

May Corporations Allocate Shares Based On Race, Gender, Or Ethnicity?

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Last December, Bally's Chicago, Inc., a Delaware corporation and indirect subsidiary of Bally's Corporation filed a registration statement with the Securities and Exchange Commission to raise funds in connection with the development and operation of a casino in the City of Chicago (Amendment No. 4 filed on January 29, 2025 is available [here](#)). Bally's Chicago had previously entered into a [Host Community Agreement](#) with the City that, among other things, imposes minority and women ownership requirements. To meet these requirements, the registration statement contemplates a rather unusual plan of distribution in which Bally's Chicago will determine whether investors have attested to qualification criteria (see the "Plan of Distribution" section of the prospectus).

Given that these qualification criteria are based on race, gender and ethnicity, it may be no surprise that they are being challenged as violating the Fourteenth Amendment to the U.S. Constitution and federal civil rights statutes. Last week, U.S. District Court Judge [Franklin U. Valderrama](#) declined to issue a temporary restraining order, ruling that the plaintiff had shown neither a likelihood of success nor irreparable injury. *Glennon v. Johnson*, U.S. Dist. Ct. Case No. 1:25-cv-01057 (N.D. Ill. Jan. 6, 2025).

Perhaps an initial question is whether stockholder qualifications of any sort are permissible under applicable state corporate laws. The California General Corporation Law expressly permits the articles of incorporation of a California corporation to include "special qualifications of persons who may be shareholders". Cal. Corp. Code § 204(a)(3). However, "[i]t would be a rare case in which any such special qualifications were desired, but it may happen occasionally in the case of a close corporation where it is desired to restrict the ownership of the corporation only to persons with certain specified characteristics or possibly in a special type of publicly held or semipublicly held corporation". Harold Marsh, Jr., R. Roy Finkle & Keith Paul Bishop, *Marsh's California Corporation Law* § 5.14 (Fifth Edition, 2025-1 Supp. 2020-2021). The only similar authorization that I could find in the Delaware General Corporation Law is Section 342(b) which pertains to close corporations ("The certificate of incorporation of a close corporation may set forth the qualifications of stockholders, either by specifying classes of persons who shall be entitled to be holders of record of stock of any class, or by specifying classes of persons who shall not be entitled to be holders of stock of any class or both.") I am interested in hearing from any reader who is aware of similar authority with respect to corporations that are not close corporations.

Another question might be whether such a limitation is permissible under state civil rights laws such as California's Unruh Civil Rights Act, Cal. Civ. Code § 51(b) (" All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status *are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.*") (emphasis added).

Finally, there is the question of whether the Securities and Exchange Commission will declare Bally Chicago's registration statement effective. Late last week, one public interest firm had [reportedly](#) urged the SEC to withhold approval of the offering

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