



The Imminent Resurrection Of Rule 14a-8 And The Renewed Significance Of State Corporate Law

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The big news at the Securities and Exchange Commission last week was that it would not seek to overturn the D.C. Court of Appeals' decision vacating Rule 14a-11 (See [D.C. Circuit Delivers Harsh Judgment on SEC Rule 14a-11](#) and [Business Roundtable v. SEC – Winners and Losers](#)). When the SEC adopted Rule 14a-11, it also approved amendments to Rule 14a-8. The SEC stayed the effectiveness of those amendments during the litigation over Rule 14a-11.

Now that the Rule 14a-11 litigation has ended, the amendments to Rule 14a-8 will become effective. According to this [statement](#) by SEC Chairwoman Mary Schapiro, this is likely to occur tomorrow. As a result, companies will no longer be able to rely on Rule 14a-8(i)(8) to exclude a proposal seeking to establish a procedure in a company's governing documents for the inclusion of one or more shareholder nominees for director in the company's proxy materials. Consequently, I expect to see more shareholder proposals seeking to amend corporate bylaws. However, whether shareholders have the power to amend bylaws unilaterally is a function of state law. Thus, now is a good time to review state law authority to adopt and amend bylaws.

California

Section 211 of the California Corporations Code confers the authority to adopt, amend or repeal bylaws on the shareholders and on the board (except as provided in Section 212 (relating to the number of directors)). The required vote of the shareholders is approval of the outstanding shares (Section 152). The articles of incorporation or bylaws may restrict or eliminate the power of the board to adopt, amend or repeal bylaws. However, the bylaws may not require a greater vote than a majority of the authorized directors to adopt, amend or repeal bylaws (because such a requirement must appear in the articles of incorporation). Finally, a bylaw changing a fixed number of directors, the range of directors or a fixed number of directors to a variable number (or vice versa) may only be adopted with the approval of the outstanding shares.

Thus, California has essentially an "opt-out" approach with respect to the board's authority to change bylaws.

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Delaware

Delaware takes a different approach. Section 109 of the Delaware General Corporation Law provides that after a corporation has received any payment for its stock, the power to adopt, amend or repeal bylaws is in the hands of the stockholders. However, Section 109 permits the certificate of incorporation to confer the same power on the directors. The statute makes it clear that conferring such power on the directors does not divest the stockholder of the power. In 2006, Delaware amended Section 216 to add a special limitation on the board's authority to amend bylaws, providing: "A bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors." [75 Del. Laws, c. 306, § 5](#).

Thus, Delaware has an "opt-in" approach to the power of directors to adopt, amend or repeal bylaws but does not allow the stockholders to be divested of that authority

Nevada

Nevada takes another approach. Under NRS 78.120(2), directors have the authority to "make" the bylaws. The statute further provides that unless prohibited in a bylaw adopted by the stockholders, the directors may adopt, amend or repeal any bylaw (including any bylaw adopted by the stockholders). Unlike California, however, Nevada does not require approval by a majority of the shares entitled to vote. The default vote required is a majority of the votes cast and this can be changed by the articles or bylaws. Some companies have specified higher shareholder vote requirements. For example, [Amerco](#) requires the affirmative vote of at least 2/3 of the shares entitled to vote generally to amend its bylaws. A big difference is that Nevada (unlike both Delaware and California) permits the articles of incorporation to vest authority to adopt, amend or repeal bylaws *exclusively* in the directors.

Thus, Nevada corporations have the ability to divest shareholders of the right to change bylaws.

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