

Amending Bylaws and Charters to Address Universal Proxy, Shareholder Activism and Officer Exculpation

Including Results of White & Case Bylaw Survey and 2023 Proxy Season Voting as of June 1, 2023

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As the 2023 proxy season winds down for calendar year companies, it is a good time to consider possible bylaw and charter amendments to address recent developments with respect to universal proxy, shareholder activism and officer exculpation.

The 2023 proxy season to date sheds light on the general acceptance by shareholders of amendments to bylaws to address universal proxy and amendments to certificates of incorporation to provide for officer exculpation. In addition, decisions of the Delaware Court of Chancery over the last several months provide guidance with respect to the validity of enhanced advance notice bylaws requiring greater disclosure by shareholders nominating directors for election and about the nominees themselves.

In this alert, we review these corporate governance developments and identify key takeaways for public companies.

Part I: Bylaw Amendments to Address the Universal Proxy Rule and Shareholder Activism

In November 2021, the SEC adopted Rule 14a-19 under the Securities Exchange Act of 1934 (the “Exchange Act”), which requires the use of a universal proxy card in any contested director election after August 31, 2022. Under the new rule, shareholders and companies involved in proxy fights are now required to use a universal proxy card that includes both the company’s and the dissident’s director nominees. This change allows shareholders to mix-and-match their preferred nominees from the company’s and the dissident’s slates rather than requiring them to vote for either the entire company slate or the entire dissident slate.¹

Based on a White & Case survey of recent bylaw amendments adopted between April 22, 2022 and June 1, 2023, 200 companies in the S&P 500 have amended their bylaws to address the SEC’s universal proxy rule and shareholder activism. Of these 200 companies, we undertook an in-depth

¹ For more information about the universal proxy rule, please see our client alert, [“In Another Win for Shareholders, SEC Adopts New Rules for Universal Proxy Cards in Contested Director Elections.”](#)

review of the bylaw amendments adopted by 100 of them. Set forth below is a summary of several types of bylaw amendments identified in our survey, including (1) bylaw amendments responsive to the universal proxy rule, (2) bylaw amendments that impose additional disclosure requirements on dissident shareholders (particularly investment funds) seeking to nominate director candidates, and (3) additional company-protective amendments relating to proxy contests and advance notice provisions more generally. As described below, certain of the bylaw amendments have become the subject of recent legal challenges and increasing investor scrutiny.

(1) Amendments Directly Responsive to New Rule 14a-19

Bylaw amendments that address the SEC's new universal proxy rule in Rule 14a-19 are ostensibly intended to ensure that, from a procedural and mechanical perspective, the bylaws function properly in the case of a contested election using a universal proxy card. These amendments could also prove helpful to companies facing a potential proxy fight to the extent they provide companies with additional bases on which to disqualify nominees of dissident shareholders for non-compliance with Rule 14a-19. In our in-depth survey of 100 S&P 500 companies that amended their bylaws, we found that 90 percent or more did so to:

- Provide that a nominating shareholder *must satisfy all of the requirements of Rule 14a-19* in order to be eligible to nominate directors. If these requirements are not met, the company may *disregard the shareholder's nominees* and not include them on a universal proxy card.
- Specifically require that the dissident shareholder's notice include a statement of the shareholder's *intent to comply* with Rule 14a-19, including referencing Rule 14a-19(a)(3) or specifically setting forth the requirement that the shareholder solicit the holders of shares representing at least 67% of the voting power of outstanding shares.
- Require that the nominating shareholder provide *reasonable evidence* of compliance with the requirements of Rule 14a-19 before the shareholders' meeting.

Moreover, the surveyed amendments generally clarify that a shareholder nominating directors pursuant to the universal proxy rule is subject to the company's existing advance notice deadline (typically at least 90 days before the one-year anniversary of the prior year's annual meeting), rather than the 60-day minimum set forth in Rule 14a-19(b)(1). As the SEC noted in its adopting release², the universal proxy rule's 60-day notice requirement is a "minimum period that does *not* override or supersede a longer period established in the registrant's governing documents" (emphasis added).

(2) Amendments to Advance Notice Bylaws to Require Greater Disclosure

In addition to bylaw amendments responsive to Rule 14a-19, over the last 12 to 18 months some companies have amended their advance notice bylaws to require greater disclosure about shareholders (particularly investment funds) nominating persons for election as directors, as well as about the director candidates themselves. These enhanced advance notice bylaws are undoubtedly aimed at discouraging activist investment funds from pursuing proxy contests. These include amendments that require: (i) investment funds that want to nominate directors to disclose investors in their funds; and (ii) all nominating shareholders to disclose information such as: (a) third parties helping to fund a proxy contest, (b) planned director nominations or proposals at other companies, (c) prior communications with other shareholders of the company, and (d) potential conflicts of interests on the part of the nominees.

² Available [here](#).

(3) Other Advance Notice Bylaw and Related Amendments

In addition to bylaw amendments that address the universal proxy rule or require greater disclosure about nominating shareholders and their nominees, our survey of bylaw amendments found that many companies have recently amended their bylaws to include other requirements for dissident shareholders pursuing proxy contests. In particular, among the 100 S&P 500 company bylaw amendments we reviewed:

- 45% added a requirement that a shareholder soliciting proxies in a proxy contest must use a proxy card color *other than white*, in order to distinguish its proxy card from that of the company.
- 17% added language to *limit the number of directors* that can be nominated by a shareholder to the number of directors up for re-election. This type of provision could block a dissident from first identifying a longer list in its notice and delaying the identification of which specific nominees it will choose to stand for election until it files its proxy statement.

Companies in our bylaw survey also made additional amendments to their advance notice and related bylaws, such as adding provisions to (i) require the written consent of a nominee to be named in the company's proxy statement;³ (ii) require that the nominating shareholder update or supplement its notice so that is true and correct as of the meeting's record date;⁴ (iii) give the board discretion to determine compliance with any director nomination provisions;⁵ and (iv) bar the re-nomination of the same director nominee in the future if the nominee withdraws or becomes ineligible, or if the nominee does not receive a specified level of support.⁶

Legal Challenges to Bylaw Amendments

In recent months, some of the bylaw provisions requiring greater disclosure about nominating shareholders and their nominees have been challenged in the Delaware courts. In one high-profile case, Politan Capital Management LP, an activist fund, filed an action in Delaware Chancery Court challenging bylaw amendments adopted by the board of Masimo Corporation.⁷ The amendments at issue required investment funds seeking to nominate directors to disclose all investors in the funds that held a 5% or greater stake.⁸ Masimo reversed this and other amendments before the Court ruled on their validity, but some legal commentators argued the bylaw may not have been valid because it required disclosure of information that was irrelevant to the board's assessment of Politan as a shareholder and a nominee of director candidates.

In two other recent cases, the Court sided with companies in upholding advance notice bylaws challenged by shareholders, which resulted in the invalidation of their director nominations. In *Rosenbaum v. CytoDyn Inc.*,⁹ the Court upheld CytoDyn's advance notice bylaw requiring nominating shareholders to disclose to the company, (i) anyone who "supports" the nomination and (ii) whether the nominee has a direct or indirect material interest in any transaction involving the company that was under consideration or had been proposed. In *Strategic Investment Opportunities LLC v. Lee*

³ 97% of the companies surveyed included this requirement; 77% already had this in their bylaws, 23% added this provision or amended an existing provision to reflect the possibility of both company and nominating shareholder proxy statements.

⁴ 57% of the companies surveyed included this requirement; 23% already had this in their bylaws and 34% added this provision.

⁵ 95% of the companies surveyed had such a provision in their bylaws; 47% of the companies already had this provision in their bylaws, and another 48% added this provision or added a specific reference to Rule 14a-19.

⁶ 23% of the companies surveyed already had this provision or added it as a new provision.

⁷ *Politan Capital L.P. vs Masimo Corporation*, C.A. No. 2022-0948-NAC (Del. Ch. Dec. 20, 2022).

⁸ See Third Amended and Restated Bylaws of Masimo Corporation, filed September 9, 2022, available [here](#).

⁹ *Rosenbaum v. CytoDyn Inc.*, C.A. No. 2021-0728-JRS (Del. Ch. Oct. 13, 2021).

Enterprises, Inc.,¹⁰ the Court rejected a shareholder's director nominees because the shareholder failed to comply with the provision of the company's bylaws that required it to be a record holder of the company's shares when it submitted the director nomination questionnaire required by the bylaws.

Based on these and other Delaware cases, it is reasonable to assume that advance notice bylaws that provide greater transparency regarding the ownership, control, and relevant past and current activities of shareholders nominating director candidates may withstand judicial challenge. More specifically, advance notice bylaws that relate to the nomination of a director candidate, such as those requiring disclosure of ongoing actions of the shareholder and/or its nominees that may present conflicts of interest or the potential for competitive harm, may well be enforceable, particularly if they are adopted by the board on a "clear day" before any activist threat has emerged.

Shareholder Proposals Attempting to Restrict Bylaw Amendments

Another recent development relating to the amendment of advance notice bylaws are shareholder proposals on this topic made pursuant to Rule 14a-8 under the Exchange Act. During the 2023 proxy season, at least 28 proposals had been submitted as of June 1, 2023 to Russell 3000 companies calling on the targeted companies obtain shareholder approval (rather than just board approval) of specified amendments to their advance notice bylaws.

Known as "fair election" shareholder proposals, these Rule 14a-8 proposals specifically called on companies to adopt a bylaw amendment that would require shareholder approval for any amendments to advance notice provisions that would: (i) require the nomination of candidates *more than* 90 days before the annual meeting, (ii) impose new disclosure requirements for director nominees, including disclosures related to *past and future plans*, or (iii) require nominating shareholders to disclose limited partners or business associates, *except* to the extent such investors own more than 5% of the Company's shares.¹¹

As of June 1, 2023, none of the 28 "fair election" proposals submitted to Russell 3000 companies passed, with the eight proposals voted on receiving an average of 13.4% shareholder support. ISS recommended against all eight of the proposals that went to a vote.¹² An additional seven of the proposals submitted were subsequently withdrawn or did not appear in the company's proxy statement. At least some of the proposals were withdrawn pursuant to an agreement that the company would revise its corporate governance guidelines to affirmatively state its commitment to providing a director nomination process that is "fair and equitable to all nominating shareholders" and would not, without shareholder consent, adopt bylaw amendments in contravention of that commitment.

Part II: Officer Exculpation

A second important governance development for public companies is the recent amendment to Delaware law permitting officer exculpation in certain circumstances. Specifically, effective August 1,

¹⁰ *Strategic Investment Opportunities LLC v. Lee Enterprises, Inc.*, C.A. No. 2021-1089-LWW (Del. Ch. Feb. 14, 2022).

¹¹ All of the "fair election" proposals that appeared in companies' proxy statements included this language, except that one went beyond this scope by calling for shareholder approval of any amendment that would require the nomination of candidates *more than 60 days* before the annual meeting, which is a stricter standard than the mainstream 90-day window period.

¹² ISS and Glass Lewis have somewhat divergent positions with respect to advance notice bylaws and amendments thereto. ISS generally recommends against directors, committee members, or the entire board if the board amends the company's bylaws or charter without shareholder approval *if* the amendment materially diminishes shareholder rights or could adversely impact shareholders. ISS generally supports advance notice bylaws that require greater disclosure about a shareholder who is nominating director candidates if "the informational requirements are reasonable and aimed at providing shareholders with the necessary information to review such" nomination. Glass Lewis believes shareholders should have the right to vote on advance notice bylaws and related amendments, and generally recommends against such bylaws and amendments. It is silent on how shareholders should vote with respect to directors who adopt advance notice bylaws or amendments making them more onerous.

2022, Section 102(b)(7) of the Delaware General Corporation Law (“DGCL”) was amended to permit a Delaware corporation to include in its charter a provision to limit the personal liability of specified *officers* for breaches of their fiduciary duty of care. Prior to this amendment, Section 102(b)(7) only allowed for the exculpation of *directors*. Accordingly, the DGCL amendment enables Delaware companies to close a loophole that had allowed plaintiffs, foreclosed by the statute from pursuing breach of duty of care claims against directors, to sue the company’s officers instead.

The amended Delaware statute, however, does not protect officers against derivative claims, claims for breach of the fiduciary duty of loyalty, for acts not in good faith or for intentional misconduct. It also does not cover actions taken *before* a company’s inclusion of the exculpation provision in its charter. Moreover, only certain officers are covered by the statute: the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer of the corporation, and any named executive officer, as disclosed in the company’s proxy statement filed with the SEC, who, in each case, served during the conduct alleged in the court action.¹³

Results of Shareholder Votes On Officer Exculpation

Unlike bylaw amendments, which can generally be adopted by a board without shareholder approval, amending a company’s charter to provide for officer exculpation requires shareholder approval under Delaware law. Between August 1, 2022 and June 1, 2023, 203 public companies in the Russell 3000, including 26 S&P 500 companies, included proposals in their proxy statements to amend their charters to provide for officer exculpation. This number is expected to increase next year as companies review the results of shareholder votes on such proposals, which have been overwhelmingly positive so far, as well as ISS support for such proposals.

As of June 1, 2023, 113 of these proposals to approve officer exculpation charter amendments had been submitted to a shareholder vote at Russell 3000 companies. Of these proposals, 104 (92%) passed, with an average of 73% shareholder support.¹⁴ The outcome of these shareholder votes was generally supported by the voting recommendations of proxy advisory firms.

At the beginning of the 2023 proxy season, ISS had issued its policy stating that it would make recommendations on these proposals on a “case-by-case” basis, taking into account the stated rationale for the proposed amendment.¹⁵ Despite this non-committal policy pronouncement, ISS’s voting record indicates its general support for the approval of officer exculpation provisions. More specifically, based on 2023 proxy season results as of June 1, 2023, ISS supported all but 17 of the 113 charter amendment proposals voted on to date,¹⁶ recommending “for” such proposals even in cases where the company had a less than positive record on governance or in some cases where ISS was recommending against the company’s director nominees and/or say-on-pay proposals.

¹³ See [Section 3114 of the DGCL](#). The term “officer” also applies to an officer who “has, by written agreement with the corporation, consented to be identified as an officer for purposes of this section.”

¹⁴ Of the nine that failed, six were at companies that required supermajorities to adopt charter amendments.

¹⁵ ISS will also consider, among other factors, the extent to which the proposal would: (i) eliminate liability for monetary damages for violating the duty of care; (ii) eliminate liability for monetary damages for violating the duty of loyalty; (iii) expand coverage beyond just legal expenses to liability for acts that are more serious violations of fiduciary obligation than mere carelessness; (iv) expand the scope of indemnification to provide for mandatory indemnification of company officials in connection with acts that previously the company was permitted to provide indemnification for, at the discretion of the company’s board, but that previously the company was not required to indemnify. It will vote for proposals providing expanded coverage in cases when an officer’s legal defense was unsuccessful if both of the following apply: (i) the individual was found to have acted in good faith and in a manner that the individual reasonably believed was in the best interests of the company; and (ii) only the individual’s legal expenses would be covered. See [ISS US Voting Guidelines](#).

¹⁶ At least two of the “against” recommendations involved unusual facts, including one where the vote on the exculpation amendment was considered at a shareholder meeting to vote on a de-SPAC transaction, which ISS opposed along with every other proposal on the meeting agenda.

In its voting recommendation reports, ISS has generally cited its belief that “rational limits” on the scope of indemnification, liability, and exculpation are the “best way to strike a balance between shareholders’ interest in accountability and their interest in attracting and retaining quality agents to work on their behalf.” As Delaware law now allows for the exculpation of officers as well as directors, ISS noted that the “failure to provide that coverage to officers could potentially put a company at a disadvantage in recruiting or retaining officers.”¹⁷

Dual Class Companies and Officer Exculpation Amendments

An additional consideration for companies with dual class common stock structures is a recent Delaware court decision that addressed the question of whether a separate class vote is required to approve an officer exculpation charter amendment.¹⁸ In this Delaware case, each of Fox Corporation and Snap Inc. had a multi-class capital structure, including one class of capital stock that was non-voting stock, and each company had adopted a charter amendment to allow for the exculpation of officers for breaches of fiduciary duty under amended Section 102(b)(7) of the DGCL. In connection with their charter amendments, each corporation sought approval of holders of a majority of their outstanding shares voting together as a single class, but did not seek a separate class vote of the non-voting stock.

The Delaware Court of Chancery ruled in March 2023 that the charter amendments at issue did *not* trigger a separate class vote of stockholders under Section 242(b)(2) of the DGCL because the proposed amendments did not affect “a power, preference, or special right that appeared expressly” in the corporations’ respective charters. However, in its ruling, the Chancery Court also suggested that the plain language of DGCL Section 242, read in isolation from settled precedent, *could* support a different outcome.

Stockholders have appealed the Chancery Court’s grant of summary judgement, and arguments on the appeal are expected later in 2023. Accordingly, companies with dual-class stock should monitor this case before submitting their amendments for stockholder approval.

III. Conclusion: Key Takeaways

Based on these developments and results there are a number of key takeaways for public companies, including the following:

- **Boards should review, and as appropriate amend, their bylaws in light of the universal proxy rule.** Boards should review their advance notice bylaws to ensure that from a mechanical and procedural standpoint they function properly in light of the universal proxy rule. Based on our survey, there is an emerging consensus around a package of appropriate amendments intended to address the rule. Even though the amendments could give companies an additional basis for rejecting director candidates for failure to comply with their bylaws, these amendments are intended to address and reinforce the requirements of the universal proxy rule and will therefore likely withstand judicial scrutiny.
- **While amending their bylaws to address the universal proxy rule, boards should consider additional amendments relating to the nomination of directors.** In addition to bylaw amendments to address the universal proxy rule, companies should consider some of the other bylaw amendments discussed above relating to director nominations and related matters and seek to adopt them on a “clear day” before any activist threat has emerged. These additional amendments could be protective of the company, and like some aspects of the universal proxy amendments, may provide additional bases for

¹⁷ See ISS Proxy Analysis & Benchmark Policy Voting Recommendation for Arthur J. Gallagher & Co. for the annual meeting on May 9, 2023.

¹⁸ *Electrical Workers Pension Fund Local 103, I.B.E.W. v. Fox Corporation*, Civil Action No. 2022-1007-JTL, and coordinated case *In Re Snap Inc.*, Consolidated Litigation, Civil Action No. 2022-1032-JTL (Del. Ch. Mar. 29, 2023).

companies to exclude director nominees or to ensure companies have adequate information to evaluate shareholder nominees. Except for bylaws that impose arguably unreasonable disclosure requirements on activist investment funds regarding the limited partners in their funds, most of these amendments have not been the subject of judicial challenge, and Delaware courts have generally sided with companies in the few instances in which they were challenged. Moreover, although Rule 14a-8 shareholder proposals have sought to require shareholder approval for certain bylaw amendments, these efforts have not been successful based on voting results to date. Going forward, companies should continue to be mindful of legal and shareholder proposal developments as they consider possible bylaw amendments.

- **Boards of Delaware corporations should consider proposing a charter amendment to provide for officer exculpation.** In light of the amendment to DGCL Section 102(b)(7) to permit officer exculpation in addition to director exculpation, boards of Delaware corporations should consider amending their charters accordingly. In addition to the benefit of making officer positions more attractive in the future, extending exculpation to officers could reduce both the volume and scope of lawsuits alleging breaches of fiduciary duties by officers, which, in turn, could reduce the indemnification and insurance burden on companies, since such lawsuits would be more likely to be resolved earlier in the process or at lower cost of settlement. Given the positive voting results during the 2023 proxy season in support of officer exculpation proposals, companies should be encouraged to give serious consideration to presenting such a proposal at their 2024 annual meetings and should disclose a clear rationale for the proposal to shareholders (e.g., to help attract and retain top officer talent).
- **Be prepared to clearly disclose the rationale for amendments to your board and to shareholders.** In light of the recent judicial scrutiny of bylaw amendments, shareholder proposals targeting certain bylaw amendments, and the need for stockholder approval of charter amendments, companies should be prepared to clearly explain the rationale for their bylaw and charter amendments to their boards, shareholders, the proxy advisory firms and the investment community at large. In addition, companies should be prepared to engage with their significant shareholders to the extent appropriate on these points.
- **Dual class companies should assess whether a separate class vote is required.** Although the Delaware Chancery Court recently held that a charter amendment to provide for officer exculpation does not require a separate vote of each class of shareholders, as noted above, the decision has been appealed. Accordingly, dual class companies deciding whether to propose such an amendment to their shareholders should carefully weigh the pros and cons of soliciting such a class vote.
- **Lastly, remember procedural requirements of the SEC.** Companies planning to propose a charter amendment to be considered at their next annual meeting should keep in mind the timing considerations for submitting such a proposal, as SEC rules require a preliminary proxy statement be filed for this type of proposal.

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