IN THE SUPREME COURT OF THE STATE OF DELAWARE

MATTHEW B. SALZBERG, JULIE M.B. BRADLEY, TRACY BRITT COOL, KENNETH A. FOX, ROBERT P. GOODMAN, GARY R. HIRSHBERG, BRIAN P. KELLEY, KATRINA LAKE, STEVEN ANDERSON, J. WILLIAM GURLEY, MARKA HANSEN, SHARON MCCOLLAM, ANTHONY WOOD, RAVI AHUJA, SHAWN CAROLAN, JEFFREY HASTINGS, ALAN HENDRICKS, NEIL HUNT, DANIEL LEFF, and RAY ROTHROCK, Defendants Below-Appellants, - and - BLUE APRON HOLDINGS, INC., STITCH FIX, INC. and ROKU, INC., Nominal Defendants Below-Appellants, v. MATTHEW SCIABACUCCHI, on behalf of himself and all others similarly situated, Plaintiff Below-Appellee.	No. 346, 2019 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2017-0931-JTL

COMPENDIUM OF AUTHORITIES
CITED IN APPELLANTS' REPLY BRIEF

Tab	Authorities
1.	S.B. 75, 148th General Assembly (Del. 2015)
2.	Council of Institutional Investors, *Proxy Access by Private Ordering* (February 2017)
3.	2A Sutherland Statutory Construction § 47:23 (7th ed.)

Dated: November 5, 2019

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TAB 1

SPONSOR: Sen. Townsend & Sen. Henry & Rep. Mitchell & Rep. M. Smith & Rep. Lynn
Sens. Blevins, Bonini, Bushweller, Cloutier, Ennis, Hall-Long, Lavelle, Marshall, McBride, McDowell, Peterson, Poore, Sokola, Reps. Brady, Dukes, Heffernan, Hudson, J. Johnson, Keeley, Longhurst, Paradee, Peterman, B. Short, D. Short, Smyk, Spiegelman, Wilson

DELAWARE STATE SENATE
148th GENERAL ASSEMBLY

SENATE BILL NO. 75

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

Section 1. Amend § 102(a)(1), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 102 Contents of certificate of incorporation.

(a) The certificate of incorporation shall set forth:

(1) The name of the corporation, which (i) shall contain 1 of the words "association," "company," "corporation," "club," "foundation," "fund," "incorporated," "institute," "society," "union," "syndicate," or "limited," (or abbreviations thereof, with or without punctuation), or words (or abbreviations thereof, with or without punctuation) of like import of foreign countries or jurisdictions (provided they are written in roman characters or letters); provided, however, that the Division of Corporations in the Department of State may waive such requirement (unless it determines that such name is, or might otherwise appear to be, that of a natural person) if such corporation executes, acknowledges and files with the Secretary of State in accordance with § 103 of this title a certificate stating that its total assets, as defined in § 503(i) of this title, are not less than $10,000,000, or, in the sole discretion of the Division of Corporations in the Department of State, if the corporation is both a nonprofit nonstock corporation and an association of professionals, (ii) shall be such as to distinguish it upon the records in the office of the Division of Corporations in the Department of State from the names that are reserved on such records and from the names on such records of each other corporation, partnership, limited partnership, limited liability company or statutory trust organized or registered as a domestic or foreign corporation, partnership, limited partnership, limited liability company or statutory trust under the laws of this State, except with the written consent of the person who has reserved such name or such other foreign corporation or domestic or foreign partnership, limited partnership, limited liability company or statutory trust, executed, acknowledged and filed with the

Secretary of State in accordance with § 103 of this title, or except that, without prejudicing any rights of the person who has reserved such name or such other foreign corporation or domestic or foreign partnership, limited partnership, limited liability company or statutory trust, the Division of Corporations in the Department of State may waive such requirement if the corporation demonstrates to the satisfaction of the Secretary of State that the corporation or a predecessor entity previously has made substantial use of such name or a substantially similar name, that the corporation has made reasonable efforts to secure such written consent, and that such waiver is in the interest of the State, (iii) except as permitted by § 395 of this title, shall not contain the word "trust," and (iv) shall not contain the word "bank," or any variation thereof, except for the name of a bank reporting to and under the supervision of the State Bank Commissioner of this State or a subsidiary of a bank or savings association (as those terms are defined in the Federal Deposit Insurance Act, as amended, at 12 U.S.C. § 1813), or a corporation regulated under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841 et seq., or the Home Owners' Loan Act, as amended, 12 U.S.C. § 1461 et seq.; provided, however, that this section shall not be construed to prevent the use of the word "bank," or any variation thereof, in a context clearly not purporting to refer to a banking business or otherwise likely to mislead the public about the nature of the business of the corporation or to lead to a pattern and practice of abuse that might cause harm to the interests of the public or the State as determined by the Division of Corporations in the Department of State;

Section 2. Amend § 102, Title 8 of the Delaware Code, by adding a new section, § 102(f), shown by underline as follows:

(f) The certificate of incorporation may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in § 115 of this title.

Section 3. Amend § 109(b), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

(b) 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. The bylaws may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in § 115 of this title.

Section 4. Amend § 114(b), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

(b) Subsection (a) of this section shall not apply to:

(1) Sections 102(a)(4), (b)(1) and (2), 109(a), 114, 141, 154, 215, 228, 230(b), 241, 242, 253, 254, 255, 256, 257, 258, 271, 276, 311, 312, 313, 390, and 503 of this title, which apply to nonstock corporations by their terms;

(2) Sections 102(f), 109(b) (last sentence), 151, 152, 153, 155, 156, 157(d), 158, 161, 162, 163, 164, 165, 166, 167, 168, 203, 204, 205, 211, 212, 213, 214, 216, 219, 222, 231, 243, 244, 251, 252, 267, 274, 275, 324, 364, 366(a), 391 and 502(a)(5) of this title; and

(3) Subchapter XIV and subchapter XVI of this chapter.

Section 5. Amend Title 8 of the Delaware Code by adding a new section, § 115, shown by underline as follows:

§ 115. Forum selection provisions.

The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. "Internal corporate claims" means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.

Section 6. Amend § 152 Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 152 Issuance of stock; lawful consideration; fully paid stock.

The consideration, as determined pursuant to § 153(a) and (b) of this title, for subscriptions to, or the purchase of, the capital stock to be issued by a corporation shall be paid in such form and in such manner as the board of directors shall determine. The board of directors may authorize capital stock to be issued for consideration consisting of cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof. The resolution authorizing the issuance of capital stock may provide that any stock to be issued pursuant to such resolution may be issued in one or more transactions in such numbers and at such times as are set forth in or determined by or in the manner set forth in the resolution, which may include a determination or action by any person or body, including the corporation, provided the resolution fixes a maximum number of shares that may be issued pursuant to such resolution, a time period during which such shares may be issued and a minimum amount of consideration for which such shares may be issued. The board of directors may determine the amount of ~~such~~ consideration for which shares may be issued by setting a minimum amount of consideration or approving a formula by which the amount or minimum amount of consideration is determined. The formula may include or be made dependent upon facts ascertainable outside the formula, provided the manner in which such facts shall operate upon the formula is clearly and expressly set forth in the formula or in the resolution approving the

formula. In the absence of actual fraud in the transaction, the judgment of the directors as to the value of such consideration shall be conclusive. The capital stock so issued shall be deemed to be fully paid and nonassessable stock upon receipt by the corporation of such consideration; provided, however, nothing contained herein shall prevent the board of directors from issuing partly paid shares under § 156 of this title.

Section 7. Amend § 157(b) Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

(b) The terms upon which, including the time or times which may be limited or unlimited in duration, at or within which, and the consideration (including a formula by which such consideration may be determined) for which any such shares may be acquired from the corporation upon the exercise of any such right or option, shall be such as shall be stated in the certificate of incorporation, or in a resolution adopted by the board of directors providing for the creation and issue of such rights or options, and, in every case, shall be set forth or incorporated by reference in the instrument or instruments evidencing such rights or options. A formula by which such consideration may be determined may include or be made dependent upon facts ascertainable outside the formula, provided the manner in which such facts shall operate upon the formula is clearly and expressly set forth in the formula or in the resolution approving the formula. In the absence of actual fraud in the transaction, the judgment of the directors as to the consideration for the issuance of such rights or options and the sufficiency thereof shall be conclusive.

Section 8. Amend § 204, Title 8 of the Delaware Code by making insertions as shown by underline and deletions as shown by strike through as follows:

§ 204 Ratification of defective corporate acts and stock.

(a) Subject to subsection (f) of this section, no defective corporate act or putative stock shall be void or voidable solely as a result of a failure of authorization if ratified as provided in this section or validated by the Court of Chancery in a proceeding brought under § 205 of this title.

(b) (1) In order to ratify ~~a~~ one or more defective corporate ~~act~~ acts pursuant to this section (other than the ratification of an election of the initial board of directors pursuant to subsection (b)(2) of this section), the board of directors of the corporation shall adopt ~~a resolution~~ resolutions stating:

~~(1) The~~ (A) The defective corporate act or acts to be ratified;

~~(2) The time of the~~ (B) The date of each defective corporate act or acts;

~~(3) If~~ (C) If such defective corporate act or acts involved the issuance of shares of putative stock, the number and type of shares of putative stock issued and the date or dates upon which such putative shares were purported to have been issued;

~~(4) The~~ (D) The nature of the failure of authorization in respect of ~~the~~ each defective corporate act to be ratified; and

~~(5) That~~ (E) That the board of directors approves the ratification of the defective corporate act or acts.

~~The resolution~~ Such resolutions may also provide that, at any time before the validation effective time in respect of any defective corporate act set forth therein, notwithstanding ~~adoption of the resolution~~ the approval of the ratification of such defective corporate act by stockholders, the board of directors may abandon the ~~resolution~~ ratification of such defective corporate act without further action of the stockholders. The quorum and voting requirements applicable to the ~~adoption of such resolution~~ ratification by the board of directors of any defective corporate act shall be the quorum and voting requirements applicable ~~at the time of such adoption for~~ to the type of defective corporate act proposed to be ratified at the time the board adopts the resolutions ratifying the defective corporate act; provided that if the certificate of incorporation or bylaws of the corporation, any plan or agreement to which the corporation was a party or any provision of this title, in each case as in effect as of the time of the defective corporate act, would have required a larger number or portion of directors or of specified directors for a quorum to be present or to approve the defective corporate act, such larger number or portion of such directors or such specified directors shall be required for a quorum to be present or to adopt the ~~resolution~~ resolutions to ratify the defective corporate act, as applicable, except that the presence or approval of any director elected, appointed or nominated by holders of any class or series of which no shares are then outstanding, or by any person that is no longer a stockholder, shall not be required.

(2) In order to ratify a defective corporate act in respect of the election of the initial board of directors of the corporation pursuant to § 108 of this title, a majority of the persons who, at the time the resolutions required by this subsection (b)(2) are adopted, are exercising the powers of directors under claim and color of an election or appointment as such may adopt resolutions stating:

(A) The name of the person or persons who first took action in the name of the corporation as the initial board of directors of the corporation;

(B) The earlier of the date on which such persons first took such action or were purported to have been elected as the initial board of directors; and

(C) That the ratification of the election of such person or persons as the initial board of directors is approved.

~~(c) The resolution adopted pursuant to subsection (b)~~ (c) Each defective corporate act ratified pursuant to subsection (b)(1) of this section shall be submitted to stockholders for ~~adoption~~ approval as provided in subsection (d) of this section, unless:

(1) No other provision of this title, and no provision of the certificate of incorporation or bylaws of the corporation, or of any plan or agreement to which the corporation is a party, would have required stockholder approval of ~~the~~ such defective corporate act to be ratified, either at the time of ~~the~~ such defective corporate act or at the time ~~when the resolution required by~~ the board of directors adopts the resolutions ratifying such defective corporate act pursuant to subsection (b)(1) of this section ~~is adopted~~; and

(2) ~~The~~ Such defective corporate act ~~to be ratified~~ did not result from a failure to comply with § 203 of this title.

(d) If the ratification of a defective corporate act is required to be submitted to stockholders for approval pursuant to subsection (c) of this section ~~requires that the resolution be submitted to stockholders~~, due notice of the time, place, if any, and purpose of the meeting shall be given at least 20 days before the date of the meeting to each holder of valid stock and putative stock, whether voting or nonvoting, at the address of such holder as it appears or most recently appeared, as appropriate, on the records of the corporation. The notice shall also be given to the holders of record of valid stock and putative stock, whether voting or nonvoting, as of the time of the defective corporate act, other than holders whose identities or addresses cannot be determined from the records of the corporation. The notice shall contain a copy of the ~~resolution~~ resolutions adopted by the board of directors pursuant to subsection (b)(1) of this section or the information required by paragraphs (A) through (E) of subsection (b)(1) of this section and a statement that any claim that the defective corporate act or putative stock ratified hereunder is void or voidable due to the ~~identified~~ failure of authorization, or that the Court of Chancery should declare in its discretion that a ratification in accordance with this section not be effective or be effective only on certain conditions must be brought within 120 days from the applicable validation effective time. At such meeting, the quorum and voting requirements applicable to the ~~adoption~~ ratification of such ~~resolution by the stockholders~~ defective corporate act shall be the quorum and voting requirements applicable ~~at the time of such adoption for~~ to the type of defective corporate act proposed to be ratified at the time of the approval of the ratification, except that:

(1) If the certificate of incorporation or bylaws of the corporation, any plan or agreement to which the corporation was a party or any provision of this title in effect as of the time of the defective corporate act would have required a larger number or portion of stock or of any class or series thereof or of specified stockholders for a quorum to be present or to approve the defective corporate act, the presence or approval of such larger number or portion of stock or of such class or series thereof or of such specified stockholders shall be required for a quorum to be present or to

~~adopt the resolution~~ approve the ratification of the defective corporate act, as applicable, except that the presence or approval of shares of any class or series of which no shares are then outstanding, or of any person that is no longer a stockholder, shall not be required;

(2) The ~~adoption of a resolution to ratify~~ approval by stockholders of the ratification of the election of a director shall require the affirmative vote of the majority of shares present at the meeting and entitled to vote on the election of such director, except that if the certificate of incorporation or bylaws of the corporation then in effect or in effect at the time of the defective election require or required a larger number or portion of stock or of any class or series thereof or of specified stockholders to elect such director, the affirmative vote of such larger number or portion of stock or of any class or series thereof or of such specified stockholders shall be required to ratify the election of such director, except that the presence or approval of shares of any class or series of which no shares are then outstanding, or of any person that is no longer a stockholder, shall not be required; and

(3) In the event of a failure of authorization resulting from failure to comply with the provisions of § 203 of this title, the ratification of the defective corporate act shall require the vote set forth in § 203(a)(3) of this title, regardless of whether such vote would have otherwise been required.

Shares of putative stock on the record date for determining stockholders entitled to vote on any matter submitted to stockholders pursuant to subsection (c) of this section (and without giving effect to any ratification that becomes effective after such record date) shall neither be entitled to vote nor counted for quorum purposes in any vote to ratify any defective corporate act.

(e) If ~~the~~ a defective corporate act ratified pursuant to this section would have required under any other section of this title the filing of a certificate in accordance with § 103 of this title, then, whether or not a certificate was previously filed in respect of such defective corporate act and in lieu of filing the certificate otherwise required by this title, the corporation shall file a certificate of validation with respect to such defective corporate act in accordance with § 103 of this title. A separate certificate of validation shall be required for each defective corporate act requiring the filing of a certificate of validation under this section, except that (i) two or more defective corporate acts may be included in a single certificate of validation if the corporation filed, or to comply with this title would have filed, a single certificate under another provision of this title to effect such acts, and (ii) two or more overissues of shares of any class, classes or series of stock may be included in a single certificate of validation, provided that the increase in the number of authorized shares of each such class or series set forth in the certificate of validation shall be effective as of the date of the first such overissue. The certificate of validation shall set forth:

~~(1) The resolution adopted in accordance with subsection (b) of this section, the date of adoption of such resolution by the board of directors and, if applicable, by the stockholders and a statement that such resolution was duly adopted in accordance with this section;~~

(1) each defective corporate act that is the subject of the certificate of validation (including, in the case of any defective corporate act involving the issuance of shares of putative stock, the number and type of shares of putative stock issued and the date or dates upon which such putative shares were purported to have been issued), the date of such defective corporate act, and the nature of the failure of authorization in respect of such defective corporate act;

(2) a statement that such defective corporate act was ratified in accordance with this section, including the date on which the board of directors ratified such defective corporate act and the date, if any, on which the stockholders approved the ratification of such defective corporate act; and

(3) the information required by one of the following paragraphs:

~~(2) If~~ a. If a certificate was previously filed under § 103 of this title in respect of ~~the defective corporate act, the title and date of filing of such prior certificate and any certificates~~ such defective corporate act and no changes to such certificate are required to give effect to such defective corporate act in accordance with this section, the certificate of validation shall set forth (x) the name, title and filing date of the certificate previously filed and of any certificate of correction thereto~~; and~~ and (y) a statement that a copy of the certificate previously filed, together with any certificate of correction thereto, is attached as an exhibit to the certificate of validation;

b. If a certificate was previously filed under § 103 of this title in respect of the defective corporate act and such certificate requires any change to give effect to the defective corporate act in accordance with this section (including a change to the date and time of the effectiveness of such certificate), the certificate of validation shall set forth (x) the name, title and filing date of the certificate so previously filed and of any certificate of correction thereto, (y) a statement that a certificate containing all of the information required to be included under the applicable section or sections of this title to give effect to the defective corporate act is attached as an exhibit to the certificate of validation, and (z) the date and time that such certificate shall be deemed to have become effective pursuant to this section; or

c. If a certificate was not previously filed under § 103 of this title in respect of the defective corporate act and the defective corporate act ratified pursuant to this section would have required under any other section of this title the filing of a certificate in accordance with § 103 of this title, the certificate of validation shall set forth (x) a

statement that a certificate containing all of the information required to be included under the applicable section or sections of this title to give effect to the defective corporate act is attached as an exhibit to the certificate of validation, and (y) the date and time that such certificate shall be deemed to have become effective pursuant to this section.

A certificate attached to a certificate of validation pursuant to paragraph b. or c. of subsection (e)(3) of this section need not be separately executed and acknowledged and need not include any statement required by any other section of this title that such instrument has been approved and adopted in accordance with the provisions of such other section.

~~(3) Such provisions as would be required under any other section of this title to be included in the certificate that otherwise would have been required to be filed pursuant to this title with respect to such defective corporate act.~~

(f) From and after the validation effective time, unless otherwise determined in an action brought pursuant to § 205 of this title:

~~(1) Each~~ (1) Subject to the last sentence of subsection (d), each defective corporate act ~~set forth in the resolution adopted pursuant to subsection (b) of~~ ratified in accordance with this section shall no longer be deemed void or voidable as a result of ~~a~~ the failure of authorization ~~identified in such resolution~~ described in the resolutions adopted pursuant to subsection (b) of this section and such effect shall be retroactive to the time of the defective corporate act; and

~~(2) Each~~ (2) Subject to the last sentence of subsection (d), each share or fraction of a share of putative stock issued or purportedly issued pursuant to any such defective corporate act ~~and identified in the resolution required by subsection (b) of this section~~ shall no longer be deemed void or voidable ~~as a result of a failure of authorization identified in such resolution and, in the absence of any failure of authorization not ratified,~~ and shall be deemed to be an identical share or fraction of a share of outstanding stock as of the time it was purportedly issued.

~~(g) Prompt notice of the adoption of a resolution pursuant to~~ (g) In respect of each defective corporate act ratified by the board of directors pursuant to subsection (b) of this section, prompt notice of the ratification shall be given to all holders of valid stock and putative stock, whether voting or nonvoting, as of the date ~~of adoption of such resolution by~~ the board of directors adopts the resolutions approving such defective corporate act, or as of a date within 60 days after ~~the~~ such date of adoption ~~of such resolution~~, as established by the board of directors, at the address of such holder as it appears or most recently appeared, as appropriate, on the records of the corporation. The notice shall also be given to the holders of record of valid stock and putative stock, whether voting or nonvoting, as of the time of the defective corporate act, other than holders whose identities or addresses cannot be determined from the records of the corporation. The notice shall contain a copy of the ~~resolution~~ resolutions adopted pursuant to subsection (b) of this section or the information specified in paragraphs (A) through (E) of subsection (b)(1) or paragraphs (A) through (C) of

subsection (b)(2) of this section, as applicable, and a statement that any claim that the defective corporate act or putative stock ratified hereunder is void or voidable due to the ~~identified~~ failure of authorization, or that the Court of Chancery should declare in its discretion that a ratification in accordance with this section not be effective or be effective only on certain conditions must be brought within 120 days from the later of the validation effective time or the time at which the notice required by this subsection is given. Notwithstanding the foregoing, (i) no such notice shall be required if notice of the ~~resolution~~ ratification of the defective corporate act is to be given in accordance with subsection (d) of this section, and (ii) in the case of a corporation that has a class of stock listed on a national securities exchange, the notice required by this subsection may be deemed given if disclosed in a document publicly filed by the corporation with the Securities and Exchange Commission pursuant to §§ 13, 14 or 15(d) of the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder, or the corresponding provisions of any subsequent United States federal securities laws, rules or regulations. If any defective corporate act has been approved by stockholders acting pursuant to § 228 of this title, the notice required by this subsection may be included in any notice required to be given pursuant to § 228(e) of this title and, if so given, shall be sent to the stockholders entitled thereto under § 228(e) and to all holders of valid and putative stock to whom notice would be required under this subsection if the defective corporate act had been approved at a meeting other than any stockholder who approved the action by consent in lieu of a meeting pursuant to § 228 of this title or any holder of putative stock who otherwise consented thereto in writing. Solely for purposes of ~~subsections (d) and (g)~~ subsection (d) of this section and this subsection, notice to holders of putative stock, and notice to holders of valid stock and putative stock as of the time of the defective corporate act, shall be treated as notice to holders of valid stock for purposes of § 222 and §§ 228, 229, 230, 232 and 233 of this title.

(h) As used in this section and in § 205 of this title only, the term:

(1) "Defective corporate act" means an overissue, an election or appointment of directors that is void or voidable due to a failure of authorization, or any act or transaction purportedly taken by or on behalf of the corporation that is, and at the time such act or transaction was purportedly taken would have been, within the power of a corporation under subchapter II of this chapter, but is void or voidable due to a failure of authorization;

(2) "Failure of authorization" means (i) the failure to authorize or effect an act or transaction in compliance with the provisions of this title, the certificate of incorporation or bylaws of the corporation, or any plan or agreement to which the corporation is a party, if and to the extent such failure would render such act or transaction void or voidable, or (ii) the failure of the board of directors or any officer of the corporation to authorize or approve any

act or transaction taken by or on behalf of the corporation that would have required for its due authorization the approval of the board of directors or such officer;

(3) "Overissue" means the purported issuance of:

a. Shares of capital stock of a class or series in excess of the number of shares of such class or series the corporation has the power to issue under § 161 of this title at the time of such issuance; or

b. Shares of any class or series of capital stock that is not then authorized for issuance by the certificate of incorporation of the corporation;

(4) "Putative stock" means the shares of any class or series of capital stock of the corporation (including shares issued upon exercise of options, rights, warrants or other securities convertible into shares of capital stock of the corporation, or interests with respect thereto that were created or issued pursuant to a defective corporate act) that:

a. But for any failure of authorization, would constitute valid stock; or

b. Cannot be determined by the board of directors to be valid stock;

(5) "Time of the defective corporate act" means the date and time the defective corporate act was purported to have been taken;

(6) "Validation effective time" with respect to any defective corporate act ratified pursuant to this section means the ~~later~~ latest of:

a. The time at which the ~~resolution~~ defective corporate act submitted to the stockholders for ~~adoption~~ approval pursuant to subsection (c) of this section is ~~adopted~~ approved by such stockholders~~,~~ or if no such vote of stockholders is required to ~~adopt the resolution~~ approve the ratification of the defective corporate act, the time at which the ~~notice~~ board of directors adopts the resolutions required by subsection ~~(g)~~(b)(1) or (b)(2) of this section ~~is given; and~~;

b. Where no certificate of validation is required to be filed pursuant to subsection (e) of this section, the time, if any, specified by the board of directors in the resolutions adopted pursuant to subsection (b)(1) or (b)(2) of this section, which time shall not precede the time at which such resolutions are adopted; and

~~b. The~~ c. The time at which any certificate of validation filed pursuant to subsection (e) of this section shall become effective in accordance with § 103 of this title.

(7) "Valid stock" means the shares of any class or series of capital stock of the corporation that have been duly authorized and validly issued in accordance with this title~~;~~.

In the absence of actual fraud in the transaction, the judgment of the board of directors that shares of stock are valid stock or putative stock shall be conclusive, unless otherwise determined by the Court of Chancery in a proceeding brought pursuant to § 205 of this title.

(i) Ratification under this section or validation under § 205 of this title shall not be deemed to be the exclusive means of ratifying or validating any act or transaction taken by or on behalf of the corporation, including any defective corporate act, or any issuance of stock, including any putative stock, or of adopting or endorsing any act or transaction taken by or in the name of the corporation prior to the commencement of its existence, and the absence or failure of ratification in accordance with either this section or validation under § 205 of this title shall not, of itself, affect the validity or effectiveness of any act or transaction or the issuance of any stock properly ratified under common law or otherwise, nor shall it create a presumption that any such act or transaction is or was a defective corporate act or that such stock is void or voidable.

Section 9. Amend § 205(f), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

(f) Notwithstanding any other provision of this section, no action asserting:

(1) That a defective corporate act or putative stock ratified in accordance with § 204 of this title is void or voidable due to a failure of authorization identified in the resolution adopted in accordance with 204(b); or

(2) That the Court of Chancery should declare in its discretion that a ratification in accordance with § 204 of this title not be effective or be effective only on certain conditions,

may be brought after the expiration of 120 days from the later of the validation effective time and the time notice, if any, that is required to be given pursuant to § 204(g) of this title is given with respect to such ratification, except that this subsection shall not apply to an action asserting that a ratification was not accomplished in accordance with § 204 of this title or to any person to whom notice of the ratification was required to have been given pursuant to § 204(d) or (g) of this title, but to whom such notice was not given.

Section 10. Amend § 245(c), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

(c) A restated certificate of incorporation shall be specifically designated as such in its heading. It shall state, either in its heading or in an introductory paragraph, the corporation's present name, and, if it has been changed, the name under which it was originally incorporated, and the date of filing of its original certificate of incorporation with the Secretary of State. A restated certificate shall also state that it was duly adopted in accordance with this section. If it was adopted by the board of directors without a vote of the stockholders (unless it was adopted pursuant to § 241 of this title or

without a vote of members pursuant to § 242(b)(3) of this title), it shall state that it only restates and integrates and does not further amend (except, if applicable, as permitted under § 242(a)(1) and § 242(b)(1) of this title) the provisions of the corporation's certificate of incorporation as theretofore amended or supplemented, and that there is no discrepancy between those provisions and the provisions of the restated certificate. A restated certificate of incorporation may omit (a) such provisions of the original certificate of incorporation which named the incorporator or incorporators, the initial board of directors and the original subscribers for shares, and (b) such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination or cancellation has become effective. Any such omissions shall not be deemed a further amendment.

Section 11. Amend § 362(c), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

(c) The name of the public benefit corporation ~~shall, without exception,~~ may contain the words "public benefit corporation," or the abbreviation "P.B.C.," or the designation "PBC," which shall be deemed to satisfy the requirements of § 102(a)(l)(i) of this title. If the name does not contain such language, the corporation shall, prior to issuing unissued shares of stock or disposing of treasury shares, provide notice to any person to whom such stock is issued or who acquires such treasury shares that it is a public benefit corporation; provided that such notice need not be provided if the issuance or disposal is pursuant to an offering registered under the Securities Act of 1933 or if, at the time of issuance or disposal, the corporation has a class of securities that is registered under the Securities Exchange Act of 1934.

Section 12. Amend § 363(a), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

(a) Notwithstanding any other provisions of this chapter, a corporation that is not a public benefit corporation, may not, without the approval of ~~90%~~2/3 of the outstanding ~~shares of each class of the~~ stock of the corporation ~~of which there are outstanding shares, whether voting or nonvoting~~ entitled to vote thereon:

(1) Amend its certificate of incorporation to include a provision authorized by § 362(a)(1) of this title; or

(2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign public benefit corporation or similar entity.

The restrictions of this section shall not apply prior to the time that the corporation has received payment for any of its capital stock, or in the case of a nonstock corporation, prior to the time that it has members.

Section 13. Amend § 363(b), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

(b) Any stockholder of a corporation that is not a public benefit corporation that holds shares of stock of such corporation immediately prior to the effective time of:

(1) An amendment to the corporation's certificate of incorporation to include a provision authorized by § 362(a)(1) of this title; or

(2) A merger or consolidation that would result in the conversion of the corporation's stock into or exchange of the corporation's stock for the right to receive shares or other equity interests in a domestic or foreign public benefit corporation or similar entity;

and has neither voted in favor of such amendment or such merger or consolidation nor consented thereto in writing pursuant to § 228 of this title, shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock; provided, however, that no appraisal rights under this section shall be available for the shares of any class or series of stock, which stock, or depository receipts in respect thereof, at the record date fixed to determine the stockholders entitled to receive notice of the meeting of stockholders to act upon the agreement of merger or consolidation, or amendment, were either: (i) listed on a national securities exchange or (ii) held of record by more than 2,000 holders, unless, in the case of a merger or consolidation, the holders thereof are required by the terms of an agreement of merger or consolidation to accept for such stock anything except (A) shares of stock of any other corporation, or depository receipts in respect thereof, which shares of stock (or depository receipts in respect thereof) or depository receipts at the effective date of the merger or consolidation will be either listed on a national securities exchange or held of record by more than 2,000 holders; (B) cash in lieu of fractional shares or fractional depository receipts described in the foregoing clause (A); or (C) any combination of the shares of stock, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in the foregoing clauses (A) and (B).

Section 14. Amend § 363(c), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

(c) Notwithstanding any other provisions of this chapter, a corporation that is a public benefit corporation may not, without the approval of 2/3 of the outstanding ~~shares of each class of the~~ stock of the corporation ~~of which there are outstanding shares, whether voting or nonvoting~~ entitled to vote thereon:

(1) Amend its certificate of incorporation to delete or amend a provision authorized by § 362(a)(1) or § 366(c) of this title; or

(2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign corporation that is not a public benefit corporation or similar entity and the certificate of incorporation (or similar governing instrument) of which does not contain the identical provisions identifying the public benefit or public benefits pursuant to § 362(a) of this title or imposing requirements pursuant to § 366(c) of this title.

Section 15. Amend § 391(c), Title 8 of the Delaware Code, by making insertions as shown by underline and deletions as shown by strike through as follows:

(c) The Secretary of State may issue photocopies or electronic image copies of instruments on file, as well as instruments, documents and other papers not on file, and for all such photocopies or electronic image copies which are not certified by the Secretary of State, a fee of $10 shall be paid for the first page and $2.00 for each additional page. ~~The Secretary of State may also issue microfiche copies of instruments on file as well as instruments, documents and other papers not on file, and for each such microfiche a fee of $2.00 shall be paid therefor.~~ Notwithstanding Delaware's Freedom of Information Act [Chapter 100 of Title 29] or any other provision of ~~this Code~~ law granting access to public records, the Secretary of State upon request shall issue only photocopies~~, microfiche~~ or electronic image copies of public records in exchange for the fees described ~~above~~ in this section, and in no case shall the Secretary of State be required to provide copies (or access to copies) of such public records (including without limitation bulk data, digital copies of instruments, documents and other papers, databases or other information) in an electronic medium or in any form other than photocopies or electronic image copies of such public records in exchange, as applicable, for the fees described in this section or § 2318 of Title 29 for each such record associated with a file number.

Section 16. Sections 1 through 7, 10 through 12 and 14 shall be effective on August 1, 2015. Sections 8 and 9 shall be effective only with respect to defective corporate acts and proposed issuances of putative stock ratified or to be ratified pursuant to resolutions adopted by a board of directors on or after August 1, 2015. Section 13 shall be effective only with respect to mergers and consolidations consummated pursuant to agreements entered into on or after August 1, 2015, or in the case of amendments, amendments approved by the board of directors on or after August 1, 2015. Section 15 shall be effective upon its enactment into law.

Ssynopsis

Section 1. Section 1 amends Section 102(a)(1) to enable the Division of Corporations in the Department of State to waive the requirement under Section 102(a)(1)(ii) in certain limited circumstances.

Section 2. In *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), the Delaware Supreme Court upheld as facially valid a bylaw imposing liability for certain legal fees of the nonstock corporation on certain members who participated in the litigation. In combination with the amendments to Sections 109(b) and 114(b)(2), new subsection (f) does not disturb that ruling in relation to nonstock corporations. In order to preserve the efficacy of the enforcement of fiduciary duties in stock corporations, however, new subsection (f) would invalidate a provision in the certificate of incorporation of a stock corporation that purports to impose liability upon a stockholder for the attorneys' fees or expenses

of the corporation or any other party in connection with an internal corporate claim, as defined in new Section 115. New subsection (f) is not intended, however, to prevent the application of such provisions pursuant to a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.

Section 3. Like the concurrent amendment to Section 102, the new last sentence of subsection (b) would invalidate a provision in the bylaws of a stock corporation that purports to impose liability upon a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in new Section 115. The new last sentence of subsection (b) is not intended, however, to prevent the application of any provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.

Section 4. The amendment to Section 114 has the effect of avoiding the application to nonstock corporations of new Section 102(f) and the new last sentence of Section 109(b).

Section 5. New Section 115 confirms, as held in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, 73 A.3d 934 (Del. Ch. 2013), that the certificate of incorporation and bylaws of the corporation may effectively specify, consistent with applicable jurisdictional requirements, that claims arising under the DGCL, including claims of breach of fiduciary duty by current or former directors or officers or controlling stockholders of the corporation, or persons who aid and abet such a breach, must be brought only in the courts (including the federal court) in this State. Section 115 does not address the validity of a provision of the certificate of incorporation or bylaws that selects a forum other than the Delaware courts as an additional forum in which internal corporate claims may be brought, but it invalidates such a provision selecting the courts in a different State, or an arbitral forum, if it would preclude litigating such claims in the Delaware courts. Section 115 is not intended, however, to prevent the application of any such provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced. Section 115 is not intended to foreclose evaluation of whether the specific terms and manner of adoption of a particular provision authorized by Section 115 comport with any relevant fiduciary obligation or operate reasonably in the circumstances presented. For example, such a provision may not be enforceable if the Delaware courts lack jurisdiction over indispensable parties or core elements of the subject matter of the litigation. Section 115 is also not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction, nor is Section 115 intended to limit or expand the jurisdiction of the Court of Chancery or the Superior Court.

Section 6. The amendment to Section 152 clarifies that the board of directors may authorize stock to be issued in one or more transactions in such numbers and at such times as is determined by a person or body other than the board of directors or a committee of the board, provided the resolution of the board of directors or committee of the board authorizing the issuance fixes the maximum number of shares that may be issued, the time frame during which such shares may be issued and establishes a minimum amount of consideration for which such shares may be issued. The minimum amount of consideration cannot be less than the consideration required pursuant to Section 153. The amendment further clarifies that a formula by which the consideration for stock is determined may include reference to or be made dependent upon the operation of extrinsic facts, such as, without limitation, market prices on one or more dates or averages of market prices on one or more dates. Among other things, without limitation, the amendment is intended to make clear that the board of directors may authorize stock to be issued pursuant to "at the market" programs without having to separately authorize each individual stock issuance pursuant to such program.

Section 7. The amendment to Section 157(b) clarifies that a formula by which the consideration for stock issued upon the exercise of rights and options in respect of stock is determined may include reference to or be made dependent upon the operation of extrinsic facts, such as market prices on one or more dates, or averages of market prices on one or more dates.

Section 8. Section 204, which became effective on April 1, 2014, sets forth procedures for ratifying stock or corporate acts that, due to a "failure of authorization," would be void or voidable. This legislation clarifies and confirms the operation of specified provisions of Section 204 and makes certain other changes in respect of the procedures by which stock and defective corporate acts may be statutorily ratified.

The amendments to Section 204(b)(1) confirm that the resolutions that the board of directors adopts to ratify a defective corporate act may include one or more other defective corporate acts. The amendments make clear that the quorum and voting requirements applicable to each defective corporate act contained in a set of board resolutions ratifying one or more defective corporate acts are those applicable to each defective corporate act, viewed on an act-by-act basis. For example, if the resolutions adopted pursuant to subsection 204(b)(1) address two defective corporate acts—the filing of an amendment to the certificate of incorporation and an issuance of shares—and the former required at all relevant times for its approval under the certificate of incorporation the affirmative vote of 75% of the total number of directors, while the latter required for its approval at all relevant times the affirmative vote of a majority of the directors present at a meeting at which a quorum is present, the resolutions must be adopted, with respect to the defective amendment, by the affirmative vote of 75% of the total number of directors, and with respect to the defective issuance, by the vote of a majority of the directors present at the meeting at which the resolutions are submitted to a vote of directors (provided a quorum is established at that meeting). Nothing in the statute is intended to prevent the board from cross-conditioning its own ratification of a defective corporate act on the approval of one or more other defective corporate acts, or from

conditioning its ratification of any defective corporate act on the approval by stockholders of one or more other defective corporate acts, whether or not such vote is required by Section 204(c).

Section 204(b)(2) is new. The new subsection addresses the situation in which the initial board of directors was not named in the original certificate of incorporation and has not been constituted by the incorporator. It permits those persons who have been acting as the corporation's directors under claim and color of an election or appointment to adopt resolutions ratifying the election of those persons who, despite having not been named in the certificate of incorporation or by the incorporator as the initial directors, first took action on behalf of the corporation as the board of directors. Nothing in this subsection is intended to prevent a corporation from correcting its certificate of incorporation pursuant to Section 103(f) if the certificate of incorporation inadvertently omitted the provision naming the initial directors or otherwise constitutes an inaccurate record with respect to the naming of the initial directors.

The amendments to Section 204(c) are designed to conform that subsection to the changes to Section 204(b) clarifying that the board may adopt a single set of resolutions ratifying multiple defective corporate acts. The changes to Section 204(c) provide that each defective corporate act—rather than the board's resolutions ratifying one or more defective corporate acts—must be submitted to stockholders for their approval, except where the defective corporate act would not have required a vote of stockholders under the General Corporation Law, the certificate of incorporation or bylaws of the corporation, or any plan to which the corporation is a party, either at the time of the defective corporate act or the time the board adopts the resolutions ratifying the act (and provided that the defective corporate act did not result from a failure to comply with Section 203).

Section 204(d), which specifies the voting standards applicable to the stockholders' approval of a defective corporate act, has been revised principally to conform with the changes to Section 204(b)(1) and Section 204(c). Consistent with the revisions to Section 204(c), Section 204(d) eliminates references to the board's resolution ratifying a defective corporate act being submitted to stockholders and instead describes the circumstances under which a defective corporate act must be submitted to stockholders for approval. Because Section 204(d), as revised, eliminates the requirement that the board's "resolution" adopting a defective corporate act be submitted to stockholders, it requires that, where the ratification of a defective corporate act is submitted to stockholders for approval at a meeting, the notice must include either the board's resolutions ratifying the defective corporate act or the information set forth in paragraphs (A) through (E) of Section 204(b)(1). As with the voting standards applicable to the board's adoption of resolutions ratifying any defective corporate act, the amendments to Section 204(d) make clear that the quorum and voting requirements applicable to the ratification of each defective corporate act submitted to stockholders are those applicable to the particular defective corporate act, viewed on an act-by-act basis. For example, if the board submits two defective corporate acts to stockholders for their approval—one involving a defective amendment to the certificate of incorporation and the other involving a defective issuance of shares—and the former required at all relevant times for its approval under the certificate of incorporation the affirmative vote of a majority of the outstanding voting power of the capital stock, while the latter required for its approval at all relevant times the affirmative vote of a majority of the Series A Preferred Stock, voting as a single class, the defective amendment must be approved by the affirmative vote of a majority in voting power of the outstanding capital stock, while the defective issuance must be approved by the vote of a majority of the outstanding Series A Preferred Stock. Nothing in the statute is intended to prevent the corporation from cross-conditioning the stockholders' approval of one defective corporate act on the stockholders' approval of one or more other defective corporate acts. Next, Section 204(d) has been amended to clarify that the only stockholders entitled to vote on the ratification of a defective corporate act, or to be counted for purposes of a quorum for such vote, are the holders of record of valid stock as of the record date for determining stockholders entitled to vote thereon. It does so by confirming that shares of putative stock will not be counted for purposes of determining the stockholders entitled to vote or to be counted for purposes of a quorum in any vote on the ratification of any defective corporate act. Corresponding changes are being made to Section 204(f) to clarify that the "retroactive" validity that Section 204 gives to putative stock will not result in shares of putative stock being considered valid stock as of the record date for the vote on the ratification of a defective corporate act or acts previously submitted to stockholders.

Section 204(d)(2), which deals with the voting standards applicable to the ratification of the election of a director requiring a vote of stockholders, has been revised such that the voting standard conforms with that of Section 204(d)(1). Thus, as with Section 204(d)(1), if the certificate of incorporation or bylaws in effect at the time of the vote on the ratification of the election of directors or at the time of the defective election require or required a larger portion of stock or of any class or series of stock or of any specified stockholder to elect such director, then the affirmative vote of such larger number or portion or stock or of any class or series of stock or of such specified stockholder will be required to ratify the election. As with Section 204(d)(1), the amendments to Section 204(d)(2) provide that the presence or approval of shares of any class or series of which no shares are then outstanding, or of any person that is no longer a stockholder, will not be required for purposes of the vote on the ratification of an election.

The amendments to Section 204(e) are intended to clarify the requirements in respect of certificates of validation. First, the changes to Section 204(e) dispense with the requirement that the board's resolutions ratifying the defective corporate act be attached to the certificate of validation. The changes to Section 204(e) require instead that the certificate of validation set forth specified information regarding the defective corporate act and the related failure of authorization.

The changes to Section 204(e) clarify that a separate certificate of validation must be filed in respect of each defective corporate act that requires the filing of a certificate of validation, except in two limited cases. The first case occurs where the corporation had filed (or, to comply with the General Corporation Law, would have filed) a single certificate under another provision of the General Corporation Law to effect multiple defective corporate acts. For example, if two or more subsidiaries of a parent corporation were merged with and into such parent corporation, albeit defectively, and the parent corporation purportedly effected both such mergers through the filing of a single certificate of merger, the defective corporate acts (i.e., both such mergers that were defectively consummated due to a failure of authorization) may be included in a single certificate of validation. The second case occurs where two or more overissues are being validated. In that case, a single certificate of validation may be used so long as the total increase in the authorized capital stock of each class or series of stock is effective as of the date of the earliest overissue referenced in the certificate of validation.

Second, the amendments clarify the information that must be included in the form of certificate of validation in cases where (x) a certificate in respect of the defective corporate act had previously been filed and no changes are required to give effect to the ratification of the defective corporate act that is the subject of the certificate of validation, (y) a certificate in respect of the defective corporate act had previously been filed and changes are required to that certificate to give effect to the ratification of the defective corporate act that is the subject of the certificate of validation, and (z) no certificate had previously been filed and the filing of a certificate was required to give effect to the ratification of a defective corporate act.

Where a certificate had previously been filed and no changes to it are required, Section 204(e) now requires that the certificate as previously filed with the Secretary of State be attached to the certificate of validation as an exhibit. Thus, if a corporation defectively amended its certificate of incorporation due to, for example, the fact that the board adopted the amendment by written consent of fewer than all directors, but a certificate of amendment was previously filed and requires no changes, the file-stamped copy of the certificate of amendment as previously filed would be attached to the certificate of validation as an exhibit.

Where a certificate had previously been filed and changes are required, Section 204(e) now expressly requires that a certificate containing all of the information required under the other section of the General Corporation Law, including the changes necessary to give effect to the ratification of the defective corporate act, be attached to the certificate of validation as an exhibit. The certificate of validation must also state the date and time as of which the certificate attached to it would have become effective. Thus, for example, if the corporation defectively effected a forward stock split of its outstanding common stock and filed a certificate of amendment that increased the authorized shares of common stock to account for the forward split but failed to include the language required by Section 242(b) of the General Corporation Law to effect the forward split of the outstanding shares of common stock, a copy of the certificate of amendment as it would have been filed, including both the increase in the authorized number of shares of common stock and the language effecting the forward stock split of the then outstanding shares of common stock, must be attached as an exhibit to the certificate of validation. The certificate attached to the certificate of validation under these circumstances need not be separately executed and acknowledged, and it need not include any statement required by any other section of the General Corporation Law that the instrument has been approved and adopted in accordance with such other section.

Where no certificate in respect of the defective corporate act had previously been filed and a certificate would have been required to be filed to give effect to the defective corporate act, Section 204(e) now expressly requires that a certificate containing all of the information required under the other section of the General Corporation Law be attached to the certificate of validation as an exhibit. The certificate of validation must also state the date and time as of which the certificate attached to it would have become effective. Thus, for example, if a corporation defectively effected a reverse stock split by board action alone, and failed to file a certificate of amendment including the language necessary to effect the reverse stock split, a certificate of amendment that includes all of the provisions that would be required under Section 242(b) of the General Corporation Law must be attached to the certificate of validation. The certificate attached to the certificate of validation under these circumstances need not be separately executed and acknowledged, and it need not include any statement required by any other section of the General Corporation Law that the instrument has been approved and adopted in accordance with such other section.

Consistent with the amendments to Section 204(d), the amendments to Section 204(f) are intended to make clear that the stockholders entitled to vote and be counted for quorum purposes on the ratification of a defective corporate act that requires a vote of stockholders are the holders of valid stock as of the record date for the approval of the ratification of the defective corporate act. By making the "retroactive effect" that Section 204(f) grants to defective corporate acts subject to the provision of Section 204(d) that expressly states that shares of putative stock will not be counted for purposes of determining the shares entitled to vote or be counted for quorum purposes on the ratification of a defective corporate act, Section 204(f) confirms that the ratification of a defective corporate act will not result in putative shares being retroactively validated such that they would need to be included in the vote on the ratification of a defective corporate act. For example, if, as of the record date for the approval of the ratification of a defective corporate act that involved the issuance of putative shares of preferred stock, the corporation has 100 shares of valid common stock outstanding and 100 shares of putative preferred stock "outstanding," only the shares of common stock would be counted as shares entitled to vote on the ratification of such defective corporate act and any other defective corporate act submitted

to stockholders at such time, even if the shares of preferred stock, by virtue of the ratification, will be deemed to have been validly issued as of a date prior to such record date.

Section 204(g) is being amended to provide that corporations that have a class of stock listed on a national securities exchange may give the notice required by Section 204(g) by means of a public filing pursuant to specified provisions of the Securities Exchange Act of 1934, as amended. Section 204(g) is also being amended to provide clarity as to the manner in which notice may be given when stockholders are approving the ratification of a defective corporate act by written consent in lieu of a meeting. The amendments provide that, where the ratification of a defective corporate act is approved by consent of stockholders in lieu of a meeting, the notice required by Section 204(g) may be included in the notice required to be given pursuant to Section 228(e). The amendments further clarify that, where a notice sent pursuant to Section 204(g) is included in a notice sent pursuant to Section 228(e), the notice must be sent to the parties entitled to receive the notice under both Section 204(g) and Section 228(e). The amendments to Section 204(g) also clarify that no such notice need be provided to any holder of valid shares that acted by written consent in lieu of a meeting to approve the ratification of a defective corporate act or to putative stockholders who otherwise consented to the ratification.

Section 204(h)(2) is being amended to clarify that the failure of the board of directors or any officer of the corporation to approve an act or transaction taken by or on behalf of the corporation that would have required approval by the board or such officer may constitute a "failure of authorization." The amendment is intended to clarify that any act taken without such approval by the board or such officer could constitute a defective corporate act susceptible to cure by ratification under Section 204. The amendment is intended solely to confirm the broad scope of acts that may be ratified under Section 204 and is not intended to imply that any specific acts suffering from such a failure of authorization would necessarily be void or voidable or that they may not be susceptible to cure by ratification under principles of common law.

Section 204(h)(6) currently defines "validation effective time" as the later of (x) the time at which the ratification of the defective corporate act is approved by stockholders (or, if no vote is required, the time at which the notice required by Section 204(g) is given) and (y) the time at which any certificate of validation has become effective. The amendments to Section 204(h)(6) confirm that, in respect of the ratification of any defective corporate act that requires stockholder approval but does not require the filing of a certificate of validation, the "validation effective time" is the time at which the stockholders approve the ratification of the defective corporate act, whether the stockholders are acting at a meeting or by consent in lieu of a meeting pursuant to Section 228. (Although the statute clarifies that, in such cases, the validation effective time commences upon the stockholders' approval of the ratification of the defective corporate act, a corresponding amendment to Section 204(g) is being made to confirm that the 120-day period during which stockholders may challenge the ratification of a defective corporate act commences from the later of the validation effective time and the time at which the notice required by Section 204(g) is given). The term "validation effective time" in Section 204(h)(6) is being further amended to permit the board of directors to fix a future validation effective time for any defective corporate act that is not required to be submitted to a vote of stockholders and that does not require the filing of a certificate of validation. Again, the 120-day period during which challenges to the ratification may be brought would commence from the later of the validation effective time and the time at which the notice required by Section 204(g) is given. The amendment is intended to obviate logistical issues that may arise in connection with the delivery of notices in situations where multiple defective corporate acts are being ratified at the same time. As amended, Section 204(h)(6) enables the board to set one date on which the ratification of all defective corporate acts approved by the board will be effective, regardless of when the notice under Section 204(g) is sent.

Section 204(i) provides that Section 204 is not the exclusive means of ratifying corporate acts, recognizing that certain "voidable" acts may be susceptible to cure by ratification under common law. The amendments to Section 204(i) are intended to clarify that the scope of the subsection encompasses actions ratified under the common law "pre-incorporation doctrine," which generally provides that a corporation is competent to adopt and ratify agreements made by its organizer or promoter in contemplation of its organization.

Section 9. Section 205(f) is being amended to conform that subsection to amended Section 204(g). These amendments confirm that the 120-day period during which stockholders may challenge the ratification of a defective corporate act under Section 205 commences from the later of the validation effective time and the time at which the notice required by Section 204(g) is given.

Section 10. The amendment to Section 245(c) clarifies that a restated certificate is not required to state that it does not further amend the provisions of the corporation's certificate of incorporation if the only amendment thereto is to change the corporation's name without a vote of the stockholders.

Section 11. Section 11 deletes the requirement of a public benefit corporation specific identifier in the name of a public benefit corporation, but requires notification to purchasers of shares in public benefit corporations under certain circumstances.

Section 12. Section 12 amends Section 363(a) to change the approval required under that Section.

Section 13. Section 13 provides a market out to the provisions requiring appraisal in certain transactions involving public benefit corporations.

Section 14. Section 14 amends Section 363(c) to change the approval required under that Section.

Section 15. Section 15 amends Section 391(c) to confirm that in exchange for the fees described the Secretary of State may issue public records in the form of photocopies or electronic image copies and need not provide public records in any other form.

Section 16. Section 16 provides that the effective date of Sections 1 through 7, 10 through 12 and 14 is August 1, 2015, that Sections 8 and 9 shall be effective only with respect to defective corporate acts and proposed issuances of putative stock ratified or to be ratified pursuant to resolutions adopted by a board of directors on or after August 1, 2015, that Section 13 shall be effective only with respect to mergers and consolidations consummated pursuant to agreements entered into on or after August 1, 2015, or in the case of amendments, amendments approved by the board of directors on or after August 1, 2015, and that Section 15 shall be effective upon its enactment into law. The effective date of Sections 8 and 9 is intended to provide certainty as to the notice and filing procedures applicable where a ratification under Section 204 has been commenced prior to August 1, 2015 but the validation effective time in respect thereof has not yet occurred. Nothing in Section 16 is intended to imply that the clarifying and confirmatory amendments to Section 204 are inapplicable in determining the proper interpretation of Section 204 with respect to ratifications that were commenced or became effective prior to August 1, 2015.

Author: Senator Townsend

TAB 2

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PROXY ACCESS BY PRIVATE ORDERING

Forward

This report provides a snapshot of proxy access bylaws at 347 companies collected by Covington & Burling as of Dec. 31, 2016. Proxy access is a mechanism that lets shareowners place their nominees for director in a company's proxy materials. This is important because it enables the owners of a company to avoid the cost of waging a separate proxy contest when they are dissatisfied with the performance of a corporate board and want to run their own candidates for election.

The Securities and Exchange Commission (SEC) first considered the idea in 1942, but it wasn't until 2003 that the commission proposed a rule to institute proxy access on a market-wide basis. Although the commission ultimately withdrew the 2003 proposal, the Dodd-Frank Act of 2010 granted the SEC explicit authority to adopt a proxy access rule, which the commission did that same year. A federal appeals court later struck down the rule as "arbitrary and capricious." But the court's action left in place the right of shareholders to file their own resolutions requesting proxy access, and companies retained the right to independently adopt proxy access through "private ordering" by amending their bylaws.

2015 marked a major turning point for proxy access. The prime catalyst was a non-binding proxy access shareholder resolution campaign led by the New York City Comptroller on behalf of five New York City pension funds, joined by CalPERS, CalSTRS and others. A favorable SEC review of the proper scope of companies' ability to exclude shareholder proposals from proxy materials helped too. In 2014, just 15 shareholder proposals requesting proxy access went to a vote and only four passed. By contrast, in 2015 and again in 2016, more than 80 such proposals went to a vote, and shareholders approved more than half. Faced with this evidence of substantial shareholder support, many companies adopted proxy access.

This report summarizes key provisions in proxy access bylaws as of Dec. 31, 2016. The report aims to assist both companies contemplating adding proxy access to their bylaws and investors making voting decisions on proxy access proposals. Although these early adopters represent 11 percent of the Russell 3000, they constitute more than half of the index's total market capitalization, and about half of the S&P 500 now have proxy access bylaws. The provisions these companies put in their bylaws will likely influence other companies' future decisions on how best to implement proxy access. CII's position on certain proxy access provisions is outlined in its August 2015 guide, Proxy Access: Best Practices.

Ownership and Holding Period Thresholds

Companies have converged on proxy access provisions that define the ownership threshold and minimum holding period before the nominator may exercise proxy access. Ninety-seven percent of proxy access bylaws have embraced the 3 percent ownership threshold, meaning that a shareholder, or group of shareholders, seeking to nominate a director via proxy access must own at least 3 percent of outstanding shares. Several companies have reduced their ownership requirement from 5 percent to 3 percent; examples include Arch Coal, BorgWarner, Cabot Oil & Gas, CF Industries, Flowserve, HCP, Marathon Oil, Noble Energy, New York Community Bancorp, NVR, Oshkosh, Priceline Group and SBA Communications.

Simply acquiring the number of shares necessary to reach the ownership threshold does not guarantee compliance, as illustrated in November 2016 during the first attempt to utilize proxy access. Gamco Investors had sought to nominate one candidate at National Fuel Gas (NFG). The investor withdrew its candidate after NFG said that Gamco's shares were not acquired according to the method prescribed in the bylaws; specifically, without intent to change or influence control of the company. (Gamco had previously sought a spin-off at NFG, and Gamco's 13D filings indicated a potential to influence or change control.)

Ninety-nine percent of proxy access bylaws explicitly base ownership on net-long holdings, and 91 percent explicitly permit loaned shares to count toward the requirement. Typically, the bylaw specifies that loaned shares must be able to be recalled within five business days' notice. Companies including CF Industries, Hasbro and Priceline Group have amended their bylaws to follow the prevailing practice on loaned shares.

Ninety-eight percent of companies adopting proxy access opt for a three-year holding period, meaning a shareholder, or group of shareholders, seeking to nominate a director via proxy access must comply with the minimum stock ownership requirement for three years preceding the nomination. Similarly, 99 percent of companies require the nominator to hold the minimum shares through the election. Thirty-one percent require the nominator to state whether it intends to continue to own the minimum required shares for at least one year following the meeting. Just five companies (Boyd Gaming, CenturyLink, FirstMerit LSB Industries and TCF Financial) are known to require such continued ownership.

Proxy access bylaws deviating from the "3 and 3" model are increasingly rare. None of the 347 bylaws examined for this report feature a holding period greater than three years.

As shown in Table 1, the number of public companies known to have ownership requirements higher than 3 percent is down to seven.

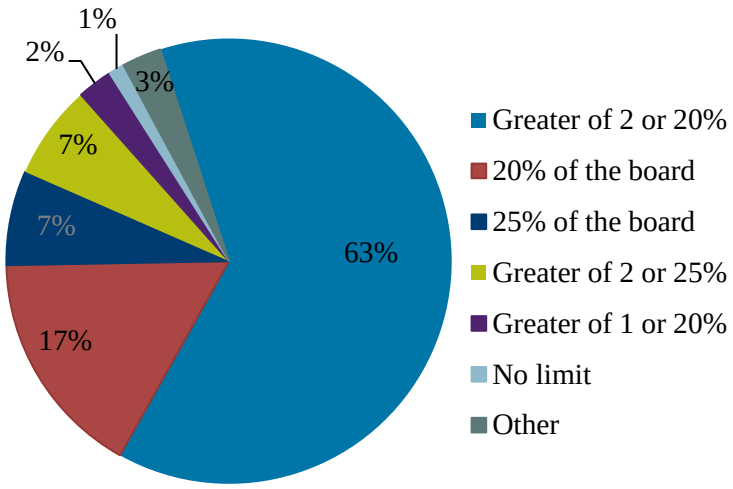
Table 1: Unusual ownership requirements

Proxy Access bylaw	Ownership requirement	Holding requirement
Hooper Holmes (2/16/10) KSW (1/5/12) (now private) LSB Industries (8/20/09) Panhandle Oil & Gas (12/11/13)	5%	One year
Nabors Industries (4/4/14) VCA (10/29/15)	5%	Three years
Covanta Holding (3/1/04) Emcore (8/7/08)	20%	No holding period specified

Maximum board seats available through proxy access

More than four-fifths of companies adopting proxy access bar access-nominated directors from generally constituting more than 20 percent of the board; this includes 17 percent with a pure 20 percent cap; 64 percent with a cap set at the greater of two directors or 20 percent; and 3 percent with a cap set at the greater of one director or 20 percent. Companies including Walt Disney and United Natural Foods amended their caps from a flat 20 percent to most common practice: the greater of two directors or 20 percent of the board. Examples of unusual caps, relative to prevailing practice, include Panhandle Oil & Gas, which permits no more than one access director per year, and LSB Industries, which follows Panhandle's approach but combines it with a 25-percent-of-the-board cap.

Graph 1: Board caps

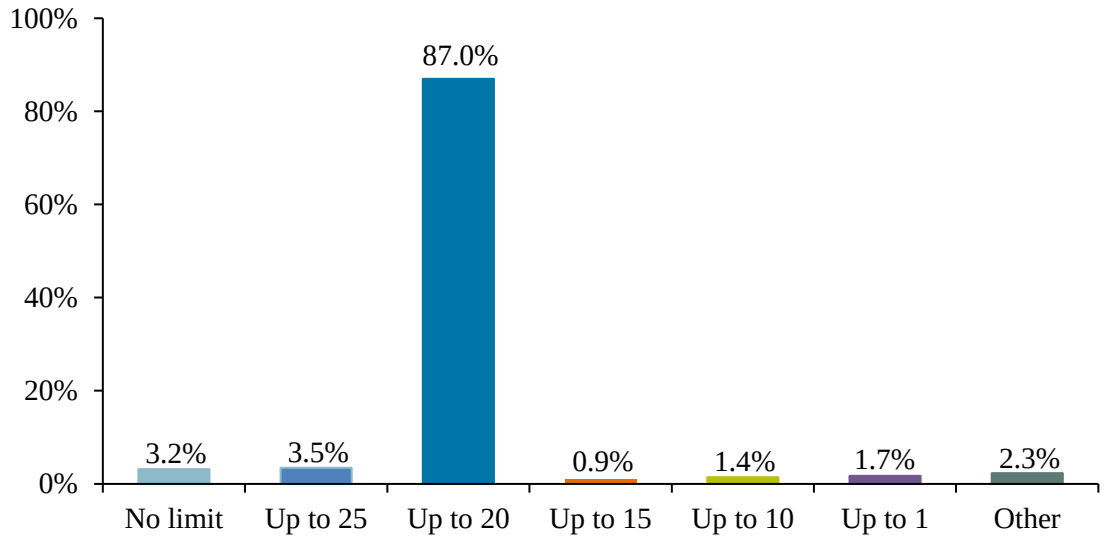


Board nominees previously elected via proxy access do not necessarily count against the maximum. The most common approach (49 percent of all proxy access bylaws) is to count nominees against the maximum only if they were elected through proxy access within the past two years. The second most popular approach (13 percent of all proxy access bylaws) is to count those elected through proxy access within the past three years.

Shareholder Aggregation Limits

As shown in the graph below, 87 percent of companies with proxy access specify that no more than 20 shareholders may aggregate their holdings to meet the ownership requirement necessary to nominate a board candidate. Just 11 companies (3 percent) refer to a "group" of shareholders without specifying any limit.

Graph 2: Aggregation Limits



Ninety-two percent of all proxy access bylaws generally provide that families of affiliated funds count as one shareholder for the purpose of the aggregation limit. Typically, bylaws will count families of funds as one if they meet one or more of the following standards:

- Group of funds under common management and investment control (found in 84 percent of proxy access bylaws)
- Group of funds that are part of the same family of funds or sponsored by the same employer (61 percent)

- Group of investment companies as defined in the Investment Company Act of 1940 (56 percent)

Sixteen companies (5 percent) set aggregation limits below 20 shareholders. Three companies permit up to 15 shareholders to combine their shares, five permit up to 10 and one allows up to five. Three companies bar multi-shareholder aggregation altogether, while three others do essentially the same by permitting aggregation only with affiliates of the same shareholder.

Notably, only one of these 16 companies adopted its bylaw after 2015; Westmoreland Coal sets the limit at 10 unless the company's market cap rises above $1 billion, at which point the limit would increase to 25.

A handful of companies have relaxed their aggregation limits. Regency Centers went from a maximum of one shareholder to 20; Cabot Oil & Gas and New York Community Bancorp doubled their maximums of 10 shareholders to 20; Borgwarner and HCP both went from a maximum of 10 to 25; Noble Energy eased its threshold from 20 to 25.

Some companies have eliminated their aggregation limits altogether. SBA Communications originally had a limit of 10; Cloud Peak Energy and Priceline Group initially had set the cap at 20.

Restrictions on Re-nomination

Provisions barring re-nomination of access candidates, sometimes referred to as "lock-out" provisions, are routinely found in proxy access bylaws; 82 percent of proxy access bylaws have some type of re-nomination constraint.

The most common re-nomination restrictions are:

- Nominees who fail to receive 25 percent of votes or withdraw cannot be nominated again for two years (53 percent of all proxy access bylaws)
- Nominees who withdraw cannot be nominated again for two years (13 percent)
- Nominees who fail to receive 20 percent of votes or withdraw cannot be nominated again for two years (6 percent)
- Nominees who fail to receive 10 percent of votes or withdraw cannot be nominated again for two years (4 percent)

Table 2: Unusually stringent re-nomination restrictions

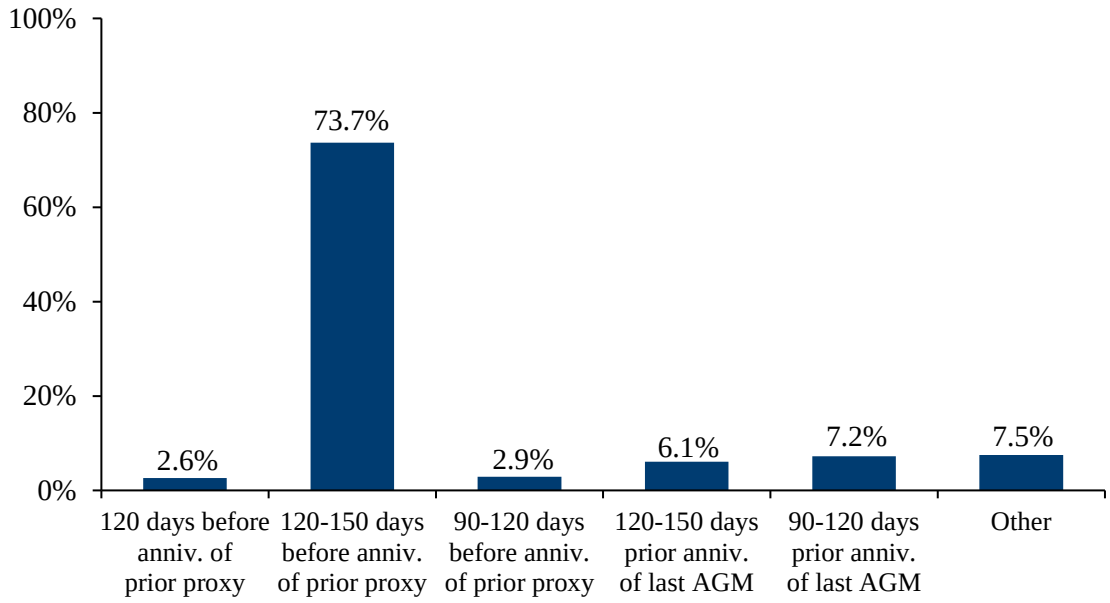
Proxy access bylaw	Re-nomination restriction
LSB Industries (8/20/09) Panhandle Oil & Gas (12/11/13)	Nominees who fail to receive 50% of votes or withdraw cannot be nominated the next year
Boyd Gaming (10/20/16)	Nominees who fail to receive 33% of votes or withdraw cannot be nominated for two years
Baxter (12/18/15) Costco Wholesale (9/26/16) United Rentals (9/8/16)	Nominees who fail to receive 25% of votes or withdraw cannot be nominated for three years

Although they are meant to reduce the incidence of nuisance candidates, restrictions on re-nomination may have unintended consequences including barring for re-nomination candidates with significant levels of shareholder support. Particularly with larger boards, it is not uncommon for a given nominee, whether management-backed or shareholder-backed, to win a seat with nominally low support. Attuned to investor concerns, some companies are modifying their policies. For example, L-3 Communications and Microsoft reduced their re-nomination thresholds from 25 to 15 percent. Other companies, including Qualcomm, Apple, Oshkosh and Cheniere Energy eliminated their re-nomination thresholds altogether. Most recently, SBA Communications went from 25 to 20 percent.

Advance notice requirements

All proxy access bylaws reviewed for this report include notice requirements for utilizing proxy access. Seventy-nine percent of proxy access bylaws tie the advance notice requirement to the first anniversary of the mailing date of the previous year's proxy statement, while 13 percent base their advance notice requirement on the anniversary of the previous annual meeting. As shown in the graph on page 8, by far the most popular notice period is 120-150 days before the first anniversary of the mailing of the proxy statement for the previous year's annual meeting.

Graph 3: Advance notice requirements for proxy access



Concurrent proxy contests

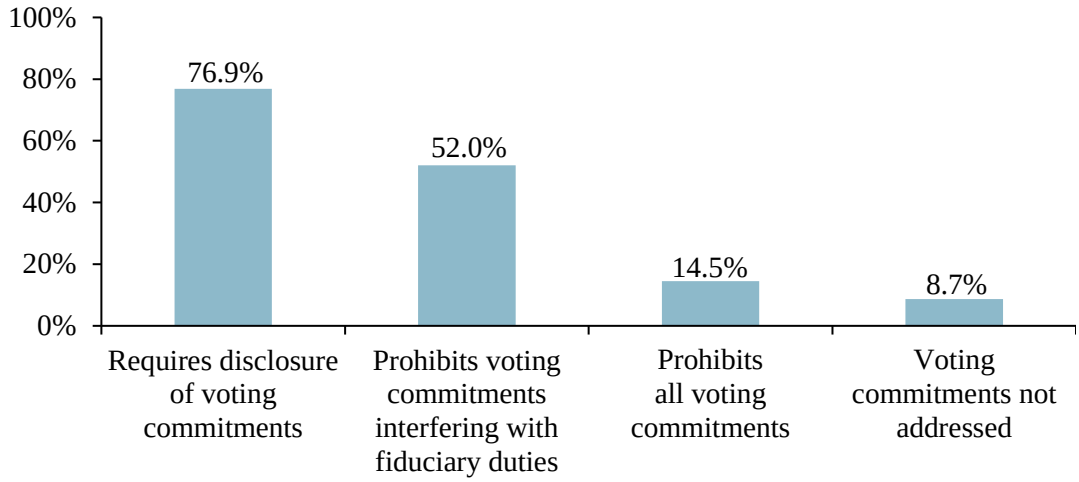
Eighty-nine percent of all proxy access bylaws allow companies to omit an access candidate if the nominator is also waging a proxy contest with a different candidate on the dissident card. Four percent of access bylaws grant similar discretion if the nominator wages a proxy contest, regardless of who is on the dissident card. Four percent of access bylaws bar the use of proxy access altogether if any shareholder is waging a proxy contest.

Some bylaws include language protecting the ability of the nominator to run at least one proxy access candidate during a proxy contest. Examples include CVS Health, Express Scripts Holding, Salesforce.com, Noble Energy, Textron and WEC Energy.

Voting commitments

Voting commitments generally bind an individual (in this case, a proxy access director, if elected) to vote in accordance with the nominator or some other affiliate. Ninety-one percent of proxy access bylaws address voting commitments in some way. As shown on page 9, a total of 77 percent of all proxy access bylaws mandate disclosure of any voting commitment. Fifty-two percent bar voting commitments that would interfere with fiduciary duties, while 15 percent prohibit voting commitments of any kind.

Graph 4: Voting commitments

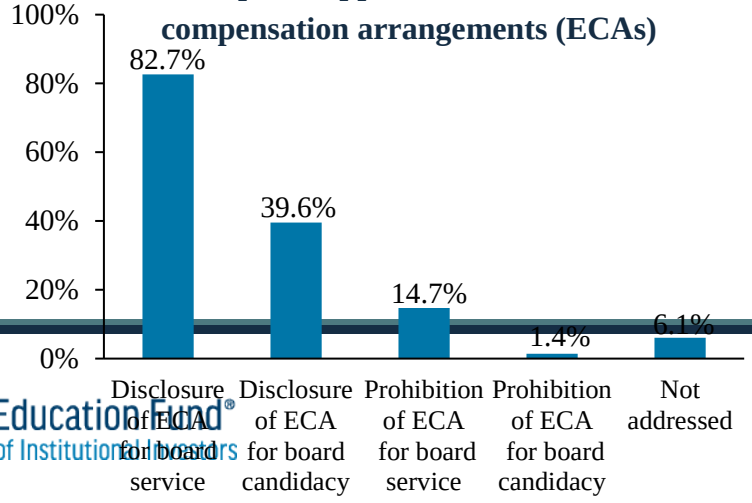


External compensation arrangements

Proxy access bylaws address compensation derived from sources other than the company, such as the nominating shareholder, in four primary ways. Eighty-three percent of proxy access bylaws require disclosure of any external compensation arrangement relating to service or actions as a director. Forty percent require disclosure of external compensation arrangements related to the nominee's candidacy.

Other approaches go beyond transparency by prohibiting such arrangements. Fifteen percent of proxy access bylaws bar compensation arrangements for board service with access candidates, or give the company the discretion to exclude such candidates from the proxy. One percent bar compensation arrangements for board candidacy or give the company the discretion to exclude such candidates from the proxy. Some companies,

Graph 5: Approaches to external compensation arrangements (ECAs)



including Honeywell International and Monsanto, initially prohibited such arrangements, but subsequently revised their bylaws to just require disclosure.

Conclusion

This report does not address all provisions found in proxy access bylaws, including some that may render the entire mechanism useless. Proxy access, by general consensus, has included limitations that make the bylaws complicated. Reliance on private ordering (rather than a more standardized approach envisaged by the SEC in 2010) has meant that this area is even more complex, with the potential for various creative ways to block or frustrate what shareowners would see as legitimate uses of the mechanism. For example, some remarkably broad provisions require a nominating shareholder to file with the SEC anytime it communicates with another shareholder, regardless of whether that communication triggers a filing requirement under the SEC's own regulations. CII is monitoring these and other onerous provisions, and intends to release an update to its 2015 Best Practices document in the second half of 2017.

As the number of companies adopting proxy access continues to grow, and early adopters re-evaluate bylaws already in place, boards across the market are giving careful consideration to every contemplated provision's practical effect, both intended and unintended. Does the provision help ensure an orderly and reasonable process for long-term holders to put the mechanism to work? Or does the provision exist primarily to chill (or entirely prevent) the use of proxy access? Investors expect boards to tackle these questions forthrightly, keep the investor's perspective in mind, and exercise responsible discretion. By doing so, they not only mitigate the distractions of litigation, "fix-it" resolutions and emboldened support for a uniform rule; they also uphold their fiduciary duty to serve the company's best interest.

Appendix 1: Proxy Access Models at a Glance

	Prevailing practice by private ordering	**2010 SEC rule (vacated)**
Low director support a prerequisite for access	No	No
Min. ownership requirement	3%	3%
Min. holding period	3 years	3 years
Aggregation limit	20 shareholders	No aggregation limit
Max. proportion of the board subject to proxy access	Greater of 2 directors or 20% of the board	Greater of one director or 25% of the board
Re-nomination restriction	Failure to obtain 25% locks-out access nominee from running again for two years	None
Advance notice to utilize proxy access	120-150 days before first anniversary of mailing of last year's proxy	120-150 days before first anniversary of mailing of last year's proxy
Concurrent proxy contests	Company may omit access candidate if nominator runs a different candidate on a dissident card	Permitted
Disclosure of voting commitments	Yes	No
Disclosure of external compensation arrangements	Yes	No

TAB 3

2A Sutherland Statutory Construction § 47:23 (7th ed.)

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Norman Singer

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Part V. Statutory Interpretation

Subpart A. Principles and Policies

Chapter 47. Intrinsic Aids

§ 47:23. Expressio unius est exclusio alterius

References

The maxim *expressio unius est exclusio alterius*, like all rules of construction, may apply under certain circumstances to help determine a legislature's intent that is otherwise not clear.[1] *Expressio unius* instructs that, where a statute designates a form of conduct,[2] the manner of its performance and operation,[3] and the persons[4] and things[5] to which it refers, courts should infer that all omissions were intentional exclusions.[6] Michigan explained that

> When what is expressed in a statute is creative, and not in a proceeding according to the course of the common law, it is exclusive, and the power exists only to the extent plainly granted. Where a statute creates and regulates, and prescribes the mode and names the parties granted right to invoke its provisions, that mode must be followed and none other, and such parties only may act.[7]

As with all aids for interpretation, *expressio unius* is a rule of statutory construction and not a rule of law,[8] is subordinate to the primary rule that legislative intent governs the interpretation of a statute,[9] and is, consequently, overcome by a strong indication of contrary legislative intent.[10]

Courts have expressed the essential idea of *expressio unius* in different ways, finding, for example: "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode;"[11] "where [a legislature] includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion;"[12] "where [a legislature] explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent;"[13] "when [a legislature] includes one possibility in a statute, it excludes another by implication;"[14] "a legislative affirmative description implies denial of the nondescribed powers;"[15] "[t]he intent of the legislature is expressed by omission as well as by inclusion;"[16] and "all the powers were expressly prohibited which were intended to be prohibited."[17] In practice, however expressed, all versions of the *expressio unius* rule reflect the same common-sense premise that when people say one thing, they do not mean something else.[18]

Footnotes

1 **United States.** Marshall v. Gibson's Products, Inc. of Plano, 584 F.2d 668 (5th Cir. 1978); Hawaii v. Trump, 878 F.3d 662 (9th Cir. 2017), cert. granted, 138 S. Ct. 923, 199 L. Ed. 2d 620 (2018) and rev'd on other grounds and remanded, 138 S. Ct. 2392 (2018); Burke v. U.S. Dept. of Justice, Drug Enforcement Agency, 968 F. Supp. 672 (M.D. Ala. 1997); Anderson v. Janovich, 543 F. Supp. 1124 (W.D. Wash. 1982).

The force of any negative implication under *expressio unius est exclusio alterius* depends on context, and the *expressio unius* canon applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded. N.L.R.B. v. SW General, Inc., 137 S. Ct. 929, 197 L. Ed. 2d 263 (2017).

The strength of the "expressio unius" canon varies by context. Ron Peterson Firearms, LLC v. Jones, 760 F.3d 1147 (10th Cir. 2014).

Alaska. State v. Patterson, 740 P.2d 944 (Alaska 1987).

Arizona. U.S. Parking Systems v. City of Phoenix, 160 Ariz. 210, 772 P.2d 33 (Ct. App. Div. 2 1989).

California. County of Sonoma v. Fouche, 1994 WL 372617 (Cal. App. 1st Dist. 1994), reh'g granted, opinion not citeable, (Aug. 9, 1994) and opinion on reh'g not for publication, (Nov. 7, 1994) and unpublished/noncitable.

Expressio unius est exclusio alterius is subordinate to the canon that an ambiguous penal statute is construed in favor of a criminal defendant. People v. One 1986 Cadillac Deville, 70 Cal. App. 4th 157, 82 Cal. Rptr. 2d 509 (3d Dist. 1999).

Illinois. Norris v. National Union Fire Ins. Co. of Pittsburgh, Pa., 326 Ill. App. 3d 314, 260 Ill. Dec. 62, 760 N.E.2d 141 (1st Dist. 2001).

Indiana. Brandmaier v. Metropolitan Development Com'n of Marion County, 714 N.E.2d 179 (Ind. Ct. App. 1999).

Michigan. Williams v. Coleman, 194 Mich. App. 606, 488 N.W.2d 464 (1992) (abrogated on other grounds by, Jones v. Bitner, 300 Mich. App. 65, 832 N.W.2d 426 (2013)); Van Etten v. Manufacturers Nat. Bank of Detroit, 119 Mich. App. 277, 326 N.W.2d 479 (1982).

Expressium facit cessare tacitum (that which is expressed puts an end to that which is implied) is a similar maxim. Taylor v. Michigan Public Utilities Commission, 217 Mich. 400, 186 N.W. 485 (1922).

Missouri. State ex rel. C. C. G. Management Corp. v. City of Overland, 624 S.W.2d 50 (Mo. Ct. App. E.D. 1981).

New Jersey. 612 Associates, L.L.C. v. North Bergen Mun. Utilities Authority, 215 N.J. 3, 17, 71 A.3d 749, 757 (2013); State v. Henderson, 375 N.J. Super. 265, 867 A.2d 516 (Law Div. 2004).

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Texas. Bidelspach v. State, 840 S.W.2d 516 (Tex. App. Dallas 1992), petition for discretionary review refused, (Nov. 25, 1992) and petition for discretionary review granted, (Feb. 24, 1993).

Virginia. Epps v. Com., 47 Va. App. 687, 626 S.E.2d 912 (2006), judgment aff'd, 273 Va. 410, 641 S.E.2d 77 (2007).

Washington. The maxim of express mention and implicit exclusion does not defeat legislative intent. Moen v. Spokane City Police Dept., 110 Wash. App. 714, 42 P.3d 456 (Div. 3 2002).

West Virginia. Concerned Loved Ones and Lot Owners Ass'n of Beverly Hills Memorial Gardens v. Pence, 181 W. Va. 649, 383 S.E.2d 831 (1989).

Wisconsin. Quinn v. Town of Dodgeville, 122 Wis. 2d 570, 364 N.W.2d 149 (1985).

Appellate Briefs. National Labor Relations Board v. SW General, Inc., On Writ of Certiorari, 2016 WL 4363344 (U.S.); Pollard v. E.I. Du Pont De Nemours Co., On Writ of Certiorari, 2001 WL 293708 (U.S.); State of Minnesota v. Mille Lacs Band of Chippewa Indians, On Writ of Certiorari, 1998 WL 664966 (U.S.); Krygoski Construction Co., Inc. v. U.S., On Petition for Writ of Certiorari, 1997 WL 33557870 (U.S.); McCabe v. City of Lynn, On Petition for Writ of Certiorari, 1996 WL 33438527 (U.S.); Hoffman-La Roche, Inc. v. Sperling, On Writ of Certiorari, 1989 WL 1128226 (U.S.); Loeffler v. Tisch, On Writ of Certiorari, 1986 WL 728314 (U.S.); Heckler v. American Hospital Association, On Writ of Certiorari, 1985 WL 669115

(U.S.); Williams v. Brown, On Appeal from the U.S. Court of Appeals for the Fifth Circuit, Appellant Reply Brief, 1979 WL 199706, 1979 WL 213593 (U.S.).

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2 **United States.** Ritchie v. Eberhart, 11 F.3d 587 (6th Cir. 1993); Carver v. Lehman, 558 F.3d 869 (9th Cir. 2009); Blausey v. U.S. Trustee, 552 F.3d 1124 (9th Cir. 2009); Boudette v. Barnette, 923 F.2d 754, 18 Fed. R. Serv. 3d 1213 (9th Cir. 1991); Solano Garbage Co. v. Cheney, 779 F. Supp. 477 (E.D. Cal. 1991); Wiles v. Worldwide Information, Inc., 809 F. Supp. 2d 1059 (W.D. Mo. 2011); Johnson v. West Pub. Corp., 801 F. Supp. 2d 862 (W.D. Mo. 2011), rev'd, 504 Fed. Appx. 531 (8th Cir. 2013), cert. denied, 134 S. Ct. 474, 187 L. Ed. 2d 318 (2013); MacDonald v. General Motors Corp., 784 F. Supp. 486 (M.D. Tenn. 1992); In re Briggs, 440 B.R. 490 (Bankr. N.D. Ohio 2010); In re Dudley, 405 B.R. 790 (Bankr. W.D. Va. 2009); Doe v. U.S., 74 Fed. Cl. 592 (2007), aff'd, 513 F.3d 1348 (Fed. Cir. 2008); Adair v. U.S., 70 Fed. Cl. 65 (2006), aff'd on other grounds, 497 F.3d 1244 (Fed. Cir. 2007); Shoshone Indian Tribe of Wind River Reservation, Wyo. v. U.S., 58 Fed. Cl. 77 (2003); Jurczyk v. West, 17 Vet. App. 358 (2000).

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Missouri. State v. Carson, 317 S.W.3d 136 (Mo. Ct. App. E.D. 2010).

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Utah. In re Marriage of Kunz, 2006 UT App 151, 136 P.3d 1278 (Utah Ct. App. 2006).

Virginia. Virginian-Pilot Media Companies, LLC v. Dow Jones & Co., Inc., 280 Va. 464, 698 S.E.2d 900 (2010).

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L. Rev. 512 (1995); Shelley, et al., The Standard of Review Applied by the United States Court of Appeals for the Federal Circuit in International Trade and Customs Cases, 45 Am. U. L. Rev. 1749 (1996); Smith, Eatin' Good? Not in This Neighborhood: A Legal Analysis of Disparities In Food Availability And Quality At Chain Supermarkets In Poverty-Stricken Areas, 14 Mich. J. Race & L. 197 (2009).

3 **United States.** Case v. Kelly, 133 U.S. 21, 10 S. Ct. 216, 33 L. Ed. 513 (1890); Forsyth v. Barr, 19 F.3d 1527, 28 Fed. R. Serv. 3d 1371 (5th Cir. 1994); Carver v. Lehman, 558 F.3d 869 (9th Cir. 2009); Blausey v. U.S. Trustee, 552 F.3d 1124 (9th Cir. 2009); Boudette v. Barnette, 923 F.2d 754, 18 Fed. R. Serv. 3d 1213 (9th Cir. 1991); Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976); Maiatico v. U.S., 302 F.2d 880 (D.C. Cir. 1962); Lukens Steel Co. v. Perkins, 107 F.2d 627 (App. D.C. 1939), judgment rev'd on other grounds, 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108 (1940); Solano Garbage Co. v. Cheney, 779 F. Supp. 477 (E.D. Cal. 1991); Johnson v. West Pub. Corp., 801 F. Supp. 2d 862 (W.D. Mo. 2011), rev'd on other grounds, 504 Fed. Appx. 531 (8th Cir. 2013), cert. denied, 134 S. Ct. 474, 187 L. Ed. 2d 318 (2013); Wiles v. Worldwide Information, Inc., 809 F. Supp. 2d 1059 (W.D. Mo. 2011); Catano v. Local Bd. No. 94 Selective Service System, 298 F. Supp. 1183 (E.D. Pa. 1969); In re Briggs, 440 B.R. 490 (Bankr. N.D. Ohio 2010); Doe v. U.S., 74 Fed. Cl. 592 (2007), aff'd, 513 F.3d 1348 (Fed. Cir. 2008); Adair v. U.S., 70 Fed. Cl. 65 (2006), aff'd on other grounds, 497 F.3d 1244 (Fed. Cir. 2007); Shoshone Indian Tribe of Wind River Reservation, Wyo. v. U.S., 58 Fed. Cl. 77 (2003).

California. Mejia v. Reed, 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166 (2003); Perkins v. Thornburgh, 10 Cal. 189, 1858 WL 892 (1858); County of Madera v. Superior Court, 39 Cal. App. 3d 665, 114 Cal. Rptr. 283 (5th Dist. 1974).

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Delaware. Progressive Northern Ins. Co. v. Mohr, 47 A.3d 492 (Del. 2012); J.G. v. W.S., 2011 WL 5346110 (Del. Fam. Ct. 2011).

Illinois. People ex rel. Nelson v. Wiersema State Bank, 361 Ill. 75, 197 N.E. 537, 101 A.L.R. 501 (1935).

Massachusetts. The omission of "Sundays and holidays excepted" indicated they were included in a time computation. Iannelle v. Fire Com'r of Boston, 331 Mass. 250, 118 N.E.2d 757 (1954).

Missouri. State v. Carson, 317 S.W.3d 136 (Mo. Ct. App. E.D. 2010).

New Jersey. The authorization to "approve or disapprove" a zoning change did not permit a "reconsideration" of prior action. Morton v. Mayor and Council of Clark Tp., 102 N.J. Super. 84, 245 A.2d 377 (Law Div. 1968), judgment aff'd, 108 N.J. Super. 74, 260 A.2d 5 (App. Div. 1969).

North Dakota. State v. Dennis, 2007 ND 87, 733 N.W.2d 241 (N.D. 2007).

Ohio. A dismissed fireman could not recover pension fund contributions under a statute allowing such recovery to one who "voluntarily resigns." O'Neal v. Trustees, Springfield Firemen's Pension and Relief Fund, 10 Ohio Op. 2d 197, 81 Ohio L. Abs. 136, 160 N.E.2d 563 (C.P. 1959).

Oregon. Clatsop County v. Morgan, 19 Or. App. 173, 526 P.2d 1393 (1974).

Pennsylvania. A ballot space for "inserting" the "name" of a candidate "not printed on the ballot" excluded a name added by sticker. In re Contested Election of School Directors of Little Beaver Tp., 165 Pa. 233, 30 A. 955 (1895).

South Carolina. Home Building & Loan Ass'n v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1937).

Tennessee. Peoples Bank & Trust Co. v. Chumbley, 174 Tenn. 581, 129 S.W.2d 213, 122 A.L.R. 936 (1939).

Utah. In re Marriage of Kunz, 2006 UT App 151, 136 P.3d 1278 (Utah Ct. App. 2006).

Remedies conferred by a statute in derogation of the common law are enforced only as prescribed by the statute. State v. Judd, 27 Utah 2d 79, 493 P.2d 604 (1972).

Virginia. Virginian-Pilot Media Companies, LLC v. Dow Jones & Co., Inc., 280 Va. 464, 698 S.E.2d 900 (2010).

Washington. State v. Swanson, 116 Wash. App. 67, 65 P.3d 343 (Div. 2 2003).

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Alabama. Sanders v. Thigpen, 277 Ala. 198, 168 So. 2d 228 (1964); Batson v. State, 46 Ala. App. 610, 246 So. 2d 677 (Crim. App. 1971); Hogan v. State ex rel. Van Antwerp, 46 Ala. App. 240, 240 So. 2d 227 (Civ. App. 1970).

California. Mejia v. Reed, 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166 (2003); Wildlife Alive v. Chickering, 18 Cal. 3d 190, 132 Cal. Rptr. 377, 553 P.2d 537 (1976).

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Delaware. Progressive Northern Ins. Co. v. Mohr, 47 A.3d 492 (Del. 2012); J.G. v. W.S., 2011 WL 5346110 (Del. Fam. Ct. 2011).

Illinois. Davis v. Retirement Bd. of Policeman's Annuity Fund of City of Chicago, 30 Ill. App. 3d 318, 332 N.E.2d 446 (1st Dist. 1975).

Policewomen were "policemen" under the Policemen's Minimum Wage Act. Patteson v. City of Peoria, 386 Ill. 460, 54 N.E.2d 445 (1944).

Indiana. Nash Engineering Co. v. Marcy Realty Corporation, 222 Ind. 396, 54 N.E.2d 263 (1944).

Kansas. Application of Olander by Ireland, 213 Kan. 282, 515 P.2d 1211 (1973).

Michigan. Taylor v. Michigan Public Utilities Commission, 217 Mich. 400, 186 N.W. 485 (1922).

Missouri. Howell v. Stewart, 54 Mo. 400, 1873 WL 7772 (1873); State v. Carson, 317 S.W.3d 136 (Mo. Ct. App. E.D. 2010).

New York. Jackson v. Citizens Cas. Co. of New York, 252 A.D. 393, 299 N.Y.S. 644 (4th Dep't 1937), order aff'd, 277 N.Y. 385, 14 N.E.2d 446 (1938); People v. Kearse, 58 Misc. 2d 277, 295 N.Y.S.2d 192 (County Ct. 1968).

North Dakota. State v. Dennis, 2007 ND 87, 733 N.W.2d 241 (N.D. 2007).

Ohio. A masculine pronoun means an ordinance does not apply to women. City of Cincinnati v. Wayne, 23 Ohio App. 2d 91, 52 Ohio Op. 2d 95, 261 N.E.2d 131 (1st Dist. Hamilton County 1970).

Pennsylvania. Appeal of St. Paul Mercury Indemnity Co. of St. Paul, 325 Pa. 535, 191 A. 9 (1937).

Rhode Island. Tompkins v. Zoning Bd. of Review of Town of Little Compton, 2003 WL 22790829 (R.I. Super. Ct. 2003).

Utah. In re Marriage of Kunz, 2006 UT App 151, 136 P.3d 1278 (Utah Ct. App. 2006).

Vermont. In re Varnum, 70 Vt. 147, 40 A. 43 (1897).

Virginia. Virginian-Pilot Media Companies, LLC v. Dow Jones & Co., Inc., 280 Va. 464, 698 S.E.2d 900 (2010).

Washington. State v. Swanson, 116 Wash. App. 67, 65 P.3d 343 (Div. 2 2003).

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Arizona. Pima County v. Heinfeld, 134 Ariz. 133, 654 P.2d 281 (1982).

California. Mejia v. Reed, 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166 (2003); Rich v. State Bd. of Optometry, 235 Cal. App. 2d 591, 45 Cal. Rptr. 512 (1st Dist. 1965).

The "costs and disbursements" of a condemnee do not include interest on an interlocutory judgment. Capistrano Union High School Dist. of Orange County v. Capistrano Beach Acreage Co., 188 Cal. App. 2d 612, 10 Cal. Rptr. 750, 92 A.L.R.2d 349 (4th Dist. 1961).

Colorado. Chism v. People, 80 P.3d 293 (Colo. 2003).

Delaware. Progressive Northern Ins. Co. v. Mohr, 47 A.3d 492 (Del. 2012); J.G. v. W.S., 2011 WL 5346110 (Del. Fam. Ct. 2011).

Illinois. People v. Gazelle, 230 Ill. App. 3d 115, 172 Ill. Dec. 151, 595 N.E.2d 214 (4th Dist. 1992).

Iowa. "[B]y granting control over animals running at large the legislature has clearly excluded power over those confined." Dotson v. City of Ames, 251 Iowa 467, 101 N.W.2d 711 (1960).

Massachusetts. A reference to "one copy" of a recorded instrument does not mean another can not be made if the recorder thinks additional copies are necessary. Bristol County v. Secretary of Com., 324 Mass. 403, 86 N.E.2d 911 (1949).

Michigan. A statute allowing the inspection of the records of "any county, city, township, town, village, school district, or other public record" did not include the state auditor's records. Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749, 60 A.L.R. 1351 (1928).

Minnesota. Congdon v. Cook, 55 Minn. 1, 56 N.W. 253 (1893).

Missouri. State v. Carson, 317 S.W.3d 136 (Mo. Ct. App. E.D. 2010).

New Jersey. State v. Rullis, 79 N.J. Super. 221, 191 A.2d 197 (App. Div. 1963).

A tear gas "pen-gun" is not within the class of designated "firearms." State v. Seng, 89 N.J. Super. 58, 213 A.2d 515 (Law Div. 1965), order rev'd on other grounds, 91 N.J. Super. 50, 219 A.2d 185 (App. Div. 1966).

New Mexico. American Auto. Ass'n, Inc. v. Bureau of Revenue, 88 N.M. 148, 1975-NMCA-046, 538 P.2d 420 (Ct. App. 1975), decision rev'd on other grounds, 1975-NMSC-058, 88 N.M. 462, 541 P.2d 967 (1975).

New York. A Workmen's Compensation Act provision relating to exposure to "arsenic, benzol, beryllium, zirconium, cadmium, chrome, lead or fluorine or to exposure to x-rays, radium, ionizing radiation or radioactive substances" did not include betanaphthylamine. Collins v. National Aniline Division, Allied Chemical & Dye Corp., 8 A.D.2d 900, 186 N.Y.S.2d 979 (3d Dep't 1959).

North Dakota. State v. Dennis, 2007 ND 87, 733 N.W.2d 241 (N.D. 2007).

Rhode Island. Tompkins v. Zoning Bd. of Review of Town of Little Compton, 2003 WL 22790829 (R.I. Super. Ct. 2003).

Texas. City of Dallas v. Yarbrough, 399 S.W.2d 938 (Tex. Civ. App. Dallas 1966).

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Virginia. Virginian-Pilot Media Companies, LLC v. Dow Jones & Co., Inc., 280 Va. 464, 698 S.E.2d 900 (2010).

"[A]ny horse, mule, cattle, hog, sheep or goat" did not include turkeys. Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938).

Washington. State v. Swanson, 116 Wash. App. 67, 65 P.3d 343 (Div. 2 2003).

Goods coming and going "by water" included goods arriving or leaving by land. State ex rel. Port of Seattle v. Department of Public Service, 1 Wash. 2d 102, 95 P.2d 1007 (1939).

West Virginia. State ex rel. City of Charleston v. Hutchinson, 154 W. Va. 585, 176 S.E.2d 691 (1970).

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6 **United States.** Smith v. Stevens, 77 U.S. 321, 19 L. Ed. 933, 1870 WL 12831 (1870); Ex parte McCardle, 74 U.S. 506, 19 L. Ed. 264, 1868 WL 11093 (1868); Sasen v. Spencer, 879 F.3d 354 (1st Cir. 2018); Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325, 21 Fed. R. Serv. 3d 1462 (1st Cir. 1991); U.S. v. Daniels, 915 F.3d 148 (3d Cir. 2019); U.S. v. McQuilkin, 78 F.3d 105 (3d Cir. 1996); U.S. v. Capobianco, 836 F.2d 808 (3d Cir. 1988); U.S. v. Hawley, 919 F.3d 252 (4th Cir. 2019); Reyes-Gaona v. North Carolina Growers Ass'n, 250 F.3d 861 (4th Cir. 2001); Blackburn v. Reich, 79 F.3d 1375 (4th Cir. 1996); Adams v. Dole, 927 F.2d 771 (4th Cir. 1991); Matter of Benjamin, 932 F.3d 293 (5th Cir. 2019); In re Bourgeois, 902 F.3d 446 (5th Cir. 2018); Coastal Conservation Association v. United States Department of Commerce, 846 F.3d 99 (5th Cir. 2017); Forsyth v. Barr, 19 F.3d 1527, 28 Fed. R. Serv. 3d 1371 (5th Cir. 1994); Aeroquip-Vickers, Inc. v. C.I.R., 347 F.3d 173, 2003 FED App. 0370P (6th Cir. 2003); Ritchie v. Eberhart, 11 F.3d 587 (6th Cir. 1993); Marshall v. Blake, 885 F.3d 1065 (7th Cir. 2018); Smith v. Zachary, 255 F.3d 446 (7th Cir. 2001); Matter of Cash Currency Exchange, Inc., 762 F.2d 542, 87 A.L.R. Fed. 255 (7th Cir. 1985); Matter of Chicago, M., St. P. & Pac. R. Co., 658 F.2d 1149 (7th Cir. 1981); U.S. v. Juan-Manuel, 222 F.3d 480 (8th Cir. 2000); Baldwin v. United States, 921 F.3d 836 (9th Cir. 2019); Regents of the University of California v. U.S. Department of Homeland Security, 908 F.3d 476 (9th Cir. 2018), cert. granted, 139 S. Ct. 2779 (2019); Rookaird v. BNSF Railway Company, 908 F.3d 451 (9th Cir. 2018); City and County of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018); Wheeler v. City of Santa Clara, 894 F.3d 1046 (9th Cir. 2018); Yith v. Nielsen, 881 F.3d 1155 (9th Cir. 2018); Hawaii v. Trump, 878 F.3d 662 (9th Cir. 2017), cert. granted, 138 S. Ct. 923, 199 L. Ed. 2d 620 (2018) and rev'd on other grounds and remanded, 138 S. Ct. 2392 (2018); Syed v. M-I, LLC, 853 F.3d 492 (9th Cir. 2017), cert. denied, 138 S. Ct. 447, 199 L. Ed. 2d 340 (2017); Copeland v. Ryan, 852 F.3d 900, 97 Fed. R. Serv. 3d 35 (9th Cir. 2017); Arc of California v. Douglas, 757 F.3d 975 (9th Cir. 2014); Carver v. Lehman, 558 F.3d 869 (9th Cir. 2009); Blausey v. U.S. Trustee, 552 F.3d 1124 (9th Cir. 2009); Webb v. Smart Document Solutions, LLC, 499 F.3d 1078 (9th Cir. 2007); Tang v. Reno, 77 F.3d 1194 (9th Cir. 1996); Boudette v. Barnette, 923 F.2d 754, 18 Fed. R. Serv. 3d 1213 (9th Cir. 1991); In re Mark Anthony Const., Inc., 886 F.2d 1101 (9th Cir. 1989); Complaint of McLinn, 744 F.2d 677 (9th Cir. 1984); Navajo Nation v. Dalley, 896 F.3d 1196 (10th Cir. 2018), cert. denied, 139 S. Ct. 1600, 203 L. Ed. 2d 755 (2019); U.S. v. Oberle, 136 F.3d 1414, 48 Fed. R. Evid. Serv. 1175 (10th Cir. 1998); Public Service Co. of Colorado v. F.E.R.C., 754 F.2d 1555 (10th Cir. 1985); U.S. v. Spoor Trustee of Louise Paxton Gallagher Revocable Trust, 838 F.3d 1197 (11th Cir. 2016); U.S. v. Alabama, 778 F.3d 926 (11th Cir. 2015); Gilmere v. City of Atlanta, Ga., 774 F.2d 1495 (11th Cir. 1985); Doe, 1 v. Federal Election Commission, 920 F.3d 866 (D.C. Cir. 2019); Department of Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California v. Federal Labor Relations Authority, 877 F.2d 1036 (D.C. Cir. 1989); Lukens Steel Co. v. Perkins, 107 F.2d 627 (App. D.C. 1939), judgment rev'd on other grounds, 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108 (1940); Schlafly v. Saint Louis Brewery, LLC, 909 F.3d 420 (Fed. Cir. 2018); Bausch & Lomb, Inc. v. U.S., 148 F.3d 1363 (Fed. Cir. 1998); Johns-Manville Corp. v. U.S., 855 F.2d 1556 (Fed. Cir. 1988);

Alabama v. PCI Gaming Authority, 15 F. Supp. 3d 1161 (M.D. Ala. 2014), aff'd, 801 F.3d 1278 (11th Cir. 2015); Burkey v. Ellis, 483 F. Supp. 897, 5 Fed. R. Evid. Serv. 518 (N.D. Ala. 1979); Smith v. Frauenheim, 2016 WL 7384039 (E.D. Cal. 2016); McGrew v. Countrywide Home Loans, Inc., 2009 WL 10672820 (S.D. Cal. 2009); Alliance of Auto. Mfrs., Inc. v. Currey, 984 F. Supp. 2d 32 (D. Conn. 2013), aff'd, 610 Fed. Appx. 10 (2d Cir. 2015), cert. denied, 136 S. Ct. 1374, 194 L. Ed. 2d 359 (2016); H.T.E., Inc. v. Tyler Technologies, Inc., 217 F. Supp. 2d 1255 (M.D. Fla. 2002); C.V. v. Dudek, 209 F. Supp. 3d 1279 (S.D. Fla. 2016); Sierra Club v. Marsh, 639 F. Supp. 1216 (D. Me. 1986), judgment aff'd, 820 F.2d 513 (1st Cir. 1987); Chesapeake Bay Foundation, Inc. v. Severstal Sparrows Point, LLC, 794 F. Supp. 2d 602 (D. Md. 2011); Gallo Motor Center Corp. v. Mazda Motor of America, Inc., 172 F. Supp. 2d 292 (D. Mass. 2001); Boettger v. Bowen, 714 F. Supp. 272 (E.D. Mich. 1989), judgment rev'd on other grounds, 923 F.2d 1183 (6th Cir. 1991); Wiles v. Worldwide Information, Inc., 809 F. Supp. 2d 1059 (W.D. Mo. 2011); Johnson v. West Pub. Corp., 801 F. Supp. 2d 862 (W.D. Mo. 2011), rev'd on other grounds, 504 Fed. Appx. 531 (8th Cir. 2013), cert. denied, 134 S. Ct. 474, 187 L. Ed. 2d 318 (2013); Fay v. U S, 22 F.R.D. 28 (E.D. N.Y. 1958); Sklarski v. Niagara Falls Bridge Commission, 2016 WL 6893590 (W.D. N.Y. 2016); U.S. v. Davis, 2006 WL 2251865 (N.D. Ohio 2006); U.S. v. Torres, 857 F. Supp. 168 (D.P.R. 1994), rev'd on other grounds, 50 F.3d 84 (1st Cir. 1995); Meritage Corp. v. Clarendon Nat'l. Ins. Co., 2004 WL 2254215 (N.D. Tex. 2004); Strom v. U.S., 583 F. Supp. 2d 1264 (W.D. Wash. 2008), rev'd on other grounds and remanded, 641 F.3d 1051 (9th Cir. 2011); In re: Coloplast Corp. Pelvic Support Systems Products Liability Litigation, 2016 WL 6901772 (S.D. W. Va. 2016); U.S. v. Mills, 186 F. Supp. 2d 965 (E.D. Wis. 2002); Citizens for Responsibility and Ethics in Washington v. Federal Election Commission, 363 F. Supp. 3d 33 (D.D.C. 2018); Clarian Health West, LLC v. Burwell, 206 F. Supp. 3d 393 (D.D.C. 2016), rev'd on other grounds and remanded, 878 F.3d 346 (D.C. Cir. 2017); Hyatt v. Lee, 2016 WL 11480814 (D.D.C. 2016); District of Columbia Financial Responsibility and Management Authority v. Concerned Senior Citizens of Roosevelt Tenant Assoc., Inc., 129 F. Supp. 2d 13 (D.D.C. 2000); National Rifle Ass'n of America v. Potter, 628 F. Supp. 903 (D.D.C. 1986); In re Local Service Corporation, 503 B.R. 136, 141 (Bankr. D. Colo. 2013); In re Baetz, 493 B.R. 228, 236 (Bankr. D. Colo. 2013); In re Royal, 397 B.R. 88 (Bankr. N.D. Ill. 2008); In re Chicago, Missouri and Western Ry. Co., 90 B.R. 344 (Bankr. N.D. Ill. 1988), decision rev'd on other grounds, 109 B.R. 308 (N.D. Ill. 1989), dismissed, 899 F.2d 17 (7th Cir. 1990); In re Larson, 553 B.R. 646 (Bankr. W.D. Mich. 2016); In re Sullivan, 254 B.R. 661 (Bankr. D. N.J. 2000); In re Briggs, 440 B.R. 490 (Bankr. N.D. Ohio 2010); In re Oszajca, 199 B.R. 103, 30 U.C.C. Rep. Serv. 2d 26 (Bankr. D. Vt. 1996), order rev'd in part on other grounds, 207 B.R. 41, 32 U.C.C. Rep. Serv. 2d 930 (B.A.P. 2d Cir. 1997); Sunoco, Inc. v. United States, 129 Fed. Cl. 322 (2016), aff'd on other grounds, 908 F.3d 710 (Fed. Cir. 2018); Doe v. U.S., 74 Fed. Cl. 592 (2007), aff'd, 513 F.3d 1348 (Fed. Cir. 2008); Adair v. U.S., 70 Fed. Cl. 65 (2006), aff'd on other grounds, 497 F.3d 1244 (Fed. Cir. 2007); Hermes Consol., Inc. v. U.S., 58 Fed. Cl. 3 (2003), subsequent determination, 58 Fed. Cl. 409 (2003), rev'd on other grounds, 405 F.3d 1339, 15 A.L.R. Fed. 2d 755 (Fed. Cir. 2005); Shoshone Indian Tribe of Wind River Reservation, Wyo. v. U.S., 58 Fed. Cl. 77 (2003); Russ Berrie & Company, Inc. v. United States, 329 F. Supp. 3d 1345 (Ct. Int'l Trade 2018), judgment entered, 359 F. Supp. 3d 1383 (Ct. Int'l Trade 2019); Holle v. McDonald, 28 Vet. App. 112 (2016); Jurczyk v. West, 17 Vet. App. 358 (2000); Scates v. Gober, 14 Vet. App. 62 (2000), aff'd as modified, 282 F.3d 1362 (Fed. Cir. 2002); Donovan v. West, 11 Vet. App. 481 (1998), reh'g granted, opinion withdrawn on other grounds, 12 Vet. App. 500 (1999).

The force of any negative implication under *expressio unius est exclusio alterius* depends on context, and the *expressio unius* canon applies only when circumstances support a sensible inference that the term left out must have been meant to be excluded. N.L.R.B. v. SW General, Inc., 137 S. Ct. 929, 197 L. Ed. 2d 263 (2017).

A list of conditions which disestablishes an insured's right to collect on insurance is exclusive. Hawkeye Chemical Co. v. St. Paul Fire & Marine Ins. Co., 510 F.2d 322 (7th Cir. 1975).

Courts understand *expressio unius* is the product of logic and common sense, and apply it only when it makes sense as a matter of legislative purpose. U.S. v. Olmos-Esparza, 484 F.3d 1111 (9th Cir. 2007).

The canon of *expressio unius est exclusio alterius* is especially feeble in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved. Waterkeeper Alliance v. Environmental Protection Agency, 853 F.3d 527 (D.C. Cir. 2017).

"[T]he maxim of statutory construction expressio unius est exclusio alterius … is increasingly considered unreliable … for it stands on the faulty premise that all possible alternative or supplemental provisions were

necessarily considered and rejected by the legislature." National Petroleum Refiners Ass'n v. F.T.C., 482 F.2d 672 (D.C. Cir. 1973).

Where a statute names the parties granted the right to invoke its provisions, such parties only may act. In re AFY, 734 F.3d 810, 821 (8th Cir. 2013), cert. denied, 134 S. Ct. 2315, 189 L. Ed. 2d 177 (2014).

Alabama. Ex parte University of South Alabama, 761 So. 2d 240 (Ala. 1999); Ex parte Holladay, 466 So. 2d 956 (Ala. 1985); Champion v. McLean, 266 Ala. 103, 95 So. 2d 82 (1957).

Alaska. Alaska State Commission for Human Rights v. Anderson, 426 P.3d 956 (Alaska 2018); Central Recycling Services, Inc. v. Municipality of Anchorage, 389 P.3d 54 (Alaska 2017); L Street Investments v. Municipality of Anchorage, 307 P.3d 965, 971 (Alaska 2013); State, Dept. of Revenue v. Deleon, 103 P.3d 897 (Alaska 2004); Angnabooguk v. State, 26 P.3d 447 (Alaska 2001); John v. Baker, 982 P.2d 738 (Alaska 1999); McKeown v. Kinney Shoe Corp., 820 P.2d 1068 (Alaska 1991); Burrell v. Burrell, 696 P.2d 157 (Alaska 1984); State, Dept. of Revenue v. Alaska Pulp America, Inc., 674 P.2d 268 (Alaska 1983); Surina v. Buckalew, 629 P.2d 969 (Alaska 1981).

Arizona. City of Surprise v. Arizona Corporation Commission, 246 Ariz. 206, 437 P.3d 865 (2019); U.S. Parking Systems v. City of Phoenix, 160 Ariz. 210, 772 P.2d 33 (Ct. App. Div. 2 1989); Fund Manager, Public Safety Personnel Retirement System v. Superior Court In and For Maricopa County, 152 Ariz. 255, 731 P.2d 620 (Ct. App. Div. 1 1986).

Arkansas. Arthur v. Zearley, 320 Ark. 273, 895 S.W.2d 928 (1995); Thomas v. State, 315 Ark. 79, 864 S.W.2d 835 (1993); Watkins v. Wassell, 20 Ark. 410, 1859 WL 904 (1859).

California. Lopez v. Sony Electronics, Inc., 5 Cal. 5th 627, 234 Cal. Rptr. 3d 856, 420 P.3d 767 (Cal. 2018); Association of California Insurance Companies v. Jones, 2 Cal. 5th 376, 212 Cal. Rptr. 3d 395, 386 P.3d 1188 (Cal. 2017); Silverbrand v. County of Los Angeles, 46 Cal. 4th 106, 92 Cal. Rptr. 3d 595, 205 P.3d 1047 (2009); People v. Oates, 32 Cal. 4th 1048, 12 Cal. Rptr. 3d 325, 88 P.3d 56 (2004); Mejia v. Reed, 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166 (2003); In re J.W., 29 Cal. 4th 200, 126 Cal. Rptr. 2d 897, 57 P.3d 363 (2002); Pacific Gas & Electric Co. v. County of Stanislaus, 16 Cal. 4th 1143, 69 Cal. Rptr. 2d 329, 947 P.2d 291 (1997); Brown v. Kelly Broadcasting Co., 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406 (1989); In re Jenson, 24 Cal. App. 5th 266, 233 Cal. Rptr. 3d 868 (2d Dist. 2018); Covarrubias v. Cohen, 3 Cal. App. 5th 1229, 208 Cal. Rptr. 3d 226 (3d Dist. 2016), review denied, (Jan. 11, 2017); People v. Johnston, 247 Cal. App. 4th 252, 201 Cal. Rptr. 3d 886 (3d Dist. 2016), review granted, see cal. rules of court 8.1105 and 8.1115, 203 Cal. Rptr. 3d 665, 373 P.3d 471 (Cal. 2016) and (disapproved of on other grounds by, People v. Page, 3 Cal. 5th 1175, 225 Cal. Rptr. 3d 786, 406 P.3d 319 (Cal. 2017)); People v. Haywood, 198 Cal. Rptr. 3d 40 (Cal. App. 3d Dist. 2015), review granted and opinion superseded, 199 Cal. Rptr. 3d 562, 366 P.3d 529 (Cal. 2016); In re Marriage of J.Q. and T.B., 223 Cal. App. 4th 687, 703, 167 Cal. Rptr. 3d 574, 586 (4th Dist. 2014); People v. Smith, 2013 WL 5934315 (Cal. App. 3d Dist. 2013), unpublished/noncitable, (Nov. 6, 2013) and review denied, (Feb. 11, 2014); Bearden v. U.S. Borax, Inc., 138 Cal. App. 4th 429, 41 Cal. Rptr. 3d 482 (2d Dist. 2006); Garcia v. San Jose Appeals Hearing Bd., 2005 WL 2403858 (Cal. App. 6th Dist. 2005), unpublished/noncitable; Blue v. City of Los Angeles, 137 Cal. App. 4th 1131, 41 Cal. Rptr. 3d 10 (2d Dist. 2006); Big Creek Lumber Co. v. County of Santa Cruz, 10 Cal. Rptr. 3d 356 (Cal. App. 6th Dist. 2004), as modified on denial of reh'g, (Mar. 10, 2004) and review granted and opinion superseded, 14 Cal. Rptr. 3d 210, 91 P.3d 162 (Cal. 2004) and judgment rev'd, 38 Cal. 4th 1139, 45 Cal. Rptr. 3d 21, 136 P.3d 821 (2006), as modified, (Aug. 30, 2006); Strang v. Cabrol, 37 Cal. 3d 720, 209 Cal. Rptr. 347, 691 P.2d 1013 (1984); County of Sonoma v. Fouche, 1994 WL 372617 (Cal. App. 1st Dist. 1994), reh'g granted, opinion not citeable, (Aug. 9, 1994) and opinion on reh'g not for publication, (Nov. 7, 1994) and unpublished/noncitable; Strang v. Cabrol, 155 Cal. App. 3d 729, 202 Cal. Rptr. 410 (3d Dist. 1984), opinion vacated, 37 Cal. 3d 720, 209 Cal. Rptr. 347, 691 P.2d 1013 (1984); In re Fain, 145 Cal. App. 3d 540, 193 Cal. Rptr. 483 (1st Dist. 1983); Gruben v. Leebrick & Fisher, 32 Cal. App. 2d Supp. 762, 84 P.2d 1078 (App. Dep't Super. Ct. 1938).

But see In re Sabrina H., 149 Cal. App. 4th 1403, 57 Cal. Rptr. 3d 863 (4th Dist. 2007).

Colorado. Chism v. People, 80 P.3d 293 (Colo. 2003); Beeghly v. Mack, 20 P.3d 610 (Colo. 2001); People v. Grant, 30 P.3d 667 (Colo. App. 2000), judgment aff'd, 48 P.3d 543 (Colo. 2002).

Connecticut. Mayer v. Historic District Commission of Town of Groton, 325 Conn. 765, 160 A.3d 333 (2017); Board of Educ. of Town and Borough of Naugatuck v. Town and Borough of Naugatuck, 70 Conn.

App. 358, 800 A.2d 517, 166 Ed. Law Rep. 659 (2002), judgment rev'd in part on other grounds, 268 Conn. 295, 843 A.2d 603, 186 Ed. Law Rep. 420 (2004).

The specific itemization of certain subjective characteristics that could constitute a defendant's "viewpoint" connotes a legislative intent that all of a defendant's other subjective characteristics, including his personal perception of what is "reasonable," can not be attributed to a person whose viewpoint determines the meaning of "reasonable." State v. Ortiz, 217 Conn. 648, 588 A.2d 127 (1991).

Delaware. Fuller v. State, 104 A.3d 817 (Del. 2014); Progressive Northern Ins. Co. v. Mohr, 47 A.3d 492 (Del. 2012); Public Service Com'n v. Diamond State Telephone Co., 468 A.2d 1285 (Del. 1983); DMS Properties-First, Inc. v. P.W. Scott Associates, Inc., 1999 WL 1261335 (Del. Ch. 1999), rev'd on other grounds, 748 A.2d 389 (Del. 2000); Brice v. State, 1997 WL 524053 (Del. Super. Ct. 1997), judgment rev'd on other grounds, 704 A.2d 1176 (Del. 1998); Quinn v. Keinicke, 700 A.2d 147 (Del. Super. Ct. 1996); Norman v. Goldman, 54 Del. 45, 173 A.2d 607 (Super. Ct. 1961); J.G. v. W.S., 2011 WL 5346110 (Del. Fam. Ct. 2011).

District of Columbia. J.P. v. District of Columbia, 189 A.3d 212 (D.C. 2018); Bolz v. District of Columbia, 149 A.3d 1130 (D.C. 2016); Stevenson v. District of Columbia Bd. of Elections & Ethics, 683 A.2d 1371 (D.C. 1996); Matter of Herman, 619 A.2d 958 (D.C. 1993); McCray v. McGee, 504 A.2d 1128 (D.C. 1986).

Florida. Headley v. City of Miami, 215 So. 3d 1 (Fla. 2017); PW Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988); Towerhouse Condominium, Inc. v. Millman, 475 So. 2d 674 (Fla. 1985); In re Ratliff's Estate, 137 Fla. 229, 188 So. 128 (1939); Grant v. State, 832 So. 2d 770 (Fla. 5th DCA 2002); St. John v. Coisman, 799 So. 2d 1110 (Fla. 5th DCA 2001); Escambia County Council on Aging v. Goldsmith, 465 So. 2d 655 (Fla. 1st DCA 1985).

Georgia. Mooney v. Webster, 300 Ga. 283, 794 S.E.2d 31 (2016); Porter v. Calhoun County, 250 Ga. 566, 300 S.E.2d 143 (1983); George L. Smith II Georgia World Congress Center Authority v. Soft Comdex, Inc., 250 Ga. App. 461, 550 S.E.2d 704 (2001).

Hawai'i. Goran Pleho, LLC v. Lacy, 144 Haw. 224, 439 P.3d 176 (2019); State v. Savitz, 97 Haw. 440, 39 P.3d 567 (2002).

Illinois. In re Detention of Lieberman, 201 Ill. 2d 300, 267 Ill. Dec. 81, 776 N.E.2d 218 (2002); County of Cook, Cermak Health Services v. Illinois State Local Labor Relations Bd., 144 Ill. 2d 326, 162 Ill. Dec. 52, 579 N.E.2d 866 (1991); People ex rel. Hansen v. Collins, 351 Ill. 551, 184 N.E. 641 (1933); Chicago & N.W.R. Co. v. Chapman, 133 Ill. 96, 24 N.E. 417 (1890); Hankins v. People, 106 Ill. 628, 1883 WL 10254 (1883); People v. Ward, 326 Ill. App. 3d 897, 261 Ill. Dec. 116, 762 N.E.2d 685 (5th Dist. 2002); Fisher v. Burstein, 333 Ill. App. 3d 803, 267 Ill. Dec. 500, 776 N.E.2d 872 (2d Dist. 2002); Norris v. National Union Fire Ins. Co. of Pittsburgh, Pa., 326 Ill. App. 3d 314, 260 Ill. Dec. 62, 760 N.E.2d 141 (1st Dist. 2001); Knolls Condominium Ass'n v. Harms, 326 Ill. App. 3d 18, 259 Ill. Dec. 924, 759 N.E.2d 985 (2d Dist. 2001), judgment rev'd on other grounds, 202 Ill. 2d 450, 269 Ill. Dec. 464, 781 N.E.2d 261 (2002); People ex rel. Klaeren v. Village of Lisle, 316 Ill. App. 3d 770, 250 Ill. Dec. 122, 737 N.E.2d 1099 (2d Dist. 2000), aff'd, 202 Ill. 2d 164, 269 Ill. Dec. 426, 781 N.E.2d 223 (2002); People v. Gazelle, 230 Ill. App. 3d 115, 172 Ill. Dec. 151, 595 N.E.2d 214 (4th Dist. 1992); Douglas Transit, Inc. v. Illinois Commerce Com'n, 164 Ill. App. 3d 245, 115 Ill. Dec. 313, 517 N.E.2d 724 (4th Dist. 1987); Browning-Ferris Industries, Inc. of Iowa v. Illinois Pollution Control Bd., 127 Ill. App. 3d 509, 82 Ill. Dec. 362, 468 N.E.2d 1016 (3d Dist. 1984); People ex rel. Fahner v. Climatemp, Inc., 101 Ill. App. 3d 1077, 57 Ill. Dec. 416, 428 N.E.2d 1096 (1st Dist. 1981).

An enumeration implies the exclusion of all other things, even absent any negative words of prohibition. Department of Corrections v. Illinois Civil Service Com'n, 187 Ill. App. 3d 304, 134 Ill. Dec. 907, 543 N.E.2d 190 (1st Dist. 1989).

Indiana. State v. Willits, 773 N.E.2d 808 (Ind. 2002); Brandmaier v. Metropolitan Development Com'n of Marion County, 714 N.E.2d 179 (Ind. Ct. App. 1999); Marshall v. State, 493 N.E.2d 1317 (Ind. Ct. App. 1986).

Iowa. Struve v. Struve, 930 N.W.2d 368 (Iowa 2019); Homan v. Branstad, 887 N.W.2d 153 (Iowa 2016); State v. Wiederien, 709 N.W.2d 538 (Iowa 2006); TLC Home Health Care, L.L.C. v. Iowa Dept. of Human Services, 638 N.W.2d 708 (Iowa 2002); State v. Robinson, 618 N.W.2d 306, 147 Ed. Law Rep. 1076 (Iowa 2000); State v. Carpenter, 616 N.W.2d 540 (Iowa 2000); City of Fort Dodge v. Janvrin, 372 N.W.2d 209 (Iowa 1985); Iowa Bankers Ass'n v. Iowa Credit Union Dept., 335 N.W.2d 439 (Iowa 1983); Wilson Food

Corp. v. Cherry, 315 N.W.2d 756 (Iowa 1982); North Iowa Steel Co. v. Staley, 253 Iowa 355, 112 N.W.2d 364 (1961); Van Eaton v. Town of Sidney, 211 Iowa 986, 231 N.W. 475, 71 A.L.R. 820 (1930).

Kansas. Phillips v. St. Paul Fire & Marine Ins. Co., 39 Kan. App. 2d 758, 184 P.3d 280 (2008), judgment aff'd, 289 Kan. 521, 213 P.3d 1066 (2009); Macray v. Clubs, Inc., 32 Kan. App. 2d 711, 87 P.3d 989 (2004); State v. McIntosh, 30 Kan. App. 2d 504, 43 P.3d 837 (2002), aff'd but criticized on other grounds, 274 Kan. 939, 58 P.3d 716 (2002); Dalke v. Allstate Ins. Co., 23 Kan. App. 2d 742, 935 P.2d 1067 (1997).

Kentucky. Schwindel v. Meade County, 113 S.W.3d 159 (Ky. 2003).

Louisiana. Filson v. Windsor Court Hotel, 907 So. 2d 723 (La. 2005); State v. Armstrong, 364 So. 2d 558 (La. 1978).

Maryland. Office and Professional Employees Intern. Union, Local 2 (AFL-CIO) v. Mass Transit Admin., 295 Md. 88, 453 A.2d 1191 (1982); Montgomery v. State, 292 Md. 155, 438 A.2d 490 (1981); Gay Inv. Co. v. Comi, 230 Md. 433, 187 A.2d 463 (1963).

Massachusetts. Carey v. New England Organ Bank, 446 Mass. 270, 843 N.E.2d 1070 (2006); Protective Life Ins. Co. v. Sullivan, 425 Mass. 615, 682 N.E.2d 624 (1997); Construction Industries of Massachusetts v. Commissioner of Labor and Industries, 406 Mass.162, 546 N.E.2d 367, 29 Wage & Hour Cas. (BNA) 1056, 114 Lab. Cas. (CCH) P 56188 (1989); Donaldson v. Boston Herald-Traveler Corp., 347 Mass. 274, 197 N.E.2d 671 (1964); Cox v. T.S. Truck Services, Inc., 19 Mass. L. Rptr. 695, 2005 WL 2373865 (Mass. Super. Ct. 2005); Middleborough Gas & Elec. Dept. v. Town of Middleborough, 48 Mass. App. Ct. 427, 721 N.E.2d 936 (2000).

A grant of power to license alcoholic beverage vendors did not include any other power to regulate the sale of alcoholic beverages. Universal Mach. Co. v. Alcoholic Beverages Control Com'n, 301 Mass. 40, 16 N.E.2d 53 (1938).

Michigan. Hoerstman General Contracting, Inc. v. Hahn, 474 Mich. 66, 711 N.W.2d 340, 59 U.C.C. Rep. Serv. 2d 308 (2006); LaGuire v. Kain, 440 Mich. 367, 487 N.W.2d 389 (1992); Feld v. Robert & Charles Beauty Salon, 435 Mich. 352, 459 N.W.2d 279 (1990); Van Sweden v. Van Sweden, 250 Mich. 238, 230 N.W. 191 (1930); Marshall v. Wabash Ry. Co., 201 Mich. 167, 167 N.W. 19, 8 A.L.R. 435 (1918); U.S. Fidelity & Guar. Co. v. Amerisure Ins. Co., 195 Mich. App. 1, 489 N.W.2d 115 (1992); Williams v. Coleman, 194 Mich. App. 606, 488 N.W.2d 464 (1992) (abrogated on other grounds by, Jones v. Bitner, 300 Mich. App. 65, 832 N.W.2d 426 (2013)); People v. Adair, 184 Mich. App. 703, 458 N.W.2d 666 (1990); Elliott v. Genesee County, 166 Mich. App. 11, 419 N.W.2d 762 (1988); City of Livonia v. Department of Social Services, 119 Mich. App. 806, 328 N.W.2d 1 (1982), aff'd in part, 423 Mich. 466, 378 N.W.2d 402 (1985).

Minnesota. State v. Caldwell, 803 N.W.2d 373 (Minn. 2011); Genin v. 1996 Mercury Marquis, VIN No. 2MEBP95F9CX644211, License No. MN 225 NSG, 622 N.W.2d 114 (Minn. 2001); Walser Auto Sales, Inc. v. City of Richfield, 635 N.W.2d 391 (Minn. Ct. App. 2001), decision aff'd, 644 N.W.2d 425 (Minn. 2002).

Mississippi. Koch & Dryfus v. Bridges, 45 Miss. 247, 1871 WL 3986 (1871).

Missouri. State ex rel. Hawley v. Pilot Travel Centers, LLC, 558 S.W.3d 22 (Mo. 2018); Harrison v. MFA Mut. Ins. Co., 607 S.W.2d 137 (Mo. 1980); Giloti v. Hamm-Singer Corp., 396 S.W.2d 711 (Mo. 1965); Gasconade County Counseling Services, Inc. v. Missouri Dept. of Health, 314 S.W.3d 368 (Mo. Ct. App. E.D. 2010); State v. Carson, 317 S.W.3d 136 (Mo. Ct. App. E.D. 2010); State ex rel. C. C. G. Management Corp. v. City of Overland, 624 S.W.2d 50 (Mo. Ct. App. E.D. 1981).

Courts use the maxim with great caution. Pippins v. City of St. Louis, 823 S.W.2d 131 (Mo. Ct. App. E.D. 1992).

Montana. Reed v. Reed, 130 Mont. 409, 304 P.2d 590 (1956).

Nebraska. State v. Brouillette, 265 Neb. 214, 655 N.W.2d 876 (2003); Pfizer Inc. v. Lancaster County Bd. of Equalization, 260 Neb. 265, 616 N.W.2d 326 (2000); Nebraska City Ed. Ass'n v. School Dist. of Nebraska City, in Otoe County, 201 Neb. 303, 267 N.W.2d 530 (1978); Calvary Baptist Church v. Coonrad, 163 Neb. 25, 77 N.W.2d 821 (1956); In re Shirley's Estate, 162 Neb. 613, 76 N.W.2d 749 (1956).

Nevada. State Department of Health and Human Services, Division of Public and Behavioral Health Medical Marijuana Establishment Program v. Samantha Inc., 407 P.3d 327 (Nev. 2017); Horizons at Seven Hills v. Ikon Holdings, 373 P.3d 66, 132 Nev. Adv. Op. No. 35 (Nev. 2016).

New Hampshire. Cowan v. Tyrolean Ski Area, Inc., 127 N.H. 397, 506 A.2d 690 (1985); Silva v. Botsch, 120 N.H. 600, 420 A.2d 301 (1980); Matter of Gamble, 118 N.H. 771, 394 A.2d 308 (1978).

New Jersey. State v. Kirk, 145 N.J. 159, 678 A.2d 233 (1996); New Jersey Sports and Exposition Authority v. Cariddi, 84 N.J. 102, 417 A.2d 529 (1980); State v. Henderson, 375 N.J. Super. 265, 867 A.2d 516 (Law Div. 2004); Prunetti v. Mercer County Bd. of Chosen Freeholders, 350 N.J. Super. 72, 794 A.2d 278 (Law Div. 2001); Elizabeth Bd. of Educ. v. New Jersey Transit Corp., 342 N.J. Super. 262, 776 A.2d 821, 155 Ed. Law Rep. 1249 (App. Div. 2001); State v. Groce, 183 N.J. Super. 168, 443 A.2d 736 (App. Div. 1982); Housing Authority of City of Wildwood v. Williams, 263 N.J. Super. 561, 623 A.2d 318 (Law Div. 1993); State v. Jersey Carting, Inc., 259 N.J. Super. 130, 611 A.2d 677 (Law Div. 1992); Shapiro v. Essex County Bd. of Chosen Freeholders, 177 N.J. Super. 87, 424 A.2d 1203 (Law Div. 1980), judgment aff'd, 183 N.J. Super. 24, 443 A.2d 219 (App. Div. 1982), judgment aff'd, 91 N.J. 430, 453 A.2d 158 (1982).

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New York. City of New York v. New York Telephone Co., 108 A.D.2d 372, 489 N.Y.S.2d 474 (1st Dep't 1985); People v. Ceasar, 188 Misc. 2d 219, 727 N.Y.S.2d 258 (Sup 2001); People v. Mastrodonato, 136 Misc. 2d 854, 519 N.Y.S.2d 497 (Sup 1987), judgment aff'd, 142 A.D.2d 464, 536 N.Y.S.2d 722 (4th Dep't 1988), judgment aff'd, 75 N.Y.2d 18, 550 N.Y.S.2d 580, 549 N.E.2d 1151 (1989) and judgment aff'd, 142 A.D.2d 460, 536 N.Y.S.2d 603 (4th Dep't 1988), judgment aff'd, 75 N.Y.2d 18, 550 N.Y.S.2d 580, 549 N.E.2d 1151 (1989); Matter of Amy Beth G., 136 Misc. 2d 85, 517 N.Y.S.2d 848 (Fam. Ct. 1987); National Superlease, Inc. v. Reliance Ins. Co. of New York, 126 Misc. 2d 988, 484 N.Y.S.2d 776 (Sup 1985), order aff'd, 123 A.D.2d 608, 507 N.Y.S.2d 16 (2d Dep't 1986).

The maxim applies where the legislature has addressed a subject and provided specific exceptions to a general rule. Kimmel v. State, 29 N.Y.3d 386, 2017 WL 1838940 (2017).

North Carolina. In re Miller, 357 N.C. 316, 584 S.E.2d 772 (2003); Campbell v. First Baptist Church of City of Durham, 298 N.C. 476, 259 S.E.2d 558 (1979); State v. White, 753 S.E.2d 698 (N.C. Ct. App. 2014), review dismissed, 367 N.C. 785, 766 S.E.2d 626 (2014) and writ denied, review denied, 367 N.C. 785, 766 S.E.2d 627 (2014).

North Dakota. Garaas v. Cass County Joint Water Resource Dist., 2016 ND 148, 883 N.W.2d 436 (N.D. 2016); State v. Dennis, 2007 ND 87, 733 N.W.2d 241 (N.D. 2007).

Ohio. Independent Ins. Agents of Ohio, Inc. v. Fabe, 63 Ohio St. 3d 310, 587 N.E.2d 814 (1992); Fort Hamilton-Hughes Memorial Hosp. Center v. Southard, 12 Ohio St. 3d 263, 466 N.E.2d 903 (1984); Weirick v. Mansfield Lumber Co., 96 Ohio St. 386, 117 N.E. 362 (1917); Board of Educ., Erie County School Dist. v. Rhodes, 17 Ohio App. 3d 35, 477 N.E.2d 1171, 24 Ed. Law Rep. 1245 (10th Dist. Franklin County 1984).

Oklahoma. Patterson v. Beall, 2000 OK 92, 19 P.3d 839 (Okla. 2000); State v. Cline, 1958 OK CR 21, 322 P.2d 208 (Okla. Crim. App. 1958).

Oregon. Gold v. Secretary of State, 106 Or. App. 573, 809 P.2d 1334 (1991); Royal Aloha Partners v. Real Estate Div., 59 Or. App. 564, 651 P.2d 1350 (1982).

Pennsylvania. Atcovitz v. Gulph Mills Tennis Club, Inc., 571 Pa. 580, 812 A.2d 1218 (2002); Miller v. Miller, 44 Pa. 170, 1863 WL 4775 (1863); Aronson v. Bright-Teeth Now, LLC., 2003 PA Super 187, 824 A.2d 320 (2003).

"Where a remedy or method of procedure is provided by an act … the directions of such act must be strictly pursued and such remedy or procedure is exclusive." Gaebel v. Thornbury Tp., Delaware County, 8 Pa. Commw. 399, 303 A.2d 57 (1973).

Rhode Island. Terrano v. State, Dept. of Corrections, 573 A.2d 1181 (R.I. 1990); Vanni v. Vanni, 535 A.2d 1268 (R.I. 1988); Centazzo v. Centazzo, 509 A.2d 995 (R.I. 1986); Murphy v. Murphy, 471 A.2d 619 (R.I. 1984); Abad v. City of Providence, 2004 WL 2821310 (R.I. Super. Ct. 2004), aff'd, 919 A.2d 379 (R.I. 2007); Cohen v. Duncan, 2004 WL 1351155 (R.I. Super. Ct. 2004), quashed, 970 A.2d 550 (R.I. 2009); Tompkins v. Zoning Bd. of Review of Town of Little Compton, 2003 WL 22790829 (R.I. Super. Ct. 2003); Blais v. Revens, 2002 WL 31546103 (R.I. Super. Ct. 2002); Blue Cross & Blue Shield of Rhode Island v. McConaghy, 2001 WL 1097807 (R.I. Super. Ct. 2001).

South Carolina. State v. Leopard, 349 S.C. 467, 563 S.E.2d 342 (Ct. App. 2002); Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984).

Tennessee. State v. Adler, 92 S.W.3d 397 (Tenn. 2002); State v. Harkins, 811 S.W.2d 79 (Tenn. 1991); Opinion of Attorney General of Tennessee, 8 Op Atty Gen 292 (Tenn 1978); Sheely v. McLemore, 153 Tenn. 498, 284 S.W. 61 (1926); State v. Bilbrey, 816 S.W.2d 71 (Tenn. Crim. App. 1991).

Texas. Chambers v. State, 580 S.W.3d 149 (Tex. Crim. App. 2019); State v. Sutton, 499 S.W.3d 434, 337 Ed. Law Rep. 607 (Tex. Crim. App. 2016); State v. Schunior, 506 S.W.3d 29 (Tex. Crim. App. 2016); Abbott v. North East Independent School Dist., 212 S.W.3d 364, 216 Ed. Law Rep. 706 (Tex. App. Austin 2006); Carrollton-Farmers Branch Independent School Dist. v. JPD, Inc., 168 S.W.3d 184 (Tex. App. Dallas 2005); City of Garland v. Public Utility Com'n of Texas, 165 S.W.3d 814 (Tex. App. Austin 2005); Commission for Lawyer Discipline v. Denisco, 132 S.W.3d 211 (Tex. App. Houston 14th Dist. 2004); Texas Mun. Power Agency v. Public Utility Com'n of Tex., 150 S.W.3d 579 (Tex. App. Austin 2004), judgment rev'd in part on other grounds, 253 S.W.3d 184 (Tex. 2007); USA Waste Services of Houston, Inc. v. Strayhorn, 150 S.W.3d 491 (Tex. App. Austin 2004); FPL Farming, Ltd. v. Texas Natural Resource Conservation Com'n, 2003 WL 247183 (Tex. App. Austin 2003); Perez ex rel. Perez v. Blue Cross Blue Shield of Texas, Inc., 127 S.W.3d 826 (Tex. App. Austin 2003); Sergeant Enterprises, Inc. v. Strayhorn, 112 S.W.3d 241 (Tex. App. Austin 2003); Gables Realty Ltd. Partnership v. Travis Central Appraisal Dist., 81 S.W.3d 869 (Tex. App. Austin 2002); Upjohn Co. v. Rylander, 38 S.W.3d 600 (Tex. App. Austin 2000); Bidelspach v. State, 840 S.W.2d 516 (Tex. App. Dallas 1992), petition for discretionary review refused, (Nov. 25, 1992) and petition for discretionary review granted, (Feb. 24, 1993); Calvert v. Thompson, 472 S.W.2d 311 (Tex. Civ. App. Austin 1971), writ granted, (June 14, 1972) and judgment aff'd in part, rev'd in part on other grounds, 489 S.W.2d 95 (Tex. 1972); Carp v. Texas State Bd. of Examiners in Optometry, 401 S.W.2d 639 (Tex. Civ. App. Dallas 1966), writ granted, (Oct. 5, 1966) and aff'd, 412 S.W.2d 307 (Tex. 1967).

The force of any negative implication depends on context, and the *expressio unius* canon does not apply unless it is fair to suppose a legislature considered an unnamed possibility and meant to say no to it. Forest Oil Corporation v. El Rucio Land and Cattle Company, Inc., 518 S.W.3d 422 (Tex. 2017).

Utah. State v. Wadsworth, 2017 UT 20, 393 P.3d 338 (Utah 2017); Bagley v. Bagley, 2016 UT 48, 387 P.3d 1000 (Utah 2016); Duke v. Graham, 2007 UT 31, 158 P.3d 540 (Utah 2007); Tustian v. Schriever, 2001 UT 84, 34 P.3d 755, 45 U.C.C. Rep. Serv. 2d 921 (Utah 2001); Olson v. Salt Lake City School Dist., 724 P.2d 960 (Utah 1986); In re Marriage of Kunz, 2006 UT App 151, 136 P.3d 1278 (Utah Ct. App. 2006).

Vermont. State v. Whitingham School Bd., 140 Vt. 405, 438 A.2d 394, 1 Ed. Law Rep. 905 (1981).

Virginia. Miller & Rhoads Building, L.L.C. v. City of Richmond, 292 Va. 537, 790 S.E.2d 484 (2016); Virginian-Pilot Media Companies, LLC v. Dow Jones & Co., Inc., 280 Va. 464, 698 S.E.2d 900 (2010); Smith Mountain Lake Yacht Club, Inc. v. Ramaker, 261 Va. 240, 542 S.E.2d 392 (2001); Com. ex rel. Virginia Dept. of Corrections v. Brown, 259 Va. 697, 529 S.E.2d 96 (2000); Offield v. Davis, 100 Va. 250, 40 S.E. 910 (1902); Epps v. Com., 47 Va. App. 687, 626 S.E.2d 912 (2006), judgment aff'd, 273 Va. 410, 641 S.E.2d 77 (2007).

Washington. State v. Linville, 191 Wash. 2d 513, 423 P.3d 842 (2018); Perez-Crisantos v. State Farm Fire and Casualty Company, 187 Wash. 2d 669, 389 P.3d 476 (2017); State v. LG Electronics, Inc., 186 Wash. 2d 1, 375 P.3d 636 (2016); In re Hopkins, 137 Wash. 2d 897, 976 P.2d 616 (1999); Kreidler v. Eikenberry, 111 Wash. 2d 828, 766 P.2d 438 (1989); Washington Natural Gas Co. v. Public Utility Dist. No. 1 of Snohomish County, 77 Wash. 2d 94, 459 P.2d 633 (1969); State v. Roadhs, 71 Wash. 2d 705, 430 P.2d 586 (1967); Bradley v. Department of Labor and Industries, 52 Wash. 2d 780, 329 P.2d 196 (1958); State v. LG Electronics, Inc., 185 Wash. App. 123, 340 P.3d 915 (Div. 1 2014), review granted, 183 Wash. 2d 1001, 349 P.3d 856 (2015) and aff'd, 375 P.3d 636 (Wash. 2016); State v. Swanson, 116 Wash. App. 67, 65 P.3d 343 (Div. 2 2003); State v. Baldwin, 109 Wash. App. 516, 37 P.3d 1220 (Div. 3 2001); State v. M.R.C., 98 Wash. App. 52, 989 P.2d 93 (Div. 2 1999), as amended, (Dec. 3, 1999).

West Virginia. Christopher J. v. Ames, 242 W. Va. 64, 828 S.E.2d 884 (2019); State ex rel. Stanley v. Sine, 215 W. Va. 100, 594 S.E.2d 314 (2004); State ex rel. Riffle v. Ranson, 195 W. Va. 121, 464 S.E.2d 763 (1995); Ratcliff v. State Compensation Com'r, 146 W. Va. 920, 123 S.E.2d 829 (1962).

Courts limit the *expressio unius* doctrine to situations where the language clearly suggests a contrast between what is expressed and what is impliedly omitted, and may not apply the rule to a Code of Professional Responsibility, which regulates a variety of separate subjects relating to the practice of law and an attorney's general conduct, and for which an expression on any one topic is designed to exclude other designated topics. Committee On Legal Ethics of West Virginia State Bar v. Roark, 181 W. Va. 260, 382 S.E.2d 313 (1989).

Wisconsin. Benson v. City of Madison, 2017 WI 65, 376 Wis. 2d 35, 897 N.W.2d 16 (2017); Heritage Farms, Inc. v. Markel Ins. Co., 2009 WI 27, 316 Wis. 2d 47, 762 N.W.2d 652 (2009); Noffke ex rel. Swenson v. Bakke, 2009 WI 10, 315 Wis. 2d 350, 760 N.W.2d 156, 241 Ed. Law Rep. 335 (2009); Quinn v. Town of Dodgeville, 122 Wis. 2d 570, 364 N.W.2d 149 (1985); Foster v. State, 70 Wis. 2d 12, 233 N.W.2d 411 (1975); Tri-Tech Corp. of America v. Americomp Services, Inc., 2001 WI App 191, 247 Wis. 2d 317, 633 N.W.2d 683 (Ct. App. 2001), decision rev'd, 2002 WI 88, 254 Wis. 2d 418, 646 N.W.2d 822 (2002); State ex rel Deer Lk. Improvement Assn v. Polk Cty Bd of Adjustment, 104 Wis. 2d 743, 314 N.W.2d 363 (Ct. App. 1981); State v. Derenne, 98 Wis. 2d 749, 297 N.W.2d 515 (Ct. App. 1980), decision rev'd on other grounds, 102 Wis. 2d 38, 306 N.W.2d 12 (1981); Gottlieb v. City of Milwaukee, 90 Wis. 2d 86, 279 N.W.2d 479 (Ct. App. 1979).

Wyoming. Town of Pine Bluffs v. State Bd. of Equalization, 79 Wyo. 262, 333 P.2d 700 (1958).

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Michigan. Feld v. Robert & Charles Beauty Salon, 435 Mich. 352, 459 N.W.2d 279 (1990); Williams v. Coleman, 194 Mich. App. 606, 488 N.W.2d 464 (1992) (abrogated on other grounds by, Jones v. Bitner, 300 Mich. App. 65, 832 N.W.2d 426 (2013)).
Missouri. Brown v. Morris, 365 Mo. 946, 290 S.W.2d 160 (1956).
Montana. State ex rel. Jones v. Giles, 168 Mont. 130, 541 P.2d 355 (1975); Farmers Alliance Mut. Ins. Co. v. Holeman, 278 Mont. 274, 924 P.2d 1315 (1996).
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8 **United States.** Keams v. Tempe Technical Institute, Inc., 39 F.3d 222, 95 Ed. Law Rep. 513 (9th Cir. 1994); U.S. v. Castro, 837 F.2d 441 (11th Cir. 1988); H.T.E., Inc. v. Tyler Technologies, Inc., 217 F. Supp. 2d 1255 (M.D. Fla. 2002).
Courts understand *expressio unius* is a product of logic and common sense and apply it only when it makes sense as a matter of legislative purpose. U.S. v. Bert, 292 F.3d 649 (9th Cir. 2002).
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9 **United States.** U.S. v. One "Piper" Aztec "F" De Luxe Model 250 PA 23 Aircraft Bearing Serial No. 27-7654057, 321 F.3d 355 (3d Cir. 2003); U.S. v. One Parcel of Land in Name of Mikell, 33 F.3d 11 (5th Cir. 1994); U.S. v. Olmos-Esparza, 484 F.3d 1111 (9th Cir. 2007); U.S. v. One 1997 Toyota Land Cruiser, 248 F.3d 899 (9th Cir. 2001), as amended, (June 21, 2001); U.S. v. One (1) 1980 Cessna 441 Conquest II

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Alaska. State, Dept. of Revenue v. Deleon, 103 P.3d 897 (Alaska 2004).

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11 Botany Worsted Mills v. U.S., 278 U.S. 282, 49 S. Ct. 129, 73 L. Ed. 379 (1929).

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A statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way. Nolan v. Olean General Hosp., 2013 WL 3475475 (W.D. N.Y. 2013).

"[A] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." Hamdan v. Rumsfeld, 548 U.S. 557, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006).

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12 Tarrant Regional Water Dist. v. Herrmann, 133 S. Ct. 2120, 186 L. Ed. 2d 153 (2013).

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13 Hillman v. Maretta, 133 S. Ct. 1943, 186 L. Ed. 2d 43 (2013).

California. Lopez v. Sony Electronics, Inc., 5 Cal. 5th 627, 234 Cal. Rptr. 3d 856, 420 P.3d 767 (Cal. 2018).

Colorado. Kyle W. Larson Enterprises, Inc. v. Allstate Ins. Co., 2012 COA 160, 305 P.3d 409, 413 (Colo. App. 2012), as modified on denial of reh'g, (Nov. 8, 2012) and cert. denied, 2013 WL 3323525 (Colo. 2013).

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New York. The maxim applies where the legislature has addressed a subject and provided specific exceptions to a general rule. Kimmel v. State, 29 N.Y.3d 386, 2017 WL 1838940 (2017).

14 Marx v. General Revenue Corp., 133 S. Ct. 1166, 185 L. Ed. 2d 242, 84 Fed. R. Serv. 3d 1486 (2013).

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California. Silverbrand v. County of Los Angeles, 46 Cal. 4th 106, 92 Cal. Rptr. 3d 595, 205 P.3d 1047 (2009).

17 Holmes v. Jennison, 39 U.S. 540, 10 L. Ed. 579, 1840 WL 4626 (1840).

18 **United States.** NTN Bearing Corp. of America v. U.S., 368 F.3d 1369 (Fed. Cir. 2004); Anaheim Union High School Dist. v. J.E., 2013 WL 2359651 (C.D. Cal. 2013); Aurora Co-op. Elevator Co. v. Aventine Renewable Energy Holdings, Inc., 2014 WL 895669 (D. Neb. 2014).

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Iowa. State v. Carpenter, 616 N.W.2d 540 (Iowa 2000).

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