Katten

Katten Muchin Rosenman LLP

Study of Delaware Forum Selection in Charters and Bylaws

January 25, 2012

Claudia H. Allen

Partner and Co-Chair
Corporate Governance Practice

KATTEN MUCHIN ROSENMAN LLP
525 West Monroe Street
Chicago, IL 60661-3693
P / +1.312.902.5432
F / +1.312.902.1061
claudia.allen@kattenlaw.com
www.kattenlaw.com

TABLE OF CONTENTS

Update on Trends 1

Key Findings and Recommendations 2

Overview and Analysis 3

Graphs 13

List of Companies Analyzed 19

Endnotes 22

KATTEN MUCHIN ROSENMAN LLP

FIRST PUBLISHED: JULY 1, 2010
LAST UPDATED: JANUARY 25, 2012

Study of Delaware Forum Selection in Charters and Bylaws

By

Claudia H. Allen

Update on Trends Since April 2011 Edition of Study. The number of Delaware corporations that have adopted or proposed adopting forum selection provisions in charters and bylaws more than doubled from 82 in the April 2011 edition of this Study to 195 as of December 31, 2011. The sheer increase in numbers does not, however, tell the whole story. The increase has occurred in an environment where questions linger as to the enforceability of forum selection provisions, and shareholder activists are beginning to express their opposition to exclusive forum clauses.

Whether a company adopts a charter provision or a bylaw provision remains closely tied to whether a company is going public or is already public. Over 95% of the 109 charter provisions analyzed were adopted or proposed in connection with initial public offerings ("IPOs"), spin-offs or reorganizations in bankruptcy, where shareholder approval is not required. Only a handful of public companies have put a charter amendment to a shareholder vote. Of the six charter amendment proposals included in proxy statements during the 2011 proxy season, five were approved and one failed. To date, only one company has included a charter amendment proposal in its 2012 proxy statement—although it is early in the proxy season. Established companies have generally continued to adopt bylaws. Yet, the extent to which non-Delaware courts will respect such bylaws remains unclear. This issue has continued to receive attention since January 2011, when the Federal District Court for the Northern District of California, in Galaviz v. Berg, refused to dismiss shareholder derivative claims against Oracle Corporation based upon an exclusive forum bylaw.[1]

Of the provisions in the Study, 55.9% are in charters, up from 51.2% in April 2011**.** While charter provisions dominated when the Study was originally published in July 2010, the ups and downs in this relative percentage appear to be correlated with the overall health of the IPO market. Forum selection bylaws constitute 35.4% of the provisions in the Study, down from 43.9% in April 2011. It is difficult to determine the extent to which the Galaviz decision may have affected the decrease in the percentage of forum selection bylaws in this edition of the Study, compared to the April 2011 edition. However, the number of forum selection bylaws adopted in the month after the Galaviz decision spiked, and, viewed in absolute terms, 51 companies adopted exclusive forum bylaws in 2011, compared to 18 in 2010.[2]

For the 2012 proxy season, the leading proxy advisory firms, Institutional Shareholder Services Inc. ("ISS") and Glass Lewis & Co. ("GL"), have taken positions on forum selection provisions. ISS has adopted a case-by-case policy with respect to forum selection proposals. This policy will take into account whether a company has adopted a number of shareholder-friendly governance practices and demonstrated material harm from litigating intra-corporate disputes outside Delaware. GL opposes forum selection provisions, having announced that it will not recommend in favor of such provisions and will recommend against governance committee chairs at companies that adopt a forum selection provision without shareholder approval or before going public. In a recent development, at least four companies received non-binding shareholder proposals requesting repeal of board-adopted forum selection bylaws. The proponent appears to be testing the waters with these proposals, all of which were submitted to large-cap companies. Additionally, the Council of Institutional Investors ("CII") has announced its opposition to exclusive forum provisions.

While Delaware corporations generally view forum selection provisions as a mechanism to reduce the costs of frivolous litigation and the cost and uncertainty of litigating Delaware law issues outside Delaware, those who oppose the provisions argue that exclusive forum clauses infringe upon shareholders' rights. Both sides in the debate argue that they are acting in the best interests of all shareholders. Signaling the concern in corporate America as to the issues giving rise to forum provisions, 27 of the companies that have adopted provisions are S&P 500 constituents. In terms of trends in governance, the adoption of forum selection provisions in charters and bylaws appears to be one of the few originating with companies, rather than shareholder activists.

Key Findings and Recommendations.

- 55.9% of the companies in this Study have adopted (or are in the process of adopting) a forum selection provision through a charter amendment. These amendments are being adopted by companies as they go public, are spun-off, emerge from bankruptcy protection or reincorporate in Delaware. In these situations, shareholder approval is generally not required, and shareholders will not have the unilateral ability to amend such clauses.
- Six companies sought shareholder approval of a charter amendment providing for exclusive forum during the 2011 proxy season. Five of those proposals passed, of which two passed by narrow margins and two passed at companies with significant insider ownership. To date, one company has included a charter amendment proposal in its 2012 proxy statement. However, it is too early in the 2012 proxy season to draw any conclusions.
- For the 2012 proxy season, ISS will review management charter amendment proposals on a case-by-case basis, taking into account whether the company has adopted specified governance practices and whether it has experienced material harm from litigating intra-corporate disputes outside Delaware. GL opposes forum selection provisions and will recommend voting against governance committee chairs at companies that adopt forum provisions before going public or without shareholder approval.
- Rather than seek shareholder approval of a charter amendment, established public companies have generally adopted forum selection bylaws through board action. 35.4% of the companies in this Study have adopted such bylaws.
- In a new development, at least four shareholder proposals seeking the repeal of exclusive forum provisions have been presented for 2012.
- In January 2011, in Galaviz v. Berg, a federal court refused to dismiss shareholder derivative claims against Oracle Corporation based upon its exclusive forum bylaw, citing federal common law. The court appears to have been strongly influenced by: (1) the adoption of this bylaw by the directors who were defendants in the case after the majority of the alleged wrongdoing had occurred; (2) the board taking this action after certain plaintiffs had purchased their Oracle shares and (3) the absence of shareholder approval. The court indicated, in dicta, that it would be more difficult to challenge the enforceability of a charter provision approved by shareholders.
- Notwithstanding the Galaviz decision, the rate at which companies are adopting forum selection provisions has continued to increase.
- Boards adopting forum selection bylaws can lessen some of the potential grounds for attacking the enforceability of such provisions if they are adopted at a time (for example, in connection with an annual governance review) when adoption cannot be characterized as a response to alleged corporate wrongdoing.
- 31.2% of the companies in the Study have their principal place of business in California, followed by 9.2% in Illinois, 7.7% in Texas, 6.2% in New York, 5.1% in each of Florida and Massachusetts and 4.6% in Colorado. There appears to be a correlation between these statistics and the perceived litigation climate in some of those states, particularly California, Illinois and Florida.
- Based upon the North American Industry Classification system ("NAICs"), 31.8% of the companies analyzed are in Manufacturing, followed by 14.9% in Finance and Insurance, 9.7% (19) in Information and 7.7% (15) in Retail Trade.
- To maximize flexibility, boards adopting such provisions should consider a carve-out allowing the board to "consent to the selection of an alternative forum." While such carve-outs were not included in the first generation of provisions, they have become increasingly common, and are included in the forum selection provisions of 50.3% of the companies analyzed in this Study. Note, however, that the plaintiffs' bar might argue that these provisions effectively permit the board, but not the shareholders, to forum shop and thus are not equitable.
- Depending in part upon the outcome of the shareholder proposals seeking repeal of forum selection provisions, companies may experience shareholder pressure to repeal board-adopted forum selection bylaws.
- Future challenges by the plaintiffs' bar to forum selection clauses seem likely, particularly following the Galaviz decision. While shareholder approval creates a stronger argument for enforceability (particularly if the provision is in the charter), no cases have addressed the effect of shareholder approval. The degree to which other courts will defer to the Delaware Court of Chancery remains unclear, and may well vary by jurisdiction.
- There does not appear to be a material downside to adopting a forum selection clause, apart from questions relating to enforceability, investor perception and, as discussed above, GL's "against" recommendations for governance committee chairs. The potential upside is significant.

Overview. In In re Revlon Inc. Shareholders Litig.,[3] Delaware Vice Chancellor Laster addressed, in dicta, the possibility of Delaware corporations adopting charter provisions providing for derivative actions and other intra-corporate disputes to be litigated exclusively in Delaware: "if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes."[4] The Vice Chancellor's suggestion echoed an emerging debate as to the advisability and enforceability of Delaware forum selection provisions. Exclusive Delaware forum selection provisions address concerns regarding plaintiffs' lawyers rushing[5] to sue "anywhere but Delaware"[6] to avoid the predictability and speed of Delaware courts and potentially to obtain larger settlements. This phenomenon may result in corporations facing parallel, competing litigation in Delaware and another state or in federal court,[7] often in connection with merger transactions.[8]

In March 2011, Chancellor Chandler commented on this phenomenon:

> Judges, defense counsel, and the plaintiffs' bar are now routinely confronted with these sorts of disputes and have yet to come up with a workable solution. The potential problems, as one can imagine, are numerous. Defense counsel is forced to litigate the same case—often identical claims—in multiple courts. Judicial resources are wasted as judges in two or more jurisdictions review the same documents and at times are asked to decide the exact same motions. Worse still, if a case does not settle or consolidate in one forum, there is the possibility that two judges would apply the law differently or otherwise reach different outcomes, which would then leave the law in a confused state and pose full faith and credit problems for all involved. Efficiency and comity would be better served if these cases were litigated in one jurisdiction.[9]

Nonetheless, the degree to which other courts (often in a corporation's headquarters state, where the court has personal jurisdiction over the corporation) will be willing to respect a forum clause remains unpredictable.

This Study analyzes the 195 exclusive Delaware charter and bylaw forum selection provisions adopted or proposed through December 31, 2011, and the legal issues associated with such provisions. While Delaware exclusive forum clauses generally provide for the Court of Chancery to be the sole and exclusive forum for enumerated categories of actions, the exact language and contours of such provisions are continuing to evolve.

Analysis of Provisions Adopted.

- **Template.** The forum selection charter provision adopted by Netsuite, Inc.[10] in 2007 has effectively served as the template for the current generation of exclusive forum provisions. The Netsuite provision states:

  > Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the [Delaware General Corporation Law], (iv) or any action asserting a claim governed by the internal affairs doctrine.

  However, in contrast to provisions currently being adopted, Netsuite's provision does not specify which court in Delaware will have jurisdiction.

- **Types of Actions Covered.** The provisions in the Study generally cover four categories of actions:

  - (1) any derivative action or proceeding brought on behalf of the corporation, with 3.6% (7) of the clauses specifically addressing derivative actions based upon "other wrongdoing" in addition to breaches of fiduciary duty;

  - (2) any action asserting a claim of breach of a fiduciary duty owed by any director or officer to the corporation or its stockholders, with 59.5% (116) of these provisions also addressing fiduciary duties owed by employees, 15.4% (30) also addressing duties owed by agents or advisors and one (Quepasa Corporation) addressing duties owed by affiliates of directors or officers. In addition, two companies, Bankrate, Inc. and EverBank Financial Corp., took the more aggressive step of including fiduciary duties owed by officers or directors to creditors, while Phillips 66 included duties owed to creditors or "other constituents". Creditors and "other constituents" would likely argue that they cannot be bound by such clauses.

- (3) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, with 59.0% (115) of these provisions also covering claims pursuant to the corporation's charter and bylaws or trust agreement, in the case of a statutory trust; or

- (4) any action asserting a claim governed by the internal affairs doctrine.[11]

Oracle Corporation, which was one of the first Delaware corporations in the Study to adopt an exclusive forum provision, limited its forum selection provision to derivative actions. Direxion Shares ETF Trust II included a fifth category of actions: "any other action over which the Court of Chancery of the State of Delaware could exercise subject matter and personal jurisdiction." Altera Corporation, Applied Materials, Inc., Furniture Brands International, Inc., GSE Holding, Inc., LoopNet, Inc., SemiLEDs Corporation and Varian Medical Systems, Inc. each included an additional category of actions: "any action to interpret, apply, enforce, or determine the validity of" its charter or bylaws. As a practical matter, these categories overlap, reflecting a "belt and suspenders" effort to articulate the universe of claims covered by an exclusive forum provision.[12]

While most provisions are formulated around the four basic categories cited above, Biogen Idec, Inc., Cherokee Inc., Imperva, Inc., InvenSense, Inc., Life Technologies Corporation, Microsemi Corporation, Mindspeed Technologies, Inc., PURE Bioscience, Inc., Symantec Corporation and VMware, Inc. adopted forum selection clauses which seek to address the same general types of claims, but are differently phrased.[13] These ten corporations represent 5.1% of the companies analyzed.

- **When Adopted.** 96.9% (189) of the exclusive forum provisions were proposed or adopted following Vice Chancellor Laster's March 2010 suggestion in Revlon. Only six corporations cited in the Study, CKE Restaurants, Inc., Kennedy-Wilson Holdings, Inc., Netlist, Inc., Netsuite, Inc., Oracle Corporation and Standard Pacific Corporation, adopted exclusive forum provisions prior to 2010. Two corporations, Financial Engines, Inc. and Meru Networks, Inc., filed forms of charters including exclusive forum provisions as exhibits to their IPO registration statements prior to the Revlon decision, although the final provisions were adopted thereafter. At least 108 such exclusive forum provisions were adopted in 2011, and, based upon SEC filings, at least 38 other companies are seeking to adopt such provisions. **Figure 1** illustrates the number of forum provisions that were adopted from March 2010 through December 2011, while **Figure 2** separately breaks out the number of charter and bylaw provisions in each of those months.

- **Circumstances of Adoption.** 52.8% (103) of the provisions were adopted, or are in the process of being adopted, in connection with IPOs, 7.7% (15) in connection with spin-offs or reorganizations, 5.1% (10) in connection with reincorporating in Delaware, 2.6% (5) following shareholder approval and 2.6% (5) in connection with emerging from bankruptcy protection **(Figure 3)**.[14] In April 2011, the comparable percentages were 50.0%, 0%, 6.1%, 0% and 6.1%, respectively. AMN Healthcare Services, Inc. adopted an exclusive forum bylaw effective the day prior to entering into a merger agreement, while Curtiss-Wright Corporation adopted a forum selection bylaw shortly after losing its 2011 "Say on Pay" vote. That timing suggests both companies had concerns regarding strike suits being filed in jurisdictions other than Delaware.[15] Reflecting the difficult capital markets, 7.8% (8) of the IPO companies withdrew their registration statements. Apart from event-driven adoptions, at least 16 bylaws were adopted by boards of public companies on a stand-alone basis, while at least 46 were adopted concurrently with other bylaw amendments, often in connection with annual bylaw reviews. These two groups represent 8.2% and 23.6%, respectively, of the forum selection provisions in this Study.

- **Charter vs. Bylaw.** 55.9% (109) of the companies in the Study included forum selection provisions in their charters, 35.4% (69) in their bylaws,[16] 5.1% (10) in the trust agreements of statutory trusts and 3.6% (7) in both charters and bylaws **(Figure 4).** In April 2011, the comparable percentages were 51.2%, 43.9%, 2.4% and 2.4%, respectively. Of the 103 IPO companies, 88.3% (92) included a forum selection clause in their charters (or, in the case of trusts, their trust agreements), and two additional companies included provisions in both their charters and bylaws. The statistics cited in this paragraph presumably reflect an acknowledgement that charter amendments require both board and shareholder action, meaning that shareholders will not have the unilateral ability to modify such charter provisions. Moreover, as described below under "Enforceability Issues," a stronger case can be made for the enforceability of charter provisions. In that regard, it is not clear why any of the IPO companies elected to adopt a bylaw rather than a charter provision. All of the companies emerging from bankruptcy protection and all of the companies being spun-off/reorganized adopted charter provisions. 90% (9) of the companies seeking to reincorporate in Delaware adopted or are in the process of adopting forum selection provisions in charters or trust agreements, with two of those companies including forum selection provisions in both their charters and bylaws.

- **Lock-In.** Provisions adopted by a number of companies, including Acadia Healthcare Company, Affinia Group Holdings, Inc., Carbonite, Inc. and Smith Electric Vehicles Corporation, provide that shareholders may only repeal a forum provision by supermajority vote. Such lock-ins run counter to the general movement away from supermajority requirements.

- **Seeking Shareholder Approval.** Likely in response to potential concerns as to the enforceability of forum selection bylaws, a small number of companies have begun to seek shareholder approval of a charter amendment.

  - **2011**. Six corporations included charter amendment proposals in their 2011 proxy statements: The Allstate Corporation, Altera Corporation, DIRECTV, InsWeb Corporation (which had previously adopted a bylaw), Life Technologies Corporation (which also had previously adopted a bylaw) and Lighting Science Group, Inc. Allstate Corporation, Altera Corporation, DIRECTV and Life Technologies Technologies are S&P 500 constituents. Since these proposals are relatively new, shareholders were only beginning to examine the issues associated with forum selection in 2011. The proposals passed at Altera Corporation, DIRECTV, InsWeb Corporation, Life Technologies Corporation and Lighting Science Group, while the proposal at The Allstate Corporation failed. The Life Technologies Corporation proposal passed easily, likely due to the fact that it was bundled with charter amendments declassifying the board, while the DIRECTV and Altera Corporation proposals, which were presented on a stand-alone basis, were narrowly approved by 50.3% and 53.2%, respectively, of the shares outstanding. The stand-alone proposal at The Allstate Corporation failed after receiving support from only 41.7% of the shares outstanding.[17] The subsequent proposals at InsWeb Corporation and Lighting Science Group Corporation passed with support from 83.1% and 93.1%, respectively, of the shares outstanding. However, the outcome at these two companies is not representative since insiders hold significant blocks of stock at both.

    USA Truck, Inc. sought shareholder approval of certain bylaw amendments, and indicated that the board intended to adopt additional provisions, including a forum selection clause, thereafter. It is not clear why the company did not include the forum selection provision in the amendments put to a vote, since shareholder approval would have provided a stronger argument for enforceability.

  - **2012.** Only one company, Sally Beauty Holdings Corporation, has so far filed a proxy statement seeking shareholder approval of a forum selection provision for the 2012 proxy season. However, the majority of companies have not yet filed their proxy statements for 2012.

  - **Issues to Consider.** Practitioners should recognize that: (a) the two 2011 stand-alone proposals that passed at companies without significant insider ownership were approved by relatively narrow margins, (b) the relevant standard for approving a charter amendment is tied to shares outstanding, rather than votes cast, and (c) investors are generally not well-versed on this issue, which means additional solicitation materials and efforts may be needed, as evidenced by the additional solicitation materials filed by The Allstate Corporation and Altera Corporation. Prior to the 2011 proxy season, the only corporation known to have sought and obtained shareholder approval of a charter forum selection provision was Charter Communications, Inc., which obtained such approval by written consent as it was emerging from bankruptcy protection.

  - **ISS Recommendations.**

    - **2011.** ISS, the influential proxy advisory firm, announced that it would recommend against forum selection proposals during the 2011 proxy season unless a company had adopted the following four "best-practice governance features:"[18]

      - Annually elected board;
      - Majority vote standard in uncontested director elections;
      - A meaningful special meeting right (generally a 10 percent demand level without onerous restrictions on topics and timing); and
      - No poison pill, unless the pill was approved by shareholders.

Based upon these criteria, ISS recommended against the forum selection proposals at The Allstate Corporation, Altera Corporation and DIRECTV. At Life Technologies Corporation, ISS somewhat reluctantly recommended in favor of the charter amendment, which bundled board declassification with forum selection, noting that declassification would substantially increase board accountability and shareholder power. Seeking to avoid the possibility of additional companies intentionally bundling forum selection amendments with other charter amendments to facilitate shareholder approval, ISS cautioned that it might issue negative recommendations affecting exclusive venue provisions and director elections for issuers choosing to take that route.[19] ISS also indicated that it planned to revisit the issues associated with exclusive forum proposals over the summer of 2011 in connection with its annual policy review process.

- **2012.** In the Fall of 2011, ISS announced a modified pollicy. ISS will now make recommendations on a case-by-case basis, taking into account:

  - Whether the company has been materially harmed by shareholder litigation outside its jurisdiction of incorporation, based on disclosure in the company's proxy statement; and

  - Whether the company has the following "good governance" features:

    - An annually elected board;

    - A majority vote standard in uncontested director elections; and

    - The absence of a poison pill, unless the pill was approved by shareholders.

The primary changes from the 2011 policy involved: moving to a case-by-case evaluation, adding a company's litigation history to the list of factors to be examined and removing a meaningful special meeting right from the list of good governance features.[20]

- **Glass Lewis Recommendations.**[21]

  - **Forum Selection Proposals.** GL has indicated that it will generally recommend that shareholders vote against any bylaw or charter amendment providing for exclusive forum. Addressing the issue of bundling a forum selection provision with shareholder-friendly amendments, GL's policy indicates that if a forum selection provision is bundled, GL will weigh the benefits of the other bundled provisions when making a vote recommendation.

  - **Consequences of Adopting Forum Provision Without Shareholder Approval.** As a matter of "corporate accountability," GL's policy goes further than ISS', providing that if a board adopts a forum selection provision without shareholder approval or is seeking shareholder approval through a bundled charter or bylaw proposal, rather than as a separate proposal, it will recommend voting against the chairman of the governance committee.

  - **Consequences of IPO Companies Adopting Forum Provisions.** Addressing the growing number of forum selection provisions in the charters of IPO companies, GL's policy indicates that if a provision is adopted before an IPO, it will recommend voting against the chairman of the governance committee, or, in the absence of such a committee, the chairman of the board, who served during the period of time when the provision was adopted.

  - **Rationale.** According to GL, forum selection provisions are "not in the best interests of shareholders" and may discourage shareholder derivative claims by increasing the costs of such claims and making them more difficult to pursue. Additionally, GL believes that shareholders should be wary of limiting their legal recourse to one jurisdiction "without compelling evidence that it will benefit shareholders."

- **Opposition from Certain Institutional Investors.** While the publicly available proxy voting guidelines of the major fund groups do not address forum selection issues, the Council of Institutional Investors ("CII"), an association of pension funds and other employee benefit funds, foundations and endowments with combined assets exceeding $3 trillion, has adopted a policy opposing exclusive forum clauses: "U.S. companies should not attempt to restrict the venue for shareowner claims by adopting charter or bylaw provisions that seek to establish an exclusive forum."[22]

- **Arguments in Support of Management Proposals.** The arguments that have appeared in proxy statements in support of forum selection proposals include the following:

  - Delaware offers a system of specialized Chancery Courts to deal with corporate law questions, with streamlined procedures and processes that help provide relatively quick decisions;

  - These courts have developed considerable expertise in dealing with corporate law issues, as well as a substantial and influential body of case law construing Delaware's corporate law and long-standing precedent regarding corporate governance;

  - Delaware's well-developed body of case law provides shareholders with more certainty regarding the outcome of intra-corporate disputes; and

  - Having intra-corporate disputes heard in a Delaware court will help the company and its shareholders avoid costly and duplicative litigation, misapplication of Delaware law by another court and the possibility of inconsistent outcomes from courts in different jurisdictions.

- **Deemed Consent.** 50.3% (98) of the provisions state that those acquiring shares or any interest therein will be deemed to have notice of and to have consented to exclusive forum. WPX Energy, Inc. has taken the additional step of including a broad definition of "Person" in its deemed notice and consent clause. Most commonly, deemed consent clauses were adopted (or are in the process of being adopted) in connection with IPOs and are in charters. However, deemed consent clauses are increasingly common in bylaws. Of the six companies that put charter provisions to a shareholder vote during the 2011 proxy season, The Allstate Corporation, Altera Corporation, InsWeb Corporation and Lighting Science Group, Inc. chose to include "deemed consent" language. For 2012, Sally Beauty Holding is putting a charter amendment with deemed consent language before its shareholders. The deemed notice and consent clauses raise the question of why exclusive forum provisions, unlike other provisions, such as those in advance notice bylaws, should merit such treatment. Theoretically, by including deemed notice and consent provisions within exclusive forum clauses, but in no (or few) other provisions of charters or bylaws, companies could face an argument that shareholders did not have notice of and have not consented to other operative provisions in charters and bylaws. Charter and bylaw provisions are, however, generally viewed as binding upon all shareholders.[23] Shareholders who purchase shares prior to the adoption of a Delaware forum selection bylaw might argue that they did not consent to the board's adoption of such a provision, and have a vested right to sue in other jurisdictions. However, this argument is undercut by the provisions in bylaws which generally grant the board authority to amend bylaws, and put shareholders on notice of such possibility.[24] Nonetheless, in Galaviz, discussed below under "Enforceability Issues," the Federal District Court for the Northern District of California, in a case of first impression, appears to have accepted such a vested rights argument.

- **Opt-Out and Limitations.**

  - **Option to Select Alternative Forum.** 64.1% (125) of the provisions specify that the corporation may consent in writing to the selection of an alternative forum ("elective forum provisions"). The earliest forum selection provisions were mandatory, rather than elective. Mandatory provisions limit the ability of the company to proceed in an alternative forum where a suit has been filed, even if the board believes such an alternative might be advantageous, unless the forum selection clause is in the bylaws—and thus subject to amendment by the board. The plaintiffs' bar might argue that elective provisions allow the board, but not the shareholders, to engage in forum shopping and thus are not equitable.

Elective forum provisions first appeared in the charters of companies, including Financial Engines, Inc. and Primerica, Inc., beginning in March 2010. They began to appear in bylaws in September 2010, when Chevron Corporation adopted an elective forum selection bylaw. The percentage of companies adopting elective, rather than mandatory, forum clauses has steadily increased since April 2011 when the comparable percentage was 56.1%.

- **Absence of Jurisdiction; Alternate Jurisdiction.**

  - 7.7% (15) of the clauses provide for the Delaware Chancery Court to be the exclusive forum "to the fullest extent" permitted by law;

  - 24.6% (48) include a carve-out for situations in which the Court of Chancery does not have jurisdiction over the indispensable parties, with Avid Corporation having adopted a carve-out requiring that it be possible to join the party over whom the Court of Chancery does not have jurisdiction in another forum; and

  - 5.1% (10) include a carve-out for situations in which a federal court assumes exclusive jurisdiction, thus recognizing that federal courts may have exclusive jurisdiction over certain claims.

  All three categories reflect concerns as to the permissible scope of an enforceable forum selection clause, implicitly acknowledging that a forum selection clause cannot confer jurisdiction which does not otherwise exist.

  In addition, some companies have adopted provisions that address the possibility of other courts having jurisdiction over intra-corporate claims:

  - 2.6% (5) of the provisions in the Study permit jurisdiction in both state and federal courts in the State of Delaware;

  - 4.1% (8) of the provisions allow for jurisdiction in any other court in the State of Delaware if the Court of Chancery lacks subject matter jurisdiction, while one provides for jurisdiction in the Superior Court of the State of Delaware; and

  - With respect to situations in which the Court of Chancery lacks personal jurisdiction over an indispensable party, 2.6% (5) of the provisions provide for jurisdiction in the state or federal courts sitting in Delaware, while 1.5% (3) broadly provide for jurisdiction in "another" court in the U.S.

- **Concerns Regarding Retroactive Application.** The Boeing Company was the first company to expressly provide that its forum selection bylaw would only apply to acts or omissions occurring after adoption, thereby eliminating any argument that the issuer was seeking to have the provision apply retroactively. This language seems to respond to the Galaviz opinion, in which the court cited the potential retroactive effect of Oracle Corporation's forum selection bylaw. InsWeb Corporation included disclosure in its charter amendment proposal stating that adoption of the forum selection provision would not have an effect on pending derivative proceedings. However, it did not incorporate this concept into the provision itself.

- **Principal Place of Business of Companies in Study.** 31.2% (61) of the companies in the Study have their principal place of business in California, followed by 9.2% (18) in Illinois, 7.7% (15) in Texas, 6.2% (12) in New York, 5.1% (10) in each of Florida and Massachusetts and 4.6% (9) in Colorado, seemingly reflecting concerns about the poor litigation climate in some of those states. For example, in 2010, a study ranking the lawsuit climate in each of the 50 states, conducted for the Institute for Legal Reform, an affiliate of the US Chamber of Commerce, ranked: California-46, Illinois-45 and Florida-42.[25] The companies in the Study have their headquarters in 35 states and three foreign jurisdictions. **(Figure 5)**.

- **Industries in Study.** Based upon NAICs codes, 31.8% (62) of the companies in the Study are in manufacturing, followed by 14.9% (29) in finance and insurance, 9.7% (19) in information, 7.7% (15) in retail trade, 6.2% (12) in professional, scientific and technical services, 4.6% (9) in

mining, 4.1% (8) in real estate, rental and leasing and 3.6% (7) in transportation and warehousing **(Figure 6).** Of the 61 California-based companies in the Study, 39.3% (24) fall within the manufacturing category.

- **Risk Factor.** In addition to describing a forum selection clause in their disclosures regarding capital stock, ILFC Holdings, Inc., Lumos Networks, Inc. and Sunshine Health, Inc. took the extra step of including a separate risk factor regarding the potential impact of a forum selection clause in their IPO registration statements. Air Lease Corporation included a risk factor in its early IPO filings, but did not include this disclosure in its final prospectus.

- **Sponsors.** Of the IPO companies in the Study, at least 73.8% (76) had private equity or venture capital backing. This statistic suggests that private equity and venture capital firms are concerned about the costs and liability issues associated with litigating Delaware law issues outside Delaware, and thus find value in forum selection provisions. In that regard, it is not surprising that KKR & Co., L.P. included a forum selection provision in its limited partnership agreement. The Carlyle Group, L.P. originally planned to include such a clause in its limited partnership agreement, but its latest IPO filings provide for mandatory arbitration.

Enforceability Issues. In Revlon, Vice Chancellor Laster noted: "The issues implicated by an exclusive forum selection provision must await resolution in an appropriate case."[26] The extent to which federal courts and state courts in other jurisdictions will defer to the courts in Delaware on the basis of such provisions remains uncertain, with only one challenge to such a clause having been litigated to date.

- **First Challenge in Federal Court.** The first challenge to such a provision took place in Galaviz in connection with a shareholder derivative action against Oracle Corporation, alleging breach of fiduciary duty, abuse of control and unjust enrichment based upon the False Claims Act. The suit was brought in the Federal District Court for the Northern District of California where Oracle is headquartered. Oracle unsuccessfully sought to have the suit dismissed on the basis of improper venue, in light of the forum selection bylaw adopted by the company in 2006. Analyzing the issue from the viewpoint of contractual forum clauses, the court focused upon the fact that the bylaw was adopted without shareholder approval:

  > the venue provision was unilaterally adopted by the directors who are defendants in this action, after the majority of the purported wrongdoing is alleged to have occurred, and without the consent of existing shareholders who acquired their shares when no such bylaw was in effect. Under these circumstances, there is no basis for the Court to disregard the plaintiffs' choice of forum, which Oracle does not contend is otherwise improper on any ground, or so inconvenient as to warrant a transfer to another federal court. . . .[27]

  Having reached this conclusion on the basis of federal common law,[28] the Court did not address the underlying question of whether the adoption of the bylaw was within the power of Oracle's directors under Delaware corporate law. The opinion also leaves open the question of whether subsequent purchasers of Oracle stock would be bound by the bylaw amendment. The Court did, however, indicate in dicta that it might be more difficult to challenge the enforceability of a charter amendment:

  > Certainly were a majority of shareholders to approve such a charter amendment, the arguments for treating the venue provision like those in commercial contracts would be much stronger, even in the case of a plaintiff shareholder who had personally voted against the amendment.[29]

  While some practitioners expected the January 2011 Galaviz decision to slow the rate at which forum selection provisions would be adopted or counseled clients to consider the unsettled state of the law before adopting such provisions,[30] the number of bylaws adopted in February 2011 spiked and the pace at which bylaws were adopted in 2011 exceeded the 2010 pace. See **Figures 1 and 2.**

- **Allegations of Invalidity in State Court.** In connection with a purported class action brought in the Superior Court of New Jersey with respect to Medquist Holdings, Inc.'s exchange offer for shares of its subsidiary, shareholders of the subsidiary alleged that the forum selection clause adopted by Medquist Holdings, Inc. is invalid. However, the complaint indicates that the validity of such provision is "an issue for another day" to be raised by a parent company shareholder.[31]

- **Delaware Upholds Non-Delaware Forum Selection Clause in Stockholders' Agreement.** In May 2010, in Baker v. Impact Holding, Inc.,[32] the Delaware Chancery Court upheld a forum selection clause in a stockholders' agreement providing for exclusive jurisdiction in the federal and state courts located in Texas. In the opinion, the Court noted: "there is no statute or other clear indication of a legislative intent to limit the scope of forum selection clauses with respect to corporations and Delaware courts routinely enforce such forum selection clauses, even where they mandate exclusive foreign jurisdiction." Thus, with respect to contractual forum selection clauses, Delaware has shown a willingness to enforce provisions that provide for a forum outside Delaware.

- **Permissible Scope.** As to the permissible scope of a Delaware bylaw, Section 109(b) of the Delaware General Corporation Law ("DGCL") provides that "bylaws may contain any provision not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers, or employees." Arguably, a forum selection bylaw relates to the "business of the corporation," the "conduct of its affairs" and the "rights or powers of its stockholders," although the issue is not entirely free from doubt. Section 102(b)(1) of the DGCL provides that the charter may contain:

  > Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders . . . if such provisions are not contrary to the laws of this State. Any provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation.

  In determining what is "inconsistent with law" or "contrary" to laws, courts generally presume that forum selection clauses are enforceable and that this presumption may only be overcome if the challenging party can meet the "heavy burden" of showing that enforcement of the clause is unreasonable, unfair or unjust.[33]

- **Securities and Exchange Commission ("SEC") Concerns.** Notably, in connection with its review of the IPO registration statement for Groupon, Inc., the SEC included the following comment in an October 3, 2011 letter to the company: "Please explain to us, and revise as applicable to address, the enforceability of the choice of forum provisions in your certificate of incorporation." Groupon, Inc. went public with the exclusive forum provision in its charter.

Provisions Adopted by Alternative Entities. Although this Study focuses upon corporations, it includes a listing of 27 public limited partnerships ("LPs") and public limited liability companies ("LLCs") that have adopted forum selection provisions. 66.7% (18) of these companies are in energy-related businesses, consistent with the origins of master limited partnerships. All of these provisions were proposed or adopted in connection with IPOs. The LLC and LP forum selection provisions resemble, in general terms, those contained in charters and bylaws. The majority of these provisions cover claims, suits, actions and proceedings:

- (1) arising out of or relating in any way to the partnership agreement (including any claims, suits or actions to interpret, apply or enforce the provisions of such agreement or the duties, obligations or liabilities among partners or of partners to the partnership or the rights or powers of, or restrictions on, the partners or partnership);

- (2) brought in a derivative manner on behalf of the partnership;

- (3) asserting a claim of breach of a fiduciary duty owed by any director or officer of the partnership or the general partner, or owed by the general partner, to the partnership or the partners (with 74.1% (20) of the provisions also addressing fiduciary duties of employees);

- (4) asserting a claim arising pursuant to any provision of the Delaware Revised Uniform Limited Partnership Act; or

- (5) asserting a claim governed by the internal affairs doctrine.

The provisions in LLC operating agreements are modified to include LLC-specific language.[34]

Some companies have elected to address potential limitations on jurisdiction or alternative jurisdiction:

- 25.9% (7) have provisions stating that if the Court of Chancery lacks subject matter jurisdiction, claims may be brought in any other court in the state of Delaware with subject matter jurisdiction;

- 7.4% (2) have provisions allowing for jurisdiction in the state or federal courts in the state of Delaware; and

- 14.8% (4) have provisions stating that the specified court or courts will have exclusive jurisdiction "to the fullest extent permitted by applicable law."

Existing Delaware authority supports the enforceability of forum selection clauses in the context of a Delaware LLC. For example, in Elf Atochem N. Am. Inc. v. Jaffari[35] the Delaware Supreme Court held that a forum selection clause in an LLC agreement providing for arbitration or litigation of intra-party disputes exclusively in California was permissible because the Delaware Limited Liability Company Act, which is intended to give maximum effect to the principle of freedom of contract and to the enforceability of LLC agreements, does not expressly bar such clauses.[36]

What Lies Ahead? In view of the steadily increasing number of forum selection provisions in charters and bylaws and the unsettled state of the law, it seems likely that additional plaintiffs will challenge the enforceability of such provisions (particularly if they are included in bylaws), and practitioners will continue to refine the prevailing model in response to case law. With a view toward proactively addressing potential grounds for challenges and securing shareholder approval, as appropriate, companies should:

- Consider whether obtaining shareholder approval of a charter amendment is a realistic possibility since a charter provision is more likely to withstand a challenge;

    - If so, provide a compelling rationale for the provision that, as applicable, addresses how the company's prior experience litigating Delaware issues in non-Delaware courts or in multiple jurisdictions harmed the company. Additionally, discuss the governance practices (such as a declassified board, majority vote standard in director elections and absence of a non-shareholder approved poison pill) demonstrating the board's stewardship of the company. Such disclosures address the criteria in ISS' policy, and help shareholders understand why the board believes a forum selection provision is in their best interests.

    - Analyze your shareholder base to determine what percentage of shareholders will follow or take into account ISS or GL voting recommendations, and determine whether any of the company's institutional shareholders have adopted their own policies on forum selection provisions;

    - Be prepared for the additional solicitation efforts which may be necessary to educate investors and secure approval;

- Consider an elective (rather than mandatory) forum provision, in order to maximize the board's flexibility. Note, however, that the plaintiffs' bar might argue that these provisions effectively permit the board, but not the shareholders, to forum shop and thus are not equitable;

- Consider the timing of adoption in relation to other events at the company which could result in potential litigation;

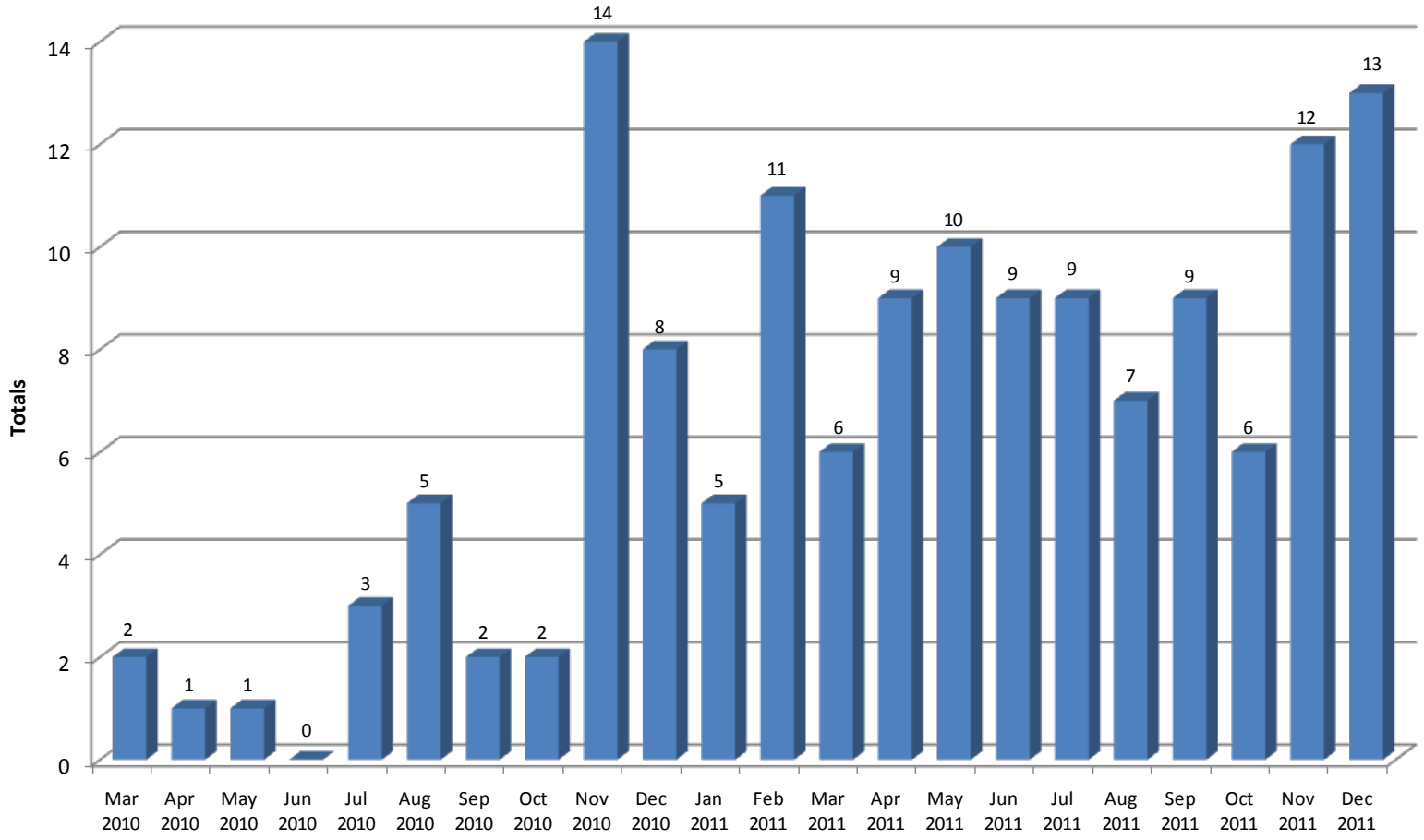
- Provide appropriate disclosure in SEC filings**,** including, as appropriate, in risk factors, so that shareholders are on notice of the forum selection provision and the associated limitation on their right to sue in other jurisdictions; and

- Recognize the real-world possibility that, although the company believes litigating in the Court of Chancery is in the best interests of the company and its shareholders, state courts in other jurisdictions or federal courts may not be willing to defer to the Court of Chancery.

The shareholder proposals requesting that boards repeal forum selection bylaws adopted without shareholder approval raise a number of questions, including how many will ultimately appear in 2012 proxy statements and what support levels will look like if the proposals go to a vote. The outcome of these proposals, the on-going implications of Galaviz, the policies adopted by ISS and GL for 2012, and the potential difficulties associated with obtaining shareholder approval of charter provisions all have the potential to affect a public company's decision whether to adopt a forum selection provision, and if so, in what form.

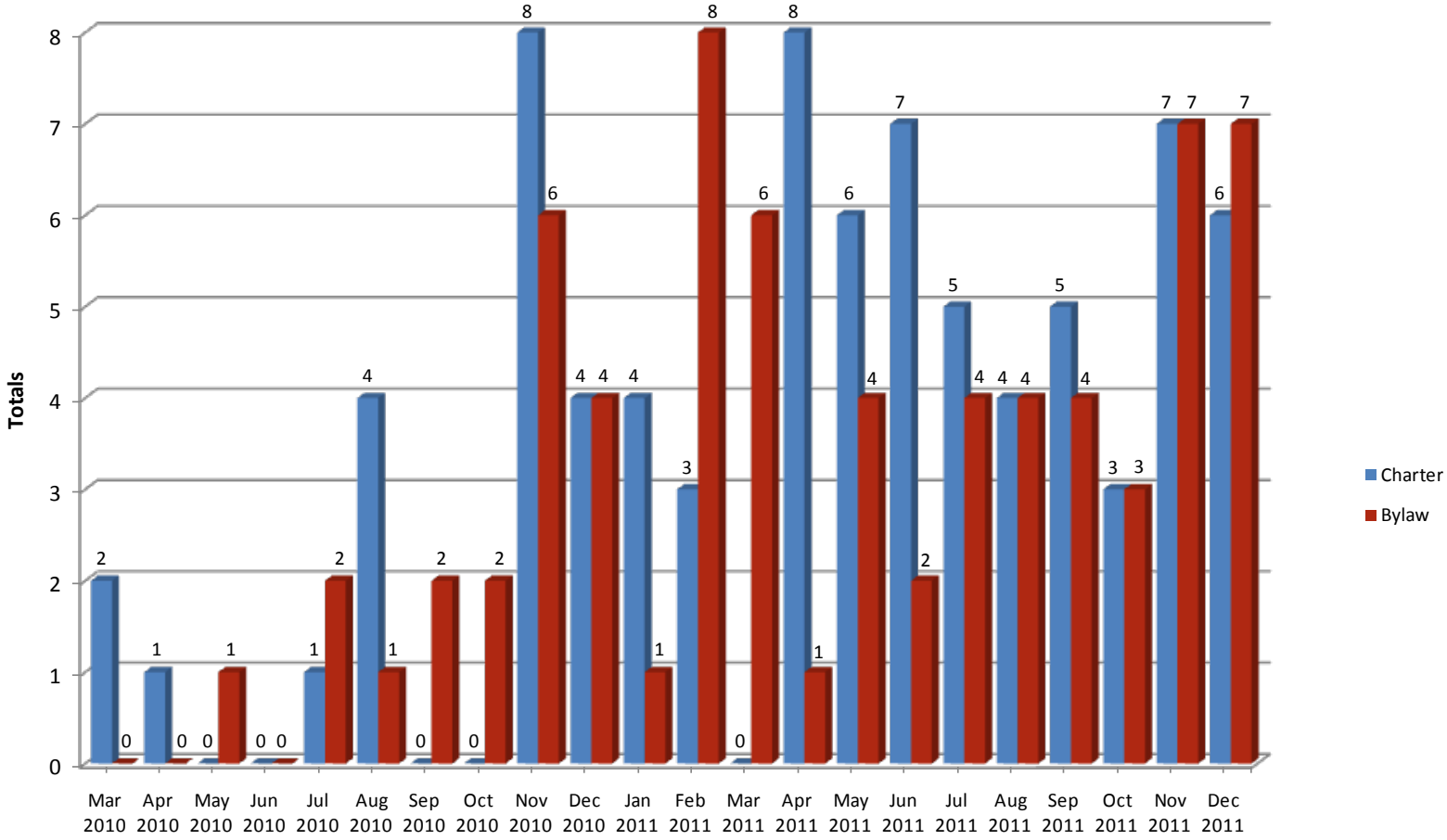
Comments, questions or requests for an updated Study should be directed to:
Claudia H. Allen
Partner and Co-Chair
Corporate Governance Practice
Katten Muchin Rosenman LLP
525 West Monroe Street
Chicago, IL 60661-3693
P / +1.312.902.5432
F / +1.312.902.1061
claudia.allen@kattenlaw.com
www.kattenlaw.com

Adoption of Forum Selection Provisions By Month (March 2010 - December 2011)



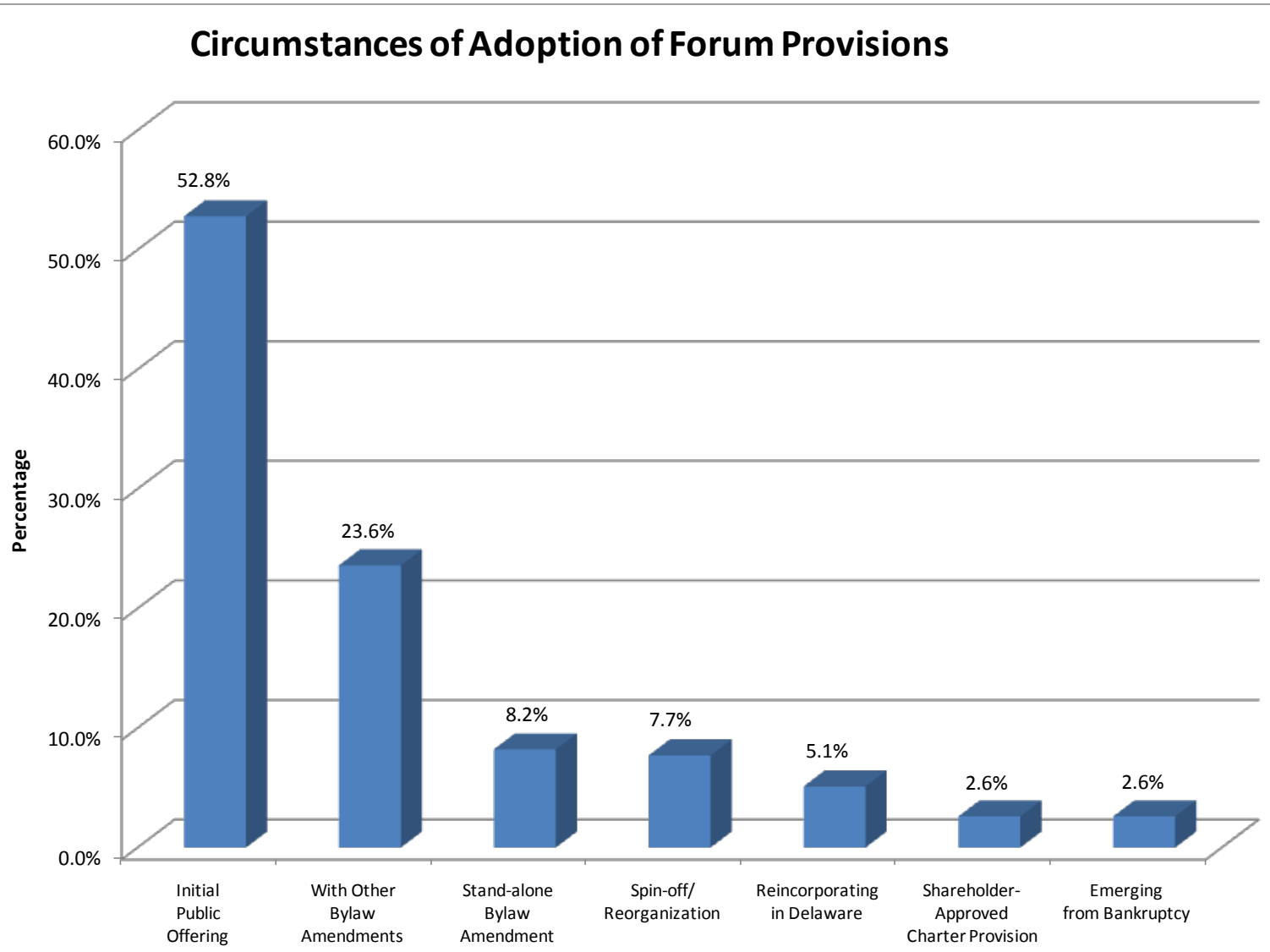
Note: Reflects date of adoption (and not, as applicable, date on which form of charter or bylaw first filed with SEC).

Figure 1



Note: Reflects date of adoption (and not, as applicable, date on which form of charter or bylaw first filed with SEC). For companies that adopted both bylaw and charter provisions, each date of adoption is reflected. Trust agreement provisions were recorded as charter provisions.

Figure 2



Note: Companies that fall within more than one category are included in each such category. Thus, percentages total more than 100%.

Figure 3

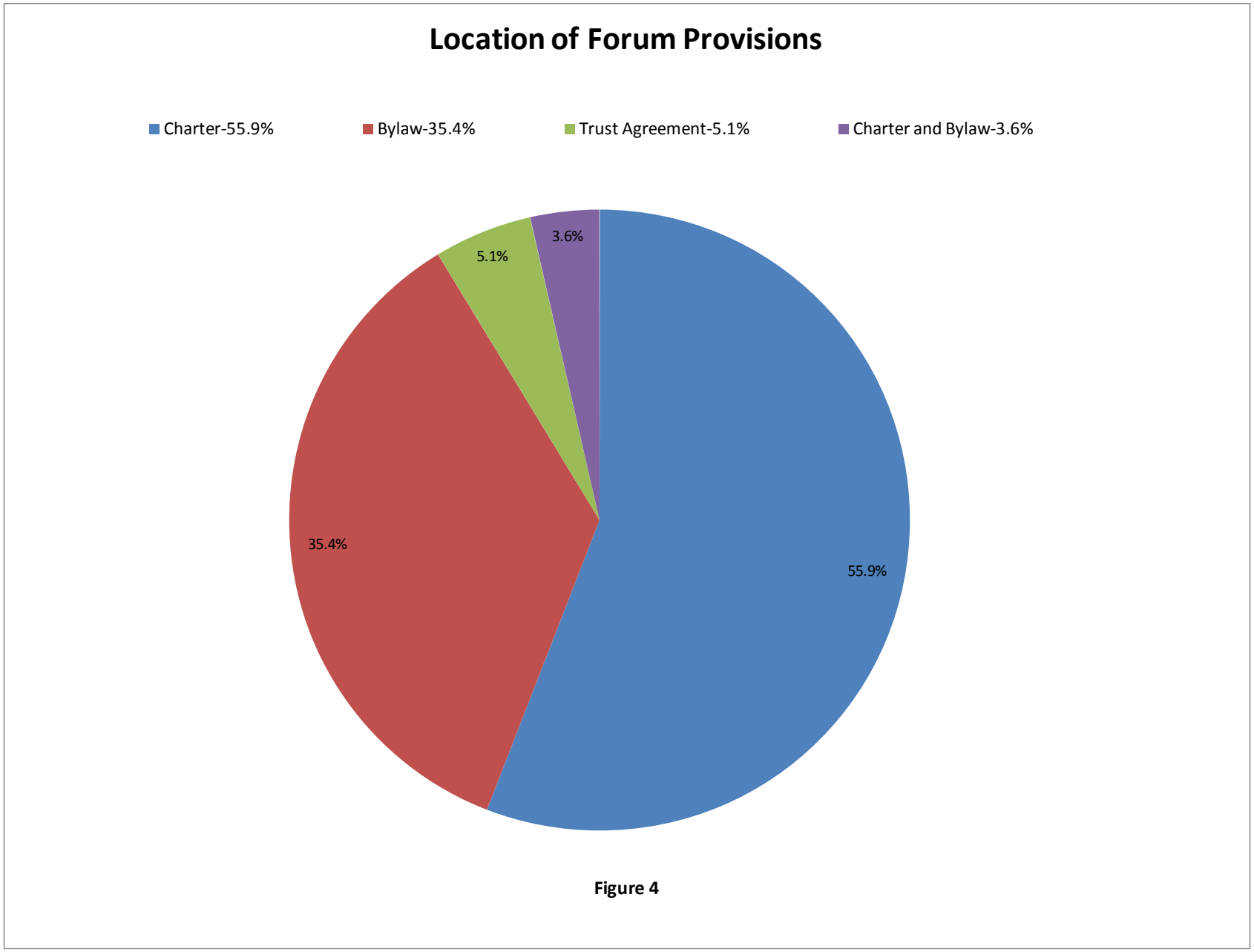

Location of Forum Provisions
Charter-55.9%
Bylaw-35.4%
Trust Agreement-5.1%
Charter and Bylaw-3.6%
3.6%
5.1%
35.4%
55.9%

Figure 4

Principal Place of Business of Companies in Study

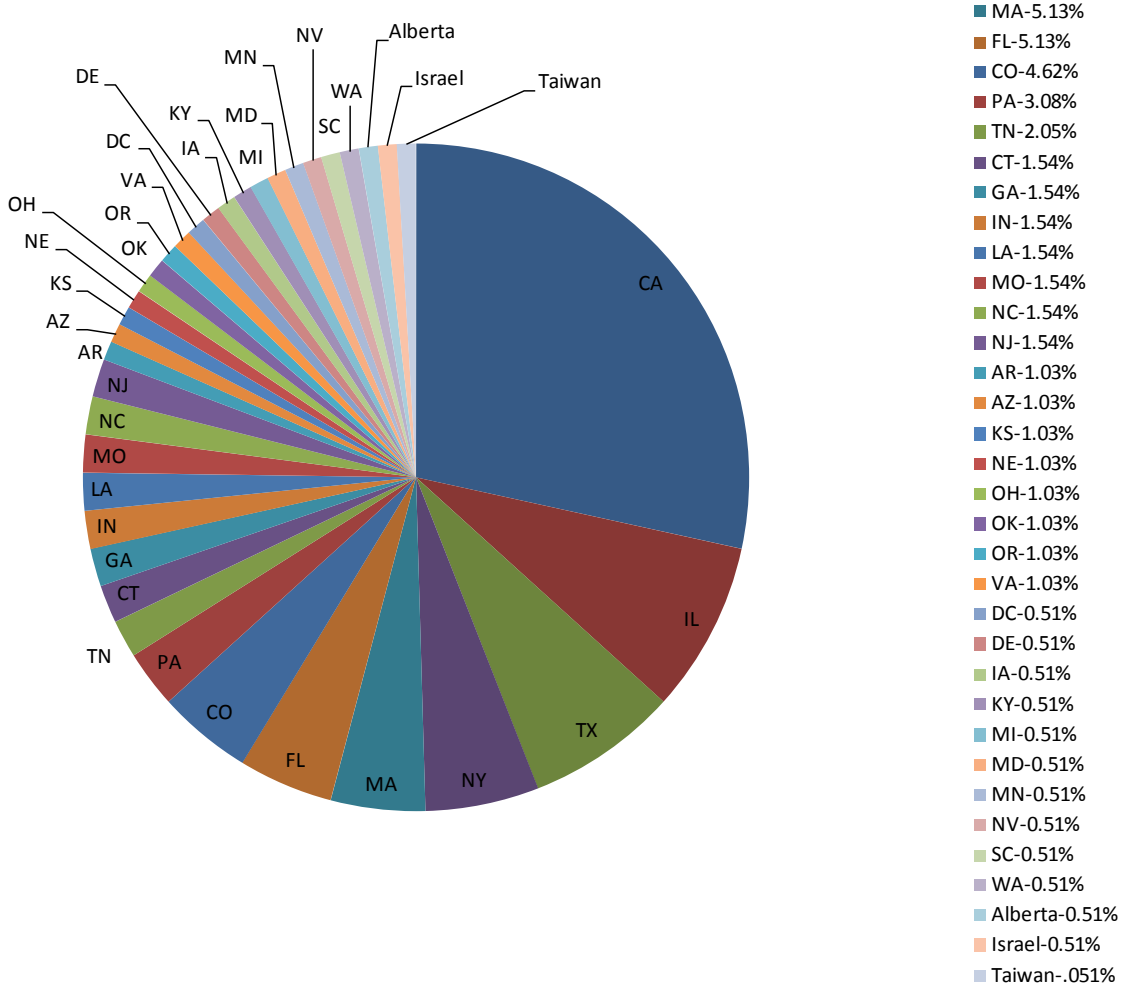
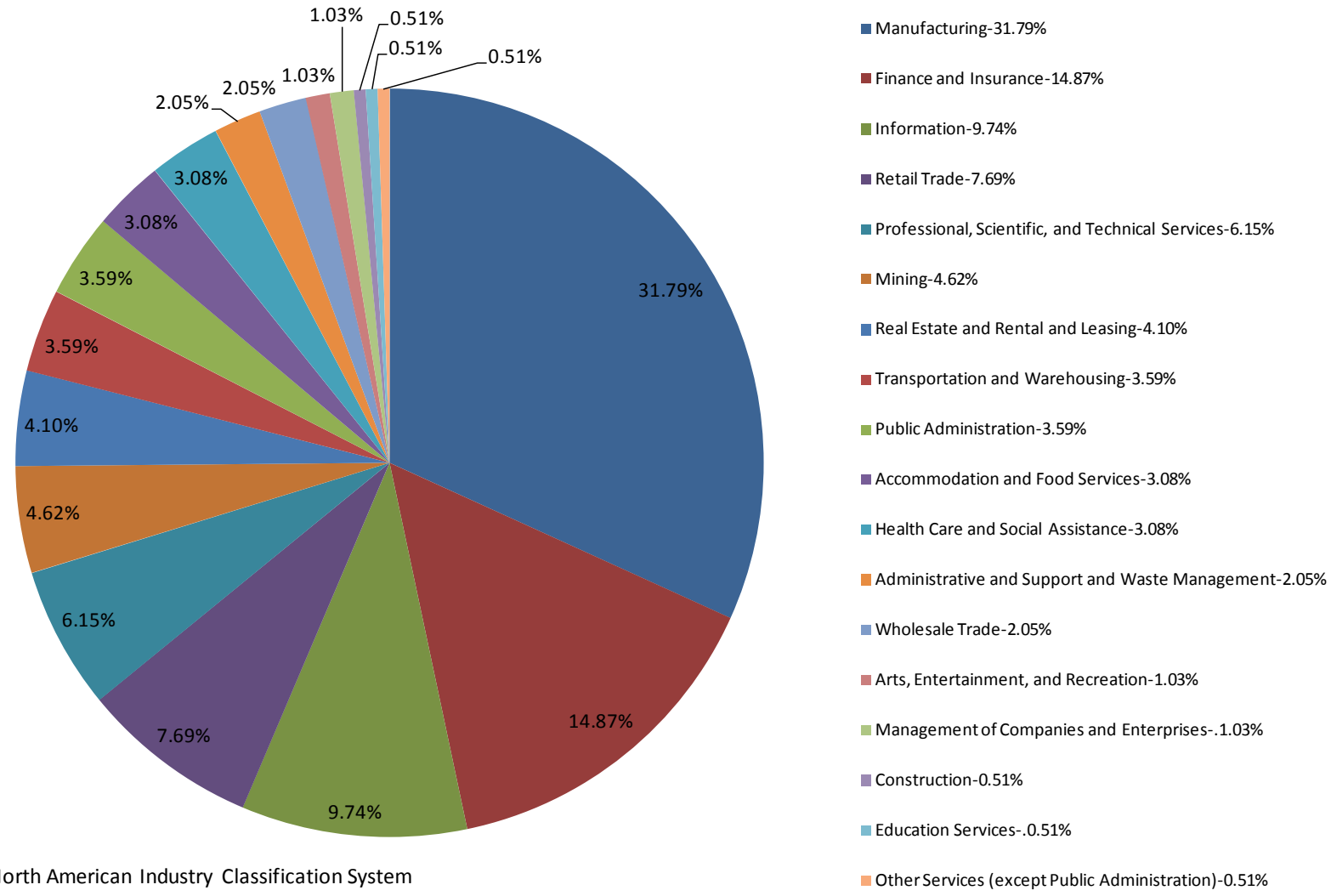


Figure 5

Breakdown of Companies by NAICS* Industry Sector



*North American Industry Classification System

Figure 6

List of Companies Analyzed in Study of Delaware Forum Selection in Charters and Bylaws[37]

Acadia Healthcare Company

ADVENTRX Pharmaceuticals, Inc.

Affinia Group Holdings, Inc.

Air Lease Corporation

Air Products and Chemicals, Inc.

Alliance Data Systems Corporation

Allison Transmission Holdings, Inc.

The Allstate Corporation

Altera Corporation

Amcol International Corporation

American Tower Corporation

AMN Healthcare Services Inc.

Angie's List, Inc.

Apache Design Solutions, Inc.

Applied Materials, Inc.

Applied Micro Circuits Corporation

Assurant, Inc.

Aurora Diagnostics, Inc.

AutoNation, Inc.

Avenue Income Credit Strategies Fund

Avid Technology, Inc.

Bankrate, Inc.

Berkshire Hathaway Inc.

Biogen Idec, Inc.

Blackstone/GSO Floating Rate High Income Fund

Blackstone/GSO Long-Short Credit Income Fund

Blount International, Inc.

Bob Evans Farms, Inc.

The Boeing Company

Booz Allen Hamilton Holding Corporation

BrightSource Energy, Inc.

Brookfield Investment Funds

Caesar's Entertainment Corporation (f/k/a Harrah's Entertainment, Inc.)

CafePress, Inc.

Carbonite, Inc.

Centre Lane Investment Corp.

Charter Communications, Inc.

Chemtura Corporation

Cherokee Inc.

Chevron Corporation

CKE Restaurants, Inc.

Clovis Oncology, Inc.

Copart, Inc.

CTPartners Executive Search, Inc.

Curtiss-Wright Corporation

Danaher Corporation

Delphi Financial Group, Inc.

Demand Media, Inc.

diaDexus, Inc. (f/k/a VaxGen, Inc.)

DIRECTV

Direxion Shares ETF Trust II

Domus Holdings Corp.

Dunkin' Brands Group, Inc.

Dynamic Offshore Resources, Inc.

Edgen Group

Envestnet, Inc.

Einstein Noah Restaurant Group, Inc.

Envivio, Inc.

Enova International, Inc.

EP Energy Corporation

Era Group, Inc.

EverBank Financial Corp.

ExamWorks Group, Inc.

FedEx Corporation

Financial Engines, Inc.

Fortune Brands Home & Security, Inc.

Francesca's Holdings Corporation

Franklin Resources, Inc.

FS Energy & Power Fund

Fulcrum BioEnergy, Inc.

Furniture Brands International, Inc.

FXCM Inc.

General Growth Properties, Inc.

Gevo, Inc.

Gordmans Stores, Inc.

GNC Acquisition Holdings, Inc.

Grand Canyon Education, Inc.

Great White Energy Services, Inc.

Green Ballast, Inc.

Groupon, Inc.

GSE Holding, Inc.

Howard Hughes Corporation

Idex Corporation

ILFC Holdings, Inc.

ImmunoCellular Therapeutics, Ltd.

Imperva, Inc.

Inphi Corporation

InSite Vision Incorporated

InsWeb Corporation

IntelePeer, Inc.

Intermolecular, Inc.

Intrepid Potash, Inc.

InvenSense, Inc.

IronPlanet, Inc.

iShares U.S. ETF Trust

Jack in the Box Inc.

Kennedy-Wilson Holdings, Inc.

Kensey Nash Corporation

Lam Research Corporation

Landstar System Inc.

Laredo Petroleum Holdings, Inc.

List of Companies Analyzed in Study of Delaware Forum Selection in Charters and Bylaws
(cont'd)

Lexmark International, Inc.

Liberty Media Corporation (f/k/a Liberty Splitco)

Liberty Mutual Agency Corporation

Life Technologies Corporation

Lighting Science Corporation

LinkedIn Corporation

Live Nation Entertainment, Inc.

Lone Pine Resources, Inc.

LoopNet, Inc.

LPL Investment Holdings Inc.

Luca Technologies, Inc.

Lumos Networks Corp.

Marathon Petroleum Corporation

Marriott Vacations Worldwide Corporation

Mattress Firm Holding Corp.

Mattson Technology, Inc.

McDonald's Corporation

MedQuist Holdings Inc. (f/k/a CBay Systems Holdings Limited)

Meru Networks, Inc.

MetroPCS Communications, Inc.

Microsemi Corporation

Mindspeed Technologies, Inc.

ModusLink Global Solutions, Inc.

Mountain Valley Spring Company

Myriant Corporation

Navistar International Corporation

NeoPhotonics Corporation

Netlist, Inc.

Netsuite, Inc.

Newgistics, Inc.

New Mountain Finance Corporation

New Mountain Finance AIV Holdings Corporation

Nexcore Healthcare Capital Corp. (f/k/a CapTerra Financial Corporation)

Nucor Corporation

O'Connor Fund of Funds Multistrategy

Oppenheimer Variable Account Funds/Panorama Series Fund, Inc.

Oracle Corporation

Orchard Supply Hardware Stores Corporation

Pandora Media, Inc.

Phillips 66

priceline.com Incorporated

Primerica, Inc.

Private Advisors Alternative Strategies Master Fund

Proofpoint, Inc.

PURE Bioscience, Inc.

Quepasa Corporation

Regional Management Corp.

Remy International, Inc.

Renewable Energy Group, Inc.

Rexnord Corporation

Roper Industries, Inc.

Rouse Properties, Inc.

RPX Corporation

RXi Pharmaceuticals Corporation

Sabre Industries, Inc.

Sagent Pharmaceuticals, Inc. (f/k/a Sagent Holding Co.)

Sally Beauty Holdings, Inc.

Sanchez Energy Corporation

SemiLEDs Corporation

Smith Electric Vehicles Corp.

The Spectranetics Corporation

Spirit Airlines, Inc.

SPX Corporation

SRAM International Corporation

Standard Pacific Corp.

Sunshine Heart, Inc.

Sunshine Silver Mines, Inc.,

Superior Energy Services, Inc.

Swift Transportation Company

Symantec Corporation

Team, Inc.

Teavana Holdings, Inc.

Tilly's, Inc.

TMS International Corp.

TransUnion Corporation

Trustwave Holdings, Inc.

Tumi Holdings, Inc.

TVAX Biomedical, Inc.

United Rentals, Inc.

USA Truck, Inc.

U.S. Concrete, Inc.

U.S. Silica Holdings, Inc.

Varian Medical Systems, Inc.

Viacom Inc.

VMware, Inc.

Wesco Aircraft Holdings, Inc.

WhiteGlove House Call Health, Inc.

WhiteSmoke, Inc.

Williams-Sonoma, Inc.

WPX Energy, Inc.

Yelp! Inc.

YRC Worldwide Inc.

Zebra Technologies Corporation

Zix Corporation

Zynga Inc.

List of Delaware LLCs and LPs Analyzed

ALST Casino Holdco, LLC

American Midstream Partners, LP

American Pacific Investcorp LP

Atlas Resource Partners, L.P.

The Carlyle Group, L.P.

Chesapeake Midstream Partners, L.P.

Compressco Partners, L.P.

CVR Partners, LP

Inergy Midstream L.P.

KKR & Co. L.P.

LRR Energy, L.P.

Magnachip Semiconductor LLC

Memorial Production Partners LP

Mid-Con Energy Partners, LP

NGL Energy Partners LP

Niska Gas Storage Partners LLC

Oiltanking Partners, L.P.

Oxford Resource

Partners LP

PetroLogistics LP

Pioneer Southwest Energy Partners L.P.

QR Energy LP

Rentech Nitrogen Partners LP

Rhino Resource Partners LP

Rose Rock Midstream, L.P.

Sprague Resources LP

Tesoro Logistics LP

USA Compression Partners, LP

ENDNOTES

[1] No. C 10-3392, 2011 WL 135215 (N.D. Cal. Jan. 3, 2011)[hereinafter "Galaviz"].

[2] Note that the 2010 statistic is based upon a partial year since the first 2010 provision was adopted in March.

[3] 990 A.2d 940 (Del. Ch. Mar. 16, 2010) [hereinafter, "Revlon"].

[4] Id. at 960. According to the Delaware Division of Corporations, more than 50% of all U.S. publicly-traded companies and 63% of the Fortune 500 are incorporated in Delaware. Delaware Division of Corporations, http://corp.delaware.gov/ (last visited Jan. 7, 2012).

[5] Generally, courts will give first-filed complaints preference in determining the forum, absent overriding considerations or near contemporaneous filing. See McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281 (Del. 1970); In re Topps Co. Shareholders Litig., 924 A.2d 951, 957 (Del. Ch. 2007).

[6] See e.g., Sara Lewis, Transforming the "Anywhere but Chancery" Problem into the "Nowhere but Chancery" Solution, 14 Stan. J.L. Bus. & Fin. 199 (2008-2009) [hereinafter, "Lewis"]; Ted Mirvis, Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions, 7 The M&A J. 17 (2007); William Savitt, Exclusive Venue Provisions for Corporate Cases, Natl. L.J. (Jun. 7, 2010) [hereinafter, "Savitt"]; Charles M. Nathan, Designating Delaware as the Exclusive Jurisdiction for Intra-Corporate Disputes, The Harvard Law School Forum on Corp. Gov. and Fin. Reg. (May 11, 2010) [hereinafter "Nathan"]; John Armour, Bernard Black & Brian Cheffins, Delaware's Balancing Act (Dec. 21, 2011) (European Corp. Gov. Inst. Law Working Paper No. 167/2010, Northwestern L. & Econ. Research Paper No. 10-04, Oxford Legal Studies Research Paper No. 64/2010, available at SSRN: http://ssrn.com/abstract=1677400) [hereinafter "Balancing Act"]; Faith Stevelman, Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law, 34 Del. J. Corp. L. 57, 133-35 (2009); Joseph A. Grundfest, Choice of Forum Provisions in Intra-Corporate Litigation: Mandatory and Elective Approaches, The 2010 Pileggi Lecture, (Oct. 8, 2010) (Rock Center for Corp. Gov. at Stanford University Working Paper No. 91, available at SSRN: http://ssrn.com/abstract=1690561) [hereinafter "Grundfest"]; Steven M. Davidoff, A Litigation Plan that Would Favor Delaware, The New York Times DealBook (Oct. 26, 2010) (available at http://dealbook.nytimes.com/2010/10/26/a-litigation-plan-that-would-favor-delaware/). See also Scully v. Nighthawk Radiology Holdings, Inc., C.A. No. 5890-VCL (Mar. 11, 2011)(Brief of Special Counsel)(addressing, among other issues, forum-shopping and potential collusion in the context of multi-jurisdictional class actions).

[7] For example, a state law claim could potentially be filed in federal court on the basis of diversity jurisdiction. In addition, a plaintiff may bring a pendent state law claim for breach of fiduciary duty in connection with a federal securities law claim. See Balancing Act at 8.

[8] According to Savitt, "[r]oughly 50% of mergers and acquisitions transactions announced by Delaware-incorporated companies generates this sort of duplicative litigation." See also, Edward Micheletti and Cliff Gardner, M&A Shareholder Litigation: A Year in Review, Law360 (Jan. 12, 2012)("In nearly every deal litigation matter, the plaintiffs' counsel attempt to create leverage for themselves by filing deal litigation raising issues of Delaware law not only in Delaware, but also in a non-Delaware forum.").

[9] In Re Allion Healthcare Inc. S'holders Litig., C.A. No. 5022-CC, 2011 WL 1135016 at *4 (Del. Ch. Mar. 29, 2011).

[10] Netsuite, Inc., Amended and Restated Certificate of Incorporation, as of Dec. 21, 2007. Filed as Exhibit 3.1 to Current Report on Form 8-K filed on Dec. 26, 2007 (available at http://www.sec.gov/Archives/edgar/data/1117106/000119312507271425/dex31.htm).

[11] The internal affairs doctrine is "a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders . . . ." Edgar v. Mite Corp., 457 U.S. 624, 645 (1982).

[12] Apparently reflecting logic similar to that underlying Delaware forum selection provisions:

> AMERCO, a Nevada corporation, adopted a Nevada forum selection bylaw, effective Sept. 8, 2010, which covers the four enumerated categories of actions described above. See Item 5.03 and Article X of Exhibit 3.1 to the Current Report on Form 8-K filed on Sept. 10, 2010 (available at http://www.sec.gov/Archives/edgar/data/4457/000000445710000037/body.htm and

http://www.sec.gov/Archives/edgar/data/4457/000000445710000037/ex31.htm, respectively).

Neuberger Berman Flexible High Income Fund Inc. adopted a Maryland forum selection charter provision on Jan. 21, 2011 that is similar to the prevailing model, although it provides for jurisdiction in state as well as federal courts:

> The federal or state courts in Maryland shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of a breach of these Articles or the Corporation's Bylaws or a claim of breach of fiduciary duty to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim against the Corporation arising under the Maryland General Corporation Law or these Articles or the Corporation's Bylaws, (iv) any other action asserting a claim by stockholders which is governed by the internal affairs or an analogous doctrine, and (v) any other action over which the federal or state courts in Maryland could exercise subject matter and personal jurisdiction.

See Exhibit 99.2A of Form N-2 filed on Jan. 21, 2011 (available at http://www.sec.gov/Archives/edgar/data/1509664/000089843211000048/exhibit.htm).

MakeMusic, Inc. adopted a Minnesota forum selection bylaw on July 28, 2011 that largely covers the four enumerated categories of actions. See Item 5.03 and Article VI.7 of Exhibit 3.1 to the Current Report on Form 8-K filed on Aug. 3, 2011 (available at http://www.sec.gov/Archives/edgar/data/920707/000119312511208223/d8k.htm and http://www.sec.gov/Archives/edgar/data/920707/000119312511208223/dex31.htm, respectively).

Itron, Inc., a Washington corporation, adopted a Washington forum selection bylaw on Aug. 31, 2011 that also largely covers the four enumerated categories. See Item 5.03 and Section 12 of Exhibit 3.1 to the Current Report on Form 8-K filed on Sept. 7, 2011 (available at http://www.sec.gov/Archives/edgar/data/780571/000078057111000009/form8-kleroyxmalcolm.htm and http://www.sec.gov/Archives/edgar/data/780571/000078057111000009/itriex32amendedandrestated.htm, respectively).

Holiday Acquisition Company, Inc., a Colorado corporation, and a subsidiary guarantor of Emergency Medical Services Corporation, adopted a Colorado forum selection bylaw that largely covers the four enumerated categories. See Exhibit 3.132 to Registration Statement on Form S-4 filed on Sept. 27, 2011 (available at http://www.sec.gov/Archives/edgar/data/1277610/000104746911008231/a2204534zex-3_132.htm).

Pacific Entertainment Corporation, a California corporation, which is reincorporating in Nevada, intends to adopt a Nevada forum selection provision that largely tracks the prevailing model. See Definitive Information Statement on Schedule 14C at 17, filed on Sept. 21, 2011 (available at http://www.sec.gov/Archives/edgar/data/1355848/000101968711003055/pacent_def14c.htm).

Aceto Corporation, a New York corporation, adopted a forum selection bylaw on Dec. 1, 2011 that largely covers the four enumerated categories of actions. The bylaw provides for exclusive jurisdiction in the Supreme Court of New York. See Item 5.03 and Exhibit 3.1 to Current Report on Form 8-K filed on Dec. 5, 2011 (available at http://www.sec.gov/Archives/edgar/data/2034/000118811211003406/t72105_8k.htm and http://www.sec.gov/Archives/edgar/data/2034/000118811211003406/ex3-1.htm, respectively).

First M & F Corporation, a Mississippi corporation, adopted a forum selection bylaw on Dec. 14, 2011 that largely covers the four enumerated categories, and provides for exclusive jurisdiction in the state courts located in Attala County, Mississippi and the federal court for the Northern District of Mississippi. See Item 5.03 and Article X of Exhibit 3.1 to the Current Report on Form 8-K filed on Dec. 20, 2011 (available at http://www.sec.gov/Archives/edgar/data/320387/000032038711000005/december2011by-lawchange8k.htm and http://www.sec.gov/Archives/edgar/data/320387/000032038711000005/exhibit31.htm, respectively).

On June 14, 2010, Intrusion, Inc., a Delaware corporation, adopted a restated certificate of incorporation that includes New York forum selection clauses in two series of preferred stock. These clauses do not include the four enumerated categories. Rather, they appear to be transaction-specific:

> Each party agrees that all legal proceedings concerning the interpretation [sic], enforcement and defense of the transactions contemplated by any of the Transaction Documents (whether brought against a party hereto or its respective affiliates, directors, officers, shareholders, employees or agents) shall be commenced in the state and federal courts sitting in the City of New York, Borough of Manhattan (the "New York Courts").

See Section 3.10(d) and Section 4.10(d) of Exhibit 3.1 to the Current Report on Form 8-K filed on June 15, 2010 (available at http://www.sec.gov/Archives/edgar/data/736012/000110465910033915/a10-12017_1ex3d1.htm).

In addition to Neuberger Berman Flexible High Income Fund Inc., a number of other funds have adopted non-Delaware forum selection provisions that do not track the current prevailing model. Examples include: Destra Investment Trust (Chicago, Cook County, Illinois, or a court of competent jurisdiction within the State of Illinois); First Trust/FIDAC Mortgage Income Fund, First Trust Global Credit Strategies Fund, First Trust High Income Long/Short Fund, First Trust Active Dividend Income Fund, First Trust Global Credit Strategies Fund (prospectuses state: "The Declaration [of Trust] also includes a forum selection clause requiring that any shareholder litigation be brought in certain courts in Illinois."); Oppenheimer Emerging Markets Debt Fund, Oppenheimer Hard Currency Fund, Oppenheimer Rising Dividends Fund, Oppenheimer Quest for Value Funds (U.S. District Court for the Southern District of New York, or NY state court); Pioneer Multi-Asset Floating Rate Trust (U.S. District Court for the District of Massachusetts, or Massachusetts Superior Court, in Boston, Massachusetts); Rochester Portfolio Series (U.S. District Court for the Southern District of New York, or NY state court); and Wasatch Funds Trust (United States District Court, District of Utah, or State of Utah, Salt Lake City District Court). Certain of the forum selection provisions (e.g., First Trust Global Credit Strategies Fund, Oppenheimer Quest for Value Funds, Rochester Portfolio Series, Wasatch Funds Trust) predate the Revlon decision.

[13] The Symantec Corporation provision is representative:

> Section 9.7 Forum for Certain Actions. Except for (a) actions in which the Court of Chancery in the State of Delaware concludes that an indispensable party is not subject to the jurisdiction of the Delaware courts, and (b) actions in which a federal court has assumed exclusive jurisdiction of a proceeding, any derivative action brought by or on behalf of the Corporation, and any direct action brought by a stockholder against the Corporation or any of its directors or officers, alleging a violation of the Delaware General Corporation Law, the Certificate of Incorporation or these Bylaws or breach of fiduciary duties or other violation of Delaware decisional law relating to the internal affairs of the Corporation, shall be brought in the Court of Chancery in the State of Delaware, which shall be the sole and exclusive forum for such proceedings; provided, however, that the Corporation may consent to an alternative forum for any such proceedings upon the approval of the Board of Directors of the Corporation. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Section 9.7.

Symantec Corporation, Amended and Restated Bylaws as of Apr. 26, 2011. Filed as Exhibit 3.01 to Current Report on Form 8-K filed on May 2, 2011 (available at http://www.sec.gov/Archives/edgar/data/849399/000095012311042914/f59058exv3w01.htm).

[14] Note that some companies may fall within more than one category (e.g., emerging from bankruptcy and IPO).

[15] Claudia H. Allen, "Say on Pay" Becomes "Sue on Pay", XXXIII The Corporate Board 6 (Jan./Feb. 2012).

[16] While Vice Chancellor Laster discussed forum selection provisions in charters, but not bylaws, his discussion in Revlon nonetheless cited the forum selection clause contained in the bylaws of Oracle Corporation. Revlon at 961.

[17] At Life Technologies Corporation, the charter amendment proposal, which also provided for board declassification, was approved by 76.9% of the shares outstanding. The company had previously adopted a forum selection bylaw. Although not the relevant legal standard, for purposes of examining the support level for the proposal, 99.3% of the votes cast (excluding abstentions) supported the management proposal. Life Technologies Corporation, Item 5.07 of Current Report on Form 8-K filed on Apr. 29, 2011 (available at http://www.sec.gov/Archives/edgar/data/1073431/000095012311040908/a59347e8vk.htm). At DIRECTV, the stand-alone charter amendment proposal passed with support from 50.3% of the shares outstanding. In terms of votes cast, 59.5% of the votes cast (excluding abstentions) supported the management proposal. DIRECTV, Item 5.07 of Current Report on Form 8-K filed on May 3, 2011 (available at http://www.sec.gov/Archives/edgar/data/1465112/000146511211000011/dtvvotingresults_042811.htm). At Altera Corporation, the stand-alone charter amendment passed with support from 53.2% of the shares outstanding. In terms of votes cast, 59.2% of the votes cast (excluding abstentions) supported the proposal. Altera Corporation, Item 5.07 of Current Report on Form 8-K filed on May 16, 2011 (available at http://www.sec.gov/Archives/edgar/data/768251/000076825111000048/q220118-kagmxvotestosecuri.htm). The failed proposal at The Allstate Corporation received support from 41.7% of the shares outstanding. In terms of votes cast, the proposal received support from 48.9% of the votes cast (excluding abstentions). The Allstate Corporation, Item 5.07 of Current Report on Form 8-K filed on May 18, 2011 (available at http://www.sec.gov/Archives/edgar/data/899051/000110465911030011/a11-12666_18k.htm). At Lighting Science Group Corporation, the stand-alone charter

amendment passed with support from 83.1% of the shares outstanding. In terms of votes cast, 99.9% of the votes cast (excluding abstentions) supported the management proposal. Lighting Science Group Corporation, Item 5.07 of Current Report on Form 8-K filed on Aug. 12, 2011 (available at http://www.sec.gov/Archives/edgar/data/866970/000119312511221303/d8k.htm). At InsWeb Corporation, the stand-alone charter amendment passed with support from 90.3% of the shares outstanding. Notably, the company had adopted a forum selection bylaw in February 2011. In terms of votes cast, 96.7% of the votes cast (excluding abstentions) supported the management proposal. InsWeb Corporation, Item 5.07 of Current Report on Form 8-K filed on July 21, 2011, (available at http://www.sec.gov/Archives/edgar/data/1077370/000107737011000025/form8-k.htm).

[18] ISS Proxy Advisory Services USA, reports on The Allstate Corporation (Apr. 20, 2011), Altera Corporation (Apr. 20, 2011) and DIRECTV (Apr. 9, 2011).

[19] ISS Proxy Advisory Services USA, report on Life Technologies Corporation (Apr. 11, 2011).

[20] ISS, Corporate Governance Policy, 2012 Updates (Nov. 17, 2011).

[21] Glass Lewis & Co., 2012 North American Proxy Season Preview (Dec. 12, 2011) and Glass Lewis & Co. 2012 Proxy Season, U.S. Proxy Paper Policy Guidelines.

[22] Council of Institutional Investors, Corporate Governance Policies (Sept. 28, 2011) (available at http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2012-21-11%20FINAL%20(2).pdf).

[23] See e.g., CA v. AFSCME, 953 A.2d 227, 234 (Del. 2008)("Bylaws, by their very nature, set down rules and procedures that bind a corporation's board and its shareholders."); Centaur Partners, IV v. National Intergroup, Inc., 582 A.2d 923, 927 (Del. 1990)("Corporate charters and by-laws are contracts among the shareholders of a corporation and the general rules of contract interpretation are held to apply."); Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401 (Del. 1985)(as to bylaws).

[24] See Kidsco Inc. v. Dinsmore, 674 A.2d 483, 492 (Del. Ch. 1995)("Where a corporation's by-laws put all on notice that the by-laws may be amended at any time, no vested rights can arise that would contractually prohibit an amendment."); Lewis at 212-214; Nathan.

[25] Harris Interactive, Inc., Ranking the States: Lawsuit Climate 2010, (U.S. Chamber Institute for Legal Reform) (available at http://www.uschamber.com/reports/ranking-states-lawsuit-climate-2010).

[26] Revlon at 961, n.8. While the enforceability of a forum selection clause involves questions of Delaware corporate law, state courts in other jurisdictions may also face equitable arguments in favor of retaining jurisdiction.

[27] Galaviz at *7.

[28] "Oracle has not shown federal law requires or even permits the federal courts to defer to any provision of state corporate law that might purport to give a corporation's directors the power to control venue under the circumstances discussed above." Galaviz at *7.

[29] Galaviz at *7. Acknowledging the higher likelihood of a charter provision being enforceable, plaintiffs' attorney Gregg S. Levin of Motley Rice commented: "If the forum selection clause is in a corporate charter and has been approved by the shareholders, I wouldn't ignore it when trying to decide where to bring suit." Allison Grande, Calif. Ruling Hands Shareholders Forum Selection Power, Law360 (Mar. 22, 2011).

[30] See e.g., Wilson Sonsini Goodrich & Rosati, Restricting Shareholder Derivative Suits to Delaware: Stop, Look, and Listen (Jan. 2011).

[31] Medquist Inc., Exhibit 99(A)(9)2, Shareholder Class Action Complaint, to Schedule 14D-9 filed on Feb. 16, 2011 (available at http://www.sec.gov/Archives/edgar/data/884497/000095012311014597/w89691exv99waw9.htm).

[32] No. 4960-VCP, 2010 WL 1931032, at *5-6 (Del. Ch. May 13, 2010) at *5-6 [hereinafter "Baker"].

[33] See Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). Delaware courts have adopted this presumption of validity. Ingres Corp. v. CA, Inc., 8 A.3d 1143, 1145 (Del. 2010) ("Consistent with the ruling of the United States Supreme Court in M/S Bremen v.

Zapata Off-Shore Co., we hold that where contracting parties have expressly agreed upon a legally enforceable forum selection clause, a court should honor the parties' contract and enforce the clause . . . ."). See also, Baker at *8. Note that these cases involved contractual forum selection provisions that were not included in bylaws or charters.

[34] Alternative entities formed in other jurisdictions have also adopted forum selection provisions. See e.g., The Jones Financial Companies, L.L.L.P, Seventeenth Amended and Restated Agreement of Registered Limited Liability Partnership, dated as of Mar. 26, 2010, filed as Appendix D to Pre-Effective Amendment No. 1 to Registration Statement on Form S-1 filed on Sept. 3, 2010 ("venue for litigation shall be laid exclusively in the Circuit Court of the County of St. Louis, Missouri or in the United States District Court for the Eastern District of Missouri. . . ").

In addition, Golar LNG Partners LP, a Marshall Islands limited partnership, adopted an exclusive Delaware forum provision that tracks the five categories. See pages 206-207 of the Registration Statement on Form F-1 filed on Mar. 30, 2011 (available at http://www.sec.gov/Archives/edgar/data/1415916/000104746911002863/a2202966zf-1.htm).

[35] 727 A.2d 286, 296 (Del. 1999).

[36] See also Douzinas v. Am. Bureau of Shipping, Inc., 888 A.2d 1146, 1149 (Del. Ch. 2006)(court upheld Texas forum selection provision in the LLC agreement of a Delaware LLC).

[37] All companies analyzed are shown, including companies that are seeking to adopt a provision, withdrew their registration statement or experienced a failed shareholder vote on a forum selection charter amendment. See Note 12 for a discussion of forum selection provisions adopted by non-Delaware corporations.

Comments, questions or requests for an updated Study should be directed to:
Claudia H. Allen
Partner and Co-Chair
Corporate Governance Practice
Katten Muchin Rosenman LLP
525 West Monroe Street
Chicago, IL 60661-3693
P / +1.312.902.5432
F / +1.312.902.1061
claudia.allen@kattenlaw.com
www.kattenlaw.com