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## Comments

### **STOCKHOLDER AND CORPORATE BOARD BYLAW BATTLES: DELAWARE LAW AND THE ABILITY OF A CORPORATE BOARD TO CHANGE OR OVERRULE STOCKHOLDER BYLAW AMENDMENTS**

L. John Bird\*

#### I. INTRODUCTION

In 2006, the state legislature of Delaware amended the Delaware General Corporate Law (the “DGCL”) to stipulate that a “bylaw adopted by the stockholders, prescribing the vote required for the election of directors, may not be amended or repealed by the board of directors.”<sup>1</sup> The introduction of this language in the DGCL—language prohibiting a board from amending or repealing a stockholder created bylaw amendment—breathed new life into an ongoing debate about whether the board of a company incorporated in Delaware has the legal power to amend or repeal other shareholder adopted bylaw amendments.<sup>2</sup>

The debate hinges on two Sections of the DGCL that seem to create conflicting inferences. According to Section 109 of the DGCL, a corporation can:

confer the power to adopt, amend or repeal bylaws upon

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1. 1 DELAWARE LAWS GOVERNING BUSINESS ENTITIES: ANNOTATED STATUTES AND RULES 21 (Spring 2007 ed.), *available at* <http://www.lexisnexis.com/csc/pdf/58559.pdf>.

2. *See, e.g.*, Posting of Gordon Smith to The Conglomerate, [http://www.theconglomerate.org/2006/07/delaware\\_bylaws.html](http://www.theconglomerate.org/2006/07/delaware_bylaws.html) (July 21, 2006) (a blog that includes comments of various contributors debating the ability of boards to amend or repeal shareholder adopted bylaw amendments within Delaware corporations, among other topics).

the directors . . . . The fact that such power has been so conferred upon the directors . . . shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws[.]<sup>3</sup>

This statute provides the legal basis for a potential bylaw amendment struggle between the board (when given the power to amend bylaws through the articles of incorporation) and the shareholders (who retain power to amend the bylaws).<sup>4</sup> Section 109 continues, “[t]he bylaws may contain any provision, not inconsistent with law or the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.”<sup>5</sup> This provides a basis to argue that shareholders should be able to amend the bylaws in any manner, provided they obtain a majority vote. In contrast, the other side of this debate holds that a shareholder adopted bylaw amendment would impinge upon the board’s power to manage the dealings of the corporation as provided in Section 141 of the DGCL.<sup>6</sup>

Because of a lack of case precedent and legislative action to reduce the confusion, the Delaware judiciary loses one of its most attractive attributes, predictability.<sup>7</sup> In the words of Vice Chancellor Strine:

Even if the stockholders could validly initiate and adopt a by-law limiting the authority of the directors, such a by-law amendment would accomplish little or nothing if the board of directors could simply repeal it after the stockholders adopted it. In some jurisdictions, of course, there is no question that such repeal can be prevented. Under many statutory schemes, the board of directors may not repeal a stockholder-adopted by-law if that by-law expressly prohibits such repeal. In other jurisdictions, however, notably Delaware and New York, the corporation

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3. DEL. CODE ANN. tit. 8, § 109(a) (2008).

4. *See id.*

5. DEL. CODE ANN. tit. 8, § 109(b) (2008).

6. *See* DEL. CODE ANN. tit. 8, § 141(a) (2008) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . .”); *see also* John C. Coffee, Jr., *The Bylaw Battlefield: Can Institutions Change the Outcome of Corporate Control Contests?* 51 U. MIAMI L. REV. 605, 608 (1997) (“Not only does this provision seemingly make the board the ultimate repository of all corporate power and authority, but it can also be read to require that any deviation from this fundamental rule be expressed in the certificate of incorporation.”).

7. *See* Dosoung Choi et al., *The Delaware Courts, Poison Pills, and Shareholder Wealth*, 5 J.L. ECON. & ORG. 375 (1989) (stating that the predictability of the Delaware judiciary contributes to the high number of companies incorporating in Delaware).

statutes allow the board of directors to amend the by-laws if the certificate or articles of incorporation so provide and *place no express limits on the application of such director amendment authority to stockholder-adopted by-laws*. The second significant legal uncertainty, therefore is whether, in the absence of an explicitly controlling statute, a stockholder-adopted by-law can be made immune from repeal or modification by the board of directors.<sup>8</sup>

In order to provide maximum predictability and to encourage continued high rates of incorporation within Delaware, the legislature should adopt a rule with a predictive effect similar to that of the Model Business Corporation Act. That Act provides explicit rules that could eliminate the ambiguity created by the DGCL. Specifically, it states: “A corporation's board of directors may amend or repeal the corporation's bylaws, unless . . . the shareholders in amending, repealing, or adopting a bylaw expressly provide that the board of directors may not amend, repeal, or reinstate that bylaw.”<sup>9</sup> This type of rule (or one that makes it clear that the board can amend any bylaw regardless of shareholder wishes) would improve the predictability of judicial decision-making and would eliminate the time wasted in debating this topic.<sup>10</sup> To maximize predictability and maintain its standing as the premier locale for incorporation, the Delaware legislature should amend the DGCL to make explicit its stance on a board's power to amend or repeal shareholder adopted bylaw amendments.

This Comment proceeds as follows: Part II discusses corporate takeovers, one situation in which a board and its shareholders are likely to have differing incentives and desires with regard to the enactment of bylaw amendments, and which gives rise to a large number of the shareholder lawsuits and academic debates in this area. Part III outlines the current debate about whether a board of directors has the legal power to amend or repeal a shareholder adopted bylaw amendment. It also briefly describes the arguments forwarded in support of each side of this debate. Part IV

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8. *Gen. DataComm Indus. v. State of Wis. Inv. Bd.*, 731 A.2d 818, 821 n.2 (Del. Ch. 1999) (emphasis added).

9. MODEL BUS. CORP. ACT § 10.20(b)(2) (2004).

10. There are far too many participants in the controversy to list. Moreover, there is a rich amount of literature on the topic. *See* Coffee, Jr., *supra* note 6, at 606 (discussing the theoretical implications of the effect of shareholder initiatives on corporate governance); Lawrence A. Hamermesh, *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street?* 73 TUL. L. REV. 409, 409 (1998) (introducing arguments on both sides of the shareholder bylaw amendments controversy); Posting of Larry Ribstein to Ideoblog, [http://busmovie.typepad.com/ideoblog/2006/06/lucian\\_bebchuk\\_.html/](http://busmovie.typepad.com/ideoblog/2006/06/lucian_bebchuk_.html/) (June 16, 2006, 07:04) (discussing a shareholder activist suit over a proposed amendment to the bylaw of a publicly traded corporation).

addresses the aforementioned passage of the Model Business Corporation Act<sup>11</sup> and the results reached in various states that have modeled the relevant Sections of their corporate laws after it.<sup>12</sup> Finally, Part V discusses why the Model Business Corporation Act is an appropriate model for Delaware to adopt and would require only minor changes to provide maximum predictability and eliminate a fundamental concern corporations may have when deciding whether to incorporate in Delaware.

## II. TAKEOVERS AND POISON PILLS

The case law that discusses shareholder and board conflict about bylaw amendments is primarily centered on takeover attempts<sup>13</sup>—a situation in which shareholders and the board are likely to have divergent incentives. While shareholders will want to maximize the value of their investment, the board of directors is likely to be displaced following a takeover, creating an incentive for them to prevent the takeover from occurring in order to keep their directorship.<sup>14</sup>

One of the more common methods used to prevent a takeover is the creation of a poison pill.<sup>15</sup> It is important to note, however, that poison pills do not function only to prevent takeovers, but can arguably result in creating increased shareholder value<sup>16</sup> or, conversely, in reducing it.<sup>17</sup> One case in which a poison pill would create value for shareholders is when the board has recently finished a study on the company and its future earnings that leads it to believe that the firm is undervalued by 50%. If an outside

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11. § 10.20(b)(2)(2004).

12. See, e.g., CAL. CORP. CODE § 211 (West 2008) (“Bylaws may be adopted, amended or repealed either by approval of the outstanding shares (Section 152) or by the approval of the board, except as provided in Section 212. Subject to subdivision (a)(5) of Section 204, the articles or bylaws may restrict or eliminate the power of the board to adopt, amend or repeal any or all bylaws.”).

13. See, e.g., *infra* note 15.

14. This inference is based on the statement that firm managers have taken “various kinds of actions . . . to prevent their removal by shareholder vote or shareholder consent.” MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS 178 (9th ed. 2005).

15. See generally Henry Lesser & Douglas Sugimoto, *Shareholder By-Law Amendments: The Looming Battle*, M&A LAW., Jan. 1998, at 2 (describing developments regarding shareholder by-law amendments and anti-takeover defenses).

16. See William J. Carney, *Controlling Management Opportunism in the Market for Corporate Control: An Agency Cost Model*, 1988 WIS. L. REV. 385, 399 (1988) (discussing a study on the wealth effects of poison pills, which found that poison pills can sometimes result in substantial positive outcomes for shareholders).

17. See generally Office of the Chief Economist, Sec. and Exch. Comm'n, *A Study on the Economics of Poison Pills*, [1985-1986 Transfer Binder] FED. SEC. L. REP. (CCH) P 83,971 (Mar. 5, 1988) (stating that adoption of poison pills has a negative effect on shareholder wealth).

party were to initiate a takeover, the party may offer a premium over the current value of the stock of 30%. From the shareholder perspective, accepting such an offer would seem to be a good decision, but, in reality, the shareholders would be foregoing additional earnings of 20% of the stock price. By delaying the takeover through use of a poison pill, the board may be able to convince the market to revalue the stock at what the board feels is the correct price, thus improving each shareholder's position beyond that offered by the potential acquirer. This positive aspect of poison pills is an important argument that boards may use in litigation, as it removes the presumption that the poison pill exists only as an entrenchment device that could create liability for the directors under *Blasius Industries, Inc. v. Atlas Corp.*<sup>18</sup>

The issues surrounding the implementation of poison pills and whether or not shareholders can amend the bylaws dealing with them were addressed by the Supreme Court of Oklahoma in *International Brotherhood of Teamsters General Fund v. Fleming Companies*.<sup>19</sup> As stated by that Court, "Oklahoma and Delaware have substantially similar corporation acts,"<sup>20</sup> and "a review of Delaware decisions revealed no comparable case from that state [Delaware]."<sup>21</sup> In *Teamsters*, shareholders were found to have the power to amend the bylaws of a corporation because of an Oklahoma statute largely identical to Section 109(a) of the DGCL.<sup>22</sup> While not the first case to hold that shareholders have the right to adopt bylaw amendments independent of the board,<sup>23</sup> the *Teamsters'*

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18. 564 A.2d 651, 657 (Del. Ch. 1988). In *Blasius*, the Court of Chancery held that an action taken as a "selfishly motivated effort to protect the incumbent board" would violate the board's duty of loyalty. The enhanced business judgment rule found in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) is applied by the court in cases where the board takes defensive actions against takeover attempts.

19. *Int'l Bhd. of Teamsters Gen. Fund v. Fleming Companies, Inc.*, 975 P.2d 907 (Okla. 1999).

20. *Id.* at 910.

21. *Id.* It is also important to note that the Oklahoma Supreme Court is looking to Delaware law to see how to proceed in this Oklahoma corporate case, and additionally addresses the lack of precedent in Delaware law. As noted in Part I of this comment, the predictability of Delaware law is important and leaving this issue open negatively affects the Delaware judiciary's reputation.

22. Compare 18 O.S. 1991 § 1013(A) (providing that, "after a corporation has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the shareholders entitled to vote . . . provided, however, any corporation, in its certificate of incorporation, may confer the power to adopt, amend or repeal bylaws upon the directors.") (current version at 18 O.S. 2008 § 1013(A)(2008)) with 8 Del. C. § 109(a). Section 109(a) provides that, after a corporation has received payment for stock, "the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote . . ." While a corporation may, in its certificate of incorporation, confer this power on the board of directors, doing so "shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws."

23. For just one example of a prior case in which stockholders sued to force a

success and the similarity of Delaware law to Oklahoma law made this case persuasive authority for subsequent Delaware cases.<sup>24</sup>

In a recent case,<sup>25</sup> Professor Lucian A. Bebchuk, the owner of 140 shares of CA, Inc. common stock, successfully sued to force CA, Inc. to withdraw its plan to exclude his poison pill proposal from the corporate ballot.<sup>26</sup> Although Professor Bebchuk's proposed bylaw amendment was not in response to an existing takeover attempt, it was drafted without an expiration date in anticipation of future takeover attempts.<sup>27</sup> This case was one of the first Delaware cases to effectively force a corporation to include a shareholder's bylaw amendment on the corporate ballot since, historically, the SEC has allowed companies to exclude this type of proposal from the ballot.<sup>28</sup> In 2006, the Securities and Exchange Commission (SEC) responded to CA, Inc.'s request for a guarantee from the SEC that there would be no federal prosecution should CA, Inc.'s board refuse to include Professor Bebchuk's proposal on their ballot. Unfortunately for CA, Inc., the SEC's letter expressed "no view with respect to CA's intention to omit the instant proposal from the proxy materials relating to its next annual meeting of security holders."<sup>29</sup>

### III. THE BOARD'S POWER TO AMEND OR REPEAL SHAREHOLDER ADOPTED BYLAW AMENDMENTS

To again quote Vice Chancellor Strine, "[In Delaware] . . . the corporation statutes allow the board of directors to amend the by-laws if the certificate or articles of incorporation so provide and place no express limits on the application of such director amendment authority to stockholder-adopted by-laws."<sup>30</sup> Although this portion of the opinion is

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corporation to include a shareholder bylaw amendment proposal on the ballot, see Exxon Corp., SEC No-Action Letter, 1992 SEC No-Act. LEXIS 281 (Feb. 28, 1992).

24. See, e.g., *Gen. DataComm Indus. v. State of Wis. Inv. Bd.*, 731 A.2d 821, 822 n.2 (Del. Ch. 1999) (noting the similarity between Oklahoma law and Delaware law). Notice also that in comparison to the number of corporations formed in Oklahoma and the number of cases litigated in Delaware, Oklahoma, through *Teamsters*, has become disproportionately influential in the litigation of shareholder activist suits.

25. *Bebchuk v. CA, Inc.*, 903 A.2d 737 (Del. Ch. 2006).

26. *Bebchuk vs. CA Enables Shareholder Voting on Poison Pill Hylaws*, HLS NEWS, July 5, 2006, available at [http://www.law.harvard.edu/news/2006/07/05\\_bebchuk.php](http://www.law.harvard.edu/news/2006/07/05_bebchuk.php)

27. *Id.*

28. *Id.*; see also Brett H. McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, Minnesota Legal Studies Research Paper No. 05-06 (January 28, 2005), available at <http://ssrn.com/abstract=659322> (providing additional information as to the precise mechanics of denying shareholders the ability to garner enough shareholder support to pass bylaw amendments).

29. *CA, Inc.*, SEC No-Action Letter, 2006 WL 1547985, at \*1 (June 5, 2006).

30. *Gen. DataComm Indus. v. State of Wis. Inv. Bd.*, 731 A.2d 818, 821 n.2 (Del. Ch.

dicta, it explicitly removes the ability of potential litigants to predict *how* the Chancery Court would decide a case where the issue is whether a board action to amend a shareholder-approved bylaw amendment was valid. According to Vice Chancellor Strine, the court will decide such cases as they arise, on a case-by-case basis, which will leave litigants guessing as to what litigation results they can expect. Although Vice Chancellor Strine made this remark in 1999, my research did not indicate that any other Delaware Court of Chancery opinions offer further clarity on how the Court might decide this issue. Further, although it offers no predictive value as to how the court might adjudicate this issue, in 2006, a Section of the DGCL was amended to add language resolving this issue in one situation.<sup>31</sup> That added language reads, “A bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors.”<sup>32</sup> The plain reading of this change affects only Section 216, and in the synopsis of this amendment, Senator Vaughn notes that “[t]his amendment does not address any other situation in which the board of directors amends a bylaw adopted by stockholder vote.”<sup>33</sup> Yet, a negative implication is created by including this rule in only this Section of the DGCL.

Prior to this latest amendment, it was easy to see both sides of the debate about whether or not a board could, without legal sanction, amend a shareholder-adopted bylaw amendment. This conflict had hinged on a disparity between Sections 109(a) and (b) and Section 141(a) of the DGCL. Because the newly adopted statutory language addresses the issue of shareholder adopted bylaw amendments explicitly, the negative implication would presumably address other bylaw amendments with equal authority. Professor Gordon Smith makes the point that regardless of where a person may have stood on this issue prior to the amendment of Section 216, it is difficult to see any way in which the newly created negative implication would help support the argument that the board cannot further amend a shareholder bylaw amendment.<sup>34</sup>

Further, according to Vice Chancellor Strine, “[t]he second significant legal uncertainty, therefore is whether, in the absence of an explicitly controlling statute, a stockholder-adopted by-law can be made immune from repeal or modification by the board of directors.”<sup>35</sup> It can be inferred

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1999).

31. DEL. CODE ANN. tit. 8, § 216 (2008).

32. S. 322, 143rd Gen. Assembly (Del. 2006) *available at* [http://legis.delaware.gov/LIS/lis143.nsf/vwLegislation/SB+322/\\$file/legis.html?open](http://legis.delaware.gov/LIS/lis143.nsf/vwLegislation/SB+322/$file/legis.html?open).

33. *Id.*

34. Smith, *supra* note 2.

35. *Gen. DataComm Indus.*, 731 A.2d at 818, n.2.

from Vice Chancellor Strine's comment that in this debate there is no explicitly controlling statute in the DGCL, nor any controlling precedent.

To explicate the shareholder activist argument in this debate, the DGCL Section 109 provides that shareholders do not forego their right to adopt bylaw amendments even if that right is concurrently vested in the board.<sup>36</sup> As Section 109 explains, "[t]he bylaws may contain *any* provision, not inconsistent with law or with the certificate of incorporation."<sup>37</sup> Because the DGCL leaves the ability to adopt bylaw amendments to the shareholders,<sup>38</sup> and this Section<sup>39</sup> of the Delaware code provides that "bylaws may contain any provision . . . relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers, or employees,"<sup>40</sup> it would seem that a bylaw amendment including a provision preventing the board from further amending or revoking the shareholder adopted amendment would be valid. Nevertheless, the SEC has continually issued no-action letters based on the interpretation of the DGCL that is shared by many Delaware law firms,<sup>41</sup> as is explained below in the discussion of DGCL Section 141. The issuance of no-action letters had the effect of eliminating the ability of shareholders to get their proposed amendments on the ballot at a company's annual shareholder meeting—a necessary step in garnering sufficient shareholder votes to pass a bylaw amendment. SEC no-action letters thus sidestep the issue of a potential conflict of a board's power to amend shareholder adopted bylaw amendments by making it nearly impossible to garner the vote necessary to pass a shareholder bylaw amendment. Yet, at least one shareholder activist, Lucian A. Bebchuk, has recently been able to avoid having the SEC issue a no-action letter for his proposed bylaw amendment,<sup>42</sup> making it a priority to resolve the question of who would win in a bylaw battle within a Delaware corporation.

Section 141 of the DGCL requires that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors."<sup>43</sup> The pro-board side in this debate argues that a bylaw amendment would in effect be a form of managing the corporation, thus making shareholder-adopted bylaw amendments invalid. It is important to note, however, that Section 141 continues past the quotation just given. Section 141 reads:

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36. DEL. CODE ANN. tit. 8, § 109(a)-(b) (2008).

37. DEL. CODE ANN. tit. 8, § 109(b) (2008) (emphasis added).

38. DEL. CODE ANN. tit. 8, § 109(a) (2008).

39. DEL. CODE ANN. tit. 8 (2008).

40. DEL. CODE ANN. tit. 8, § 109(b) (2008).

41. *Bebchuk v. CA, Inc.*, 902 A.2d 737 (Del. Ch. 2006).

42. *Id.*

43. DEL. CODE ANN. tit. 8 § 141(a) (1999).



The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, *except as may be otherwise provided in this chapter or in its certificate of incorporation*. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.<sup>44</sup>

Thus, while the board has presumptive authority to manage the business of a corporation, the DGCL and a company's certificate of incorporation act as the deciding factors in determining when shareholders can act in a manner that would seem at first blush to impinge upon the management function of the board. Since the majority of Delaware corporations follow the standards outlined in the DGCL<sup>45</sup> without extensive amendment, the power to amend the bylaws is almost invariably given to the board of directors. As there are typically no limits placed on the board's power by a company's articles of incorporation or the DGCL, the reference to articles of incorporation and "this chapter"<sup>46</sup> in Section 141 of the DGCL are essentially irrelevant to this issue. Thus, a typical board appears to have the power to amend or revoke shareholder bylaw amendments with impunity.

The arguments as to whether a board has the power to amend shareholder-adopted bylaws is further clouded by the conflict between Sections 109(b) and 141(a) of the DGCL, a conflict which has been the subject of discussion for a number of years. In 1997, Professor Jeffrey Gordon authored a paper which gained notoriety labeling the conflict between these two Sections a "recursive loop."<sup>47</sup> The "loop" works as follows: the phrase "except as may be otherwise provided in this chapter" in Section 141(a) could be interpreted as referring to Section 109(b), so that Section 109(b) trumps Section 141(a). In the alternative, the phrase "not inconsistent with law" in Section 109(b) could refer to Section 141(a), so that Section 141(a) trumps Section 109(b).

The determination as to which Section is dominant, 141(a) or 109(b),

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44. *Id.* (emphasis added).

45. DEL. CODE ANN. tit. 8 § 109(a) (1999).

46. DEL. CODE ANN. tit. 8 § 141(a) (1999).

47. Jeffrey N. Gordon, "Just Say Never?" *Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett*, 19 CARDOZO L. REV. 511, 546 (1997).

merely adds to the confusion surrounding the ability of the board to amend or revoke shareholder-adopted bylaw amendments. Board members would argue that if 141(a) was dominant, their ability to further change shareholder-adopted bylaws would be part of corporate management by the board, and thus within their power. Board members would further argue that, even if 109(a) was deemed the dominant Section of law, they are not actually eliminating shareholders' ability to adopt bylaw amendments pursuant to 109(a); they are merely exercising their own rights under 109(a) and, providing even greater credence to the board's position, their power as defined by the corporation's articles of incorporation.<sup>48</sup>

Shareholders would argue that if 109(a) is dominant, they should have the power to adopt bylaws that are explicitly protected from further board amendment or revision.<sup>49</sup> Shareholder activists would also argue that bylaw amendments such as those that limit the use of a poison pill do not impinge upon the board's role and direction to manage the business and affairs of the company in violation of statute, as the certificate of incorporation allows for shareholders to enact such bylaw amendments.<sup>50</sup> The shareholders' argument would remain unchanged even if Section 141 was deemed the dominant Section of the DGCL.

This ongoing debate regarding which DGCL Section is dominant—141(a) or 109(b)—and who, then, has the ultimate power to amend bylaws, was brought to life once more by the change to Section 216 of the DGCL. Despite the notes accompanying that change (which state that the change has no effect on any other Section of the DGCL),<sup>51</sup> it creates the strong negative implication that *only* bylaw amendments specifically referred to in Section 216 are protected from subsequent board revision or repeal. Therefore, Section 216 appears to support the argument that Section 141(a) dominates Section 109(b) and that, statutorily speaking, corporate

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48. Presuming, of course, the particular corporation includes in its certificate of incorporation the power for directors to amend the bylaws. See Frederick H. Alexander, Esq. & James D. Honaker, Esq., *The Nuts and Bolts of Majority Voting*, in 1 39TH ANNUAL INSTITUTE ON SECURITIES REGULATION 585, 590 (Practising Law Institute 2007) ("Nearly all Delaware corporations include in their charter a provision empowering directors to amend the bylaws, and such provisions typically grant the board unqualified amendment power.").

49. An example of such explicit language might read, "This bylaw shall not be subject to further amendment, alteration, or repeal by the board of directors, but shall only be amended, altered, or repealed by the vote of a majority of shareholders to effect such amendment, alteration, or repeal."

50. My research did not indicate that any Delaware corporations include in their articles of incorporation a clause eliminating shareholders' right to enact bylaw amendments as provided in the DGCL § 109(a).

51. S. 322, 143rd Gen. Assem. (Del. 2006), available at [http://legis.delaware.gov/LIS/lis143.nsf/vwLegislation/SB+322/\\$file/legis.html?open](http://legis.delaware.gov/LIS/lis143.nsf/vwLegislation/SB+322/$file/legis.html?open) ("This amendment does not address any other situation in which the board of directors amends a bylaw adopted by stockholder vote.").

management by the board is given more emphasis than a shareholder's right to amend corporate bylaws.

#### IV. THE MODEL BUSINESS CORPORATION ACT AND SHAREHOLDER BYLAW AMENDMENTS

California, a state that follows the general format of the Model Business Corporation Act in the area of shareholder bylaw amendments, provides a marked contrast to Delaware which does not follow the Model Business Corporation Act. For example, in contrast to Delaware's statutes<sup>52</sup> California's bylaw amendment statutes are relatively clear. The relevant Section of California law states, "Bylaws may be adopted, amended or repealed either by approval of the outstanding shares (Section 152) or by the approval of the board . . . . [T]he articles or bylaws may restrict or eliminate the power of the board to adopt, amend or repeal any or all bylaws."<sup>53</sup> The California corporate code allows for shareholders to amend the corporate bylaws with no uncertainty and includes in the amendment a provision restricting or eliminating the board's ability to further amend or revoke a shareholder amendment. As a search of the Fletcher Cyclopaedia<sup>54</sup> reveals, at least nineteen states have adopted corporate bylaw amendment statutes similar to Section 10.20 of the Model Business Corporation Act.<sup>55</sup>

The predictive quality created by the Model Business Corporation Act is apparent when analyzing the case law arising from shareholder attempts to pass bylaw amendments.<sup>56</sup> My research of case law from states that

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52. *See supra* Part III.

53. CAL. CORP. CODE § 211 (West 2008).

54. 8 WILLIAM MEADE FLETCHER ET AL., *Fletcher Cyclopaedia of the Law of Private Corporations* § 4183 (perm. Ed., rev. vol. 1982). The following subsections contain the provisions of the states which, during a cursory review, contain language nearly identical to that of the Model Business Corporation Act: 4183-17, 4183-22, 4183-50, 4183-57, 4183-82, 4183-92, 4183-111, 4183-127, 4183-137, 4183-142, 4183-152, 4183-172, 4183-192, 4183-207, 4183-217, 4183-237, 4183-242, 4183-257, and 4183-262.

55. The relevant portion of the Model Business Corporation Act §10.20 reads as follows:

(b) A corporation's board of directors may amend or repeal the corporation's bylaws, unless:

(1) the articles of incorporation or section 10.21 reserve that power exclusively to the shareholders in whole or part; or

(2) the shareholders in amending, repealing, or adopting a bylaw expressly provide that the board of directors may not amend, repeal, or reinstate that bylaw.

56. In a search in "search" on the website Westlaw.com, within the "allstates" database, and using the search string "bylaw /3 amend! & pill" only twenty-one results were found as of February 24, 2008. Nineteen of the results were Delaware cases, one was a case completely unrelated to take-over defenses, and the final was a case originating in

followed the Model Business Corporation Act in drafting their bylaw amendment provisions revealed no cases arising from shareholders' attempts to prevent board revision of shareholder-created bylaw amendments.<sup>57</sup> This is not to say that such cases will never arise in those states, but rather that these cases have not arisen yet. It is reasonable to infer that the clarity of the corporate statute at issue would compel potential litigants to settle or drop a case that they would otherwise litigate if the corporation were formed in Delaware or another jurisdiction with corporate laws similar to those of Delaware.

Litigation is expensive and uncertain, and becoming more expensive every year.<sup>58</sup> As it is likely that corporations will continue to favor legal regimes which minimize litigation by having clear laws and a high level of predictability,<sup>59</sup> it is becoming increasingly important that the Delaware legislature resolve this issue proactively, rather than reactively, to avoid damaging its reputation as the premier state for incorporation.

#### V. THE MODEL BUSINESS CORPORATION ACT: A MODEL FOR DELAWARE CORPORATE LAW.

Various parts of the Model Business Corporation Act,<sup>60</sup> written by the American Bar Association, have been integrated into the statutes of a number of states. Some states, such as Virginia,<sup>61</sup> have taken the language of the Model Business Corporation Act and incorporated it into their statutes without change. In other states, it serves as the basis for the legislature to draft its own statutes.<sup>62</sup> This has resulted in a number of very

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Oklahoma, which had corporate statutes similar to Delaware, and not the Model Business Corporation Act. This case is *Int'l Bhd. of Teamsters Gen. Fund v. Fleming Companies, Inc.*, 975 P.2d 907 (Okla. 1999). This search string is by no means exhaustive, but serves to illustrate the lack of cases on point in jurisdictions outside of Delaware.

57. These states include Virginia, VA. CODE ANN. § 13.1-714 (2005); Mississippi, MISS. CODE ANN. § 79-4-10.20 (West 1972); Iowa, IOWA CODE § 490.1020 (2002); Arizona, ARIZ. REV. STAT. ANN. § 10-1020 (1996); Arkansas, ARK. CODE ANN. § 4-27-1020 (1987).

58. Lindsay Fortado, *Hourly Billing Rates Continue to Rise*, LAW.COM, Dec. 12, 2005, <http://www.law.com/jsp/article.jsp?id=1134122711101>.

59. See, e.g., ASIAN DEVELOPMENT BANK, GOVERNANCE: SOUND DEVELOPMENT MANAGEMENT (1995), <http://www.adb.org/Documents/Policies/Governance/govpolicy.pdf> (last visited Nov. 29, 2008) ("The importance of predictability cannot be overstated since, without it, the orderly existence of citizens and institutions would be impossible.").

60. AMERICAN BAR ASSOCIATION, Model Business Corporation Act (2002) <http://www.abanet.org/buslaw/library/onlinepublications/mbca2002.pdf> (last visited Dec. 12, 2008).

61. VA. CODE ANN. § 13.1-714 (2005).

62. See, e.g., MASS. ANN. LAWS Ch. 156B, § 17 (LexisNexis 2008) ("The power to make, amend or repeal bylaws shall be in the stockholders; provided that if authorized by the articles of organization, the by-laws may provide that the directors may also make, amend or repeal the by-laws in whole or in part, except with respect to any provision thereof

similar statutes across a large number of states. Delaware is one state that has yet to adopt bylaw amendment laws modeled after the Model Business Corporation Act. While this is not necessarily bad, the uncertainty created by the current statutory language<sup>63</sup> and lack of precedent<sup>64</sup> resolving this confusion is undesirable. Should it wish to resolve this uncertainty, the Delaware legislature has several options. While the five options presented below are by no means an exhaustive list, a range of options from extremely pro-board to extremely pro-shareholder is presented. The first option is to do nothing and wait for a case involving shareholder-adopted bylaw amendments to reach the judiciary. Second, the legislature could amend existing statutes to give the board explicit power to amend or revoke shareholder adopted bylaw amendments. Third, it could adopt the relevant provisions of the Model Business Corporation Act wholesale, giving shareholders the ability to adopt bylaws that cannot be further amended by the board when so stated within the bylaw. Fourth, it could make all shareholder-adopted bylaws immune to board modification as a default, allowing the certificate of incorporation to create exceptions on a corporation-by-corporation basis. Fifth, the legislature could adopt legislation allowing shareholders to create bylaws that disallow further board amendment for a limited period of time. Each of these five options has associated costs and benefits. Given Delaware's current corporate landscape, the fifth option appears to be the best.

A. *Wait for a case to reach the court.*

Of the five options presented above, waiting for a case to reach the judiciary shows the least amount of initiative and is the most irresponsible. As the premier state for large company incorporation,<sup>65</sup> Delaware cannot allow unpredictability to enter its judicial landscape.<sup>66</sup> Currently, even the

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which by law, the articles of organization or the by-laws requires action by the stockholders. Not later than the time of giving notice of the meeting of stockholders next following the making, amending or repealing by the directors of any bylaw, notice thereof stating the substance of such change shall be given to all stockholders entitled to vote on amending the bylaws. Any by-law adopted by the directors may be amended or repealed by the stockholders.”).

63. See *supra* Part III for the discussion of why the current statutory language is unclear.

64. *Int'l Bhd. of Teamsters*, 975 P.2d at 910; see also *supra* note 20 and accompanying text.

65. See State of Delaware Official Website, Division of Corporations, <http://corp.delaware.gov> (last visited Dec. 12, 2008) (“[M]ore than 50% of all U.S. publicly-traded companies and 60% of the Fortune 500 [have their legal home in Delaware][.]”).

66. See ASIAN DEVELOPMENT BANK, *supra* note 59, at 20-21 (describing the importance of predictability).

esteemed Court of Chancery<sup>67</sup> cannot predict how it would decide a case in which a shareholder sues after passing a bylaw amendment that was immediately amended or revoked by the board.<sup>68</sup> While this course of action appears to be the one the Delaware Legislature is pursuing, it creates the lowest level of predictability,<sup>69</sup> and is thus undesirable. While avoiding making a change is a way of avoiding personal responsibility for any change that is eventually enacted and may be politically expedient, it also makes the Delaware Legislature responsible for the current lack of clarity and the accompanying judicial uncertainty.

*B. Give the board explicit power to amend or revoke shareholder adopted bylaw amendments.*

As the most management-friendly of the five options this Comment presents, giving the board explicit power to amend or revoke shareholder-adopted bylaw amendments seems to be an excellent fit for Delaware<sup>70</sup> (or any state trying to encourage a company to incorporate or reincorporate within the state). Yet in this era of increased shareholder activism,<sup>71</sup> and

67. See Press Release, LexisNexis, Delaware Courts Lead Nation in Use of Electronic Filing with Major Expansion of LexisNexis File and Reserve (Jan. 8, 2008), *available at* <http://www.lexisnexis.com/about/releases/1029.asp> (“The Delaware Court of Chancery, [is] the nation’s premier business court . . .”).

68. See *Gen. DataComm Indus. v. Wis. Inv. Bd.*, 731 A.2d 818, 821 n.2 (Del. Ch. 1999). In *General Datacomm*, Vice Chancellor Strine wrote:

Under many statutory schemes, the board of directors may not repeal a stockholder-adopted by-law if that by-law expressly prohibits such repeal. In other jurisdictions, however, notably Delaware and New York, the corporation statutes allow the board of directors to amend the by-laws if the certificate or articles of incorporation so provide and place no express limits on the application of such director amendment authority to stockholder-adopted by-laws. The second significant legal uncertainty, therefore is *whether, in the absence of an explicitly controlling statute, a stockholder-adopted by-law can be made immune from repeal or modification by the board of directors.* (emphasis added).

69. As a company would not know whether they had any liability until after the shareholder suit, it could make no prediction as to its liability in this option. Any of the other options provide some level of guidance as to the legality of board action amending a shareholder adopted bylaw amendment.

70. See Crystal R. Reid, *Corporate Landscape Changing*, BISMARCK TRIBUNE, May 6, 2007, <http://www.bismarcktribune.com/articles/2007/05/06/news/local/132998.txt> (“[Delaware] always has been most responsive to corporate management [sic].”).

71. See Bernard Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520 (1990) (discussing shareholder monitoring); John C. Coffee, Jr., *Liquidity Verses Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277 (1991) (discussing the emergence of institutional investors as corporate monitors); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 452 (1991) (examining the agency implications of increased institutional shareholder activism); ASHTON PARTNERS, *THE NEW CRISIS: SHAREHOLDER ACTIVISM*,

with investment companies controlling large blocks of votes,<sup>72</sup> a law that is this unfavorable to shareholders may have a negative impact on Delaware. If this type of law was passed, “Delaware corporation shareholders may start pressing managment [sic] for [a corporate structure more friendly to shareholders].”<sup>73</sup> If an investment fund were to threaten a company with a proxy fight, the company’s managers and board of directors would have a strong incentive<sup>74</sup> to acquiesce on the issue, even if that required the company to reincorporate outside of Delaware in order to appease the major shareholder.

Although it is unlikely that this change alone would prompt a company’s shareholders to push for reincorporation as a part of the overall corporate structure,<sup>75</sup> it could be the proverbial straw that breaks the camel’s back and could result in a number of companies leaving Delaware to reincorporate in a state with corporate laws that are more shareholder-friendly.<sup>76</sup>

*C. Adopt the relevant provisions of the Model Business Corporation Act.*

Adopting the substance of the provisions of the Model Business Corporation Act is a route taken by many states in formulating their corporate codes.<sup>77</sup> The Act is continuously amended by the American Bar Association, and therefore is extremely up-to-date.<sup>78</sup> It has incorporated

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available at <http://www.fdashtonpartners.com/media/PDFs/trends/The%20New%20Crisis%20-%20Shareholder%20Activism.pdf>.

72. See ASHTON PARTNERS, *supra* note 71, at 2 (“[H]edge funds could have far-reaching impacts on Corporate America with an estimated \$1 trillion in assets.”).

73. Reid, *supra* note 70.

74. See ASHTON PARTNERS, *supra* note 71, at 1 (“[A]pproximately 80% of companies researched were either acquired or run by new management within three years after the proxy contest.”).

75. See Reid, *supra* note 70 (“North Dakota has placed itself in a potentially competitive stance to Delaware, offering a corporate structure that Delaware corporation shareholders may start pressing managment [sic] for.”).

76. North Dakota is a perfect example of a state with very shareholder-friendly corporate codes. It has adopted the most pro-shareholder corporate statutes in the U.S. in an effort to attract more companies to incorporate within it. *Id.*

77. See, e.g., *supra* note 57 (containing a list of some states that have adopted in large part the relevant Sections of the Model Business Corporation Act).

78. See American Bar Association Web Store, <http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5070548> (last visited Dec. 12, 2008). This store lists the following in the product description for MODEL BUSINESS CORPORATION ACT 2007:

The Model Act was first promulgated in 1950 by the Committee on Corporate Laws of the American Bar Associations Section of Business Law. The Committee has regularly reviewed and revised the Act since that time, including a major revision in 1969, substantial changes to the financial provisions in 1980 and a completely revised Act in 1984. Significant amendments to the Model

many changes over the years based on best practices, as well as the suggestions of practitioners and academics.<sup>79</sup>

While certain to provide predictability when confronted with the issue of boards amending shareholder-passed bylaw provisions,<sup>80</sup> adopting the relevant provisions of the Model Business Corporation Act would be a fairly significant step backwards from Delaware's historically pro-management<sup>81</sup> statutes. This change would also allow corporate raiders to get a foot in the door.<sup>82</sup> Although other states have statutes of this type,<sup>83</sup> no state can compare to Delaware in terms of the sheer volume of companies incorporated within it.<sup>84</sup> Thus, while adopting the Model Business Corporation Act serves the purposes of most states,<sup>85</sup> it may ultimately prove unsuccessful in Delaware if corporate boards fear shareholder activists<sup>86</sup> enough to reincorporate in different states.<sup>87</sup>

*D. Make shareholder adopted bylaws immune to board modification as a default rule.*

Making shareholder-adopted bylaws immune to board modifications as a default rule would be more shareholder-friendly than the existing law in most states.<sup>88</sup> The arguments noted above against adopting provisions similar to the Model Business Corporation Act would apply with equal weight to making shareholder amendments per se immune to further board amendment. Additionally, the strength of this law would even more actively drive out corporations that wish to avoid giving activist

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Act published in supplements regularly thereafter, including, most recently, 2005.

79. See, e.g., D. Gordon Smith, *A Proposal to Eliminate Director Standards From the Model Business Corporation Act*, 67 U. CIN. L. REV. 1201 (1999), available at <http://ssrn.com/abstract=163572> (providing one example of input and feedback about the formulation of the Model Business Corporation Act).

80. See generally discussion *supra* Part IV (arguing that the Model Business Corporation Act provides predictability to the extent that suits are rarely brought for adjudication).

81. Reid, *supra* note 70.

82. *Id.* (describing a pro-shareholder statutory change that could "open[] up the state for corporate raiders").

83. See *supra* note 57 (listing a few examples of such states).

84. See State of Delaware Official Website, Division of Corporations, *supra* note 65.

85. That the law serves the purposes of most states is evidenced by the number of states that have statutes based on the Model Business Corporation Act.

86. See generally ASHTON PARTNERS, *supra* note 71 (explaining the fears a board might have when dealing with activist shareholders).

87. To gain an idea of how competitive states are in trying to persuade corporations to incorporate within their jurisdiction, see *infra* notes 112-13.

88. Because boards are generally given the power to amend corporate bylaws, a default rule making a bylaw immune to board amendment would be taking away that power.



shareholders a strong ability to coerce or limit board action.

In the same way the DGCL allows companies to give the board the power to amend bylaws,<sup>89</sup> one possible method of mitigating the consequences of this sort of law would be to statutorily allow companies to opt-out through their articles of incorporation. In the same manner that companies *can* give the bylaw amendment power to the board (and most Delaware corporations do), creating a law such as this and allowing for a company to opt out in their articles of incorporation would likely result in every company opting-out, making the law ineffectual in solving the problem that it was meant to address. In essence, if companies were not allowed to opt-out, this sort of law would cripple a board of directors, and if companies were allowed to opt out, the law would be impotent.

*E. Allow shareholders to create bylaws that disallow further board amendment for a limited duration.*

In order to craft a bylaw amendment statute that is balanced between appeasing shareholders<sup>90</sup> and leaving corporate decision making power in the hands of the board,<sup>91</sup> the Delaware legislature is forced to walk a fine line. Given the speed at which businesses and shareholders are maturing,<sup>92</sup> an approach that creates a clear legal distinction without appearing to be overly pro-shareholder or pro-management would be ideal.<sup>93</sup> A statute that creates a limited ability for shareholders to protect specific bylaws would seem to strike this chord. While it appears that the Delaware legislature has taken a step towards this solution with the newly adopted amendment to the DGCL Section 216,<sup>94</sup> the question of what would happen with other bylaw amendments conflicts remains, along with the accompanying uncertainty and unpredictability.

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89. DEL. CODE ANN. tit. 8, § 109(a) provides corporations with this option.

90. See Reid, *supra* note 70 (arguing that shareholders may start pressing management to incorporate in states with pro-shareholder legal regimes, making the appeasement of shareholders a necessary consideration in order to maintain the high level of incorporations that Delaware now enjoys).

91. That this is necessary is shown by the concern boards give to choosing a state for reincorporation. Their decision is based on such concerns as corporate raiders, as mentioned in note 82 herein, as well as a number of other aspects of a state's legal system, as illustrated in notes 110, 112, and 113 herein.

92. See, e.g., ASHTON PARTNERS, *supra* note 71, at 2 (quoting Carl Icahn as saying "[t]he environment for shareholder activism continues to improve").

93. All statements as to what is "good" or "ideal" are based purely on the goal of maintaining high levels of incorporation within Delaware, along with the consequential high levels of tax income and legal prestige.

94. See *supra* Part III herein. Section 216 deals with a specific area susceptible to board members entrenchment attempts, and based on how recently the amendment was implemented, appears to have finally ripened in the eyes of the Delaware legislature.

This uncertainty can only be resolved through a broad statute that deals directly with the issue. Anything less would leave unanswered questions and unresolved potential conflicts. The statute would need to grant specific authority for shareholders to adopt bylaws that could, if specified, be protected from board revocation or amendment for a period of 2 years.<sup>95</sup> This limited protection from board amendment would serve the purpose of shareholder activists in affecting such major corporate events as takeover attempts,<sup>96</sup> without affecting the board's ability to run the corporation (as well as avoiding a violation of DEL. CODE ANN. tit. 8 § 141).<sup>97</sup> Since shareholders typically meet annually,<sup>98</sup> the minimum length of time that could reasonably be considered for a moratorium on the board's ability to affect a change would be one year. If a company has shareholder meetings less than once a year, the span of time between shareholder meetings should be the minimum moratorium on board amendment of bylaws which prohibit further board amendment. This would ensure that shareholders are able to exercise their statutory right to amend the corporate bylaws<sup>99</sup> and that the right is not just lip-service followed by an immediate board action to reverse the shareholder change.<sup>100</sup> This narrowly tailored ability to amend would also ensure that previous stockholders did not have an undue influence on the operations of the corporation.

As illustrated by Professor Bebchuk,<sup>101</sup> a shareholder adopted bylaw can, if narrowly tailored, pass through the initial stages of judicial review.<sup>102</sup> As argued by Professor Gordon Smith, "Delaware courts would be inclined to impose fiduciary limitations on bylaws at the front end,

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95. This is merely one example of the potential time limits that could be written into the statute. One year, or three year limits would be equally plausible. The Legislature should, however, think of a rational justification for the period of time they choose.

96. Specifically, shareholders could change the nature of poison pills or force their redemption, a concern of shareholders as evidenced in part two of this note.

97. DEL. CODE ANN. tit. 8 § 141(a) (2008) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . .").

98. This is by no means the rule, as each company's bylaws specify the frequency of its shareholder meetings. If, however, a company's management has refused to convene a shareholder meeting for an excessive length of time, the Chancery Court can require one be convened. See, for example, *Saxon Industries, Inc. v. NKFW Partners*, 488 A.2d 1298 (Del. 1984), where management refused to hold a shareholder meeting for a period of time exceeding 13 months, or within 30 days of the date designated in the company's bylaws or articles of incorporation, and was forced to hold a shareholder meeting.

99. DEL. CODE ANN. tit. 8 § 109(a) (2008).

100. According to Vice Chancellor Strine, the current legal regime of Delaware may allow just such an action as this, without legal repercussion for the board. *General DataComm*, 731 A.2d 818, 821 n.2.

101. *Bebchuk*, 902 A.2d 737 (2006).

102. *Id.*

rather than forcing the board of directors to amend the offensive bylaws after the fact.”<sup>103</sup> This continued narrow allowance of shareholder bylaw amendments, combined with the ability to make amendments with limited duration would, unlike earlier shareholder actions,<sup>104</sup> allow shareholders to affect corporate change without stripping the board of its decision making authority.

As institutional shareholders have grown in size and influence,<sup>105</sup> the importance of maintaining a statutory system that appeals to them has also increased.<sup>106</sup> Yet, Delaware did not become the premier state for corporations through appeasing shareholders, but through management-friendly policies.<sup>107</sup> As has been repeated many times in this comment, maintaining the high level of incorporations Delaware currently enjoys depends upon satisfying institutional and activist shareholders as well as corporate managers and board members.

## VI. CONCLUSION

As large investment firms acquire more shares of corporations, thereby gaining additional control over the companies in which they invest, and as shareholders in general become more activist, it will become increasingly important for Delaware law to be easily understood and predictable when shareholders and boards of directors consider the litigation effects of bylaw amendment conflicts. Because of the number of difficulties presented to shareholders attempting to pass a bylaw amendment, these laws themselves have historically been unimportant. However, small numbers of investment firms now hold major blocks of shares, reducing some of the difficulties in passing a shareholder bylaw amendment. One of the biggest hurdles in passing a shareholder bylaw amendment is that many shareholders are rationally apathetic, and often give management their proxy with little or no research on the matters up for vote.<sup>108</sup> A second major problem is that shareholders face a collective

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103. Gordon Smith, *Bebchuk v. CA, Inc.*, THE CONGLOMERATE, June 16, 2006, [http://www.theconglomerate.org/2006/06/bebchuk\\_v\\_ca\\_in.html](http://www.theconglomerate.org/2006/06/bebchuk_v_ca_in.html).

104. See Latham and Watkins, M&A Deal Commentary, at 2 (August 1, 2006) [http://www.lw.com/upload/pubContent/\\_pdf/pub1620\\_1.pdf](http://www.lw.com/upload/pubContent/_pdf/pub1620_1.pdf) (last visited Dec. 12, 2008) (“A critical issue for activist institutional investors historically has been their relative inability to translate successful shareholder proposals into compliant corporate action.”).

105. See ASHTON PARTNERS, *supra* note 71 (quoting Carl Icahn).

106. See Reid, *supra* note 70 (arguing that shareholders may start pressing management to incorporate in states with pro-shareholder legal regimes).

107. *Id.* (“[Delaware] always has been most responsive to corporate management [sic].”).

108. Harry G. Hutchison & R. Sean Alley, *Against Shareholder Participation: A Treatment for McConvill's Psychonomicosis*, 2 BROOK. J. CORP. FIN. & COM. L. 41, 45 (2007).

action problem,<sup>109</sup> as they are unable to coordinate with each other in passing an amendment. By consolidating the voting power in a small number of investment firms, the individual benefit of monitoring the board will begin to outweigh the costs, eliminating the rational apathy problem. Also, the smaller number of firms involved in the voting process reduces or eliminates the collective action problem. This consolidation of power means that shares will start being voted in concert, creating the realistic possibility that shareholders will begin to successfully adopt bylaw amendments.

Delaware is the legal forum that is consistently chosen by corporations, in part due to its high level of predictability.<sup>110</sup> Delaware has, however, fallen behind other states in adopting laws that govern the bylaw amendment battles that can occur between shareholders and a board of directors.<sup>111</sup> In order to beat back advances of Nevada<sup>112</sup> and Wyoming,<sup>113</sup> among other states, in securing incorporations (and the accompanying corporate tax dollars), the Delaware legislature needs to address this issue. In providing the board of directors with a strong say in bylaw disputes, Delaware will perpetuate its history of being management-friendly<sup>114</sup> and will continue to attract big business. At the same time, creating laws allowing shareholders to pass bylaw amendments of limited duration, will put Delaware in a position to maintain the majority of the incorporation market should shareholder activists gain a position of decision-making authority in the coming years.

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109. George W. Dent Jr., *Academics in Wonderland: The Team Production and Director Primacy Models of Corporate Governance*, 44 HOUS. L. REV. 1213, 1253 (2008).

110. See, e.g., Delaware Intercorp, Why Incorporate in Delaware? <http://www.delawareintercorp.com/t-WhyIncorporateinDelaware.aspx> (last visited February 24, 2008) (“Delaware’s large body of business laws helps a company plan carefully to avoid a lawsuit.”).

111. See *supra* Part IV.

112. See, e.g., Xtreme Business Solutions, Nevada Corporations Online, <http://www.nevadacorporationsonline.com/nvvsdel.htm> (last visited Dec. 12, 2008) (comparing Nevada and Delaware corporations and concluding that Nevada is a preferable state to incorporate within).

113. See, e.g., Corporations Today Inc., COMPARE WYOMING, <http://www.corporations-today.com/compare.html> (last visited Dec. 12, 2008) (comparing Wyoming, Nevada, and Delaware laws and concluding that Wyoming is the most business friendly of the three).

114. See, e.g., 3M Co, Proxy Statement (DEF 14A/Item 4) (March 23, 1995) (“Delaware offers corporate governance law friendly to management. In 1986, for example, the state removed the financial penalty for directors who violate the fiduciary duty of care . . .”).