

Advance Notice, Fair Warning: Delaware Court Says Bylaw Provisions Aren't Moving Targets

October 13, 2026

As most public companies prepare for their director nomination window to open between December and February, the Delaware courts have delivered a timely reminder: Advance notice bylaws are important tools for boards facing shareholder activism, but only when their requirements are clear and their enforcement is grounded in the bylaws' text.

In [*ATG Capital Opportunities Fund LP v. Empery Digital, Inc.*](#), the Delaware Court of Chancery held that a board's rejection of an activist nomination notice was both contractually improper where the alleged deficiencies were not required by the company's bylaws and inequitable.

The decision offers practical guidance: Companies should draft advance notice bylaws carefully, apply them fairly and avoid using them to import disclosure obligations the bylaws do not clearly contain.

Background

Empery began as an electric powersports company but, in July 2025, adopted a digital asset treasury strategy focused on acquiring and holding bitcoin. By year-end, the company was struggling, and its shares traded at a discount to the value of its bitcoin holdings.

Activists soon pressed for change. ATG Capital and Tice Brown each prepared for a proxy contest, including by buying additional shares and moving shares into record name. In January 2026, Brown met with Empery leadership, demanded liquidation of the company's bitcoin assets and volunteered that he was "not working with ATG."

On February 26, ATG noticed its intent to nominate a full director slate at Empery's annual meeting, and Brown separately noticed his intent to nominate himself.

The board later expressed concern that ATG was short bitcoin and suspected that ATG and Brown were "acting together." After considering ATG and Brown's alleged relationship, ATG's alleged failure to disclose its bitcoin short, and issues in nominee questionnaires, the nominating and corporate governance committee recommended rejecting the nomination notices, and the board unanimously agreed.

As to ATG, Empery's rejection letter rested on three asserted deficiencies:

- **First**, ATG did not disclose Brown as a "participant" in its solicitation and, in turn, omitted related disclosures about Brown in its nomination notice (the participant deficiency).
- **Second**, ATG did not disclose its short position in a bitcoin exchange-traded fund (ETF), which the board believed put ATG's interests out of line with those of other Empery stockholders (the short position deficiency).
- **Third**, the questionnaires submitted by ATG's nominees contained biographical omissions and inaccuracies regarding their employment histories and outside directorships.

ATG sued in early April, and Empery delayed its annual meeting during the litigation. During the delay, Empery invested significantly in AI data centers and sold half of its remaining bitcoin. ATG amended its complaint to argue that the nomination window should reopen because of the company's strategic pivot.

Chancery's decision

Because the annual meeting was approaching, the Court of Chancery held an expedited trial focused on two questions: whether the board breached Empery's bylaws or its fiduciary duties by rejecting ATG's nomination notice, and whether equity required reopening the nomination window after Empery's AI data center pivot.

The court applied the familiar principle that corporate action affecting the stockholder franchise is "twice tested" – first under the law, then in equity.

The contractual review

Reviewing the rejection as a matter of contract, the court noted that bylaws are part of the binding contract among directors, officers and stockholders. Applying basic contract principles, the court reiterated that clear bylaw terms receive their ordinary meaning, while ambiguities in advance notice bylaws are resolved in favor of stockholder electoral rights.

On the participant deficiency, the court acknowledged the board had reason to suspect ATG and Brown were acting together. But unlike other companies' bylaws, Empery's did not explicitly require disclosure of third-party arrangements or groups under Section 13(d).

The court applied Schedule 14A's "narrow" definition of "participant." Brown did not qualify because ATG did not nominate him, he did not finance ATG's nomination or economically induce ATG to transact in or vote Empery securities and the record showed no participation in or financing of ATG's proxy contest.

Empery argued that its bylaws incorporated proxy statement disclosure requirements under Exchange Act Section 14(a), including disclosures about arrangements between "participants" and others concerning issuer securities, and that Rule 14a-9 required disclosure of ATG's suspected relationship with Brown.

The court did not decide those federal securities law defenses because Empery's letter rejecting ATG's nomination notice did not cite the Section 14(a)-based bylaw provision or Rule 14a-9 as independent grounds for invalidation. Having rejected the notice for failing to disclose Brown as a participant in the rejection letter, defendants could not shift theories at trial.

On the short position deficiency, the court held that Empery's bylaws required disclosure of short positions in the company's stock, not unrelated ETFs, and its nominee questionnaire likewise did not ask about ETF positions. The court found that the proxy rules do not require disclosure of investments in unrelated assets or potential stockholder interest misalignment, and any Rule 14a-9 theory was waived because it was absent from the rejection letter.

The equitable review

After concluding that ATG's notice complied with the bylaws, the court held that the board's rejection also failed equitable review. Because the board took defensive action affecting the stockholder franchise, enhanced scrutiny applied. The directors therefore had to show a real, nonpretextual threat to a corporate interest or the achievement of a significant corporate benefit, that their motivations were proper and a reasonable, nonpreclusive and noncoercive response to the threat posed. The court held they did not meet that burden.

The court credited that the board had reason to worry ATG might seek control and liquidate Empery's bitcoin. But that concern did not permit the board to prevent stockholders from voting on ATG's plans. Vice Chancellor Lori Will observed that Delaware law does not allow directors to block a proxy contest simply because they believe an insurgent's strategy is unwise.

The court found the rejection disproportionate and preclusive. The board could have made its case to stockholders, including by highlighting its concerns about ATG's plans. Instead, the rejection kept ATG's slate off the ballot and assured an uncontested election.

Reopening the nomination window

Because the court invalidated the rejection of ATG's nomination notice, Empery stockholders would have a choice between the incumbent board and ATG's nominees. Accordingly, the court held that Empery's pivot to AI data centers did not manipulate the corporate machinery or jeopardize electoral fairness in a manner warranting reopening the nomination window. The court concluded that ATG had not established that the board breached its fiduciary duties by declining to reopen the nomination window.

Delaware Supreme Court affirmed

The Delaware Supreme Court affirmed the judgment on October 8, expressly upholding the Court of Chancery's interpretation of "participant" and its conclusion that Empery waived disclosure theories raised only late in the expedited proceedings. Empery's stockholder meeting is scheduled for October 14, with ATG's nominees on the ballot.

Key takeaways

- **Draft bylaws with precision.** Delaware courts will enforce clear advance notice bylaws, but they will not supply missing disclosure obligations. Stockholders are not expected to deduce disclosure requirements or “guess” what a board might interpret bylaws to require. Boards should consult with counsel to ensure that advance notice bylaws are clear, appropriately comprehensive and reasonably constructed so as not to inequitably interfere with the stockholder franchise.
- **Use advance notice bylaws to inform stockholders, not to displace them.** Advance notice bylaws help boards evaluate nominations and communicate with stockholders. They do not authorize incumbents to exclude nominees because they disagree with an activist’s strategy, incentives or expected business plan. Ultimately, advance notice bylaws cannot be misused to thwart stockholder choice or entrench existing directors.
- **Make rejection decisions disciplined and record-based.** Rejecting a nomination notice is a consequential step. It involves legal, reputational and strategic considerations. Boards should work closely with counsel to identify material deficiencies tethered to the bylaws’ plain language, document the specific grounds in the deficiency letter and avoid shifting theories later. In providing a rejection or deficiency letter to an activist, boards do well to provide a letter that is based in fact, even handed and prepared in good faith. As the court emphasized, “Advance notice bylaws are not moving targets.”

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