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# Stockholder Nominees Barred For Noncompliance With “Clear Day” Advance Notice Bylaw

In [Rosenbaum v. CytoDyn Inc.](#), the Delaware Court of Chancery, in an opinion by Vice Chancellor Slights, upheld a board’s decision to exclude stockholder nominees from being considered at CytoDyn’s annual meeting based on deficiencies in the stockholders’ notice required by the company’s advance notice bylaw. The court found that the board had not engaged in any manipulative or inequitable conduct in rejecting the nominees. Even though the board waited almost one month before notifying the stockholders of deficiencies in their nomination notice, the court emphasized that the stockholders had not submitted their notice until close to the deadline, which left no time to fix the deficiencies, and that the bylaw did not in any event require the board to engage in an iterative process with the proponent to fix deficiencies.

## Background

Plaintiff stockholders of CytoDyn provided advance notice of their nominations to CytoDyn’s board the day before the advance notice deadline in CytoDyn’s “commonplace” advance notice bylaw. One month after the deadline, the board sent a deficiency letter to the plaintiffs regarding the disclosures in their nomination notice. The deficiencies identified by the board included the plaintiffs’ failure to disclose (i) the identity of a limited liability company formed by one of the plaintiffs (who was also a nominee) to fund the proxy contest, as well as the limited liability company’s donors, and (ii) the plaintiffs’ support of an acquisition by CytoDyn that had been previously considered and rejected by the board, pursuant to which CytoDyn would acquire a company with ties to two of plaintiffs’ nominees and employ one of the nominees who also had patent disputes with CytoDyn. Plaintiffs attempted to address the deficiencies shortly after their receipt of the deficiency letter, but well after the advance notice deadline. Upon the continued rejection of their nominations by the CytoDyn board, the plaintiffs filed suit in the Court of Chancery, seeking an injunction requiring the board to place the plaintiffs’ nominees on the ballot for the CytoDyn annual meeting scheduled for October 2021. The court considered the matter after a trial on a paper record.

## Takeaways

The court concluded that the CytoDyn board did not engage in manipulative or inequitable conduct, and therefore, denied the plaintiffs’ request for an injunction. Key takeaways from the court’s opinion include the following:

- *Delaware courts continue to give deference to a board’s adoption of an advance notice bylaw where the bylaw was adopted on a “clear day” and where its terms are not “overtly unreasonable.”* In *Rosenbaum*, the plaintiffs “wisely” did not challenge, and the court did not review, the CytoDyn board’s adoption of the advance notice bylaw. The bylaw had been adopted about six years earlier, was not adopted in response to any corporate threat and had terms the court characterized as “commonplace,” including that it required timely notice of nominations in a 90 to 120 day window prior to the one-year anniversary of the preceding year’s annual meeting. Thus, the *Rosenbaum* opinion does not change Delaware courts’ approach to the review of similarly adopted advance notice bylaws, which, as the court observed, “serve an indisputably

legitimate purpose." So, companies thinking of enhancing their advance notice bylaws would be better served to do so on a "clear day," rather than waiting until there is a precipitating event.

- *Stockholders can obtain equitable relief if they can demonstrate "compelling circumstances" that the board's enforcement of the bylaw is inequitable under Schnell v. Chris-Craft Indus., Inc.* The court rejected plaintiffs' argument that enhanced scrutiny under *Blasius* applied—which standard applies to a court's review of board actions taken for the primary purpose of interfering with stockholder voting rights—because there was no evidence of "manipulative conduct" by the board. The court did not, however, automatically apply the business judgment rule, instead invoking *Schnell* and observing that equitable relief might be appropriate if the plaintiffs show that an advance notice bylaw, *as applied in the particular circumstances*, denied stockholders a fair opportunity to nominate director candidates. Indeed, as the court put it, "[a]ny attempt to utilize the corporate machinery and the Delaware Law for the purposes of perpetuating oneself in office by obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest must be denied because those are inequitable purposes, contrary to established principles of corporate democracy." Here, however, the court found no such compelling circumstances. The nomination notice was deficient on at least the two disclosures discussed above that were responsive to the information required by the advance notice bylaws, either of which according to the court would have justified the board's rejection of the nomination notice. Specifically, according to the court, disclosure of plaintiffs' supporters was "vital information" and disclosure of plaintiffs' support of the acquisition was information about a possible future transaction that would be material to stockholders. Further, the board's one-month delay in responding to the nomination notice was not inequitable because the stockholders chose to submit the notice on the eve of an unambiguous deadline with the full understanding that the bylaws did not provide stockholders an opportunity to cure deficiencies later. The court wrote, "[g]iven that Plaintiffs waited until the last minute to submit their Nomination Notice, they were obliged to submit a compliant notice. They did not do so."
- *Boards should be mindful that the Delaware courts' review of advance notice bylaws depends on the specific circumstances before the court.* In upholding the board's decision, the court emphasized that the particular bylaw at issue, unlike many advance notice bylaws, did not set forth a procedure to cure deficiencies beyond the deadline. Under a different bylaw, the board's duties would be evaluated differently. Furthermore, the court observed in dicta that even without an express cure period in the bylaw, it would have been harder for the board to justify silence if the nomination notice had been made with ample time before the deadline to correct deficiencies.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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