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Shareholders' Rights & Shareholder Activism 2025

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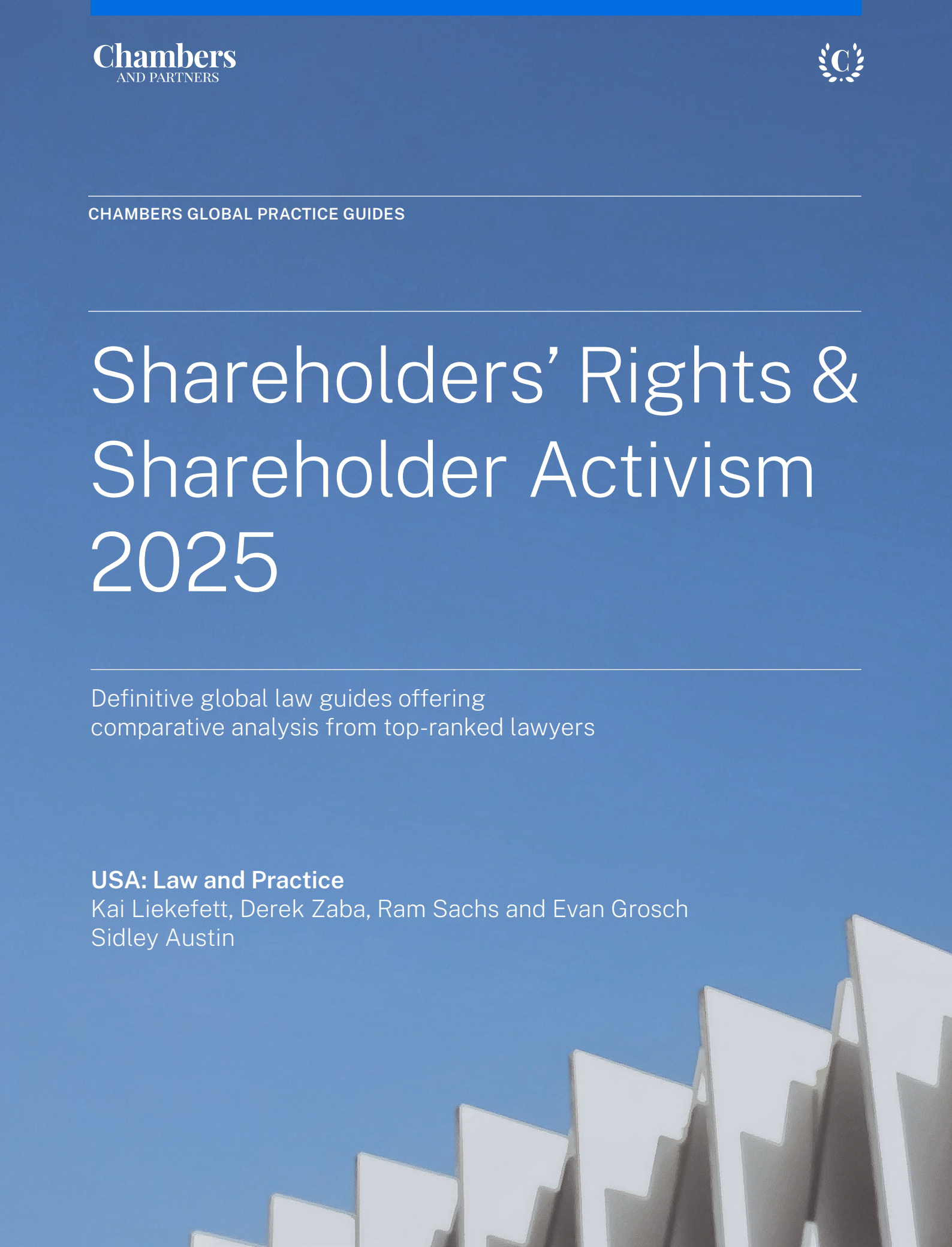
USA: Law and Practice

Kai Liekefett, Derek Zaba, Ram Sachs and Evan Grosch
Sidley Austin



USA

Law and Practice

Contributed by:
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Sidley Austin has a shareholder activism and corporate defence practice that is widely recognised as the go-to activism defence practice, being ranked No 1 across all league tables for this kind of work. The practice is led by Kai Liekefett and Derek Zaba, two of the very few lawyers in the world who devote 100% of their time to shareholder activism, proxy fights, hostile takeovers and other contests for corporate control, including settlements. In the past five years, Sidley has defended approximately 150 proxy contests worldwide and approximately 25% of all late-stage US proxy contests, more than any other law firm. The team has opposed all major activists. Sidley is frequently hired as "shareholder activism counsel", "proxy fight counsel" or "red team" by companies and/or their boards to work with primary outside counsel on activism defence matters.

Authors

Kai Liekefett co-chairs Sidley's shareholder activism and corporate defence practice. He has over 20 years of experience. Kai has defended around 150 proxy contests globally and approximately 25% of all late-stage US proxy fights, more than any other defence attorney in the world. Under his leadership, Sidley rose to the top of all activism defence league tables. Chambers USA has recognised him as one of the leading (Band 1) lawyers for takeover defence. Kai has been included in the NACD Directorship 100 as a governance professional every year since 2022.

Derek Zaba co-chairs Sidley's shareholder activism and corporate defence practice. He spends 100% of his time on shareholder activism, contested and complex M&A, and corporate governance matters. With more than two decades of experience, Derek has been involved in hundreds of activist campaigns and contested M&A situations. Prior to joining Sidley, Derek was the head of the activism and corporate defence practice at a leading shareholder engagement and corporate governance advisory firm. He also served as a partner and investment professional at activist and event-driven hedge funds.

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1. Types of Company, Share Classes and Shareholdings

1.1 Types of Company

The dominant state of incorporation for United States (US)-domiciled companies is Delaware. The primary forms for business entities under Delaware law include C corporations ("C Corps"), S corporations ("S Corps"), limited liability companies (LLCs), limited partnerships (LPs), general partnerships (GPs) and limited liability partnerships (LLPs).

Publicly traded companies are typically C Corps. The primary features of a C Corp include limited liability, a lack of pass-through tax treatment, management by a board of directors, governance via corporate by-laws, perpetual existence, stock issuance and additional corporate formalities.

An S Corp is similar to a C Corp, but an S Corp may only be formed under certain conditions. To be registered as an S Corp, an entity must:

- have 100 or fewer shareholders;
- consist of shareholders who are US citizens, permanent residents, certain trusts, estates or exempt organisations;
- issue only one class of shares; and
- derive no more than 25% of its income from passive sources. Despite these restrictions, an S Corp can be a more attractive option compared to a C Corp due to its pass-through tax treatment, which lowers the taxation burden on investors.

LLCs, LPs, GPs and LLPs are typically used by private entities. They are more versatile than publicly traded companies and have fewer corporate formalities. Tax treatment may vary – these entities generally receive pass-through tax treatment but may elect to be taxed as a corporation, depending on the specific company and the tax implications at play.

Investors' choice of entity depends on a variety of factors, including tax treatment, corporate formalities, liability concerns and more. This guide will focus primarily on Delaware-based publicly traded companies, namely C Corps. Practice may vary for companies incorporated in other states and for private companies.

1.2 Types of Company Used by Foreign Investors

Foreign investors typically use the same entity forms as domestic investors, with one notable exception. Generally, a foreign investor who is not a resident of the US may not invest in an S Corp. The choice of corporate entity depends on factors like the nature and size of the investment, tax considerations, regulatory requirements and the investor's financial goals.

1.3 Types or Classes of Shares and General Shareholders' Rights

The main classes of shares issued by Delaware corporations are common and preferred shares. Common shares typically give stockholders standard voting rights for corporate actions requiring stockholder approval. Preferred stockholders, on the other hand, are frequently granted no or only limited voting pow-

er, but are given preferential treatment over common stockholders when distributing corporate profits like dividends. Preferred stockholders are also given priority repayment rights over common stockholders when a company is dissolved.

The rights of stockholders are set out in the governing documents of the corporation. While by-laws vary across corporations, standard by-laws for public corporations in Delaware outline the rights of stockholders related to stockholder meetings, voting, notice for certain corporate actions, and stockholder nominations of directors and other proposals of business, among other items.

1.4 Variation of Shareholders' Rights

Shareholder rights can vary based on the governing documents of a corporation or the terms of the issued shares.

Some examples include dual-class shares, non-voting shares and preferred shares. With dual-class shares, one class is typically provided to company insiders, while another class is offered to other investors. The shares offered to investors usually have much more limited voting rights in comparison to the class of shares retained by company insiders. This structure is particularly attractive to the founders of a company as it permits the sale of equity but limits the loss of control.

As discussed previously, preferred shares often provide shareholders with priority over common shares for company dividends and distributions, but frequently have no or limited voting rights.

1.5 Minimum Share Capital Requirements

This requirement varies by the state of incorporation; in Delaware, there is no minimum capital requirement for forming a corporation.

1.6 Minimum Number of Shareholders

Under the Delaware General Corporation Law (DGCL), a corporation may issue one or more classes of shares and one or more series of shares within any such classes (DGCL § 151). LLCs in Delaware may also be formed with as few as one member.

S Corps require shareholders to be US citizens, permanent residents, certain trusts, estates and exempt organisations. However, foreign investors may be shareholders or members of other entity types.

Stock exchanges have separate requirements for the minimum number of shares. For example, a company seeking to list on the New York Stock Exchange in connection with its initial public offering must typically have at least 400 holders of 100 shares or more and at least 1.1 million publicly held shares with a market value of at least USD40 million. Nasdaq generally requires that companies seeking to list on the Nasdaq have:

- a minimum of 1,250,000 unrestricted publicly traded shares outstanding upon listing; and
- 450 shareholders of 100 shares or more, 2,200 total shareholders, or 550 total shareholders with an average trading volume of 1.1. million over the preceding 12 months.

1.7 Shareholders' Agreements/Joint Venture Agreements

Shareholders' agreements and joint venture agreements are commonly used in the context of private companies to delineate and clarify the economic and control rights of the respective parties.

In 2024, the DGCL was amended to expressly approve of stockholder agreements. Under DGCL § 122 (18), corporations have the power to enter into contracts with one or more current or prospective stockholders. Without limiting what may be included in such agreements, the statute specifically permits a corporation to:

- "restrict or prohibit itself from taking actions specified in the contract";
- "require the approval or consent of one or more persons or bodies before the corporation may take actions specified in the contract (which persons or bodies may include the board of directors or 1 or more current or future directors, stockholders or beneficial owners of stock of the corporation)"; and
- "covenant that the corporation or one or more persons or bodies will take, or refrain from taking, actions specified in the contract (which persons or

bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation)".

Given the relatively recent passage of this amended language, its exact contours are not yet clear. However, certain commentators have noted that the language of DGCL § 122 (18) appears unduly broad in the wider context of Delaware law, which has balanced contractual flexibility with mandatory corporate requirements, and introduces new uncertainty.

This amendment follows the Delaware Court of Chancery's decision in *West Palm Beach Firefighters' Pension Fund v Moelis & Company*, which struck down a stockholder agreement between Moelis & Company and its controlling stockholder. In *Moelis*, the court cited the DGCL 141 (a) mandate that the "business and affairs of every corporation... shall be managed by or under the direction of a board of directors".

The trial court held that certain of the contractual rights granted to the controller conflicted with Section 141 (a). The court recognised that its holding called into question certain elements of market practice, but reaffirmed that "a court must uphold the law, so the statute prevails".

In response to the trial court's strict application of the statute, other parties in Delaware, including the Delaware Bar and the legislature, moved to pass the amendments of DGCL § 122 (18) to expressly permit stockholders' agreements. The case is presently on appeal to the Delaware Supreme Court, which heard oral argument on the appeal in May 2025.

1.8 Typical Provisions in Shareholders' Agreements/Joint Venture Agreements

Shareholders' agreements can include a wide variety of terms based on the purpose and goals of the agreement.

Such rights may include approval rights for corporate actions, board and committee representation, standstill provisions, voting commitment provisions and commitments for the target to conduct a specific course of action such as a strategic review. These rights may also be conditioned upon action by the shareholder, such as maintaining ownership thresholds.

Shareholders' agreements are typically enforceable and frequently disclosed in the company's public filings as material agreements.

2. Shareholders' Meetings and Resolutions

2.1 Types of Meeting, Notice and Calling a Meeting

Under Delaware law, a company is generally required to hold an annual meeting of stockholders, unless directors are elected by the written consent of stockholders. As such, the vast majority of Delaware public companies hold an annual meeting of stockholders. If an annual meeting is not held for a period of 30 days after the date designated for the annual meeting in the by-laws, or if no date has been designated and no meeting has taken place in the prior 13 months, then, upon request of a stockholder or director, the Delaware Court of Chancery may order a meeting to be held.

Stockholders, as of a specified record date, must be given notice of the annual meeting. The notice must include the date, time and place (including the means of remote communication, if any), and the record date for determining stockholders entitled to notice of the meeting.

Notice must be given no more than 60 days and no less than ten days prior to the date of the annual meeting. The board of directors must set the record date to occur no more than 60 days and no less than ten days prior to the date of the annual meeting. A company's governing documents may set forth additional requirements for notice for a stockholder meeting.

At the annual meeting, stockholders elect directors to the board of directors. Stockholders may vote on additional proposals, including the ratification of auditors and approval of executive compensation on an advisory basis. Stockholders may also vote on other proposals put forth by the board or stockholders, including the amendment of governing documents,

approval of stock issuances and non-binding proposals on a variety of subjects.

It is not typical to hold more than one meeting of stockholders per year.

2.2 Notice of Shareholders' Meetings

Under Delaware law, notice of a special meeting of stockholders typically follows similar rules as for annual meetings of stockholders. Such notice must include certain information such as the purpose for which the meeting is called.

2.3 Procedure and Criteria for Calling a General Meeting

Companies' governing documents typically permit the board of directors to call a meeting of shareholders. Governing documents may provide for other individuals, such as the chairperson of the board or the chief executive officer, to call a meeting of shareholders.

Some companies may also provide shareholders with the right to call a special meeting of shareholders, so long as such shareholders' ownership interest in the company exceeds a specified percentage.

Special meetings are typically called by the board of directors to approve extraordinary transactions. Shareholders, in contrast, may call a special meeting as part of an effort to change company strategy or operations (eg, a campaign to remove and replace directors by an activist or hostile bidder).

Procedures for calling a special meeting of shareholders are often specified in a company's by-laws or certificate of incorporation.

2.4 Information and Documents Relating to the Meeting

Shareholders generally rely on the filings required under federal securities laws, primarily the company's annual report filed on Form 10-K and the proxy statement, which includes various information on the company, corporate governance, executive and director compensation, and the proposals subject to a shareholder vote at the meeting.

Under Delaware law, stockholders are entitled to examine the list of stockholders entitled to vote at a stockholder meeting during the 10-day period ending on the day prior to the meeting date.

2.5 Format of Meeting

Delaware law permits companies to hold stockholder meetings virtually.

2.6 Quorum, Voting Requirements and Proposal of Resolutions

Delaware law requires that quorum consist of no less than a third of shares entitled to vote at the meeting. Otherwise, the certificate of incorporation or the by-laws may determine the quorum requirements. In the absence of any specifications, Delaware law will generally require that a majority of shares entitled to vote will constitute a quorum.

2.7 Types of Resolutions and Thresholds

The corporation's certificate of incorporation or by-laws may set requirements for a resolution to pass. For instance, the voting standard for the election of directors may be a majority of outstanding shares, a majority of shares present or a plurality voting standard (ie, the election of directors who receive the highest number of votes).

In certain instances, the relevant threshold may be set by statute. As one example, the removal of directors generally requires the approval of the majority of outstanding shares.

2.8 Shareholder Approval

Matters requiring shareholder approval include the election of directors, the amendment of the certificate of incorporation, certain stock option plans, certain issuances of shares, and a sale of the company or of all or substantially all of the company's assets.

Voting standards vary, frequently requiring the approval of a majority of outstanding shares present at the meeting or a majority of outstanding shares. For the election of directors, the default vote standard is the plurality of shares, which can be modified in the organisational documents to a majority-vote standard.

2.9 Voting Requirements

Shareholders are able to vote at the shareholder meeting or may vote via proxy. Shareholders commonly vote their shares electronically prior to the meeting through an electronic online platform, although paper and phone voting options are sometimes available.

2.10 Shareholders' Rights Relating to the Business of a Meeting

Under Rule 14a-8 of the Securities Exchange Act of 1934, as amended, shareholders may be entitled to submit a proposal to be considered at a shareholder meeting and to be included in the company's proxy statement. A shareholder must meet ownership requirements by holding shares worth at least USD2,000 of the company's market value for the prior three years, USD15,000 for two years or USD25,000 for one year. The shareholder must then provide a written statement that the shareholder intends to hold the requisite amount of securities and a written statement offering to meet with the company regarding the proposal. The proposal must be received by the company's head office at least 120 days before the date the proxy statement was released for the prior year's annual meeting, or in certain cases, for a reasonable period before proxy materials are sent for special meetings.

The company may exclude a proposal made under Rule 14a-8 from its proxy statement on various bases, including a procedural defect, violation of state law, micromanagement (relating to a company's ordinary business operations) and economic relevance (relating to a company's operations that account for less than 5% of its total assets, net earnings, gross sales and otherwise without a significant effect on the company's business).

The US Securities and Exchange Commission Staff (the "Staff") recently issued new guidance that the Staff will take a "company-specific approach" to determine whether a proposal relates to a significant policy issue, rather than focus on whether a proposal has a "broad societal impact" or universally significant issues.

The Staff also reinstated prior guidance that proposals seeking "intricate detail or specific timeframes or methods for implementing complex policies" or that are "highly prescriptive" are excludable as micromanaging the company.

Alternatively, a shareholder owning at least one share may submit a proposal via the process set forth in the company's by-laws. However, companies are not typically required to include a proposal submitted under the by-laws in their proxy statements and proxy cards disseminated to shareholders, and as a result, such proposals are significantly rarer than Rule 14a-8 proposals.

2.11 Challenging a Resolution

Shareholders can make certain procedural challenges to resolutions passed at a shareholder meeting. Resolution of such challenges depends on the circumstances at issue, as well as applicable Delaware law and the company's certificate of incorporation and by-laws.

Meetings must be called in compliance with Delaware law and the company's certificate of incorporation and by-laws. Procedural defects related to a general meeting may include failure to meet the requirements for notice or quorum, a person without authority to do so having called the meeting, an improper person acting as chair of the meeting or an improper tally of votes, among other items.

Notice

See **2.1 Types of Meeting, Notice and Calling a Meeting** and **2.2 Notice of Shareholders' Meetings**.

Quorum

See **2.6 Quorum, Voting Requirements and Proposal of Resolutions**.

Improper Authority to Call a Meeting/Improper Chair

An annual meeting should be called in the manner provided in the by-laws (DGCL § 211 (b)). Typically, a company's by-laws will stipulate that the board of directors is the proper party to call a general meeting. Additionally, corporate by-laws typically outline who may act as chairperson of the annual meeting. In many cases, this person is the president or chairperson of the company or another member of the board.

Improper Vote Count
A shareholder may raise an objection to the manner in which votes were counted by the inspector of election at the annual meeting.

Remedies
DGCL § 225 provides a mechanism to determine the validity of any director election or other stockholder vote. If the Court of Chancery determines that the stockholder vote was not validly held, it may order that a new vote be held or award other equitable relief appropriate under the circumstances.

In addition, common law bases for action may enable stockholders to challenge stockholder votes passed at a meeting for failure to comply with statute or the company's governing documents.

2.12 Institutional Shareholder Groups
Institutional investors influence a company's actions via exercising voting rights as shareholders and via ongoing engagement. Institutional investors often hold large stakes in public companies, giving them considerable voting power at shareholder meetings. Institutional investors are thus able to communicate approval or disapproval of director performance via voting. Even in uncontested elections of directors, institutional investors may withhold votes to demonstrate dissatisfaction. Institutional investors also play influential roles in whether shareholder proposals pass – frequently, such proposals highlight ESG concerns that may be shared by institutional investors.

Beyond exercising the shareholder franchise, institutional investors can guide companies through direct engagement and issuing broader policy documents, including voting policies. These policies can influence action by boards and management.

Proxy advisors play influential roles in assisting in monitoring corporate governance practices and making influential recommendations that can impact the vote of institutional investors. While larger institutional investors may have in-house governance teams to assess corporate performance and governance, many institutions leverage proxy advisors such as ISS and Glass Lewis to guide their votes at shareholder meetings. These proxy advisors issue research reports and vote recommendations explaining their positions in advance of shareholder meetings.

2.13 Holding Through a Nominee
Shareholders holding shares via a nominee, such as a brokerage firm, must follow the procedures of the nominee in order to vote shares. Information related to matters to be voted at a shareholder meeting would be available via a public filing submitted by the company and thus available to holders of shares via nominees.

2.14 Written Resolutions
Under Delaware law, stockholders may approve a resolution by written consent, unless otherwise specified in the company's certificate of incorporation. Where action by written consent is permitted, the applicable voting standard is typically the minimum number of votes to take such action at a stockholder meeting. Company by-laws may specify further procedures for stockholder action by written consent.

3. Share Issues, Share Transfers and Disclosure of Shareholders' Interests

3.1 Share Issues
Under Delaware law, existing stockholders do not have the pre-emptive right to subscribe to an additional issue of shares unless such right is granted in the company's certificate of incorporation (DGCL § 102 (b)(3)).

3.2 Share Transfers
As a general matter, for public companies, there are no broadly applicable legal or regulatory restrictions on the transfer or disposal of shares. Government authorities may impose restrictions on stock transfer for certain regulated entities, such as utilities or banks. In addition, in recent years, antitrust considerations have grown across wide swaths of the economy.

3.3 Security Over Shares
Shareholders are generally entitled to grant security interests over their shares.

3.4 Disclosure of Interests

Companies generally cannot require the disclosure of a shareholder's interest. However, securities laws do require disclosure under certain circumstances.

For example, institutional investors managing over USD100 million must file Form 13F with the SEC on a quarterly basis, which provides insight into such investors' stock holdings. Investors must also file a Schedule 13D (active investment) or Schedule 13G (passive investment) if the investor directly or indirectly acquires the voting or investment power of over 5% of a voting class of company stock.

In addition, shareholders may be required to file a notification under an antitrust statute, the Hart-Scott-Rodino Act of 1976, as amended, to disclose stakes above a certain dollar threshold adjusted annually by the Federal Trade Commission (set at USD126.4 million for 2025). A shareholder may be exempt from such notification requirements if the share purchase is made solely for the purpose of investment, and the total stake remains at or below 10% of the company's outstanding shares.

4. Cancellation and Buybacks of Shares

4.1 Cancellation

Under Delaware law, a company may retire shares that were previously issued if they are not currently outstanding. This may occur after a company acquires its own shares through a repurchase, redemption, conversion or exchange.

By default, a retired share may be reissued by the company at a later date. If, however, the company's certificate of incorporation specifically forbids their reissue, then a certificate identifying such shares must be filed. This filing has the effect of amending the certificate of incorporation to reduce the total number of shares authorised to the retired shares' class (DGCL § 243).

4.2 Buybacks

Delaware public companies are allowed to buy back their shares, but must comply with certain requirements to ensure that they do not inadvertently become subject to market manipulation claims. Rule 10b-18, under the Securities Exchange Act of 1934, as amended, provides companies with a safe harbour to purchase shares of common stock. To qualify under the rule, a company's open-market repurchases must be made by the company itself or by no more than one repurchase agent per day. Additionally, the company cannot repurchase shares at the very beginning or end of a trading day, and repurchases must be made at a price no higher than the highest of either:

- the highest independent bid; or
- the previous transaction price.

The company's daily repurchases must not exceed 25% of the average daily trading volume of the prior four weeks.

In addition to the Rule 10b-18 requirements, a company repurchasing its shares may also be subject to an excise tax on such repurchases equal to 1% of the aggregate fair market value of the shares repurchased.

5. Dividends

5.1 Payments of Dividends

A Delaware corporation is permitted to pay dividends to stockholders out of the company's surplus, or its net profits, if no surplus exists. As such, if neither a surplus nor net profit exists, a company generally may not pay dividends to stockholders (DGCL § 170).

To declare a dividend, the company's directors must generally fix a record date to determine which stockholders are entitled to receive such dividend. This date should be within 60 days of the payment of the dividend. Moreover, the record date must be a date on or after the day that the company acts to fix such date.

6. Shareholders' Rights as Regards Directors and Auditors

6.1 Rights to Appoint and Remove Directors

While shareholders generally elect or remove directors to the board of a company via a shareholder vote at the company's annual meeting, there are other means by which shareholders can elect or remove directors. For example, the by-laws or certificate of incorporation may provide shareholders with the right to call a special meeting or act by written consent for the purposes of removing directors and electing replacements. The company's governing documents will often set forth the procedure for taking such action.

6.2 Challenging a Decision Taken by Directors

As a general proposition, shareholders can challenge decisions of directors in court by citing statute, the company's governing documents and fiduciary duties under common law, among other reasons. The resolution of such challenges depends on the circumstances at issue, as well as applicable Delaware law and the company's certificate of incorporation and by-laws.

To require directors to take (or not take) action, a shareholder typically seeks injunctive relief, predicated on the likelihood of success of the claim that directors breached their obligations or another basis for action (eg, a contractual obligation). Shareholders would likely seek to obtain a preliminary injunction to achieve temporary relief, and then seek to proceed to trial for a permanent injunction. Obtaining an injunction is a three-part test: likelihood of success, irreparable harm and the balancing of equities.

Despite having the potential remedy of injunctive relief, there are meaningful hurdles to bringing such claims, including:

- the generally high standard for obtaining a mandatory injunction; and
- the deferential standard of review employed by courts in most instances when reviewing the decisions of directors (known as the business judgment rule).

The business judgment rule is a presumption that directors acted independently, with due care, in good faith and in the honest belief that their actions were in stockholders' best interests. A plaintiff bears the burden of rebutting this presumption. Thus, a stockholder plaintiff generally would need to allege, and later prove, facts sufficient to rebut this presumption.

6.3 Rights to Appoint and Remove Auditors

Generally, public companies include a voting item at their annual meeting requesting that shareholders ratify the appointment of a designated auditor. The results of the shareholder vote are typically viewed as advisory.

7. Corporate Governance Arrangements

7.1 Duty to Report

Public companies (and therefore their boards) are required to report certain corporate governance arrangements. While there are a variety of situations where disclosure may become required, the most common vehicles for corporate governance disclosures are a public company's annual report and proxy statement. In these filings, public companies provide detailed information on the board of directors, corporate governance practices and other policies.

8. Controlling Company

8.1 Duties of a Controlling Company

Controlling stockholders owe fiduciary duties. Recently, the definition of a "controlling stockholder" has been in flux. Both the Delaware common law and statutory law provide definitions of a "controlling stockholder".

Under common law, the Delaware Court of Chancery has held that a controlling stockholder does not have the duty to "engage in self-sacrifice for the benefit of minority stockholders" (*In re Synthes, Inc S'holder Litig.*). The court has further developed this idea through later rulings. In 2024, it found that "a controller does not owe any enforceable duties when declining to vote or when voting against a change to the status quo" (*In re Sears Hometown and Outlet Stores, Inc S'holder Litig.*). On the other hand, "a controller owes limited but enforceable duties when voting to change

the status quo" (Id). The court held that "if the majority stockholder seeks to change the status quo, then the majority controller cannot harm the corporation knowingly or through grossly negligent action" (Id). At the same time, though, the court held that "when exercising stockholder-level voting power, a controller owes a duty of good faith that demands the controller not harm the corporation or its minority stockholders intentionally" (Id). The duties and liabilities of controllers ultimately require a facts-and-circumstances assessment within the existing legal framework.

The Delaware Supreme Court recently clarified the test to determine whether a minority stockholder is a controlling stockholder. To have control generally, the stockholder must have "potent voting power and management control" and to have transaction-specific control, the stockholder must have exercised actual control during the course of the transaction (*In re Oracle Corporation Derivative Litigation*).

Additionally, the Delaware General Assembly recently amended DGCL § 144 to provide a definition of a "controlling stockholder". The contours of this amendment remain subject to litigation and have created differences of opinion among commentators. Generally, a controlling stockholder of a company under Delaware law either:

- owns or controls a majority in voting power entitled to vote in the election of directors;
- has the right to cause the election of nominees selected at their discretion and who constitute a majority of the board; or
- owns or controls at least one-third of the voting power entitled to vote in the election of directors and has the power to exercise control over management of the corporation.

Delaware also amended § 144 to create safe harbours and specify cleansing mechanisms for conflicted transactions involving controlling stockholders and control groups.

Under the amendment, a controlling stockholder or a control group may be cleansed if the conflicted transaction is approved by either:

- an informed majority of disinterested directors serving on the board or special committee of at least two disinterested directors; or
- informed and disinterested stockholders.

If such procedures are not in place, the conflicted transaction must generally meet the entirely fairness standard.

9. Insolvency

9.1 Rights of Shareholders If the Company Is Insolvent

As a threshold matter, "insolvency" has different meanings in different contexts, and broadly speaking, shareholder recoveries and rights may depend on whether a company is insolvent under the:

- balance sheet insolvency test, in which the sum of debts is greater than the "fair value" of assets; or
- an equity or cash flow insolvency test, in which companies are unable to pay debts as they become due in the ordinary course (note that there are further breakdowns between these categories of insolvency, such as how fair value is measured, and whether the inability to pay debts as they become due is measured by actual failure to pay or by an anticipated inability to pay).

The result is that a company can be technically insolvent but nonetheless hold long-term value for shareholders, particularly where said company is balance-sheet solvent but cash-flow insolvent. Therefore, shareholders can and should stay apprised and cognisant of how insolvency is being measured, particularly when a company enters into Chapter 11 proceedings or other in-court processes, and should consult with restructuring or bankruptcy counsel relatively early in the process.

Once a company has entered into insolvency proceedings, such as Chapter 11 cases, if there is a path to long-term value, shareholders may find it advantageous to organise an equity committee to specifically pursue the equity's interests. The key consideration here is cost: absent being designated an "official equity committee" by the bankruptcy court – which is, as

more than one judge has put it, "the rare exception" (see, eg, *In re Williams Commc'ns Grp., Inc, 281 B.R. 216, 223 (Bankr. S.D.N.Y. 2002)*) – or proving that the committee has made a "substantial contribution" to the case (see 11 USC §§ 503 (b)(3)(D), (b)(4)), professional fees for equity committee representatives, such as counsel and financial advisors involved in bankruptcy court litigation, will be the direct financial responsibility of committee members.

In conjunction with or in the absence of a path to long-term value, shareholders also have the ability to assert rights against directors and officers in both derivative and direct claims – a path that is potentially clearer following the Supreme Court's recent decision invalidating non-consensual third-party releases in Purdue Pharma (see *Harrington v Purdue Pharma L. P., No. 23-124, 2024 WL 3187799 (US 27 June 2024)*). Even in bankruptcy cases where there is no remaining value in the company itself, courts may permit and/or companies may consensually agree to pursue certain claims to the extent of available D&O insurance, thereby allowing shareholders to tap an alternative source of recovery. Again, however, shareholders can and should consult with restructuring or bankruptcy counsel relatively early in the process in order to fully understand paths to recovery via D&O claims in an insolvency or Chapter 11 scenario.

10. Shareholders' Remedies

10.1 Remedies Against the Company

Shareholders may claim that directors, officers or other fiduciaries breached their fiduciary duty to shareholders. These claims can take two forms: direct and derivative.

A direct suit is a claim made by a shareholder directly against a director or officer who has allegedly breached a fiduciary duty owed to shareholders, leading to actual injury to the plaintiff. A derivative suit is a claim made by a shareholder on behalf of the company.

Courts distinguish between direct and derivative suits by evaluating two factors:

- the party experiencing the harm; and
- the party entitled to relief.

In a direct suit, the shareholder has been directly harmed, and as such, the shareholder is entitled to damages. In a derivative suit, on the other hand, the company has been harmed and is, therefore, the entity entitled to relief.

Importantly, the pleading standard for a derivative suit is more onerous than the pleading standard for a direct suit. Under the applicable rules, a derivative complaint must do both of the following:

- state with particularity any effort by the plaintiff to obtain the desired action from the defendant and the reasons for not obtaining such action; and
- allege facts supporting a reasonable inference that the plaintiff has standing to sue derivatively under the laws governing the company. This standard requires that the plaintiff file a demand on the board, and only following the board's rejection or inaction can the plaintiff move forward with the derivative action.

In some cases, shareholders may name the company as a party to an action concerning alleged breaches of duties to achieve relief that would not be possible without the company (eg, as a nominal defendant in a derivative action).

10.2 Remedies Against the Directors

See **10.1 Remedies Against the Company**.

10.3 Derivative Actions

See **10.1 Remedies Against the Company**.

11. Shareholder Activism

11.1 Legal and Regulatory Provisions

Shareholder activism operates under a multi-part legal framework encompassing the following.

- State corporate law, which is determined by the company's jurisdiction of incorporation.
- Federal securities law, particularly disclosures required by both investors and publicly traded

companies. These disclosures can help a company identify an emerging activist threat (eg, Schedule 13D filing) or provide an activist with information to use in its campaign (eg, disclosures in a proxy statement or annual report).
- Governing documents can facilitate or restrict an activist's rights. Shareholder rights vary based on the terms of the certificate of incorporation and by-laws.
- Other legal documents that may restrict activism include employment or severance agreements, debt instruments or other agreements with change-of-control provisions.

Activists leverage a variety of legal tools to pursue their objectives. While the specific mechanisms vary by situation, activists can:

- submit books-and-records demands to gain access to confidential information of the company, including shareholder lists, board minutes, board materials and other documents;
- submit a nomination notice for the purpose of electing directors or proposing other business at a company's annual meeting;
- call a special meeting of shareholders to replace directors or consider other business, or pursue similar actions via the written consent of shareholders if permitted by a company's organisational documents;
- leverage litigation to pressure the company, where such litigation may challenge the legality of a company's by-laws or the sufficiency or accuracy of a company's past disclosures; and
- engage with regulators to influence corporate decisions (eg, merger approval).

11.2 Aims of Shareholder Activism

Activist shareholders typically have primarily economic goals in pursuing a campaign. However, activists occasionally also use arguments related to ESG topics.

Activist demands frequently include the following.

- M&A:
  (a) sell the company;
  (b) spin-off or sell a particular division or asset;
  and
  (c) challenge announced M&A transactions.
- Balance sheet:
  (a) initiate a share buy-back or special dividend;
  (b) increase leverage; and
  (c) change the capital allocation policy.
- Operational:
  (a) replace the CEO or another key executive officer;
  (b) increase operational efficiency to increase profit margins; and
  (c) pursue new business strategies.
- Board of directors/governance:
  (a) change the board's composition;
  (b) separate the chair and CEO roles; and
  (c) enhance shareholder rights/reduce takeover defences.
- Compensation:
  (a) reduce executive compensation; and
  (b) modify executive incentive structures.
- Environmental and social:
  (a) pursue sustainable policies, disclosures or diversification;
  (b) challenge political contributions; and
  (c) push for a political and/or social response/statement by the company.

11.3 Shareholder Activist Strategies

Activists use a variety of strategies to pursue change at a target company. These strategies can be categorised as follows.

Stakebuilding

Typically, the activist will build a stake in the company in secret, including by acting in concert with other shareholders or utilising derivative instruments.

An activist may be required to disclose its stake eventually due to required Form 13F, Schedule 13D/G, and Hart-Scott-Rodino filings (see **3.4 Disclosure of Interests**).

Engagement

Typically, an activist attempts to first engage privately with the management and board of a target company before making public demands. For example, the activist may send a private letter calling for a specific

course of action and request a meeting with senior leadership and/or board members.

Public Pressure

In other situations, an activist may immediately lead with a press release, including an open letter to the board or shareholders, setting forth concerns and a specified plan of action. Such steps often coincide with the first public disclosure of the activist's position in the company.

Proxy Contest

An activist may nominate director candidates for election to the target company's board and/or submit other shareholder proposals at the next annual shareholder meeting.

An activist can also ask shareholders to take similar actions at a special meeting of shareholders or via action by written consent, to the extent permitted by applicable state law and the target company's governing documents.

Litigation/Books-and-Records Demands

Books-and-records demands by activists have also increased in prominence in recent years, enabling activists to obtain access to confidential corporate records. In Delaware, a stockholder must demonstrate a "proper purpose" to succeed in such demand.

In 2025, Delaware's General Assembly amended DGCL § 220 to define the books and records subject to inspection. Such books and records are now defined to be a set of identified core materials, such as board minutes, board materials and any agreement entered into under DGCL § 122 (18).

Furthermore, the Court of Chancery may order the production of other, additional records if all demand requirements are met and the stockholder has demonstrated a compelling need for inspection to further its "proper purpose" and that, by clear and convincing evidence, specific records are necessary and essential to further such purpose.

DGCL § 220, as amended, expressly allows corporations to redact unrelated information and require the stockholder to enter into a confidentiality agreement as a condition to production.

11.4 Recent Trends

Shareholder activism is an ever-present reality for US companies. Activists typically target companies with perceived shortfalls in performance or governance. The threat applies to companies across market caps. Size has not been a barrier to activists, as companies with a market capitalisation of more than USD100 billion have faced prominent campaigns.

Following the Trump administration's announcement of reciprocal tariffs in April 2025, global markets faced the largest decline since the onset of COVID-19, as the prospect of major US import levies disrupted supply chains and heightened inflationary risks. The uncertainty stirred by these tariffs suppressed the appetite for corporate M&A, a major driver of activism, in H1 2025. Though the overall activism volume softened compared to 2024, the number of activist campaigns globally still remained above levels seen in 2020 through 2023, demonstrating the resiliency of shareholder activism despite ongoing macroeconomic turbulence. First-time activists remained an important catalyst, representing 42% of funds waging H1 2025 campaigns and spearheading 31% of H1 2025 campaigns.

Moving forward, with the expected downward trajectory of interest rates and a looser regulatory environment in Washington, M&A is likely to re-emerge as the most prominent argument among activist agitators, particularly for companies in the mid- and small-cap range. In advance of this shift, companies should pressure-test existing strategies and prepare for demands to conduct one-off strategic reviews.

Companies should engage with advisors to proactively identify steps to eliminate or mitigate weaknesses and address concerns from the broader investment community. In some cases, it may be appropriate to develop and disclose a governance transition plan to align with investor expectations.

11.5 Most Active Shareholder Groups

Hedge funds are typically the drivers of activism in the USA. There is a significant ecosystem of funds raising

capital based on the notion that active engagement can deliver superior returns uncorrelated with the broader market. These funds have developed various reputations along the spectrum of activism.

The most prominent activist funds frequently engage in public, high-pressure fights. These activists' agendas are more likely to include M&A, such as the sale of an entire company or certain divisions, and other means of quickly returning value to shareholders such as stock buybacks. Newer funds may be further incentivised to take aggressive and well-publicised positions in order to build stature among the investor community. Even more established funds will use aggressive campaigns to reaffirm their "fearsome" reputation.

Other funds have focused on private engagement and may see themselves as "constructivists" aligned with long-term shareholders. Such investors typically focus on longer-term strategic and operational changes with an eye towards building a sustainable business. These funds may develop more collaborative relationships with companies, straddling the line between activists and advisors.

Institutional or other traditional large shareholders are unlikely to publicly lead an activism campaign. This tendency has solidified in recent years as institutions have evolved further into "passive" products that track the broader market or a specific index, and away from "active" products that select specific companies for investment.

Nonetheless, institutional investors continue to show a willingness to vote for activist nominee director slates or shareholder proposals.

11.6 Proportion of Activist Demands Met

Many activist engagements remain private, and as such, the universe of public information does not incorporate the full scope of demands.

Based on public data, in 2024, activists agitating at US companies sought 249 board seats and obtained 125 board seats. In the first half of 2025, activists sought 155 board seats and obtained 76 board seats. These board seats were largely obtained through settlements and not by shareholder vote.

11.7 Company Prevention and Response to Activist Shareholders

Companies can take proactive steps to minimise the risk of shareholder activism. The most important – and obvious – step, is, of course, increasing the company's stock price. Strong financial performance and shareholder returns are key to deterring activists.

Specialist legal advisors can provide recommendations on "best-in-class" improvements to governance practices and documents. Financial advisors can help boards assess activists' typical financial theses, such as increased capital return and M&A options.

Consistent responsiveness to shareholders can prevent a future campaign, where:

- an effective investor relations programme can reveal investor priorities and sentiments in advance of an activist outreach; and
- ongoing investor communications should address and rebut potential activist attack theses; this task becomes even more important if and when the company faces short-term turbulence.

The board should engage in regular self-assessment to ensure effective composition and function, where:

- in recent years, activists have increasingly attacked individual directors as part of an activist campaign, claiming that such directors do not add appropriate skills or experience to the board; and
- boards engaging in meaningful refreshment are frequently in stronger positions against shareholders agitating for change.

After an activist approaches the company, the course of action depends on the particular context and circumstances. In general, a company should take the following steps:

- identify an internal working team to evaluate and manage engagement with the activist;

- retain appropriate advisors, including specialist legal counsel, bankers and communication/investor relations experts;
- familiarise key members of the management team and the board with their legal obligations;
- carefully prepare for any interactions with the activist;
- develop a communications plan to respond to a potential public campaign;
- analyse the company's strategy, performance and operations with the assistance of external advisors from an activism perspective; and
- review governance documents to identify and address potential legal vulnerabilities.

These steps can help a company regain the initiative, particularly as activists often use the element of surprise as leverage to force preferred outcomes.

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