

The Shareholder Bill of Rights Act of 2009

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On May 19, Senators Charles Schumer (D-NY) and Maria Cantwell (D-WA) introduced the Shareholder Bill of Rights Act of 2009. The bill, if adopted as introduced, would fundamentally restructure corporate governance by federalizing some of the most basic state law rules governing U.S. public corporations. While some states, such as Delaware and North Dakota, have independently taken some of the measures included in the bill, it would trump state law and impose the new requirements on all U.S. public companies.

Say on Pay. All public companies would be required to hold a shareholder vote on executive compensation at each annual meeting of shareholders. Although the vote would be nonbinding and advisory only, if a public company ignored or failed to address a negative shareholder vote on compensation, shareholder reaction would likely be strong. A separate nonbinding advisory vote would be required for all “golden parachute” payments in connection with business combination transactions.

Proxy Access. The bill requires the SEC to issue rules allowing shareholders to use the company’s proxy statement to nominate directors. To make a nomination in the company’s proxy statement, the shareholder must have owned at least 1% of the company’s shares for two or more years. The requirements of the bill are less stringent than the SEC’s contemplated proposal on shareholder access, which uses a three-tiered ownership requirement based on the size of the company.

Majority Voting. In uncontested elections, directors would be required to receive a majority of the votes cast to be elected. In

contested elections, plurality voting would continue to apply. Directors in uncontested elections who do not receive a majority of the votes cast would be required to resign, and the board must accept the resignation.

Staggered Boards. Under the bill, staggered boards would be eliminated. All public companies would be required to amend their governing documents to provide for the annual election of all directors.

Independent Chairman. Public companies would be required to split the jobs of CEO and Chairman, and the Chairman must be an independent director. Former executive officers would not be permitted to serve as Chairman.

Risk Committee. Public companies would be required to establish a risk committee of the board to establish and evaluate the company’s risk management practices.

Although the bill is sweeping, the details regarding the actual operation of the bill and its true scope will not be known until subsequent rulemaking by the SEC and stock exchanges, if the bill passes. Senator Schumer has said that he hopes the bill will be passed before the end of the year. Although several prominent politicians, including President Obama, have supported various aspects of the bill, whether there is adequate support to federalize these fundamental provisions of corporate law is currently unknown. However, if adopted, the bill’s ramifications to U.S. public corporations would be far-reaching. The text of the bill may be found at www.thomas.gov.

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