

All Shares Are Equal But With Proxy Access Some Shares Are More Equal Than Others

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In George Orwell's famous satire of Stalin's Soviet Union, *Animal Farm*, the animals started out with seven commandments. The seventh commandment was "All Animals Are Equal". As time passed, three of the original commandments were modified and eventually the seven commandments were whittled down to just one:

"My sight is failing," she [Clover, a mare] said finally. "Even when I was young I could not haveread what was written there. But it appears to me that that wall looks different. Are the Seven Commandments the same as they used to be, Benjamin [a donkey]?" For once Benjamin consented to break his rule, and he read out to her what was written on the wall. There was nothing there now except a single Commandment. It ran:

ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS

Such seems to be the case with shareholder access bylaws. Section 6.01(a) of the Revised Model Business Corporation Act (RMBCA) similarly provides that all shares within a class or series must be equal.

Except to the extent varied as permitted by this section, all shares of a class or series must have terms, including preferences, rights and limitations, that are identical with those of other shares of the same class or series.

Section 6.01(e), which was added in 2002, authorizes distinctions amongst holders of shares:

Any of the terms of shares may vary among holders of the same class or series so long as such variations are expressly set forth in the articles of incorporation.

California's General Corporation Law similarly imposes equality not just on shares within the same class or series but also on the holders of shares:

Except as specified in the articles or in any shareholders' agreement, no distinction shall exist between classes or series of shares or the holders thereof.

Cal. Corp. Code § 203 (emphasis added). [Note that "shareholders' agreement" is a defined term that is applicable only to a statutory close corporation. Cal. Corp. Code § 186.]

All shares of any one class shall have the same voting, conversion and redemption rights and other rights, preferences, privileges and restrictions, unless the class is divided into series. If a class is divided into series, all the shares of any one series shall have the same voting, conversion and redemption rights and other rights, preferences, privileges and restrictions.

Cal. Corp. Code § 400(b).

Proxy access proposals are based on the principle that some shareholders are more equal than others. Not every shareholder is granted access to the proxy – only those who meet specific ownership criteria. While neither California nor the RMBCA prohibits distinctions amongst holders of shares within the same class or series both require that the differential treatment be specified in articles of incorporation.

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