

HAVE YOU REVIEWED YOUR BYLAWS LATELY?

Nov 08, 2021

Many public companies conduct periodic corporate governance reviews as they prepare for year-end, preferably on a “clear day” where the absence of a threat can support a lower standard of judicial scrutiny for bylaw changes. The following are some of the areas for consideration for bylaws:

- **Exclusive forum bylaws** – If not already adopted, consider adding exclusive forum provisions (i.e., state courts in the state of incorporation) for state law claims. Consider whether to extend exclusive forum provisions to federal securities law cases (exclusive to federal district courts generally), taking into account recent court decisions, applicable state law and proxy advisor policies. For example, ISS does not support unilateral (without shareholder vote) adoption of provisions that (i) restrict the forum to a particular federal district court, (ii) specify a state other than the state of incorporation for state law matters or (iii) specify a particular court within the state. And Glass Lewis may recommend against the governance committee chair where adopted without a shareholder vote.
- **Date of annual meeting** – Older bylaws may not provide the board with the flexibility to set or postpone the annual meeting date without having to amend the bylaws.
- **Calling of special meetings of shareholders** – Consider the list of who has authority to call special meetings. Typically it includes the CEO and a majority of the board. A state may require that persons in certain positions or a specified percentage of shareholders have the authority to call a meeting. Inclusion of a minority of the board may create risks in the case of board dissent. Some companies permit a specified percentage of shareholders, with detailed informational and procedural requirements.
- **Conduct of shareholder meeting** – Sometimes overlooked, particularly in legacy bylaws, detailed authorizing provisions can clarify the authority of the board or a presiding officer as well as address questions of validity in light of the silence of many corporate statutes.
- **Virtual shareholder meetings** – Even where clearly permissible under corporate statutes, it may be prudent to affirm the permissibility of virtual meetings in bylaws as well.

- **Notice of shareholder meetings** – Although proxies have been common for some time, consider whether notice provisions may need to be better aligned to the company’s practices.
- **Advance notice provisions** – If not updated recently, consider reviewing informational and procedural requirements for currency and to ensure they aren’t “overtly unreasonable.”
 - If applicable, similarly review any special meeting or written consent provisions for consistency of informational requirements and, to the extent applicable, procedural requirements
- **Shareholder vote thresholds** – Carefully review the validity of thresholds in light of state law and the consistency of corresponding proxy disclosures. Note that a pending [NYSE rule proposal](#) would ease the requirement to count abstentions as votes “against” a proposal subject to NYSE rules and instead follow charter documents and state law.
- **Board Powers** – Some legacy bylaws may not acknowledge the permissibility of the business to be managed “under the direction” of the board, instead of only directly.
- **Board meetings** – On a “clear day” – in absence of specific threat – review provisions regulating the calling and conduct of board meetings in light of the potential for a minority of directors to steer the agenda or voting:
 - Can anyone other than the chair or a majority of directors call special meetings of the board or committees?
 - How is notice of meetings transmitted? If by email, is telephonic notice also provided as a courtesy? Is less than 24 hours’ notice permitted?
 - Does anyone other than the chair have authority to set the agenda?
 - Review committee charters and delegations of authority in light of the potential for a majority of a committee to turn over.
 - Consider the practice of non-committee members on the board attending committee meetings in light of the potential for dissident directors to participate.
- **Removal of directors** – For Delaware companies, review director removal requirements in light of the 2017 Chancery Court decision (invalidating supermajority requirement).
- **Officers** – Review in light of and to ensure alignment with existing appointments, including the separation of the chair and CEO. Similarly, review board-elected officers versus delegation of authority to appoint officers to the CEO in light of practice.

- **Style** – Review and update the bylaws for gender neutrality.

RELATED CAPABILITIES

- Securities & Corporate Governance

MEET THE TEAM



R. Randall Wang

St. Louis

randy.wang@bclplaw.com

[+1 314 259 2149](tel:+13142592149)

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.