2011

The Model Business Corporation Act at Sixty: Shareholders and Their Influence

Lisa M. Fairfax
George Washington University, lfairfax@law.gwu.edu

Recommended Citation

Lisa M. Fairfax, The Model Business Corporation Act at Sixty: Shareholders and Their Influence, 74-WTR Law & Contemp. Probs. 19 (2011).

THE MODEL BUSINESS CORPORATION ACT AT SIXTY: SHAREHOLDERS AND THEIR INFLUENCE

LISA M. FAIRFAX*

I

INTRODUCTION

In the sixty years since the Committee on Corporate Laws (Committee) promulgated the Model Business Corporation Act (MBCA), there have been significant changes in corporate law and corporate governance.[1] One such change has been an increase in shareholder activism aimed at enhancing shareholders' voting power and influence over corporate affairs.[2]

Such increased shareholder activism (along with its potential for increase in shareholder power) has sparked considerable debate. Advocates of increasing shareholder power insist that augmenting shareholders' voting rights and influence over corporate affairs is vital not only for ensuring board and managerial accountability, but also for curbing fraud and other forms of misbehavior.[3] Corporate-governance scandals involving entities such as Enron and American International Group (AIG), as well as the recent financial meltdown,[4] have spurred efforts to enhance shareholder power because they highlight the need for greater accountability and improved safeguards against corporate malfeasance. Opponents contend that increasing shareholder power inappropriately shifts the balance of power away from boards.[5] In their view,

---

This article is also available at http://www.law.duke.edu/journals/lcp.

* Leroy Sorenson Merrifield Research Professor of Law, George Washington University School of Law. Special thanks to Jim Cox for organizing this symposium edition.

1. *See* MODEL BUS. CORP. ACT introductory note xii–xxv (2007) (describing major amendments to the MBCA); Robert W. Hamilton, *Corporate Governance in America 1950–2000: Major Changes but Uncertain Benefits*, 25 J. CORP. L. 349, 353–63 (2000) (describing substantial changes in corporate governance from 1950—the year of the enactment of the MBCA—to 2000).

2. *See, e.g.*, Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 IND. L.J. 1259, 1288–1303 (2009) (describing recent shareholder activism and its impact); RISKMETRICS GROUP, 2007 POSTSEASON REPORT: A CLOSER LOOK AT ACCOUNTABILITY AND ENGAGEMENT 5–7 (2007) [hereinafter 2007 POSTSEASON REPORT].

3. *See, e.g.*, Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 861 (2005).

4. *See* Steven Davidoff & David Zaring, *Big Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 465 (2009) (discussing the financial crisis).

5. *See* Stephen Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1754 (2005).

such a shift undermines directors' ability to act independently or otherwise consider the interests of all shareholders and corporate constituents, while increasing the pressure on boards to focus on short-term financial results.[6] Opponents also insist that such a shift inappropriately enhances the power of shareholders with special or narrow agendas who may advance their personal interests at the expense of the broader shareholder class.[7] In many respects, the debate regarding the propriety of shareholder activism and increased shareholder power has been as intense as shareholder activism itself.

Importantly, however, shareholder activism has culminated in considerable corporate-governance changes that challenge the board-centric model of corporate governance embedded in the MBCA.[8] These changes likely reflect a permanent shift in the dynamics between boards and shareholders.[9] Although the impact of that shift is not clear, it is clear that the MBCA must take account of that shift, and provide guidance for corporations seeking to determine how best to allocate power between shareholders and directors. Hopefully, the next sixty years will reflect such guidance.

II

THE "NEW" SHAREHOLDERS AND THEIR RISE TO INFLUENCE

A. The Changing Shareholder Landscape

It is difficult to properly appreciate increased shareholder activism without first appreciating the changes in the shareholder landscape that have occurred over the last sixty years. Ultimately, changes in shareholder composition have facilitated and accelerated shareholder activism and the resulting changes in the corporate-governance landscape.

Perhaps the most noteworthy change with regard to shareholder composition has been the sharp growth of the institutional investor over the last sixty years. In 1950, institutional investors, such as pension funds, mutual funds, and insurance companies, owned less than 10% of the total U.S. equity market.[10] Institutional investors owned about 66% of the total U.S. equity market by 2006, and such investors owned more than 76% of the equity at the

---

6. *See id.* at 1746; Bebchuk, *supra* note 3, at 906–18 (considering, but rebutting, the concern that increased shareholder power negatively impacts the rights of other stakeholders).

7. *See* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 577 (2006); Bainbridge, *supra* note 5, at 1754.

8. *See* MODEL BUS. CORP. ACT § 8.01 (2008).

9. *See* Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 1041–42 (2010).

10. *See* Hamilton, *supra* note 1, at 353 (describing the principal U.S. institutional investors as pension funds, investment companies including mutual funds and closed-end funds, insurance companies, private foundations, endowments, securities firms, and private investment vehicles such as LBO funds and hedge funds).

largest 1000 companies by the end of 2007.[11] By contrast, the percentage of public stock held by retail investors has fallen dramatically over the last sixty years. Thus, the percentage of stock held by households and nonprofits, which include individual investors and those who hold large share blocks, declined from 78% in 1970 to 36% in 2008.[12] Clearly, one of the more noteworthy changes since 1950 has been the rise in institutional ownership coupled with the decline in retail stock ownership.

This change has a significant impact on shareholders' ability to influence corporate affairs. Indeed, the concentration of institutional ownership has the potential to overcome the collective-action problems posed by the traditional pool of dispersed retail investors.[13] As a result, that ownership enhances institutional investors' ability to communicate with the board and with one another, thereby enhancing their potential ability to influence corporate affairs. To be sure, other factors may limit this ability.[14] Nevertheless, the rise of the institutional investor opens the door for shareholders to engage in greater activism and ultimately exercise greater power over the corporation.

One institutional investor that has taken advantage of this door opening has been the hedge fund. Virtually unheard of in 1950, hedge funds have risen to prominence over the last few years. The lack of regulation over hedge funds makes it difficult to pinpoint the precise percentage of the equity market held by hedge funds.[15] However, available data reveals that hedge funds currently control more than one trillion dollars in assets.[16] Moreover, hedge-fund activism has risen dramatically. Hedge funds have powerful incentives to generate positive returns, coupled with a freedom from regulatory and structural barriers that hamper other institutional investors.[17] As a result, engaging in activism is both easier and more desirable for hedge funds. To be sure, not all hedge funds engage in activism; but those that do engage tend to wield substantial influence over their targeted corporations.[18] Hedge-fund growth and activism, therefore,

---

11. *See* The Conference Board, *U.S. Institutional Investors Boost Ownership of U.S. Corporations to New High* (Sept. 2, 2008), http://www.thefreelibrary.com/Institutional+investors+boost+ownership+of+U.S.+corps+to+new+highs-a01611670934.

12. *See* Kahan & Rock, *supra* note 9, at 996.

13. *See* Iman Anabtawi & Lynn Stout, *Fiduciary Duties of Activist Shareholders*, 60 STAN. L. REV. 1255, 1275–76 (2008).

14. *See, e.g.*, Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 532–67 (pinpointing legal rules and legal risks that hamper shareholder action), 575–84 (1990) (discussing collective actions problems and ways to surmount such problems); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 452 (1991) (noting agency costs associated with institutional investor activism that may undermine fundamental change).

15. *See* Anabtawi & Stout, *supra* note 13, at 1279; Kahan & Rock, *supra* note 9, at 997.

16. *See* Anabtawi & Stout, *supra* note 13, at 1279; Kahn & Rock, *supra* note 9, at 997.

17. *See* Anabtawi & Stout, *supra* note 13, at 1278; Alon Brav et al., *Hedge Fund Activism, Corporate Governance and Firm Performance*, 63 J. FIN. 1729, 1734–36 (2008).

18. *See* Anabtawi & Stout, *supra* note 13, at 1278; Brav et al., *supra* note 17, at 1234–36; *see also* Frank S. Partnoy & Randall S. Thomas, *Gap Filling, Hedge Funds, and Financial Innovation* 5 (Brookings-Nomura Papers on Fin. Servs., Working Paper Mp. 06–21, 2006), *available at* http://ssrn.com/abstract=931254.

has contributed considerably to the shifting balance of power within the corporation.

Another important development in the shareholder landscape has been the growth of proxy advisory firms.[19] Among other things, such firms advise institutional investors on voting matters.[20] There is extensive debate regarding whether and to what extent proxy advisory firms influence corporate voting.[21] However, at the very least, such firms facilitate shareholders' ability to influence corporate affairs by coordinating the voting efforts and policies of large institutional investors.[22] Hence, these firms represent an important component of the changed corporate-governance landscape.

Ultimately, each component of that changed landscape serves to enhance shareholders' potential to wield influence in the corporate arena. As the next part reveals, in recent years, many shareholders have transformed that potential into reality.

B. Shareholders and Their Enhanced Voting Power

Over the last decade, shareholders have engaged in a variety of efforts aimed at increasing their influence over the corporation. This part analyzes some of the core campaigns.

1. Majority Voting

One of the most successful shareholder activists' campaigns in recent years has been the effort to implement majority voting. Until recently, virtually all U.S. corporations employed a plurality voting system, pursuant to which a director was elected so long as she received a plurality of the votes cast.[23] In an uncontested election, such a system meant that a director could be elected so long as she received one vote cast in her favor, without regard to votes that are withheld or cast against her.[24] Over the past several years, shareholder activists have waged an aggressive campaign to substitute the plurality system for a majority-vote regime whereby a director cannot be elected without receiving a majority of votes cast in her favor. Not only have shareholders submitted an increasing number of majority-vote shareholder proposals,[25] but those proposals

19. *See* Tamara Belinfanti, *The Proxy Advisory and Corporate Governance Industry: The Case for Increased Oversight and Control*, 14 STAN. J.L. BUS. & FIN. 384, 427–29 (2009); Stephen J. Choi et al., *Director Elections and the Role of Proxy Advisors*, 82 S. CAL. L. REV. 649, 650–60 (2009).

20. *See* Belinfanti, *supra* note 19, at 427–49; Choi et al., *supra* note 19, at 650–60.

21. *See* Choi et al., *supra* note 19, at 657.

22. *See* Belinfanti, *supra* note 19, at 397–402.

23. *See* Claudia H. Allen, *Study of Majority Voting in Director Elections*, NEAL, GERBER & EISENBERG LLP, ii (Nov. 12, 2007), http://www.ngelaw.com/files/upload/majoritystudy111207.pdf.

24. *See* Security Holder Director Nominations, 68 Fed. Reg. 60,784, 60,786 n.52 (proposed Oct. 23, 2003); J.W. Verret, *Pandora's Ballot Box, or a Proxy with Moxie? Majority Voting, Corporate Ballot Access, and the Legend of Martin Lipton Re-Examined*, 62 BUS. LAW. 1007, 1010 (2007).

25. In 2006 and 2007, shareholders submitted more than 150 majority voting proposals. *See* 2007 POSTSEASON REPORT, *supra* note 2, at 16. By contrast, only twelve majority vote proposals were

have consistently averaged near fifty percent shareholder support.[26] More importantly, corporations have begun implementing some form of majority-vote regime in record numbers. Hence, while fewer than thirty companies had a majority-vote regime in 2005,[27] by 2008, 72% of S&P 500 companies and 62% of Fortune 500 companies had adopted some form of majority voting.[28] Corporate-governance experts predict that majority voting will soon be the most dominant election standard.[29]

Shareholder activists contend that majority voting enables shareholders to truly impact election outcomes. Because voting for directors is one of the primary mechanisms for shareholders to influence corporate affairs, the ability to vote also encompasses the ability to impact corporate behavior and to potentially hold corporate actors accountable for misbehavior. To be sure, factors such as the holdover rule and the potential for failed elections may mute the impact of majority voting.[30] Nevertheless, the virtual sea-change in the director election standard has the potential to significantly influence the power dynamics between shareholders and directors.

2. Broker Voting

In July of 2009, the Securities and Exchange Commission (SEC) voted to eliminate broker discretionary voting for uncontested director elections. Under New York Stock Exchange (NYSE) Rule 452, brokers were permitted to vote shares in their control for "routine matters" if brokers did not receive voting instructions from the beneficial holders by the tenth day preceding a shareholder meeting.[31] The SEC voted to eliminate uncontested elections from those matters classified as "routine," and hence brokers can no longer cast votes for uninstructed shares in such elections.[32] The change went into effect at the beginning of 2010. In July 2010, Congress passed the Dodd-Frank Wall Street

---

submitted in 2004. *See* Stephen Taub, *Investors Back Shareholder Resolutions*, CFO.COM (Aug. 22, 2006), http://www.cfo.com/article.cfm/7826000?f=search.

26. *See* 2007 POSTSEASON REPORT, *supra* note 2, at 17.

27. *See* Brooke A. Masters, *Proxy Measures Pushing Corporate Accountability Gain Support*, WASH. POST, June 17, 2006, at D1.

28. Claudia Allen, Majority Voting and the 2008 Proxy Season, at 4, *available at* http://www.law.northwestern.edu/professionaled/documents/archive/Garrett/2008/Issues2008ProxySeason_ClaudiaAllen.pdf; *see also* Allen, *supra* note 23, at iii (revealing that at the start of the 2008 proxy season, 66% of S&P 500 companies, and 57% of Fortune 500 companies had some form of majority voting).

29. *See* Arthur Fleischer, Majority Voting and Shareholder Access, 1636 PLI/Corp 313, 317 (Nov. 7, 2007) ("Majority voting is clearly becoming the norm in United States corporations."); Martin Lipton, *What Directors Can Expect in the New Year*, COMPLIANCE WEEK (Jan. 3, 2006), http://www.complianceweek.com/article/2161/what-directors-can-expect-in-the-new-year.

30. *See* Fairfax, *supra* note 2, at 1296–1300; William K. Sjostrom, Jr. & Young Sang Kim, *Majority Voting for the Election of Directors*, 40 CONN. L. REV. 459, 487–89 (2007).

31. *See* Exchange Act Release No. 60,215, 2009 WL 1897466, at 2 n.7 (July 1, 2009), *available at* http://sec.gov/rules/sro/nyse/2009/34-60215.pdf; *see also* NYSE, Inc. Rule 452 (2009), *available at* http://rules.nyse.com/nysetools/PlatformViewer.asp?SelectedNode=chp_1_5&manual=/nyse/rules/nyse-rules/.

32. *See* Exchange Act Release No. 60,215, *supra* note 31.

Reform and Consumer Protection Act (Dodd-Frank Act). The Dodd-Frank Act not only codified this change, but also extended it, directing that all national securities exchanges prohibit broker discretionary voting in uncontested elections.[33]

This altered rule could substantially affect shareholders' ability to influence corporate affairs. In 2006, a NYSE working group found that broker voting invariably follows management recommendation, and hence, influences election outcomes in favor of management, particularly during elections where shareholders have organized a "vote no" or a "withhold the vote" campaign.[34] The amended Rule 452, coupled with the directive from the Dodd-Frank Act for all other exchanges, could reverse or counteract this influence. The changes in broker voting also may make it more difficult for directors to receive a majority vote, especially when shareholders target those directors.[35] If the changes in broker voting make it more difficult for directors to receive a majority vote, such changes could enhance shareholder power even in the context of elections that fall short of a full-blown proxy contest.

3. Staggered Boards

Shareholders also have experienced success in their campaign to abolish staggered boards—boards in which only a portion of directors are elected each year. While there may be legitimate reasons for maintaining staggered boards, their existence hinders shareholders' ability to replace a majority of the board. For this reason, shareholder activists view staggered boards as a form of managerial entrenchment and have sought to eliminate such boards since the 1980s.[36] Although shareholder proposals seeking such elimination have averaged well over fifty percent shareholder support since 2000, this kind of support did not prompt most corporations to alter their board structure in the early part of the decade.[37] More recently, however, this phenomenon has changed. Thus, in 2007, directors at a majority of S&P 500 companies were elected annually.[38] Moreover, between 2003 and 2009, two-thirds of companies with staggered boards had eliminated them.[39] Like majority voting, the elimination of staggered boards has the potential to greatly enhance shareholders' ability to influence election outcomes, and hence to sway corporate affairs.

---

33. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 957, 124 Stat. 1376, 1906–07 (2010).

34. *See* REPORT AND RECOMMENDATIONS OF THE PROXY WORKING GROUP TO THE NEW YORK STOCK EXCHANGE 14 (2006), *available at* http://www.nyse.com/pdfs/PWG_REPORT.pdf.

35. *See id*. at 12–13. The rule could also make it difficult for some corporations to meet the quorum requirements. *See id*. at 12.

36. *See* Bebchuk, *supra* note 3, at 852.

37. *See id*. at 852–54 (noting that more than sixty percent of corporations had failed to declassify their boards despite majority support for such declassification).

38. *See* 2007 POSTSEASON REPORT, *supra* note 2, at 23.

39. *See* Kahan & Rock, *supra* note 9, at 1009.

4. Proxy Fights

In recent years not only has there been an increase in proxy fights, but there also has been an increase in the relative success of such fights. Thus, from 2001 through 2005, there was an average of 61 proxy fights, with a 45% success rate, with success defined as shareholder activists obtaining at least one contested board seat.[40] By contrast, there were 100 such fights in 2006 and 107 in 2007, with a 57% and 50% success rate respectively.[41] In 2009, there were a record 133 proxy fights.[42] While many of those fights resulted in success via settlement, shareholder activists also achieved success in 60% of the proxy fights that went to an actual vote in 2009.[43] Currently, it appears that proxy fights have declined.[44] However, shareholder activists' success in proxy fights waged over the last few years underscores shareholders' greater influence, and highlights their enhanced ability to shape and even control the corporate agenda and corporate decision-making.

5. Proxy Access

Many shareholder activists perceive proxy access—the ability to nominate candidates of their choice on the corporation's proxy statement—as indispensable to their shareholder-empowerment efforts. Currently, only management-supported candidates appear on the corporate ballot.[45] If shareholders want to nominate candidates, they must solicit shareholders by creating and distributing their own proxy statement.[46] Because of the expense involved with such a process, shareholders rarely engage in these separate proxy solicitations—and thus, rarely nominate their own candidates for director.[47] In light of this phenomenon, shareholder activists have been fighting to obtain proxy access for decades. While there is considerable and intense debate regarding the benefits and desirability of proxy access, shareholder activists insist that proxy access will enable them to positively influence corporate affairs and prevent abuses of power.

---

40. *See* Charles Nathan & Dennis Craythorn, *The 2009 Proxy Season and the Year of Investor Anger*, N.Y. L.J., Nov. 17, 2008, at 4; *In Proxy fights, Odds in Favor of Dissidents*, REUTERS (Aug. 23, 2007), http://blogs.reuters.com/reuters-dealzone/2007/08/23/after-all-the-punches-proxy-fights-win-half-the-time/.

41. *See* Nathan & Craythorn, *supra* note 40, at 4.

42. *See* John Laide, *Proxy Fight Season*, SHARKREPELLENT.NET (Feb. 4, 2010), https://www.sharkrepellent.net/request?an=dt.getPage&st=1&pg=/pub/rs_20100204.html&Proxy_Fight_Season&rnd=284029.

43. *See* John Laide, *Proxy Fight Volume and Success Rates Decline*, SHARKREPELLENT.NET (June 4, 2010), https://www.sharkrepellent.net/request?an=dt.getPage&st=1&pg=/pub/rs_20100624.html&&Proxy_Fight_Volume_and_Success_Rates_Decline&rnd=906184.

44. *See id*.

45. *See* 17 C.F.R. § 240.14a-8(i)(8) (2006).

46. *See* 17 C.F.R. § 240.14a-3(a) (2006) (requiring that any solicitation of a proxy be accompanied by a filed proxy statement).

47. *See* Security Holder Director Nominations, 68 Fed. Reg. 60,784 (proposed Oct. 23, 2003).

On August 25, 2010, for the first time in its history, the SEC approved a proxy-access regime that not only requires every public company to grant proxy access to its shareholders, but also allows shareholders to propose additional mechanisms for gaining access to the company's proxy statement.[48] Under the new rules, shareholders would be eligible to have their nominees included on the corporation's proxy materials if they (1) own at least three percent of the voting power of a company's securities, (2) have held such securities continuously for at least three years and intend to continue such ownership after the director election, and (3) are not holding the securities in order to change control of the company or gain board seats that exceed the maximum number required to be included under the rule.[49] In this respect, the final rules provide that a company is not required to include more than one nominee, or a number of nominees that would represent up to twenty-five percent of the company's board, whichever is greater.[50] In addition to mandating proxy access in this manner, the new rules amend the shareholder-proposal rule to require that companies include on their proxy statement shareholder proposals regarding the company's nomination procedures.[51] The SEC made clear that if shareholders approve any such proposals, they will not supplant the mandated access rule, but rather will provide an additional route through which shareholders may obtain access to the corporation's proxy statement for the purposes of nominating candidates of their choice.[52]

According to the SEC, the economic crisis underscored the need for proxy reform because the crisis raised "serious concerns about the accountability and responsiveness of some companies and boards of directors to the interests of shareholders," as well as concerns regarding how the proxy structure may be "impeding the ability of shareholders to hold boards accountable."[53] The SEC stated that the new rules "facilitate the effective exercise of shareholders' traditional state law rights."[54]

Shareholders have fought for proxy access almost since the inception of the federal proxy rules, and while the SEC has proposed access rules in the past, it

48. *See* Facilitating Shareholder Director Nominations, Securities Act Release No. 9136, Exchange Act Release No. 62,764, Investment Company Act Release No. 29,384, 2010 WL 3343532, at 9 (Aug. 25, 2010), *available at* http://www.sec.gov/rules/final/2010/33-9136.pdf [hereinafter Final Proxy-Access Rule].

49. *See id*. at 24–25.

50. *See id*. at 26.

51. *See id.* at 33. This new provision reverses a provision adopted by the SEC in 2007. *See* 17 C.F.R. § 240.14a-8(i)(8) (2007).

52. *See* Final Proxy-Access Rule, *supra* note 48, at 231–32.

53. *See* Facilitating Shareholder Director Nominations, Securities Act Release No. 9046, Exchange Act Release No. 60,089, Investment Company Act Release No. 28,765, 2009 WL 1953653, at 7 (proposed June 10, 2009), *available at* http://www.sec.gov/rules/proposed/2009/33-9046.pdf [hereinafter 2009 Proxy-Access Proposal].

54. *See* Final Proxy-Access Rule, *supra* note 48, at 1.

had previously declined to implement them.[55] Hence, this new proxy-access regime not only represents a historical moment in the SEC's history, but it also could significantly impact corporate elections and shareholders' influence over those elections. The SEC's implementation of proxy access clearly solidifies the current corporate-governance shift towards enhanced shareholder power.[56]

III

THE MBCA RESPONDS AND IMPLICATIONS FOR THE NEXT SIXTY YEARS

As these changes reveal, the corporate-governance landscape has been altered considerably since 1950. Given the cumulative and significant nature of those alterations, they are likely to be a permanent fixture of our governance landscape. How should the MBCA respond to these changes?

On the one hand, some may contend that any changes to the MBCA should be relatively minimal, and perhaps even non-existent. As an initial matter, the fact that the MBCA is designed to be an enabling statute means that it is aimed at facilitating private ordering between directors and shareholders. Significant changes to the MBCA, particularly those embracing mandated rules, would undermine the enabling philosophy of the MBCA. Such changes not only may prevent directors and shareholders from freely choosing the governance scheme they believe to be most appropriate, but also may increase the possibility that corporate-governance rules could have both negative and unintended consequences on the governance structures of public and private companies.[57] From this perspective, significant changes to the MBCA may not appear desirable. Such a perspective therefore counsels against any such changes, even in response to the apparent growing influence of shareholders.

On the other hand, arguably the changes that already have been made to the MBCA are sufficient to account for the new governance environment. Some scholars contend that the very fact that shareholders have managed to gain greater influence over corporate affairs may obviate the need and even the desirability for reforms aimed at increasing shareholders' voting power.[58] Thus, shareholder success through the proposal process may obviate any need for significant alterations to the MBCA. Moreover, the Committee already has altered the MBCA in response to shareholder concerns, and those alterations address two issues that have particularly captured shareholders' attention. First,

---

55. *See* 2009 Proxy-Access Proposal, *supra* note 53, at 19–26 (discussing previous proposals); *see also* Fairfax, *supra* note 2, at 1273–78.

56. As this article was going to press, the Business Roundtable and the U.S. Chamber of Commerce filed a court action challenging the SEC's new proxy rules, and the SEC delayed implementation of the rules until the challenge has been resolved.

57. *See* REPORT OF THE COMMITTEE ON CORPORATE LAWS ON VOTING BY SHAREHOLDERS FOR THE ELECTION OF DIRECTORS 16 (2006), *available at* http://www.abanet.org/buslaw/committees/CL270000pub/directorvoting/20060313000001.pdf (noting potential for unintended consequences in the contest of changes related to majority voting).

58. *See* Kahan & Rock, *supra* note 9, at 1048.

the MBCA has been amended to provide for the adoption of provisions that enable resignation of directors who fail to receive a majority of the vote.[59] While that amendment falls short of a true majority-vote system, it nevertheless represents an important response to shareholder concerns in this area. Second, and perhaps most significantly, the MBCA has been altered not only to facilitate the adoption of proxy-access bylaw provisions, but also to support the legitimacy of bylaw provisions that provide for reimbursement of proxy expenses.[60] Because the new SEC rule is contingent on the ability of shareholders to nominate directors under state law,[61] these MBCA changes will be critical to ensuring shareholders' ability to utilize the proxy-access regime authorized by the SEC. Given the important weight that shareholders have placed on the proxy-access issue, these alterations are especially significant, and, in light of the SEC's actions with respect to proxy access, may decrease the need for any further reforms.

Of course, shareholder activists would likely disagree with this assessment, particularly because although the MBCA is an enabling statute, it is by no means neutral on the shareholder-power debate. Instead, the MBCA remains an essentially board-centric statute. In this respect, shareholder activists may contend that the board-centric nature of the MBCA must continue to be altered to better reflect or acknowledge shareholders' increased influence in corporate affairs. And in fact, there continue to be a host of issues on which shareholders have focused that could have ramifications in the MBCA.

Perhaps most importantly, the new proxy-access regime may prompt additional changes to the MBCA. In particular, the MBCA may be able to provide guidance to shareholders seeking to craft their own access proposal, or otherwise may be altered to help companies grapple with the thorny issues raised by proxy-access and shareholder-access proposals. Second, shareholders' increased focus on the elimination of staggered boards could prompt a desire for changes to that provision under section 8.06. Such changes could range from provisions that would enable a default requirement for annual elections to those that would limit a board's ability to implement a staggered-board regime. Third, shareholders' recent attention to special meetings could mean that they demand

---

59. *See* Memorandum from the Comm. on Corporate Laws, Committee on Corporate Laws Adopts Amendments to the Model Business Corporation Act Relating to Voting By Shareholders for the Election of Directors, (June 20, 2006), *available at* http://www.abanet.org/buslaw/committees/CL270000pub/nosearch/mbca/amendments/release.pdf [hereinafter Committee Amendments on Voting] (noting potential for unintended consequences in the contest of changes related to majority voting).

60. *See Changes in the Model Business Corporation Act—Shareholder Proxy Access Amendments to Chapters 2 and 10*, 64 BUS. LAW. 1157, 1157 (2009). On April 10, 2009, Delaware signed into law several changes to its corporate code. For the complete set of changes, *see* Del. Code. Ann. tit. 8, § 112 (2009). Such changes include provisions that clarify shareholders ability to adopt bylaw amendments related to proxy access and reimbursement of proxy expenses.

61. *See* Final Proxy-Access Rule, *supra* note 48, at 38 (noting that a company would not be subject to the mandated proxy-access rule if state law or the company's governing documents prohibit shareholders from nominating candidates to the board of directors).

some reconsideration of the special-meeting provisions under section 7.02.[62] Fourth, there may be some desire to consider potential changes related to fiduciary responsibilities under section 8.30. In this regard, it is important to note that increased shareholder power generates concerns for directors and managers that could implicate the MBCA. In this vein, some have argued that increased shareholder power should trigger a corresponding increase in shareholder responsibility.[63] Consistent with this argument, increased shareholder power could have an impact on section 8.30, triggering a consideration of whether the potential shift in shareholder responsibilities should generate a shift in shareholder duties and even shareholder liability. Fifth, increased shareholder power may implicate the disclosure provisions of the MBCA, especially with respect to the new proxy-access regime. How and to what extent do directors' disclosure duties change when shareholder-nominated candidates become members of the board? If they do not change, is it important to reiterate or otherwise highlight that lack of change in the MBCA?

Ultimately, there are a variety of ways in which the MBCA may continue to be affected by the changing corporate-governance environment, and this part only illustrates a few. It is tempting to resist additional changes to the MBCA. However, such changes not only may be inevitable, but also may be desirable, particularly because they may provide the Committee with an opportunity to comprehensively assess the impact of those changes as well as their ramifications for other governance issues and provisions within the MBCA.

IV

CONCLUSION

The shifting corporate-governance landscape has promoted a reconsideration of the power allocation between shareholders and directors. To be sure, the Committee has been actively engaged in such reconsideration, and has made important changes to the MBCA. As the Committee has pointed out, however, such changes must be done both "cautiously and deliberately."[64] More importantly, any changes must be implemented in a manner that does not damage the MBCA's core commitment to advance the best interests of the corporation, and that allow different companies to adopt different governance rules. Nevertheless, it is clear that increased shareholder activism and the resulting increase in shareholder power has affected the relationship between boards and shareholders, and it is equally clear that the MBCA must remain flexible enough to grapple with the negative and positive repercussions of that effect. However, when contemplating the next sixty years, the most important

62. *See 2010 Proxy Season Watchlist of Key Shareholder Proposals,* RISKMETRICS GROUP (April 8, 2010), http://www.riskmetrics.com/knowledge/proxy_season_watchlist_2010 (demonstrating that there were more proposals on special meetings than any type of other proposal submitted).

63. *See* Anabtawi & Stout, *supra* note 13, at 1255.

64. *See* Committee Amendments on Voting, *supra* note 59, at 2.

changes to the MBCA may be those highlighting the notion that although the corporate-governance climate may change, the basic duties of directors and officers, as well as the core purpose of the corporation, remain the same.