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Simply Because a Provision is in the Charter or Bylaws Does Not Necessarily Mean it is Enforceable

March 8, 2016

The recent Delaware case of *In re Vaalco Energy, Inc. Stockholder Litigation* (December 21, 2015) is a reminder to practitioners that provisions in the certificate of incorporation (or charter) and bylaws of a Delaware corporation are enforceable only to the extent permissible by the Delaware General Corporation Law (the DGCL).

In the *Vaalco Energy* case, while Vaalco, the target corporation in question, had earlier amended its charter to de-stagger its board of directors so that the board was a single class, Vaalco had not removed from its charter a residual provision that prohibited stockholders from removing the directors other than for cause. As part of a consent solicitation, an insurgent group sued and claimed that such removal provision was not enforceable because DGCL Section 141(k) permits stockholders to remove directors with or without cause, unless the corporation in question either has a staggered board or cumulative voting. The Delaware Court of Chancery agreed, and held that Vaalco's removal for cause provision was unenforceable because it ran afoul of Section 141(k).

The principle in *Vaalco Energy* is noticeable in other charter and bylaw provisions as well. For example, there are Delaware corporations that have bylaw provisions (but not charter provisions) that purport to eliminate the right of stockholders to act by written consent. However, DGCL Section 228 expressly requires that any such restriction be contained in a company's charter and, therefore, any such restriction contained in the

bylaws is unenforceable.

Although *Vaalco Energy* is a Delaware decision, it provides guidance as to how states outside Delaware can be expected to interpret charter and bylaw provisions in light of their respective state corporate statutes.

Corporations are creatures of statute, with their existence, rights, and restrictions being derived from the applicable corporate statute of their state of incorporation. Accordingly, other state courts are likely to rule in a manner similar to the Chancery Court's holding in *Vaalco Energy* when considering charter or bylaw provisions that on their face contravene the state corporate statute at issue.

Vaalco Energy is a reaffirmation of the precept that provisions in the charter or bylaws are only as enforceable as the state corporate statute in question permits.

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