



## FAQ on Proposed Delaware Bill Restricting Fee-Shifting Bylaws

In early March, the Delaware State Bar Association's (DSBA) Corporation Law Council issued proposed legislation to restrict the ability of corporations to adopt fee-shifting bylaws or charter provisions.

*What prompted this proposed legislation?*

On May 8 of last year, the Delaware Supreme Court ruled on [ATP Tour, Inc. v. Deutscher Tennis Bund](#), which permitted a membership corporation to enforce a "fee-shifting" bylaw. The bylaw provided that any member who brought a lawsuit against the corporation or its members or directors would be liable to pay those defendants' legal fees if the member was not fully successful in the lawsuit. Because the Delaware Code does not have separate provisions for stock and member corporations, some corporate law firms quickly sent memos to their corporate clients, alerting them to the ATP decision and suggesting that they consider adopting fee-shifting provisions. Since the case was decided, more than 30 public corporations have adopted fee shifting provisions, and six corporations have gone public with such provisions.

*Why CII and many investors generally oppose fee-shifting provisions?*

Fee-shifting bylaws create prohibitively high hurdles for shareholders to pursue litigation for meritorious claims. Shareowner suits are generally brought by one or more shareowners on behalf of many shareowners. Very few shareowners would be willing to risk paying a corporation's legal fees on behalf of other shareowners. Therefore, fee-shifting bylaws severely restrict shareholders' ability to file suit against corporations. As a result, the accountability of corporations to shareowners is diminished and corporate officials who breach their fiduciary duties are insulated from meritorious legal challenges. CII has expressed these views in numerous [letters](#) to Delaware legislators, the chair of the Delaware Bar and proxy advisory firms.

*How would the proposed legislation address investor concerns about fee-shifting provisions?*

The proposed legislation would significantly narrow the application of the ATP decision by adding language to the Delaware Code invalidating provisions in certificates of incorporation or bylaws of stock corporations that impose liability upon a shareowner for the attorneys' fees or expenses of the corporation.

*What is the process and timing of the proposed legislation?*

The proposed legislation is subject to approval by the DSBA Corporation Law Section and the Executive Committee of the DSBA. Assuming those approvals occur in the coming weeks, the proposed legislation is expected to be considered by the Delaware State Legislature as early as mid-April.

*How and when might investors express their views on the proposed legislation?*

Interested investors are encouraged to express their views on the proposed legislation when it comes before the Delaware State Legislature. CII currently plans on writing a letter to all 21 members of the Delaware State Senate at that time. That letter will be available on the Council's Web site. We encourage other interested investors to weigh in on this important issue.