

THE IOWA BUSINESS CORPORATION ACT'S  
STAGGERED BOARD REQUIREMENT FOR  
PUBLIC CORPORATIONS: A HOSTILE  
TAKEOVER OF  
IOWA CORPORATE LAW?

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I. INTRODUCTION

In corporation law, a “staggered” or “classified” board of directors is one that is divided into two or three groups, with directors in each group serving staggered multi-year terms.<sup>1</sup> Three classes of directors are typical, with members of each class serving a three-year term, but only one class standing for election at each annual meeting, similar to the election pattern for U.S. Senators.<sup>2</sup> Proponents argue that a staggered board promotes “continuity, stability, and independence” on the part of corporate leadership better than the traditional unitary board structure with annual

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1. Rivka Weill, *Declassifying the Classified*, 31 DEL. J. CORP. L. 891, 895 (2006).

2. *Id.*; see U.S. CONST. art. I, § 3, cl. 2 (providing the staggered election process for U.S. Senators).

terms for all directors.<sup>3</sup>

A staggered board is also a defense against hostile takeovers.<sup>4</sup> If a target company has a staggered board, the hostile bidder must sustain a proxy contest through at least two annual meeting cycles in order to obtain control of the target company's board—a proposition that will often be unacceptably difficult or expensive.<sup>5</sup> Thus, in the wake of the hostile takeover wars of the 1980s, many public corporations persuaded their shareholders to implement staggered board structures through corporate charter or bylaw amendments.<sup>6</sup>

By the late 1990s, corporate governance experts and activist shareholders began to question the wisdom of staggered boards.<sup>7</sup> These critics contended that staggered boards reduce director accountability, promote management entrenchment, and could even reduce shareholder value.<sup>8</sup>

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3. See, e.g., Richard H. Koppes et al., *Corporate Governance Out of Focus: The Debate Over Classified Boards*, 54 BUS. LAW. 1023, 1025 (1999).

4. See, e.g., *id.* at 1024 (“[C]lassifying a board of directors greatly improves the ability of a corporation to defend itself against unsolicited takeover bids and proxy fights.”); Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 890 (2002) [hereinafter Bebchuk et al., *The Powerful Antitakeover*] (arguing that staggered boards create “a more powerful antitakeover defense than has previously been recognized”).

5. Use of the staggered board as a hostile takeover defense was dramatically illustrated by Air Products & Chemicals Inc.’s recent unsuccessful hostile bid for Airgas, Inc. *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 61–62 (Del. Ch. 2011) (describing the events that resulted in the nomination of three Air Products nominees and explaining Air Products’s inability to gain control over Airgas’s board due to Airgas’s classified board structure).

6. See, e.g., Koppes et al., *supra* note 3, at 1026 (noting that adoption of staggered boards “increased with the high merger activity of the 1980s”).

7. See *id.* at 1025 (discussing the tendency of observers and scholars in the 1990s to favor declassifying boards).

8. See, e.g., Bebchuk et al., *The Powerful Antitakeover*, *supra* note 4, at 891 (finding that staggered boards increased the insulation of board members from takeovers and reduced returns to shareholders of corporations that faced hostile bids). Institutional investors became concerned about a potential negative effect on stock returns and diminished director accountability, and as a result, these investors began to discourage staggered boards. See *id.* at 900 (discussing institutional investors’ increased awareness of potential managerial entrenchment related to staggered boards); see also, e.g., COUNCIL OF INTUITIONAL INVESTORS, CORPORATE GOVERNANCE POLICIES § 2.1 (2011), available at [http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2012-21-11%20FINAL%20\(2\).pdf](http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2012-21-11%20FINAL%20(2).pdf) (“All directors should be elected annually. Boards should not be classified (staggered).”).

For the last twenty years, the battle over staggered boards has been waged primarily at corporate annual meetings,<sup>9</sup> where shareholder proposals recommending repeal of staggered board structures have attracted considerable support<sup>10</sup> and remain quite popular.<sup>11</sup> The results of this pressure are impressive: “the proportion of public companies with staggered boards has fallen from 60 percent in 2002 to less than half in 2011 (and less than one-third among S&P 500 companies).”<sup>12</sup>

State legislatures have also emerged as an important arena in the battle over staggered boards of directors. In this forum, as seen in Massachusetts (1990), Indiana (2009), and Oklahoma (2010), the trend *requires* staggered boards for public corporations, whether shareholders want them or not.<sup>13</sup> Following this pattern, the Iowa Legislature enacted Senate File 325 in 2011. This bill, signed by the Governor just a few days after its passage, amends the Iowa Business Corporation Act to require, as a default proposition, that public corporations chartered in Iowa have staggered boards.<sup>14</sup>

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9. See Bebchuk et al., *The Powerful Antitakeover*, *supra* note 4, at 900 (examining the emergence of shareholder activism in the 1990s and the movement toward voting in opposition to staggered boards at annual meetings).

10. See *id.* (citing John C. Coates IV, *Measuring the Domain of Mediating Hierarchy: How Contestable Are U.S. Public Corporations?*, 24 J. CORP. L. 837, 861 tbl.5 (1999)) (indicating an increase in popularity of shareholder proposals to de-stagger boards in the 1990s).

11. The Shareholders Rights Project (SRP), a Harvard Law School clinic, recently reported that it had successfully pressed initiatives to de-stagger the boards of forty-two public corporations. HARVARD LAW SCHOOL SHAREHOLDER RIGHTS PROJECT NEWS ALERT (Mar. 19, 2012), [http://srp.law.harvard.edu/newsletters/03-19-2012\\_SRP-News-Alert.html](http://srp.law.harvard.edu/newsletters/03-19-2012_SRP-News-Alert.html). The SRP's success has created its own controversy. Four prominent partners in Wachtell, Lipton, Rosen & Katz, a New York law firm that specializes in corporate takeover defense, responded to the SRP report with a spirited defense of staggered boards and sharp attacks on Harvard for sponsoring the SRP. Brian Baxter, *Spat Over Staggered Boards Pits Wachtell Against Harvard's Bebchuk*, AM. LAW DAILY (Mar. 21, 2012), <http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202546631600&slreturn=>.

12. Noam Noked, *Activism and the Move Toward Annual Director Elections*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Jan. 15, 2012, 11:17 AM), <http://blogs.law.harvard.edu/corpgov/2012/01/15/activism-and-the-move-toward-annual-director-elections/>.

13. IND. CODE ANN. § 23-1-33-6(c) (LexisNexis 2010); MASS. GEN. LAWS ANN. ch. 156B, § 50A, ch. 156D, § 8.06(b)–(g) (West 2005 & Supp. 2011); OKLA. STAT. ANN. tit. 18, § 1027(D)(2) (West 1999 & Supp. 2012).

14. S. File 325 § 6, 84th Gen. Assemb., Reg. Sess. (Iowa 2011) (codified at IOWA CODE § 490.806A (Supp. 2011)).

As this Article explains, the new staggered board laws are apparently designed to help local, public corporations resist unwanted takeover bids—an understandable goal for legislators who want to keep home-grown public corporations headquartered in their respective states.<sup>15</sup> But, as this Article also explains, such laws come with a high pricetag: they circumvent traditional principles of corporate governance and shareholder primacy, and may also mask conflicts of interest on the part of corporate managers who lobby for their passage.<sup>16</sup>

## II. BACKGROUND: THE BATTLE FOR CASEY'S GENERAL STORES, INC.

In spring 2010, Alimentation Couche-Tard, Inc., a Canadian corporation that operates convenience stores, offered to acquire Casey's General Stores, Inc., a United States convenience store chain that is both headquartered and incorporated in Iowa.<sup>17</sup> Although Alimentation's proposed merger would have paid shareholders a fourteen percent premium over Casey's then stock price, Casey's board rejected the offer as inadequate.<sup>18</sup> Alimentation made several higher bids, but Casey's management rejected each subsequent proposal.<sup>19</sup> The spurned suitor then pursued a hostile tender offer for Casey's stock and waged a proxy fight for control of Casey's board; both efforts were unsuccessful.<sup>20</sup>

Because Casey's did not have a staggered board, all of the company's director seats were contested by Alimentation nominees at Casey's September 2010 annual meeting, the final round of the takeover fight.<sup>21</sup>

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15. Both the Massachusetts and Iowa laws were designed to help a specific public company resist an unwanted takeover bid. *See infra* Part III.A. The Indiana and Oklahoma laws were designed to enable local corporations to resist shareholder requests for staggered boards that might weaken the affected companies' takeover defenses. *See id.*

16. *See infra* notes 74-77 and accompanying text.

17. *Casey's Rejects Takeover Bid by Alimentation Couche-Tard*, RTT NEWS (Apr. 9, 2010, 12:01 PM), <http://www.rttnews.com/Story.aspx?Id=1265424>.

18. *Id.*

19. *See* Solarina Ho, *Chronology—Couche-Tard Drops Casey's Takeover Bid*, REUTERS (Sept. 30, 2010, 5:27 PM), <http://www.reuters.com/article/2010/09/30/caseys-idUSN3029385020100930> (providing a timeline of various offers made by Alimentation, but denied by Casey's).

20. *Id.* (indicating that Casey's rejected Alimentation's subsequent offers and noting that Casey's shareholders refused to elect Alimentation board nominees).

21. *Casey's Shareholders Speak Out on Takeover*, KCCI (Sept. 23, 2010, 2:28 PM), <http://www.kcci.com/money/25130108/detail.html>; *see* Ho, *supra* note 19 (indicating Alimentation dropped its takeover efforts shortly after Casey's annual

Had the insurgent nominees won, Alimentation would have gained considerable leverage in its hostile bid, because control of Casey's board would have enabled Alimentation to reverse Casey's institutional opposition to the proposed merger.<sup>22</sup>

Alimentation abandoned its takeover efforts in October 2010.<sup>23</sup> At that point, Casey's could have done more to arm itself against future hostile offers by implementing staggered director terms. But in Iowa, as in most states, implementing staggered terms required an amendment to the company's articles of incorporation<sup>24</sup>—a process that involved both board approval *and* a shareholder vote.<sup>25</sup> And, there was the rub: it would have been nearly impossible for Casey's to obtain a favorable shareholder vote on any staggered board proposal. Institutional investors own the bulk of Casey's stock,<sup>26</sup> and in 2010, as now, the leading proxy advisory company recommended that such shareholders vote *against* staggered boards.<sup>27</sup> Thus, opposition by shareholders effectively blocked Casey's "articles amendment" route to a staggered board that could bolster the company's takeover defenses.

### III. MANDATORY STAGGERED BOARDS FOR IOWA PUBLIC CORPORATIONS A.K.A. THE "CASEY'S BILL"

Shortly after the 2011 Iowa Legislature convened, House Study Bill

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meeting in September 2010).

22. Other potential obstacles to the takeover would have remained. These include Iowa's business combination statute, which prevents a public corporation from engaging in a business combination with a shareholder who acquired ten percent of the corporation's stock for at least three years following the shareholder reaching that threshold, unless certain exceptions apply. IOWA CODE § 490.1110 (2011); *see also* 6 MATTHEW G. DORÉ, IOWA PRACTICE SERIES § 35:11 (2011) (explaining the protections against unwanted takeover attempts provided in the Iowa Business Corporation Act).

23. *Ho, supra* note 19.

24. *See* IOWA CODE § 490.806 (2011 & Supp. 2011) ("The *articles of incorporation may provide for* staggering the terms of directors . . . .") (emphasis added).

25. *See* IOWA CODE § 490.1003 (2011) (requiring that amendments to articles of incorporation have both director and shareholder approval).

26. A recent public report estimated Casey's institutional share ownership at eighty-nine percent. *Casey's General Stores Reports Q1 (Jul) Earnings*, THE STOCK MARKET WATCH (Sept. 8, 2011, 1:30 PM), <http://thestockmarketwatch.com/stock-market-news/hot-stocks-to-watch/caseys-general-stores-reports-q1-jul-earnings/12295>.

27. *See* ISS, 2012 INTERNATIONAL PROXY VOTING SUMMARY GUIDELINES 10 (2011); RISKMETRICS GROUP, 2010 INTERNATIONAL PROXY VOTING GUIDELINES SUMMARY 8 (2009).

42, a bill amending the Iowa Business Corporation Act (IBCA), was introduced in the Iowa General Assembly.<sup>28</sup> Known as the “Casey’s Bill” by those who tracked its progress, and ultimately enacted as Senate File 325,<sup>29</sup> this law adds a new section to the IBCA—section 806A—and requires a “public corporation”<sup>30</sup> to have a staggered board of directors<sup>31</sup> unless the company is exempt. A public corporation is “exempt” only if it already had a staggered board structure in place or if its board of directors decided within forty days of Senate File 325’s effective date that the corporation would preserve a unitary board structure.<sup>32</sup> Thus, just a few weeks after Senate File 325 was signed by the Governor, Casey’s was able to implement a staggered board and adopt corresponding amendments to the company’s articles of incorporation without any shareholder input whatsoever.<sup>33</sup>

Senate File 325 bolstered Casey’s new takeover protections with other provisions that are applicable only to “nonexempt” public corporations. For example, the board of directors of nonexempt public corporations gain exclusive control over the board’s *size*.<sup>34</sup> This provision effectively prevents shareholders from amending a corporation’s bylaws to increase the number of seats on the board and thereby create vacancies that a hostile bidder might attempt to capture.

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28. IOWA H. JOURNAL, 84th Gen. Assemb., 2011 Reg. Sess., at 189 (Iowa 2011). An identical bill was introduced as Senate Study Bill 1121 and was assigned to the Senate Judiciary Committee. IOWA S. JOURNAL, 84th Gen. Assemb., 2011 Reg. Sess., at 312 (Iowa 2011).

29. After compromise amendments, House Study Bill 42 was reintroduced by the House Judiciary Committee as House File 578 and by the Senate Judiciary Committee as Senate File 325. IOWA H. JOURNAL, at 563; IOWA S. JOURNAL, at 312. Senate File 325 was later substituted for House File 578, and passed in both chambers. IOWA S. JOURNAL, at 490; IOWA H. JOURNAL, at 730.

30. S. File 325 § 1, 84th Gen. Assemb., Reg. Sess. (Iowa 2011) (codified at IOWA CODE § 490.140(21A) (Supp. 2011)) (defining a “public corporation” as “a corporation that has a class of voting stock that is listed on a national securities exchange or held of record by more than two thousand shareholders”).

31. *Id.* § 6 (codified at IOWA CODE § 490.806A(1)).

32. *Id.* (codified at IOWA CODE § 490.806A(2)(b)). As passed, Senate File 325 also defined an exempt public corporation to include a corporation that became public after the bill took effect. *Id.* (codified at IOWA CODE § 490.806A(2)(c)).

33. *Id.* § 8 (codified at IOWA CODE § 490.1005A) (requiring the board of directors of a nonexempt public corporation to amend the corporation’s articles of incorporation to reflect the new staggered board requirement).

34. *Id.* § 3 (codified at IOWA CODE § 490.803(2)(b)) (“[T]he number of directors of a [nonexempt] public corporation . . . shall be increased or decreased only by the affirmative vote of a majority of its board of directors.”).

### A. Legislative Precedents From Other Jurisdictions

Casey's was not the first public corporation to benefit from a legislatively-mandated staggered board of directors. After a British industrial manufacturing firm launched a hostile bid for Norton Company in 1990, Massachusetts mandated staggered boards for public companies organized within the state.<sup>35</sup> Indiana adopted a mandatory staggered board law for public companies in 2009,<sup>36</sup> which helped Indiana's Ball Corporation put an end to perennial requests from shareholders that the company de-stagger its board.<sup>37</sup> And in 2010, the Oklahoma Legislature accommodated Chesapeake Energy Corporation's desire to maintain a staggered board structure by mandating that public companies in Oklahoma implement staggered boards.<sup>38</sup>

These laws are similar to Iowa's new staggered board law in that a staggered board is required for any public corporation that is not "exempt," and the board of directors controls the decision whether the corporation should opt out of the requirement.<sup>39</sup> Variations from the Iowa law include part of the Massachusetts law, which also allows shareholders to participate in the "opt out" decision, but only by a two-thirds

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35. See Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1859 (2002) (explaining Massachusetts' move to statutorily-mandated staggered boards after BTR announced a hostile takeover attempt of Norton Company); see also MASS. GEN. LAWS ANN. ch. 156B, § 50A, ch. 156D, § 8.06(b)-(g) (West 2005 & Supp. 2011) (codifying Massachusetts' staggered board law).

36. IND. CODE ANN. § 23-1-33-6(c) (LexisNexis 2010).

37. Ted Allen, *Proxy Season Preview: Takeover Defenses*, DEAL LAWYERS, (Mar. 8, 2010), <http://www.deallawyers.com/Blog/2010/03/us-season-preview-takeover-defenses.html> ("Ball Corp., which is headquartered in Colorado but incorporated in Indiana, won permission to exclude a declassification proposal filed by the California Public Employees' Retirement System by pointing to a new Indiana law that mandates classified boards unless a company opted out by July 31, 2009. Some activist investors were outraged by the company's decision not to opt out and then push for exclusion, noting that declassification resolutions have earned majority support at Ball four times in the last five years.").

38. Daniel Gilbert, *Oklahoma Board Rule Benefits Chesapeake*, WALL ST. J. (July 11, 2011), <http://online.wsj.com/article/SB10001424052702303763404576418091195332896.html> (discussing Oklahoma's statutory mandate of staggered boards and how the statute helped Chesapeake Energy Corporation defend against shareholder calls for board restructuring); see OKLA. STAT. ANN. tit. 18, § 1027(D) (West 1999 & Supp. 2012).

39. IOWA CODE § 490.806(A) (Supp. 2011).

supermajority vote,<sup>40</sup> and part of the Oklahoma law, which does not allow any opt out at all until 2015.<sup>41</sup> Like the Iowa legislation, some of these laws also protect directors of “nonexempt” public corporations in other ways. For example, under both Massachusetts and Oklahoma law, directors may be removed only for cause,<sup>42</sup> and in Massachusetts, as in Iowa, directors control the size of the board.<sup>43</sup>

### B. *The Policy Arguments*

I was Chair of the Business Law Section of the Iowa State Bar Association (ISBA) when the legislative predecessors of Senate File 325 were introduced in the Iowa General Assembly and became known as the “Casey’s Bill.”<sup>44</sup> Acting on the ISBA’s behalf, I participated in legislative committee meetings that led to enactment of the Casey’s Bill as Senate File 325.

Proponents of the bill included Senator Jack Whitver and Representative Kevin Koester, both of Ankeny (where Casey’s corporate headquarters is located), Casey’s inside and outside counsel, and company lobbyists.<sup>45</sup> Their arguments included the following.<sup>46</sup>

Casey’s had just spent more than half a year and considerable corporate resources to defeat what its management believed was an inadequate and opportunistic acquisition offer from Alimentation.<sup>47</sup> The

40. MASS. GEN. LAWS ANN. ch. 156D, § 8.06(c)(2).

41. OKLA. STAT. ANN. tit. 18, § 1027(H).

42. MASS. GEN. LAWS ANN. ch. 156D, § 8.06(d); OKLA. STAT. ANN. tit. 18, § 1027(H).

43. MASS. GEN. LAWS ANN. ch. 156D, § 8.06(e)(4).

44. *See supra* notes 28–29 (describing the legislative history of the Casey’s Bill).

45. The author met with all of these individuals in various public and private meetings that were held as the Casey’s Bill advanced in the Iowa General Assembly in February 2011.

46. Arguments supporting the bill were not made in writing, but were presented orally at Iowa House and Senate Subcommittee hearings that I attended on February 22, 2011. I memorialized my impressions of these meetings in an e-mail sent to members of the ISBA’s Business Law Council. *See* e-mail from Matthew Doré, ISBA Bus. Council Chair, to members of ISBA Bus. Law Council (Feb. 23, 2011, 17:33 CST) (on file with author).

47. The takeover battle lasted over six months and was very expensive for Casey’s. One of its defensive strategies was to repurchase \$500 million worth of Casey’s stock with borrowed funds in order to raise the company’s share price above Alimentation’s bid. *See Ho, supra* note 19.

new staggered board defense would enable the company to deflect such offers more easily in the future. Although the bill allowed Iowa public companies to implement staggered boards without shareholder input, other states had already taken that path.<sup>48</sup> Moreover, the Iowa Legislature had previously endorsed strong takeover defenses by including a poison pill statute, a nonshareholder constituency statute, and a business combination statute in the IBCA.<sup>49</sup>

The bill's proponents also pointed out that only five Iowa public companies did not have staggered boards and that none of those companies opposed the bill.<sup>50</sup> The only Casey's shareholders who might be adversely affected by a staggered board, they argued, were arbitrageurs who speculate in shares of companies targeted by hostile bidders. Finally—and this was the clincher—the bill's proponents predicted that Iowans would lose jobs if Alimentation were to succeed in a future hostile bid for Casey's.<sup>51</sup> It was contended that the Canadian company would dismantle Casey's Iowa corporate headquarters, stores serving some of Iowa's most remote rural communities, and central Iowa distribution facilities that provide jobs to many of Casey's 23,000 employees.<sup>52</sup>

I and other members of the ISBA's Business Law Section Council opposed the Casey's Bill in its original form, which included not only a mandatory staggered board for public Iowa corporations, but also a prohibition of any articles amendment that would de-stagger the board of such a corporation, and a requirement that a corporation's directors could be removed only for cause.<sup>53</sup> We outlined our objections in a memorandum to ISBA President Frank Carroll, and then publicly circulated that memorandum to legislative committees that were considering the bill.<sup>54</sup> Our objections included the following.

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48. See *supra* note 13 and accompanying text.

49. See DORÉ, *supra* note 22.

50. Memorandum from Casey's Gen. Stores, Inc. to the Iowa Legislature (Feb. 2011) (on file with author). According to this untitled memo circulated by Casey's in the Iowa Legislature, the five companies (out of fifteen public companies chartered in Iowa) were Casey's, EMC Insurance Group, Inc., FBL Financial Group, Inc., Iowa Telecommunications Services, Inc., and West Bancorporation. *Id.*

51. See e-mail from Matthew Doré, *supra* note 46.

52. See *id.*

53. H. Study B. 42, 84th Gen. Assemb., Reg. Sess. (Iowa 2011), available at [http://coolice.legis.state.ia.us/linc/84/external/HSB42\\_Introduced.pdf](http://coolice.legis.state.ia.us/linc/84/external/HSB42_Introduced.pdf).

54. Memorandum from ISBA Bus. Law Section Council to ISBA President Frank Carroll (Feb. 16, 2011) (on file with author).

The goal of the Casey's Bill—giving Iowa public corporations tools to resist hostile takeovers—was not in itself objectionable. But the bill accomplished that end through means that were inconsistent with overarching principles of the IBCA and historical principles of American corporate law that provide shareholders a voice on all fundamental issues of corporate governance.<sup>55</sup> A corporation must ordinarily obtain shareholder consent before taking actions like staggering the board of directors, conclusively limiting the board's size, or insulating directors from removal.<sup>56</sup> Moreover, the bill's prohibition on amendments to the articles of incorporation to de-stagger a nonexempt public corporation's board would effectively foreclose any future proposals from Casey's shareholders on that topic.<sup>57</sup>

We also pointed out that many Iowans own shares of public companies like Casey's, and that a far greater number of Iowa citizens invest in such companies indirectly through mutual and pension funds.<sup>58</sup> The very corporate governance provisions that the Casey's Bill imposed as a matter of law, we noted, were provisions that these institutional investors would likely oppose, both on grounds of director accountability and shareholder value.<sup>59</sup> In addition, Iowa's corporation code, the IBCA, is

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55. See, e.g., IOWA CODE § 490.1020 (2011) (allowing shareholders to amend bylaws and to prevent directors from altering bylaws adopted by shareholders); *id.* § 490.1003 (requiring that amendments to the articles of incorporation be approved by the board of directors *and* shareholders).

56. See, e.g., *supra* notes 25 and 26 for a discussion of shareholders' right to vote when a corporation wishes to stagger its board. The size of the board is changed through amendments to either the corporation's articles or its bylaws (*see* IOWA CODE § 490.803 (2011)) and a for-cause director removal requirement can be imposed only through an amendment to the corporation's articles (*see* IOWA CODE § 490.808 (2011)). Shareholders may vote on either matter. *See supra* note 55.

57. SEC Rule 14a-8(i)(1), 17 C.F.R. § 240.14a-8(i)(1) (2011) (stating that a corporation may exclude shareholder proposals at an annual meeting if the proposal is illegal under state law); *see also* Allen, *supra* note 37 (describing Ball Corporation's successful use of Indiana's mandatory staggered board law to exclude a staggered board shareholder proposal).

58. *See supra* note 26. For example, as of June 30, 2011, the Iowa Public Employee Retirement System (IPERS) reported investments of \$932.3 million in "companies of Iowa interest," which presumably includes Casey's. IPERS COMPREHENSIVE ANNUAL FINANCIAL REPORT 2011, at 54 (2011), *available at* <http://www.ipers.org/publications/misc/pdf/financial/cafr/cafrinvestments.pdf>.

59. See, e.g., *supra* note 27 and accompanying text; *see also* Lucian A. Bebchuk et al., *Staggered Boards and the Wealth of Shareholders: Evidence From Two Natural Experiments* (The Harvard John M. Olin Discussion Paper Series, Discussion Paper No. 697, 2011) [hereinafter Bebchuk et al., *Staggered Boards*], *available at*

patterned on the Model Business Corporation Act (MBCA),<sup>60</sup> which reflects best practices in American corporate law as determined by leading attorneys and corporate law experts across the country. The MBCA does *not* mandate staggered boards or the related provisions included in the Casey's Bill.<sup>61</sup> Finally, we warned that while passage of the Casey's Bill might help Casey's remain headquartered and incorporated in Iowa, the bill might also send a signal of local management protectionism that could discourage other public companies from locating or incorporating in the state.<sup>62</sup>

### C. *The Compromise*

The ISBA's opposition to the Casey's Bill did not prevent the legislation from advancing in the Iowa General Assembly.<sup>63</sup> Nevertheless, several changes requested by the ISBA were incorporated to limit the bill's scope, and, although still opposed to the bill, the ISBA did not lobby against its enactment. The compromise version, introduced in the Iowa General Assembly as Senate File 325 and passed by substantial margins,<sup>64</sup> deleted the "for cause" director removal language and removed the provision explicitly prohibiting charter amendments to de-stagger the board.<sup>65</sup> A sunset provision was also included, so that the staggered board requirement and other IBCA changes effected by Senate File 325 will end December 31, 2014.<sup>66</sup> Nonetheless, any corporation that implements a staggered board as a result of Iowa Code section 490.806A, including Casey's, shall continue to have a staggered board until its articles of

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[http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=1706806](http://papers.ssrn.com/so13/papers.cfm?abstract_id=1706806) (noting this is the most recent of several studies suggesting that staggered board structures depress share values). One Iowa institutional investor, IPERS (*see supra* note 58), *might* have sided with Casey's assuming IPERS owned Casey's stock and the issue had been put to a vote. Iowa law directs that, where consistent with other investing principles, IPERS should invest "in a manner that will enhance the economy of the state, and in particular, *will result in increased employment of residents of the state.*" IOWA CODE § 97B.7A (2011) (emphasis supplied).

60. *See* DORÉ, *supra* note 22, § 1:2.

61. *See* MODEL BUS. CORP. ACT ch. 8 (2010).

62. *See* Memorandum from ISBA Bus. Law Section Council, *supra* note 54.

63. *See supra* notes 28-29 and accompanying text.

64. The vote was 40-10 in the Senate and 96-2 in the House. IOWA S. JOURNAL, 84th Gen. Assemb., 2011 Reg. Sess., at 490 (Iowa 2011); IOWA H. JOURNAL, 84th Gen. Assemb., 2011 Reg. Sess., at 730 (Iowa 2011).

65. *Compare* H. Study B. 42, *supra* note 53, with S. File 325, *supra* note 14.

66. S. File 325 § 9(1) (incorporating a sunset provision, which terminates the legislation on Dec. 31, 2014).

incorporation are amended to change the board structure.<sup>67</sup>

#### IV. CONCLUSION

The reach of Senate File 325 is relatively small, affecting only public corporations incorporated in Iowa.<sup>68</sup> Among this small group, the new law impacts only companies (like Casey's) that chose to take advantage of the law's provisions through board inaction.<sup>69</sup> Nor does it appear that Casey's stock price has suffered from the implementation of a staggered board.<sup>70</sup>

Nonetheless, there are reasons to be concerned. Senate File 325 sacrifices a shareholder's traditional right to participate in fundamental corporate governance decisions, such as determining the corporation's board structure and size.<sup>71</sup> Shareholders are not monolithic, and some might support the new law's board of director provisions. But the law's staggered board mandate runs counter to the known preferences of most institutional investors.<sup>72</sup> These investors are typically the *only* shareholders with a sufficiently large ownership stake in a public corporation to justify active participation in company affairs. As the Delaware Supreme Court recently observed: "Shareholder voting rights are sacrosanct. The fundamental governance right possessed by shareholders is the ability to vote for the directors the shareholder wants to oversee the firm. Without that right, a shareholder would more closely resemble a creditor than an

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67. *Id.* § 9(2) (noting in the repeal provision that a staggered board structure remains "until such time as the articles of incorporation are specifically amended to remove or modify the staggered terms"). Thus, a company like Casey's may retain a staggered board structure until the board approves an amendment to the articles effectively removing or modifying the staggered terms and obtains necessary shareholder approval. *See* IOWA CODE § 490.1003 (2011) (stating that an amendment to the articles of incorporation requires both director and shareholder approval).

68. Memorandum from Casey's Gen. Stores, Inc., *supra* note 50.

69. *See supra* note 33 and accompanying text. In contrast, the new Oklahoma staggered board law is mandatory for almost all public companies through 2014. *See* OKLA. STAT. ANN. tit. 18, § 1027(D) (West 1999 & Supp. 2012).

70. *See Interactive Stock Chart for Casey's General Stores Inc. (CASY)*, BLOOMBERG, <http://www.bloomberg.com/quote/CASY:US/chart> (last visited Apr. 9, 2012) (indicating that as of April 2012, Casey's stock was trading at a higher price relative to the previous five years). Of course, complex studies are required to measure the impact that a staggered board structure has on a firm's share price. *See, e.g.,* Bebchuk et al., *Staggered Boards*, *supra* note 59. No such studies have been conducted for Casey's share price.

71. *See supra* notes 55–57 and accompanying text.

72. *See supra* note 27 and accompanying text.

owner.”<sup>73</sup>

Even more concerning is that Iowa’s move to a mandatory staggered board structure for public corporations gives those companies an additional means to resist hostile takeovers. I am no fan of these transactions, and like many Iowans, I was happy to see Casey’s preserved as a home-grown Iowa corporation. However, as the Delaware courts have long recognized, takeover defenses represent a potential conflict of interest for corporate management.<sup>74</sup>

Corporate managers *may* use these defenses to extract higher share price offers from hostile bidders or to protect the company’s shareholders from coercive offers. But, corporate managers may also resist a takeover in order to save their own jobs, sacrificing shareholder interests in the process. Thus, Delaware courts apply carefully calibrated standards of scrutiny when shareholders challenge the implementation or use of takeover defenses by corporate managers: managers must show that the takeover was a threat to corporate policy and effectiveness and that the defense was a reasonable response.<sup>75</sup> The IBCA already provides corporate management with an ample arsenal of hostile takeover defenses.<sup>76</sup> Understandably anxious to protect a local corporation and local jobs, the substantial majority of Iowa legislators who voted for Senate File 325 were apparently not concerned about the increased conflict of interest risk.<sup>77</sup>

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73. *EMAK Worldwide, Inc. v. Kurz*, No. 512, 2011, 2012 WL 1319771, at \*3 (Del. Apr. 17, 2012).

74. *See, e.g., Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (quoting *Bennett v. Propp*, 187 A.2d 405, 409 (Del. 1962)) (noting the conflict of interests within management when a threat to control is involved).

75. *See, e.g., id.* at 954 (citations omitted); *see also* FRANKLIN A. GEVURTZ, CORPORATION LAW § 7.3 (2d ed. 2010) (surveying caselaw in this subject area).

76. For a discussion of Iowa takeover defenses, *see supra* note 22 and accompanying text. These defenses were so formidable that Alimentation challenged their constitutionality as part of its hostile takeover bid for Casey’s. *See* Defendants’ Amended Answer, Affirmative Defenses and Counterclaims for Declaratory and Injunctive Relief at 18, 50–53, *Casey’s Gen. Stores, Inc. v. Alimentation Couche-Tard Inc.*, C.A. No. 4:10-cv-265 (S.D. Iowa June 18, 2010).

77. *See supra* note 64 for the vote totals on S. File 325. During the floor debate in the Iowa Senate, one participant (Senator Mark Chelgren, who voted against the bill) noted that the bill was not friendly to shareholders. *See* e-mail from James Carney, ISBA Lobbyist, to members of ISBA Bus. Law Council Legislative Committee (Mar. 7, 2011, 15:03 CST) (on file with author). The absence of meaningful or extensive legislative debate concerning business entity laws is not unusual. *See, e.g.,* Allan W. Vestal & Thomas E. Rutledge, *Disappointing Diogenes: The LLC Debate*

Finally, Casey's did not disclose to shareholders the company's role in the enactment of Senate File 325, and that is especially troubling. Because new IBCA section 806A *mandated* a staggered board for the corporation unless its directors decided to opt out,<sup>78</sup> Casey's management was able to accomplish a staggered board without any affirmative action whatsoever. The company then disclosed the amendment of the articles of incorporation to its shareholders in the company's Form 10-K federal securities filing, noting: "[o]ur articles of incorporation recently were amended to stagger the terms of the Company's board of directors, as a result of amendments to the Iowa Business Corporation Act."<sup>79</sup> The disclosure made no mention of the company's role in promoting the amendments.<sup>80</sup>

Of course, Casey's was not legally obligated to make any such disclosure. Ordinarily, federal securities law requires special disclosure to shareholders when corporate managers transact business with their corporation because related party transactions entail conflicts of interest.<sup>81</sup> These disclosure rules *do not* catch the indirect, but potentially significant, conflicts of interest that exist when corporate managers lobby for mandatory staggered board laws or other corporate governance rules that enhance their own job security.<sup>82</sup>

Perhaps that should change. Securities law has long recognized the need for corporations to disclose matters that reflect on management integrity.<sup>83</sup> Moreover, in the wake of *Citizens United v. Federal Election Commission*<sup>84</sup> shareholders are pressing corporations to disclose their

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*That Never Was*, 51 ST. LOUIS U. L.J. 53 (2006) (tracing lack of state legislative debate on LLC statutes).

78. See *supra* notes 31–33 and accompanying text.

79. Casey's Gen. Stores, Inc., Annual Report (Form 10-K) 13 (June 28, 2011), available at <http://www.sec.gov/Archives/edgar/data/726958/000119312511175866/d10k.htm>. The company *did*, however, disclose that the move to a staggered board structure, along with other antitakeover provisions in the IBCA, might enable management to resist a hostile acquisition proposal that could be beneficial to shareholders. *Id.*

80. See *id.*

81. See, e.g., 17 C.F.R. § 229.404 (2011) (requiring disclosures of any transactions in which a related party has a material interest).

82. See *id.*

83. See, e.g., *In re Franchard Corp.*, 42 SEC 163 (1964) (“[The integrity of management] is always a material factor.”).

84. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

political expenditures.<sup>85</sup> Why not require corporations to disclose when they lobby for corporate governance changes that protect incumbent managers? Disclosure might curb abuses of that practice.<sup>86</sup> Consideration of the form and scope of appropriate disclosure is a topic for another day.

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85. See, e.g., Catherine Dunn, *More Shareholders Demanding Corporate Political Transparency*, CORPORATE COUNSEL (Mar. 6, 2012), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202544454767> (“This proxy season, investors have filed 109 proposals on political spending and disclosure—about double the number they filed in this arena three years ago . . .”).

86. LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY 92 (1914) (“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).