer upon the holders of any bonds, debentures or other obligations issued or to be issued by the corporation the power to vote in respect to the corporate affairs and management of the corporation . . . ."). Ten other states' corporate statutes also explicitly take this approach, though it is less clear whether this statutory authority has ever been used, at least in the case of publicly held corporations. See Model Bus. Corp. Act Ann. § 7.21, at 7-122 (4th ed. 2011 rev.).

\textsuperscript{79}Del. Code Ann. tit. 8, § 221.

\textsuperscript{80}The power of the board of directors to nominate candidates for election to that body is implicit and reflected in, among many other places, SEC and stock exchange rules. See, e.g., Regulation S-K Item 407(c), 17 C.F.R. § 229.407(c)(2)(vi) (2013) (requiring disclosure concerning the issuer's nominating committee, including information about each nominee approved by the committee for "inclusion on the registrant's proxy card"); NYSE Listed Company Manual § 303A.04(a), (b)(i) ("Listed companies must have a nominating/corporate government committee . . . [and the committee must] select, or . . . recommend that the board select, the director nominees for the next annual meeting of shareholders"); NASDAQ Stock Market Listing Rules, Rule 5605(e) (requiring that nominees for election to the board of directors of a listed issuer be selected either by independent directors constituting a majority of the board, or by a nominations committee comprised solely of independent directors).

\textsuperscript{81}See, e.g., Del. Code Ann. tit. 8, § 141(a) (2013) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . ."); Model Bus. Corp. Act § 8.01(b) ("[T]he business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its board of directors . . . .").
If, as suggested above, nomination is a matter of proper business at the annual meeting, it would seem appropriate to conclude that the board (or a nominating committee it creates) has the power to nominate, just as it has the power to propose other matters for action by shareholders. That view was explicitly endorsed in one fairly recent judicial opinion, is implicit in the Delaware statute that prohibits board committees from approving matters required by law to be submitted to stockholders for approval, other than election of directors, and is in any event consistent with general pronouncements about the mechanisms for nominating candidates for election, all to the effect that it is common and accepted practice to have a nominating committee present a slate of candidates at the meeting, even before inviting nominations from the floor.

Finally, given the breadth of the typical statutory catch-all authority for inclusion of governance provisions in the corporation's charter, one can imagine that the right to nominate directors could be conferred on anyone.

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82 See DEL. CODE ANN. tit. 8, § 141(a) (2013) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . "); MODEL BUS. CORP. ACT § 8.01(b) ("The business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its board of directors . . . ").

83 See supra pp. 14-16.

84 In addition to matters which governing statutes expressly empower and require the board of directors to submit to a stockholder vote (e.g., a proposed charter amendment, DEL. CODE ANN. tit. 8, § 242(b), a merger proposal, DEL. CODE ANN. tit. 8, § 251(c), a proposal to dissolve, DEL. CODE ANN. tit. 8, § 275(a)), boards routinely submit other matters, such as proposals to engage in transactions for which stock exchange listing standards require shareholder approval, to approve equity compensation plans, and to ratify the company's choice of outside auditor. See, e.g., NASDAQ Stock Market Listing Rules, Rule 5635(c); NYSE Listed Company Manual §§ 303A.08, 312.03(a); Mai Dao, Suchismita Mishra & K. Raghunandan, Auditor Tenure and Shareholder Ratification of the Auditor, 22 ACCT. HORIZONS 297, 298 (2008) ("Although there is no legal requirement for public companies to submit the selection of the external auditor for ratification by shareholders, many do so as a matter of good corporate governance.").

85 Rude v. Cook Inlet Region, Inc., 294 P.3d 76, 90 (Alaska 2012) (confirming that the board of directors had the authority to select a slate of nominees without participation by shareholders).

86 See DEL. CODE ANN. tit. 8, § 141(c) (2013).

87 See Michael E. Murphy, The Nominating Process for Corporate Boards of Directors: A Decision-Making Analysis, 5 BERKELEY BUS. L.J. 131, 145 (2008) (discussing the lack of formal procedures for the nomination of directors until the 1970s when nominating committees composed of directors were instituted).

88 See CANNON, supra note 34, at 130 ("After the nominating committee has presented its report, which places the names of its nominees in consideration, the Chair should then call for nominations from the floor." (emphasis omitted)); ROBERT ET AL., supra note 34, at 421 ("After the nominating committee has presented its report and before voting for the different offices takes place, the chair must call for further nominations from the floor.").

89 See, e.g., DEL. CODE ANN. tit. 8, § 102(b)(1) (2013) ("[T]he certificate of incorporation may . . . contain . . . [a]ny provision for the management of the business and for the conduct of the
In practice, though, it is the shareholders and the board of directors who most commonly and generally nominate directors, and the next Part addresses the interaction of those two constituencies on the subject of director nominations by shareholders.

V. HOW CAN THE SHAREHOLDERS' RIGHT TO NOMINATE DIRECTORS BE LIMITED?

As noted earlier, courts go to great lengths to express solicitude for the importance of shareholder electoral rights, including the right to nominate directors. Like any right, however, the right to nominate directors is not absolute. What limitations on that right, then, are permissible? That is the question addressed in this Part, beginning with the most clearly developed aspect of the response to the question—advance notice bylaws—and proceeding thereafter into murkier waters involving other forms of limitation on the right to nominate.

A. Advance Notice Bylaws

A bylaw precluding director nominations by shareholders unless preceded by a notice given to the corporation by a certain time before the shareholder meeting obviously limits the scope of the right to nominate. Without great controversy or analysis, however, this sort of bylaw has become standard in U.S. public companies. The Delaware Court of
Chancery has observed that advance notice bylaws, provisions that require stockholders to provide the corporation with prior notice of their intent to nominate directors along with information about their nominees, are "commonplace" and "are often construed and frequently upheld as valid by Delaware courts." In fact, they have been upheld in other jurisdictions as well, and over a very long period of time. As discussed below, however, these bylaws have evolved substantially in recent years, and it is worth stepping back and considering the basis for validating them, and the extent to which, as evolved or evolving, there may be continuing concerns with their validity or application.

In discussion above, it has been suggested that the right to nominate flows either from the right to vote or from a statutory policy of permitting proper business to be conducted at the annual meeting. With respect to either source of the right, one could argue that in the absence of an authorizing statute (or perhaps a charter provision as well, if the right to nominate were viewed as part of the right to vote), any bylaw that purported to prevent a stockholder from putting forward a nomination at the annual

Section 1.2, that require stockholders to give advance notice of an intent to nominate directors . . . have been widely adopted, primarily by public companies . . . "); HANDBOOK FOR THE CONDUCT OF SHAREHOLDERS' MEETINGS, supra note 9, at 24 ("Courts in Delaware and elsewhere have validated advance notice provisions in public corporation bylaws.").


97See Booker v. First Fed. Sav. & Loan Ass'n, 110 S.E.2d 360, 362-63 (Ga. 1959) (upholding a ten-day notice requirement); In re O'Shea, 269 N.Y.S. 840, 840 (App. Div. 1934) (upholding a five-day notice provision); HANDBOOK FOR THE CONDUCT OF SHAREHOLDERS' MEETINGS, supra note 9, at 26 n.6 (noting validation of a sixty-day notice requirement (citing Am. Gen. Corp. v. Torchmark Corp., 1990 WL 595282, at *3-*4 (S.D. Tex. 1990)); see also McKee & Co. v. First Nat'l Bank of San Diego, 265 F. Supp. 1, 9-10 (S.D. Cal. 1967), aff'd 397 F.2d 248, 248 (9th Cir. 1968) (upholding a bylaw requiring advance submission of information about shareholder nominees). The applicable Delaware law on this subject, on the other hand, remained unclear at least until 1988. In 1985, the Court of Chancery noted but did not reject (or accept, for that matter) an assertion that a stockholder has an unfettered right to present any proper business at an annual meeting without advance notice, and that a bylaw requiring thirty days' advance notice of business to be presented at the meeting was therefore invalid. Mesa Petroleum Co. v. Unocal Corp., 1985 WL 44692, at *4 (Del. Ch. Apr. 22, 1985). It was only in 1988 when the Court of Chancery, with no citation of authority and little discussion, rejected a challenge to a similar bylaw. Nomad Acquisition Corp. v. Damon Corp., 1988 WL 383667, at *6 (Del. Ch. Sep. 16, 1988), reprinted in 14 DEL. CORP. L. 814, 827 (1989) (finding no reasonable probability of success at trial on a claim that a bylaw requiring sixty days advance notice of director nominations was invalid).

98See infra pp. 26-32.
meeting would be facially invalid. 99 That is clearly not the law, however, but it may be useful to consider why. 100 The short answer is that for a bylaw or charter provision to be "inconsistent with law[,]" 101 the conflict with the governing statute must have at least some meaningful substance, and cannot simply be of theoretical but no practical content. 102

Thus, and in a somewhat analogous setting, courts have ruled that despite a statute plainly requiring that stockholders have a right to act by written consent "[u]nless otherwise provided in the certificate of incorporation" (and not in the bylaws), a bylaw may not eliminate that right, but could permissibly impose "minimal essential provisions for ministerial review of the validity of the action taken by shareholder consent." 103 Thus, and while that statute effectively prohibits a bylaw purporting to delay substantially the exercise of the right to act by written consent without a meeting, 104 a bylaw can permissibly provide salutary, protective benefits (such as prompt verification of the outcome of an election contest) as long as it does not unduly impair the statutory right. 105 Or, as the Delaware courts have come to formulate this idea in relation to bylaws limiting the right to nominate directors, such bylaws will be sustained unless they "unduly restrict the stockholder franchise or are applied inequitably." 106

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99 And indeed, it has been argued. See Mesa Petroleum Co., 1985 WL 44692, at *4 (noting the claim that the right to present business (including nominations) at the annual meeting is "unfettered").

100 See id.

101 Del. Code Ann. tit. 8, § 109(b) (2013) (authorizing a broad range of bylaws as long as they are consistent with law and with the certificate of incorporation).

102 See Jones Apparel Grp., Inc. v. Maxwell Shoe Co., Inc., 883 A.2d 837, 845-46 (Del. Ch. 2004) ("[T]he court must next carefully consider the statutory text at issue and the policy values at stake as reflected not only in the DGCL but also in our common law, and only invalidate a certificate provision if it transgress[es]—i.e., vitiates or contravenes—a mandatory rule of our corporate code or common law." (quoting Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 118 (Del. 1952))).

103 Datapoint Corp. v. Plaza Sec. Co., 496 A.2d 1031, 1035-36 (Del. 1985) (invalidating a bylaw restricting stockholder action by written consent, where the governing statute—Section 228 of the Delaware General Corporation Law—permitted elimination of the right to act by written consent only by provision of the charter, and not by bylaw); see also Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 929 (Del. 1990) ("The by-law amendment proposed by Centaur fixes the number of directors at fifteen. Article Eighth [of the certificate of incorporation] grants the board broad authority to fix the number of directors, which power may be exercised from time to time through the adoption of by-laws. Because the proposed provision is clearly 'inconsistent with' the directors' power to enlarge the board without limit, it would be a nullity if adopted.").


105 Datapoint, 496 A.2d at 1035.

We will return later to the second, "applied inequitably" aspect of this formulation.\textsuperscript{107} Focusing for now on the first part of this formulation, however, the question becomes whether and when an advance notice bylaw "unduly restricts" the right to nominate directors.\textsuperscript{108} It is suggested here that this phrase ("unduly restrict") really works in two dimensions: proportionality and neutrality. The dimension of proportionality involves an inquiry into the impact of the restriction on the practical ability to nominate directors, and, less explicitly, requires attention to the extent of the putative benefits of the restriction.\textsuperscript{109} In other words, courts explicitly or implicitly balance the negative impact of the limitation on the right to nominate against the positive impact on the interests of the corporation and its stockholders.\textsuperscript{110}

Thus, for example, a court could conclude that a bylaw requiring sixty days advance notice of intent to nominate (a) would impose only a minimal burden on stockholders seeking to elect one or more directors of their selection, especially in the context of an election contest in a public company, where proxy material must be filed with the SEC and proxies must ordinarily be solicited over an extended period, but (b) would have the salutary effect of affording time for dissemination of additional information and competing argument about the merits of the election.\textsuperscript{111} On that second point, consider the possibility that an election contest might be initiated just days before the meeting and vote, or—as is now technologically possible—at the meeting itself, if voting is accomplished by online submission of ballots and no proxies are solicited ahead of the meeting.\textsuperscript{112} It is fairly easy to be

\textsuperscript{107}See infra Part V.B. See Openwave, 924 A.2d at 238-39 (advance bylaws that operate inequitably will not be enforced).

\textsuperscript{108}See infra Part V.B.

\textsuperscript{109}Openwave, 924 A.2d at 238-39.

\textsuperscript{110}Id.

\textsuperscript{111}See 17 C.F.R. § 240.14a-6 (2014) (requiring filing of preliminary proxy material at least ten calendar days before definitive copies are sent or given to security holders); SEC Concept Release on the U.S. Proxy System, 75 FR 42892, 43014-15 (July 22, 2010) (noting "certain logistical and legal matters" that effectively require that proxy solicitations involve an extended period for distribution of solicitation materials to beneficial shareholders through the street name registration system).

\textsuperscript{112}Of course, it seems alien in our current legal system to think of an election contest in a publicly held company being conducted without a solicitation of proxies. But as Professor Jill Fisch has reminded us, there was a time when courts held that proxy voting was impermissible at common law, at least in the absence of an authorizing charter or bylaw provision. Jill E. Fisch, The Transamerica Case, in The Iconic Cases in Corporate Law, 46, 47 (Jonathan R. Macey, ed., 2008). And today, proxy voting may well be a technological anachronism, in a world in which shareholder votes can be conveyed instantly and remotely by electronic transmission, actual discussion at a meeting can be broadcast instantaneously by streaming video, and real time participation in stockholder meetings can occur from anywhere in the world with an Internet
concerned that a rushed contest of this sort would not serve the interests of shareholders generally in voting on an informed basis, and it has been easy for courts to conclude that a reasonably short advance notice requirement usefully addresses this concern, without significantly impeding any shareholder's practical ability to conduct an election contest.\textsuperscript{113}

Stretch the advance notice period to 180 days, however, and the balance changes: the notice requirement becomes more burdensome by reducing the shareholder's flexibility, and the marginal benefit of facilitating dissemination of additional useful information becomes considerably more attenuated. A court willing to uphold the sixty day notice requirement could well choose to invalidate the 180 day requirement. As one might imagine, there is no definitive law establishing a maximum permissible advance notice period, and courts have resisted creating such an essentially legislative rule.\textsuperscript{114} The result of this uncertainty, according to at least one authority, is that "care should be taken to assure that the time period selected is reasonably related to the bylaw's purpose."\textsuperscript{115}

The second dimension in evaluating the validity of a bylaw limiting the right to nominate is the question of its neutrality as between shareholder nominees and candidates nominated by the board of directors. It is


\textsuperscript{114}See \textit{Openwave}, 924 A.2d at 238-39.

\textsuperscript{115}See Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 728 A.2d 25, 41-42 (Del. Ch. 1998) (upholding a board's adoption of a bylaw requiring that a special meeting convened upon stockholder demand be held between ninety and one hundred days after validation of the demand, observing that a decision about the choice of time period "is necessarily and inherently judgmental[,]" and ninety to one hundred days "struck a proper balance in this specific case[,]" especially in light of the unchallenged ninety day period in the company's advance notice bylaw); cf. Goggin v. Vermillion, Inc., 2011 WL 2347704, at *4 (Del. Ch. June 3, 2011) (finding it unlikely that a bylaw requiring over 150 days advance notice of nominations and proposals would be found to be "unreasonably long or unduly restrictive" of plaintiff's franchise rights).

\textsuperscript{116}\textit{Handbook for the Conduct of Shareholders' Meetings}, \textit{supra} note 9, at 24 (citing Levitt Corp. v. Office Depot, Inc., 2008 WL 1724244, *4 (Del. Ch. Apr. 14, 2008), reprinted in 33 Del. J. Corp. L. 579, 584 (2008)); see also Coates & Faris, \textit{supra} note 17, at 1350 (suggesting that the Delaware Supreme Court's opinion in \textit{Prime Computer} indicates that "a least drastic means-type test" should play a role in determining the validity of a bylaw delaying the effectiveness of stockholder action by written consent).
suggested that courts would and should view the provision more skeptically if the advance notice requirement were tailored to elicit and disseminate information to shareholders about shareholder nominees significantly ahead of the timetable for gathering and disseminating equivalent information about the board's nominees.  

Duration of the advance notice period, however, is not the only dimension in which an advance notice requirement could "unduly restrict" the right to nominate directors. Advance notice bylaws also frequently contain an informational component, one that has expanded considerably over a fairly short time, but without much comment. In their "early" form (through the 1980s, at least), advance notice bylaws required submission of the information that would be required under the federal proxy rules to be included in any event in the contestant's proxy materials. Such informational requirements were thus considered innocuous and were sustained as not unreasonable.  

More recently, however, advance notice bylaws have come to require a submission of a number of additional informational matters, and even substantive representations and agreements, such as:

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116As a general proposition, courts evaluate the reasonableness of bylaws, particularly those affecting the right to elect directors, in part by reference to whether they impose any discriminatory effect. See, e.g., McKee & Co. v. First Nat'l Bank of San Diego, 265 F. Supp. 1, 12 (S.D. Cal. 1967) (validating nomination bylaw and finding no threat of discrimination in its application); Superior Bedding Co. v. Serta Assocs., Inc., 353 F. Supp. 1143, 1149 (N.D. Ill. 1972) ("Any bylaw must . . . be non-discriminatory in its application").

117HANDBOOK FOR THE CONDUCT OF SHAREHOLDERS' MEETINGS, supra note 9, at 25 ("The informational requirements of advance notice provisions also have expanded."). For example, a Lexis search on "bylaw" or "by-law" & "written questionnaire with respect to the background and qualification of such person"—terminology from the now very common form of advance notice below reproduced infra note 123—reveals no results prior to 2006, but hundreds of results currently, suggesting that this sort of provision has become widely used in just the past seven years.


119See id. ("Such information is a reasonable requirement even where no solicitations are made since the bank's management has the duty to ascertain and disclose to shareholders any facts which may affect a nominee's loyalty to the bank. A bank is a quasi-public institution, and if a minority shareholder wishes to place a representative on its board, other shareholders who are asked to vote on the nominee should know the background and interest of the nominating shareholder and his nominee. In short, this bylaw does no more than establish a policy of full disclosure which certainly can be only to the best interests of the bank.").
• Information about the nominator's (and its nominees') holdings of derivative securities and hedging transactions in the company's shares, not required to be disclosed under federal law;\textsuperscript{126}
• A commitment to update information;\textsuperscript{121}
• A formal verification of the information submitted;\textsuperscript{122}
• Responses to a questionnaire, presumably prepared by management or the board of directors but with content not specified in the bylaw, about the nominees' background and qualifications;\textsuperscript{123}
• A representation and agreement that the nominee has made no commitment to vote as a director that could limit or interfere with the ability to comply with fiduciary duties, and that the nominee will comply with all governance policies and guidelines of the company.\textsuperscript{124}

\textsuperscript{126} HANDBOOK FOR THE CONDUCT OF SHAREHOLDERS' MEETINGS, \textit{supra} note 9, at 25 (citing CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP, 562 F. Supp. 2d 511, 559-61 (S.D.N.Y. 2008)).
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} One currently common formulation provides:
To be eligible to be a nominee for election or reelection as a director of the corporation, a person must deliver (in accordance with the time periods prescribed for delivery of notice under Section 2 of this Article III) to the Secretary of the corporation at the principal executive offices of the corporation a written questionnaire with respect to the background and qualification of such person and the background of any other person or entity on whose behalf the nomination is being made (which questionnaire shall be provided by the Secretary upon written request)....

Weyerhaeuser Co., Bylaws Art. III § 3 (Form 10-Q, Exh. 3.2) (July 10, 2010); BorgWarner, Inc., Amended and Restated Bylaws Art. II § 8 (Form 10-Q, Exh. 3.2) (July 25, 2012) (same); Vulcan Materials Co., Amended and Restated Bylaws Art. I § 1.05 (Form 8-K, Exh. 99.3(b)) (July 13, 2012) (same); The Boeing Co., Bylaws Art. I § 11.3 (Form 8-K, Exh. 3.2) (Apr. 30 2012) (same); Arkansas Best Corp., Third Amended and Restated Bylaws Art. II § 2.13(d) (Form 10-Q, Exh. 3.5) (Apr. 22, 2010) (same).
\textsuperscript{124} Section 3 of the Weyerhaeuser Co. Bylaws, quoted in the previous footnote, goes on to require submission of:
a written representation and agreement (in the form provided by the Secretary upon written request), which agreement shall...provide that such person...is not and will not become a party to...any agreement, arrangement or understanding with, and has not given any commitment or assurance to, any person or entity as to how such person, if elected as a director of the corporation, will act or vote on any issue or question (a 'Voting Commitment') that has not been disclosed to the corporation or...any Voting Commitment that could limit or interfere with such person's ability to comply, if elected as a director of the corporation, with such person's fiduciary duties under applicable law,...is not and will not become a party to any agreement, arrangement or understanding with any person or entity other than the corporation with respect to any direct or indirect compensation, reimbursement or indemnification in connection with service or action as a director that has not been
These expanded requirements have not yet attracted specific judicial attention. If and when they do, the following considerations might be brought to bear:

- Adducing information about nominees' ownership of the company's securities and disseminating that information to stockholders in connection with an election of directors are useful steps presumably because such ownership may affect the motivations and conduct of a director, in either positive or negative ways.125 Presumably as well, then, ownership of derivative instruments related to the company's issued securities may shed useful light on the motivational significance of the candidate's ownership of non-derivative securities.126 The bylaw provision requiring disclosure of ownership of derivative securities is thus at least plausibly valid, even if federal law does not (yet) require disclosure of all such information. On the other hand, such a provision applicable to shareholder nominees disclosed therein, and . . . in such person's individual capacity and on behalf of any person or entity on whose behalf the nomination is being made, would be in compliance, if elected as a director of the corporation, and will comply with all applicable publicly disclosed corporate governance, conflict of interest, confidentiality and stock ownership and trading policies and guidelines of the corporation.

Weyerhaeuser Co., Bylaws Art. III § 3 (Form 10-Q, Exh. 3.2) (July 10, 2010).

125 Consistent with statutes authorizing bylaws that require share ownership as a qualification to serve as a director, many public corporations have adopted share ownership guidelines for their directors. See, e.g., DEL. CODE ANN. tit. 8, § 141(b) (2013); see also Updated Survey of Share Ownership Guidelines and Stock Retention Requirements, AYCO COMP. & BENEFITS DIG., at 4 (May 18, 2012), available at http://www.aycofinancialnetwork.com/news/digest/digest_1205.pdf ("76% of the Fortune 100 have stock ownership guidelines for directors. Typically, a director's ownership target will be a multiple of the annual retainer."). Legal scholars have also asserted that substantial share ownership promotes more effective director oversight and reduces managerial agency costs. See, e.g., Sanjai Bhagat et al., Director Ownership, Corporate Performance, and Management Turnover, 54 BUS. LAW. 885, 890 (1999) ("Traditionally, directors, as large shareholders, had a powerful personal incentive to exercise effective oversight. It was the equity ownership that created an effective agency. To recreate this powerful monitoring incentive, directors must become substantial shareholders once again."). But cf. Fran M. Stoller, The Case Against Stock Ownership Requirements for Directors, BOARDMEMBER.COM (June 2, 2009), available at http://www.loeb.com/caseagainststockownershiqrequirementsdirectors/ (arguing that adverse effect on board diversity and the potential for conflicts of interest, including in relation to creditors, undermines the utility of director share ownership).

126 It has been known for some time that the motivations associated in the abstract with ownership of common stock can be accentuated, attenuated, or eliminated altogether through the holding of derivative instruments that hedge such ownership. See, e.g., Concept Release on the U.S. Proxy System, Exchange Act Release No. 34-62495, 75 Fed. Reg. 42982, 43017-43019 (proposed July 22, 2010) (to be codified at 17 C.F.R. pts. 240, 270, 274, et al.) (discussing the question of empty voting and strategies for separating voting rights from the economic interest in shares).
would become suspect if board nominees were not also required to provide such information as a condition to their own nomination. A bylaw requiring the person who submits the notice to verify the information supplied seems, at one level, to be innocuous: it seems a mild burden at most, and may marginally promote accurate and complete disclosure of useful information. Again, though, the verification requirement would become suspect if the board's nominees—especially if they are not already directors subject to fiduciary duties—were free of any such requirement. Nonetheless, as an abstract matter a verification requirement seems at least superficially valid. Such a requirement, however, may raise some knotty issues if and when someone seeks to enforce it in a specific case. In one situation, a nominee (or her nominator) may inadvertently fail to provide the required verification, and may not supply it until after the bylaw deadline for submission of the information and the verification. One can reasonably suspect that a court would decline to support exclusion of a shareholder nominee in that situation, on the theory that such literal enforcement would operate inequitably because it would not advance any salutary purpose of the verification requirement. In another situation, it might be determined after a shareholder nominee is elected that the information she submitted, and therefore her verification, was incorrect in some material respect. Would a court undo her election and declare an opposing, board-nominated candidate the winner instead? This too seems like an extreme remedy, one that a court would be unlikely to impose, especially in the absence of proof that the informational failure was seriously significant or intentional. A lesser sanction—e.g.,

127 Peter Allan Atkins, Richard J. Grossman, & Edward P. Welch, *Rethinking Director Nomination Requirements and Conduct in an Era of Shareholder Activism*, INSIGHTS, July 2013, at 1, available at http://www.skadden.com/insights/rethinking-director-nomination-requirements-and-conduct-era-shareholder-activism (cautioning board members to make nomination requirements applicable to shareholder and board nominees alike or have a legitimate basis for any difference).
128 See *MODEL BUS. CORP. ACT* § 8.30(c) (2010) (requiring a director to disclose to fellow directors information known to be "material to the discharge of their decision-making or oversight functions," presumably including their evaluation and selection of nominees for election to the board of directors).
130 In arguably analogous cases of proxy solicitation fraud, courts exercise considerable discretion in fashioning relief with a range of remedies. *See J.I. Case Co., v. Borak*, 377 U.S. 426, 433 (1964) (explaining that courts have latitude in fashioning remedies); Bertoglio v. Tex. Int'l Co.,
defining a false submission as a basis for disqualifying the director from being elected and serving in the future—is perhaps more plausible, but not relief one might expect a court to grant on its own authority.\textsuperscript{131} It is, perhaps, more appropriately built into the bylaws, through a director-qualification requirement; submission of a false or misleading statement in connection with a nomination would preclude service as a director.\textsuperscript{132} In any event, a verification requirement in an advance notice bylaw may well benefit from further thought and elaboration about whether, how, and by whom it could be enforced.

- A requirement that a shareholder nominee complete and submit a questionnaire about his or her background and qualifications raises these same enforcement issues and more. One can understand the motivation for requiring such a submission: SEC rules now require the company's own proxy statement to examine the board's own nominees' qualifications in much more specific depth,\textsuperscript{133} and it is not illogical to seek to elicit similar information about shareholder nominees.\textsuperscript{134} One should also not fault the typical questionnaire requirement simply because the bylaw provision is open-ended, leaving the content of the questionnaire presumably to the discretion of the board of directors.\textsuperscript{135} As disclosure requirements and the range of pertinent information evolve,\textsuperscript{136} corporations should have the flexibility to revise the questionnaire without having to amend

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\item \textsuperscript{131} Cf. Del. Code Ann. tit. 8, § 225(c) (2013) ("[The court may remove a director that] has been convicted of a felony in connection with the duties of such director . . . or if there has been a prior judgment on the merits by a court of competent jurisdiction that [the director] has committed a breach of the duty of loyalty in connection with the duties of such director . . . to that corporation."); Model Bus. Corp. Act § 8.09(a) & Official cmt. at 18-6 (2010) (permitting judicial removal of a director for fraudulent conduct with respect to the corporation or its shareholders, or for what the Official Comment describes as other "serious misconduct").
\item \textsuperscript{132} See Model Bus. Corp. Act § 2.06(b) (2010) ("The bylaws of a corporation may contain any provision that is not inconsistent with law or the articles of incorporation."); Model Bus. Corp. Act § 8.02 (2010) ("The ... bylaws may prescribe qualifications for directors.").
\item \textsuperscript{133} 17 C.F.R. §§ 229.401, 240.14a-101 (2013). This section, requires the inclusion in the proxy statement, for each director nominee, a discussion of "the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director for the registrant at the time that the disclosure is made, in light of the registrant's business and structure." Id.
\item \textsuperscript{134} In fact, a shareholder nominee included in the company's proxy materials pursuant to a proxy access bylaw must make disclosure equivalent to that described in the preceding footnote for the board's nominees. 17 C.F.R. § 240.14n-101 (2013).
\item \textsuperscript{135} See Model Bus. Corp. Act § 8.01 (2010) (outlining duties of directors).
\item \textsuperscript{136} See generally Atkins et al., supra note 127.
\end{enumerate}
\end{footnotesize}
the bylaws in order to keep the questionnaire relevant. That said, however, the requirements of proportionality and neutrality should be kept in mind when designing the questionnaire: a court should and would likely inquire whether the questionnaire seeks to elicit information comparable to what is available with respect to board-selected nominees, and whether the information is at least plausibly useful to shareholders in evaluating competing candidates for office and not unreasonably burdensome (for proprietary or other reasons) to provide.137

- The widespread practice of requiring nominees to submit agreements that they have made no commitment to vote, as a director, that could limit or interfere with their ability to comply with fiduciary duties, and that they will comply with all governance policies and guidelines of the company, is problematic on several levels, even assuming that the board's own nominees are required to submit similar undertakings.138 Most notably, such provisions are disturbingly open-ended. As typically drafted, for example, the bylaw could be said to call for a commitment to comply with policies and guidelines not even yet adopted.139 It is also ambiguous in its reference to "corporate governance" policies, unless it is plain from some relevant context (e.g., designation of "corporate

137 Practitioners have suggested that advance notice informational requirements be structured in two steps, so that the board can determine what information is truly useful after seeing initial materials identifying the nominating shareholders and their nominees. Id. ("[S]ome disclosures, representations and agreements might be better framed if the company knew, before providing its requirements, the identity of the sponsoring shareholder and of the nominees, and much of the information that otherwise would be obtained through required disclosures to the company at the time of submission of a nomination. Accordingly, in order to make more informed decisions about how precisely to frame the disclosures, representations and agreements to be required in a particular case, companies may wish to consider adopting a two-stage advance notice process."). The risk in this approach is that supplemental informational requirements adopted by incumbents in the second stage of the process could in some circumstances be found to be unduly burdensome and to operate inequitably.

138 Although such provisions are common, they are not included in the model ABA public company bylaws cited above. PUBLIC COMPANY ORGANIZATIONAL DOCUMENTS, supra note 95.

139 The typical provision calls for an agreement to "comply with all applicable publicly disclosed corporate governance, conflict of interest, confidentiality and stock ownership and trading policies and guidelines of the corporation." Weyerhaeuser Co., Bylaws Art. III § 3 (Form 10-Q, Exh. 3.2) (July 11, 2010). Thus, it is ambiguous on the question of whether it seeks a commitment to comply with policies and guidelines that may be formulated, publicly disclosed, and applicable only in the future. Most likely, however, a court asked to consider remedial consequences for failure to comply with a policy or guideline would read the phrase narrowly to apply only to policies or guidelines in existence and publicly disclosed at the time the nominee submits the required agreement.
governance policies" on the company's web site) what specific policies and guidelines are covered. Even though it may be perfectly acceptable to require a nominee to commit to abide by a specific reasonable corporate policy, such as maintaining the confidentiality of proprietary information, requiring a commitment to abide by an ambiguously broad set of policies heightens a distinct concern, namely whether a nominee can fairly be called upon to adhere to any and all corporate policies and guidelines, even those with which she disagrees and might seek to alter if elected. Would the typical bylaw provision, for example, prevent the nomination of a candidate who openly and candidly questions the validity or enforceability of a confidentiality "guideline," and discloses the intent to change it or not comply with some reasonably foreseeable aspect of it? And returning to other questions of enforceability, what remedy would be appropriate if a nominee were elected but subsequently was deemed to have violated a corporate governance guideline with which she previously agreed to comply? Immediate removal from office? Would breach of the initial agreement to comply be a basis for remedial action independent of breach of the policy or guideline? Would the board of directors be able to take such remedial action on its own? If the sanction were removal from office, one would think not, given that the board of directors generally lacks the power to remove one of its members. Or,


141 Atkins et al., supra note 127 ("[O]ne fix . . . would be for the board to establish in the company's bylaws a director nomination requirement that, prior to being accepted as a nominee, each proposed nominee must confirm in writing . . . that she or he will abide by all policies applicable to directors from time to time, including policies defining and specifying the treatment of company confidential information."); see also Frederick H. Alexander et al., Proxy Access and Delaware Corporations, DEL. CORP. L. COUNSELING CLIENT UPDATE, Sept. 2010, at 2, available at http://65.36.194.206/nna/PDFs/ClientUpdate_DECorpCounseling_Sept2010.pdf ("[C]orporations may wish to review their qualification provisions to ensure that all nominees will comply with significant corporate governance policies and informational provisions." (emphasis in original)).

142 See Atkins et al., supra note 127 (discussing confidentiality guidelines).

143 Despite the absence of a controlling statute, "]t]he case law . . . is reasonably clear that authority cannot be lawfully granted to directors to remove a fellow director with or without cause." DAVID A. DREXLER ET AL., 1-13 DELAWARE CORPORATION LAW AND PRACTICE § 13.01[12][b] (LexisNexis 2013); Kurz v. Holbrook, 989 A.2d 140, 157 (Del. Ch. 2010), aff'd in relevant part sub nom. Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 402 (Del. 2010); Nevins v. Bryan, 885 A.2d 233, 252 n. 70 (Del. Ch. 2005), aff'd, 884 A.2d 512 (Del. 2005).
could removal be a self-executing remedy, if the applicable bylaw specified the breach as a failure to satisfy a continuing qualification requirement, thereby requiring removal as the consequence?

B. Invalidation or Ad Hoc Non-Enforcement?

The preceding discussion addresses whether bylaws that limit the right to nominate directors are valid, by examining whether such bylaws "unduly restrict" the right to nominate. Invalidation as "unduly restrictive," however, is not the only potential obstacle to enforcement of a limitation on the right to nominate: as previously noted, a limitation on the right to nominate will also not be enforced if it is deemed to be "applied inequitably." In fact, it is surely far easier for a court to find a case-specific equitable reason for declining to enforce a bylaw limitation rather than to make a generally applicable pronouncement about the formal validity of such a limitation.

Indeed, recent Delaware case law involving the application of advance notice bylaws has relied heavily on the proposition that a bylaw should not be interpreted or applied to prevent a nomination if that interpretation or application would operate inequitably. In several cases, the courts have given effect to concerns about the negative effects of advance notice provisions by construing such provisions narrowly, to avoid impairment of the shareholders' right to nominate directors. In JANA Master Fund, Ltd. v. CNET Networks, Inc., for example, the court addressed and rejected the corporation's claim that a bylaw precluded a shareholder from presenting a proposal to expand the board and making nominations at the annual meeting of stockholders. The court arrived at its conclusion by construing the

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144 See supra Part V.A.
145 See, e.g., JANA Master Fund, Ltd. v. CNET Networks, Inc. 954 A.2d 335, 346 (Del. Ch. 2008) (rejecting the corporation's claim that a bylaw precluded a shareholder from presenting a proposal to expand the board and making nominations at the annual meeting of stockholders).
146 Id.
147 Id.
148 Id. at 335.
149 The bylaw in question provided:
Any stockholder of the Corporation that has been the beneficial owner of at least $1,000 of securities entitled to vote at an annual meeting for at least one year may seek to transact other corporate business at the annual meeting, provided that such business is set forth in a written notice and mailed by certified mail to the Secretary of the Corporation and received no later than 120 calendar days in advance of the date of the Corporation's proxy statement released to security-holders in connection with the previous year's annual meeting of security holders (or, if no annual meeting was held in the previous year or the date of the annual meeting has been changed by more than 30 calendar days from the date contemplated at the time of
bylaw narrowly to apply only to proposals submitted pursuant to SEC Rule 14a-8, under which the stockholder seeks inclusion of its proposal in the company's proxy materials.\textsuperscript{150} By this approach, the court avoided having to determine the validity of the bylaw requiring that a stockholder seeking to nominate a director have owned shares for at least a year.\textsuperscript{151}

In other cases, the courts have declined to enforce bylaw limitations on the right to nominate, even when they literally and indisputably apply, where their application would operate inequitably. For example, in \textit{Icahn Partners LP v. Amylin Pharm., Inc.},\textsuperscript{152} the court found that the plaintiff stockholder had established a "colorable" claim in its assertion that the directors should not be permitted to enforce an advance notice bylaw because their "refusal to engage in discussions with [a potential bidder] signals a significant enough change in the expectations of stockholders to warrant reopening of the nomination process so that stockholders can make an informed decision about the composition of the Board that will guide the Company's future activities."\textsuperscript{153}

Thus, and as observed in the \textit{Wirth} and \textit{Laughlin},\textsuperscript{154} a provision that limits the right to nominate director candidates must, before being enforced,
satisfy a court that it clearly has that effect and that it does not operate inequitably in the circumstances, and a failure to satisfy either of these conditions will likely result in non-enforcement regardless of any determination concerning the theoretical validity or invalidity of the provision.\footnote{This is the reverse of the approach reflected in the recent decision by the Delaware Court of Chancery to uphold forum-selection bylaws requiring that certain shareholder claims be litigated in Delaware. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 963 (Del. Ch. 2013). In that case, the court was asked to determine that the forum selection bylaws were invalid per se; rejecting that request, the court concluded—essentially in the abstract—that the bylaws were valid, but left open the question of whether they would be enforced in any particular case. \textit{Id.} at 958-62. As the court explained, ‘if a plaintiff believes that a forum selection clause cannot be equitably enforced in a particular situation, the plaintiff may sue in her preferred forum and respond to the defendant's motion to dismiss for improper venue by arguing . . . that the forum selection clause should not be respected because its application would be unreasonable.’ \textit{Id.}}

\section*{C. Blanket Elimination of the Right to Nominate Directors}

Returning to the question of general validity, as opposed to \textit{ad hoc} enforcement, we can now examine limitations on the right to nominate that are far more intrusive than advance notice requirements: namely, a charter or bylaw provision purporting to eliminate entirely the right to nominate directors. At this point such provisions are more theoretical than real. In light of that theoretical quality, and the corresponding absence of any judicial pronouncements directly addressing the subject, it is pure speculation to offer a conclusion with regard to validity. But the need to speculate does not deter an academic, as it might a court: if, as suggested earlier, the right to nominate is part and parcel of the statutory right to conduct proper business at an annual meeting of stockholders,\footnote{See \textit{supra} note 65 and accompanying text.} even a charter provision cannot entirely take that right away from a stockholder entitled to attend and vote on the election of directors at the annual meeting.\footnote{See \textit{supra} note 65 and accompanying text.} Just as a bylaw cannot entirely eliminate the right on the part of stockholders to act by written consent, due to inconsistency with the controlling statute,\footnote{See \textit{supra} p. 22-23.} just as a charter provision may not require 25 percent share ownership as a condition to exercise of the statutory right to inspect corporate books and records,\footnote{Loew's Theatres, Inc. v. Commercial Credit Co., 243 A.2d 78, 81 (Del. Ch. 1968). If it is invalid, as Loew's holds, to condition exercise of an important statutorily-conferring right upon ownership of at least 25 percent of the outstanding stock, it is at least reasonable to infer that a blanket prohibition in the charter against shareholder nominations, regardless of ownership level,} and just as a bylaw may not eliminate the...
statutory right to vote by proxy, 160 the stockholders' statutory right to nominate directors cannot be eliminated altogether, by either a charter or bylaw provision. 161 And it is anticlimactic to point out that a court will in any event strain to avoid reading any privately adopted provision as a blanket elimination of the right to nominate. 162

D. Share Ownership Requirements

Less drastic than blanket elimination of the right to nominate would be a provision requiring that a nomination by a shareholder or member be supported by a minimum percentage of share ownership or a minimum number of members. Such a requirement, while undoubtedly rare in the context of publicly traded corporations, is not at all unheard of in the bylaws of nonprofit corporations. 163 It is also the sort of requirement that would also be invalid. Less clear is whether exercise of the statutorily based right to nominate directors could be conditioned on some much lesser minimum level of share ownership. See infra notes 170-71 and accompanying text.

160 People's Home Sav. Bank v. Superior Court of S.F., 38 P. 452, 452-453 (Cal. 1894) (invalidating a bylaw prohibiting any person other than a shareholder to act as a proxy to vote shares, finding the bylaw inconsistent with the statute because corporations have no power to create bylaws that are unreasonable in their practical application, or that violate state law); People ex rel. Snapp v. Younger, 238 Ill. App. 502, 504 (1925) (invalidating bylaw prohibiting the voting of more than 8 shares by proxy due to its inconsistency with statutes authorizing voting by proxy); see also Dixie Elec. Power Ass'n v. Hosey, 208 So. 2d 751, 753 (Miss. 1968) (holding that directors may not adopt a bylaw eliminating the right to vote by proxy because of its inconsistency with a charter provision prescribing that matters be determined by the vote of shares present in person or by proxy).

161 See supra note 19 and accompanying text.

162 See Norris v. S. Shore Chamber of Commerce, 424 N.E.2d 76, 77-78 (Ill. App. 1981) (rejecting the argument that a bylaw providing for submission of nominees by a nominating committee precluded, by the principle of expressio unius est exclusion alterius, nominations by members from the floor of the meeting, based in part on another bylaw provision mandating the application of Robert's Rules of Order (including its discussion of invitation of floor nominations) to meeting procedures).

we validate, to a considerable degree, in our political electoral systems. Upholding a state system in which write-in candidacies were prohibited and access to the ballot required either party endorsement or specified levels of petition support, the Supreme Court in Burdick v. Takushi established that despite its "fundamental significance," the right to vote does not, as a matter of Constitutional law, preclude "substantial regulation of elections," in order that they "be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."\footnote{Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).} Where electoral rights "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'\footnote{Id. at 434 (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).} Conversely, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.\footnote{Id. at 434 (citing Anderson v. Celebrezze, 460 U.S. 780, 788-789 & n.9 (1983)).} Applying this flexible set of standards, which interestingly mirrors the standards governing review of corporate directors' defensive actions,\footnote{For the word "severe" in the Burdick First Amendment test of ballot access restrictions, substitute "preclusive or coercive," and for Burdick's rule that the State's "important regulatory interests are generally sufficient to justify" ballot access restrictions that are "reasonable" and "nondiscriminatory," substitute Unitrin's judicial deference to non-preclusive/draconian defensive measures if they fall within a "range of reasonableness." Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1388 (Del. 1995).} courts have sustained a variety of laws that require political nominees to have achieved either endorsement from an established political party or some specified level of petition support.\footnote{See, e.g., Norman v. Reed, 502 U.S. 279, 294-95 (1992) (upholding a ballot access requirement that a new party's candidates obtain 25,000 nominating signatures, or about 2 percent of eligible voters, in the suburban Cook County district); Jenness v. Fortson, 403 U.S. 431, 442 (1971) (upholding a Georgia requirement that candidates not nominated by an established political party obtain nominating signatures from at least 5 percent of eligible voters, and noting that there is an important state interest in requiring some preliminary showing of a significant degree of support before printing the name of a political organization's candidate on the ballot (if no other, the interest is one of avoiding confusion, deception, and even frustration of the democratic process at the general election)); see also Donald E. Daybell, Guarding the Treehouse: Are States "Qualified" to Restrict Ballot Access in Federal Elections?, 80 B.U. L. REV. 289, 294 (2000) ("Currently, every state in the nation imposes some form of ballot-access signature requirements on all candidates for office, whether members of a major or minor party or candidates running as independents.").}

Similar treatment is likely for a corporate nomination requirement keyed to a minimum level of share ownership. A severely restrictive requirement—for example, requiring that shareholder nominations be made
by holders of at least 25 percent of the outstanding voting shares—seems most unlikely to pass muster. On the other hand, a requirement aimed at eliminating nuisance nominations, like the fairly minimal requirements observed in nonprofit corporation bylaws, is likely to be viewed as supported by important interests in promoting orderly and effective shareholder voting.\textsuperscript{169} Severity of impact on the ability to nominate may depend on the individual corporation's circumstances, most notably the configuration of the holdings of its shares, and the likely ability to assemble nomination requests from holders of the specified ownership percentage.\textsuperscript{170}

A minimum share ownership requirement for nomination, however, could be tweaked or coupled with other modifications that would present additional questions of validity. For example, a bylaw could define share ownership so as to take into account hedging transactions and other derivative securities holdings, so that a minimum level of share ownership as a condition to nominate would be tested by reference to net economic interest in the shares.\textsuperscript{171} Clearly there is a recognized legitimate interest in avoiding a plethora of "nuisance" nominations, but is it a difference in level of economic interest in shares that differentiates a "nuisance" nomination from a legitimate one? If so, defining entitlement to nominate by reference to full economic interest in shares would be appropriate. On the other hand, unless the level of one's net economic interest in stock somehow correlates

\textsuperscript{169}See supra note 163.

\textsuperscript{170}This exercise might resemble the approach adopted by the SEC in approving the 3 percent/three year ownership requirements in its ill-fated 2010 proxy access rules. See Facilitating Shareholder Director Nominations, Securities Act Release No. 9136, Exchange Act Release No. 62,764, Investment Company Act Release No. 29,384, 75 Fed. Reg. 56,668, 56691-56693 (Sept. 16, 2010) (examining data about share ownership distribution, including data reflecting incidence of companies with at least one 1 percent, 3 percent, and 5 percent holder, and companies with at least two 1 percent, 1.5 percent, and 2.5 percent holders, and concluding that the selected ownership requirement "should not expose issuers to excessively frequent and costly election contests...but [] is also not so high as to make use of the rule unduly inaccessible as a practical matter.").

\textsuperscript{171}See, e.g., Alcoa, Inc. Bylaws, Art. II, § 3 (May 6, 2013), available at http://www.sec.gov/Archives/edgar/data/4281/000119312513206551/d533288dex3b.htm (providing that a special meeting may be called by holders of at least 25 percent of the outstanding shares, and specifying that this threshold be measured by reference to holdings of "Net Long Shares," which was defined to exclude shares as to which such person does not have the right to vote or direct the vote at the special meeting or as to such person who has entered into an agreement effectively hedging or transferring their economic rights in the shares); Bylaws of Archer-Daniels-Midland, Inc., Art I, § 1.2, available at http://www.adm.com/company/Documents/ADM-Bylaws.pdf (providing for a 10% ownership requirement, also defined by reference to a net long position); Mattel, Inc. Amended and Restated Bylaws, Art. I, § 2 (May 13, 2011), available at http://corporate.mattel.com/about-us/amended%20and%20restated%20bylaws.pdf (providing for a 15 percent ownership requirement, also defined by reference to a net long position).
positively with making "better" nominations, the critical criterion is the level of voting power, on the theory that a trivial level of voting power indicates that the nomination would most likely be futile and therefore unnecessarily disruptive.\textsuperscript{172} If that theory controls, underlying net economic interest in the shares possessing such voting power should not be deemed significant, and a share ownership requirement keyed to economic interest rather than voting power would be of questionable validity.

Another possible tweak would involve requiring that the specified minimum level of share ownership have been held for some defined period of time.\textsuperscript{173} Such a requirement would mirror proxy-access bylaw provisions for including shareholder nominees in the corporation's proxy materials, which have included durational holding requirements along with minimum required levels of ownership.\textsuperscript{174} As applied to director nominations, a durational share holding requirement would ostensibly rest on the theory that long-term share ownership ought to entitle the owner to a greater voice in corporate governance.\textsuperscript{175} Proceeding from that theory, charter provisions prescribing tenure voting—\textit{i.e.}, scaling voting rights according to duration of

\begin{footnotesize}
\begin{enumerate}
\item See infra notes 174-75 (noting the controversy over the merits of encouraging long-term share ownership by according greater electoral or other rights to longer-term shareholdings).
\item See supra note 21 (discussing SEC Rule 14a-11 and shareholder proposals to amend bylaws to provide for proxy access, both of which have paired minimum ownership requirements with ownership duration requirements of varying lengths). Unlike durational holding requirements in proxy access bylaws, however, such a requirement as applied to the right to nominate directors, as opposed to the right to require inclusion of nominees in company proxy materials, would lack a clear statutory foundation. Cf. 8 DEL. CODE ANN. tit. 8, §112 (2013) ("Such procedures or conditions may include . . . requiring a minimum record or beneficial ownership, or duration of ownership, of shares of the corporation's capital stock, by the nominating stockholder . . . .")

\item This theory (sometimes described as the "short termist" approach) has its supporters. See, e.g., ASPEN INST., OVERCOMING SHORT-TERMISM: A CALL FOR A MORE RESPONSIBLE APPROACH TO INVESTMENT AND BUSINESS MANAGEMENT 3 (2009) ("[S]hareholder participation rights should be conditioned on minimum holding periods or time-based vesting . . . ."); Malcolm S. Salter, How Short-Termism Invites Corruption . . . And What to Do About It at 3, 6 (Harvard Bus. Sch. Working Paper 12-094, 2012). However, it also has its detractors. See, e.g., Mark J. Roe, Corporate Short-Termism—In the Boardroom and in the Courtroom, 68 BUS. LAW 977, 979 (2013) ("[C]ritical aspects of the modern corporation and securities markets point away from according the short-termist view much, or possibly any, weight in corporate lawmaking."); Jesse M. Fried, The Uneasy Case for Favoring Long-Term Shareholders at 56 (Harvard Law Sch. Working Paper No. 200), available at http://ssrn.com/abstract=2227080 (contending that long-term shareholders' interests do not, in fact, always align with the overall economic-value maximization for the typical firm).
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share holding—have been upheld.**176** Without explicit statutory authorization for a durational holding requirement applicable to the right to nominate, however, it is less clear that this right—especially if viewed as within the scope of the statutory right to transact business at the annual meeting, rather than as a subsidiary element of the default right to vote—could be conferred or withheld depending on the duration of the shareholder/nominator's share ownership.

**E. Prohibiting Nomination of Candidates Who Do Not Satisfy Qualification Provisions**

Unlike nomination of directors, the matter of qualifications to serve as a director is explicitly addressed in corporate statutes, and such qualifications can be established in either the charter or the bylaws.**177** Notably, one Delaware case has suggested that the two subjects operate independently: in 1930 the Delaware Supreme Court concluded that stockholders were free to nominate and elect a candidate who did not at that point satisfy a share ownership qualification in the company's bylaws, recognizing that if elected the candidate could, before being seated, acquire the necessary shares.**178** In other words, a nominee could be elected (although not seated) as a director despite not satisfying a qualification for serving as a director.**179** This is surely not a startling outcome: a share ownership qualification is presumably designed to promote better conduct as a director, but it is hard to see why it is useful to require a similar incentive for conduct not as a director but as a candidate for office.**180**

That unsurprisingly elector-favorable analysis is less compelling, however, with respect to a qualification (an age limit or prior service requirement, for example) that the candidate cannot possibly satisfy, if elected.**181** After all, if it is permissible to require in a bylaw that a director be

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**176**Williams v. Geier, 671 A.2d 1368, 1370-71 (Del. 1996) (validating a charter provision for "tenure voting" in which voting power would vary depending on the duration of the stockholder's holding).

**177**See, e.g., DEL. CODE ANN., tit. 8, § 141(b) (2013) ("The certificate of incorporation or bylaws may prescribe other qualifications for directors."); MODEL BUS. CORP. ACT § 8.02 (2011) ("The articles of incorporation or bylaws may prescribe qualifications for directors.").

**178**Triplex Shoe Co. v. Rice & Hutchins, 152 A. 342, 351 (Del. 1930).

**179**See id.

**180**See Salter, supra note 175, at 19-20.

**181**See DREXLER ET AL., supra note 143, at § 13.01[6].
no older than 75 years of age, it does not seem unreasonable to likewise preclude nomination of a candidate who has already attained that age.\footnote{See id. at § 13.01[6] ("Valid qualifications could be either general, as, for example, a maximum age, or specific, as, for example, a requirement of American citizenship for directors of a corporation engaged in the defense industry."); Corporate Laws Committee, supra note 17, at 783 ("Examples of qualifications that may be permissible under section 8.02 are eligibility requirements based on residence, shareholdings, age, length of service, experience, expertise and professional licenses or certifications."').}

The question then becomes generally whether, in such a more appropriate context, a director qualification could also be framed as a condition to the right to nominate, such that no nominee who fails to satisfy the qualification requirement may be nominated for election to the board.\footnote{See Corporate Laws Committee, supra note 17, at 782 ("A qualification for nomination for director prescribed before a person's nomination shall apply to such person at the time of nomination.").} Based on the examples reviewed above, the likely answer is that it depends: such a linkage between the qualification and the right to nominate seems unobjectionable in the age requirement example; yet it seems unnecessary and thus unreasonable in the case of the share ownership requirement. Perhaps the solution is simply a matter of drafting precision: a bylaw could provide that a candidate who fails to meet a qualification requirement may not be nominated at the meeting unless the candidate has undertaken to come into compliance with the requirement if and when elected and seated as a director.

VI. STEPS TO ADDRESS UNCERTAINTIES ABOUT THE RIGHT TO NOMINATE DIRECTORS

The immediately preceding drafting suggestion sets the agenda for this last Part: namely, to identify a few pitfalls and steps that drafters of corporate statutes and governance documents might consider in light of uncertainties about the nature and scope of the shareholder's right to nominate directors.\footnote{See, e.g., id. at 784 (discussing timing and applicability concerns of nomination qualifications).}

Picking up on questions raised above, the remainder of this section addresses a few of these matters, in no particular order:

- If it is intended that a nomination is required in order to elect a director, the governing provision must make this clear, by establishing unequivocally that no person may be elected as a
director unless that person is nominated in accordance with whatever nomination procedures are specified. 185

- Drafters of corporate statutes could consider whether to specify by statute the right to nominate director candidates, and thereby avoid uncertainty over the source of the right.
- Drafters of corporate statutes could consider whether to establish by legislation whether to prohibit adoption of bylaw limitations on the right to nominate that would purport to preclude a nomination announced shortly before adoption of the limitation. 186 Alternatively, the matter could be left to the courts to address by applying equitable considerations. 187
- Shareholders (such as venture capital investors) who seek assurance of continued board representation should not be satisfied with provisions that confer merely a right to nominate; 188 that assurance must rest upon a firmer commitment not just to nominate but to elect their designated representative directors. 189
- If it is intended that the ability to meet a qualification requirement if and when elected as a director is a prerequisite to being nominated as a candidate, the applicable charter or bylaw provision should say so explicitly, and that position should be upheld at least in general, especially if the candidate could not possibly meet the qualification if elected. If the qualification could be satisfied before being seated as a director, the provision should simply require an undertaking by the candidate to come into compliance promptly if elected.
- If a minimum level of share ownership is intended to be a prerequisite to the right to nominate directors, the governing

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185 See, e.g., PUBLIC COMPANY ORGANIZATIONAL DOCUMENTS, supra note 95, §1.2(d) at 85 ("A person shall not be eligible for election or re-election as a director at an annual meeting unless . . . the person is [properly] nominated . . . or . . . the person is nominated by or at the direction of the Board of Directors.").
186 See supra note 17 (describing recently amended Model Business Corporation Act section 8.02(d)).
188 See Harrah's Entm't, Inc. v. JCC Holding Co., 802 A.2d 294, 299-300, 310-314 (Del. Ch. 2002) (addressing whether a shareholder group's specific right to nominate directors excluded their general right to nominate other candidates).
provision should clarify how such ownership is to be measured (e.g., by reference to voting power, or to economic interest), and if a board of directors adopts such a provision it should articulate a logical basis for its choice of measuring standard.

- Boards of directors that are considering bylaws or charter provisions that limit shareholder nominations, by requiring advance notice, disclosure or verification of information, or commitments about relationships and conduct, should carefully evaluate whether the purposes to be served by such limitations are adequately addressed by requirements applicable to board nominees as well.

- Corporations that have adopted, or are considering the adoption of, bylaws that require disclosure or verification of information or commitments about relationships or conduct as a condition to the right to nominate director candidates should address how such requirements are to be enforced.

VII. CONCLUSION

With ever-increasing shareholder activism and increased sensitivity on the part of management to the prospect of director election contests, the scope of the right of shareholders to nominate and the scope of permissible limitations of that right are likely to come under increasing scrutiny. Statutes and case law, however, do not adequately define this important right of shareholders to nominate director candidates. If nothing else, it is important to identify the source of that right, and it has been suggested here that this right is an element of the statutory right to bring up proper business at the annual meeting of stockholders. Under that approach, the right to nominate may not be eliminated in its entirety, either by bylaw or charter provision, although it can be restricted in limited ways that are designed to

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190 See, e.g., Atkins et al., supra note 127 (discussing director elections); Steven M. Davidoff, As Shareholder Fights Heat Up, Activists Aim at Bigger Targets, DEALBOOK (Apr. 16, 2013), available at http://dealbook.nytimes.com/2013/04/16/as-shareholder-fights-heat-up-activists-aim-at-bigger-targets/?_r=0 (describing uptick in election contests at large companies).

191 See, e.g., DEL. CODE ANN. tit. 8, § 211(b) (2013) (stating that in addition to the election of directors, "[a]ny other proper business may be transacted at the annual meeting"); MODEL BUS. CORP. ACT ANN. §7.01 Official cmt. (2011) ("The principal action to be taken at the annual meeting is the election of directors . . . but the purposes of the annual meeting are not limited and all matters appropriate for shareholder action may be considered at that meeting.").
promote orderly and informed voting on the election of directors, and that are not deemed to operate inequitably in the circumstances.\textsuperscript{192}

\textsuperscript{192}See supra Part V.C.