BYLAWS MANDATING ARBITRATION OF STOCKHOLDER DISPUTES?

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ABSTRACT

Would a board-adopted bylaw mandating arbitration of stockholder disputes and eliminating the right to pursue such claims on a class action basis be enforceable? That question moved to the forefront as a result of late June 2013 decisions from the United States Supreme Court and the Delaware Court of Chancery, which, when read together, suggest that the answer to this question is yes. In American Express Co. v. Italian Colors Restaurant, the United States Supreme Court, interpreting the Federal Arbitration Act, upheld a mandatory arbitration provision—including a class action waiver—in a commercial contract. The decision focused upon the arbitration provision as a contract subject to the FAA. Next, the Delaware Court of Chancery rendered its opinion in Boilermakers Local 154 Retirement Fund v. Chevron Corp. The decision, which emphasized that bylaws are contracts between a corporation and its stockholders, upheld the validity of bylaws adopted by the boards of Chevron Corporation and FedEx Corporation requiring that intra-corporate disputes be litigated exclusively in Delaware courts. Subsequent United States Supreme Court and Delaware Supreme Court decisions addressing forum selection and the board's power to adopt bylaws have only strengthened the argument.

In addition to complementing each other, both American Express and Boilermakers address a similar issue: the explosion in class action and derivative lawsuits that settle primarily for attorneys' fees, most commonly in the context of mergers and acquisitions. Stockholders ultimately bear the costs of such litigation. Class actions and derivative lawsuits are forms of representative litigation, in which named plaintiffs seek to act on behalf of a class of stockholders or the corporation itself. The plaintiffs are customarily represented by attorneys on a contingent fee basis, making the lawyer the "real party in interest in these cases." If mandatory arbitration bylaws barring class actions were enforceable, the logical outcome would be a marked decline in class actions, since the alleged existence of a class is a principal driver of attorneys' fees.

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This Article examines the legal and policy issues raised by arbitration bylaws, whether adopting such bylaws would be attractive to public companies, likely reactions from stockholders, and opportunities for private ordering. Since arbitration is a creature of contract, this Article argues that there are opportunities for corporations to craft bylaws that take into account company-specific issues, while responding to many likely criticisms. However, the inherent bias of some stockholders and corporations against arbitration is likely to make experimentation in this area slow and difficult.

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I. INTRODUCTION

Would a board-adopted bylaw mandating arbitration of stockholder disputes and eliminating the right to pursue such claims on a class action basis be enforceable? That question moved to the forefront as a result of late June 2013 decisions from the United States Supreme Court\(^1\) and the Delaware Court of Chancery,\(^2\) which, when read together, suggest that the answer to this question is yes. In *American Express Co. v. Italian Colors Restaurant*, the United States Supreme Court, interpreting the Federal Arbitration Act ("FAA"), upheld a mandatory arbitration provision—including a class action waiver—in a commercial contract.\(^3\) The decision focused upon the arbitration provision as a contract subject to the FAA.\(^4\) Next, in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, the Delaware Court of Chancery emphasized that bylaws are contracts between a corporation and its stockholders\(^5\) and upheld the validity of bylaws adopted by the boards of Chevron Corporation and FedEx Corporation requiring that intra-corporate disputes be litigated exclusively in Delaware courts.\(^6\) Subsequent United States Supreme Court and Delaware Supreme Court decisions addressing forum selection and a board's power to adopt bylaws have only strengthened this argument.\(^7\)

In addition to complementing each other, both *American Express* and *Boilermakers* address a similar issue: the explosion in class action and derivative lawsuits that settle primarily for attorneys' fees, most commonly in the context of mergers and acquisitions.\(^8\) Stockholders

\(^1\) See Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).
\(^3\) See American Express, 133 S. Ct. at 2312.
\(^5\) See Boilermakers, 73 A.3d at 955.
\(^6\) See id. at 956, 958, 963.
\(^8\) See infra note 37; see also Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter?*, 75 Ohio State L.J. 829 (2014) ("[O]ur findings suggest that the merits count for little in the decision to bring a fiduciary suit and that...")
ultimately bear the costs of such litigation. Class actions and derivative lawsuits are forms of representative litigation in which named plaintiffs seek to act on behalf of a class of stockholders or the corporation itself. In these cases, plaintiffs are customarily represented by attorneys on a contingent fee basis, "mak[ing] the lawyer the real party in interest." If mandatory arbitration bylaws barring class actions were enforceable, the logical outcome would be a marked decline in class actions, since the alleged existence of a class is a principal driver of attorneys' fees.

II. THE SUPREME COURT AND MANDATORY ARBITRATION

In American Express, the United States Supreme Court held that an arbitration agreement and related waiver of class action arbitration are enforceable, even if the cost of pursuing an individual claim through arbitration exceeds the potential recovery. The case involved antitrust claims relating to commercial agreements between American Express and merchants who accepted American Express cards. The agreements mandated "arbitration and provid[ed] that there 'shall be no right or authority for any Claims to be arbitrated on a class action basis.'" In reaching its decision, the Court emphasized that arbitration is a matter of contract and "courts must 'rigorously enforce' arbitration agreements such suits are brought for their nuisance value."); Randall S. Thomas, What Should We Do About Multijurisdictional Litigation in M&A Deals, 66 Vand. L. Rev. 1925, 1945 (2013) ("In more recent years, the settlement percentages in Delaware have gone from 48.7% of all M&A class actions filed in 2005 to 76.9% of all such cases in 2012.")

Stockholders are essentially suing themselves. See John C. Coffee, Jr., Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534, 1536 (2006) ("[B]ecause the costs of securities class actions—both the settlement payments and the litigation expenses of both sides—fall largely on the defendant corporation, its shareholders ultimately bear these costs indirectly and often inequitably."); Hal S. Scott & Leslie N. Silverman, Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes, 36 Harv. J.L. & Pub. Pol'y 1187, 1194 (2013) ("Class actions generally result in institutional stockholders suing themselves, paying high defense costs and giving plaintiffs' attorneys a large percentage of the settlement amount.").

See Korso & Myers, supra note 8, at 832.

See Thomas, supra note 8, at 1926; Korso & Myers, supra note 8, at 832.

See American Express, 133 S. Ct. at 2311.

See id. at 2308.

Id.

See id. at 2309 (citation omitted); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011) (citation omitted). Determining whether a contract exists involves state law principles concerning contract formation. See First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."); Southland Corp. v. Keating, 465 U.S. 1, 19-20 (1984) ("Indeed, the lower courts generally look to state law regarding questions of formation of the arbitration agreement under
according to their terms,"¹⁶ including terms that specify "the rules under which that arbitration will be conducted"¹⁷ regardless of public policy objections.¹⁸

The holding was consistent with prior high-court decisions endorsing arbitration as an "efficient, streamlined procedure" for resolving contractual disputes¹⁹ and the liberal policy favoring arbitration underlying the FAA.²⁰ Section 2 of the FAA states:

\[ A \text{ written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal shall be valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract. } \]

As indicated by the last clause of Section 2, the grounds for invalidating an arbitration clause are narrow.²²

Reflecting the policy favoring arbitration, the United States Supreme Court has held that state rules or laws that have a

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¹⁶American Express, 133. S. Ct. at 2309 (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985)).
¹⁷Id. (citation omitted).
¹⁸See id. at 2310 (citation omitted).
¹⁹See Concepcion, 131 S. Ct. at 1749.
²⁰See id. at 1745 ("The FAA was enacted . . . in response to widespread judicial hostility to arbitration agreements."); see, e.g., Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) ("[T]o overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act . . . Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts . . . ").
²¹9 U.S.C. § 2 (2012) (emphasis added). Section 2 of the FAA, by its terms, requires that the agreement to arbitrate involve commerce. See id. Shares of public securities are traded on national securities markets and through the use of interstate means of communication. See G. Richard Shell, Arbitration and Corporate Governance, 67 N.C.L. Rev. 517, 523 (1989). Accordingly, the FAA should generally apply. See id. State arbitration acts, which are similar to the FAA, would apply to contracts that only involve intrastate commerce. See id. The United States Supreme Court has interpreted the phrase "transaction involving commerce" broadly. See, e.g., Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995).
²²See Southland Corp. v. Keating, 465 U.S. 1, 11 (1984) (quoting 9 U.S.C. § 2 (2012) ("[A]rbitration] clauses may [only] be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' We see nothing in the act indicating that the broad principle of enforceability is subject to any additional limitations under state law.").
disproportionate impact on, or discriminate against, arbitration agreements are preempted by the FAA, and that in the context of federal statutes, the mandate of the FAA may only be "overridden by a contrary congressional command." Moreover, according to the United States Supreme Court, an arbitration clause is "in effect, a specialized kind of forum-selection clause," and the Court has emphasized the strong presumption in favor of the validity and enforceability of forum selection clauses in commercial contracts.

Since the United States Supreme Court's arbitration and forum selection decisions involve commercial contracts, the main issue is whether the holdings would apply to a different type of contract, namely, the contract between a company and its stockholders set forth in a corporation's bylaws. This Article proceeds by examining the validity of forum selection bylaws under Delaware law in Part III. Part IV analyzes the legal, practical, and policy issues associated with adopting a mandatory arbitration bylaw, while Part V considers what a mandatory arbitration bylaw would be effective for.

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23 See Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013) (citation omitted) ("Truth to tell, our decision in AT&T Mobility all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law 'interfer[ed] with fundamental attributes of arbitration.'"); Concepcion, 131 S. Ct. at 1747 ("[T]he rule would have a disproportionate impact on arbitration agreements"); Preston v. Ferrer, 552 U.S. 346, 355 (2008) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward. The conflicting rule is displaced by the FAA."); see also Barbara Black & Jill I. Gross, Investor Protection Meets the Federal Arbitration Act, 1 STAN. J. COMPLEX LITIG. 1, 11-16 (2012) (discussing the FAA preemption doctrine); David Horton, Federal Arbitration Act Preemption, Purposivism, and State Public Policy, 101 GEO. L.J. 1217, 1217 (2013) (arguing for a narrower scope of preemption based upon purposivism, rather than textualism).

24 American Express, 133 S. Ct. at 2309 (citation omitted); see also Rodriguez de Quijas v. Shearson/Am. Ex., Inc., 490 U.S. 477, 483 (1989) ("Under [the FAA], the party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute."); Shearson/Am. Ex. v. McMahon, 482 U.S. 220, 238 (1987) ("[E]ven assuming the [Congressional] conferees had an understanding of existing law that all agreed upon, they specifically disclaimed any intent to change it."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985): Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

25 Rodriguez, 490 U.S. at 483 (citation omitted).


27 See infra Part III.

28 See infra Part IV.
arbitration bylaw would look like in view of opportunities for private ordering. Finally, Part VI raises the question of what companies are likely to do.

III. DELAWARE AND FORUM SELECTION BYLAWS

While the plaintiffs' bar was assessing the implications of American Express, the Delaware Court of Chancery rendered a much-awaited opinion in Boilermakers. That decision upheld the statutory and contractual validity of bylaws adopted by Chevron Corporation and FedEx Corporation, requiring that stockholder class actions, derivative actions, and other intra-corporate disputes be litigated exclusively in Delaware. While specifying an exclusive forum, each bylaw also provides that the board may consent to litigating in another jurisdiction, a feature noted with approval in the opinion. Exclusive forum bylaws are intended to help Delaware corporations address forum shopping and the related phenomenon of plaintiffs' attorneys filing lawsuits arising out of the same facts in multiple jurisdictions, often with a view toward obtaining attorneys' fees. These provisions seek to avoid the cost and

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29 See infra Part V.
30 See infra Part VI.
33 See id. at 963.
34 See id. at 964 ("The boards of the companies in this case have reserved the right in the bylaw itself . . . to waive the corporation's rights under the bylaw in a particular circumstance in order to meet their obligation to use their power only for proper corporate purposes.").
35 There is no mechanism for consolidating or otherwise streamlining such litigation at the state law level, although defendants have tried various techniques: motions to dismiss or stay litigation outside Delaware; a "one forum motion" that seeks to have judges in the courts where claims have been filed confer to determine the one forum in which litigation should proceed; and stipulating or moving for class certification on the theory that a judgment against the class in one forum should be recognized and given effect in other fora where the same or similar class claims are pending. See Edward B. Micheletti & Jenness E. Parker, Multi-Jurisdictional Litigation: Who Caused This Problem, and Can it be Fixed?, 37 DEL. J. CORP. LAW 1, 14-20 (2012).

On the federal level, the Judicial Panel on Multidistrict Litigation determines whether civil actions pending in two or more federal judicial districts should be transferred to a single federal district court for pretrial proceedings. See 28 U.S.C. § 1407 (2012):

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.
uncertainty of parallel litigation, the risk of inconsistent outcomes, and the potential for Delaware law—which governs intra-corporate disputes of Delaware corporations—to be misinterpreted by other courts.\footnote{Multi-forum litigation that settles for attorneys' fees, but without any economic recovery for stockholders, has become most common in the context of mergers and acquisitions,\footnote{See Claudia H. Allen, Trends in Exclusive Forum Bylaws, THE CONFERENCE BD. GOVERNANCE CTR. 1 (Jan. 2014), archived at http://perma.cc/N96S-CGF6.} and it is viewed by some commentators and


With respect to the preclusive effect of a federal judgment on state proceedings, see Pyott v. La. Mun. Police Emps' Ret. Sys., 74 A.3d 612 (Del. 2013). In that case, the Delaware Supreme Court held that the Delaware Court of Chancery was required to dismiss a Delaware derivative complaint after a California federal court entered a final judgment dismissing essentially the same claim brought by different stockholders. \textit{See id. at 615-16} ("[T]he United States Supreme Court has held that a state court is required to give a federal judgment the same force and effect as it would be given under the preclusion rules of the state in which the federal court is sitting."). \textit{But cf.} George S. Geis, \textit{Shareholder Derivative Litigation and the Preclusion Problem}, 100 VA. L. REV. 261, 267 (2014) ("[T]he [Pyott] decision refused to clarify Delaware's privity requirement for collateral estoppel claims, leaving a split among the lower court decisions. This means that fundamental questions persist about the finality of any given derivative case and the precise standards for adequate representation in this context.").


\textit{37See Robert M. Daines & Olga Koumrian, Shareholder Litigation Involving Mergers and Acquisitions, CORNERSTONE RESEARCH 1 (Feb. 2013), archived at https://perma.cc/8EPQ-4LYJ?type=pdf. According to this paper, in 2012, 93\% of transactions valued over $100 million were challenged, with an average of 4.8 lawsuits per transaction. \textit{Id. at} 1. For transactions with Delaware-incorporated targets, 65\% resulted in multi-forum litigation in Delaware and other jurisdictions, 19\% were challenged outside Delaware only, and 16\% were challenged solely in the Delaware Court of Chancery. \textit{Id. at} 3. In 81\% of settlements, stockholders received only supplemental disclosures "and the parties in only one settlement acknowledged that litigation contributed to an increase in the merger price." \textit{Id. at} 6; see also Matthew D. Cain & Steven M. Davidoff, \textit{Takeover Litigation in 2012} 2-3 (Feb. 2013), \textit{archived at} http://perma.cc/XK9B-KTDQ (finding that 91.7\% of 2012 deals valued at $100 million or more resulted in litigation and that the average number of lawsuits per transaction was five).

Similarly, in 2013, Daines and Koumrian found that 94\% of 2013 transactions valued at over $100 million were challenged, with an average of five lawsuits per transaction. Robert M. Daines & Olga Koumrian, \textit{Shareholder Litigation Involving Mergers and Acquisitions: Review of 2013 M&A Litigation, CORNERSTONE RESEARCH 1 (Mar. 2014), archived at} http://perma.cc/G5H2-JT3Z. Cain and Davidoff's preliminary statistics for 2013 indicate that 97.5\% of 2013 deals valued at $100 million or more resulted in litigation, and the average number of lawsuits per transaction had increased to 6.9. Matthew D. Cain & Steven M. Davidoff, \textit{Takeover Litigation in 2013} 2 (Moritz College of Law, Working Paper No. 256, 2014), \textit{archived at} http://perma.cc/7FWG-9UAY.

In the context of mergers and acquisitions, there has been a shift away from settlements providing for an increase in deal consideration toward settlements that provide for additional disclosure and the payment of attorneys' fees. \textit{See} Thomas, \textit{supra} note 8, at 1927. Attorneys' fees are payable even if stockholders do not receive an economic benefit based upon the "corporate benefit" doctrine, also known as the "common benefit" or "substantial
judges as the equivalent of a transaction tax. Additionally, lawsuits modeled upon merger litigation and alleging fiduciary breaches as a result of companies failing to obtain stockholder approval of pay practices—often referred to as "sue-on-pay" lawsuits—as required by the federal securities laws, or seeking to enjoin meetings at which stockholders will vote on compensation plans, have often been brought outside a corporation's state of incorporation.

Prior to the lawsuits against FedEx and Chevron, an increasing number of public companies adopted exclusive forum bylaws through unilateral board action. Beginning in February 2012, virtually identical lawsuits were filed in the Delaware Court of Chancery against twelve

benefit" doctrine. See Sean J. Griffith, Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees, September 2014, 56 B.C. L. Rev. 25-27 (forthcoming), archived at http://perma.cc/26VQ-V4RR; N. Browning Jeffries, The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals, 11 BERKELEY BUS. L.J. 55, 83-84 (2014). The doctrine generally provides that attorneys' fees may be awarded if stockholders receive some other benefit, which, in merger litigation, is often alleged to consist of additional disclosures. See Griffith at 18. Delaware is among the states that have adopted the doctrine. See Jeffries at 84. Plaintiffs' counsel must make a showing of the benefit conferred based upon its efforts. See id.

While settlements typically do not result in cash payments to stockholders, the 2015 settlement of derivative litigation against Freeport-McMoRan Copper & Gold Inc. in the Delaware Court of Chancery provided for the company to pay $137.5 million to its stockholders in the form of a special dividend, subject to court approval. See Kevin LaCroix, Massive and Unusual Freeport-McMoRan Derivative Lawsuit Settlement Finalized, THE D&O DAILY (Jan. 16, 2015), archived at http://perma.cc/L8YE-ARUD. Both the size and form of the proposed settlement payment are noteworthy. See id.

38See Jeffries, supra note 37, at 108; Andrew J. Pincus, The Trial Lawyers' New Merger Tax, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM 6-7 (Oct. 2012), archived at http://perma.cc/27LU-K84W; City Trading Fund v. Nye, No. 651668/2014, 2015 WL 93894, *12 (N.Y. Sup. Ct., Jan. 7, 2015) ("It is no secret that when a public company announces a merger, lawsuits follow . . . However, the ubiquity and multiplicity of merger lawsuits, colloquially known as a "merger tax", has caused many to view such lawsuits with a certain degree of skepticism.").


high profile corporations that had adopted such bylaws. The lawsuits challenged the statutory validity of the bylaws and asserted that the provisions were contractually invalid since they were adopted without stockholder approval. Ten of the companies repealed their bylaws, and nine of those companies paid attorneys' fees. This left FedEx and Chevron as the only defendants willing to stand behind their bylaws. The lawsuits had a chilling effect, with exclusive forum bylaw adoptions grinding to a halt as companies awaited the outcome of the FedEx and Chevron litigation.

A. Statutory Validity

In *Boilermakers*, Chancellor Leo E. Strine noted that bylaws are presumptively valid and held that the bylaws were valid under Section 109(b) of the Delaware General Corporation Law ("DGCL"). According to that Section, "]the 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." Chancellor Strine emphasized that bylaws address internal affairs claims, meaning claims relating to the relationships among or between a corporation and its current officers, directors and stockholders. As a

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44The lawsuits asserted other claims, including breaches of fiduciary duty. In *Boilermakers*, the court only considered validity claims. See Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 938 (Del. Ch. 2013).
45See Allen, supra note 36, at 2.
46See id.
47Companies going public, being spun-off, emerging from bankruptcy or otherwise in situations where public stockholder approval is not required have most typically adopted exclusive forum charter provisions. See id. In the context of companies that are already public, exclusive forum clauses have overwhelmingly been adopted through unilateral board action. See id. This article addresses companies that are already public, and thus focuses upon exclusive forum bylaws and mandatory arbitration bylaws. Following *Boilermakers*, public companies once again began to adopt exclusive forum bylaws, with 105 Delaware corporations and 30 non-Delaware corporations and trusts adopting exclusive forum bylaws between June 25 and October 31, 2013. See id. at 3. By December 31, 2013, the number of Delaware corporations had increased to 155. See id. at n.15.
49DELCODE ANN. tit. 8, § 109(b) (2013).
50See *Boilermakers*, 73 A.3d at 950-51; see also VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113 (Del. 2005) ("The internal affairs doctrine applies to those matters that pertain to the relationships among or between the corporation and its
result, he concluded that the bylaws clearly relate to the business of the corporations, the conduct of their affairs, and the rights of their stockholders.\textsuperscript{51} The opinion states that the bylaws direct how the corporations, their boards, and their stockholders may take certain actions, and therefore "are process-oriented, because they regulate where stockholders may file suit, not whether the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation."\textsuperscript{52}

Chancellor Strine further underscored the procedural nature of the bylaws by analogizing them to advance notice bylaws, which create a process that helps a board avert a potentially chaotic situation involving director nominations and other matters being proposed from the floor of a stockholders meeting.\textsuperscript{53} Lastly, since Delaware law, like federal law, respects and enforces forum selection clauses,\textsuperscript{54} the Delaware Court of Chancery found that the bylaws are not "inconsistent with law" for purposes of Section 109(b) of the DGCL.\textsuperscript{55}

B. Contractual Validity

The Delaware Court of Chancery rejected the plaintiffs' argument that a board-adopted forum selection bylaw cannot be valid in the absence of advance stockholder approval.\textsuperscript{56} The plaintiffs' argument was intended to overcome the presumptive validity of forum selection clauses

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\textsuperscript{51}See Boilermakers, 73 A.3d at 951.
\textsuperscript{52}Id. at 951-52 (emphasis in original).
\textsuperscript{53}See id. at 952.
\textsuperscript{54}In Ingres Corp. v. CA, Inc., the Delaware Supreme Court held 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" unless the resisting party can show that the "clause was unreasonable, unjust, or otherwise invalid." 8 A.3d 1143, 1145, 1147 (Del. 2010). In M/S Bremen v. Zapata Off-Shore Co., the United States Supreme Court held that a forum selection clause should be enforced unless the resisting party can meet the heavy burden of showing that enforcement would be "unreasonable" under the circumstances. 407 U.S. 1, 10 (1972); see also Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for the Western Dist. of Tex., 134 S. Ct. 568, 574 (2013) (citation omitted) (internal quotation marks omitted) ("[A] valid forum-selection clause . . . should be given controlling weight in all but the most exceptional cases.").
\textsuperscript{55}Boilermakers, 73 A.3d at 939.
\textsuperscript{56}See id. at 956.
under both federal and Delaware law. In essence, the plaintiffs were claiming that stockholders had a "vested right" to sue where they believed appropriate, and the board's action was depriving them of this right. Delaware courts have, however, explicitly rejected the "vested rights" doctrine, holding that "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." Chancellor Strine noted that bylaws are a binding contract between a corporation and its stockholders, to be interpreted in accordance with contractual principles, and that stockholders are on notice that the board may unilaterally adopt a bylaw within the parameters of Section 109(b) if the charter so permits. The stockholders retain the right to amend such a bylaw if they believe it to be appropriate, and they have the right to challenge the application of a forum clause to a specific situation if enforcement would be "unreasonable and unjust." The focus on bylaws as contracts meshes with the FAA and its broad policy favoring arbitration of contractual disputes. The opinion highlights that a stockholder is deemed a party to a flexible contract created by the bylaws, together with the certificate of incorporation and DGCL, and thus is on notice that bylaws may be amended by the board. This argument suggests that the type of consent customarily required to form an agreement may be evidenced by an investor's purchase of stock—without more.

57 See id. at 955; see also supra note 54.
58 See Boilermakers, 73 A.3d at 955.
59 Kidsco Inc. v. Dinsmore, 674 A.2d 483, 492 (Del. Ch. 1995). As a practical matter, stockholders also have constructive notice of any such amendments since company filings with the Securities and Exchange Commission ("SEC") are publicly available. Public companies are required to disclose amendments to their bylaws within four business days pursuant to Item 5.03 ("Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year") of the SEC's Current Report (Form 8-K), archived at http://perma.cc/BYQ6-ACNA. See infra Part IV.E (discussing constructive notice in the context of litigation challenging the validity of a mandatory arbitration bylaw adopted by a Maryland real estate investment trust).
62 See id. at 955-56.
63 See id. at 939-40. But see Barbara Black, Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?, 75 L. & CONTEMP. PROBS. 107, 114 (2012) ("The
C. Novel Issue

Chancellor Strine stated that the novelty of an exclusive forum bylaw should not affect its validity: "[T]he [Delaware] Supreme Court long ago rejected the position that board action should be invalidated or enjoined simply because it involves a novel use of statutory authority." This argument should also apply to the novel concept of public companies adopting arbitration bylaws.

D. Subsequent Delaware Supreme Court Decision

As anticipated, the plaintiffs in *Boilermakers* appealed the decision to the Delaware Supreme Court. The Court was widely expected to affirm the well-reasoned decision. The plaintiffs, however, unexpectedly withdrew their appeal without publicly stating their rationale. They likely concluded that *Boilermakers* would be upheld and that such a Delaware Supreme Court decision would carry more weight with courts outside Delaware in connection with future "as applied" challenges to the enforceability of exclusive forum provisions.
In May 2014, the Delaware Supreme Court rendered an opinion in *ATP Tour, Inc. v. Deutscher Tennis Bund (German Tennis Federation)* that indirectly provided the endorsement of *Boilermakers* and exclusive forum bylaws that Chevron and others had been seeking.\(^\text{73}\) The opinion upheld the facial validity of board-adopted bylaws requiring stockholders who do not prevail in intra-corporate litigation to pay the corporation's...

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Shareholder Complaint, Bushansky v. Armacost, No. C 12-01597 (N.D. Cal. Aug. 9, 2012). Notably, the lawsuit was filed in the same court that, in a case of first impression, had refused to dismiss a lawsuit against Oracle Corporation on the basis of its exclusive forum bylaw. See *infra* Part IV.C.

The *Bushansky* case was subsequently stayed "until the Supreme Court of Delaware decides the likely appeal of the Delaware Decision." Stipulation and Order to Continue Stay at 1, Bushansky v. Armacost, No. C 12-01597 (N.D. Cal. Aug. 20, 2013).

According to the Delaware plaintiffs' October 28, 2013 motion, Chevron wanted to "certify a class and litigate all of the remaining claims" seemingly in an effort to obtain a precedent that would bind the California court. See Mot. for Dismissal Without Prejudice at 3, Boilermakers Local 154 Ret. Fund v. Chevron Corp., No. 7220-CS (Del. Ch. Oct. 28, 2013); see also Micheletti & Parker, *supra* note 35, at 19 (citations omitted):

Another option for controlling multi-jurisdictional litigation is for parties in one forum to either stipulate or move for class certification. The theory behind this approach is that once a class is certified in one forum, any judgment . . . should be afforded *res judicata* effect against similar class claims pending in any other forum.


The Delaware case against Chevron was then dismissed without prejudice as to the named plaintiffs only on January 29, 2015, without Chevron obtaining the binding precedent it had sought. See Order of Dismissal, Boilermakers Local 154 Ret. Fund v. Chevron Corp., No. 7220-CB (Del. Ch. Jan. 29, 2015).

\(^73\) See *ATP Tour, Inc. v. Deutscher Tennis Bund (German Tennis Federation)*, 91 A.3d 554, 558, 560 (Del. 2014) (citation omitted).
Like exclusive forum and arbitration bylaws, fee-shifting bylaws seek to address the phenomenon of strike suits. In *ATP Tour*, the Delaware Supreme Court answered four certified questions of law from the United States District Court for the District of Delaware concerning the validity of a fee-shifting bylaw adopted by the board of a non-stock corporation. The court found that the bylaw was facially valid, noting that the DGCL, other Delaware statutes, and Delaware common law do not forbid adoption of such a bylaw. In that regard, the court stated that a bylaw allocating risk among the parties to intra-corporate litigation appears to satisfy the requirement under the DGCL of "relat[ing] 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." The court went on to state that a certificate of incorporation can permit fee-shifting either expressly or "implicitly by silence" and that there is no requirement under the DGCL that such a provision be included in the certificate of incorporation. Emphasizing the contractual nature of bylaws, the court held that a fee-shifting bylaw would fall within the recognized power of parties to modify the American Rule in litigation, under which each party to litigation pays its own costs and expenses. Quoting *Boilermakers*, the court also found stockholders are bound by a board-adopted bylaw,

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74 See id. at 558. Although the bylaw has been referred to as a "fee-shifting" provision, it only shifts fees to the plaintiff and specified parties. Such claiming parties are automatically responsible for the defendants' fees, costs and expenses unless they "obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought." Id. at 556. In practice, this sets a very high bar for claiming parties. See Claudia H. Allen, Fee-Shifting Bylaws: Where Are We Now?, 13 CORP. L. & ACCOUNTABILITY REP. 147, 148 (2015).

75 Cf. id. at 560 (stating that such an intent to deter litigation would not necessarily invalidate the bylaw).

76 ATP Tour, Inc. is a Delaware non-stock (membership) corporation that operates a global professional men's tennis tour. See id. at 555. The court did not address whether its opinion would also apply to traditional corporations. Most provisions of the DGCL, including § 109(b) concerning the permissible scope of bylaws, apply to non-stock corporations, and all references to stockholders are deemed to apply to the members of a non-stock corporation. See id. at 557 n.10; DEL. CODE ANN. tit. 8, § 114 (2013). Nonetheless, the question remains open. See infra note 92 (regarding proposed legislation negating the application of ATP Tour to traditional stock corporations); S.B. 236, 147th Gen. Assemb. (Del. 2014), archived at http://perma.cc/HYW7-T592.

77 See *ATP Tour*, 91 A.3d at 558.

78 Id. at 558 (quoting DEL. CODE ANN. tit. 8, § 109(b) (2013)).

79 Id.

80 See id. at n.16 (citing DEL. CODE ANN. tit. 8, § 102(a) (2013)).

81 See *ATP Tour*, 91 A.3d at 558.
without regard to whether they purchased stock before or after the bylaw was adopted.\textsuperscript{82}

Like the Delaware Court of Chancery in \textit{Boilermakers}, the Delaware Supreme Court cautioned that while a bylaw may be facially valid, the adoption and enforcement of the bylaw may be challenged on equitable grounds.\textsuperscript{83} In that regard, the court cited to \textit{Schnell v. Chris-Craft Industries, Inc.}, in which the court struck down a board-adopted bylaw that moved the date of the annual meeting to a month earlier than the scheduled date, on the grounds that the board was using the bylaw to entrench itself.\textsuperscript{84} "The \textit{Schnell} Court famously stated that 'inequitable action does not become permissible simply because it is legally possible.'\textsuperscript{85} The court underscored that it did not have the facts necessary to determine whether the fee-shifting bylaw was adopted for a proper purpose or whether it was being applied properly,\textsuperscript{86} thus highlighting that fee-shifting bylaws are subject to the same type of situational review as exclusive forum bylaws\textsuperscript{87} and, presumably, arbitration bylaws.

Elaborating upon the issue of proper purpose, the court stated, "The intent to deter litigation, however, is not invariably an improper purpose. Fee-shifting provisions, by their nature, deter litigation . . . [and] an intent to deter litigation would not necessarily render the bylaw unenforceable in equity.\textsuperscript{88} Notably, exclusive forum and arbitration provisions also involve deterrents to litigation. On a spectrum, exclusive forum provisions would seem to have the most modest impact, since they affect the place where litigation proceeds and not whether it moves forward,\textsuperscript{89} while fee-shifting provisions would have the strongest impact, as they create the specter of significant, unknown expenses solely by virtue of unsuccessfully pursuing a case.\textsuperscript{90} Arbitration falls somewhere in between.\textsuperscript{91}

\textsuperscript{82}See id. at 560.
\textsuperscript{83}See id at 558; see also infra note 91 (concerning arbitration bylaws).
\textsuperscript{84}See \textit{ATP Tour}, 91 A.3d at 558 (citing \textit{Schnell} v. Chris-Craft Indus., Inc., 285 A.2d 437, 438-40 (Del. 1971)).
\textsuperscript{85}\textit{Id.} (quoting \textit{Schnell}, 285 A.2d at 439). The court cited other cases in which bylaws were adopted for inequitable purposes, focusing upon the specific facts of each case. See \textit{id.} at 559.
\textsuperscript{86}See \textit{id.} at 559.
\textsuperscript{87}Cf. \textit{Boilermakers} Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 963 (Del. Ch. 2013) ("[S]ituational review . . . exist[s] to deal with real-world concerns when they arise in real-world and extant disputes, rather than hypothetical and imagined future ones.").
\textsuperscript{88}\textit{ATP Tour}, 91 A.3d at 560.
\textsuperscript{89}See \textit{Boilermakers}, 73 A.3d at 951-52.
\textsuperscript{90}These concerns were recently articulated by the plaintiffs in a motion to invalidate a fee-shifting bylaw adopted by the board of a traditional stock company. \textit{See} Motion to
Signaling a concern as to the implications of fee-shifting on stockholders who hold fully paid and non-assessable shares, within two weeks after the ATP Tour decision, members of the Delaware bar representing both plaintiffs and defendants introduced amendments to the DGCL that would bar provisions in bylaws and certificates of incorporation of stock corporations imposing liability on stockholders, including fee-shifting provisions. The amendments also reflected concerns among members of the Delaware bar that fee-shifting and other clauses imposing liability on stockholders could result in a significant decrease in the number of meritorious as well as frivolous cases filed in Delaware, thereby negatively affecting Delaware's preeminence in the field of corporate law. Although the legislation was being fast-tracked,

Invalidating Retroactive Fee-Shifting and Surety Bylaw or, in the Alternative, to Dismiss and Withdraw Counsel, at 8-9, Kastis v. Carter, No. 8657 (Del. Ch. Jul. 21, 2014):

Plaintiffs will risk substantial financial liability if they 'continue to pursue their claims in this action.' Plaintiffs and their counsel cannot pursue those claims if they will be at risk for hundreds of thousands or even millions of dollars in Defendants' litigation costs. By enacting this draconian Bylaw, the Board imposed a risk that neither Plaintiffs, their counsel, nor any economically rational stockholder or lawyer, could accept.

The deterrent effect of some fee-shifting bylaws is amplified by additional clauses, such as those prohibiting the award of attorneys' fees, requiring the posting of a bond, or requiring the payment of interest.

91In an October 2014 speech, Delaware Supreme Court Justice Ridgely expressed concern as to whether a board-adopted arbitration bylaw that "eliminates the equitable standing of a stockholder to sue derivatively on behalf of a corporation is per se an inequitable purpose under an ATP analysis." See Hon. Henry DuPont Ridgely, The Emerging Role of Bylaws in Corporate Governance at 23 (forthcoming SMU L. REV.), archived at http://perma.cc/R47Z-6V4T. He went on to explain that derivative actions are intended to allow stockholders to sue on behalf of the corporation in situations where those controlling a corporation refuse to assert such a claim. See id. A judicially-created rule requiring that derivative claims be litigated (and not be arbitrated) would present conflicts with the Supreme Court's holdings that arbitration is procedural rather than substantive and that rules may not discriminate against arbitration. See supra note 23; see also Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (finding that an arbitration bylaw does not interfere with the right to bring a derivative claim).

92See S.B. 236, 147th Gen. Assemb. (Del. 2014), archived at http://perma.cc/HYW7-T592. The proposed amendments would have modified DEL. CODE ANN. tit. 8 § 102(b)(6), concerning the personal liability of stockholders, and added a new § 331 (Monetary Liability of Stockholders) to codify the general concept that provisions in a certificate of incorporation or bylaws may not impose liability on stockholders without their consent. See id. The legislation would not have affected the ability of non-stock corporations, like ATP Tour, to adopt fee-shifting. See id.

93See, e.g., John Armour et al., Delaware's Balancing Act, 87 IND. L.J. 1345, 1347 (2012) ("An extensive body of precedent, developed by expert judges, has been a key part of Delaware's 'value-added' for firms, which has helped to sustain its high share in the market for corporate law, despite premium pricing in the form of sizeable 'franchise taxes' levied on firms that incorporate there."). The number of public companies that would have adopted such a provision likely would have been modest, due to the potential for investor and proxy advisor backlash. As a practical matter, fee-shifting bylaws may be more attractive to private
following criticism from the U.S. Chamber of Commerce\textsuperscript{94} and some public companies,\textsuperscript{95} the legislation was tabled until the 2015 legislative session.\textsuperscript{96}

Nonetheless, \textit{ATP Tour} represents a strong endorsement by the Delaware Supreme Court of the power of a board of directors to adopt bylaws it believes are in the best interests of the company and all of its stockholders as they face a rising tide of strike suits.\textsuperscript{97} The decision could also encourage experimentation with other types of bylaws that could affect class and derivative litigation.\textsuperscript{98} Likely in response to

\textsuperscript{94}See generally Steven Davidoff Solomon, \textit{A Ruling's Chilling Effect on Corporate Litigation}, \textit{N.Y. TIMES DEALBOOK} (May 23, 2014, 5:01 PM), archived at \url{http://perma.cc/9CGL-8UTA}.

\textsuperscript{95}See Letter from Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform to Members of the Delaware General Assembly (June 9, 2014).

\textsuperscript{96}See \textit{Senate Joint Resolution No. 12 (Calling for Continued Examination of Important Proposed Amendments to the Delaware General Corporation Law Relating to Fee-Shifting and Other Aspects of Corporate Litigation)}, 147th Gen. Assemb. (Del. 2014), archived at \url{http://perma.cc/L2S2-PHZ9}. Also on the state level, Oklahoma enacted legislation, effective Nov. 1, 2014, mandating bilateral "loser pays" fee-shifting in derivative lawsuits and allowing the court to award costs, including attorneys' fees, if the derivative action confers a "substantial benefit." See \textit{Okla. Stat. tit. 18 § 1126} (2014).

In the absence of Delaware legislation barring fee-shifting provisions, a limited number of public corporations thereafter adopted fee-shifting bylaws and charter provisions, largely modeled on the ATP bylaw. As of January 14, 2015, 39 corporations had adopted or announced an intent to adopt such a provision, while 13 limited partnerships had done so. See Allen, supra note 74, at 148. As discussed in \textit{Fee-Shifting Bylaws}, the majority of such corporations were small-cap, micro-cap, and nano-cap. None was a large cap. See id.

Although the number of companies that adopted fee-shifting provisions was modest, such provisions elicited significant criticism. See, e.g., Letter from the Am. Fed'n of Labor and Cong. of Indus. Orgs, seven other labor unions and the Nat'l Conference on Pub. Emp. Ret. Sys. to The Hon. Jack Markell, Governor of Del. (Dec. 3, 2014) ("We write to express our serious concerns regarding the national and sweeping implications of a recent Delaware Supreme Court decision which eviscerates investor's rights and threatens the security of US capital markets.").

In addition, three lawsuits challenging such provisions were filed in the Delaware Court of Chancery and a lawsuit seeking to have a fee-shifting bylaw and a concurrently adopted exclusive forum bylaw declared invalid and inapplicable was filed in the United States District Court for the Northern District of California. See Allen supra note 74, at 147-48; Olson v. Riverbed Technology, No. 4:15-cv-00562 (N.D. Cal. filed Feb. 5, 2015).

\textsuperscript{97}See ATP Tour, Inc. v. Deutscher Tennis Bund (German Tennis Federation), 91 A.3d 554, 560 (Del. 2014).

\textsuperscript{98}For example, after the \textit{ATP Tour} decision was rendered, four companies adopted (or announced an intention to adopt) bylaws prohibiting any current or former stockholders or group of stockholders from initiating a direct or derivative claim unless the claiming stockholder delivers to the corporate secretary written consent by beneficial stockholders owning at least 3% of the outstanding shares. See, e.g., Imperial Holdings, Inc., Amended and Restated Bylaws, Current Report (Form 8-K), Exhibit 3.2 (November 3, 2014), archived at \url{http://perma.cc/4S7J-5H9T}. Imperial Holding stated that it intends to seek stockholder ratification at the next annual meeting. See Press Release, Imperial Holdings, Inc. (Nov. 3,
concerns as to where this experimentation could lead, some members of the Delaware bar have signaled that the bar will be undertaking a broader review of the implications and limits of Delaware's theory of bylaws and charters as contracts, in view of *Boilermakers* and *ATP Tour.*

IV. ISSUES RAISED BY MANDATORY ARBITRATION BYLAWS

Reading *American Express* and *Boilermakers* together, some have concluded that a board would have the unilateral power to adopt a mandatory arbitration bylaw covering intra-corporate disputes that waives the right to bring a class action, and that such a bylaw would be valid and enforceable. However, before drawing a conclusion, there are a number of additional legal and practical issues to consider.

A. Process v. Substance

Arguably, a mandatory arbitration bylaw, unlike a forum selection bylaw regulating process, could be viewed as regulating substantive matters under the reasoning and language of *Boilermakers*, since stockholders would lose the right to pursue a judicial remedy. This

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2014, archived at http://perma.cc/N5QZ-4DJF. The percentage threshold represents another effort to address strike suits by holders of small amounts of stock. One of those bylaws is currently being challenged. See Rothenberg v. Imperial Holdings, Inc., No. 502015CA000621 (Fla. Cir. Ct., Palm Beach County, filed Jan. 20, 2015).

100 Lawrence A. Hamermesh, *Consent in Corporate Law*, 70 BUS. LAW 162, 173 (2014/2015) ("[T]hose of us who draft and recommend changes to Delaware's corporate statutes will have to confront how, if at all, to place legislative limits on the doctrine of corporate consent."). As a practical matter, such a review of Delaware's contractual bylaw theory could affect the future of arbitration bylaws.

101 See *infra* Part IV.A-G.

102 As Chancellor Strine stated in *Boilermakers*, the bylaws did not regulate "whether the stockholder may file suit." (emphasis in original). *Boilermakers*, 73 A.3d 934, 952. However, it seems unlikely that the court was focusing on alternative dispute resolution when this phrase was penned, and Delaware case law has emphasized that bylaws are procedurally oriented. See CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 234-36 (Del. 2008) (concerning distinctions between the subject matter of bylaws and certificates of incorporation); Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1079 (Del. Ch. 2004), aff'd, 872 A.2d 559 (Del. 2005) ("[T]here is a general consensus that bylaws that regulate the process by which the board acts are statutorily authorized"); Gow v. Consol. Coppermines Corp., 165 A.
argument would likely have the most valence in situations where mandatory arbitration is combined with a class action waiver. If mandating arbitration substantively limits the rights of stockholders, then under Section 102(b)(1) ("Contents of the Certificate of Incorporation") of the DGCL, the arbitration provision must be in a company's certificate of incorporation, rather than in its process-oriented bylaws. Section 102(b)(1) requires including in the certificate of incorporation "any provision creating, defining, limiting and regulating the powers of the stockholders, or any class of the stockholders . . . if such provisions are not contrary to the laws of [Delaware]."

However, this argument appears weak. Proponents of mandatory arbitration bylaws would likely argue that such bylaws are procedural, since they do not determine whether a corporation or its management is liable, only the forum in which liability is determined. Moreover, as previously discussed, according to the United States Supreme Court, an arbitration clause is a specialized type of forum-selection clause. Additionally, the Supreme Court has held that arbitration itself does not affect substantive rights, including statutory rights under the securities laws. Thus, if Delaware deemed board-adopted arbitration

136, 140 (Del. Ch. 1933) ("[A]s the charter is an instrument in which the broad and general aspects of the corporate entity's existence and nature are defined, so the by-laws are generally regarded as the proper place for the self-imposed rules and regulations deemed expedient for its convenient functioning to be laid down.").


104 If a mandatory arbitration provision were required to be in the certificate of incorporation, corporations going public, being spun-off, emerging from bankruptcy or otherwise in situations where public stockholder approval is not required would be the most likely candidates for adopting a mandatory arbitration charter provision, rather than corporations that are already public. See Allen, supra note 36, at 2.

105 Del. Code Ann. tit. 8, § 102(b)(1) (emphasis added). While this section of the DGCL is phrased as "may," it effectively requires that limitations on stockholder power be included in the certificate of incorporation and not the bylaws. See id.

106 See Boilermakers, 73 A.3d at 943.


108 See id. at 486 ("[R]esort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act."); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987) ("In this case, where the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights, enforcement does not effect a waiver of 'compliance with any provision' of the Exchange Act under § 29(a)."; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985):

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute, it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.
bylaws—whether or not they include a class action waiver—generally to be invalid under Section 109(b) of the DGCL or otherwise to violate public policy, it is probable that the FAA would preempt Delaware law.

**B. Delaware Policy Concerning Arbitration**

A basic question is whether Delaware supports arbitration of disputes. According to the Delaware Supreme Court, Delaware public policy favors arbitration. Moreover, Delaware's Uniform Arbitration Act, like the FAA, has a broad scope and focuses upon the existence of a contract:

A written agreement to submit to arbitration any controversy . . . is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, without regard to the justiciable character of the

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109 DEL. CODE ANN. tit. 8, § 109(b) (2013).
110 See Black & Gross, supra note 23, at 3 (concerning federal preemption). Recent Supreme Court precedent reflects an expansive view of federal preemption. See, e.g., AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747-48 (2011) (holding that the FAA preempted California's judicial rule invalidating class action waivers as unconscionable in certain circumstances).
111 See SBC Interactive, Inc. v. Corp. Media Partners, 714 A.2d 758, 761 (Del. 1998) ("[T]he public policy of Delaware favors arbitration."); see also NAMA Hldgs., LLC v. Related World Mkt. Ctr., LLC, 922 A.2d 417, 430 (Del. Ch. 2007) ("A strong presumption exists in favor of arbitration, and, accordingly, contractual arbitration clauses are generally interpreted broadly by the courts."); Julian v. Julian, No. 4137-VCN, 2009 WL 2937121, at *3 (Del. Ch. Sept. 9, 2009) ("If a claim is arbitral, i.e., properly committed to arbitration, this Court lacks subject matter jurisdiction because arbitration provides an adequate legal remedy.").
Briefly, controversy, and confers jurisdiction on the Chancery Court of the State to enforce it and to enter judgment on an award. In determining any matter arising under this chapter, the Court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute . . .

Consistent with Delaware's general policy favoring arbitration, its limited liability company and limited partnership statutes permit governing documents to mandate arbitration. Additionally, Delaware established its own system of private arbitration through the Court of Chancery, in which the Chancellor, Vice Chancellors, and masters in Chancery would have acted as arbitrators. However, that system was successfully challenged on First Amendment grounds as interfering with the public's right of access to Delaware's "government-sponsored arbitration proceedings." Nonetheless, the decision left the door open to structuring alternatives that can pass muster under the First Amendment.

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113 Del. Code Ann. tit. 10, § 5701 (2013). Note that some states have statutes permitting arbitration provisions in a corporation's charters or bylaws. See, e.g., Conn. Gen. Stat. § 52-408 (2013) ([A] written provision in the articles of association or bylaws of [a] . . . corporation . . . to arbitrate any controversy which may arise . . . , shall be valid, irrevocable and enforceable, except when there exists sufficient cause at law or in equity for the avoidance . . . ).


117 At the end of 2014, efforts were underway in Delaware to develop an alternative arbitration program that would provide for the speedy resolution of disputes, but not utilize sitting judges. See Margaret Milford, Strine Pushes New Arbitration Process, News Journal (Dec. 6, 2014). The goal was to have a legislative proposal ready for consideration early in 2015. See id.
C. Bylaws as Contracts under the FAA

As noted above, Chancellor Strine emphasized the contractual nature of bylaws in *Boilermakers.* The Delaware Supreme Court has been explicit: "Corporate charters and by-laws are contracts among the shareholders of a corporation and the general rules of contract interpretation are held to apply." This conclusion is particularly important in light of the United States Supreme Court's focus on state law contract formation principles when determining whether a contract exists for purposes of Section 2 of the FAA.

On the federal level, the 2011 decision of the United States District Court for the Northern District of California in *Galaviz v. Berg* has garnered significant attention. *Galaviz* involved a stockholder derivative claim brought against Oracle Corporation, a Delaware corporation. Oracle sought to have the case dismissed on the basis of its exclusive forum bylaw. In a case of first impression, and without ever reaching the underlying issues of state law, the court denied the motion on the basis of federal common law. The court held that the exclusive forum bylaw amendment required stockholder approval, and emphasized that much of the alleged wrongdoing occurred prior to the adoption of that bylaw. In coming to that conclusion, the court sought to draw a distinction between commercial contracts and those created under corporate law statutes:

To whatever degree bylaws may generally be contractual in nature, however, Oracle here seeks to rely on principles of *corporate* law with respect to how its bylaws could be amended. Oracle has not pointed to any commercial contract case upholding a venue provision that was

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118 See *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 957 (Del. Ch. 2013); see also *supra* Part III.B.
120 See *supra* note 15.
122 See *id.* at 1171.
123 See *id.*
124 See *id.* at 1172, 1175.
125 See *Galaviz*, 763 F. Supp. 2d at 1171-72.
inserted by a purported unilateral amendment to existing contract terms.\textsuperscript{126}

Chancellor Strine sharply criticized \textit{Galaviz} in the \textit{Boilermakers} opinion, remarking that the contention "that board-adopted bylaws are not like other contracts because they lack the stockholders' assent—rests on a failure to appreciate the contractual framework established by the DGCL for Delaware corporations and their stockholders."\textsuperscript{127} Subsequent state and federal opinions involving challenges to the enforcement of exclusive forum provisions have relied upon the theory of bylaws and charters as contracts, including several expressly finding \textit{Boilermakers}, and not \textit{Galaviz}, persuasive.\textsuperscript{128}

\textsuperscript{126}Id. at 1174 (emphasis in original). The Court emphasized the need for bilateral approval: "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." Id. at 1175.

\textsuperscript{127}Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 956 (Del. Ch. 2013). Notwithstanding this language, other courts could follow the reasoning in \textit{Galaviz}. See, e.g., Roberts v. Triquint Semiconductor, Inc., No. 1402-02441 (Or. Cir. Ct. Aug. 14 2014). While discussing \textit{Boilermakers} and "the flexible nature of a Delaware shareholder contract," the court in \textit{Roberts} nonetheless focused upon Triquint's bylaw having been adopted simultaneously with the corporation entering into a merger agreement, and not "prior to any of its alleged wrongdoing." Id. at 9. As a result, the court declined to dismiss the case on the basis of Triquint's exclusive forum bylaw. See id.

The Delaware Court of Chancery, in turn, criticized the \textit{Roberts} opinion. See City of Providence v. First Citizens BancShares, Inc., 99 A.3d 229 (Del. Ch. 2014). In \textit{City of Providence}, the court upheld an exclusive forum bylaw designating courts in the State of North Carolina, where First Citizens was headquartered. See id. at 229. Like Triquint, First Citizens adopted its exclusive forum bylaw concurrently with entering into a definitive merger agreement. See id. at 231. With respect to that timing, Chancellor Bouchard concluded: "That the Board adopted it on an allegedly 'cloudy day' when it entered into the merger agreement . . . rather than on a 'clear' day is immaterial given the lack of any well-pled allegations . . . demonstrating any impropriety in this timing." Id. at 241.

Apart from \textit{Galaviz} and \textit{Triquint}, the only other instance in which a court is known to have declined to enforce an exclusive forum bylaw or charter provision involved litigation relating to Facebook's IPO. See \textit{In re Facebook, Inc., IPO Sec. & Derivative Litig.}, 922 F. Supp. 2d 445, 463 (S.D.N.Y. 2013); see also Allen, supra note 36, at 7. There, the United States District Court for the Southern District of New York declined to dismiss four derivative actions on the basis of a charter provision that was technically not in effect when stock was sold in the offering, although it dismissed the cases on other grounds. See \textit{In re Facebook, Inc.}, 922 F. Supp. 2d at 463.

\textsuperscript{128}See Allen, supra note 36, at 6-8; Report of Proceedings, Miller v. Beam, Inc., No. 2014 CH 00932, at 44 (Ill. Cir. Ct. Mar. 5, 2014) (upholding exclusive forum bylaw and finding that the \textit{Boilermakers} analysis was "simply more persuasive analytically" than the \textit{Galaviz} analysis); Order, Mot. to Dismiss Granted, Groen v. Safeway Inc., No. RG14716641, at *2 (Cal. Super. Ct. May 14, 2014) ("Notwithstanding Plaintiffs' contrary contentions, the Boilermakers decision was not limited to an analysis of whether a corporate board has the power to adopt and amend bylaws unilaterally under 'Delaware's corporate framework.'
It is worth bearing in mind that Congress could limit the broad scope of the FAA through legislation. For example, the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act includes four provisions that limit, or provide authority to limit, mandatory pre-dispute arbitration in specified circumstances. While Congress could seek to limit or prohibit the use of arbitration in intra-corporate disputes, such legislation is unlikely to draw broad bipartisan support in a politically deadlocked Washington.

D. Securities and Exchange Commission

The staff ("Staff") of the Securities and Exchange Commission ("SEC") disfavors mandatory arbitration, as evidenced by its policy against accelerating the registration statements of companies with such


[I]f boards cannot unilaterally amend bylaws to adopt [exclusive forum] provisions, they also cannot amend bylaws for dozens of other reasons that are standard corporate practice. A material portion of the bylaws of publicly traded corporations that have been amended by unilateral board action would thus have to be declared invalid.

See also infra Part IV.E (analyzing decisions upholding Commonwealth REIT's arbitration bylaw).

129 See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The four provisions are: § 748 (Commodity Whistleblower Incentives and Protection); § 921 (Authority to Restrict Mandatory Pre-Dispute Arbitration); § 922 (Whistleblower Protection); and § 1028 (Authority to Restrict Mandatory Pre-Dispute Arbitration). See id. Notably, under § 921, the SEC has authority to prohibit or impose limitations on the use of arbitration provisions by brokers, dealers and municipal securities dealers in their agreements with customers or clients "if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors." Id.

130 Members of Congress continue to consider limiting the circumstances under which mandatory arbitration may apply. See, e.g., The Arbitration Fairness Act of 2013 (H.R. 1844, S. 878, 113th Cong. (2013) (the legislation, which died in committee, provided that no predispute arbitration agreement would be valid or enforceable if it required arbitration of an employment, consumer, antitrust, or civil rights dispute); see also H.R. 1844 (113th): Arbitration Fairness Act of 2013, GOVTRACK.US, archived at http://perma.cc/TPQ4-5Q8Q (last visited Dec. 30, 2014); S. 878 (113th): Arbitration Fairness Act of 2013, GOVTRACK.US, archived at https://perma.cc/V7AB-R3AQ (last visited Dec. 30, 2014); see also Melissa Lipman, Franken Urges Consumer Arbitration Fix After AmEx Ruling, Law360 (Dec. 17, 2013), archived at http://perma.cc/UF5G-QUPK.
provisions in their organizing documents.\textsuperscript{131} Despite the policy, a small number of companies have gone public with organizational documents mandating arbitration, although it is not clear that these provisions were flagged during the SEC registration process.\textsuperscript{132}

The Staff views mandatory arbitration of securities claims as contrary to the anti-waiver provisions of Section 14 of the Securities Act of 1933, as amended ("Securities Act"),\textsuperscript{133} and Section 29(a) of the Securities Exchange Act of 1934, as amended ("Exchange Act"),\textsuperscript{134} which are largely the same. Under Section 29(a) of the Exchange Act, \\[\text{[a]ny}\n
\textsuperscript{131}See Black & Gross, supra note 23, at 8.
\textsuperscript{132}For example, Government Properties Income Trust, a Maryland real estate investment trust, went public in 2009 with a mandatory arbitration provision in its declaration of trust (which is the analog of a charter). See Government Properties Income Trust, Amended and Restated Declaration of Trust § 6.10, Registration Statement (Form S-11/A), Exhibit 3.1 (May 28, 2009), archived at http://perma.cc/3WDL-G4EW. Detailed procedures for arbitration were set forth in its bylaws. See Government Properties Income Trust, Amended and Restated Bylaws art. IX, Registration Statement (Form S-11/A), Exhibit 3.2 (May 28, 2009), archived at http://perma.cc/P6FW-5A6H.

Carolina National Corporation, a South Carolina corporation and small business issuer, filed a registration statement in 2002 with a provision in its certificate of incorporation explicitly enabling a binding arbitration bylaw: "The Bylaws of the Corporation may require binding arbitration of disputes arising out of or related to share ownership." Carolina National Corporation, Articles of Incorporation, Registration Statement (Form SB-2), Exhibit 3.1 (Jan. 9, 2002), archived at http://perma.cc/3FUQ-SHJ9. The bylaws, in turn, included the following provision:

\begin{quote}
Any dispute between a shareholder of the Corporation and (1) the Corporation, or (2) any officer of the Corporation, or (3) any other shareholder of the Corporation which arises out of the aggrieved shareholder's status as a shareholder shall be resolved by binding arbitration held in Columbia, South Carolina pursuant to the rules of the American Arbitration Association.
\end{quote}


RMX REIT, INC., a Washington real estate investment trust and a small business issuer, filed a registration statement in 1995 with a mandatory arbitration provision in its certificate of incorporation, that states:

\begin{quote}
Any controversy or claim arising out of or relating to these Articles of Incorporation or the By-Laws of this corporation, including but not limited to the interpretation of any term herein contained, any voting deadlock regarding the Board of Directors or the Stockholders, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and the judgment upon the award rendered by the Arbitrator(s) shall be binding and may be entered in any court having jurisdiction thereof. Jurisdiction for all internal corporate disputes shall be in the State of Washington and venue shall be in Spokane County (or the Federal Court for the Eastern District of Washington only if that Court has proper jurisdiction as established by law or custom.
\end{quote}

RMX REIT, Inc., Articles of Incorporation art. XII, Registration Statement (Form SB-2), Exhibit 3.1 (June 19, 1997), archived at http://perma.cc/UTC6-NF69.

condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder . . . shall be void."135 The Staff's position is at odds with United States Supreme Court precedent that an agreement to arbitrate is not a waiver of substantive rights.136 How and when this conflict will be directly addressed remains to be seen.137

134Id.

The Staff's policy disfavoring arbitration does not apply in all situations. For example, certain foreign corporations whose securities or depository receipts trade in the United States require arbitration of investor claims in their governing documents or depository receipt agreements, in some cases as required by the laws of the jurisdiction in which they were formed. See Christos Ravanides, Arbitration Clauses in Public Company Charters: An Expansion of the ADR Elysian Fields or a Descent Into Hades?, 18 AM. REV. INT'L ARB., 371, 389-408 (2007).

Additionally, the rules of the Financial Industry Regulatory Authority, Inc. ("FINRA"), which are approved by the SEC, provide for arbitration of investor disputes. See FINRA, FINRA Dispute Resolution Arbitrator's Guide, 9, 10 (Dec. 2014), archived at http://perma.cc/VN3Y-ZC98. While FINRA interprets those rules as prohibiting class action waivers, Charles Schwab & Co. amended its customer agreements in 2011 to prohibit clients from pursuing or participating in class actions, and to require resolving all claims in individual arbitration. See Susan Antilla, Schwab Case Casts Spotlight on Securities Arbitration and Its Flaws, N.Y. TIMES DEALBOOK (Sept. 4, 2013), archived at http://perma.cc/U6HM-4UC2. FINRA then instituted disciplinary proceedings against Schwab. See id. In 2013, a FINRA hearing panel found that while Schwab had violated FINRA rules, FINRA's enforcement powers were preempted by the FAA. See id. FINRA appealed to its National Adjudicatory Council. See id. FINRA's Board of Governors took the case from the National Adjudicatory Council and reversed the hearing panel, finding that since FINRA's rules were subject to SEC oversight, they overrode the FAA. See Mason Braswell & Mark Schoeff Jr., Schwab Pays $500,000 to Settle FINRA Dispute Over Class Action Waivers, INVESTMENTNEWS (Apr. 24, 2014), archived at http://perma.cc/9GZD-6KM6. The Board of Governors also determined that Schwab's efforts to prevent arbitrators from consolidating claims from more than one party violated FINRA rules. See id. Schwab, which received negative publicity as a result of its efforts to ban class actions, settled for $500,000, rather than seek an appeal. See Jed Horowitz & Suzanne Barlyn, Schwab Drops Ban on Clients Filing Class-Action Lawsuits, REUTERS (Apr. 24, 2014), archived at http://perma.cc/43Y4-L973.

Additionally, in 2007, there were reports that the SEC was studying whether to allow companies to amend their bylaws to provide for arbitration of stockholder disputes as part of a broader package of proposals. See Kara Scannell, SEC Explores Opening Door to Arbitration, THE WALL ST. J. (Apr. 16, 2007, 12:01 AM), archived at http://perma.cc/QXV7-B3QQ.


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The Staff's position was illustrated most recently in 2012, when The Carlyle Group L.P. sought to go public with a mandatory arbitration provision in its limited partnership agreement. Consistent with its historical position, the Staff stated that it did not anticipate exercising its authority to accelerate the effective date of the company's registration statement if the limited partnership agreement included such a provision, adding, "the Commission would need to make any decision on a request for acceleration." The company eliminated the arbitration provision seemingly as a result of the Staff's position and significant negative publicity, and substituted a different type of forum selection provision—namely, an exclusive forum clause. If a company in Carlyle's position sought acceleration from the SEC and the Commissioners denied such a request, the company could presumably seek recourse through the courts. But, to date, no company has pursued such a time-consuming and expensive course of action. Such an approach would also, as a practical matter, attract negative publicity, be problematic for underwriters who want to take an offering to market at the time they


139 Letter from Pamela Long, Assistant Dir., SEC, to Jeffrey W. Ferguson, Esq., counsel for The Carlyle Group, L.P. (Feb. 3, 2012), archived at http://perma.cc/GQH2-SEK2. The SEC was also urged to take this position by outside groups. See, e.g., Letter from Public Citizen, AFSCME, and seven other organizations to Mary L. Schapiro, Chairman, SEC (Feb. 3, 2012), archived at http://perma.cc/KX66-A3W8 ("Forced arbitration would enable companies to violate federal securities laws with near-impunity."). Senators Al Franken, Robert Menendez, and Richard Blumenthal also wrote to Chairman Schapiro, stating that The Carlyle Group arbitration provision "would unlawfully deprive investors of their ability to vindicate their statutory rights." Miles Weiss, Jesse Hamilton & Cristina Alesci, Carlyle Drops Class-Action Lawsuit Ban as Opposition Mounts, BLOOMBERG (Feb. 3, 2012, 5:57 PM), archived at http://perma.cc/2DKR-VNJA.


141 See Alison Frankel, Wake Up Shareholders! Your Rights May be in Danger, REUTERS (June 25, 2013, archived at http://perma.cc/Y6V9-N771 ("[A distinguished law professor] told me he believes the SEC 'has limited power' to block such provisions if a corporation really wants to litigate the issue up to the Supreme Court.").

142 See Carl W. Schneider, Arbitration Provisions in Corporate Governance Documents, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Apr. 27, 2012, 9:11 AM), archived at http://perma.cc/7NF2-X7GV ("As a practical matter, Carlyle had no means to challenge the Commission and no practical alternative other than to withdraw its arbitration provision, which it did.").
believe optimal, and complicate the ability of a company to work with the Staff on a going-forward basis.\(^{143}\)

The Staff’s position was also evident during the 2012 proxy season when Gannett Co., Inc. and Pfizer Inc. each received a binding stockholder proposal to adopt a bylaw requiring arbitration of stockholder disputes, subject to specified parameters.\(^{144}\) Each company sought SEC no-action relief under Exchange Act Rule 14a-8 ("Shareholder Proposals"),\(^{145}\) arguing that the proposal, if implemented, would cause the company to violate the anti-waiver provision in Section 29(a) of the Exchange Act.\(^{146}\) The Staff granted no-action relief without being explicit about the basis of the decision, stating, "We note that there appears to be some basis for your view that implementation of the proposal would cause the company to violate the federal securities laws."\(^{147}\)

Notably, the SEC has had relatively little to say about arbitration bylaws adopted by companies that are already public, as evidenced by provisions adopted by five related Maryland real estate investment trusts ("REITs")\(^{148}\) and a related limited liability company (collectively, the

\(^{143}\) There is another theoretical option. Under Section 8 of the Securities Act, "the effective date of a registration statement shall be the twentieth day after the filing thereof or such earlier date as the Commission may determine . . . ." Securities Act of 1933, § 8, 15 U.S.C. § 77h (1976) (emphasis added). Thus, after resolving all other comments with the Staff, an issuer could wait 20 days and then sell its securities. See id. However, underwriters want the certainty and speed provided by a final sign-off from the SEC, in the form of an "acceleration order" ending the 20-day period.


\(^{145}\) See Gannett Co., Inc., SEC No-Action Letter, supra note 144; Pfizer Inc., SEC No-Action Letter, supra note 144.

\(^{146}\) See id.

\(^{147}\) See id. Relief was granted pursuant to Rule 14a-8(i)(2) (violation of law) under the Exchange Act. See 17 C.F.R. § 240.14a-8 (2015). Two other companies, Frontier Communications Corp. and Google Inc., received such proposals in 2012 and chose to present them to their stockholders without seeking no-action relief from the Staff. See Frontier Communications Corp., Proxy Statement (Schedule 14A) 44-45 (Mar. 26, 2012), archived at http://perma.cc/E3FS-VKYE; Google Inc., Proxy Statement (Schedule 14A) 103-04 (May 9, 2012), archived at http://perma.cc/C94U-GTXM. Both proposals received very low levels of support, with the Frontier proposal receiving support from 8.1% of the common stock present or represented by proxy and entitled to vote at the meeting, and the Google proposal receiving support from less than one percent of the voting power of the common stock present or represented by proxy and entitled to vote at the meeting. See Frontier Communications Corp., Current Report (Form 8-K), Item 5.07 (May 14, 2012), archived at http://perma.cc/WS24-XLFX; Google Inc., Current Report (Form 8-K), Item 5.07 (June 26, 2012), archived at http://perma.cc/5TEN-C3UX.

\(^{148}\) According to the National Association of Real Estate Investment Trusts, a REIT is "a company that owns or finances income-producing real estate. Modeled after mutual funds,
"Maryland Cluster"). The most well-known of the companies is Commonwealth REIT, which adopted a mandatory arbitration bylaw in 2009 after its Initial Public Offering ("IPO"). Since the company was entitled to utilize an automatically effective shelf registration statement when selling securities to the public, it did not need an acceleration order from the SEC Staff in order to access the capital markets. Similarly, Hospitality Properties Trust, Senior Housing Properties Trust, and Five Star Quality Care, Inc. adopted mandatory arbitration bylaws in 2009, and Select Income REIT, a former subsidiary of Commonwealth REIT, adopted a mandatory arbitration bylaw in 2013. Each company adopted arbitration bylaws after it was public, and both Hospitality Properties Trust and Senior Housing Properties Trust was entitled to utilize an automatic shelf registration. The SEC did, however, comment on Select Income REIT's arbitration provision in connection with a 2013 review of the company's Annual Report on Form 10-K:

We note the bylaws were revised on February 21, 2013 to include a shareholder arbitration provision. Please provide

REITs provide investors of all types regular income streams, diversification and long-term capital appreciation. REITs typically pay out all of their taxable income as dividends to shareholders. In turn, shareholders pay the income taxes on those dividends. National Association of Real Estate Investment Trusts, What is a REIT?, archived at https://perma.cc/Y5Y6-F6L3.

See HRPT Properties Trust, Quarterly Report (Form 10-Q), Part II, Item 5 (Nov. 6, 2009), archived at http://perma.cc/3V8U-XE38. HRPT Properties Trust changed its name to Commonwealth REIT in 2010. The company currently operates under the name Equity Commonwealth.

See supra note 150. At the time, Five Star Quality Care, Inc. was entitled to use a shelf registration statement, but not an automatic shelf. The company filed a shelf registration statement on November 12, 2009, and the SEC declared it effective without comment on November 27, 2009. See Registration Statement (Form S-3) (Nov. 12, 2009), archived at http://perma.cc/3J7X-ZFHZ; Notice of Effectiveness (Nov. 27, 2009), archived at http://perma.cc/GG5J-T9B6.
us an analysis as to how this provision, when applied to claims related to the federal securities laws, is consistent with Section 14 of the Securities Act. The analysis should include a discussion of procedural protections, substantive remedies and Commission oversight.¹⁵⁶

Select Income REIT responded by agreeing to exclude disputes arising under the federal securities laws from the scope of its bylaw, rather than challenge the basis for the SEC’s inquiry.¹⁵⁷ Notably, Select Income REIT had planned to include an arbitration provision in its IPO bylaws, but deleted that provision after receiving the same Staff comment concerning Section 14.¹⁵⁸ Fiduciary duty claims, which are the primary claims generating multi-forum litigation,¹⁵⁹ remain subject to Select Income REIT’s mandatory arbitration provisions.¹⁶⁰ The last of the Maryland Cluster companies, TravelCenters of America LLC, a Delaware limited liability company and former subsidiary of Hospitality


¹⁵⁷See Select Income REIT, Amended and Restated Bylaws, Current Report (Form 8-K), Exhibit 3.2 (May 16, 2013), archived at http://perma.cc/53MB-8SXK. This contrasts with the outcome reported in 1990. See Carl W. Schneider, Arbitration Provisions in Corporate Governance Documents: An Idea the SEC Refuses to Accelerate, INSIGHTS: CORP. AND SEC. L. ADVISOR, May 1990, at 21. Schneider reported that the Staff refused to accelerate the effectiveness of an IPO in light of the mandatory arbitration clause in the company's organizational documents, and that the Staff made clear that it would not change its position if the company carved-out federal securities claims. See id. at 24.


Properties Trust, amended its limited liability company agreement and bylaws in 2009 after it was public to include mandatory arbitration provisions. Whether other companies will seek to adopt mandatory arbitration provisions after they are public remains to be seen.

E. Limited Precedent

As of December 2014, there were only three known opinions addressing the validity and enforceability of a mandatory arbitration bylaw adopted by a public company, and limited case law addressing arbitration bylaws in other contexts. The three public company cases

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161 See TravelCenters of Am. LLC, Quarterly Report (Form 10-Q), Part II, Item 5 (Nov. 6, 2009) archived at http://perma.cc/J3DH-916C; see also TravelCenters of Am. LLC, Amendment to Amended and Restated Limited Liability Company Agreement, Quarterly Report (Form 10-Q), Exhibit 3.2 (Nov. 6, 2009) archived at http://perma.cc/HZG6-WL4; TravelCenters of Am. LLC, Amended and Restated Bylaws, Quarterly Report (Form 10-Q), Exhibit 3.4 (Nov. 6, 2009) archived at http://perma.cc/AL54-PQD3.

162 See id. Due to the freedom of contract associated with limited liability companies, potential state law issues concerning the validity of a mandatory arbitration provision are of less concern than in the corporate context. See Elizabeth S. Miller, Recent Cases Involving Limited Liability Companies and Limited Liability Partnerships 1, 47 (March 2008), archived at http://perma.cc/6QXL-FKAH. Moreover, limited liability company agreements are often structured to eliminate fiduciary duties, to the extent permitted by applicable law. See, e.g., Del. Code Ann. tit. 6, § 18-1101(b) (2013); see also Leo E. Strine, Jr. & J. Travis Laster, The Siren Song of Unlimited Contractual Freedom, 1 (Harvard Law School, John M. Olin Center for Law, Economics, and Business, Discussion Paper No. 789, 2014) (citation omitted) (“[T]he statutes that authorize alternative entities declare as public policy the goal of granting the broadest contractual freedom possible, and permit the parties to the governing instrument to waive any of the statutory or common law default principles of law and to shape their own relationships.”), archived at http://perma.cc/2ZVE-XSM.

are all trial court cases involving Commonwealth REIT, two of which were in Maryland state court and one in Massachusetts federal district court. In connection with a takeover attempt, two activist hedge funds, Corvex Management LP and Related Fund Management, LLC, sued Commonwealth REIT in the Circuit Court of Baltimore in 2013, alleging that the trustees of the company breached their fiduciary duties and seeking declaratory and injunctive relief. Commonwealth REIT initiated arbitration of those claims pursuant to the company's bylaws,
and the plaintiffs then sought to stay the arbitration, claiming that the arbitration provisions were invalid and unenforceable.169

The court denied the stay, finding that the plaintiffs had assented to arbitration.170 In reaching this conclusion, the court noted that the share certificates for Commonwealth's stock bore a legend indicating that the holder agreed to be bound by the company's declaration of trust and its bylaws:171 "This Court finds that this is enough to constitute mutual assent of the parties to the Arbitration Bylaws at issue."172 This is a constructive notice argument that could theoretically be interpreted to mean a stockholder is bound simply by purchasing shares: "Maryland courts as well as courts from other jurisdictions have frequently ruled that constructive knowledge, constructive notice, and knowledge/notice through incorporation-by-reference are adequate and bind a party to a contract, thereby satisfying mutuality."173 The court also found that the plaintiffs, who were sophisticated parties, had actual knowledge of the arbitration bylaws, "and thereby assented to them through [their] purchases of [Commonwealth] stock."174

In addressing the plaintiffs' argument that the arbitration provisions were invalid due to a lack of consideration,175 the court focused on a clause in the bylaws stating that "on the demand of any party[,] a stockholder dispute will] be resolved through binding and final arbitration"176 and sought to distinguish "more one-sided arbitration clauses."177 A Delaware court arguably would be less likely to focus on this language, since, under current established Delaware law, bylaws in their entirety are viewed as contracts between a corporation and its stockholders.178 Along similar lines, under United States Supreme Court

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170 See id. at *17-18.
171 See id. at *17. Commonwealth's declaration of trust specifically authorized the trustees to adopt, amend or repeal bylaws. Id. at *27.
172 Id. As a practical matter, the shares of most public companies are held in "street name," meaning in the names of banks, brokers, and other financial intermediaries, rather than in the name of individual stockholders. See Street Name, SEC.Gov (last visited Sept. 26, 2014), archived at http://perma.cc/AP4X-X8GZ.
174 See supra Part IV.C.
precedent, requiring separate consideration for the arbitration provisions in bylaws, as compared to other bylaws, could be viewed as impermissibly imposing a disproportionate obligation on these provisions. Apart from the cited language, the Maryland court went on to state that it also found consideration in the fact that each party voluntarily entered into the bylaw contract, including the arbitration provisions.

In *Katz v. Commonwealth REIT*, the same court and the same judge once again addressed the validity and enforceability of Commonwealth's arbitration bylaws. However, *Katz* explicitly references *American Express* and *Boilermakers*, both of which were decided after *Corvex*. In *Katz*, the plaintiffs sought to distinguish their situation from that of the hedge funds in *Corvex*. The plaintiffs argued that *Corvex* involved a hostile bidder that acquired shares with actual knowledge of the arbitration bylaws, and that the arbitration provisions should not apply to "ordinary shareholders who did not acquire their shares with knowledge of the Arbitration Bylaws . . . ." They also claimed that the legend on their Commonwealth stock certificates was not a sufficient basis for finding that they had assented to the arbitration provisions, and that most public company stockholders never receive stock certificates. The court rejected these arguments, finding that all stockholders should be treated in the same fashion and that the plaintiffs had constructive notice of the arbitration provisions. Additionally, the court emphasized that *Concepcion* requires that arbitration agreements be on an equal footing with other contracts and not be held to a higher standard.

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179 See supra Part II.
180 See *Corvex*, 2013 WL 1915769, at *21.
182 See id. at 23-24, 39-40.
184 See *Katz*, slip op. at 9.
185 Id.
186 See id. at 19; see also *Street Name*, supra note 172.
187 Maryland courts, as well as courts from other jurisdictions, have frequently ruled that constructive knowledge, constructive notice, and knowledge or notice through incorporation-by-reference are adequate to inform and bind a party to a contract, and thereby, satisfy mutuality." *Katz*, slip op. at 22.
188 See id. (citing AT&T Mobility LLC v. Concepcion, 131 S. Ct. at 1745).
In reaching its conclusion that all Commonwealth stockholders were bound by the arbitration provisions regardless of their level of sophistication or when they purchased stock, the Katz court cited Boilermakers for the proposition that stockholders enter into a flexible contract with the corporation and its officers and directors when they buy stock:

[Commonwealth] stockholders assent to a contractual framework that explicitly recognizes that they will be bound by bylaws adopted unilaterally pursuant to Maryland REIT law. . . This means [Commonwealth] stockholders assent to not having to assent to board-adopted bylaws. Accordingly, Plaintiffs purchased their shares with constructive knowledge that the Arbitration Bylaws were in effect and that their shares were subject to them. This Court finds that this is enough to constitute mutual assent of the parties to the Arbitration Bylaws at issue.189

Following the reasoning in Boilermakers, the court explicitly rejected arguments that the arbitration bylaws should not bind stockholders that purchased shares before the arbitration provisions were adopted, stating "the timing of the Arbitration Bylaw has no effect on whether Plaintiffs are bound to it."190 Notably, in the context of private companies and associations, many courts have found that existing stockholders and members are bound by subsequently adopted arbitration provisions.191

The plaintiffs also argued that the provisions in Commonwealth's arbitration bylaws barring both fee shifting and awarding attorneys' fees in derivative or class actions192 eliminated the ability of stockholders

189Id. at 29. The court was not persuaded by attempts to distinguish Maryland law from Delaware law. See id. at 28 ("[G]iven the respect the Delaware courts command in corporate matters and their expertise in that field, along with the dearth of Maryland precedent in accord, this Court shall adhere to the Court of Chancery's view in its Boilermakers opinion.").

190Id. at 43. As a practical matter, if stockholders who purchased shares of the same class of stock at different times had different rights, corporations would face considerable difficulty in tracing the rights associated with a given share at a specific point in time. See, e.g., North v. McNamara, No. 1:13-cv-833, 2014 WL 4684377, at *5 (S.D. Ohio Sept. 19, 2014) ("To hold otherwise would lead to inconsistent and contradictory rights and remedies for shareholders of the same company. The Court cannot condone that outcome.").

191See supra note 164.

192The fee provisions are set forth in Section 16.6 of the Bylaws:

[E]ach party involved in a Dispute shall bear its own costs and expenses (including attorney's fees), and the arbitrators shall not render an award that would include shifting of any costs or expenses (including attorneys' fees), or,
to seek redress for "even the most flagrant breaches of fiduciary duty." However, citing *American Express* and *Concepcion*, the Court concluded:

[I]t is clear that Plaintiffs' argument that the Arbitration Bylaw is invalid because it is prohibitively expensive fails . . . That the Plaintiffs find the expense involved in proving their remedy is not worth the associated costs does not constitute the elimination of the right to pursue that remedy as to render the bylaw invalid.

In reaching that conclusion, the court focused on the provisions in Commonwealth's declaration of trust providing the trustees with the power to make and amend bylaws.

In the third Commonwealth decision, *Delaware County Employees Retirement Fund v. Portnoy*, the United States District Court for the District of Massachusetts denied the plaintiff's motion for a declaratory judgment that Commonwealth's arbitration bylaws were invalid and unenforceable, finding that res judicata precluded the court from deciding the issue. The court, however, went on to conclude that "even if res judicata did not apply, the Plaintiffs' arguments, arising under Maryland law . . . fail on the merits."

The District Court agreed that constructive knowledge adequately binds a party to a contract and that the trustees had the power under Commonwealth's declaration of trust to adopt the arbitration provisions without stockholder consent. As in *Corvex* and *Katz*, the court found that the arbitration agreement was supported by consideration since each in a derivative case or class action, award any portion of the Trust's award to the claimant or the claimant's attorneys.


*Katz*, slip op. at 39.

*Id.* at 41 (citation omitted).

*See id.* at 43-44.


*Id.*

*See id.* at *10. The Court went on to state: "Maryland law suggests that a party to a contract is presumed to have knowledge of company bylaws incorporated into the contract, even if they are not provided with a copy of them." *Id.* at *11.

*See id.* at *12.
party was obligated to arbitrate at the demand of the other. 200 Effectively acknowledging that arbitration provisions are procedural, rather than substantive, the court stated "the plaintiffs have not shown that the Arbitration Bylaw interferes with their rights to bring a derivative claim against the trustee Defendants or any other right under the Declaration." 201

While noting that contract defenses, including unconsonability, may be applied to invalidate arbitration agreements, the court found that the plaintiffs had failed to demonstrate that the arbitration provisions were unconscionable "insofar as the Plaintiffs had constructive knowledge of the Bylaw and are still able to vindicate their rights through arbitration." 202 With respect to vindication of rights, the court was referring to a decision by the arbitration panel challenged in Corvex invalidating a Commonwealth bylaw relating to consent solicitations. 203 As a practical matter, the arbitration provisions did not insulate the trustees from the stockholders of Commonwealth. 204 Corvex and Related successfully solicited written consents from the holders of more than two-thirds of Commonwealth's outstanding shares to remove all trustees without cause. 205 The process was, however, time consuming and expensive. 206

F. Stockholder Opposition

Mandatory arbitration bylaws that include a class action waiver have attracted criticism, due to the perception that they would insulate corporations from liability. 207 This reaction is consistent with the reaction

201 Id. at *10.
202 Id. at *14.
203 See id; see also Commonwealth REIT, Arbitration Panel Ruling Regarding the Amended and Restated Bylaws of Commonwealth REIT, Quarterly Report (Form 10-Q), Exhibit 3.18 (Nov. 7, 2013), archived at http://perma.cc/S56Y-WXXD.
204 See Commonwealth REIT, supra note 203.
207 See Frankel, supra note 141 (arguing that Congress intended securities law claims to be litigated on a class-basis, as evidenced by provisions in the Private Securities Litigation Reform Act and the Securities Litigation Uniform Standards Act, and that such litigation serves an important policing function). Note, however, that the United States Supreme Court granted a petition for certiorari in Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014), on November 15, 2013. See Max Stendahl, Securities Class Actions on Life Support in High Court Case, LAW360 (Nov. 15, 2013), archived at http://perma.cc/MW2R-F9FM. The class action involved a challenge to the fraud-on-the-market theory, which allows plaintiffs'
of consumer advocates to the United States Supreme Court's recent decisions upholding arbitration provisions in commercial agreements, the initial reaction of stockholder advocates to exclusive forum provisions in charters and bylaws, and the recent reaction to the ATP Tour decision. For example, partners at one well-known plaintiffs' firm have asserted that arbitration bylaws "threaten to undermine the integrity of our financial markets by removing judicial oversight not only of corporations' compliance with federal securities laws, but also of corporate directors' compliance with the fiduciary obligations to shareholders."

Some of this criticism is overstated. Arbitration bylaws will not be universally attractive to public companies, as discussed below. Moreover, it does not take into account the likelihood that companies that choose to pursue arbitration through a bylaw will adopt a variety of company-specific clauses that have the potential to address many likely criticisms. Stockholders who oppose a board-adopted arbitration bylaw could check the board's power by submitting a binding or non-binding repeal proposal for consideration at the next annual meeting or, potentially, at a special meeting. In Boilermakers, Chancellor Strine emphasized that "stockholders have powerful rights they can use to protect themselves if they do not want board-adopted . . . bylaws to be part of the contract between themselves and the corporation," and that the power to repeal bylaws is one of those rights. A handful of non-binding stockholder attorneys to obtain class certification in securities fraud cases without having to prove actual reliance by each investor. See id. If that theory had been overturned, it would have been very difficult to obtain class certification. See id. The Supreme Court declined to overturn the fraud-on-the-market theory, but modified it to permit challenging whether alleged misrepresentations affected stock price at the class certification stage, rather than the later summary judgment phase. See David H. Webber, Shareholder Litigation Without Class Actions, Dec. 15, 2014, at 3, 57, ARIZ. L. REV. (forthcoming), archived at http://perma.cc/49EK-2BSZ.

209 See supra note 141; Allen, supra note 42, at 1, 5-7; supra notes 93-96 and accompanying text (concerning fee-shifting provisions).
210 Jay Eisenhofer & Michael Barry, Arbitration Threatens to Wipe Out Shareholder Rights, PENSIONS & INVESTMENTS (Jan. 21, 2014), archived at http://perma.cc/T3L9-3CK8 (suggesting that state legislatures should prohibit boards from adopting mandatory arbitration bylaws without stockholder consent and that Congress should make clear that arbitration bylaws adopted without stockholder consent are not consistent with the securities laws).
211 See infra Part IV.G.
212 See infra Parts IV.G, V.
213 Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 957 (Del. Ch. 2013). However, some states permit the board to possess sole power to amend bylaws. See, e.g., MD. CODE ANN., CORPS. & ASS'NS § 2-109(b) (2014).
214 See Boilermakers, 73 A.3d at 956.
repeal proposals were presented in 2012 with respect to exclusive forum bylaws, of which two ultimately went to a vote and failed by almost a two-to-one margin.\textsuperscript{215}

Stockholders could also express their opposition by targeting directors, likely those on the board's nominating and corporate governance committee, for "withhold" or "against" votes at the next annual meeting of stockholders. Institutional Shareholder Services, Inc. ("ISS") and Glass Lewis & Co. LLC ("Glass Lewis"), the leading proxy advisory firms, have signaled significant concern that board-adopted bylaws relating to litigation require stockholders to give up important rights, and that such bylaws may result in "withhold" or "against" recommendations for individual directors, the members of the board's corporate governance committee, and potentially, the entire board.\textsuperscript{216} In the current governance environment, even if stockholders do not succeed in such efforts, they can nonetheless send a strong message if a repeal proposal or votes against or withheld from a director represent 30\% (or, in some cases, less) of the votes cast on that matter.\textsuperscript{217}

\textsuperscript{215}See Allen, \textit{Putting on the Brakes}, supra note 42, at 1290.

\textsuperscript{216}See ISS, 2015 \textit{U.S. Proxy Voting Summary Guidelines} (Dec. 22, 2014), archived at https://perma.cc/4TTY-FM3H?type=pdf. Under its 2015 Guidelines, ISS will recommend against or withhold votes from individual directors, committee members, or in some cases, the entire board "if the board amends the company's bylaws or charter without shareholder approval in a manner that materially diminishes shareholders' rights or that could adversely impact shareholders," taking into account company-specific factors. See \textit{id}. at 12-13. In addition, ISS generally opposes management proposals concerning bylaws affecting stockholders' litigation rights, although it nominally has a case-by-case policy. See \textit{id}. at 23.


[They] may recommend that shareholders vote against the chairman of the governance committee or the entire committee, where the board has amended the company's governing documents to reduce or remove important shareholder rights, or to otherwise impede the ability of shareholders to exercise such right, and has done so without seeking shareholder approval. See \textit{id}. at 14. It will also recommend against the entire governance committee if a company adopts a provision limiting the ability of stockholders "to pursue full legal recourse" if such a provision is not put to a stockholder vote following the IPO. See \textit{id}. at 1-2.

\textsuperscript{217}Directors tend to closely examine the percentage of votes cast against or withheld from director nominees. According to PwC, approximately 10\% of candidates failed to receive 70\% support in 2014, and 58\% of directors surveyed indicated that opposition in the 11-25\% range would cause concern as to renomination. See PwC, \textit{Trends Shaping Governance and the Board of the Future: PwC's 2014 Annual Corporate Directors Survey 11} (2014), archived at http://perma.cc/6GJG-9VPM. In the context of "say-on-pay" votes, see \textit{supra} notes 38-41, if ISS determines that a board of directors failed to respond adequately to a prior year's proposal that received less than 70\% support, ISS may recommend voting against
Other potential avenues for expressing opposition include:

- Submitting binding or non-binding stockholder bylaw amendment proposals that would bar board-adopted arbitration bylaws. Companies would likely seek to omit these proposals from their proxy statements by submitting requests for no-action relief to the SEC;218
- Encouraging the SEC to bring enforcement actions against companies with arbitration bylaws that cover securities law claims, based upon alleged violations of the anti-waiver provisions of Section 29 of the Exchange Act;219
- Pressuring companies to obtain stockholder approval before such a provision may be enacted or, potentially within a short period thereafter;220
- Seeking to have Congress or the states adopt statutes limiting the power of corporations to require mandatory arbitration of stockholder disputes;221 and
- Seeking to have the stock exchanges prohibit arbitration of stockholder disputes through their listing standards.222

While public company arbitration bylaws are relatively new, and few stockholders have fully considered such provisions, some

or withholding votes from members of the compensation committee and potentially, the full board. See ISS, supra note 216, at 37.
218Companies may seek no-action relief under one or more of the identified bases set forth in Rule 14a-8(i) under the Exchange Act, including violating state law. See 17 CFR §240.14a-8(i)(2) (relating to a violation of any state, federal, or foreign law). In that regard, companies might argue that such bylaws impermissibly infringe upon board power under state law. See CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 240 (Del. 2008) (finding a stockholder-proposed bylaw that would have required the company to reimburse stockholders for their reasonable expenses in nominating one or more candidates to the board of directors would violate Delaware law since it did not reserve to the board the “full power” to decide whether it would be appropriate, in a specific case, to award reimbursement at all).
219See supra Part IV.D.
220See, e.g., Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 957 (Del. Ch. 2013) (“[S]tockholders have powerful rights they can use to protect themselves if they do not want board-adopted . . . bylaws to be part of the contract between themselves and the corporation . . . .”). Seeking advance approval or ratification within 12 months of adoption would be consistent with the process that ISS has supported in respect of stockholder rights plans, also known as poison pills. See ISS, supra note 216, at 24.
221State statutes could, however, be preempted by the FAA. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011) (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”); see also Ann Lipton, ILEP Business Litigation Conference, BUSINESS LAW PROF. BLOG (Apr. 5, 2014), archived at http://perma.cc/DJ6D-PAX4.
222See generally Listing and Delisting Requirements, SEC.GOV, archived at http://perma.cc/J8MB-KBZQ.
institutional investors have come out strongly against arbitration bylaws. For example, the Council of Institutional Investors ("CII"), whose members have combined assets exceeding $3 trillion, has adopted the following policy:

1.9 Judicial Forum: Companies should not attempt to restrict the venue for shareowner claims by adopting charter or bylaw provisions that seek to establish an exclusive forum. Nor should companies attempt to bar shareowners from the courts through the introduction of forced arbitration clauses.

Additionally, CII has urged the SEC to "remain vigilant in exercising its well-founded and long-held opposition to such provisions as being contrary to the anti-waiver provisions of the federal securities laws." CII has been joined by, among others, the AFL-CIO.

If a corporation adopted an arbitration bylaw providing for the waiver of class action rights, individual retail stockholders would have the right to pursue claims in arbitration, but the costs of pursuing a remedy would likely exceed any potential recovery, as was the case in American Express. This could leave retail stockholders with no effective recourse, unless the corporation would be willing to bear the

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223 See About Us, COUNCIL OF INSTITUTIONAL INVESTORS, archived at http://perma.cc/D64D-BYEN.
225 See Letter from Jeff Mahoney, Gen. Counsel, Council of Institutional Investors, to Keith F. Higgins, Dir., Div. of Corp. Fin., SEC, and John Ramsey, Acting Dir., Div. of Trading and Mkt., SEC (Dec. 11, 2013), archived at http://perma.cc/MHU2-B76U ("[A] recent potential trend in corporate governance . . . may not only impair shareowners' rights, but also threaten to undermine the integrity of our public markets generally."); see also Letter from U.S. Institutional Investors to the Chairman and Ranking Member of the House Comm. on the Judiciary and the House Comm. on Banking, Housing & Urban Affairs (Dec. 17, 2013), archived at http://perma.cc/SE48-7SKR ("When forced arbitration clauses and class action waivers appear in corporate bylaws or investor-advisor agreements, they can have the practical effect of preventing shareholders from pursing any legal remedy whatsoever.").
226 The AFL-CIO has urged the SEC to act in order to "prevent corporations from exempting themselves from the civil justice system through forced arbitration clauses and class-action bans." See Yin Wilczek, AFL-CIO Asks SEC to Restrict Arbitration Pacts, 29 CORP. COUNSEL WEEKLY 243 (2014).
227 See Am. Exp. Co. v. Italian Colors Rest., 133 S.Ct. 2304, 2308, 2311 (2013) (holding class proceedings are not an entitlement and upholding class action waiver).
228 See id. at 2306, 2308 (stating that proving the antitrust claims against American Express would be very expensive).
other parties' individual costs. Yet, this might not be materially different from the current status quo in which retail investors often fail to submit claims in connection with securities class action settlements. The most likely parties to pursue arbitration would be institutional investors, some of whom already elect to opt-out of class actions.

In considering stockholder sentiment, it is important to consider whether a company is going public or is already public. Companies that are going public often include provisions, such as classified boards and dual class common stock, which are not "stockholder friendly," in their organizational documents. Eager investors often overlook such provisions. However, if the company does not perform well after going public, such provisions come under harsh scrutiny. A mandatory arbitration bylaw unilaterally adopted by the board of a company that is already public must be promptly disclosed on an SEC Form 8-K.

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229 See Scott & Silverman, supra note 9, at 1189. Scott & Silverman propose that stockholders present binding bylaw amendment proposals, to be voted upon at meetings of stockholders. See id. at 1226. The amendments would call for mandatory individual arbitration of securities law claims, with costs of arbitrating "non-frivolous claims" to be borne by the corporation. Id. at 1218. In addition, the corporation would pay attorneys' fees if the stockholder prevails. Id. Such bylaws would require reapproval five years from the date of adoption. See id. at 1217. As a practical matter, such a proposal, assuming the SEC permitted it to be included in proxy statements, seems unlikely to gain traction or pass at this time.

230 See id. at 1189 ("[S]ecurities class actions generally do not provide redress to smaller stockholders. Indeed, smaller investors often do not bother to collect their settlements because they are so small—we have all experienced throwing class action notices in a wastebasket."). Empirical data on the percentage of stockholders that submit claims is difficult to obtain and can vary based upon the specific case, including the manner in which notice is provided. See Tiffaney Allen, Class Action Perspectives: Anticipating Claims Filing Rates in Class Action Settlements, RUST CONSULTING (Nov. 2008), archived at http://perma.cc/Z632-LSBY (last visited May 22, 2014) ("A typical securities settlement may conclude with between 20 and 35 percent of class members having filed claims.").

231 See Amir Rozen, Joshua B. Schaeffer & Christopher Harris, Opt-Out Cases in Securities Class Action Settlements, CORNERSTONE RESEARCH (2013), archived at https://perma.cc/BD64-P6CR (explaining that the most common opt-out plaintiffs are pension funds). While the number of opt-out cases is small, the phenomenon nonetheless suggests that some investors are dissatisfied with the class action process. See John C. Coffee, Jr., Litigation Governance: Taking Accountability Seriously, 110 COLUM. L. REV. 288, 314-18 (2013) (discussing why stockholders opting out receive higher recoveries than class members).

232 See Steven Davidoff Solomon, A Deeper Look at LinkedIn's Structure, N.Y. TIMES DEALBOOK (May 12, 2011), archived at http://perma.cc/V4UF-USR8; Therese Poletti, IPO Investors: Beware the Dual-Class Stock, MARKETWATCH (Apr. 5, 2012, 12:01 AM), archived at http://perma.cc/FV2A-QKLA (explaining that dual class common stock can limit shareholder's ability to influence corporate matters and is thus not "stockholder friendly").

233 See Poletti, supra note 232.

234 See Lucian A. Bebchuk et al., The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy, 54 STAN. L. REV. 887, 890, 939 (2002) (arguing that staggered boards reduce stockholder returns and will be criticized by stockholders if a company does not do well after going public).
and, as a result, is more likely to attract prompt negative attention from stockholders.

Despite the many criticisms, some stockholders support mandatory arbitration. Since stockholders effectively bear the costs of class actions and derivative lawsuits, supporting arbitration as an alternative dispute resolution mechanism aimed at reducing costs is a rational response to such litigation. For example, at Gannett and Pfizer, it was stockholders who sought to create a mandatory arbitration regime. Along the same lines, the Committee on Capital Markets Regulation endorsed arbitrating stockholder disputes as a means to reduce the costs of frivolous litigation: "shareholders should have the right, if they choose, to adopt alternatives to traditional litigation by instituting alternative dispute resolution mechanisms such as arbitration (with or without class actions) or judge-conducted trials." A board that adopts an arbitration bylaw would have the option of seeking stockholder ratification. This would be similar to the path taken by companies that adopt a short-term stockholder rights plan, known as a poison pill, and then seek stockholder approval. However, it is unclear whether obtaining such approval is realistic in the current activist environment.

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235 Item 5.03 ("Amendments to Articles of Incorporation or Bylaws: Change in Fiscal Year") requires that a company disclose amendments to its bylaws within four business days. See Form 8-K (Current Report), archived at http://perma.cc/8XLL-MCF7.

236 See Shell, supra note 21, at 519-20 (suggesting that arbitration may be a more cost effective, rational alternative to litigation for corporate shareholders); supra note 9.


G. Will Arbitration Be Attractive to Corporations?

On a practical level, it is also important to consider whether public corporations will support mandatory arbitration, and, if so, whether they will craft arbitration provisions to exclude categories of disputes, such as those involving securities law claims or claims above a specified dollar threshold. While arbitration is often viewed by opponents as favoring corporations, and is widely used in the financial services industry, corporations have a range of viewpoints on the issue. In the author's experience, while arbitration theoretically offers speed, lower costs, confidentiality, and the ability to influence the selection of the arbitrator, corporations that disfavor arbitration often have unexpectedly been found liable in a prior arbitration involving a significant damage award and then realized that the award is final and non-appealable, except in extremely limited circumstances. Moreover, those limited circumstances may not be expanded contractually. Additionally, some arbitrations

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241See Scott & Silverman, supra note 9, at 1210.

242See supra note 136 (concerning FINRA arbitration).

243Under Section 10(a) of the FAA, there are four grounds for appealing an arbitral award, which grounds largely focus upon misconduct, rather than mistake:

(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (2012). The fourth exception in Section 10(a) requires a party to meet a heavy burden: "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 591, 599 (1960). "The arbitrator's construction holds, however good, bad, or ugly." Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2071 (2013).

The United States Supreme Court has held that parties may not contractually agree to expand the grounds for appeal under the FAA. See Hall Street Assoc., L.L.C. v. Mattel, Inc., 552 U.S. 576, 578 (2008). In Hall Street, the Court did, however, state that "[t]he FAA is not the only way into court for parties wanting review of arbitration award[s]: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable." Id. at 590; see also Cable Connection v. DirecTV, 190 P.3d 586, 589 (Cal. 2008) (upholding an arbitration clause in which the parties agreed that the
approximate trials, with extensive and expensive discovery and motion practice\textsuperscript{244} that eliminate some of the perceived advantages of arbitration.\textsuperscript{245} In such a situation, the key difference between litigation and arbitration is that the arbitrator's decision is unappealable, thus rendering arbitration less predictable.\textsuperscript{246} Predictability may be of less concern when the amounts in controversy are relatively small.\textsuperscript{247} However, in connection with securities class actions and derivative claims, the stakes can be high, making arbitration less attractive.\textsuperscript{248}

For corporations that favor arbitration, a class action waiver may be the most vital element in an arbitration provision.\textsuperscript{249} This is due in large part to the practical reality that many of the potential advantages of arbitration, such as speed and lower cost, are lost in the context of class actions.\textsuperscript{250} Class action arbitration involves all the complexity of class action litigation,\textsuperscript{251} the same high stakes, and the same pressure upon arbitrators would not have the power to commit errors of law or legal reasoning, and that legal errors constituted an excess of arbitral authority reviewable by the California courts).\textsuperscript{244}See Thomas J. Stipanowich, Arbitration: The "New Litigation", 2010 U. ILL. L. REV 1, 6, 9, 12 (2010) (explaining that arbitration often involves practices and procedures typical of litigation, such as prehearing motion practice and extensive discovery).\textsuperscript{245}See id. at 21 n.132 (explaining that extensive discovery eliminates the main advantages of arbitration, such as cost, speed, and efficiency).\textsuperscript{246}Arbitration differs from litigation in other respects. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 664 (1965): Arbitration differs from judicial proceedings in many ways: arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete . . . . As to eliminating the right to trial by jury, in some courts, such as the Delaware Court of Chancery, there are no jury trials. See Grundfest & Savelle, supra note 128, at 386 n.272. However, some of these differences may, if the parties so choose, be eliminated through drafting. See infra Part V.\textsuperscript{247}See Drahozal & Ware, supra note 240, at 455.\textsuperscript{248}See id.\textsuperscript{249}See Jennifer B. Poppe & Alithea Z. Sullivan, Could the Supreme Court's Enforcement of Arbitration in Concepcion Reverberate in the Securities Litigation Sphere?, 8 SEC. LITIG. REP. (Sept. 2011) (arguing that a mandatory arbitration bylaw or charter provision must include an enforceable class action waiver to be effective).\textsuperscript{250}See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011) ("[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."); Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758, 1775 (2010) ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."). But see S.I. Strong, Does Class Arbitration "Change the Nature" of Arbitration? Stolt-Nielsen, AT&T, and a Return to First Principles, 17 HARV. NEGOT. L. REV. 201, 271 (2012) (citation omitted) ("[I]t is currently true that there is nothing about class arbitration that 'changes the nature of arbitration' ").\textsuperscript{251}See Richard A. Nagareda, The Litigation-Arbitration Dichotomy Meets the Class Action, 86 NOTRE DAME L. REV. 1069, 1109 n.174 (2011) ("[F]aced with the choice of a class
corporations to settle even weak cases, but without the right to appeal. In Concepcion, Justice Scalia commented upon this situation:

Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed de novo and questions of fact for clear error . . . We find it hard to believe that defendants would bet the company with no effective means of review . . . .

It is worth noting that precluding class actions inherently creates the potential for parallel arbitrations arising from the same facts, but without the ability to coordinate such proceedings through class action mechanisms.

From the point of view of the plaintiffs' bar, mandatory arbitration bylaws that either include a class action waiver or preclude derivative actions would require representing individual clients in bilateral arbitration, where recoveries could be quite small, particularly in the case of retail stockholders. This would undercut a business model that

252 See William H. Baker, Class Action Arbitration, 10 CARDOZO J. CONFLICT RESOL. 335, 336 (2009) (noting that opponents of class actions assert that corporations are sometimes forced to settle even meritless class actions because of the potentially high exposure resulting from aggregating individual claims, while proponents argue that class actions offer relief to those with claims that are economically irrational to bring on an individual basis); Alexandra D. Lahav, Symmetry and Class Action Litigation, 60 UCLA L. REV. 1494, 1498 (2013) (“The trends favoring settlement classes over litigated classes are driven, at least in part, by a belief that litigation class actions pressure defendants into settling meritless cases to the detriment of defendants and society.”).

253 See supra note 243.

254 Concepcion, 131 S. Ct. at 1752.

255 See Scott & Silverman, supra note 9, at 1210 (suggesting that in the event of numerous parallel arbitrations "a corporation could consider a form of mass stockholder settlement to avoid defending multiple arbitrations simultaneously."). Aggregating individual claims could, however, result in many of the difficulties that make class arbitration an unattractive option for corporations.

256 Institutional investors, such as those that opt-out of class actions, would remain viable clients. See supra note 231.
largely depends upon earning contingent fees from settling class actions or derivative claims, rather than individual claims. 257

V. WHAT WOULD AN ARBITRATION BYLAW LOOK LIKE?

A. Contractual Flexibility

Arbitration is a creature of contract, as emphasized by the FAA and state arbitration statutes. 258 Thus, an arbitration bylaw might address issues such as discovery, motions, arbitrator qualifications, experts, fee awards, confidentiality, duration of proceedings, and any applicable third party provider rules, such as the JAMS Comprehensive Arbitration Rules & Procedures or the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). 259 Corporations have considerable latitude to craft arbitration bylaws that take into account known issues and company-specific concerns. 260 For example:

257 See Aff. of Peter H. Mixon, Gen. Counsel to the California Public Employees’ Retirement System, in Supp. of Pls.’ Opp. to Defs.’ Pet. for an Order to Arbitrate and for a Stay of Proceedings at 3, Cent. Laborers’ Pension Fund v. Portnoy, No. 24-C-13-1966, 2013 WL 3287066, at 3 (Md. Cir. Ct., June 5, 2013) (“If there is no possibility of a fee award, attorneys will no longer pursue shareholder fiduciary duty cases on a contingency fee basis, and will instead either require that shareholders pay millions in hourly rate compensation or simply elect not to bring such cases on behalf of institutional investors.”); Brian JM Quinn, Corporate Governance Overreach by Carlyle?, M&A LAW PROF BLOG (Jan. 19, 2012), archived at http://perma.cc/8CVS-75HT (“If arbitration may not be pursued in a representative capacity, then the incentives for any plaintiff’s counsel to be in this business quickly fall away. The result is, effectively, that shareholder arbitration for a publicly traded issuer would disappear.”).

258 See American Express, 133 S. Ct. at 2309; supra note 21.


260 See Concepcion, 131 S. Ct. at 1749 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decision maker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets."). In practice, the drafter of an arbitration provision should consider the matters that may already be addressed in a chosen third party arbitration provider's default rules before deciding whether a particular issue needs to be specifically addressed in that provision.

In adopting a mandatory arbitration bylaw, directors must be mindful of their fiduciary duties of care and loyalty. Accordingly, before proceeding, boards should create a record reflecting a balanced and thorough consideration of the benefits and risks associated with arbitrating stockholder disputes, including why the board believes the proposed bylaw is in the best interests of all stockholders and superior to litigating. Challenges to arbitration bylaws are likely to include allegations that adoption involved director self-interest and was intended to entrench the board.
• Setting fixed time periods for briefing, hearings, and the rendering of a decision would address the issues of prolonged, expensive proceedings that continue without resolution;
• Setting limits on discovery, including as to type and duration, or prohibiting discovery, would address issues associated with lengthy and expensive discovery that resembles discovery in litigation;\(^\text{261}\)
• Prohibiting all or certain types of motion practice would also address the issue of arbitration proceedings that resemble litigation;\(^\text{262}\)
• Specifying arbitrator qualifications, for example requiring former judges or individuals who have experience resolving disputes involving public corporations or disputes above a specified dollar threshold, would address concerns regarding the background and quality of arbitrators;
• Requiring a panel of three arbitrators for disputes above a specified dollar threshold would help mitigate the risk of an aberrant result. In that regard, companies would have to consider whether all three arbitrators should be neutrals, or whether each party would have the right to appoint an arbitrator;
• Carving out claims in excess of a specified high dollar threshold, and providing that such claims would be litigated, would also address concerns about unpredictability. However, that construct could result in plaintiffs automatically filing claims above the dollar threshold in the absence of appropriate safeguards;
• Specifying that the corporation will pay the costs of individual stockholders to arbitrate "nonfrivolous claims" (as determined by the arbitrator(s)), would help address concerns as to claimants for whom the costs of individual arbitration would exceed a potential recovery;\(^\text{263}\)

\(^{261}\) See, e.g., Lawyers for Civil Justice, Civil Justice Reform Group, & U.S. Chamber of Commerce, Litigation Cost Survey of Major Companies, USCOURTS.GOV 2 (May 10-11, 2010), archived at http://perma.cc/WUL7-8678 ("The reality is that the high transaction costs of litigation, and in particular the costs of discovery, threaten to exceed the amount at issue in all but the largest cases.").

\(^{262}\) See supra note 243.

\(^{263}\) See supra note 9, at 1224 (advocating paying the costs of all claimants). While paying costs may be a practical approach to address negative perceptions, the majority opinion in American Express found that a contractual waiver of class arbitration is enforceable under the FAA even when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. See Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013). A corporation considering paying stockholders' arbitration costs
• Stipulating that parties may seek a temporary restraining order or preliminary injunction from a court of competent jurisdiction, pending the outcome of arbitration, would help overcome concerns that arbitrators may not act with "real-world" speed or lack power to enforce their decisions.264

• Building in penalties for automatically going to court to contest whether an arbitration clause is enforceable or whether disputes are arbitrable could lessen the incentives to seek judicial relief. For example, to the extent permitted by applicable law, providing that the loser pays the other party's court costs and fees if the party seeking judicial relief had no good faith basis for doing so would change the current dynamic.265

• Providing for an exclusive litigation forum in the event that an arbitration bylaw is not enforceable would address concerns regarding the untested nature of arbitration bylaws;

• Requiring that the substantive laws of the corporation's jurisdiction of incorporation be applied would help create more consistency and predictability in decisions;266

• Providing that arbitrators' decisions (perhaps including brief findings of fact and conclusions of law) will be made public could, for those corporations interested in making the arbitration process more transparent, answer critics who believe that arbitration occurs in a black box and automatically disadvantages individuals. Such an approach could also respond to the argument that confidential private arbitration results in an atrophy of the law.267 While this proposal may seem radical, it is worth bearing in mind that

would want to evaluate potential aggregate costs and consider whether it would be in the best interests of all stockholders to set a ceiling on the per arbitration costs it would cover.

264 See Schneider, supra note 136, at 22.

265 Note, for example, that the Private Securities Litigation Reform Act ("PSLRA"), as codified in Section 27(c) of the Exchange Act, provides for mandatory fee-shifting if the court determines that an action was meritless. The proposed 2014 Delaware legislation on fee-shifting would have allowed the court to impose fee-shifting as a sanction. See supra Part III.D.


267 See Quinn, supra note 257:

If parties are required to bring all corporate litigation to private arbitrators, then corporate law litigation will quickly disappear from the courts and the law will begin to atrophy. Rather than having a deep and rich common law, the corporate law will become nothing more than an inside game with only a small number of litigators and professionals being in the "know" as to the current state of the private law.

See also Jennifer J. Johnson & Edward Brunet, Arbitration of Shareholder Claims: Why Change is Not Always a Measure of Progress 4 (Lewis & Clark Law School Legal Research
• The outcomes of arbitration become public when parties go to court to enforce arbitral awards.\textsuperscript{268} 
• Litigation settlements generally do not result in precedent, and most litigation is resolved through settlement;\textsuperscript{269} and 
• For some companies, confidentiality takes a back seat to the opportunity for streamlined proceedings and lower costs.\textsuperscript{270}

At the same time, some issues are less susceptible to a drafting solution:

• If arbitrators choose not to abide by the terms (such as time limits for rendering a decision) set forth in the arbitration provision, the parties generally will not have recourse to the courts or through AAA or other alternative dispute resolution providers, except in particularly egregious cases;\textsuperscript{271}
• One of the principal downsides of arbitration under the FAA in high-stakes situations is that decisions may not be appealed to the courts, except on the narrow grounds specified in the FAA.\textsuperscript{272} Moreover, the United States Supreme Court has held that parties may not contractually agree to expand the grounds for appeal set forth in Section 10 of the FAA.\textsuperscript{273} The only potential appeal would be to another arbitrator or arbitral tribunal, if provided for in an arbitration clause.\textsuperscript{274} However, providing for such a non-

\textsuperscript{269}See \\textsuperscript{L}eandra Lediarma, Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?, 75 NOTRE DAME L. REV. 221, 221-222 (1999).
\textsuperscript{270}See, e.g., AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011) ("[T]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."); Preston v. Ferrer, 552 U.S. 346, 357 (2008) ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'").
\textsuperscript{271}See supra note 259 (concerning AAA and JAMS arbitration rules); supra note 243 (concerning the very limited grounds for appeal under the FAA).
\textsuperscript{272}As discussed below, one mitigating strategy would be to carve-out disputes where claims are in excess of a specified threshold. See infra note 296 and accompanying text.
\textsuperscript{274}For example, the American Arbitration Association ("AAA") has Optional Appellate Arbitration Rules that provide for: (a) a standard of review greater than is currently permitted by federal and state statutes; (b) a process that AAA anticipates can be completed in about three months; and (c) an Appellate Panel consisting of former federal and state judges
judicial appeal would undercut one of the signature features of arbitration—finality. It would also build in delay and additional costs, while leaving a party without recourse to the courts; and

• It is impossible to craft an arbitration provision that addresses every contingency. However, there is no certainty associated with litigation either.

As discussed above, a handful of arbitration bylaws have been proposed or adopted to date. These provisions, together with the arbitration provision that The Carlyle Group, L.P. proposed, highlight central points that should be addressed in a bylaw, while also reflecting considerable variation and opportunities for customization.

B. Proposed 1990 Provision

In 1990, a Pennsylvania corporation planned to include a mandatory arbitration provision in its IPO charter and bylaws. That provision is set forth in Appendix A (the "Pennsylvania Bylaw"). The SEC declined to accelerate the company's IPO registration statement until such provisions were removed. Nonetheless, it is worth examining the provision since it represents one of the early chapters in the evolution of arbitration bylaws. The Pennsylvania Bylaw provided that it would apply both to controversies and claims brought by current and former stockholders as well as to those brought by the corporation against current and former stockholders. In the current stockholder environment, the clause providing for claims to be brought by the
corporation could be controversial. Similarly, while the Pennsylvania Bylaw permits class action arbitration, today corporations are more likely to require a waiver of class action rights. The Pennsylvania Bylaw also addresses key procedural issues, explicitly providing that:

- It covers all direct, derivative or representative claims against the corporation, its directors, officers, agents, affiliates, associates, employees and control persons, each of whom is a third party beneficiary. The Pennsylvania Bylaw states that it covers actions arising under any state or federal securities laws and excludes claims relating to statutory appraisal. The provision is broadly drawn with a view toward ensuring that all intra-corporate disputes will be settled through arbitration;
- Claims will be settled under the FAA in accordance with specified rules, in this case, the Commercial Arbitration Rules of the AAA;
- The arbitrators must follow the substantive laws that would otherwise be applicable;
- The parties are entitled to any and all remedies that would be available in the absence of the arbitration bylaw;
- Arbitration will take place in a specified location;
- The parties may seek a temporary restraining order or preliminary injunction from a court of competent jurisdiction to preserve the status quo during the arbitration; and
- Judgment upon any award may be entered in a court of competent jurisdiction.

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282 See supra Part III.D (concerning the imposition of liability on stockholders through fee-shifting bylaw and charter provisions).
284 See infra Appendix A(a).
283 See infra Appendix A(a).
285 See infra Appendix A(a).
286 See infra Appendix A(a).
287 See infra Appendix A(b).
288 See infra Appendix A(c)(2).
289 See infra Appendix A(a).
C. 2012 Mandatory Arbitration Proposal

As discussed above, both Pfizer Inc. and Gannett Co. received binding stockholder proposals in 2012 that would have added a mandatory arbitration provision to each company's bylaws. Appendix B sets forth the proposal presented to Pfizer Inc. (the "Pfizer Bylaw"). The Pfizer Bylaw varies from the Pennsylvania Bylaw in certain material respects:

- It does not cover claims by the corporation against its current or former stockholders. As noted, such a clause could generate controversy, and is likely to be of limited utility;
- The arbitrators must state the basis of their decision;
- While the location of arbitration is specified, there is a carve-out for disputes in which less than $25,000 is at issue. Such smaller disputes will be arbitrated in the jurisdiction where the claimant resides;
- The Pfizer Bylaw does not apply to a claim for damages in excess of $3,000,000. This carve-out arguably eliminates the risk that "bet the company disputes" will be settled through arbitration;
- Derivative claims are subject to requirements and procedures that apply to derivative proceedings in Delaware, the corporation's jurisdiction of incorporation;
- Class actions are not permitted;
- The parties may agree not to arbitrate all or part of any controversy. This provision functions much like the carve-out in

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291 See supra Part IV.D.
292 See generally infra Appendix B.
293 Compare Appendix A(a) (requiring arbitration when a corporation pursues claims against its stockholders), with Appendix B (no such requirement).
294 Compare Appendix B(a) (requiring arbitrators to state the basis for their decisions), with Appendix A (no such requirement).
295 Compare Appendix B(b) (containing such a venue requirement, with a carve-out for smaller disputes), with Appendix A (no such carve-out).
296 Compare Appendix B(c) (exempting disputes involving high damage claims from the mandatory arbitration requirement), with Appendix A (no such carve-out).
297 Compare Appendix B(e) (subjecting derivative claims to requirements applicable to Delaware derivative claims and procedures) with Appendix A (no such provision).
298 Compare Appendix B(e) (prohibiting class actions), with Appendix A (addressing class actions). If an arbitration agreement is silent on the issue of class actions, a party may not be compelled, under the FAA, to submit to class arbitration absent a contractual basis for concluding that the party agreed to do so. See Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758, 1775-76 (2010).
an exclusive forum bylaw allowing the board to consent to an alternative forum and thereby satisfy its fiduciary duties;\textsuperscript{299} 
\begin{itemize}
  \item The bylaw is effective 30 days after it is adopted, and does not apply to controversies or claims relating to shares acquired before the effective time or claims arising out of actions or omissions prior to that time.\textsuperscript{300} While the concept of "vested rights" has been rejected in Delaware,\textsuperscript{301} the bright line eliminates potential arguments that the arbitration provision is intended to strip current stockholders of rights to litigate or cut off access to the courts with respect to past events;\textsuperscript{302} and
  \item The board may adopt "reasonable alternative arbitration procedures with respect to future controversies or claims."\textsuperscript{303}
\end{itemize}

D. Arbitration Bylaw Adopted by Commonwealth REIT

Commonwealth REIT's arbitration bylaw, discussed above,\textsuperscript{304} is set forth on Appendix C (the "Commonwealth Bylaw").\textsuperscript{305} The Commonwealth Bylaw is far more detailed and does not hew to the structure of the two previously discussed bylaws.\textsuperscript{306} The principal differences are that the Commonwealth Bylaw:

\begin{itemize}
  \item See Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 954 (2013). \textit{Compare} Appendix B(f) (providing that the parties may agree to exclude all or part of any controversy or claim from the mandatory arbitration requirement), with Appendix A (no such provision).
  \item Compare Appendix B(g) (creating an effective date for the arbitration bylaw), with Appendix A (no such bright line).
  \item See Kidsco Inc. v. Dinsmore, 674 A.2d 483, 492 (Del. Ch. 1995) ("[W]here 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."). In the context of recent decisions upholding the validity of exclusive forum bylaws and fee-shifting bylaws, the Delaware Court of Chancery and the Delaware Supreme Court have also emphasized that all stockholders, regardless of when they purchase shares, are bound by board-adopted bylaw amendments. \textit{See Boilermakers}, 73 A.3d at 956 ("[T]he Chevron and FedEx stockholders have assented to a contractual framework established by the DGCL and the certificates of incorporation that explicitly recognizes that stockholders will be bound by bylaws adopted unilaterally by their boards."); \textit{see also} ATP Tour, Inc. v. Deutscher Tennis Bund (German Tennis Federation), 91 A.3d 554, 558, 560 (Del. 2014).
  \item See id.
  \item Compare Appendix B(h) (granting the board of directors flexibility in selecting arbitrators and arbitration procedures), with Appendix A (no provision for such flexibility).
  \item See supra Part IV.E.
  \item See generally infra Appendix C.
  \item Compare Appendix C, with Appendix A, and Appendix B.
• Adds disputes, claims or controversies concerning the meaning, interpretation, effect, validity, performance or enforcement of Commonwealth's organizational documents to the list of matters subject to arbitration. This provision appears to have anticipated that stockholders would challenge the Commonwealth Bylaw, which was the case;
• Provides for a panel of three arbitrators, with each party having the right to select an arbitrator who may be an affiliated or interested person;
• Allows limited discovery of documents "directly related to the issues in dispute" if ordered by the arbitrators;
• Specifies that the award must be in writing, and that it may briefly state the findings of fact and legal conclusions upon which it is based;
• Stipulates that monetary awards must be paid in cash free of any tax, deduction or offset and must be paid within 30 days or as specified in the award;
• Prohibits awarding attorneys' fees and fee shifting. From the point of view of the plaintiffs' bar, this provision is the most problematic since it effectively eliminates the business model of bringing contingent fee cases; and
• Expressly states that an award is final and binding, although this is the norm for arbitration.

E. Arbitration Provision Proposed by The Carlyle Group, L.P.

As discussed above, the Carlyle Group, L.P. had intended to include a mandatory arbitration provision in its limited partnership agreement in connection with its IPO, but eliminated the provision after the SEC Staff indicated that it would not accelerate the company's registration statement. While statutes governing what may be included in a limited partnership agreement are far more flexible than corporate

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307 See infra Appendix C, Section 16.1.
308 See infra Appendix C, Section 16.2.
309 See infra Appendix C, Section 16.4.
310 See infra Appendix C, Section 16.5.
311 See infra Appendix C, Section 16.6.
312 See infra Appendix C, Section 16.6; supra Part III.D (discussing fee-shifting).
313 See supra note 257.
314 See infra Appendix C, Section 16.7.
315 See supra Part IV.D.
statutes, the provision, as set forth in Appendix D (the "Carlyle Provision"), is instructive. The Carlyle Provision is the most detailed of those analyzed. Among other things, it provides that:

- Covered claims include those that "(x) sound in contract, tort, fraud or otherwise, (y) are based on common law, statutory, equitable, legal or other grounds, or (z) are derivative or direct claims." The Carlyle Provision generally reflects a "belt and suspenders" approach to specifying the claims that are subject to mandatory arbitration;
- The general partner has power to agree to exceptions, which would seem to include consenting to a lawsuit. This carve-out is also similar in certain respects to the language in exclusive forum bylaws allowing the board to consent to being sued in an alternative forum;
- Claims will be settled under the FAA in accordance with the Rules of Arbitration of the International Chamber of Commerce;
- A panel of three arbitrators, consisting of United States lawyers, law professors, or retired judges, will preside, provided, that if the amount in controversy is less than $3,000,000, the dispute will be settled by a sole arbitrator. The proviso stands in sharp contrast to the clause in the Pfizer Bylaw addressing the size of disputes to be arbitrated;
- The proceedings, awards, and any materials or documents created or produced for the proceedings are confidential.

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316 See generally infra Appendix D.
317 See infra Appendix D, Section 16.9(a)(i)(F)(x), (y) and (z).
318 See infra Appendix D, Section 16.9(a)(i).
319 Compare Appendix D, Section 16.9(a)(i) (providing the general partner with discretion to waive application of the mandatory arbitration requirement), with Appendix B(f) (providing that the parties may agree to exempt all or part of any controversy or claim from the mandatory arbitration requirement), and Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 954 (2013) (providing that the board may consent to litigating in another jurisdiction).
320 See infra Appendix D, Section 16.9(a)(ii) (providing for the arbitration agreement set forth in Section 16.9 to be governed by the FAA); Appendix D, Section 16.9(a)(i)(F)(z) (providing for such rules to govern arbitration proceedings).
321 See infra Appendix D, Section 16.9(a)(v)(A) (concerning arbitrator qualifications); Appendix D, Section 16.9(a)(i)(F) (providing for a sole arbitrator if the estimated value of claims is less than $3 million).
322 Cf. Appendix B(c) (placing a $3 million ceiling on claims subject to arbitration).
323 See infra Appendix D, Section 16.9(a)(vi).
Limited partners may only bring claims in their individual capacity, and not as a plaintiff, class representative or class member or as a private attorney general in any purported class or representative proceedings. This clause would seem to bar both class and derivative claims;

- It must be enforced only in its entirety, meaning that no clauses are severable;
- If the arbitrators or any court or tribunal refuse to enforce the Carlyle Provision in its entirety, then the exclusive forum for disputes will be the Delaware Court of Chancery, unless the general partner consents to being sued in a different forum.

VI. WHAT WILL COMPANIES DO?

The Delaware courts have signaled that board-adopted bylaws addressing the phenomenon of frivolous litigation, including forum selection bylaws, are valid, although their adoption and enforcement are subject to situational challenge. At the same time, the United States Supreme Court has adopted an expansive view of the enforceability of arbitration and other forum selection provisions.

Exclusive forum bylaws have a natural appeal to corporations seeking to rein in the cost of litigation. They provide for litigation to be conducted in the courts most familiar with the underlying substantive law, and, in the case of the Delaware Court of Chancery, a highly regarded judiciary with the proven ability to act swiftly based upon a developed body of case law. The argument for mandatory arbitration

324 See infra Appendix D, Section 16.9(a)(vii)(B) (limiting claims to those brought in a plaintiff's individual capacity).
325 See infra Appendix D, Section 16.9(a).
326 See infra Appendix D, Section 16.9(c). Exclusive forum provisions typically specify that the board will have the power to consent to such an alternate forum. See Allen, supra note 36, at 3-4.
327 See Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 949, 954 (2013); ATP Tour, Inc. v. Deutscher Tennis Bund (German Tennis Federation), 91 A.3d 554, 558 (Del. 2014).
328 See Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013) (holding that a contractual waiver of class arbitration is enforceable under the FAA even when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery); Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for the Western Dist. of Tex., 134 S. Ct. 568, 574 (2013) (citation omitted) ([A] valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases.);
329 See supra note 37; Micheletti & Parker, supra note 35, at 12 ("The net result of the 'multi-jurisdictional litigation tactic' is to increase the costs of litigation and elevate the risk of an adverse decision for corporate defendants.").
330 See id. at 29.
bylaws is less clear. This is due, in part, to the difficulty in determining whether there are real advantages to mandatory arbitration that outweigh the unpredictability of arbitration, particularly in "bet the company" situations.\footnote{See Drahazol & Ware, supra note 240, at 455.} It remains to be seen whether public companies interested in arbitration will be willing to experiment with arbitration bylaws or whether push-back from activists, stockholders, and potentially Congress and state legislatures, will stand in the way.

A few things are, however, reasonably certain. Any large public company that embarks on the path of mandating arbitration for intra-corporate disputes will face negative publicity,\footnote{See, e.g., Horowitz & Barlyn, supra note 135 ("Over the last year, [Schwab] heard clearly that a number of our clients and members of the general public have strong feelings about maintaining access to class-action lawsuits.").} an uncertain legal landscape,\footnote{See supra note 141 and accompanying text.} problems associated with being a "first mover"; lawsuits challenging the facial validity of its arbitration provision,\footnote{See, e.g., Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (2013) (concerning exclusive forum bylaws); ATP Tour, Inc. v. Deutscher Tennis Bund (German Tennis Federation), 91 A.3d 554, 558, 560 (Del. 2014) (concerning fee-shifting bylaws).} as-applied challenges,\footnote{This would be consistent with the challenges to forum selection, fee-shifting and minimum ownership threshold to sue bylaws. See supra Part III; Scott & Silverman, supra note 9, at 1221 (speculating that Pfizer and Gannett were concerned about the cost of defending arbitration bylaws proposed by stockholders if such bylaws were adopted). In each of Boilermakers and ATP Tour, the court noted that the enforceability of bylaws is subject to situational review. See Boilermakers, 73 A.3d at 963; ATP Tour, 91 A.3d at 558.} and opposition from stockholders who believe that they are being deprived of important rights.\footnote{See supra notes 225-26 and accompanying text.} If a company is not yet public, and the Staff objects to mandatory arbitration of securities claims, then the company must also be willing to either take its case to the SEC's Commissioners and potentially to the courts to overcome the Staff's policy against arbitration\footnote{See Schneider, supra note 136, at 26.} or to carve-out securities law claims from the arbitration provision.\footnote{See supra notes 157-59 and accompanying text.} Often lost in the debate is the underlying problem—too many lawsuits that are brought for the primary purpose of obtaining attorneys' fees, with stockholders bearing the cost of such settlements. Exclusive forum and mandatory arbitration bylaws are the latest attempts to address this problem.

\footnotesize
\begin{itemize}
\item \footnote{See Drahazol & Ware, supra note 240, at 455.}
\item \footnote{See, e.g., Horowitz & Barlyn, supra note 135 ("Over the last year, [Schwab] heard clearly that a number of our clients and members of the general public have strong feelings about maintaining access to class-action lawsuits.").}
\item \footnote{See supra note 141 and accompanying text.}
\item \footnote{See, e.g., Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934 (2013) (concerning exclusive forum bylaws); ATP Tour, Inc. v. Deutscher Tennis Bund (German Tennis Federation), 91 A.3d 554, 558, 560 (Del. 2014) (concerning fee-shifting bylaws).}
\item \footnote{This would be consistent with the challenges to forum selection, fee-shifting and minimum ownership threshold to sue bylaws. See supra Part III; Scott & Silverman, supra note 9, at 1221 (speculating that Pfizer and Gannett were concerned about the cost of defending arbitration bylaws proposed by stockholders if such bylaws were adopted). In each of Boilermakers and ATP Tour, the court noted that the enforceability of bylaws is subject to situational review. See Boilermakers, 73 A.3d at 963; ATP Tour, 91 A.3d at 558.}
\item \footnote{See supra notes 225-26 and accompanying text.}
\item \footnote{See Schneider, supra note 136, at 26.}
\item \footnote{See supra notes 157-59 and accompanying text.}
\end{itemize}
Arbitration. (a) Any controversy or claim brought directly, derivatively or in a representative capacity by any present or former shareholder of the Corporation in his, her or its capacity as a present or former shareholder, whether against the Corporation, in the name of the Corporation or otherwise, arising out of or relating to any acts or omissions of the Corporation or any of its officers, directors, agents, affiliates, associates, employees or controlling persons (including without limitation any controversy or claim relating to a purchase or sale of securities of the Corporation) shall be settled by arbitration under the Federal Arbitration Act in accordance with the commercial arbitration rules of the American Arbitration Association and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Any controversy or claim brought by the Corporation against any present or former shareholder of the Corporation in his, her or its capacity as a present or former shareholder shall also be settled by arbitration under the Federal Arbitration Act in accordance with the commercial arbitration rules of the American Arbitration Association and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. In arbitration proceedings under this Article, the parties shall be entitled to any and all remedies that would be available in the absence of this Article and the arbitrators, in rendering their decision, shall follow the substantive laws that would otherwise be applicable. This Article shall apply, without limitation, to action arising under any Federal or State securities laws.

(b) The arbitration of any dispute pursuant to this Article shall be held in the City of Philadelphia, Pennsylvania (or in such other location as the Corporation and the claimant shall approve).

(c) Notwithstanding the foregoing:

(1) This article shall not apply to valuation proceedings under Sections 1571-1580 or Sections 2541-2548 of the Pennsylvania BCL and shall not apply to the extent otherwise expressly required by law.\textsuperscript{380}

(2) In order to preserve the status quo pending the resolution by arbitration of a claim seeking relief of an injunctive or equitable nature, any party, upon submitting a matter to arbitration as required by this

\textsuperscript{380} Schneider, supra note 136, at 23.

\textsuperscript{380} The cited Sections relate to judicial appraisal proceedings.
Article, may simultaneously or thereafter seek a temporary restraining order or preliminary injunction from a court of competent jurisdiction pending the outcome of the arbitration.

(3) Any claim subject to arbitration hereunder brought by a present or former shareholder of the Corporation in a representative capacity on behalf of a class of shareholders or former shareholders shall be administered by the American Arbitration Association in accordance with the procedures applicable to class actions in the United States District Court for the Eastern District of Pennsylvania.

(d) This Article is intended to benefit the officers, directors, agents, affiliates, associates, employees and controlling persons of the Corporation, each of whom shall be deemed to be a third party beneficiary of this Article, and each of whom may enforce this Article to the full extent that the Corporation could do so if a controversy or claim were brought against it.

APPENDIX B

2012 Binding Arbitration Bylaw Proposal
Presented to Pfizer Inc.341

Resolved, that the bylaws are amended to add the following article:

(a) Any controversy or claim brought directly or derivatively by any present or former shareholder of the Corporation as a present or former stockholder, whether against the Corporation, in the name of the Corporation or otherwise, arising out of or relating to any acts or omissions of the Corporation or any of its officers, directors, agents, affiliates, associates, employees or controlling persons, shall be settled by arbitration under the Federal Arbitration Act in accordance with the commercial arbitration rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction. In the arbitration proceedings, the parties shall be entitled to all remedies that would be available in the absence of this Article and the arbitrators, in rendering their decision, shall follow the substantive laws that would otherwise be applicable and shall state the basis of their decision. This Article shall apply, without limitation, to an action arising under any federal or state securities law.

341 See Pfizer Inc., SEC No-Action Letter, supra note 144.
(b) Arbitration under this Article shall be held in New York, New York, except that arbitration of disputes involving an amount in controversy of less than $25,000 shall be held in the jurisdiction in which the claimant stockholder resides.

(c) This Article shall not apply to appraisal proceedings or to a claim for damages in excess of $3,000,000. Any claim brought derivatively will be subject to requirements applicable to derivative proceedings in Delaware.

(d) Any party, upon submitting a matter to arbitration as required by this Article, may seek a temporary restraining order or preliminary injunction on an individual basis from a court of competent jurisdiction pending the outcome of the arbitration.

(e) No controversy or claim subject to arbitration under this Article may be brought in a representative capacity on behalf of a class of stockholders or former stockholders.

(f) The parties to any proceeding may agree not to arbitrate all or part of any controversy or claim, on the selection of arbitrators, and the location and procedures applicable to any proceeding.

(g) This Article shall be effective 30 days after it is adopted (the "Effective Date"). This Article shall not apply to controversies or claims relating to (i) shares acquired by the claimant prior to the Effective Date or (ii) claims arising out of actions or omissions occurring prior to the Effective Date.

(h) The board of directors may adopt reasonable alternative arbitration procedures with respect to future controversies or claims.

Supporting Statement

Lawyer driven class actions impose large burdens on corporations without meaningful benefits to shareholders. Suits commonly are filed soon after merger announcements or stock price changes to generate legal fees in settlements. Shareholders bear the ultimate costs of defending court class actions, funding settlements, and indemnifying officers and directors. Requiring arbitration on an individual basis should reduce such abuses. The proposed bylaw would affect only future purchasers of shares.
Section 16.1. Procedures for Arbitration of Disputes. Any disputes, claims or controversies brought by or on behalf of any shareholder of the Trust (which, for purposes of this ARTICLE XVI, shall mean any shareholder of record or any beneficial owner of shares of the Trust, or any former shareholder of record or beneficial owner of shares of the Trust), either on his, her or its own behalf, on behalf of the Trust or on behalf of any series or class of shares of the Trust or shareholders of the Trust against the Trust or any Trustee, officer, manager . . ., agent or employee of the Trust, including disputes, claims or controversies relating to the meaning, interpretation, effect, validity, performance or enforcement of the Declaration of Trust or these Bylaws (all of which are referred to as "Disputes") or relating in any way to such a Dispute or Disputes shall, on the demand of any party to such Dispute, be resolved through binding and final arbitration in accordance with the Commercial Arbitration Rules (the "Rules") of the American Arbitration Association ("AAA") then in effect, except as those Rules may be modified in this ARTICLE XVI. For the avoidance of doubt, and not as a limitation, Disputes are intended to include derivative actions against Trustees, officers or managers of the Trust and class actions by shareholders against those individuals or entities and the Trust. For the avoidance of doubt, a Dispute shall include a Dispute made derivatively on behalf of one party against another party.

Section 16.2. Arbitrators. There shall be three arbitrators. If there are only two parties to the Dispute, each party shall select one arbitrator within 15 days after receipt by respondent of a copy of the demand for arbitration. Such arbitrators may be affiliated or interested persons of such parties. If either party fails to timely select an arbitrator, the other party to the Dispute shall select the second arbitrator who shall be neutral and impartial and shall not be affiliated with or an interested person of either party. If there are more than two parties to the Dispute, all claimants, on the one hand, and all respondents, on the other hand, shall
each select, by the vote of a majority of the claimants or the respondents, as the case may be, one arbitrator. Such arbitrators may be affiliated or interested persons of the claimants or the respondents, as the case may be. If either all claimants or all respondents fail to timely select an arbitrator then such arbitrator (who shall be neutral, impartial and unaffiliated with any party) shall be appointed by the parties who have appointed the first arbitrator. The two arbitrators so appointed shall jointly appoint the third and presiding arbitrator (who shall be neutral, impartial and unaffiliated with any party) within 15 days of the appointment of the second arbitrator. If the third arbitrator has not been appointed within the time limit specified herein, then the AAA shall provide a list of proposed arbitrators in accordance with the Rules, and the arbitrator shall be appointed by the AAA in accordance with a listing, striking and ranking procedure, with each party having a limited number of strikes, excluding strikes for cause.

Section 16.3. Place of Arbitration. The place of arbitration shall be Boston, Massachusetts unless otherwise agreed by the parties.

Section 16.4. Discovery. There shall be only limited documentary discovery of documents directly related to the issues in dispute, as may be ordered by the arbitrators.

Section 16.5. Awards. In rendering an award or decision (the "Award"), the arbitrators shall be required to follow the laws of the State of Maryland. Any arbitration proceedings or Award rendered hereunder and the validity, effect and interpretation of this arbitration agreement shall be governed by the Federal Arbitration Act, 9 U.S.C. §1 et seq. The Award shall be in writing and may, but shall not be required to, briefly state the findings of fact and conclusions of law on which it is based. Any monetary award shall be made and payable in U.S. dollars free of any tax, deduction or offset. The party against which the Award assesses a monetary obligation shall pay that obligation on or before the 30th day following the date of the Award or such other date as the Award may provide.

Section 16.6. Costs and Expenses. Except as otherwise set forth in the Declaration of Trust or these Bylaws, including Section 15.2 of these Bylaws, or as otherwise agreed between the parties, each party involved in a Dispute shall bear its own costs and expenses (including attorneys' fees), and the arbitrators shall not render an award that would include shifting of any such costs or expenses (including attorneys' fees)
or, in a derivative case or class action, award any portion of the Trust's award to the claimant or the claimant's attorneys. Each party (or, if there are more than two parties to the Dispute, all claimants, on the one hand, and all respondents, on the other hand, respectively) shall bear the costs and expenses of its (or their) selected arbitrator and the parties (or, if there are more than two parties to the Dispute, all claimants, on the one hand, and all respondents, on the other hand) shall equally bear the costs and expenses of the third appointed arbitrator.

Section 16.7. Final and Binding. An Award shall be final and binding upon the parties thereto and shall be the sole and exclusive remedy between such parties relating to the Dispute, including any claims, counterclaims, issues or accounting presented to the arbitrators. Judgment upon the Award may be entered in any court having jurisdiction. To the fullest extent permitted by law, no application or appeal to any court of competent jurisdiction may be made in connection with any question of law arising in the course of arbitration or with respect to any award made except for actions relating to enforcement of this agreement to arbitrate or any arbitral award issued hereunder and except for actions seeking interim or other provisional relief in aid of arbitration proceedings in any court of competent jurisdiction.

Section 16.8. Beneficiaries. This ARTICLE XVI is intended to benefit and be enforceable by the shareholders, Trustees, officers, managers (including Reit Management & Research LLC or its successor), agents or employees of the Trust and the Trust and shall be binding on the shareholders of the Trust and the Trust, as applicable, and shall be in addition to, and not in substitution for, any other rights to indemnification or contribution that such individuals or entities may have by contract or otherwise.

APPENDIX D

2012 Proposed Arbitration Provision for the Limited Partnership Agreement of The Carlyle Group L.P. 343

Section 16.9. Dispute Resolution.

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343The Carlyle Group, L.P., supra note 140, at § 16.9(a).
(a) The Partnership, each Partner, each Record Holder, each other Person who acquires an interest in a Partnership Security and each other Person who is bound by this Agreement (collectively, the "Consenting Parties" and each a "Consenting Party") (i) irrevocably agrees that, unless the General Partner shall otherwise agree in writing, any claims, suits, actions or proceedings arising out of or relating in any way to this Agreement or any Partnership Interest (including, without limitation, any claims, suits or actions under or to interpret, apply or enforce (A) the provisions of this Agreement, including without limitation the validity, scope or enforceability of this Section 16.9(a) or the arbitrability of any Dispute (as defined below), (B) the duties, obligations or liabilities of the Partnership to the Limited Partners or the General Partner, or of Limited Partners or the General Partner to the Partnership, or among Partners, (C) the rights or powers of, or restrictions on, the Partnership, the Limited Partners or the General Partner, (D) any provision of the Delaware Limited Partnership Act or other similar applicable statutes, (E) any other instrument, document, agreement or certificate contemplated either by any provision of the Delaware Limited Partnership Act relating to the Partnership or by this Agreement or (F) the federal securities laws of the United States or the securities or antifraud laws of any international, national, state, provincial, territorial, local or other governmental or regulatory authority, including, in each case, the applicable rules and regulations promulgated thereunder (regardless of whether such Disputes (x) sound in contract, tort, fraud or otherwise, (y) are based on common law, statutory, equitable, legal or other grounds, or (z) are derivative or direct claims)) (a "Dispute"), shall be finally settled by arbitration conducted by three arbitrators (or, in the event the amount of quantified claims and/or estimated monetary value of other claims contained in the applicable request for arbitration is less than $3.0 million, by a sole arbitrator) in Wilmington, Delaware in accordance with the Rules of Arbitration of the International Chamber of Commerce (including the rules relating to costs and fees) existing on the date of this Agreement except to the extent those rules are inconsistent with the terms of this Section 16.9, and that such arbitration shall be the exclusive manner pursuant to which any Dispute shall be resolved; (ii) agrees that this Agreement involves commerce and is governed by the Federal Arbitration Act, 9 U.S.C. Section 1, et seq., and any applicable treaties governing the recognition and enforcement of international arbitration agreements and awards; (iii) agrees to take all steps necessary or advisable, including the execution of documents to be filed with the International Court of Arbitration or the International Centre for ADR in order to properly submit any Dispute for arbitration pursuant to this
Section 16.9; (iv) irrevocably waives, to the fullest extent permitted by law, any objection it may have or hereafter have to the submission of any Dispute for arbitration pursuant to this Section 16.9 and any right to lay claim to jurisdiction in any venue; (v) agrees that (A) the arbitrator(s) shall be U.S. lawyers. U.S. law professors and/or retired U.S. judges and all arbitrators, including the president of the arbitral tribunal, may be U.S. nationals and (B) the arbitrator(s) shall conduct the proceedings in the English language; (vi) agrees that except as required by law (including any disclosure requirement to which the Partnership may be subject under any securities law, rule or regulation or applicable securities exchange rule or requirement) or as may be reasonably required in connection with ancillary judicial proceedings to compel arbitration, to obtain temporary or preliminary judicial relief in aid of arbitration, or to confirm or challenge an arbitration award, the arbitration proceedings, including any hearings, shall be confidential, and the parties shall not disclose any awards, any materials in the proceedings created for the purpose of the arbitration, or any documents produced by another party in the proceedings not otherwise in the public domain; (vii) irrevocably agrees that, unless the General Partner and the relevant named party or parties shall otherwise mutually agree in writing, (A) the arbitrator(s) may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim, (B) SUCH CONSENTING PARTY MAY BRING CLAIMS ONLY IN ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF, CLASS REPRESENTATIVE OR CLASS MEMBER, OR AS A PRIVATE ATTORNEY GENERAL, IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING, and (C) the arbitrator(s) may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class or consolidated proceeding; and (viii) agrees that if a Dispute that would be arbitrable under this Agreement if brought against a Consenting Party is brought against an employee, officer, director or agent of such Consenting Party or its affiliates (other than Disputes brought by the employer or principal of any such employee, officer, director or agent) for alleged actions or omissions of such employee, officer, director or agent undertaken as an employee, officer, director or agent of such Consenting Party or its affiliates, such employee, officer, director or agent shall be entitled to invoke this arbitration agreement. Notwithstanding Section 16.10, each provision of this Section 16.9(a) shall be deemed material, and shall not be severable and this Section 16.9(a) shall be enforced only in its entirety. . . .
(c) If the arbitrator(s) or any court or tribunal of competent jurisdiction shall refuse to enforce Section 16.9(a) in its entirety or shall determine that any Dispute is not subject to arbitration as contemplated thereby, then, and only then, shall the alternative provisions of this Section 16.9(c) be applicable. Each Consenting Party, to the fullest extent permitted by law, (i) irrevocably agrees that unless the General Partner consents in writing to the selection of an alternative forum, any Dispute shall be exclusively brought in the Court of Chancery of the State of Delaware or, if such court does not have subject matter jurisdiction thereof, any other court located in the State of Delaware with subject matter jurisdiction; (ii) irrevocably submits to the exclusive jurisdiction of such courts in connection with any such claim, suit, action or proceeding; (iii) irrevocably agrees not to, and waives any right to, assert in any such claim, suit, action or proceeding that (A) it is not personally subject to the jurisdiction of such courts or any other court to which proceedings in such courts may be appealed, (B) such claim, suit, action or proceeding is brought in an inconvenient forum, or (C) the venue of such claim, suit, action or proceeding is improper; (iv) expressly waives any requirement for the posting of a bond by a party bringing such claim, suit, action or proceeding; (v) consents to process being served in any such claim, suit, action or proceeding by mailing, certified mail, return receipt requested, a copy thereof to such party at the address in effect for notices hereunder, and agrees that such service shall constitute good and sufficient service of process and notice thereof; provided that nothing in clause (v) hereof shall affect or limit any right to serve process in any other manner permitted by law; and (vi) irrevocably waives any and all right to trial by jury in any such claim, suit, action or proceeding; and (vii) agrees that proof shall not be required that monetary damages for breach of the provisions of this Agreement would be difficult to calculate and that remedies at law would be inadequate.