Setting the Ground Rules for Corporate Elections

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We like to thank John Coates, Zohar Goshen, Bob McCormick, Roberta Romano and the participants in the ICGF Roundtable on Advanced Notice Bylaws.

Abstract

Advance notice bylaws (ANBs) have become the principal mechanism for regulating proxy contests. By specifying when and how shareholders may nominate candidates and what disclosures must accompany those nominations, ANBs determine the ground rules for corporate elections. Delaware courts review ANBs under fiduciary duty principles, but that framework has limits: it creates uncertainty, chills nominations, and encourages boards to draft expansive provisions with little risk of sanction. This Article develops a systematic framework for rethinking the regulation of ANBs. First, modest reforms could retain judicial review while adding prescriptive rules to improve transparency, standardize timing, and equalize disclosure obligations between incumbents and challengers. Second, the SEC could supplant judicial review by requiring nominees and nominators to provide the information called for by Schedules 13D and 14A—even where statutory triggers such as the 5% ownership threshold are not met. These disclosures would operate as both floor and ceiling: companies could not exclude nominations for failure to provide additional information. Third, issuers, activists, and investors could craft a consensus "best practices" bylaw that courts would treat as a benchmark, reducing uncertainty and limiting excesses while preserving scope for private ordering. Finally, a 'name and shame' system would impose no additional SEC-mandated disclosures and would limit disqualification to cases of materially false statements, shifting decisions about the sufficiency of other information from boards and courts to the shareholders themselves. Among these approaches, SEC rulemaking is the most attractive. It aligns with the agency's historic role in regulating proxy contests, provides a clear and uniform disclosure baseline, and reduces the strategic use of ANBs to entrench incumbents. As a second-best, a consensus best practices model would supply courts with a market-grounded reference point for disciplining excessive bylaws.

Keywords: Corporate Governance, Activism, Proxy Contests, Advance Notice Bylaws, Disclosure, Securities Regulation

JEL Classifications: G30, G34, G38, K22

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I. Introduction

Imagine that an activist investor, Alpha Capital, owns 4.9% of the common stock of XYZ Corp. Frustrated by what it sees as persistent underperformance and excessive executive compensation, Alpha Capital decides to nominate one director candidate to stand for election at XYZ's upcoming annual meeting. It submits its nomination two weeks before the close of the window prescribed by XYZ's advance notice bylaw. The bylaw requires disclosure not only of the nominating shareholder and its nominee, but also of any known "supporters," any person acting in concert with such supporters, and any person with whom there exists any "agreement, arrangement, or understanding" relating to the nomination.

Several weeks earlier, Alpha met privately with portfolio managers at a large actively managed mutual fund complex that owns approximately 4% of XYZ's stock. During that meeting, the mutual fund managers expressed dissatisfaction with XYZ's leadership and encouraged Alpha to "do something" before the upcoming annual meeting. They made no promises about voting and offered no logistical or financial support, but Alpha viewed the exchange as a green light to proceed. In the days that followed, a number of portfolio managers from at other active funds also conveyed to Alpha their discontent with the situation at XYZ. Alpha did not disclose its exchanges with the portfolio managers in its nomination materials.

On the final day of the nomination window, XYZ's board informs Alpha that its nomination is being rejected as procedurally deficient for failing to disclose a known supporter and an implied "understanding" regarding the nomination. With the window now closed, Alpha cannot cure the alleged defect. Was the board justified in rejecting the nomination? By whom and how should this question be decided?

Although Delaware law is clear that stockholders have a fundamental right to participate in the voting process, including the right to nominate directors, the Delaware General Corporation Law is almost completely silent as to how a stockholder may propose a nominee for election. The U.S. Securities and Exchange Commission (SEC)'s proxy rules are likewise silent on this important aspect of the corporate election system. Advance notice bylaws (ANBs) have been adopted by individual corporations to fill this void and provide some order to the process.

Advance notice bylaws typically have two primary components. The first is to set a time schedule for stockholders to give notice of their intention to nominate director candidates in advance of an annual meeting.[1] The second is to require disclosures that allow boards of directors to make well-informed recommendations about nominees and that give stockholders sufficient information to cast well-informed votes.[2] As things currently stand, failure to supply a timely nomination or failure to make required disclosure can lead to the disqualification of a nominee.

ANBs thus play an important role in structuring the corporate election process. At the same time, they can be abused to discourage challenges to an incumbent board of directors.[3] This can be done through requiring excessive advance notice; through disclosure requirements that are unnecessary or overly burdensome to comply with, either because of the amount of information required or because of its sensitivity; through improperly rejecting a nomination based on an alleged failure to provide accurate disclosures; or through improperly forcing activists who try to make nominations to litigate the propriety of ANB requirements or the rejection of a nomination.

Some of these issues have arisen in recent cases. In *Kellner*, the Delaware Supreme Court rejected a 1099-word bylaw provision requiring the disclosure of "ownership of any equity interest in AIM and 'any principal competitor' of AIM, by a broadly defined group of people."[4] In the battle between hedge fund Politan and Masimo, an eventually withdrawn bylaw required the disclosure of the limited partners in the Politan fund, and of "plans or proposals" to nominate directors at other

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[1] Strictly speaking, advance notice bylaws also govern the process for shareholders to bring other business before a meeting. Because director nominations have been the primary site of recent controversy—and to avoid needless repetition—we focus exclusively on nominations throughout this paper.

[2] *Strategic Inv. Opportunities LLC v. Lee Enterprises, Inc.*, No. CV 2021-1089-LWW, 2022 WL 453607, at *9 n.104 (Del. Ch. Feb. 14, 2022), citing *Openwave Sys. Inc. v. Harbinger Cap. P'rs Master Fund I, Ltd.*, 924 A.2d 228, 238-39 (Del. Ch. 2007) and *BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 980 (Del. 2020) (describing advance notice bylaws as "commonplace"); and *Jorgl v. ImmunoTech Inc.*, 2022 WL 16543834 (Del. Ch. Oct. 28, 2022) ("Advance notice bylaw provisions provide several benefits to a company, including giving a board time to evaluate the proposed candidates and preventing last-minute 'surprise attacks' by third parties for control or board representation.").

[3] Bloomberg columnist Matt Levine quipped that the "board of directors can say 'anyone who wants to run for director must write a disclosure statement that explains in detail where they were every hour of the last 20 years, and they must write it in gold ink on paper woven from unicorns' manes… Except that the board can waive this requirement for management nominees." Matt Levine, *Money Stuff: Activism*, Bloomberg (Oct. 27, 2022).

[4] *Kellner v. AIM Immunotech*, 320 A.3d 239, 253 (Del. 2024).

companies within the following year.[5] In *Paragon v. Cryan*, the court frowned on a provision that required "disclosure of all 'events, occurrences, and/or circumstances involving or relating to the Proposed Nominee that could impact, impede, and/or delay' the candidate's ability to obtain a federal security clearance."[6]

In this Article, we address how the timing and the content of advance notice disclosures should be determined. We discuss five approaches. The first approach, which is the one currently in use, is for boards to specify the timing and content, subject to *ex post* fiduciary duty review by courts. As we will discuss, the approach entails several shortcomings. We therefore discuss four alternatives. The first is to supplement the current *ex post* fiduciary duty review with some *ex ante* prescriptive rules designed to address specific shortcomings of the former approach. The second is a wholesale replacement of *ex post* fiduciary duty review with *ex ante* prescriptive rules set by the S.E.C. The third alternative involves having market participants draw up a "consensus" best practices bylaw that firms could adopt voluntarily or through shareholder pressure and that courts could use for guidance in engaging in their *ex post* judicial review. The final, most radical, approach would permit ANBs to mandate only basic disclosures, such as the names of nominees. While boards could request more detailed disclosures, and could disclose nominees' refusal to provide such information, they could not disqualify a nominee for failure to provide them. Rather, this "name and shame" approach would leave it to shareholders to determine what "sanctions"—in the form of reduced support at the ballot—to impose on nominees who failed to provide the information.

Part II provides a general overview of the state of play regarding advance notice bylaws. Part III examines of the asserted functions of advance notice bylaws and their potential shortcomings. A proper understanding of the beneficial and detrimental aspects of ANBs is critical for evaluating how ANBs should be regulated. Parts IV to VII compare four approaches for regulating ANBs. Part IV examines the current *ex post* fiduciary duty review system for evaluating ANBs and identifies its drawbacks. Part V suggests a more modest and a more expansive proposal for complementing the existing system with, or replacing it by, *ex ante* prescriptive rules. Part VI discusses the potential benefits and limitations of drawing up a "consensus" best practices bylaw. Part VII analyzes a "name and shame" approach. We close with a brief conclusion.

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[5] *Politan Cap. Mgmt. LP v. Kiani*, No. 2022-0948, 2022 WL 14599835, at ¶ *106* (Del. Ch. Oct. 21, 2022) (verified complaint).

[6] *Paragon Techs., Inc. v. Cryan*, 2023 WL 8269200, at *10 (Del. Ch. Nov. 30, 2023).

II. THE STATE OF PLAY

In this Part, we provide an overview of the current state of play and a brief description of how we got here. Historically, advance notice bylaws have evolved over several generations. First generation ANBs were fairly straightforward. They set a window of 60 or 90 days in advance of the meeting for submitting nominations and required some basic information about the nominees.[7]

Second generation ANBs began to emerge around 2005 in response to the rise of activist and other "event driven" investors.[8] In a recent article, Benjamin Bates traces how the timing and substantive disclosure requirements in ANBs have expanded over the past decades.[9] While first-generation ANBs typically required shareholders to submit nominations 60 to 90 days before an annual meeting,[10] by 2023, around 75% of the companies sampled had moved to a more restrictive window of 90 to 120-day.[11]

Beyond timing, second generation ANBs require increased disclosures about the nominator and any nominees. One common provision focuses on *agreements, arrangements, or understandings* (AAUs) between nominators and third parties. These bylaws typically require a nominator to describe "all agreements, arrangements and understandings between the stockholder and beneficial owner, if any, and any other person or persons (including their names) in connection with the nomination of such person for election as a director."[12] The goal is to supplement Form 13D and Schedule 14A disclosures and to shed light on possible undisclosed agendas or side deals that might shape board behavior. By 2023, over 80% of large-cap companies required such detail in some form, up from approximately 45% in 2012.[13]

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[7] Mark Weingarten, Second Generation Advance Notice Bylaws, https://corpgov.law.harvard.edu/2009/03/17/second-generation-advance-notification-bylaws/.

[8] Charles Nathan, Developments in Takeover Defenses, https://corpgov.law.harvard.edu/2008/10/23/developments-in-takeover-defenses.

[9] Benjamin C. Bates, *Rewriting the Rules for Corporate Elections*, 100 N.Y.U. L. Rev. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4945937.

[10] Back in 1989, Chancellor Allen described a 50-day advanced notice requirement as "rather long". Paramount Commc'ns Inc. v. Time Inc., 1989 WL 79880, at *5 (Del. Ch. July 14, 1989) (unpublished opinion).

[11] Bates, supra note 9, at 7.

[12] See, e.g., Dollar General Corp 10-K (FY 2022) Ex. 3.2 (3/24/2023) at p. 10 Section 10(b)(iii)(B). More generally, see Bates, supra note 9 at 12.

[13] Bates, supra note 9, at 13-15.

ANBs also ask whether the nominating party is *acting in concert* with other investors. These "AIC" provisions aim to identify informal coalitions or "wolf packs" that arguably escape Form 13D or AAU disclosures, where multiple funds coordinate their positions without forming a provable 13D "group." Such disclosures often extend to family members, affiliates, and associates. Bates observes that this broadened scope is intended to prevent stealth campaigns, though it can also make it difficult for activists to comply if a bylaw has a vague or sweeping definition of "acting in concert."[14] Over 60% of newly revised bylaws now include some form of "acting in concert" clause, reflecting a substantial increase compared to a decade ago.[15]

A related disclosure item involves *known supporters*. The objective here is to alert both the board and shareholders to the depth and identity of a nominee's backing, as well as to require the disclosure of members of a nominator's "posse"[16] whose identity is not otherwise required by 13D, AAU provisions or AIC provisions.[17] Although less widespread than AAUs or acting-in-concert provisions, Bates notes that many companies adopting known-supporter rules have done so in the wake of contested elections.[18]

With regard to stock ownership and derivatives, modern ANBs demand highly granular information. Shareholders must disclose not just the total shares owned but also derivatives—like swaps or options—that amplify or hedge economic exposure. Since 2013, the percentage of ANBs of large cap companies that require disclosure of synthetic-ownership provisions have soared from under 20% to nearly 60%.[19] Separately, *13D provisions* tie corporate bylaw obligations to federal disclosure requirements: if a shareholder or group must file a Schedule 13D (after surpassing 5% ownership), it is often required to furnish the same information to the company under the ANB.[20]

Finally, Bates describes an emerging category of provisions, such as mandatory questionnaires and minimum eligibility standards for nominees. These questionnaires often require nominees to fill out lengthy surveys addressing any conflicts, criminal history, or contractual obligations.[21]

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[14] *Id.* at 16-17.

[15] *Id.*

[16] We use the term "posse" to denote an aggregation that may or may not constitute a "group" under Rule 13d-5(b)(1)(i).

[17] Bates, supra note 9, at 20.

[18] *Id.*

[19] *Id.* at 24.

[20] *Id.* at 22.

[21] *Id.* at 25.

Litigation has also influenced the evolution of ANBs. The 2008 decision in *JANA Master Fund, Ltd. v. CNET Networks* read CNET's advance notice bylaws narrowly to apply only to Rule 14a-8 proposals and not to other business to be conducted at the meeting.[22] *Levitt Corp. v. Office Depot*, took a similar approach in reading a bylaw restricting business that could be conducted at the annual meeting as not applying to director nominations.[23] In response to these decisions, law firms issued memoranda and recommended modifications to advance notice bylaws to broaden their language.[24]

This iterative process has continued. Two recent cases have been particularly influential, as judged by the reaction of law firms and treatise writers*:* *Rosenbaum v. CytoDyn*[25] and *Strategic Investment Opportunities v. Lee Enterprises*.[26] At issue in *Rosenbaum v. CytoDyn*, among other things, was a bylaw provision that required:

> "[I]dentification of the names and addresses of other stockholders (including beneficial owners) known by any of the Proposing Persons to support nominations or other business proposal(s), and to the extent known the class and number of all shares of the Corporations' capital stock owned beneficially or of record by such other stockholder(s) or other beneficial owner(s)[.]"[27]

In upholding the disqualification of the proposed slate of directors, Vice Chancellor Slights held that "advance notice bylaws are commonplace, and provisions asking stockholders to disclose supporters are equally ubiquitous" with citations in the accompanying footnote 183.[28]

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22 954 A.2d 335 (Del. Ch. 2008).

23 *Levitt Corp. v. Office Depot, Inc.*, C.A. No. 3622-VCN (Del. Ch. April 14, 2008).

24 *See* Charles Nathan (Latham & Watkins LLP), Developments in Takeover Defenses (October 23, 2008), available at https://corpgov.law.harvard.edu/2008/10/23/developments-in-takeover-defenses/; Daniel Sternberg and Matthew Salerno (Cleary Gottlieb), CNET and Office Depot: Precision Drafting Needed for Advance Notice Bylaws (June 2008), available at https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/cgmacgreport0608.pdf. *See also,* Charles Nathan (Latham & Watkins LLP), Second Generation Advance Notice Bylaws and Poison Pills (April 22, 2009), available at https://corpgov.law.harvard.edu/2009/04/22/second-generation-advance-notice-bylaws-and-poison-pills/.

25 *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140.

26 *Strategic Investment Opportunities LLC v. Lee Enterprises*, 2022 WL 453607.

27 *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140, p.11.

28 *Id.* at 48.

Once Slights upheld CytoDyn's "known-supporters" bylaw, it attracted attention in law firm memos.[29]

Similarly, in *Strategic Investment Opportunities v. Lee Enterprises*, one of the grounds the company cited in rejecting the nomination materials was that they did not meet the requirement for a completed and signed D&O questionnaire.[30] Once the court upheld the company's D&O questionnaire ANB, law firm memos responded by recommending that advance notice bylaws include such provisions.[31]

In *Politan Capital Management LP v. Masimo Corporation*, the plaintiff challenged a set of bylaw amendments adopted after Politan disclosed an 8.8% stake in Masimo.[32] Three provisions were at issue. The first required Politan to disclose the identities and holdings of its limited partners, including any stakes in Masimo's competitors or litigation counterparties.[33] This, Politan argued, effectively blocked hedge funds from making nominations without breaching confidentiality agreements.[34] The second mandated disclosure of past and future activism by requiring nominators to reveal all prior nominations at other companies and any planned nominations in the next 12 months.[35] Finally, a "known supporters"

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[29] Andrew M. Freedman, Lori Marks-Esterman, Ron S., Berenblat, and Theodore J. Hawkins (Olshan, Frome, Wolosky LLP.), Client Alert: Delaware Chancery Court Decision Highlights Newfound Importance of Delivering Nomination Notices Well Ahead of Advance Notice Deadlines (November 2021); Ryan M. Philp, Allison M. Wuertz, and Matt Ducharme (Hogan Lovells), Rosenbaum v. CytoDyn: Noncompliance with advance notice bylaw can block shareholders' board nominees (January 20, 2022), available at https://www.engage.hoganlovells.com/knowledgeservices/viewContent.action?key=Ec8teaJ9Varli44%2F5uf3UMxgHJMKLFEppVpbbVX%2B3OXcP3PYxlq7sZUjdbSm5FIetvAtgf1eVU8%3D&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQ0qFfoEM4UR4%3D&emailtofriendview=true&freeviewlink=true; David Hennes and Sarah Young (Ropes & Gray), Advance Notice Bylaws: Caution Required (October 21, 2021), available at https://www.ropesgray.com/en/insights/alerts/2021/10/advance-notice-bylaws-caution-required; *See also*, R. Franklin Balotti & Jesse A. Finkelstein, Delaware Law of Corporations and Business Organizations", Fourth Edition (2023), at Section 7.7 (Stockholder Nominations and Proposals; Advance Notice Bylaws).

[30] *Strategic Investment Opportunities LLC v. Lee Enterprises*, 2022 WL 453607, ¶ 19.

[31] *See, e.g.*, Douglas Schnell & Daniyal Iqbal (Wilson Sonsini Goodrich & Rosati), Lessons from the 2023 Proxy Season: Advance Notice Bylaws and Officer Exculpation, *Harvard Law School Forum on Corporate Governance* (September 5, 2023), available at https://corpgov.law.harvard.edu/2023/09/05/lessons-from-the-2023-proxy-season-advance-notice-bylaws-and-officer-exculpation/. *See also*, Balotti & Finkelstein, supra note 29, at Section 7.7 (Stockholder Nominations and Proposals; Advance Notice Bylaws).

[32] *Politan Capital Mgmt. LP v. Masimo Corp.*, No. 2022-0948, Verified Complaint at 2 (Del. Ch. Oct. 21, 2022).

[33] *Id.* at 6–7.

[34] *Id.* at 8.

[35] *Id.* at 39.

provision further required nominators to disclose any shareholders "known" to support their nominee, which raised concerns that even informal expressions of support could require disclosure.[36] Although Masimo ultimately removed the controversial items, rendering the complaint moot, the Delaware Chancery Court's decision to award the plaintiff an $18 million attorneys' fee[37] suggests that Masimo's ANB had gone too far.[38]

More recently, the Delaware Supreme Court invalidated certain bylaws in *Kellner v. AIM Immunotech*.[39] There are two principal holdings. First, to win on a "facial challenge," plaintiffs must demonstrate that there are no circumstances in which the bylaw will be valid, a very difficult burden to satisfy unless the bylaw is genuinely indecipherable. Second, an "as applied" challenge will be analyzed under enhanced scrutiny. Applying that framework, the court held that the "Ownership Provision" was facially invalid because it was "indecipherable".[40] Three other provisions failed enhanced scrutiny review and were deemed unenforceable. The "AAU Provision" was found to function "as a 'tripwire' rather than an information-gathering tool".[41] The "Consulting/Nomination Provision" was found to be "draconian," since it "gave the board license to reject a notice based on a subjective interpretation of the provision's imprecise terms."[42] And the "Known Supporter Provision" was rejected because it was unqualified in the nature of the support requiring disclosure, making it a potential impediment to the stockholder franchise.[43]

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[36] *Id.* at 44.

[37] *Politan Capital Mgmt. LP v. Masimo Corp., C.A.* No. 2022-0948, at *160* (Del. Ch. Feb. 29, 2024) (bench ruling), https://fingfx.thomsonreuters.com/gfx/legaldocs/zjvqebyayvx/frankel-politanvmasimo--feeruling.pdf.

[38] Derek Zaba, Kai Haakon Liekefett & Leonard Wood, *Bylaw Amendments, Shareholder Activism, and Flying Close to the Sun*, Harv. L. Sch. F. on Corp. Governance (Nov. 21, 2022), https://corpgov.law.harvard.edu/2022/11/21/bylaw-amendments-shareholder-activism-and-flying-close-to-the-sun/.

[39] *Kellner v. AIM Immunotech Inc.*, 320 A.3d 239 (Del. 2024)

[40] *Id*. at 263.

[41] *Id.* at 265.

[42] *Id*. at 266 (internal quotation marks omitted).

[43] *Id*. In its analysis of the "known supporter provision", the Delaware Supreme Court provided two pieces of additional guidance to legal advisors. First, it suggested that a provision that only required disclosure of "financial support" might have fared differently. Second, it indicated that part of what made the provision problematic was that it interacted with the daisy-chain feature introduced by the "Stockholder Associated Person" term, and thus triggered more expansive disclosure requirements than in the case of the Known Supporter Provision that had been validated in *CytoDyn*. The decision by the Court of Chancery had also criticized the known supporter provision for similar reasons. Our inspection of ANBs containing Known Supporter Provisions suggests that a handful of

In addition, *Kellner* strongly implied that "clear-day" challenges, brought before an actual activist is planning to make a nomination, can only be brought on the narrow grounds that the bylaw is inconsistent with the corporation's certificate of incorporation, unintelligible or otherwise prohibited. On April 14, 2025, in *Siegel v. Morse*, the Delaware Court of Chancery held that a stockholder's challenge to an "acting in concert provision" in The AES Corporation's ANB was unripe under *Kellner* because no one had attempted or intended to nominate a director.[44] On June 2, 2025, in *Assad v. Chambers*, the Court of Chancery similarly dismissed a challenge to Owens Corning's ANB on ripeness grounds. The plaintiff, a stockholder of Owens Corning, alleged that the company's ANB was unduly expansive—especially in its "acting in concert," "wolf pack," and "daisy chain" features—and argued that the bylaw's design rendered compliance practically unattainable. But the court concluded that equitable review was premature in the absence of any stockholder who had tried or planned to nominate a director or who claimed to be chilled by the bylaw's requirements.[45] Together, these cases make clear that the "enhanced scrutiny" standard will only apply to as-applied bylaw challenges.

Changes to SEC rules have also triggered changes to advance notice bylaws. The 2021 SEC amendments to the proxy rules included the new "universal proxy" rule.[46] Under that rule, a company has to include an activist's nominees in its own proxy voting card, which will be mailed to all

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firms heeded the courts' advice and amended the provision to require disclosure of known *financial* support (see, e.g., Moderna, Inc. Amended and Restated Bylaws § 2(a)(2)(D)(ii) (Dec. 14, 2018), https://www.sec.gov/Archives/edgar/data/1682852/000119312518349938/d677222dex32.htm (requiring identification of "other stockholders … known by any of the Proposing Persons to support such nominations"); Moderna, Inc. Amended and Restated Bylaws § 2(a)(2)(D)(ii) (May 8, 2024), https://www.sec.gov/Archives/edgar/data/1682852/000168285224000031/exhibit325820248-k.htm (revised to require identification of "other stockholders … known by any of the Proposing Persons to be providing financial support or meaningful assistance in furtherance of the nomination(s)")). More systematically, Frankenreiter and Hirst note that "around the time of the Delaware Supreme Court's decision in Kellner … companies … adopted ANBs that were more readable, featured shorter sentences, and contained fewer 'horse choker' provisions". Jens Frankenreiter & Scott Hirst, *The Rise of the Horse-Choker: The Complexification of Advance Notice* Bylaws 41 (March 2025) (unpublished manuscript) (on file with authors).

[44] *Siegel v. Morse*, C.A. No. 2024-0628-NAC, at 1 (Del. Ch. Apr. 14, 2025) (Cook, V.C.).

[45] *Assad v. Chambers*, C.A. No. 2024-0688-NAC, Letter Op. at 2–3 (Del. Ch. June 2, 2025) (Cook, V.C.).

[46] 17 CFR § 240.14a-19 ("Rule 14a-19"); U.S. Securities and Exchange Commission, Universal Proxy (January 31, 2022), available at https://www.sec.gov/corpfin/universal-proxy-secg.

the company's shareholders, as long as the activist files a proxy statement that complies with Form 14A and solicits at least 2/3 of the stockholders.

The universal proxy rule prompted a wave of memoranda and bylaw amendments[47] to account for the procedural and mechanical features of a contested director election using universal proxy cards and because of a concern that the universal proxy rules would lead to an uptick in contests.[48] In updating bylaws to respond to these developments, many boards also adopted bylaw amendments that enhanced ANB disclosure requirements.[49]

III. THE FUNCTIONS OF ADVANCED NOTICE BYLAWS

Advance notice bylaws can serve several functions, some arguably desirable and others less so. One commonly asserted function is to "permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations."[50] This function is most closely related to the *timing* component of the advance notice. This function of ANBs is uncontroversial: companies should not have to face the possibility of a surprise nomination from the floor of a shareholder meeting. Going beyond this, ANBs are also designed to give companies sufficient time to "respond to shareholder

[47] Glass Lewis, 2023 Proxy Season Briefing: Key Trends and Data Highlights (2023), p. 4. ("More than 685 companies in our coverage amended advance notice bylaws in response to universal proxy […]").

[48] Richard Hall, *et al.* (Cravath, Swaine & Moore LLP), Potential Corporate Bylaw Amendments in Response to SEC Universal Proxy Rules (October 4, 2022); William H. Aaronson, *et al.* (Davis Polk & Wardwell LLP), Practical takeaways of universal proxy card voting in contested director elections (October 17, 2022); Eric T. Juergens, *et al.* (Debevoise & Plimpton LLP), Potential Bylaw Amendments in Light of Universal Proxy Rules (January 9, 2023); Eduardo Gallardo (Paul Hastings LLP), Revisiting Corporate Bylaws for the Universal Proxy Era (August 15, 2022) (enforcement of Universal Proxy Guardrail Provisions); Deborah Conrad and Ryan Aymard (Milbank LLP), Bylaw Amendments to Address Universal Proxy Rules (March 13, 2023); Spencer D. Klein and Tyler Miller (Morrison Foerster), Preparing for the Mandatory Universal Proxy Card and Its Potential Impacts on Shareholder Activism and Proxy Contests (January 21, 2023); Thomas W. Christopher, *et al.* (White & Case), Amending Bylaws and Charters to Address Universal Proxy, Shareholder Activism and Officer Exculpation (June 8, 2023); Douglas Schnell and Daniyal Iqbal (Wilson Sonsini Goodrich & Rosati), Lessons from the 2023 Proxy Season: Advance Notice Bylaws and Officer Exculpation (September 5, 2023), available at https://corpgov.law.harvard.edu/2023/09/05/lessons-from-the-2023-proxy-season-advance-notice-bylaws-and-officer-exculpation/.

[49] Neal Whoriskey (Milbank LLP), More Choice Requires More Information (April 5, 2023), available at https://www.milbankgeneralcounsel.com/2023/04/more-choice-requires-more-information-universal-proxy-and-horizontal-conflicts-filling-in-the-large-disclosure-gaps/.

[50] Kellner, quoting *Openwave Sys. Inc. v. Harbinger Cap. Partners Master Fund I, Ltd.,* 924 A.2d 228, 239 (Del.Ch. 2007).

nominations" whether by conducting a further investigation or by campaigning. Whether ANBs are strictly necessary to serve this function is less clear. As long as a company has *some* advance notice, it could postpone the shareholder meeting if it needs more time. However, it is conducive to the orderly administration of shareholder meetings (and may be more efficient) to avoid postponements by instead providing advance notice of a proxy contest before the parties start their actual solicitations.

A second asserted function of ANBs, more related to the *content* component of the advance notice, is to "assist the board's 'information-gathering and disclosure functions, allowing boards of directors to knowledgeably make recommendations about nominees and ensuring that stockholders cast well-informed votes.'"[51] For disclosure requirements to be justified, the information to be disclosed must either be directly material to the decision-making process or indirectly result in the production of material information. ANBs require disclosure of information to the board. Even though boards do not, as such, cast votes in elections, they can use the information to determine whether and on what terms to settle a proxy challenge.

Alternatively, one could view ANB disclosures to the board as just a conduit for information that relates to shareholder decision-making. In that respect, ANB disclosures could serve three functions that go beyond the information disclosed to shareholders as part of a proxy solicitation. First, when ANB disclosures are provided to the board sufficiently in advance of a solicitation, the board has the opportunity to investigate and dig deeper—an investigation that may, in turn, uncover material facts, including that the original disclosures were materially false or misleading. Second, ANB disclosures may supplement the information otherwise supplied to shareholders as part of the proxy statement or under Section 13(d) because ANBs call for the disclosure of directly material information that may not be required to be disclosed by SEC rules. For example, because ANBs often have a broader scope than Rule 13d-5's definition of "group," compliance may reveal some aggregations of shareholders that would not otherwise be disclosed. Third, ANBs may act as a sanction enhancement device. SEC enforcement of Section 13(d) and the proxy rules is incomplete and slow and the primary sanction for violation is disclosure.[52] Even to the extent that ANBs call for disclosure of the same information that must be contained in a company's securities filings, activists who fail to comply or make false

[51] *Kellner*, quoting *Paragon Techs., Inc. v. Cryan*, 2023 WL 8269200, at 7 (Del. Ch. Nov. 30, 2023).

[52] *CSX v. The Children's Investment Fund*, 654 F.3d 276, 286-87 (2d Cir. 2011); *Treadway Companies, Inc. v. Care Corp.*, 638 F.2d 357 (2d Cir.1980).

statements face the potential additional sanction of nominee disqualification.

Another aspect of ANBs relates to the company's ability to enforce its provisions. As noted, boards enforce ANBs by disqualifying a nominee if the ANB requirements are not met. Disqualification is, at least at present, the only effective sanction that a company can impose for ANB violations. But to impose that sanction, the company must have some ability to discover on its own the information it requires the activist to provide. While the possibility that violations will be detected will create some deterrent effect, the possibility that violations will remain undetected also means that ANB disclosures may not always be accurate.

While ANBs can serve useful functions, they can also be abused. With respect to timing, ANBs could require notification so far in advance that makes it difficult to oust incumbents in a proxy challenge, especially in circumstances where the cause of the challenge (economic decline, scandals, etc.) is of recent origin.[53] With respect to content, required disclosures can be problematic because compliance is costly, the information sought is confidential, making complex disclosures is prone to errors, or the information is "campaign" information.

First, making the required disclosures can be costly. Given the overall costs of a full-fledged campaign, the costs of making ANB disclosures are probably not overwhelming. However, at the margin, any additional costs can, in principle, discourage some challenges.[54] This is especially true for proxy challenges in smaller companies where the fixed costs of complying with ANB disclosure requirements are likely to amount to a greater percentage of the total costs.

Discouraging some challenges, however, is not necessarily undesirable from a public policy perspective. The universal proxy rule has created the potential for "gadfly" proxy challenges brought by holders with no material economic stake in the company who are primarily motivated by garnering

[53] Delaware case law suggests that if the company experiences a material change in circumstances after the deadline for nominations, there may be equitable grounds not to enforce the timing provisions. See, e.g., *Hubbard v. Hollywood Park Realty Enterprises*, Inc., 1991 WL 3151 (Del. Ch. Jan. 14, 1991); *Vejseli v. Duffy*, C.A. No. 2025-0232-WBD (Del. Ch. May 21, 2025)). However, as illustrated by *Sternlicht v. Hernandez*, 2023 WL 2881642 (Del. Ch. Jun. 4, 2023), that is a narrow exception.

[54] In a review of proxy contests initiated between 2017 and 2020, the SEC found that the median (mean) reported estimated total solicitation costs for dissidents were approximately $750,000 ($1.8 million). U.S. Sec. & Exch. Comm'n, Release No. 34-93596, Universal Proxy, at 45 tbl.3 (Nov. 17, 2021), https://www.sec.gov/files/rules/final/2021/34-93596.pdf. Relative to that benchmark, the incremental costs of providing additional disclosures to satisfy more demanding ANBs are not negligible.

publicity. For these activists, Rules 14a-4 and 14a-19 reduce the costs of getting their nominees onto the company's proxy card. To be sure, a gadfly activist would still need to file a proxy statement and to solicit 2/3 of the shareholders to obtain the benefits of a universal proxy. But compiling a proxy statement that just meets the regulatory requirements is relatively cheap[55] and the 2/3 requirement can often be satisfied by soliciting fewer than 200 stockholders.[56] Adding to these expenses the costs of complying with an ANB could discourage publicity-seeking activists' nominations. And even though gadfly nominations have little chance of success, they impose burdens on companies. In particular, when multiple parties solicit shareholder votes, the associated processing and intermediary fees borne by the issuer are higher than in uncontested solicitations.[57]

Second, ANBs may require disclosure of confidential business information. Examples of confidential information that has been demanded include the names of the limited partners in an activist hedge fund (which a hedge fund may be contractually prohibited from making),[58] an activist hedge fund's future targets (which would impair an activist's ability to compete with other activist asset managers), and marketing materials provided to third parties to solicit investments. Information about one's known supporters may also be confidential information as some institutional investors who support an activist may prefer to keep this information non-public, at least until after the election contest is over. [59] Disclosure of confidential information, while not costly to prepare, can be harmful to an activist's business and inhibit its ability to run an effective campaign.

Third, ANBs may require disclosure of information that, because it is voluminous, vague, unknown to the activists or otherwise hard to collect,

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[55] What makes proxy contests expensive is the cost of producing effective campaign materials. Marcel Kahan & Edward Rock, The Insignificance of Proxy Access, 97 Va. L. Rev. 1347, 1384-88 (2011) (discussing costs of preparing proxy statement).

[56] See Jonathan Lewellen & Katharina Lewellen, The Ownership Structure of U.S. Corporations 44 fig. 2 (Tuck Sch. Of Bus., Working Paper, June 2022), https://ssrn.com/abstract=4189239. Soliciting many shareholders can be expensive, mostly because of the fees charged by Broadridge.

[57] See FINRA Rule 2251, Supplementary Material .01(a)(1), https://www.finra.org/rules-guidance/rulebooks/finra-rules/2251.

[58] See supra note 33 and corresponding text.

[59] Certain advance notice bylaws go even further, and require not only the identification of "known supporters", but also "a description of any material contacts between … a Proposing Person … and any other stockholders of… the corporation in connection with … any … nomination set out in the Proposing Stockholder Notice … from the date three (3) months prior to the date of the Proposing Stockholder Notice". Milbank LLP, *Alignment Advance Notice Bylaw* (Mar. 2025), https://www.milbank.com/a/web/cdFa2SVBQRWpb878SAULn4/alignment-anb.pdf.

entails a high risk of error. [60] Any errors in such complex disclosures could then be used to disqualify a nomination.[61]

Finally, ANBs may require disclosure of "campaign" information. In political elections, for example, having information about which TV ads an opponent is planning to air in which markets and on what days would be useful in planning a response. In a corporate election, information about an activist's known supporters may be similarly valuable in running a proxy campaign as it would enable the company to target these supporters; furthermore, the prospect of being identified as a known supporter may deter some shareholders from engaging or expressing their support in the first place; finally, information about materials that an activist distributed internally or to its investors can be valuable since it may shed light on the activist's campaign strategy and arguments. The problem with requiring disclosure of campaign information is that it can create an uneven playing field, thus reducing the activist's chances of prevailing and thereby discouraging contests to start with.

Information can fall into multiple of these categories. In particular, information may be, or arguably be, directly material to investors or could potentially lead to the discovery of material information, but may also be costly to produce, confidential, complex, or campaign-related. In

[60] For example, as noted, advanced notice bylaws occasionally require nominating persons to identify and provide stock ownership information about other persons with whom they are "acting in concert". A representative "acting in concert" definition provides that "A person shall be deemed to be 'Acting in Concert' with another person … if such person knowingly acts (whether or not pursuant to an express agreement, arrangement or understanding) in concert with, or towards a common goal relating to the management, governance or control of the Corporation in parallel with, such other person where (i) each person is conscious of the other person's conduct or intent and this awareness is an element in their decision-making processes and (ii) at least one additional factor suggests that such persons intend to act in concert or in parallel, which such additional factors may include, without limitation, exchanging information (whether publicly or privately), attending meetings, conducting discussions, or making or soliciting invitations to act in concert or in parallel; provided, that a person shall not be deemed to be Acting in Concert with any other person solely as a result of the solicitation or receipt of revocable proxies or consents from such other person in response to a solicitation made pursuant to, and in accordance with, Section 14(a) of the Exchange Act by way of a proxy or consent solicitation statement filed on Schedule 14A. A person Acting in Concert with another person shall be deemed to be Acting in Concert with any third party who is also Acting in Concert with such other person." Amended and Restated Bylaws of Exagen Inc. (Form 8-K, Ex. 3.1) (Mar. 12, 2014), https://www.sec.gov/Archives/edgar/data/1397911/000139791114000075/a20140312amendedandrestate.htm.

[61] Chancellor Bouchard famously criticized an overbroad bylaw as a "horse-choker of a bylaw" during oral argument in *Pershing Square v. Allergan*, No. 10057-CB, Tr. at 26 (Del. Ch. Sept. 25, 2014), but his remark concerned special-meeting procedural requirements, not advance notice bylaws.

determining whether disclosure of such information should be required, boards left to their own devices are likely to err on the side of requiring disclosure. The reasons are three-fold. First, board members may be motivated by their desire to stay on the board. Second, board may subjectively overestimate the quality of the job that they are doing, whether in absolute terms or in relation to the activist, and therefore sincerely believe that challenges are not in shareholders' interests. Third, board members may genuinely believe the information would be useful but unaware of, or indifferent to, the costs of production.

Boards, of course, are not entirely left to their own devices. As currently structured, ANBs are subject to fiduciary duty review by courts in "as applied" challenges under enhanced scrutiny. We will refer to the current system as the *ex post* judicial review system.

IV. The Limitations of *Ex Post* Judicial Review

Currently, the regulation of the timing and content components of ANBs relies on *ex post* judicial review. This review is conducted under general principles of fiduciary duty law applied in the context of ANBs. In Delaware, the doctrinal framework for this review is the *Coster/Blasius* line of cases. Under *Coster*, courts engage in a two-step inquiry. In the first step, courts "review whether the board faced a threat to an important corporate interest or to the achievement of a significant corporate benefit." The threat "must be real and not pretextual", and "the board's motivations must be proper and not selfish or disloyal". Importantly, "the threat cannot be justified on the grounds that the board knows what is in the best interests of the stockholders."[62] If the board's actions pass muster under the first step, the court considers whether the ANB provisions are "reasonable in relation to the threat posed and are not preclusive or coercive to the stockholder franchise."[63] Other states have not yet had an opportunity to determine whether they follow Delaware's lead or adopt a different framework.

As we discuss in this Part, *ex post* judicial review under *Coster* entails significant limitations: it tolerates a lack of transparency about what must be disclosed; activists who make false disclosures may face insufficient sanctions; there is uncertainty over what provisions are valid; it entails severe limitations on clear-day challenges; the *ex post* focus on analysis is likely to generate biases; and courts suffer from information deficiencies. To a large extent, these limitations are inherent to the judicial review

[62] *Coster v. UIP Cos., Inc.*, 300 A.3d 656, 690 (Del. 2023).

[63] *Id*. See also *Kellner* [at n. 144] quoting *Frantz Mfg. Co. v. EAC Indus*., 501 A.2d 401, 407 (Del. 1985) (ANB must "`be reasonable in their application' and not unfairly interfere with stockholder voting.")

framework. To a lesser extent, they derive from the specific way in which Delaware has applied this framework.

A. Lack of Transparency

ANBs, as the name implies, are part of a company's bylaws. While current law requires companies to disclose their certificate of incorporation and bylaws in their securities filings,[64] companies do not have to disclose additional documents, such as director questionnaires, that are incorporated by reference into ANBs. What disclosures are called for in director questionnaires, in other words, is not made public.

While, at present, many items in directors' questionnaires tend to be standardized and must be completed both by incumbent board nominees and nominees by activists, questionnaires can contain supplemental items that need to be completed only by activist nominees.[65] Non-standard items in questionnaires may be particularly likely in companies that receive an advance notice and those items may even have been added to the questionnaire after the advance notice has been received.

The lack of transparency as to what disclosures are required by questionnaires affects both potential activists and regular shareholders. Activists have a legitimate interest in finding out the information they will need to disclose *before* making an actual nomination and, to a lesser extent, before they make an activist investment in the company. This enables them to decide at an earlier stage whether to proceed with a proxy challenge and to start collecting the relevant information before making an actual nomination. Regular shareholders have a legitimate interest in finding out the information activists will need to disclose as part of their evaluation of the company's corporate governance. Such information can help them to evaluate whether to bring a lawsuit challenging the validity of the disclosure requirements, to bring a Rule 14a-8 shareholder proposal to pressure the board to revise the questionnaire or to change the bylaws, or to withhold votes in a director election.

To be sure, even though questionnaires are not publicly available, shareholders could obtain the questionnaire in two ways: by actually making a nomination and having the questionnaire sent to them; or by requesting a copy under Section 220 of the DGCL. But neither of these methods are substitutes for public availability. Obtaining a questionnaire

[64] Item 601(b)(3) of Regulation S-K [17 CFR 229.601(b)(3)].

[65] Different versions of a director questionnaire are often used for nominees who are not already directors and for nominees who are already directors (and have already once supplied answers to the questionnaire for new directors). The relevant questionnaire is generally the former.

by making a nomination is not an option for regular shareholders and, for activists, does not address their interest in knowing the required disclosures in advance. Obtaining a copy of the questionnaire under Section 220 has several downsides. It entails delay—under the statute, the company has 5 business days to respond to any request during which time the questionnaire could be changed.[66] It may entail costs if the company disputes that the shareholder has a proper purpose or otherwise refuses to comply with the request. It is cumbersome as requests have to be made for each company individually, differences in questionnaires of different companies are hard to detect, and one cannot electronically search for questionnaires with certain offensive provisions. The information content is limited as the company may change the questionnaire after it has been sent to a requesting shareholder without the shareholder becoming aware of the change. And for an activist, making a Section 220 request for a questionnaire also provides the company with notice that a nomination may be forthcoming.

In sum, as currently structured, there is a lack of transparency as to the content of ANB disclosures chiefly due to the difficulty of accessing the questionnaire. *Ex post* judicial review does not lend itself to correct this lack of transparency.

B. Enforcement and Scope

Ex post judicial review also entails institutional limitations in the sanctions that may be imposed for supplying false or incomplete information in ANB disclosures. Activists are typically not fiduciaries and therefore owe no fiduciary duties to the corporation and other shareholders. As a result, materially false or misleading submissions made by activists in complying with ANBs probably do not violate corporate law. The main sanction for false or misleading disclosures in ANBs is thus not a monetary penalty or other court-imposed sanction but a judicial endorsement of self-help: companies are permitted to disqualify an activist if the activist's disclosures are materially false or misleading.

This limited sanction, however, may not be optimal. It will not always be easy to determine whether a disclosure is false or misleading; if it were, ANB disclosure requirements would not be needed. As a result, many false or misleading disclosures may remain undetected. Moreover, for the sanction to be effective, a company would have to determine that a disclosure was false or misleading in the few months between the nomination and the annual meeting. Once a nominee has been elected, it is unclear if the election would be invalidated based on a false or misleading

[66] 8 Del. C. § 220(c)(1) (2025).

disclosure in a questionnaire.[67] And if the activist's slate of nominees obtains a majority of board seats, it is further unclear who would even bother to sue.[68]

C. Uncertainty

Case by case fact-specific adjudication proves to be an awkward means for developing advanced notice ground rules. Courts observe and have the ability to review advance notice bylaws only in the context of litigation. Litigation involving advance notice bylaws, however, is relatively infrequent. To date, while there have been 31 Delaware judicial opinions dealing with challenges to ANBs (and, to our knowledge, none in other states), most shed little light on the basic ground rules for election contests.[69] The few that potentially provide such ground rules often turn on

[67] Recently, some companies have adopted bylaws that would invalidate an election after the fact. For example, Avantor's bylaws require any nomination made pursuant to the company's proxy access regime to include "a letter of resignation signed by [the] Nominee, which letter shall specify that such … Nominee's resignation is irrevocable and that it shall become effective upon a determination by the Board of directors… that .. any of the information provided to the Corporation by the Nominator … or the … Nominee in respect of the nomination … is or was untrue in any material respect". Aviator Inc., Amended and Restated Bylaws § 2.12(C)(ix) (Feb. 28, 2024), available at https://www.sec.gov/Archives/edgar/data/1722482/000172248224000071/avantor-fourthamendedand.htm. In a similar vein, the advance notice bylaws of Blade Air Mobility require nominees to deliver to the company's Secretary "an irrevocable, contingent resignation to the Board of Directors, in a form acceptable to the Board of Directors". Blade Air Mobility, Inc., Amended and Restated Bylaws § 2.03(D)(2) (May 13, 2021), available at https://www.sec.gov/Archives/edgar/data/1779128/000110465921065292/tm2115701d2_ex3-2.htm. The validity of those provisions is currently being challenged before the Delaware Court of Chancery.

[68] Albeit to a lesser extent, sanctions that can be imposed under Delaware law are also limited for any rules' violations by incumbents. Unlike activists, incumbents owe fiduciary duties. Incumbents, also, are within the personal jurisdiction of Delaware courts and, in any case, claims against them would involve core internal affairs governed by Delaware law if they are sued elsewhere. But although, as fiduciaries, incumbents can in theory be exposed to personal liability for any violations, in the context of ANBs, the most likely sanction for any rules violations by incumbents would an injunction ordering the incumbents to change their actions. Such injunctions, rather than damage awards, have been the remedy provided in the few cases where activists successfully challenged the propriety of ANBs as well in cases in related context, such as anti-activist poison pills or takeover defenses. As in the case of activists, the limitation of sanctions may result is suboptimal deterrence against violations.

[69] Those opinions comprise three issued by the Delaware Supreme Court: *Kellner v. AIM ImmunoTech Inc.*, 320 A.3d 239 (Del. 2024); *BlackRock Credit Allocation Income Trust v. Saba Capital Master Fund, Ltd.*, 224 A.3d 964 (Del. 2020); and *Hill International, Inc. v. Opportunity Partners L.P.*, 119 A.3d 30 (Del. 2015); and 28 opinions issued by the Delaware Court of Chancery: *Assad v. Chambers*, C.A. No. 2024-0688-NAC (Del. Ch. June 2, 2025); *Vejseli v. Duffy*, C.A. No. 2025-0232-WBD (Del. Ch. May 21, 2025)); *Siegel*

the specific facts. Thus, for example, in *Kellner v. AIM Immunotech*, the court invalidated an advance notice bylaw provision consisting of a 1,099-word single-sentence with thirteen discrete parts, finding that the provision was indecipherable. Would an equivalent provision have been valid if the single sentence had been broken down in several sentences and some of the lengthier subsections been streamlined?

Fact-intensive analysis is, of course, one of the hallmarks of the Delaware courts.[70] In some areas, such as mergers and acquisition jurisprudence, cases arise with sufficient frequency to lead to the development of a reasonably clear, widely understood, "handbook" for how to proceed. But when there are relatively few cases addressing a particular topic, a fact-intensive analysis does not provide a lot of *ex ante* certainty about the outcome.

In many areas of law, lack of certainty is not a problem; indeed, it may be a feature, rather than a bug, of the Delaware regulatory system. Thus, for example, uncertainty over what constitutes "fair dealing" in a conflict transaction may lead the parties to structure the transactions with lots of

v. Morse, 2025 WL 1101624 (Del. Ch. 2025); *Kellner v. AIM ImmunoTech Inc.*, 307 A.3d 998 (Del. Ch. 2023); *Paragon Technologies*, Inc. v. Cryan, 2023 WL 8269200 (Del. Ch. 2023); *Hammann v. Adamis Pharmaceuticals Corporation*, 2023 WL 5424109 (Del. Ch. 2023); *Sternlicht v. Hernandez*, 2023 WL 3991642 (Del. Ch. 2023); *Jorgl v. AIM ImmunoTech Inc.*, 2022 WL 16543834 (Del. Ch. 2022); *Strategic Investment Opportunities LLC v. Lee Enterprises*, Incorporated, 2022 WL 453607 (Del. Ch. 2022); *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140 (Del. Ch. 2021); *Bay Capital Finance*, L.L.C. v. Barnes and Noble Education, Inc., 2020 WL 1527784 (Del. Ch. 2020); *Saba Capital Master Fund*, Ltd. v. Blackrock Credit Allocation Income Trust, 2019 WL 2711281 (Del. Ch. 2019); *In re Ebix*, Inc. Stockholder Litigation, 2016 WL 208402 (Del. Ch. 2016); *AB Value Partners*, LP v. Kreisler Manufacturing Corporation, 2014 WL 7150465 (Del. Ch. 2014); *Icahn Partners LP v. Amylin Pharmaceuticals*, Inc., 2012 WL 1526814 (Del. Ch. 2012); *Sherwood v. Ngon*, 2011 WL 6355209 (Del. Ch. 2011); *Goggin v. Vermillion, Inc.*, 2011 WL 2347704 (Del. Ch. 2011); *Jana Master Fund*, Ltd. v. CNET Networks, Inc., 954 A.2d 335 (Del. Ch. 2008); *Levitt Corp. v. Office Depot, Inc.*, 2008 WL 1724244 (Del. Ch. Apr. 14, 2008); *Openwave Systems Inc. v. Harbinger Capital Partners Master Fund I*, Ltd., 924 A.2d 228 (Del. Ch. 2007), 2007 WL 1500034; *Accipiter Life Sciences Fund*, L.P. v. Helfer, 905 A.2d 115 (Del. Ch. 2006); *Oliver Press Partners*, LLC v. Decker, 2005 WL 3441364 (Del. Ch. 2005); *Mentor Graphics Corp. v. Quickturn Design Systems*, Inc., 728 A.2d 25 (Del. Ch. 1998); *Linton v. Everett*, 1997 WL 441189 (Del. Ch. July 31, 1997); *Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 315117 (Del. Ch. Jan. 14, 1991); *Nomad Acquisition Corp. v. Damon Corp.*, 1988 WL 96192 (Del. Ch. Sept. 16, 1988); *Mesa Petroleum Co. v. Unocal Corp.*, 1985 WL 44692 (Del. Ch. Apr. 22, 1985); *Lerman v. Diagnostic Data, Inc.*, 421 A.2d 906, 914 (Del. Ch. 1980).

[70] Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 Colum. L. Rev. 1208 (1998).

procedural safeguards rather than go to the limit of a clearly-drawn line to meet the specified minimum standards for fair dealing.[71]

But sometimes, as with ANB disclosures, a "rule" is better than a "standard." Consider the differential incentives facing shareholders and firms. An activist faced with an ANB of uncertain validity has two choices: invest the time and expense of complying even though the ANB may be invalid; or challenge the bylaw. The problem with the second option is that, unless the activist's challenge is expedited and resolved by the time ANB disclosures are due, the activist takes the risk of having its nominees disqualified if portions of the challenged disclosures are upheld. Uncertainty about the validity of advance notice bylaws will thus lead many activists to take to a conservative approach and comply with bylaws that would have a good chance of being found invalid if challenged.

The incentives for activists to be conservative are mirrored by incentives for boards to be aggressive. Companies and their advisors face relatively weak deterrence against adopting provisions that push the envelope. If a provision goes too far, the legal remedy is usually limited to striking down that provision (although there may be significant market penalties if shareholders view aggressive stances negatively). There are no fines, damages are speculative and likely barred by exculpation provisions, and the remaining provisions in the advance notice bylaws—including any adopted at the same time as the provision struck down by the court—may remain in effect.[72] That remedial approach—common in equity—may be defensible after the fact, but it blunts the incentive to adopt defensible ANBs in the first place. Unlike *Paramount v. QVC*, where the Delaware Supreme Court voided an entire lockup package after finding it was unreasonable as a whole, the *Kellner* remedy effectively told drafters that going too far might still leave them with something. As the Chancery Court has warned in other contexts, judicial remedies that strike out offending portions of a provision while keeping the remaining parts of the provision enforceable risk creating a "no-lose" scenario for the board.[73] The limited sanction for unreasonable bylaws, in turn, can create a feedback loop. Companies may adopt aggressive bylaws that activists won't challenge, these bylaws become

[71] More generally, when there are few disputes, it may be more cost efficient to regulate these disputes through ex post than through ex ante rulemaking. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

[72] See *Kellner*, noting that "one problematic bylaw does not invalidate others when the board has a proper motive." *Kellner*, 320 A.3d at 261 n.151.

[73] *See Sunder Energy, LLC v. Jackson*, 305 A.3d 723, 753-54 (Del. Ch. 2023), affirmed – A.3d – (Del. 2024).

"market practice," and courts take market practice into account in evaluating the validity of subsequent bylaws.[74]

D. Limitations to Clear Day Challenges

Even in a judicial review system, uncertainty could be significantly reduced if the validity of bylaw provisions could be adjudicated in a "clear day" challenge well in advance of a nomination. The potential benefit of clear-day facial challenges is twofold. First, it increases the number of challenges that can be brought, and with it the number opportunities the courts will have to clarify the law governing ANBs. Second, to the extent that attorney's fees are awarded to successful plaintiffs in clear-day facial challenges, those costs can clarify the rules in advance of a nomination and disincentivize overly aggressive ANBs.

But at least in Delaware, the basis for clear day challenges is now so narrow that showing that ANB disclosures are unreasonable is not sufficient. The recent Delaware Supreme Court opinion in *Kellner* distinguished between bylaw provisions that are facially invalid because they cannot operate lawfully under any set of circumstances, (e.g. because they are inconsistent with the corporation's certificate of incorporation)[75] and bylaw provisions that are merely unenforceable because they run afoul of fiduciary duty cases such as *Schnell* (because they are inequitable), or *Blasius* and *Coster* (because they interfere with a corporate election or a stockholder's voting rights in contests for control). Only facially invalid bylaws are subject to clear day challenges. The *Kellner* opinion only implies, but does not outright state, that a bylaw can never be so draconian under *Coster* that that it cannot operate lawfully under any set of circumstances and hence that bylaw challenges under *Coster* can never be brought on a clear day.[76] But a recent ruling by the Delaware Chancery Court held so.[77] As it currently stands, Delaware case law would thus not

[74] See, e.g., *See Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140, at *19 (Del. Ch. Oct. 13, 2021) ("[A]dvance notice bylaws are commonplace, and provisions asking stockholders to disclose supporters are equally ubiquitous."); *Kellner v. AIM ImmunoTech Inc*., 307 A.3d 998. 1030, 1034 (Del. Ch.) ("[p]rovisions to [require disclosure and derivative ownership, short interests, and hedging arrangements] are 'very common'"; "[d]irector questionnaire provisions are fairly standard in second generation advance notice bylaw").

[75] *Kellner*, 320 A.3d at 258.

[76] Because the factors that the court relied on in *Kellner* to enjoin the enforcement of three of the bylaws are rather generic, *Kellner* may be better understood has a "ripeness" principle: only bylaws involved in a genuine election controversy will be reviewed.

[77] *Siegel v. Morse*, 2025 WL 1101624, at *5–7 (Del. Ch. Apr. 14, 2025) (holding that equitable challenges to advance notice bylaws require a ripe controversy and rejecting a

permit clear-day challenges on the grounds that the board violated its fiduciary duties in adopting an ANB.

E. Ex Post *Focus of Analysis*

Whether or not case-by-case adjudication leads to uncertainty, any as-applied review of ANB disclosures is likely to focus on the *ex post* costs and benefits of disclosure: *given that an activist has emerged and wants to make a nomination*, is requiring disclosure justified? But the relevant policy issue is the *ex-ante* effects of ANB disclosure requirements: what is the effect of a disclosure obligation on the likelihood of an activist taking a position and proceeding up to the level of making nominations? Even if disclosure would be desirable from an *ex post* perspective, disclosure may be undesirable *ex ante* because the prospect of having to make disclosures may excessively chill nominations. At some point, the costs of compliance, the costs of disclosing confidential information, the reduced likelihood of success from having to disclose campaign-relevant information, and the possibility of being disqualified due to errors in the disclosure of complex information will convince some activists not to bother.

A reduced likelihood of activists proceeding up to the level of making nominations, in turn, may create two types of costs. First, activism may be desirable because it enhance firm value either because activist gain some influence over corporate policies and use it to promote changes that enhance firm value or because incumbents, to fend off an activist challenge, institute improvements on their own.[78] Second, the mere threat of activism may have a desirable disciplinary effect on management: managers, concerned that their company may become the target of activism, institute changes that enhance company value without the company actually ever becoming a

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stockholder's attempt to invoke *Coster* to bring a "clear-day" challenge where no proxy contest was threatened or chilled).

[78] There is significant evidence that activist campaigns benefit target shareholders. See, e.g., Lucian A. Bebchuk et al., *The Long-Term Effects of Hedge Fund Activism*, 115 Colum. L. Rev. 1085, 1155 (2015) (presenting evidence that positive short term stock-price spike accompanying activist interventions reflects the intervention's long-term consequences); Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. Fin. 1729, 1730 (2008) (finding that "find that the market reacts favorably to activism, consistent with the view that it creates value" (updated sample available at https://docs.google.com/file/d/1cwdHV2wJfWhAtV44gSJqOm0ZRYHEAA6r/view); April Klein & Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors*, 64 J. Fin. 187, 189 (2009) (finding a significantly positive market reaction for activist hedge funds' activities); Christopher P. Clifford, *Value Creation or Destruction? Hedge Funds as Shareholder Activists,* 14 J. CORP. FIN. 323, 328-333 (2008); but see Ed deHaan, David F. Larcker & Charles McClure, *Long-Term Economic Consequences of Hedge Fund Activist Interventions*, 24 REV. ACCT. STUD. 536 (2019).

target. Fewer activist challenges will generate fewer of these benefits. However, as some have argued, the effects of activism may be negative rather than positive because the pressure from activist engagements and from the threat of activist engagements cause managers to "manage to the market."[79] To the extent that *ex ante* effects are net positive, an analysis of ANB that focuses on *ex post* effects will lead to a systematic bias towards upholding disclosure requirements that are excessive from an *ex ante* perspective.

F. Information Defects

Even to the extent judges consider *ex ante* effects, whether in the context of an as applied challenge or otherwise, they will have limited information. The main source of information is the evidentiary record and the arguments developed and presented by the parties. Judges have only a few clerks and no systematic way to gather information on *ex ante* effects, which are market-wide rather than case-specific. Given the limited access to information, judges are prone to make mistakes. This problem is aggravated by the fact that the disclosures required by ANBs will often constitute information that is potentially directly material or can lead to the discovery of material information, and hence somewhat valuable. Evaluating whether boards should be permitted to require such disclosures would therefore require information not just about the direction but also the magnitude of *ex ante* effects.

V. AN *EX ANTE* PRESCRIPTIVE FRAMEWORK

In this Part, we will discuss potential *ex ante* prescriptive frameworks for advance notices. An *ex ante* prescriptive framework could, depending on its features, either complement or replace the current *ex post* judicial review framework. In the first Section, we propose features of an *ex ante* prescriptive framework that largely complement the *ex post* judicial review framework.[80] We then turn to a more expansive framework that would largely replace the current *ex post* judicial review framework.

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[79] William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 675–88 (2010).

[80] Even to the extent that some of the *ex ante* prescriptive requirements could be imposed by state law, states in general, and Delaware in particular, may lack the incentives to do so. First, as some of us have argued elsewhere, an *ex post* adjudicatory approach lends a veneer of technocratic objectivity and neutrality which helps Delaware fend off arguments that corporate law is political and rules should be set by Congress (or by the SEC pursuant to authority from Congress), rather than by legislators elected by the citizens of the state of Delaware. Marcel Kahan & Edward Rock, Symbiotic Federalism and the

A. Rules as a Supplement to Ex Post *Review*

1. Disclosure of Questionnaires

Neither current SEC regulation nor state law currently require companies to publicly disclose the questions in the directors' questionnaires that companies often require nominators to complete as part of the ANB disclosures. This impedes both activists—who will not know the contents of the questionnaire until they request one from the company—and shareholders in general, who may want to take actions to remove requirements they oppose. It also enables the company to delay the furnishing of the questionnaire when a request is made or to change the contents of the questionnaire after a request has been received.

All of these problems can be avoided by requiring companies to publicly disclose their ANB director questionnaires, just as they already publicly disclose their charter and bylaws. Requiring companies to file their questionnaire, or to put it on their investor relations website, has no downside. In particular, companies would not have to generate any new information but merely disclose an existing document. Moreover, companies do not have any legitimate interest in keeping the contents of the questionnaire secret. Questionnaires do not include trade secrets or competitive information whose disclosure could harm the company's business.

A public disclosure requirement could be imposed through *ex ante* legislation or regulation.[81] While both the SEC or states could adopt a public disclosure requirement, the SEC is the natural body to do so.[82] The SEC, rather than Delaware case-law or statutory law, generally deals with disclosure requirements. Specifically, the SEC could require that any public company with an ANB that requires completion of a questionnaire disclose the then-current version of the directors' questionnaire by the beginning of the nomination window. Absent a more recent timely posting, the prior year's questionnaire would be deemed to apply to the following year.

In addition, SEC rules could provide that the company may not, after the last date for posting, amend the questionnaire (or the bylaws themselves)

Structure of Corporate Law, 58 VAND. L. REV. 1573 (2005). Moreover, from a regulatory competition perspective, states would have little incentive to set up an expensive regulatory apparatus that comes up with rules that could then easily be copied by other states. Kamar

[81] It is conceivable that courts would hold ANBs that are not publicly disclosed in advance unenforceable but this seems a roundabout way to induce public disclosure.

[82] Reg. S-K and stock exchange rules already require the disclosure of committee charters. § 229.407 (Item 407) Corporate governance (audit committee charter); NYSE Listed Companies Manual Section 303A.

to require any additional disclosures. This additional requirement would impose little burden on the company and is needed to make the disclosure requirement effective. If a company could strategically change the questionnaire, an activist would shoot at a moving target even if a questionnaire had been posted, and shareholders would have no effective ability to oppose excessive disclosures via questionnaires. If an activist is required to complete a questionnaire well ahead of the date of the annual meeting, it is only fair to require the company to tell the activist what information must be provided as of the time the questionnaire is due.

This requirement would be easy to enforce. Even to the extent that the SEC brings no enforcement actions and shareholders lack a private right of action, companies would have to post a new version of the directors' questionnaire or would otherwise be stuck with the old version. If a company failed to post a new version in a timely manner and tried to invalidate a nomination made, any state-law challenge to that board action would look to the SEC rule to determine which version applies.

2. Disclosure of ANB Responses

One significant purpose of ANB content provisions is to provide information that is either directly material or that can lead to the discovery of material information. An *ex ante* prescriptive system could thus require that the ANB notice—including the disclosures made by the nominator in compliance with the ANB—not only be sent to the company but also, with sensitive personal information removed,[83] be made publicly available.

Public disclosure would generate several benefits. First, just like boards, investors have an interest in being informed when a shareholder seeks to nominate alternative candidates to the board of directors. For any shareholder subject to Section 13(d), disclosure of the filing of an ANB notice would already be required. But not all activist groups are subject to 13D.[84] We see no reason why those that are not now required to file should be exempt.

Second, to the extent that information provided in compliance with the ANB is directly relevant to shareholders and investors, it may be important

[83] Currently, questionnaires for new directors require the disclosures of significant sensitive personal information, such as financial records. By contrast, most responses to questions about AAUs or known supporters would not contain sensitive personal information.

[84] See Ryan McDonough, Venky Nagar & Jordan Schoenfeld, *Voluntary Disclosures by Activist Investors: The Role of Activist Expectations*, 29 REV. ACCT. STUD. 2031, 2064 tbl.3 (2024) (reporting that 41% of activist campaigns in their sample were initiated by investors who did not file a Schedule 13D).

to shareholders to see that information when the advance notice is filed rather than to wait for the company (or the activists) to disclose it later in the course of a proxy contest.

Finally, for information that indirectly leads to the discovery of material and relevant information, shareholders and other market participants may have a legitimate interest in engaging in their own research about the nominees or the nominating group. Having access to the ANB notice will likely aid in that research. In particular, investor research (when added to company research) may yield three benefits: the discovery of *more* information; the *earlier* discovery or distribution of information; and *reduced bias*.

The first two benefits are obvious: research by market participants may lead to discovery of information not found by the board, lead to the earlier discovery of information also found by the board, or result in investors learning of information known to the board but not yet filed. In the last regard, note that the board may be reluctant to communicate certain information to investors out of concern that they be sued under Rule 14a-9.

But there is also another reason why a board may fail to disclose material and relevant information about nominees they discover: the information may make a shareholder *more* likely to support the activist. Information discovered by incumbent boards and disclosed to shareholders is thus likely to be biased. By contrast, investors and shareholders have no incentive to look only for information favorable to incumbents.

On the other hand, the questionnaires that large public companies use in evaluating whether to add someone to the board are, at present, broader and more detailed than the annual director questionnaire used to assist counsel in drafting the proxy statement.[85] Items that are relevant to deciding whether to nominate someone to the board may well be broader, more intrusive and elicit more personally sensitive information than disclosures required under Schedule 14A. These "screening" questionnaires typically ask about any criminal and federal suits, any accusations of sexual harassment or other illegal behavior (even if they did not go anywhere), finances, and other obligations (such as service on nonprofit boards or boards of private companies). In addition, companies do full background checks (going back 20 or so years); interview 3-5 people as references; and do full governance, conflict and reputational checks. While this disclosure may be valuable in evaluating a candidate, much less is required on the proxy statement. Because these questionnaires are more probing, requiring the disclosure of the answers could discourage some candidates (both activist and board candidates) from being considered, even if disclosing the

[85] Private communication with M. Foran (Prudential), on file with the authors.

questions in the questionnaires themselves would not. Taking an *ex ante* perspective, a balance must be struck between the value of the additional disclosure and its chilling effect on potential nominees.

3. Liability Enhancement

One issue with the current system of *ex post* fiduciary duty review is the limited set of sanctions, and hence the limited deterrence, created for false disclosures. An *ex ante* prescriptive system could enhance these sanctions.[86] If the SEC required the public filing of ANB disclosures and such disclosures are considered part of the solicitation process, making false disclosures would violate Rule 14a-9[87] and could form the basis for a private right of action by shareholders.[88] In addition to civil liability, false statements may also give rise to criminal liability under Section 32(a) of the Exchange Act, which imposes criminal penalties for any willful violation of the Act or its rules, including Rule 14a-9.[89] While criminal enforcement is uncommon and generally reserved for egregious misconduct, activists who knowingly submit false information as part of a campaign to influence the outcome of a shareholder vote risk exposure to both civil claims and criminal prosecution.

4. Timing

Another aspect of ANBs that lends itself to *ex ante* prescription is the time frame for providing advance notice. Setting a concrete numerical cut-off is the province of regulation and legislation, rather than the province of

[86] Again, in principle, states could change their law to provide such sanction enhancements. Depending on the other elements, however, states would face personal jurisdiction and choice-of-law barriers. Take the case of Delaware. While directors of Delaware corporations are deemed to have consented to personal jurisdiction by Delaware courts, no equivalent provision applies to activists and imposing such a "deemed consent" provision would likely be unconstitutional. Delaware may thus lack personal jurisdiction over activists and other states may not apply Delaware law to claims against an activist as such a claim would fall outside the traditional scope of internal affairs. These barriers would probably not inhibit sanction enhancements if states imposed their own public disclosure requirements. Making a false disclosure in a document filed in a state's office would provide the state with personal jurisdiction in an action for false statements and the state in a such an action would apply its own law.

[87] 17 C.F.R. § 240.14a-9(a)

[88] *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1091–96 (1991) (holding that knowingly false statements of opinion in a proxy statement can support liability under Rule 14a-9).

[89] Securities Exchange Act of 1934 § 32(a), 15 U.S.C. § 78ff(a) (providing for fines and up to twenty years of imprisonment for willful violations of the Act or any rule thereunder).

judge-made law. A prescriptive provision could be enacted either legislatively by states or by the SEC through regulation.

Establishing a time frame is desirable to prevent "advance notice creep." Originally, as noted above, notice was required 60 to 90 days in advance of the anniversary of the previous year's annual meeting. Now, the standard notice period is 90-120 days, with some companies pushing that to 120 to 150 days from to the anniversary or the prior year's annual meeting or, to a similar effect, a 90-to-120-day period from the anniversary or the prior year's *mailing* of the proxy statement.

In keeping with current market practice, dissidents would have to submit their nominations in the 90-to-120-day window preceding the annual meeting (or, if the meeting has not been announced by the beginning of that time frame, preceding the anniversary of the prior year's annual meeting). This would allow the company time to engage in settlement discussions and devise its own campaign materials.

We note that the current window already hampers some challenges. Activists need to make at least a preliminary decision to mount a challenge well in advance of the advance notice period. They have to assemble a team of nominees and complete the voluminous disclosures required by advance notice bylaws and the accompanying questionnaire. Thus, whatever the advance notice period, the preliminary decision point for an activist is probably months prior to the last date for filing the notice. The earlier in time activists need to decide on a challenge, the longer is the time gap between the emergence of the problems affecting the corporation that induce the challenge and the time the problems can be rectified. But as the market seems to have adjusted to this schedule, we do not see any reason to change it, despite the fact that earlier, "first generation" ANBs typically provided for a shorter 60-to-90-day nomination window.

5. Equal Treatment: What's Sauce for the Goose is Sauce for the Gander

A final element of an ex ante prescriptive system could be an equal treatment requirement: if an activist files an ANB notice and accompanying disclosures, then the company and its nominees would be required to disclose the same information to the activist that the activist must disclose to the company. If the activist information is required to be filed publicly, the information supplied by company nominees should be publicly filed as well. The company should have sufficient time, say [30] days after an activist submits its complete notice to provide its information. Moreover, to avoid triggering the prohibition of solicitations before filing a proxy statement, if the information is publicly filed, it should not be due until after the company files it proxy statement. An equal treatment requirement would thus serve to make the playing field more level.[90]

The rationale for requiring company disclosures is the same as the rationale for requiring disclosure from activists: the disclosures contain information that is directly relevant to shareholders, lead to the discovery of additional information that is relevant, and may aid the activist in determining whether and at what terms to settle an election contest.

Requiring incumbents to live by the same rules that they impose on activists may have another desirable effect: it may counteract the incumbents' inclination to require excessive disclosures. As it stands now, incumbents bear little direct costs in loading up on the information that activists need to provide. This can lead to long and detailed disclosures that activists and their nominees are required to make. Part of the disclosures are required by a questionnaire that is compiled by lawyers who have few reasons not to err on the side of adding information requirements.

Importantly, an equal treatment requirement, whether or not coupled with a public disclosure requirement, would maintain flexibility in the design of ANBs. Companies would be free, under such a requirement, to impose any disclosure obligations (subject to *ex post* judicial review) and would be free to change the required disclosures if the state-of-the-art on ANBs changes. Unlike most of the other elements of an ex ante prescriptive regime that we have discussed in this section, an equal treatment provision lends itself to be adopted by state law.

6. Director Qualification-Related Disclosures

Some company bylaws or charters prescribe requirements for director qualification. Age limits, for example, are common requirements. For other companies such as airlines, the citizenship of directors will determine the

[90] The playing field will continue to be non-level. Lucian A. Bebchuk & Marcel Kahan, *A Framework for Analyzing Legal Policy Toward Proxy Contests*, 78 CALIF. L. REV. 1071 (1990).

citizenship of the company and thus its ability to fly domestically.[91] Defense contractors often seek directors with security clearances.[92]

Companies and shareholders both have a legitimate interest in determining whether a person is qualified to serve as director under the company's bylaw qualification requirements. Nevertheless, it might be argued that failure to provide such information, or failure to meet a director qualification, should not be grounds for disqualifying a nominee.

One technical reason is that qualification requirements are only relevant if and when a person actually obtains the votes to serve as a director. Determining whether a nominee meets the requirements is thus premature in several ways: the person may not be elected, additional information may be provided, the nominee characteristics may change between the ANB deadline and the election date, and the qualifications may change by the time the nominee, if elected, would start to serve. Indeed, if a qualification that would bar a nominee from serving is imposed by a bylaw, an activist could, as part of an election contest, also seek to amend the bylaw to remove the qualification.[93]

Under this approach, companies would be free to request information needed to determine whether a nominee meets the requirements, at the time an activist supplies the other information required by ANBs, in order to make a preliminary assessment of whether the requirements are met. If an activist fails to supply this information or if the company concludes that the nominee does not meet the qualifications, the company could inform shareholders that it was unable to make an assessment or that its assessment was negative. But the nominee would not be disqualified as a result and the

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[91] See, e.g. See Delta Air Lines, Inc., Amended and Restated Bylaws art. II, § 8(j)(vii) (Dec. 7, 2022), https://www.sec.gov/Archives/edgar/data/27904/000168316822008312/delta_ex0301.htm#a_012 ("The corporation shall not be required to include any Stockholder Nominee in its proxy materials for any meeting of stockholders pursuant to this Section 9 … whose election would cause the corporation to fail to qualify as 'citizen of the United States' as the term is used in Section 40102(a)(15) of Title 49 of the United States Code...").

[92] See, e.g., See TTM Techs., Inc., Sixth Amended and Restated Bylaws art. 2.2 (May 8, 2024), https://www.sec.gov/Archives/edgar/data/1116942/000119312524136138/d807061dex32.htm ("[E]ach of at least three of the Directors will possess Personnel Security Clearances ('PCLs') at least to the level of the Contractor's Facility Security Clearance ('FCL')").

[93] See Shareholders Raise Issue of Oxy Directors' Age, Race, Los Angeles Times, May 27, 1989, (noting proxy contest at Occidental Petroleum when Armand Hammer was still CEO and chair in which the dissidents proposed a (shareholder adopted) bylaw requiring directors be less than 70 years old, a "qualification" that a majority of the incumbent directors could not satisfy).

final determination of whether a director-elect meets a valid director qualification could be made after an election.

Waiting until after the election to determine whether a nominee meets the director qualifications and whether a director qualification was validly imposed has the obvious advantage that the nominee may not gather sufficient votes to start with, rendering the issue of qualification moot.[94] Not permitting the company to disqualify a nominee from being on the ballot for failure to make disclosures or failure to meet the requirement has the further advantage of avoiding the Hobson's choice of forcing nominees to either make disclosures or to risk becoming ineligible to stand for election.

Shareholders have an interest in not wasting their votes as, ultimately, it is the shareholders who elect the director and have a legitimate interest in only considering director candidates who are qualified to serve. But it is less clear that this interest constitutes sufficient grounds for forcing activists to make the requisite disclosures with the threat of disqualification from the ballot if the disclosures are not made. If shareholders do not want to waste their votes on a nominee who possibly does not meet the director qualification, the costs of any uncertainty about whether a nominee is qualified will fall on the activist nominee, rather than on the company. In light of this, nominees are likely to make the relevant disclosures whether or not required to do so.

The justifications for treating director qualification disclosures differently from other disclosures are particularly strong if, as we suggest in the next section, regular (i.e. non-qualification related) advance notice disclosures are prescribed by SEC regulations and companies are generally not permitted to require additional disclosures. Allowing an exception for (non-SEC prescribed) director qualification disclosures, however, would create an incentive for boards to circumvent the restriction on imposing supplemental disclosure obligations by embedding those requirements in their director qualification bylaws. Tactics of this sort would be somewhat limited by the requirement of subjecting their own candidates to the same requirements.

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[94] In a similar vein, whether a nominee's election would violate the qualifications may depend on other contingencies resolved during the meeting. For example, whether the election of a nominee who is not a U.S. citizen could cause Delta Airlines to no longer to qualify as a "citizen of the United States" (see *supra* note 91) might depend on who else is elected at the meeting.

B. Rules as Substitute for Ex Post Review: Incorporating Existing Regulation by Reference

Going beyond the proposals discussed in the previous Section, and mooting some of them, one could imagine a regime in which the substantive content of advance notice nomination disclosures is prescribed by regulation, and companies are prohibited from requiring any additional disclosures. Even though such a prescriptive system would replace the current system of *ex post* judicial review of company-imposed disclosure obligations, one feature of the current system should remain: companies would retain the power to disqualify any nominee when the disclosures made are materially false or misleading, with the validity of such disqualification adjudicated by state court judges.

There are two principal benefits from an *ex ante* prescriptive approach. First, a prescriptive system would provide certainty. Such additional certainty is highly desirable in the ANB context. As we have discussed earlier, uncertainty systematically disadvantages activists by forcing them into either complying with a potentially overbroad disclosure requirement or litigating but facing the prospect of disqualification if they do not prevail. This predicament, in turn, provides an incentive to companies to err on the side of imposing aggressive disclosure requirements.

Second, the current system of *ex post* judicial review is highly imperfect. As we have discussed, case by case as-applied adjudication makes it difficult to generate a comprehensive set of ground rules. Moreover, judges may overweight the *ex post* desirability of disclosure and give insufficient attention to *ex ante* effects in analyzing whether a disclosure requirement passes muster under *Coster*. Indeed, judges have little access to the market-wide information required to analyzing *ex ante* effects. While an *ex ante* prescriptive system will suffer from its own shortcomings, as we discuss below, they may be less severe than the problems generated by *ex post* judicial review as currently practiced.

As a practical matter, and as a matter of institutional competence, rules governing the substantive content of advance notice disclosures would have to be adopted by the SEC, rather than implemented via state legislation. The SEC, of course, has a long history of regulating shareholder voting. Current SEC rules govern the contents of proxy statements, when and how proxy statements must be distributed, the form and contents of the proxy card, the extent to which a proxy card may or must include the name of other director candidate (the “bona fide nominee” rule and the “universal proxy rule”), and when the dissidents and the issuer must give notice to each other of the names of their nominees, and provide detailed disclosure requirements about a nominating party’s identity, its ownership stake, financial arrangements with nominees, and any contract, arrangement, or understandings regarding the giving and withholding of proxies involving participants in the solicitation. On top of that, the SEC has substantial expertise in crafting disclosure requirements, employs a staff of 4,200, including trained lawyers and economists (of which around 400 work in the Division of Corporate Finance),[95] and can access and obtain market-wide information by issuing a notice of proposed rule-making (even before soliciting more detailed input in a proposed rule release) or convening roundtables where participants from around the corporate governance ecosystem can present their views. Finally, SEC rules would have the benefit of applying to all U.S. publicly traded corporations regardless of where they are incorporated.

We do not want to overstate the SEC's logistical advantages, however. While the SEC has a large staff, the number of professionals working on rulemaking in the Division of Corporation Finance is much smaller (less than 20) and may shrink further, at least in the short term, as a result of the Trump Administration's cost-cutting efforts. Even to the extent that the SEC deploys resources to rulemaking, it has to adopt and revise a plethora of other rules.[96] Keeping any prescriptive disclosure regime straightforward and simple would thus make it more likely for the SEC to act.

Therefore, rather than crafting a new advance notice regime from scratch, the simplest approach would be for the SEC to incorporate its existing regulations by reference. Specifically, when submitting a nomination, the activist and its nominees could be required to provide all the information required by Schedule 13D, without regard to whether the nominator owns >5%, and all the nominator and nominee information required to be disclosed in the proxy statement under Schedule 14A.[97]

Significant portions of the disclosure content of ANBs are an attempt to achieve the goals of 13D, namely, to provide transparency into who is cooperating with whom and what their economic incentives are. Similarly, the requirement to complete a director questionnaire provides advance notice of the information that would eventually be required to be included

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95 https://www.sec.gov/spotlight/sec-employees.shtml#:~:text=The%20SEC's%204%2C200%20employees%20make,and%20companies%20can%20create%20jobs. SEC Performance Reports to Congress

96 The SEC's current rulemaking agenda includes rules on Crypto safe harbors and further deregulation of private offerings.

97 Many ANBs contain a variety of provisions that overlap with the disclosure requirements under Section 13(d). These include "AAU" ("agreements, arrangements and understandings") provisions and "13d" provisions. "Known supporter" provisions go well beyond what is required under 13D but are likewise designed to reveal who is on the activist's team.

in a proxy statement. While ANBs often go beyond the required 13D and 14A disclosures, the core disclosures required by ANBs relates to 13D and 14A disclosure items.[98]

While one can argue over whether the SEC's interpretation of the scope of 13D and 14A is optimal, the disclosure requirements reflect information that the SEC has deemed important to investors in the context of director election or the related context of the emergence of a shareholder that may wield some measure of influence or control. By tying advance notice disclosures to the existing 13D and 14A disclosure regimes, uncertainty is further reduced by prior case law interpreting what certain terms in the regulations mean and by network externalities generated from future case law.

Standardizing disclosures through SEC regulation would, however, carry three systematic disadvantages: first, different disclosure regimes may be optimal for different companies; second, what is optimal may evolve over time (and SEC rules are harder to change than rules under the current *ex post* judicial review regime); and third, the SEC is a monopolistic regulator leaving companies with few alternatives if the SEC adopts poor rules. These downsides need to be weighed against the benefits from SEC regulation.

Based on current evidence, however, these downsides are limited. First, while ANBs vary from company to company and have evolved systematically over time, the differences do not seem to be mainly driven by firm-specific factors as opposed to lawyer-specific effects. Moreover, a cursory review of recent Delaware decisions involving firms that rejected nominations for inadequate compliance with substantive disclosures required by ANBs suggests that most of those firms would also have been able to reject the nominations if the ANBs had only required the disclosures described in this section.[99]

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[98] ANBs' disclosure requirements sometimes go well beyond SEC requirements: AAU and AIC provisions are meant to expand the regulatory definition of group to include person acting in concert with an activist or known supporters; questionnaires solicit information that goes well beyond the required disclosures in proxy statement; and some ANB disclosure items—e.g., the requirement to disclose investments in competitors—have no direct parallel in either 13D or 14A.

[99] For example, in *Kellner*, the nomination was excluded (among other grounds) because the nominating person "omitted and misrepresented meaningful" agreements, arrangements or understandings (a disclosure that would arguably have been required by Item 7(b) of Schedule 14A); similarly, in *Jorgl*, because "notice omitted to mention arrangements or understandings with an undisclosed group"; in *Paragon*, because they failed to disclose any "plans or proposals … that would be required to be disclosed … pursuant to Item 4 of Schedule 13D"; in *Cytodyn*, because it failed to disclose a known

Additionally, while it is true that the optimal rules may change over time, and SEC rules are harder to change than firm adopted ANBs, the gap should not be exaggerated. For one, there are few incentives in the current process for board-adopted ANBs to reflect changes in optimal disclosures.

In any case, if companies think that there are additional facts about nominators or nominees that firms and shareholders should know—either because optimal disclosure requirements have evolved or because the initial disclosure regime based on incorporation by reference of Schedules 14A and 13D disclosure rules does not require sufficient disclosures—companies can propose amendments to Schedule 14A. While the SEC is sometimes slow in acting on requests for rulemaking (in particular, amendments to Schedule 13D have in the past been tied up in controversy) and has become increasingly partisan,[100] proposals for Schedule 14A changes may be relatively uncontroversial. The reason is that companies will themselves have to live by any enhanced 14A disclosures that they advocate for activists and will therefore tend to exercise self-restraint in advocating for additional disclosures.

Finally, while it is true that the SEC is a monopolistic regulator, this can be viewed as a benefit. To be sure, the current state level system of *ex post* judicial review creates a safety valve for corporations if one jurisdiction were to adopt undesirable law as firms can in effect choose the state corporate law they are governed by through their incorporation decision. No equivalent safety valve would exist if the SEC were to adopt undesirable rules. While this is a serious concern, its significance depends on the extent to which companies make incorporation (and reincorporation) decisions to maximize firm value or deviate from firm value maximization when doing so generates benefits for directors and managers. This is an old debate in corporate law and one's views on that debate will bear on the attraction of the proposal we have made in this section.

VI. PRIVATE ORDERING

Another possibility would be for market participants themselves to determine the optimal content of ANB disclosures, rather than having the SEC or issuer law firms do so unilaterally. Lawyers representing companies, activists, and major investors could get together and come up with a consensus "best practices" advance notice bylaw. Compared to SEC

financial supporter (a disclosure that would have been required under Item 4 of Schedule 14A—see Section (a)(2) and the definition of "participant" in Instruction 3(a)(iv)).

[100] Joseph Engelberg, Matthew Henriksson, Asaf Manela & Jared Williams, *The Partisanship of Financial Regulators*, 36 REV. FIN. STUD. 4373 (2023).

devised disclosures, this would have several advantages but one major disadvantage.

A significant advantage of such a private ordering system is purely pragmatic. Though an effort to create a consensus "best practices" advance notice bylaw is far from guaranteed to come to fruition—various participants may not come to a consensus on the substance or law firms with expertise in crafting ANBs may be concerned that a consensus bylaw would undermine their competitive advantage—, the likelihood of such an effort succeeding may exceed the likelihood of the SEC adopting advance notice content regulations. Relatedly, a consensus "best practices" advance notice bylaw and SEC content regulation may not be substitutes; to the contrary, a consensus "best practices" advance notice bylaw could form the basis for SEC-devised content regulation.

The other advantages relate to the disadvantages of SEC content regulations: their one-size-fits-all nature, the lack of responsiveness to changes in optimal disclosures, and the lack of a safety valve. Companies would not be required to adopt the consensus "best practices" advance notice bylaw, thus leaving room for firm-specific departures. The barriers to updating a consensus "best practices" advance notice bylaw would likely be lower than the barriers to amending SEC disclosure requirements. And a consensus "best practices" advance notice bylaw would be more responsive to the needs of market participants, thus lowering the need for safety valve.

A final issue relates to the legal status of a consensus best practice bylaw. At a minimum, such a bylaw could provide evidence of market practice. Even in the current system, courts have made reference to market practices in evaluating whether particular ANBs pass muster.[101]

To generate maximal benefits, however, a consensus "best practices" advance notice bylaw would have to do more. Specifically, courts applying *Coster* might modify their analysis by incorporating a presumption that disclosure provisions that correspond to those in a consensus "best practices" advance notice bylaws are valid and potentially that disclosure provisions that go beyond those in a consensus "best practices" advance notice bylaw are presumptively invalid. These presumptions should be rebuttable in two limited circumstances. First, if either the company or the activist can show firm-specific reasons for departing from the best practices. Second, if the company can show that changes are necessary to close "loopholes" and do not materially increase the burden on activists (in terms of costs of production, requiring the disclosure of confidential or campaign-related information, or complexity). With such presumptions, a consensus

[101] See, e.g., *Cytodyn*.

"best practices" advance notice bylaw would significantly reduce uncertainty, reduce bias generated from the *ex post* focus of analysis, and reduce information defects.

A further concern with a market driven "best practices" bylaw arises from who is included in the effort to forge a consensus. In particular, one of the concerns raised with regard to the SEC's universal proxy was that it would encourage non-financial activists to nominate candidates. This does not seem to have occurred so far but could develop over time. A consensus best practice ANB drafted jointly by representatives of issuers and financially motivated activists may raise the costs of nominations for non-financial activists without affecting the competition between financially-motivated activists and issuers. Whether this is a vice or a virtue depends on one's perspective.

VI. Name and Shame

The issue of ANB content requirements is ultimately about *who* decides what information activists have to disclose above and beyond the information presently required to be disclosed by SEC rules. The current system of *ex post* judicial review gives boards substantial discretion to require additional information, subject to the limitations set by *Coster*. *Ex ante* prescriptive content rules would call on the SEC to revise its current disclosures and leave limited discretion for boards to require additional disclosures. A private ordering system with presumptions would rely on expert consensus "best practices."

But there is an additional possible answer: shareholders themselves could decide what information they want and need. Under such an approach, the company could require advance notification about the fact that an activist plans to engage in a proxy solicitation in an election contest and the names of the nominees. Failure to supply such basic information needed to run an orderly election contest would be grounds for disqualification.

The company could also request additional information from an activist, such as information about known supporters, investments in competitors, and other information items commonly required in second-generation ANBs. But the company would have no right to disqualify a nominee for a failure to supply such additional information. Rather, it would be limited to a "name and shame" sanction: to inform shareholders that the activist has refused to supply information that the board deems important and let shareholders draw adverse inferences from the failure to supply this information.

A "name and shame" approach would obviously eliminate many of the problems that we have identified in the current *ex post* judicial review system. The lack of transparency would be mooted (as activists would no longer be required to disclose information by a certain date), and the problems generated by uncertainty, bias generated from the *ex post* focus of analysis, and information defects would disappear, at least in their present incarnation, as courts would not review ANB content requirements under *Coster*. The main question is whether a "name and shame" system would throw out the baby with the bath water by reducing incentives to supply information.

The case for "name and shame" rests on two arguments. First, that boards do not really need to know the information supplied by ANB content rules in advance of the distribution of the proxy statement (or ever). And second, that shareholders can draw proper inferences from an activist's refusal to supply information beyond the information required to be disclosed by SEC rules. If boards do not really need information beyond the fact that an activist plans to make nominations and who is being nominated, and if shareholders can draw proper inferences from a refusal to answer the board's questions, little is lost by not requiring the supply of detailed information as a condition for running an activist election campaign.

As we noted in Part II, it is often argued that boards need information—and need it before the distribution of the proxy statement—in order to fulfill their responsibilities to shareholders. This includes evaluating whether to endorse a nominee, deciding whether and at what terms to settle a contest, and ensuring that shareholders have full information about potential nominees. In practice, however, ANB disclosures rarely, if ever, result in a board endorsing an activist nominee. As to the second rationale, at least some of the information that many ANBs currently require to be disclosed would be helpful to a board in deciding whether and on what terms to settle a proxy contest. Still, even though such disclosures can be helpful, it is less clear that a failure to provide them justifies disqualifying a nominee. If an activist fails to provide information that the board feels it needs in order to settle a contest, the board can refuse to settle; or more to the point, it can threaten not to settle unless the information is provided and thereby induce the disclosure. For a hypothetical activist not interested in settlement, the fact that information would be helpful to the board for settlement purposes is irrelevant.

This, in fact, is how other types of negotiations proceed: in selling a house, a potential buyer wants information about the condition of the house while the potential seller wants information about the financial soundness of the potential buyer. Both sides have an incentive to provide requested information even if not obligated to do so. Some information may be provided; some may not be provided and the deal will fail as a result; some may not be provided, but the other party can decide to live without it. In a negotiation, the proper "remedy" for a failure to supply information requested by the counter party is thus not to reach a deal—or for that counterparty to adversely revise the terms under which they are willing reach one. This, presumably, is how things went under first generation ANBs, which had only minimal content requirements: if the board was dissatisfied with the disclosures made by the activist, it refused to reach a settlement.

The key issue is thus how a failure to supply information would affect *shareholders*. Shareholders, unlike boards, cannot easily request that the activist provide additional information. Shareholders, however, can draw inferences from an activist's failure to supply information. This is particularly likely in a competitive election contest since the other side—the board—can disclose information it learned from its own investigations and has incentives to draw the shareholders' attention to the fact that the board asked the activist to supply certain information and that the activist refused. If the request for information is reasonable and shareholders would be likely to draw adverse inferences from an activist's refusal to supply it, the activist would have strong incentives to disclose the information even if failure would not result in a disqualification.

But boards have incentives to request more information than is socially optimal, and its information requests cannot be assumed to be always reasonable. Shareholders would thus have to decide whether the activist had legitimate reasons for not supplying the information—because it is costly to produce, confidential, campaign-related, or overly complex—or whether the activist is not supplying it because the disclosure would be adverse to its interests. In the former case, shareholders may not draw adverse inferences from a failure to supply the information. A "name and shame" system would thus, without reliance on courts, induce activists to comply with reasonable information requests—or else suffer the consequences of losing credibility with shareholders—but impose no or only mild sanctions on activists for failing to comply with unreasonable information requests.

Leaving it to shareholders to determine what information they deem important is consistent with the letter and the spirit that animates *Coster*. As Chancellor Allen noted in his often cited (including in *Kellner*) *Blasius* opinion, "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests" and a board response "cannot be justified on the grounds that the board knows what is in the best interests of the stockholders."[102] But, if boards cannot substitute their judgement for shareholders' in how to vote, why should the board be able

[102] See *Coster*, 300 A.3d at 672.

to substitute its judgement for shareholders when deciding whether a failure to supply (non-SEC mandated) information should disqualify an activist from getting their vote?

Even if shareholders make this decision correctly, however, a "name and shame" system would have to provide sufficient sanctions against making materially false statements. False disclosures differ from a failure to supply information in that a failure to supply information is apparent, and will thus permit shareholders to draw proper inferences, whereas false disclosures must first be identified as false. At least on some occasions, it would not be discovered that the information supplied is false. From a deterrence perspective, the penalty for supplying false information should therefore be sufficiently high to deter the supply of false information even though such information will not always be exposed as false.

Shareholders, of course, would draw inferences from a supply of false information and these inferences would likely be more negative than those from a mere failure to supply information. Moreover, activists are typically repeat players, and getting caught making a materially false statement may hamper their future ability to wage successful campaigns. But shareholder inferences will likely be less than optimal as they will only be applied once information has been exposed as false and tend to ignore the *ex ante* deterrence effect of sanctions. In the same vein, reputational sanctions may not be ideally calibrated, and some activists are not repeat players. Permitting the board to disqualify activists who make materially false and misleading statements, or requiring them to resign if the falseness is discovered after the election,[103] may thus generate superior deterrence than shareholder-imposed or reputational sanctions. Boards, to be sure, may sometimes go overboard and be overly aggressive in characterizing information as false or material. Courts, however, have significant experience with such disclosure claims and dealing with disclosure disputes would involve problems not equivalent to those under the present *ex post* judicial review system of ANB reasonableness. A "name and shame" system for failure to provide information could thus be combined with a "disqualification" sanction for providing materially false and misleading information.

VII. Conclusion

Who should set the ground rules for corporate elections? And what should they be?

[103] See supra note 67.

Advanced notice bylaws are a relatively new phenomenon. When two of us first wrote about hedge funds in corporate governance and corporate control nearly twenty years ago,[104] ANBs were not a "thing." At that time, tender offers combined with a proxy contest had emerged as the principal route by which potential acquirers could challenge a board's deployment of a poison pill to block a hostile bid. Bidders would nominate a slate of directors, management would or would not resist and shareholders would decide. Schedule 13D and the SEC's proxy rules provided the basic ground rules. Firms did not impose extensive advanced notice bylaws.

What happened? Hedge funds became increasingly active in corporate governance, "short slate" proxy contests became common, "activism defense" became an M & A sub-specialty, and board advisers developed tools for responding to shareholder activism. As the years went by, ANBs became longer and longer and increasingly demanding.

Of the various alternatives canvased above, which do we recommend and why?

Our top choice would be for the SEC to re-enter the picture, pre-empt the field and set a common set of ground rules for corporate elections. Historically, the election process for public companies has been overseen by the SEC, it has clear regulatory authority to do so, and has usefully modified the rules in recent years with the introduction of the universal proxy. It continues to adjust the rules in response to market developments including its recent amendments to 13D and its on-going scrutiny and rulemaking regarding proxy advisers. As we argued above, a set of ground rules applicable to all public companies would reduce cost, increase transparency and avoid the messy case-by-case adjudication of the current system.

What rules should the SEC adopt? That is a more complicated question but our preliminary proposal is to require that, at the time of nomination, nominees provide the information that the proxy rules will ultimately require them to provide and also provide the disclosures required by Schedule 13D without regard to whether they hold 5% or more. Companies would be free to request additional information under a "name and shame" regime. That is, they could request additional information, publicize and criticize a nominee's failure to provide the requested information, and refuse to enter into settlements absent additional information, but could not exclude a nominee from the proxy statement for failure to do so.

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[104] Marcel Kahan & Edward Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021 (2007).

Were the SEC to intervene, ANBs could no longer be used strategically to oppose activists.

Our second best solution would be for leading lawyers who specialize in ANBs, from both the company and activist sides, to convene a working group under the auspices of an investor focused organization like the Council of Institutional Investors, and adopt a common set of ground rules that would provide boards with the information they need to assist shareholders in evaluating nominees, while not allowing boards to block unwelcome nominations through the strategic use of ANBs. We expect that an industry-driven set of basic ANBs would create pressure on companies to conform and would provide a true market benchmark for judges adjudicating bylaw cases. Together, this could approximate the clarity and consistency of an SEC driven approach.

We conclude that the remaining alternatives are inferior to these two approaches. The status quo of common law development encounters all of the classic problems with the common law. The development of the law is dependent on the flow of cases. Judges do not have access to unbiased market wide data and cannot provide market wide ground rules. Efforts to increase the flow of cases through permitting facial challenges encounter the same challenges and are strongly resisted by defendants. A state legislature is clearly inferior to the SEC in its expertise and its ability to collect the data necessary to determine an optimal set of ground rules.

The ”minimalist” strategy in which firms are required to disclose their director questionnaire in advance would be useful but incomplete as it would preserve alternative channels by which firms could use ANBs strategically and would not relieve the courts of policing that use.

A pure “name and shame” strategy (a version of our preferred SEC-driven strategy in which the SEC decides that nothing other than compliance with existing 13D and 14A rules may be required as a condition of nomination) worked well enough until the emergence of hedge fund activism. It may not, however, be sufficient for the current environment in which, as cases have shown, problematic groups have sought to take control of public companies. As with other pure market driven proposals such as eliminating mandatory disclosure,[105] it places heavy demands on investors to draw appropriate conclusions from the absence of information. Shareholders would have weak incentives to do this well.

In the cut and thrust of high stakes battles for control, it is entirely understandable and predictable for challengers to develop tools and strategies to challenge companies and for companies to develop tools and

[105] Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984).

strategies to resist those challenges. But, separate and apart from these ongoing battles, any election system needs clear ground rules that determine when nominations are due and what basic information a nominee must provide. Given the fundamental importance of the corporate election process for corporate governance, simple and neutral basic rules are important for the overall legitimacy of the system. The SEC is best positioned to provide those rules.

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