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Special Meetings and Consent Solicitations: How the Written-Consent Right Uniquely Empowers Shareholders

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Special Meetings and Consent Solicitations: How the Written-Consent Right Uniquely Empowers Shareholders

ABSTRACT. Despite a decline in companies' takeover defenses, provisions barring shareholders from acting by written consent remain intact. A key reason that these antitakeover provisions persist rests in the widely held view that giving shareholders the right to act by written consent would not increase their power over the company's management as long as shareholders already have the right to call a special meeting. This Note argues that this view is wrong. The written-consent right does uniquely empower shareholders. That power results not from what the right allows shareholders to do but from what it prevents boards from doing without shareholder consent.

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INTRODUCTION

In the early 1980s, the hostile takeover—taking control of a company without the approval of its board of directors—emerged as a significant phenomenon in corporate governance.[1] In response to the growing popularity of hostile takeovers, boards of directors started to adopt increasingly severe takeover defenses.[2] Takeover defenses are provisions—generally found in a company's bylaws or articles of incorporation—that make it harder for activist investors and hostile bidders to gain control of a company without board support. A common example is the "poison pill," which essentially prevents the acquisition of a company without board approval.[3]

Takeover provisions have been a key focus of corporate law scholarship ever since.[4] They drive, for example, a heated debate about how much control shareholders should have over the affairs of a company relative to the board of directors. Dozens of academic papers have been published on the topic, discussing everything from which defenses have the largest antitakeover effects[5] to whether defenses increase or decrease shareholder wealth.[6] The debate has also played out in the public arena. During the 2000s, shareholders increasingly brought

1. Bengt Holmstrom & Steven N. Kaplan, *Corporate Governance and Merger Activity in the United States: Making Sense of the 1980s and 1990s*, 15 J. ECON. PERSP. 121, 121 (2001).

2. John Laide, *Major Milestone in Takeover Defenses Likely to Be Achieved This Year*, SHARKREPELLENT (Mar. 17, 2005), https://www.sharkrepellent.net/pub/rs_20050316.html [https://perma.cc/4CNF-RCA7].

3. Julian Velasco, *Just Do It: An Antidote to the Poison Pill*, 52 EMORY L.J. 849, 856-59 (2003).

4. Michael Klausner, *Empirical Studies of Corporate Law and Governance: Some Steps Forward and Some Steps Not*, *in* OXFORD HANDBOOK ON CORPORATE LAW AND GOVERNANCE 184, 193 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) ("Takeover defenses have been a third topic of intense debate in corporate governance since the 1980s."); *see, e.g.*, Jordan M. Barry & John W. Hatfield, *Pills and Partisans: Understanding Takeover Defenses*, 160 U. PA. L. REV. 633 (2012); Lucian Arye Bebchuk, *Why Firms Adopt Antitakeover Arrangements*, 152 U. PA. L. REV. 713 (2003); Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887 (2002) [hereinafter Bebchuk et al., *Powerful Antitakeover Force*]; Lucian Bebchuk et al., *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783 (2009) [hereinafter Bebchuk et al., *What Matters in Corporate Governance?*].

5. *See, e.g.*, Bebchuk et al., *Powerful Antitakeover Force*, *supra* note 4, at 890-94; John A. Pearce II & Richard B. Robinson, Jr., *Hostile Takeover Defenses That Maximize Shareholder Wealth*, 47 BUS. HORIZONS 15 (2004).

6. *See, e.g.*, Sanjeev Bhojraj et al., *Takeover Defenses: Entrenchment and Efficiency*, 63 J. ACCT. & ECON. 142, 143 (2017); Lynn A. Stout, *Do Antitakeover Defenses Decrease Shareholder Wealth? The Ex Post/Ex Ante Valuation Problem*, 55 STAN. L. REV. 845, 856-61 (2002); Martin Lipton & Theodore Mirvis, *Harvard's Shareholder Rights Project Is Wrong*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 23, 2012), https://corpgov.law.harvard.edu/2012/03/23/harvards-shareholder-rights-project-is-wrong [https://perma.cc/HY7H-YK4C].

proposals at annual meetings to request that the company remove its takeover defenses,[7] most prominently in the movement to destagger board-of-director elections.[8]

Although the debate between shareholders and boards continues to this day, shareholders seem to be winning: the most widespread types of takeover defenses from the early 2000s are now present in only a minority of companies' corporate-governance documents. As an illustration, in 2002, 61% of S&P 500 companies had classified boards, 59% barred shareholders from calling special meetings, and 60% had poison pills in force.[9] In 2018, however, only 11% of S&P 500 companies had staggered boards (also known as classified boards), 36% barred shareholders from calling special meetings, and fewer than 2% had poison pills in force.[10]

Yet despite this general decline in takeover defenses, one takeover-defense provision has remained remarkably resilient. The vast majority of public companies' articles of incorporation still include a provision barring shareholders from acting via written consent.[11] This provision persists despite the fact that a number of companies each year receive shareholder proposals requesting the right to act by written consent,[12] and despite the fact that hostile bidders and

7. *See 2012 Proxy Season Review*, SULLIVAN & CROMWELL LLP (July 20, 2012), https://www.sullcrom.com/siteFiles/Publications/2012_Proxy_Season_Review-7-20-2012.pdf [https://perma.cc/X78X-VZUQ]; *2013 Proxy Season Review*, SULLIVAN & CROMWELL LLP (2013), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2013_Proxy_Season_Review.pdf [https://perma.cc/D7E3-LQF3]. *See generally* Lucian Bebchuk et al., *Towards the Declassification of S&P 500 Boards*, 3 HARV. BUS. L. REV. 157 (2013) (discussing the progress made by Harvard's Shareholder Rights Project toward the declassification of S&P 500 boards).

8. *See, e.g.*, Bebchuk et al., *supra* note 7, at 162-66. The goal of staggered (or classified) boards is to prevent a majority of board members from coming up for election each year at the annual meeting. This deters hostile takeovers as it significantly increases the time before a hostile acquirer or shareholder activist can replace a majority of the board. A majority of the board is required to take actions such as removing a poison pill or approving an acquisition offer. Laide, *supra* note 2.

9. FactSet Research Sys. Inc., *Takeover Defense Trend Analysis: 2002 Year End Snapshot*, SHARKREPELLENT. SharkRepellent is a subscription-only data feed that includes information on approximately 6,000 U.S.-incorporated companies. *See infra* note 114.

10. FactSet Research Sys. Inc., *Takeover Defense Trend Analysis: Current Snapshot*, SHARKREPELLENT.

11. *See id.* When I list the companies that give shareholders the right to act by written consent, I do not include those companies that require unanimous consent. I chose not to include companies with unanimous consent because in big public companies, unanimous consent is, for all practical purposes, impossible.

12. *2013 Proxy Season Review*, *supra* note 7; *2015 Proxy Season Review*, SULLIVAN & CROMWELL LLP (July 20, 2015), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2015

activists have successfully used consent solicitations to gain concessions from, or control over, companies.[13]

This takeover-defense provision—barring shareholders from acting by written consent—is explained in depth below. Essentially, it works by preventing shareholders from acting in concert before a company's annual meeting. For example, imagine that an acquirer makes an offer to buy a company, which the board refuses against the shareholders' wishes. As a result, the shareholders want to replace the board with new directors that they believe will better represent their interests. If shareholders do not have the right to act by written consent,[14] they must wait until the next annual meeting—which may be up to twelve months away—before taking such action. In that time, the acquirer may drop its bid, hesitant to wait around for an annual meeting in which it is uncertain that a majority of the board will be replaced. By contrast, if a target company lacks this takeover defense, the bidder could engage in a consent solicitation, allowing the bidder to gain control of the target's board once it obtains consents from greater than 50% of the outstanding shares.[15]

This Note explores why the takeover defense against written consents has endured, while most of the other key antitakeover provisions have disappeared. The provision has endured in part because of state laws requiring board approval

_Proxy_Season_Review.pdf [https://perma.cc/VF7N-K7MW]; *2017 Proxy Season Review*, SULLIVAN & CROMWELL LLP (July 17, 2017), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2017_Proxy_Season_Review.pdf [https://perma.cc/C2V9-F8V4].

13. *See* Stephen Taub, *The New Tactic That's Working for Activist Funds*, INSTITUTIONAL INV. (June 27, 2013), http://www.institutionalinvestorsalpha.com/IssueArticle/3223980/Archive-AR-Magazine/The-New-Tactic-Thats-Working-for-Activist-Funds.html [https://perma.cc/4239-Y7VN]; Greg Taxin, *Lessons from the Wet Seal Consent Solicitation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 17, 2012), https://corpgov.law.harvard.edu/2012/10/17/lessons-from-the-wet-seal-consent-solicitation [https://perma.cc/3EQJ-W8HX].

14. As a caveat, shareholders also must not have the right to call a special meeting for this to be true. *See infra* Section II.B.

15. *Takeover Law and Practice*, WACHTELL, LIPTON, ROSEN & KATZ 129 (Mar. 2015), http://www.wlrk.com/files/2015/TakeoverLawandPracticeGuide.pdf [https://perma.cc/5TH9-ZV4G].

to remove it.[16] More significantly, however, it has endured because boards have persuasively argued that removing it would not benefit shareholders.[17]

Specifically, boards have argued that shareholders do not need the right to act by written consent because most companies already give shareholders the right to call a special meeting.[18] Like the right to act by written consent, the right to call a special meeting allows shareholders to act before the regularly scheduled annual meeting. Boards thus contend that the right to call a special meeting is functionally equivalent to the right to act by written consent. Both rights allow shareholders to take various actions including removing and replacing directors prior to the annual meeting. Boards have also argued that the special-meeting right benefits shareholders, such as by ensuring notice to all shareholders and a lower voting threshold.[19]

This Note argues that, contrary to this view, there is an important distinction between the two rights: while boards can unilaterally place extreme restrictions

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16. Under Delaware law, a charter amendment, which is required to give shareholders the right to act by written consent, requires both a board and shareholder vote. *See* DEL. CODE ANN. tit. 8, § 242 (2018); Scott Hirst, *Action by Written Consent: A New Focus for Shareholder Activism*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 5, 2010), https://corpgov.law.harvard.edu/2010/07/05/action-by-written-consent-a-new-focus-for-shareholder-activism [https://perma.cc/VYN2-6SW7].

17. This is the main argument boards make in response to virtually every shareholder proposal to gain the right to act by written consent. *See, e.g.*, *Shareowner Proposals: Proposal No. 7: Right to Act by Written Consent*, HONEYWELL (2016), http://investor.honeywell.com/Interactive/newlookandfeel/4121346/proxy/PDF/honeywell-proxy2016_0109.pdf [https://perma.cc/YS3V-9PSL] [*hereinafter Honeywell Shareholder Proposal*] ("Adoption of this proposal is unnecessary since shareowners already have the ability to call special meetings based on the vote of 20% of outstanding shares."); Quest Diagnostics, Proxy Statement (Form 14A) 64 (Apr. 10, 2016) ("[T]he stockholders' existing rights, including the ability to call a special meeting, already provide stockholders with the benefits the proponent identifies for action by written consent without the serious negative consequences."); Textron Inc., Proxy Statement (Form 14A) 51 (Mar. 6, 2018) (stating that the written-consent right "is unnecessary in light of the existing ability of Textron's shareholders to call special meetings of shareholders and our shareholders' right to proxy access"); TimeWarner, Proxy Statement (Form 14A) 15 (Apr. 8, 2011) ("Stockholder meetings are a better method to raise important matters for consideration by stockholders, and holders of 15% of the outstanding Common Stock already have the right to request a special meeting of stockholders . . . .").

18. *See, e.g.*, sources cited *supra* note 17. The view that these rights are basically equivalent is reflected in the small amount of scholarship on the topic. *See, e.g.*, Matteo Gatti, *The Power to Decide on Takeovers: Directors or Shareholders, What Difference Does It Make?*, 20 FORDHAM J. CORP. & FIN. L. 73, 115-19 (2014); Hirst, *supra* note 16.

19. *See* Eric S. Robinson, *Defensive Tactics in Consent Solicitations*, 51 BUS. LAW. 677, 681 (1996) ("The dissident in a consent solicitation must obtain unrevoked consents from the holders of a majority of the outstanding shares rather than a plurality of the shares voted as is the case for the election of directors at a meeting.").

on the exercise of the special-meeting right, they cannot do so with the written-consent right because most changes to that right require shareholder approval.[20] Put differently, the written-consent right uniquely empowers shareholders not because of what it allows shareholders to do, but because of what it prevents boards from doing without their consent.

While this distinction may seem minor, its consequences are significant. Although the bylaws of most S&P 500 companies in Delaware nominally give shareholders the right to call a special meeting, this right is, in reality, extremely limited at many of these companies—and, at some companies, virtually nonexistent—due to the extreme restrictions that companies' bylaws place on the right.[21] Consequently, in the fraction of companies that give shareholders both rights, the written-consent right is often much more robust than the special-meeting right. For that reason, even though far fewer companies give shareholders the right to act by written consent, shareholders use it to gain representation on company boards far more often than they use the special-meeting right.[22]

The right to act by written consent, although used frequently by activists and hostile bidders, has gone virtually unexamined in the academic literature.[23] In particular, no published work has identified precisely how the written-consent right empowers shareholders relative to the special-meeting right. This Note is also the first academic paper to draw attention to the restrictions that boards can and do place on shareholders' right to call a special meeting.

More importantly, by revealing exactly how the written-consent right uniquely empowers shareholders, this Note's conclusions can help shareholders who want to remove such provisions wage a more persuasive fight. In the last two decades, shareholders and academics have successfully pressured boards to remove or soften existing takeover defenses.[24] Yet provisions barring shareholders from acting by written consent endure in the vast majority of companies'

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20. *See infra* Part III.

21. *See infra* Section III.B.1.

22. *See infra* Section III.A.

23. Other than a 1996 article by Eric Robinson, see *supra* note 19, the only academic articles writing in any depth about the written-consent right are from the 1980s. *See* Jesse A. Finkelstein & Gregory V. Varallo, *Action by Written Consent: A Reply to Messrs. Herzel, Davis and Harris*, 42 BUS. LAW. 1075 (1987); Leo Herzel et al., *Consents to Trouble*, 42 BUS. LAW. 135 (1986); Daniel J. DeFranceschi, Note, *Written Consents—A Powerful Tool in Hostile Battles for Corporate Control*, 14 DEL. J. CORP. L. 967 (1989). Robinson's 1996 article discusses some of the ways that boards can gain more control over a consent solicitation; however, it does not discuss the consent right in relation to special meetings.

24. *See* sources cited *supra* notes 7-10.

charters.[25] While shareholders have brought proposals to remove this defense in the past,[26] their arguments have generally failed to adequately respond to boards' contentions that the special-meeting right is not only sufficient but also preferable for shareholders.[27] Such proposals have failed to receive approval from a majority of the shareholders.[28] This Note directly responds to this contention and demonstrates that the right to act by written consent *does* uniquely empower shareholders.

This Note proceeds in four Parts. Part I discusses the movement against takeover-defense provisions. It explains that while there has been a drastic decline in most takeover-defense provisions, the vast majority of S&P 500 companies still bar shareholders from acting by written consent. Part II explores the reasons why provisions barring shareholders from acting by written consent have persisted. Most importantly, boards have successfully argued that getting rid of this provision—and giving shareholders the right—would have no benefits for shareholders who already have the right to call a special meeting. The Part then concludes by comparing the two rights, explaining that the significance of many of the procedural differences between them is overstated. Yet, while these rights can be used in similar ways for similar shareholder actions, Part III argues that the written-consent right is more empowering to shareholders. Part IV considers the practical upshots of this Note's findings for various players in the corporate-governance landscape.[29]

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25. *See supra* note 11 and accompanying text.

26. *See Takeover Law and Practice*, *supra* note 15, at 17. ("Governance activists have been seeking to increase the number of companies that may be subject to consent solicitations. 70% of S&P 500 companies prohibit shareholder action by written consent as of the end of 2014 (or require such consent to be unanimous). During 2005-2009, only one Rule 14a-8 shareholder proposal was reported to have sought to allow or ease the ability of shareholders to act by written consent. From 2010 to 2014, however, there were just over 125 such proposals (just under one-quarter of which passed).").

27. *See, e.g.*, Davita Healthcare Partners, Proxy Statement (Form 14A) 15 (2016); *Stockholder Proposal – Right to Act by Written Consent*, HP (2018), https://www.hpannualmeeting.com/stockholder-proposals [https://perma.cc/R634-HWNL]; *Proposal 4: Stockholder Proposal on Whether to Allow Stockholders to Act by Written Consent*, INTEL (2018), https://iiwisdom.com/intc-2018/stockholder-proposals [https://perma.cc/TJ7E-PP56].

28. *See 2013 Proxy Season Review*, *supra* note 7, at 12; *2015 Proxy Season Review*, *supra* note 12, at 9; *2017 Proxy Season Review*, *supra* note 12, at 14-15.

29. Finally, while this Note demonstrates that the written-consent right is a more important tool for shareholder activism than previously thought, it takes no position on whether activism or takeover defenses are good or bad. The issue of whether takeover defenses are beneficial for shareholders, and for the world more generally, is complicated and has been the subject of various lengthy theoretical and empirical analyses. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH (2012); Bebchuk et al., *Powerful Antitakeover Force*, *supra* note 4; John C. Coates

It important to note that this Note focuses on Delaware law. More than 50% of publicly traded companies and more than 60% of Fortune 500 companies are incorporated in Delaware.[30] Therefore, Delaware law remains the most significant state law for understanding the legal regimes within which companies operate. Many of the Note's insights, however, can be applied to companies located in other states and to an understanding of takeover defenses and corporate governance more generally.

I. THE BACKLASH AGAINST TAKEOVER DEFENSES

This Part reviews the backlash against takeover defenses during the 2000s. While takeover defense provisions were pervasive in the early 2000s, many of them are now found in only a minority of corporate-governance documents.[31]

A. *Takeover Defenses in the Early 2000s*

When hedge-fund activists emerged as major players in the early 2000s, takeover-defense provisions were ubiquitous in corporate-governance documents. A takeover defense is defined as any provision in a "corporate charter or operating policy that makes a takeover" more difficult.[32] Defenses range from mild to severe in intensity.[33] Some merely make an unwelcome takeover more

IV, *Empirical Evidence on Structural Takeover Defenses: Where Do We Stand?*, 54 U. MIAMI L. REV. 783 (2000); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Stout, *supra* note 6, at 845. The conclusions of this Note do not in any way contribute to answering this broader normative question. Instead, the goal of this Note is merely to shed light on the significance of a particular takeover defense that has long been underestimated.

30. *See* Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 389 (2003) (discussing how "no state even comes close to Delaware in terms of the number of incorporations"); E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1403 (2005) ("Nearly sixty percent of the Fortune 500 companies and nearly the same proportion of those listed on the New York Stock Exchange are Delaware corporations. In addition, seventy percent of initial public offerings in 2004 on the New York Stock Exchange, the American Stock Exchange, and the NASDAQ were Delaware corporations."); Division of Corps., *About the Division of Corporations*, ST. DEL., https://corp.delaware.gov/aboutagency.shtml [https://perma.cc/CDT8-JNZU].

31. *See* FactSet Research Sys. Inc., *supra* note 9; FactSet Research Sys. Inc., *supra* note 10.

32. *See* Chamu Sundaramurthy, *Antitakeover Provisions and Shareholder Value Implications: A Review and a Contingency Framework*, 26 J. MGMT. 1005, 1005 (2000).

33. Richard S. Ruback, *An Overview of Takeover Defenses*, *in* MERGERS AND ACQUISITIONS 49, 49 (Alan J. Auerbach ed., 1988).

difficult (e.g., barring shareholders from acting by written consent), while others, when used in combination, can make a takeover virtually impossible (e.g., a poison pill plus a staggered board).[34]

Boards first adopted many of these defenses in response to a series of hostile takeovers in the 1980s and 1990s.[35] Target company shareholders often favor takeovers due to the large premiums over the market price that acquirers are often willing to pay. Nevertheless, boards at that time successfully argued that takeover defenses were in the best interests of shareholders. While takeover defenses made hostile takeovers more difficult, they also helped boards ensure that an acquirer was paying top dollar for the target company.[36] Moreover, boards argued that such provisions helped managers avoid "wasting time and corporate resources worrying about a hostile takeover" and allowed them to focus on the long-term value of the company.[37]

Two of the most famous provisions adopted by boards of directors were (1) the poison pill; and (2) the staggered board. A poison pill can be adopted or removed at any time by a company's board of directors.[38] If a company does not have a poison pill, a potential acquirer may either get approval for an acquisition from the board or approach shareholders directly with a tender offer to buy their shares.[39] A poison pill forecloses the latter option by making any acquisition "prohibitively expensive or otherwise unattractive to an unwanted acquirer."[40] The hostile acquirer's only real alternatives, then, are to negotiate directly with the current board—which is difficult once an acquirer has gone hostile—or to

34. Bebchuk et al., *Powerful Antitakeover Force*, *supra* note 4, at 890 (finding that the "safety valve" to a poison pill—i.e., that the bidder can replace the board by running a proxy contest—is "illusory" when the company has an effective staggered board).

35. Sundaramurthy, *supra* note 32, at 1005.

36. Ruback, *supra* note 33, at 50.

37. *See id.*

38. *See* John C. Coates IV, *Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence*, 79 TEX. L. REV. 271, 322 (2000) ("A bidder that has won a proxy fight . . . may simply remove the pill."); *id.* at 322 n.201 ("'Dead-hand' pills may be removed only by directors in place before a bid begins (or by hand-picked successors), and 'no-hand' pills may not be removed at all . . . . But such pills have never gained wide acceptance and are illegal in Delaware.").

39. *Guide to Acquiring a US Public Company*, LATHAM & WATKINS LLP (2015), https://www.lw.com/thoughtLeadership/lw-acquiring-a-us-public-company-for-the-non-us-acquirer [https://perma.cc/CQ95-JYE9].

40. *Minority Investments in Public Companies—Selected Considerations for the Private Investor*, O'MELVENY & MYERS LLP (Jan. 26, 2011), https://www.omm.com/resources/alerts-and-publications/publications/minority-investments-in-public-companies-selected-considerations-for-the-private-investor [https://perma.cc/MQ9C-FLAQ].

run a proxy contest to elect a new majority to the board of directors who will remove the pill.[41]

To counteract the potential that a hostile acquirer will run a proxy contest (that is, solicit the votes of other shareholders in its favor) to replace the current board, companies instituted staggered boards to make proxy contests substantially more difficult. Generally, the default in all states is that all directors are up for reelection annually.[42] Companies with staggered boards, however, sort directors into classes, with only one particular class elected at successive annual meetings.[43] This means that if a hostile acquirer wants to elect a new slate of directors to the board, it must wait two or more years to elect a majority to the board. When the staggered board and poison pill are used together, the possibility of a hostile takeover is "illusory."[44]

By the early 2000s, a majority of S&P 500 companies had at least one of these takeover defenses in effect.[45] In 2002, approximately 60% of S&P 500 companies had poison pills in force, and 61.19% had classified boards.[46] Other widespread takeover defenses included (1) barring shareholders from calling a special meeting (present in 59.14% of S&P 500 companies); (2) barring action by written consent (present in 73.31% of S&P 500 companies); and (3) preventing directors from being removed except for cause (present in 52.16% of S&P 500 companies).[47] All of these defenses make it significantly more difficult and time-consuming for an activist or hostile acquirer to run a successful proxy contest and gain corporate control.

B. The Current State of Takeover Defenses

While these takeover defenses were rampant in the early 2000s, today they are not. In 2017, only 10.85% of S&P 500 companies had classified boards,[48] 1.4%

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41. *See* Julian Velasco, *Just Do It: An Antidote to the Poison Pill*, 52 EMORY L.J. 849, 850 (2003).

42. Bebchuk et al., *Powerful Antitakeover Force*, *supra* note 4, at 893.

43. *See id.*

44. *Id.* at 890.

45. FactSet Research Sys. Inc., *supra* note 9.

46. *Id.*

47. *Id.*

48. FactSet Research Sys., Inc., SHARKREPELLENT, http://sharkrepellent.net (last visited Sept. 18, 2018).

had poison pills in force,[49] 35.74% barred shareholders from calling special meetings,[50] and 25.11% required that directors be removed only for cause.[51] In other words, takeover defenses that were in place in the vast majority of S&P 500 companies fewer than twenty years ago now exist in only a small minority of S&P 500 companies.

This change was motivated by a movement in the 2000s in favor of shareholder empowerment.[52] At its most basic, shareholder empowerment is the idea that shareholders should be given more power relative to the board over the affairs of the company to decide how to maximize long-term value.[53] A number of factors drove this movement. One factor was the slew of corporate-fraud cases in the early 2000s, including the Enron and WorldCom scandals,[54] which led shareholders and the public to demand greater accountability from corporate management.[55] Another factor was the rise of new owner intermediaries like pension funds and hedge funds, leading institutional and indirect shareholders to surpass individual and direct shareholders in corporate ownership.[56] Because of this change in ownership makeup, shareholders not only had greater incentives to monitor corporate management, they were also better equipped to do so.

This move in favor of shareholder empowerment also had support from academia. In the early 2000s, scholars began trying to measure the effects of takeover defenses on shareholder wealth.[57] What they found was that "firms with stronger shareholder rights had higher firm value, higher profits, [and] higher

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49. *Id.*

50. *Id.*

51. *Id.*

52. *See* Jessica Hall, *Poison Pills Drop to Lowest Level in 20 Years*, REUTERS (Mar. 30, 2010, 5:00 PM), https://www.reuters.com/article/us-dealtalk-poisonpills-idUSTRE62T5D320100330 [https://perma.cc/MJT7-KE9P].

53. *See* William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 655-56 (2010).

54. *See In re* Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511 (S.D. Tex. 2003); *In re* WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d 745 (S.D.N.Y. 2003).

55. Noam Noked, *Activism and the Move Toward Annual Director Elections*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 15, 2012), https://corpgov.law.harvard.edu/2012/01/15/activism-and-the-move-toward-annual-director-elections [https://perma.cc/5KSH-YQPC].

56. Maria Goranova & Lori Verstegen Ryan, *Shareholder Empowerment: An Introduction*, *in* SHAREHOLDER EMPOWERMENT: A NEW ERA IN CORPORATE GOVERNANCE 1, 11 (Maria Goranova & Lori Verstegen Ryan eds., 2015).

57. *See, e.g.*, Bebchuk et al., *Powerful Antitakeover Force*, *supra* note 4; Bebchuk et al., *What Matters in Corporate Governance?*, *supra* note 4; Paul Gompers et al., *Corporate Governance and Equity Prices*, 118 Q.J. ECON. 107 (2003).

sales growth,"[58] and that takeover-defense provisions were associated with lower corporate valuations.[59] They also found that staggered boards were particularly negatively associated with shareholder returns.[60] While the question of whether antitakeover provisions are good or bad for shareholders is still up for debate,[61] the literature promoting shareholder empowerment significantly shaped attitudes toward takeover defenses outside the academy.[62]

These factors led to a profound change in corporate governance. Corporations began to adopt these "best practices" to strengthen shareholders' rights and weaken takeover defenses.[63] Now "[s]hareholders [exert] more influence than ever on how boards and management teams operate"[64]—and companies frequently brag about the quality of their corporate governance based on their relative scarcity of takeover-defense provisions.[65] Cisco, for example, writes on the investor relations page of its website: "Cisco is committed to shareholder-friendly corporate governance and the Board of Directors has adopted clear corporate policies that promote excellence in corporate governance."[66] Under this statement, Cisco lists the takeover defenses it lacks, noting that all directors are

58. *See* Gompers et al., *supra* note 57, at 107.

59. *See* Bebchuk et al., *What Matters in Corporate Governance?*, *supra* note 4, at 800-11.

60. *See* Bebchuk et al., *Powerful Antitakeover Force*, *supra* note 4, at 934-35.

61. *See, e.g.*, Klausner, *supra* note 4, at 193 ("[A]cademics continue to debate the value of takeover defenses in law journals and finance journals.").

62. *See, e.g.*, Lucian Bebchuk, *Giving Shareholders a Voice*, N.Y. TIMES: DEALBOOK (Apr. 19, 2012, 2:29 PM), https://dealbook.nytimes.com/2012/04/19/giving-shareholders-a-voice [https://perma.cc/Y2LH-TTA5].

63. Martin Lipton et al., *Wachtell Lipton Offers Thoughts for Boards of Directors in 2018*, CLS BLUE SKY BLOG (Dec. 5, 2017), https://clsbluesky.law.columbia.edu/2017/12/05/wachtell-lipton-offers-thoughts-for-boards-of-directors-in-2018 [https://perma.cc/86EQ-DJYP].

64. *Shareholder Engagement: Proactive Shareholder Engagement Can Be a Win-Win. Boards Can Help*, PWC, https://www.pwc.com/us/en/services/governance-insights-center/shareholder-engagement.html [https://perma.cc/V8PZ-PPY4].

65. *See* Matthew S. Brown, *The Ratings Game: Corporate Governance Ratings and Why You Should Care*, GLOBAL CORP. GOVERNANCE, https://www.globalcorporategovernance.com/n_namericas/080_093.htm [https://perma.cc/8V4P-GECC]; *see, e.g.*, *Corporate Responsibility*, VENTAS, https://www.ventasreit.com/corporate-responsibility/corporate-governance [https://perma.cc/MSL3-WY2T]; *Microsoft Corporation Corporate Governance Fact Sheet*, MICROSOFT, https://www.microsoft.com/en-us/Investor/corporate-governance/faq-factsheet.aspx [https://perma.cc/52D5-4U2T]; *Summary of Corporate Governance Practices*, W. UNION (2018), https://www.wuannualmeeting.com/corporate-governance/corporate-governance [https://perma.cc/B984-ZQLE].

66. Chuck Robbins & Kelly A. Kramer, *Corporate Governance: Governance Highlights*, CISCO, https://investor.cisco.com/investor-relations/governance/Highlights/default.aspx [https://perma.cc/KT27-D4CG].

up for election annually, that shareholders have the right to call a special meeting and to take action by written consent, and that there is no poison pill in effect.[67]

II. THE RIGHT TO ACT BY WRITTEN CONSENT

One takeover-defense provision, however, has not faced a similar backlash in either the literature or the business world: the provision barring shareholders from acting by written consent. This takeover-defense provision persists largely because of the widely held view that shareholders who already have the right to call a special meeting do not also need the right to act by written consent. As this Note will show, that view is wrong.

A. *A Majority of Companies Still Bar Shareholders from Acting by Written Consent*

Shareholders who have the right to act by written consent can "strike at any time during the year,"[68] rather than waiting for the next annual meeting to carry out particular actions. Almost as soon as a majority of shareholders provide their written consent to replacing a majority of the board, that action is effective.[69] Giving shareholders the right to act by written consent therefore threatens both the incumbent board and its defense policies, including any poison pills.

In 2002, 73.3% of S&P 500 companies barred action by written consent.[70] Today, approximately 70% of S&P 500 companies still bar action by written consent,[71] and of those incorporated in Delaware, approximately 63% bar it.[72] This is not only true of the companies with the largest market capitalizations; approximately 72.7% of S&P 1500 companies bar shareholders from acting by written consent.[73] In other words, even as companies have shed their takeover defenses, a majority of large companies have retained prohibitions on action by written consent.

Why have provisions barring shareholders from acting by written consent remained while other defense provisions have disappeared? There are two main

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67. *Id.*

68. *See* Robinson, *supra* note 19, at 677.

69. *Id.* at 681.

70. FactSet Research Sys. Inc., *supra* note 9.

71. FactSet Research Sys. Inc., *supra* note 10.

72. FactSet Research Sys. Inc., SHARKREPELLENT, https://sharkrepellent.net (last visited Nov. 13, 2018).

73. FactSet Research Sys. Inc., *supra* note 48.

reasons: (1) Delaware state law requires both a board and a shareholder vote to remove written-consent provisions; and (2) boards of directors have persuasively argued that shareholders do not need this right.

First, in Delaware, if a company bars shareholders from acting via written consent, shareholders alone cannot remove that bar.[74] Instead, they would have to amend the company's articles of incorporation, which requires approval of the board of directors.[75] And as a general matter, boards are in favor of takeover defenses.[76] By contrast, the right to call a special meeting can be adopted through changes to companies' bylaws,[77] which *do not* require board approval.[78]

Yet while Delaware law partly accounts for the staying power of this takeover defense, it does not tell the whole story. Historically, boards have supported removal of takeover defenses included in articles of incorporation under certain circumstances. For example, staggered-board provisions, which also require board approval for removal,[79] were widely eliminated after institutional investors, the Harvard Shareholder Rights Project, and other industry stakeholders engaged in an extensive campaign to pressure boards to remove staggered-board provisions.[80]

The staying power of provisions barring action by written consent thus also results from the lack of pressure boards face to give shareholders the right. Whatever pressure there had initially been has dissipated over time.[81] While di-

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74. *See* DEL. CODE ANN. tit. 8, § 228 (2018) (specifying that written consent can serve in lieu of a meeting "unless otherwise provided in the certification of incorporation"); *id.* § 242 (describing the procedures required for an amendment of a certificate of incorporation).

75. *Id.* § 242.

76. *See* Sa-Pyung Sean Shin, *Takeover Defenses in the Era of Shareholder Activism* 1 (Sing. Mgmt. Univ., Working Paper No. 4-2016, 2016), https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=2605&context=soa_research [https://perma.cc/9LP9-WUA8] ("While shareholder activists attempt to bring about changes at target firms with their significant ownership and specific plans, boards and management often resist activist demands and seek to defend their strategies and existing governance mechanisms.").

77. In Delaware, a board can grant shareholders the ability to call a special meeting in either the company's bylaws or its charter. *See* DEL. CODE ANN. tit. 8, § 211(d).

78. *See id.* § 109(a).

79. Lucian A. Bebchuk & Alma Cohen, *The Costs of Entrenched Boards*, 78 J. FIN. ECON. 409, 419 tbl.1 (2005) (using data from the Investor Responsibility Research Center and finding that a vast majority of staggered boards are based on firm charters as opposed to bylaws).

80. *See 102 Companies Declassified*, SHAREHOLDER RTS. PROJECT (2017), https://www.srp.law.harvard.edu/declassifications.shtml [https://perma.cc/W5W6-W2T6].

81. *See 2017 Proxy Season Review*, *supra* note 12, at 14 ("The number of proposals requesting that the company grant shareholders the right to act by written consent has continued to drop verted shareholder attention and a focus on the removal of other takeover defenses like staggered-board provisions partly explain this lack of pressure, it is mostly the result of a widely held view that the right does not benefit shareholders who already have the right to act by special meeting.

This view is based on the fact that both rights allow shareholders to engage in virtually equivalent substantive actions. Generally, if shareholders do not have the ability to call a special meeting or act by written consent, they must wait until an annual meeting to replace incumbent board members, amend company bylaws, and take similar actions. The written-consent and special-meeting rights both allow shareholders to take these actions—including replacing incumbent directors—at any time.[82] For example, the shareholders of Wet Seal, a women's clothing store, used the written-consent right in 2012 to remove a majority of the board.[83] Having the right to act by written consent was key, as Wet Seal's annual meeting was seven months away and shareholders wanted to act before the board appointed a new CEO.[84]

Boards of directors are the primary proponents of the view that the rights are interchangeable, although it is unclear whether they actually believe it.[85] When denying shareholders the right to act by written consent, boards repeatedly cite the availability of the special-meeting right. For example, when 3M denied a shareholder request for the right to act by written consent, it explained:

> The Company's amended Bylaws already give stockholders holding at least 25 percent of the outstanding common shares the ability to call a special meeting. This ability to call a special meeting allows stockholders to initiate action without waiting for the Company's next Annual Meeting, making action by written consent unnecessary to facilitate prompt action by stockholders.[86]

Dozens of similar examples of boards denying shareholder requests for the written-consent right exist.[87]

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significantly in recent years, primarily because the individuals who were the main proponents shifted their attention to proxy access.").

82. DEL. CODE ANN. tit. 8, § 228.

83. *See* Taxin, *supra* note 13; Company Overview of The Wet Seal, LLC, BLOOMBERG (Sept. 18, 2018, 1:43 PM), https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=310562251 [https://perma.cc/57J2-V5Q8].

84. *See* Taxin, *supra* note 13.

85. *See* sources cited *supra* note 17.

86. 3M Co., Proxy Statement (Form DEF 14A) (Mar. 26, 2014).

87. *See, e.g.*, *supra* note 17 and accompanying text.

While boards are the most vocal proponents of this view, key corporate participants seem to share it. Many large institutional shareholders, which generally oppose takeover defenses, also argue that the written-consent right is unnecessary as long as shareholders have the right to call a special meeting. Citing conversations with its shareholders, Merck & Company stated that "most of [its] largest investors continue to believe that shareholder interests are appropriately protected by a well-structured right to call a special meeting."[88] This view is also reflected in the voting and corporate-governance polices of some of the most important institutional shareholders and corporate-governance organizations. For example, CalSTRS, one of the largest and most influential pension funds, writes in its Corporate Governance Principles: "Shareholders should have the right to act by written consent and/*or* call a special meeting."[89] BlackRock, which seeks to "make proxy voting decisions in the manner most likely to protect and enhance the economic value of the securities held in client accounts," likewise writes in its 2018 Proxy Voting Guidelines: "[W]e may oppose shareholder proposals requesting the right to act by written consent if the company already provides a shareholder right to call a special meeting . . . ."[90] And the Council of Institutional Investors, a nonprofit association of pension funds that seeks to promote good corporate governance, recommends that boards of directors give shareholders the special-meeting right, but does not provide any recommendation regarding the written-consent right.[91]

B. The Procedural Differences Between the Two Rights Are Overstated

In addition to claiming that the special-meeting right and the written-consent right are virtually duplicative in their substantive protections, boards further claim that shareholders should prefer special meetings because they provide superior procedural protections. Unlike consent solicitations, boards claim, special meetings ensure participation by all shareholders and a forum for debate and

88. Merck & Co., Proxy Statement (Form DEF 14A) (Apr. 11, 2016).

89. *Corporate Governance Principles*, CALSTRS 14 (Nov. 1, 2017) https://www.calstrs.com/sites/main/files/file-attachments/corporate_governance_principles_1.pdf [https://perma.cc/BNV3-JP2C] (emphasis added).

90. *Proxy Voting Guidelines for U.S. Securities*, BLACKROCK 1, 16 (Feb. 2018), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf [https://perma.cc/KDN7-CW6Q].

91. *See Corporate Governance Policies*, COUNCIL INSTITUTIONAL INV. 12 (Sept. 15, 2017), https://www.cii.org/files/policies/09_15_17_corp_gov_policies.pdf [https://perma.cc/3CMN-YCX3].

conversation. This Section explores these procedural differences in detail and argues that they are not as significant as boards claim.

To act by written consent, Delaware law requires that a shareholder deliver to the company pieces of paper called "consents" that are signed by a sufficient number of shareholders setting forth the action they wish to be taken.[92] Action by written consent can occur "without a meeting, without prior notice and without a vote."[93] Such a process is generally initiated by a single shareholder or group of shareholders who solicit consents from other shareholders regarding a specific action. While a consent solicitation can start at any time, "a specific timetable" determined by state law "applies to the process."[94]

Acting by special meeting, on the other hand, requires that a meeting take place, that notice be given to all shareholders, and that a shareholder vote occur. Generally, to call a special meeting, shareholders must comply with the requirements articulated in the company's bylaws,[95] after which the place and date of the meeting will be set and notice will be provided to all shareholders.[96] Unless the corporation's bylaws specify otherwise, a shareholder proposal must receive a majority vote of those present at the meeting in order to pass.[97] In contrast, action by written consent requires support from a majority of the *shares outstanding*.[98]

Because of these slight procedural differences, boards often claim that the right to call a special meeting is not only an adequate replacement for the right to act by written consent, but a better one.[99] They focus in particular on three

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92. DEL. CODE ANN. tit. 8, § 228 (2018).

93. *Id.*

94. Michael R. Levin, *Consent Solicitations*, ACTIVIST INVESTOR (2014), http://www.theactivistinvestor.com/The_Activist_Investor/Consent_Solicitations.html [https://perma.cc/NT5Z-W47Q].

95. DEL. CODE ANN. tit. 8, §§ 211, 222; Michael R. Levin, *Special Shareholder Meetings*, ACTIVIST INVESTOR (2014), http://www.theactivistinvestor.com/The_Activist_Investor/Special_Meetings.html [https://perma.cc/QHP3-BR52].

96. *See* DEL. CODE ANN. tit. 8, § 222.

97. *Id.* §§ 211, 212, 215(c).

98. *See* Levin, *supra* note 94.

99. *See, e.g.*, Altaba, Inc., Proxy Statement (Form 14A) 39 (Sept. 11, 2017) ("The Board believes that stockholders of the Fund are better served by holding stockholder meetings for which all stockholders receive notice, and at which all stockholders have an opportunity to consider and discuss the proposed actions and vote Shares held by such stockholders."); Gen. Elec. Co., Notice of 2014 Annual Meeting & Proxy Statement (Form 14A) 48 (Mar. 10, 2014) (writing that it is the Board's view that "action at an annual or special meeting supports shareowners' interests more than action by written consent"); Verizon Commc'ns, Inc., Proxy Statement (Form 14A) 27 (Mar. 19, 2012) ("The Board strongly believes that shareholder democracy can procedural "benefits": (1) prior notice to the board and shareholders; (2) a dialogue between the board and shareholders made possible by the meeting; and (3) an opportunity for the board to respond and provide its recommendation. Consider PayPal's response to a shareholder request for the right to act by written consent in 2017:

> [Special meetings] offer important protections and advantages that are absent from the written consent process:
>
> The meeting and the stockholder vote take place in a transparent manner on a specified date that is publicly announced well in advance, giving all interested stockholders a chance to express their views and cast their votes; The meeting provides stockholders with a forum for open discussion and consideration of the proposed stockholder action; . . . and The Board is able to analyze and provide a recommendation with respect to actions proposed to be taken at a stockholder meeting.[100]

While the wording differs, many boards make nearly identical arguments to those made by PayPal.[101]

While these procedural differences between the two rights do exist, their significance is highly overstated. First, under federal law, boards and shareholders of large public companies generally must receive notice of consent solicitations. Insurgents soliciting consents from more than ten shareholders in a public company must file a consent-solicitation statement on Schedule 14A,[102] and must file preliminary consent-solicitation materials at least ten calendar days before final materials are mailed under Rule 14a-6 of the Securities Exchange Act.[103] Because action by written consent requires support from a majority of shares outstanding, a consent solicitation in a large public company will almost always involve the solicitation of more than ten shareholders. As a result, shareholders and the

best be assured by shareholder action being taken at an appropriately called annual or special meeting of shareholders. Shareholder meetings provide the best opportunity for discussion and interaction among the Company's stakeholders so that all points of view may be considered prior to a vote.").

100. PayPal, Proxy Statement (Form 14A) 64-65 (Apr. 13, 2017).

101. *See, e.g.*, sources cited *supra* note 99.

102. Ethan Klingsberg, *Action by Written Consent: A New Focus for Shareholder Activism*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 5, 2010), https://corpgov.law.harvard.edu/2010/07/05/action-by-written-consent-a-new-focus-for-shareholder-activism [https://perma.cc/M644-PY4M]; *see* 17 C.F.R. § 240.14a-2(b)(2) (2018).

103. 17 C.F.R. § 240.14a-6(a).

board will have notice in the form of a publicly filed preliminary consent-solicitation statement at least ten days in advance.

The board of directors can also amend a company's bylaws for even greater notice requirements. Under section 213(b) of the General Corporation Law of Delaware, a board may adopt a bylaw that establishes its authority to set the record date for action by written consent.[104] As long as the board amends the bylaws accordingly, a stockholder planning a consent solicitation must first reach out to the board to request that a record date be set, thereby giving the board notice and up to twenty days to plan its response.[105]

Second, the view that special meetings provide a robust forum for dialogue between shareholders and boards is very idealistic. Besides a few well-attended shareholder meetings,[106] the attendance at most shareholder meetings is poor.[107] IDEXX Laboratories, an S&P 500 company, recently moved to a "virtual" annual meeting due to low attendance at its in-person meetings. In justifying the decision, the General Counsel wrote: "[O]ur annual meetings have been poorly attended. In 2016, fewer than 15 non-employee shareholders attended, and consistent with many of our past years, we received no questions."[108] Most shareholders instead vote by proxy.[109]

In fact, acting by written consent instead of at a special meeting may ensure more shareholder participation.[110] Because action by written consent requires

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104. DEL. CODE ANN. tit. 8, § 213(b) (2018).

105. Robinson, *supra* note 19, at 679-80.

106. *See* Warren Cassell Jr., *How to Attend Berkshire Hathaway's Annual Meeting*, INVESTOPEDIA (Dec. 17, 2015), https://www.investopedia.com/articles/investing/121715/how-attend-berkshire-hathaways-annual-meeting.asp [https://perma.cc/V788-YZFU] ("Approximately 40,000 people attended Berkshire's general meeting in 2015."); *see also* Richard Feloni, *Here's What It's Like to Attend Walmart's 14,000-Person Shareholders Meeting, a 3-Day Extravaganza*, BUS. INSIDER (May 31, 2017, 12:04 PM), http://www.businessinsider.com/walmart-shareholders-meeting-2016-photos-2017-5 [https://perma.cc/5TH3-J9FK].

107. *See* Elizabeth Boros, *Virtual Shareholder Meetings*, 2004 DUKE L. & TECH. REV., no. 8, ¶ 7; Brad Loncar, *Investment Tip: Annual Shareholder Meetings Are Undervalued*, LONCARBLOG (June 15, 2014), http://www.loncarblog.com/brads-blog-annual-meetings [https://perma.cc/XB3F-K8BM].

108. Letter from Jacqueline L. Studer, Corporate Vice President, Gen. Counsel & Corp. Sec'y, IDEXX Labs., Inc., to Kenneth A. Bertsch, Exec. Dir., Council of Institutional Inv'rs 1 (Apr. 28, 2017), https://www.cii.org/files/issues_and_advocacy/correspondence/IDEXX%20response.pdf [https://perma.cc/Z9WE-3ZYQ].

109. STEPHEN BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 210 (2008) ("[M]ost shareholders will not attend the meeting in person. Instead, most shareholders vote by proxy.").

110. *See* Boros, *supra* note 107, ¶ 8 ("At first sight this written consent option seems quite 'anti-meeting,' but considering how few shareholders attend or vote (either in person or by proxy) support from a majority of *outstanding shares*, it ensures that an incumbent board can only be replaced if a true majority of shareholders support the action. In contrast, action by special meeting requires support from a majority of shareholders voting *at the meeting*. A minority of shareholders can thus act if they are the only ones to attend the meeting.

Finally, action by consent solicitation does not foreclose boards and management from responding and voicing their concerns. As long as they have notice of a consent solicitation, boards and management can reach out to large shareholders directly to voice their concerns and present their own recommendations.[111] In addition, boards can and frequently do respond through countersolicitations that express their recommendations.[112] If shareholders agree with the board position, they can mail in their consents to the countersolicitation, effectively revoking their prior consent.[113]

In sum, when examining only what the two rights allow shareholders to do, the special-meeting and written-consent rights appear very similar. Both allow shareholders to take the same type of actions, and the procedural differences between them are largely overstated.

III. COMPARING RESTRICTIONS ON THE TWO RIGHTS

Despite the apparent similarities, upon examining what limitations boards can place on each right, the rights start to look different in important ways. And contrary to what boards have long claimed, the right to act by written consent is the more powerful tool available to shareholders.

A. Data on the Use of the Special-Meeting and Written-Consent Rights

The claim that shareholders do not need the written-consent right if they have the special-meeting right makes sense only if the rights really are interchangeable. However, a review of data on the frequency of the use of these two

at a normal meeting, obtaining an absolute majority of the entire body of shareholders by this written procedure is likely to require gathering many more votes than simply securing a mere majority of those present at a meeting.").

111. *See* Catherine Bromilow et al., *Director Dialogue with Shareholders*, CORP. BOARD (May/June 2014), https://www.weil.com/~/media/files/pdfs/directordialoguewithshareholders.pdf [https://perma.cc/6HQR-CBLY].

112. Robinson, *supra* note 19, at 684.

113. *See id.*

rights to remove and replace incumbent board members casts doubt on the claim that the rights are really substitutes.

Based on a review of the data available from the SharkRepellent database on FactSet,[114] consent solicitations are used as a tactic much more often than special meetings in campaigns for board control or representation. The following table represents approximate shareholder use of the two tools from 2007 to March 2019 in campaigns for board control or representation.[115]

Corporation Type	Shareholder Action	Times Used, 2007-2019
All Delaware Corporations	Consent Solicitations	47
	Special Meetings	16
Russell 1000-Listed DE Corporations	Consent Solicitations	8
	Special Meetings	3
S&P 500-listed DE Corporations	Consent Solicitations	3
	Special Meetings	2

The fact that consent solicitations are used much more than special meetings is particularly surprising given that many fewer companies allow shareholders to act by written consent. Of S&P 500 companies incorporated in Delaware, 37% allow shareholders to act by written consent,[116] and 56% allow shareholders to

114. SharkRepellent includes data on the "Defense Profiles of approximately 6,000 US-incorporated companies, including the Fortune 500, S&P 1500, Russell 3000, Nasdaq-100 and IPOs from 1999 to present." FactSet Research Sys. Inc., *What Is SharkRepellent.net?*, SHARKREPELLENT, https://www.sharkrepellent.net/pub/contactus.shtml [https://perma.cc/KD5Y-WURG]. It also includes "reports available for over 3,000 activist campaigns and proxy fights," as well as a daily report of activist filings. *Id.* The SharkRepellent database, due to its comprehensive survey of U.S. public companies and shareholder activism, is used frequently in academic papers on corporate governance and shareholder activism. *See, e.g.*, Lucian Bebchuk, Scott Hirst & June Rhee, *Towards the Declassification of S&P 500 Boards*, 3 HARV. BUS. L. REV. 157, 160 n.4 (2013); Lucian A. Bebchuk & Robert J. Jackson, Jr., *The Law and Economics of Blockholder Disclosure*, 2 HARV. BUS. L. REV. 39, 56 (2012); Alma Cohen & Charles C.Y. Wang, *How Do Staggered Boards Affect Shareholder Value? Evidence from a Natural Experiment*, 110 J. FIN. ECON. 627, 632 (2013); Sean J. Griffith & Natalia Reisel, *Dead Hand Proxy Puts and Shareholder Value*, 84 U. CHI. L. REV. 1027, 1052 & n.124 (2017).

115. FactSet Research Sys. Inc., *supra* note 72. This Note uses the word "approximately" here to account for potential inaccuracies or incomplete data on the SharkRepellent database. All data within the table were generated using SharkRepellent.

116. *Id.*

call a special meeting. Of Russell 1000 companies incorporated in Delaware, 34% allow shareholders to act by written consent, while 44% allow shareholders to act by special meeting.[117]

That activist shareholders use consent solicitations more often than special meetings to replace incumbent boards indicates that these two rights may not be as interchangeable as many claim. This next Section explores why that is.

B. The Key Difference Between the Special-Meeting and Written-Consent Rights

The written-consent right is more empowering to shareholders not because of what shareholders can do, but because of what directors *cannot do*. In Delaware, boards of directors can and have put substantial restrictions on shareholders' right to call a special meeting without shareholder approval. But boards of directors cannot put similar restrictions on shareholders' right to act by written consent without shareholder approval. The significance of this distinction can be seen in the bylaws and charters of large Delaware companies as well as the previous data on the use of each of the rights.

1. Restrictions on Special Meetings Imposed by Company Bylaws

In Delaware, boards can restrict shareholders' ability to call a special meeting by amending a company's bylaws.[118] Although by default, only shareholders can amend company bylaws, a company's articles of incorporation may grant directors the power to amend them as well.[119] Unsurprisingly, the "vast majority" of

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117. FactSet Research Sys. Inc., *supra* note 48.

118. *See* DEL. CODE ANN. tit. 8, § 211(d) (2018); *see also* Kidsco Inc. v. Dinsmore, 674 A.2d 483, 493 (Del. Ch.), *aff'd*, 670 A.2d 1338 (Del. 1995) (discussing this restriction). While there has not been a court case that addresses the issue directly, there appears to be almost no limit to what types of restrictions can be placed on shareholders' right to call a special meeting. Instead, in those cases in which boards have imposed restrictions (even in some cases, after the intention to call a special meeting was announced, *see, e.g.*, *Dinsmore*, 674 A.2d at 487-89), the Delaware Chancery Court has had no problem finding them valid. *See id.* at 496-97. The only limitation on a board's ability to impose restrictions in a company's bylaws comes from the permissive *Unocal* and *Unitrin* standard, and the *Dinsmore* court indicated that under that standard, such a bylaw amendment would be invalid only if it precludes a shareholder vote. *See id.* at 495-97 (discussing Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995); and Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946 (Del. 1985)).

119. *See* DEL. CODE ANN. tit. 8, § 109(a) ("In the case of a nonstock corporation, the power to adopt, amend or repeal bylaws shall be in its members entitled to vote. Notwithstanding the foregoing, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstock corporation, upon its governing body.").

such articles grant boards this power.[120] As a result, boards can unilaterally amend the bylaws of the vast majority of Delaware companies to restrict shareholders' right to call a special meeting.

While management and boards often publicly flaunt that they give shareholders this right,[121] in reality, their bylaws heavily restrict the right by limiting (1) *when*, (2) *how*, and (3) *by whom* the right can be exercised. These limitations can effectively render calling a special meeting unfeasible.

a. Limitations on When a Special Meeting Can Be Called

Many company bylaws put substantial restrictions on when shareholders can call special meetings. These provisions are especially severe when the special meeting involves the removal or election of directors. Such provisions effectively state that a special meeting that would involve the removal and election of directors cannot be requested until *X* days (generally around 30 to 90) after an annual meeting and *Y* days (generally around 90 to 120) before the next annual meeting.[122] The effect of these provisions is that a special meeting involving board control or representation cannot be requested during almost one-half to two-thirds of the year.

Biogen's bylaws provide a representative example. They state that Biogen is not required to call a special meeting in response to a valid request from shareholders if it "contains an identical or substantially similar item . . . to an item that was presented at any meeting of stockholders held within thirty (30) days prior to" the request.[123] The election of directors "shall be deemed a 'Similar Item' with respect to all items of business involving the election or removal of directors."[124] Because annual meetings almost always involve the election of directors, the result of this provision is that no special-meeting request that seeks

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120. Alex Walsh, *Do Shareholders Actually Have "Contracts" with Delaware Corporations?*, REG. REV. (Oct. 24, 2017), https://www.theregreview.org/2017/10/24/walsh-shareholders-contracts-delaware [https://perma.cc/7SVR-JKAQ].

121. *See, e.g.*, *infra* note 128 and accompanying text.

122. *See e.g.*, *id.* at 5; *By-Laws*, JPMORGAN CHASE & CO. 4 (Jan. 19, 2016), https://www.jpmorganchase.com/corporate/About-JPMC/document/jpmc-bylaws-january2016.pdf [https://perma.cc/WS5S-P6TR] [hereinafter *Chase Bylaws*]; *Bylaws*, VERIZON WIRELESS 4-5 (Nov. 3, 2016), http://www.verizon.com/about/sites/default/files/Bylaws%20Nov%202016.pdf [https://perma.cc/UW4K-3Q3K] [hereinafter *Verizon Wireless Bylaws*].

123. *Fourth Amended and Restated Bylaws of Biogen Inc.*, BIOGEN INC. 5 (June 7, 2017), http://investors.biogen.com/static-files/0cd5a2ca-c9a1-4573-b6d0-80813b973adb [https://perma.cc/95HX-E79F] [hereinafter *Biogen Bylaws*].

124. *Id.* (emphasis omitted).

to elect new directors is effective if delivered within 30 days after an annual meeting. Moreover, Biogen's bylaws also provide that the company shall not be required to call a special meeting if the request is received within 120 "days prior to the first anniversary of the date of the prior year's annual meeting."[125] Taken together, these bylaws require that the request be made at least 30 days after the prior annual meeting and at least 120 days before the next one. In other words, Biogen's board can refuse to schedule a special meeting in response to a valid request involving board elections for almost half of the year.

Devon Energy Corporation's bylaws provide an even more extreme example of a restriction on when a special meeting can be called. Its bylaws state that "[a] Special Meeting Request shall not be valid, and a special meeting requested by stockholders shall not be held, if" the special-meeting request is delivered within 120 days before the next annual meeting.[126] Moreover, if it involves the "election of directors," such a request will also be held invalid if it is delivered within 120 days after an annual meeting that involved "the election or removal of directors, changing the size of the Board of Directors and the filling of vacancies and/or newly created directorships resulting from any increase in the authorized number of directors."[127] In this case, the result is that shareholders cannot request a special meeting in order to elect or remove directors during approximately two-thirds of the year.

Interestingly, despite these extreme restrictions, Devon Energy publicizes the fact that it allows shareholders to call a special meeting as evidence of its pro-shareholder corporate-governance structure. It has also cited the fact that it gives shareholders the special-meeting right to oppose shareholder efforts to gain the right to act by written consent. In response to a shareholder proposal requesting the right to act by written consent, Devon Energy responded:

> [T]he Board of Directors amended our Certificate of Incorporation to add a right permitting stockholders who hold just 25% of the voting power of the Company's outstanding capital stock to call a special meeting of stockholders. Not only is this a positive governance attribute, it also obviates the need to permit stockholders action by less than unanimous written consent by providing a means for stockholders to raise important matters outside of the normal annual meeting cycle. The proposal at issue here, however, will not enhance our corporate governance

125. *Id.*

126. *Bylaws*, DEVON ENERGY CORP. 5-6 (Jan. 26, 2016), http://s2.q4cdn.com/462548525/files/doc_downloads/governance/documents/Bylaws-1-26-16.pdf [https://perma.cc/PY2R-VJUT] [hereinafter *Devon Energy Bylaws*].

127. *Id.* at 6.

> in any meaningful way, and the Board of Directors does not believe that the proposal is in the best interests of Devon or its stockholders.[128]

Whether or not these statements were made in good faith, the restrictiveness of Devon Energy's bylaws casts serious doubt on stockholders' ability to "raise important matters outside of the normal annual meeting cycle" through special meetings.[129]

b. Limitations on How a Special Meeting Can Be Called

In addition to restricting when a special meeting can be called, boards can restrict the special-meeting right by requiring a substantial delay between a request for a special meeting and the meeting's actual occurrence.[130] The bylaws of many large Delaware companies allow boards to schedule the meeting as many as 90 or 120 days after receiving a valid shareholder request.[131] For example, Amgen's bylaws state that the date shall be fixed by the board of directors, but that "the date . . . shall be not more than 90 days after the Secretary's receipt of Special Meeting Request(s) constituting the Requisite Percent made in compliance with this Section 6 and all other applicable sections of these Bylaws."[132] Companies with similar provisions include 3M Company (up to 90 days),[133] Devon Energy Corporation (up to 120 days),[134] and Pfizer (up to 90 days).[135]

These bylaw provisions substantially diminish the primary benefit of the special-meeting right: calling a meeting to act quickly. If we assume that annual meetings are on average 182.5 days away, giving a board the option to delay a

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128. Devon Energy Corp., Proxy Statement (Form DEF 14A) 82 (Apr. 24, 2013).

129. *See supra* notes 126-127 and accompanying text.

130. These bylaw provisions have been upheld by the Delaware Chancery Court. *See* Kidsco Inc. v. Dinsmore, 674 A.2d 483, 486-89, 496-97 (Del. Ch.), *aff'd*, 670 A.2d 1338 (Del. 1995).

131. *See, e.g.*, *Amended and Restated Bylaws*, AMGEN INC. 3 (Feb. 15, 2016), https://www.amgen.com/~/media/amgen/full/www-amgen-com/downloads/amgen_inc_bylaws.ashx [https://perma.cc/4KGT-VA6T] [hereinafter *Amgen Bylaws*] (90 days); *Devon Energy Bylaws*, *supra* note 126, at 5-6 (120 days); *By-laws*, PFIZER 3-4 (Dec. 14, 2015), http://www.pfizer.com/files/investors/corporate_governance/By-Laws_December_2015.pdf [https://perma.cc/ER3Y-9HDT] [hereinafter *Pfizer Bylaws*] (90 days).

132. *See Amgen Bylaws*, *supra* note 131, at 3.

133. *Amended and Restated Bylaws*, 3M CO. 2-3 (Nov. 10, 2015), http://s2.q4cdn.com/974527301/files/doc_downloads/gov_docs/GovDocs2015/Bylaws_11_10_2015.pdf [https://perma.cc/4UGF-M8DS] [hereinafter *3M Bylaws*].

134. *Devon Energy Bylaws*, *supra* note 126, at 6.

135. *Pfizer Bylaws*, *supra* note 131, at 3-4.

special meeting by up to 90 or 120 days would let shareholders act only two to three months earlier than would the annual meeting.

Many company bylaws also impose additional delays on shareholders' exercise of their special-meeting right through provisions that require extensive disclosure before shareholders can submit a valid request for a special meeting.[136] For example, the bylaws of Biogen state that in order for shareholders to submit valid requests for special meetings, all requesting shareholders must first provide information including: the purpose of the meeting, evidence of the stockholder's beneficial ownership, and "a certification that the stockholder satisfies the Net Long Beneficial Ownership requirement of these bylaws."[137] Depending on how large the company is and how diversified share ownership is, satisfying these disclosure requirements may be extremely time-consuming. Again, the result is that calling a special meeting ends up being only slightly faster than acting at the annual meeting.

c. Limitations on Who Can Call a Special Meeting

Many Delaware companies' bylaws also place restrictions on who can call a special meeting. First, many Delaware companies require that the request come from holders of a certain percentage of the company's outstanding common stock.[138] Setting a minimum threshold has important benefits. Minimum thresholds prevent small shareholders from disrupting the affairs of a company by requiring it to hold an expensive and time-consuming meeting on issues that have little support from the wider shareholder population. The Model Business Corporation Act, for example, sets a default of at least "10% of all the votes entitled to be cast on any issue."[139]

However, setting the minimum threshold too high can seriously disadvantage shareholder proposals. While some minimum percentage may be necessary to prevent too many special meetings from being called, company bylaws frequently require a number substantially in excess of 10%. Around half of the Delaware S&P 500 companies that allow shareholders to act by special meeting require that the request come from stockholders representing 20-25% of the

136. *See, e.g.*, *Amgen Bylaws*, *supra* note 131, at 2; *Biogen Bylaws*, *supra* note 123, at 4-5; *Verizon Wireless Bylaws*, *supra* note 122, at 9-10.

137. *Biogen Bylaws*, *supra* note 123, at 4-5.

138. *See e.g.*, *3M Bylaws*, *supra* note 133, at 2 (requiring that shareholders represent at least 25% of outstanding voting shares); *Biogen Bylaws*, *supra* note 123, at 4 (requiring that shareholders represent at least 25% of outstanding common stock); *Chase Bylaws*, *supra* note 122, at 1 (requiring that shareholders represent at least 20% of outstanding common stock).

139. MODEL BUS. CORP. ACT § 7.02(a)(2) (AM. BAR ASS'N 2016).

total voting shares.[140] This effectively requires shareholders to engage in significant coordination and communication as well as to comply with bylaw disclosure requirements before they can submit a valid request for a meeting.

This requirement is made more demanding by the fact that the bylaws of many companies impose restrictions on what shareholders can count toward that percentage. Some companies require that requesting shareholders hold their shares in record name.[141] However, the vast majority of shareholders—around 70-80%—hold stock in nominee or "street" name.[142] As a result, most shareholders either cannot request a special meeting or must first go through the process of becoming the record holder of their stock. Other companies require that requesting shareholders must have owned their shares in the company continuously for at least one year,[143] even though as of December 2016, the average holding period for stocks traded on the New York Stock Exchange was 8.3 months.[144] Again, the result is that most shareholders cannot count toward the required percentage of shareholders needed to call a special meeting.

140. FactSet Research Sys. Inc., *supra* note 72.

141. *See e.g.*, *3M Bylaws*, *supra* note 133, at 2; *Chase Bylaws*, *supra* note 122, at 1; *Verizon Wireless Bylaws*, *supra* note 122, at 4-5.

142. Marina Petrova, *Capital Formation for Internet Companies: Why Facebook Stayed Private for So Long and What That Means for Investors*, 12 J. BUS. & SEC. L. 305, 325-26 (2012); Jeffrey T. Hartlin, *The SEC Approves the Elimination of Broker Discretionary Voting in All Director Elections*, PAUL HASTINGS: STAY CURRENT 1 (Aug. 2009), https://www.paulhastings.com/docs/default-source/PDFs/1385.pdf [https://perma.cc/7DXG-8VK8]. As the Financial Industry Regulatory Authority (FINRA) has written on street name versus record name:

> [M]ost stocks these days are held in the "street name" of the broker, rather than under the name of any particular investor. In that situation, when an investor opens an investment account, the stocks he or she buys are registered in the issuer's books as belonging to the brokerage firm. The brokerage firm, in its records, however, lists the investor as the actual owner. The broker holds the stock in a "book-entry" form, according to the Securities and Exchange Commission.
>
> This replaces the need for a physical certificate by allowing the broker to keep an electronic record of the purchase in its books, which allows for faster trading. Investors, meanwhile, retain all the rights and benefits of being a shareholder without the burden of keeping a physical stock certificate safe from loss or theft.

It's Your Stock, Just Not in Your Name: Explaining 'Street Names', FINRA (Dec. 21, 2015), https://www.finra.org/investors/its-your-stock-just-not-your-name-explaining-street-names [https://perma.cc/B74X-B3WW].

143. *See, e.g.*, *Honeywell Shareholder Proposal*, *supra* note 17.

144. Michael W. Roberge et al., *Lengthening the Investment Time Horizon*, MFS (July 2017), https://www.mfs.com/content/en_us/mfs-insights/lengthening-the-investment-time-horizon.html [https://perma.cc/QRY2-HCXA].

A final limitation on who can call a special meeting relates to how minimum stock ownership is calculated for purposes of calling a special meeting. Many company bylaws state that in calculating the percentage of stock held by a requesting shareholder, a company will look at the shareholder's net long position in the company.[145] This means that if a shareholder has both a long and a short position in a company, then the company will net those positions against each other to calculate the percentage of shares that the stockholder represents. The result of this position—and likely its purpose—is that it significantly diminishes the ability of hedge funds, many of whom hold both long and short positions in companies, to call a special meeting.[146]

d. How These Restrictions Interact with a Poison Pill and Section 13(d) of the Williams Act

These provisions may also have yet another indirect effect on shareholders' ability to call a special meeting. Because calling a special meeting requires massive coordination among shareholders, shareholders run the risk of triggering (1) a poison pill (if the company has one or institutes one in response to news that shareholders want to call a special meeting); or (2) section 13(d) of the Williams Act, which requires strict disclosure from a "group" that owns more than 5% of a voting class of a company's equity.[147]

The poison-pill issue was raised by Valeant and Pershing Square in their hostile-takeover battle with Allergan.[148] In 2014, in response to a bid from Valeant to buy Allergan, Allergan enacted a poison pill.[149] A shareholder would trigger the poison pill if it became a "beneficial owner" of 10% or more of the stock. "Beneficial owner" was defined to include "any securities . . . which are Beneficially Owned . . . by any other Person . . . with whom such Person . . . has an

145. *See, e.g.*, *Biogen Bylaws*, *supra* note 123, at 4; *Chase Bylaws*, *supra* note 122, at 1-2.

146. *See, e.g.*, *All Cap Strategies*, GOTHAM FUNDS, https://www.gothamfunds.com/Default.aspx [https://perma.cc/HRD5-UGUT].

147. *See* Williams Act, 15 U.S.C. § 78m(d) (2018); 17 C.F.R. § 240.13d–5(b)(1) (2018) ("When two or more persons agree to act together for the purpose of acquiring, holding, *voting* or disposing of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership, for purposes of sections 13(d) and (g) of the Act." (emphasis added)).

148. Verified Complaint for Declaratory Relief and Injunctive Relief, PS Fund 1, LLC v. Allergan Inc., No. 9760 (Del. Ch. June 12, 2014).

149. *Id.* at 3.

agreement, arrangement, or understanding to act together for the purpose of acquiring, holding, voting, or disposing of any securities of the Company."[150]

To remove the poison pill, Pershing Square, acting with Valeant, tried to call a special meeting in order to replace the board of directors.[151] While Allergan's bylaws technically allowed shareholders to call a special meeting, its bylaws included many of the restrictions reviewed above. In particular, the bylaws required that shareholders owning 25% of the company's stock "become direct record owners of the shares and submit written requests to the Company that identify the *same* underlying purpose for the special meeting [and] reflect the *same* matters to be acted upon at the meeting."[152]

The question that Pershing Square and Valeant faced was whether calling a special meeting would necessarily trigger the poison pill.[153] As they pointed out, the special meeting bylaws required coordination among 25% of the company's shareholders; yet the poison pill appeared to be triggered if 10% or more of the shareholders had an understanding to act together for the purpose of voting any securities of the company.[154] While Allergan indicated that certain acts implicit in calling a special meeting would not trigger the pill, it refused to give Pershing Square a clear answer on whether other acts, such as providing assistance to fellow shareholders in completing the request, would trigger the poison pill.[155] Pershing and Valeant therefore sued and requested declaratory relief from the Delaware Chancery Court.[156]

The parties eventually settled in June 2014, with Allergan stipulating that certain conduct, including assisting others with the completion of their special-meeting requests, would not trigger the pill.[157] As a result, the issue of whether various special-meeting requirements that would trigger a poison pill could be imposed was never decided by the Delaware Chancery Court.

In addition to raising concerns about the complicated interaction between certain special-meeting requirements and poison pills, the Allergen takeover battle revealed a second important barrier to shareholders' exercise of their special-meeting right. Bylaws may require so much coordination among shareholders

150. *Id.* at 5.

151. *Id.* at 2-3.

152. *Id.* at 4.

153. *Id.* at 7.

154. *Id.* at 4-5.

155. *Id.* at 6.

156. *Id.* at 7.

157. Stipulation and [Proposed] Order Regarding Application of Allergan Rights Plan and Dismissal Without Prejudice, PS Fund 1, LLC vs. Allergan, Inc., No. 9760 (Del. Ch. June 27, 2014).

that compliance could trigger disclosure obligations under section 13(d) of the Williams Act.

The above concerns make the exercise of the special-meeting right both less likely and more expensive. First, they may deter some shareholders from attempting to call a special meeting while a poison pill is in effect or if they have not filed a Schedule 13D. Second, they may impose delay and cost on any shareholder who may have to commence litigation to resolve the questions left open by Allergen's settlement.

2. *Boards' Inability to Impose Similar Restrictions on Shareholders' Right to Act by Written Consent*

In Delaware, while many boards have, without shareholder approval, put severe restrictions on shareholders' right to call a special meeting, they have not put such restrictions on shareholders' right to act by written consent. That difference stems from Delaware statutory and case law that prevents boards from exerting the same power over the written-consent right.[158]

In the 1980s, the Supreme Court of Delaware interpreted section 228 of the Delaware General Corporation Law to require that any modification or elimination of shareholders' right to act by written consent must be in a company's articles of incorporation.[159] It based its decision on the following language in section 228(a), which reads:

> Unless otherwise provided in the certificate of incorporation, any action required by this chapter to be taken at any annual or special meeting of stockholders of a corporation, or any action which may be taken at any annual or special meeting of such stockholders, may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted and shall

158. Robinson, *supra* note 19, at 679.

159. Allen v. Prime Comput., Inc., 540 A.2d 417, 420 (Del. 1988) (holding that "the exercise of the right to act immediately by majority written consent may be modified or eliminated only by the certificate of incorporation"); *see also* Datapoint Corp. v. Plaza Sec. Co., 496 A.2d 1031, 1032, 1036 (Del. 1985) (finding that a bylaw "designed to limit the taking of corporate action by written shareholder consent" served to "intrude on fundamental stockholder rights").

> be delivered to the corporation by delivery to its registered office in this State . . . .[160]

The court held that, because any modification or elimination of the right must be in the company's certificate of incorporation, "bylaws which effectively abrogate the exercise of this right" would be invalid.[161] Whether the modification of the right is in the certification of incorporation or the bylaws is important: unlike amendments to the bylaws, amendments to the articles of incorporation require *both* shareholder and board approval. Boards thus find it significantly harder to amend the articles of incorporation to limit shareholder power.

The Delaware Supreme Court also stated that, while a bylaw establishing "minimal essential provisions for ministerial review" would not be found to have abrogated the right, a bylaw that affected the exercise of the right more substantively would be found invalid.[162] In determining whether a bylaw served merely a minimal, essential ministerial purpose, courts were instructed to consider the following factors:

> First, a court must determine the purpose sought to be served. A bylaw whose real purpose is delay of shareholder action is per se unreasonable. Second, the court should consider the impact of the bylaw upon the effective exercise of the power conferred under § 228. Finally, the bylaw should contain only the minimal requisites for a reliable and prompt ministerial review to ensure the orderly function of corporate democracy.[163]

In applying these factors, the Delaware court struck down a bylaw that delayed the effectiveness of shareholder action taken by written consent for at least twenty days.[164] Bylaw provisions that would not run afoul of this rule include establishing a deadline for delivery of consents and providing that the company will appoint a consents inspector.[165]

Why Delaware statute and case law treats the two rights so differently is somewhat unclear. One possibility is that when section 228, giving shareholders the right to act by written consent, was added to the General Corporation Law

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160. DEL. CODE ANN. tit. 8, § 228 (2018); *see Prime Comput.*, 540 A.2d at 420.

161. *Prime Comput.*, 540 A.2d at 420.

162. *Id.*

163. *Id.*

164. *Id.* at 418.

165. *See* Robinson, *supra* note 19, at 682-84, 688-89.

in 1967, its "broad use in takeover battles was not contemplated."[166] Instead, it was intended as a less expensive and quieter alternative to shareholder meetings, "designed to facilitate shareholder action where the outcome is a foregone conclusion."[167]

Whatever the reason for the disparate treatment, the practical significance of this difference is clear. Many of the companies that give shareholders both rights place extreme restrictions on shareholders' special-meeting right, but do not place nearly the same type or degree of restrictions on the consent right.[168]

Biogen, for example, allows shareholders both to act by written consent and to call a special meeting.[169] But the restrictions on the rights differ immensely. Biogen imposes several limitations on shareholders' exercise of the special-meeting right, including requiring "net long" shareholders to own at least 25% of the outstanding common stock to call a special meeting and imposing significant timing constraints.[170] In contrast, Biogen imposes virtually no restrictions on shareholders' exercise of the written-consent right.[171] Its bylaws provide that the board must fix a record date—for determining which shareholders are of record for purposes of the consent solicitation—within twenty days of receiving a shareholder request.[172] The bylaws also provide that the corporation may appoint an

166. *Prime Comput.*, 540 A.2d at 419.

167. Leo Herzel et al., *supra* note 23, at 138 (quoting Grynberg v. Burke, No. 6480, 1981 WL 17034, at 6* (Del. Ch. Aug. 13, 1981)).

168. *See, e.g.*, *Amended and Restated By-Laws*, CBRE GROUP, INC. (May 18, 2018), https://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTA4NjI2fENoaWxkSUQ9LTF8VHlwZToz&t=1 [https://perma.cc/D49N-NUQL]; *Amended and Restated Certificate of Incorporation*, CBRE GROUP, INC., https://www.sec.gov/Archives/edgar/data/1138118/000119312516596024/d169985dex31.htm [https://perma.cc/R5PY-MRCA]; *Amended and Restated Bylaws*, MATTEL INC. (Jan. 24, 2017), https://corporate.mattel.com/about-us/pdf/Mattel-Amended-and-Restated-Bylaws.pdf [https://perma.cc/MZ3E-APFK]; *Restated Certificate of Incorporation*, MATTEL INC., https://www.sec.gov/Archives/edgar/data/63276/000119312507119676/dex990.htm [https://perma.cc/46JY-44AY]; *Amended and Restated Bylaws*, OFFICE DEPOT, INC., https://www.sec.gov/Archives/edgar/data/800240/000119312516666874/d234084dex31.htm [https://perma.cc/8AJX-BL6P]; *Amended and Restated Bylaws*, SYSCO CORP., http://investors.sysco.com/~/media/Files/S/Sysco-IR/documents/corporate-governance/Amended-and-Restated-Bylaws-20160826.PDF [https://perma.cc/ZDZ4-UY26].

169. *See Biogen Bylaws*, *supra* note 123, at 4-6, 8-9; Amended and Restated Certificate of Incorporation, BIOGEN INC. (Mar. 3, 2015), https://investors.biogen.com/static-files/c9eab189-8f30-4d7a-902b-e0e51abf91af [https://perma.cc/59J4-U52S].

170. *Biogen Bylaws*, *supra* note 123, at 4.

171. *Id.* at 8-9, 20, 31.

172. *Id.* at 8-9.

inspector to do a "ministerial review of the validity of such consents and revocations."[173]

The Coca-Cola Company also gives shareholders both the right to act by written consent and the right to call a special meeting.[174] But while its bylaws impose significant restrictions on shareholders' exercise of their special-meeting right, its restrictions on the written-consent right are minimal. The restrictions on the special-meeting right include requiring that "net long" shareholders owning at least 25% of the outstanding common stock call a special meeting and requiring substantial disclosure from requesting shareholders.[175] The only bylaw regarding shareholders' use of the written-consent right, in contrast, is the board of director's ability to set a record date.[176] A board can set the record date several days after it receives notice of a consent solicitation so that "the company [may] issue stock into friendly hands" or just "buy some time . . . to consider alternatives."[177] Alternatively, the board may set a record date as early as possible "to reduce the influence of arbitrageurs, and if the dissident delays in commencing its solicitation—increase the disparity between the stockholders who owned shares on the record date and the stockholders who own shares at the time of solicitation."[178] However, while fixing the record date can be an important tool for boards of directors in responding to consent solicitations, it is unlikely to do much to deter or prevent consent solicitations.

IV. TAKEAWAYS FOR CORPORATE GOVERNANCE

This finding has several practical implications. First, shareholders have for years submitted proposals requesting that companies give them the right to act

173. *Id.* at 9.

174. *By-Laws of the Coca-Cola Company*, COCA-COLA COMPANY §§ 5(b), 9 (Sept. 2, 2015), https://www.coca-colacompany.com/investors/by-laws-of-the-coca-cola-company [https://perma.cc/VG34-L2PB] [hereinafter *Coca-Cola Bylaws*]; *see also Restated Certificate of Incorporation of the Coca-Cola Company (Originally Incorporated on September 5, 1919)*, COCA-COLA COMPANY (July 27, 2012), https://www.coca-colacompany.com/investors/restated-certificate-of-incorporation-of-the-coca-cola-company-originally-incorporated-on-september-5-1919 [https://perma.cc/FK2N-4ZAU] (allowing for a director or a director's corporation to contract with Coca-Cola if the transaction is "authorized, ratified or approved . . . by vote at a stockholders' meeting of the holders of record of a majority of all the outstanding shares of the capital stock of the corporation or by writing or writings signed by a majority of such shareholders").

175. *Coca-Cola Bylaws*, *supra* note 174, § 5(b)(i).

176. *Id.* § 9.

177. Robinson, *supra* note 19, at 680.

178. *Id.* at 681.

by written consent. Boards have routinely rejected these requests by pointing to the already existing right to call a special meeting.[179] This Note's conclusion that the special-meeting right is not an adequate substitute for the written-consent right will help shareholders better respond to this argument. Moreover, if boards continue to decline shareholders' requests, shareholders may be able to either pressure boards to remove bylaw provisions that restrict shareholders' ability to call a special meeting or remove them themselves by using their ability to amend company bylaws.

This Note's findings also bear on the evaluation of corporate-governance structures. When judging whether a company has "good corporate governance," the focus is often on what rights shareholders are affirmatively given.[180] This Note shows that looking only at what rights shareholders are given, and not at the restrictions placed on those rights, produces an overly optimistic picture of how much power shareholders actually have. While a shareholder may nominally have certain rights—and, as a result, the company may be able to portray itself as having a shareholder-friendly corporate governance—the reality may be quite different. As illustrated, rights can be severely limited through complicated bylaw provisions that boards can adopt unilaterally. For this reason, future analyses of companies' corporate governance should look more closely at how certain rights given to shareholders are actually implemented and restricted through company bylaws.

CONCLUSION

To summarize, the rights to act by written consent and to call a special meeting are very similar in what they allow shareholders to do. This fact may seem to support the commonly held view that shareholders that already have the right to call a special meeting do not also need the right to act by written consent. But looking only at what the two rights allow shareholders to do—and not at what restrictions boards can place on those rights—is a mistake.

Contrary to popular opinion, the right to act by written consent is more empowering to shareholders than the right to call a special meeting, because boards cannot unilaterally impose the same type of restrictions on the latter as they can on the former. A review of the corporate governance documents of large Delaware companies demonstrates the significance of this distinction. Boards have, with little oversight or fanfare, significantly restricted shareholders' exercise of their special-meeting right. However, companies have generally not imposed similar restrictions on shareholders' exercise of their written-consent right.

179. *See supra* notes 86-91 and accompanying text.

180. Lipton et al., *supra* note 63.

Thus, even though the two rights can be used to accomplish similar actions, the written-consent right is used far more frequently than the special-meeting right to conduct fights for board control.