

Client Alert

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DE Court Invalidates Supermajority Bylaw Requirement for Director Removal

The Delaware Court of Chancery recently invalidated a bylaw requiring a supermajority vote of the stockholders to remove a director. The court held that such a provision is inconsistent with the Delaware General Corporation Law, which states that director removal requires approval from the holders of a majority of the shares entitled to vote at an election of directors. The decision is an important reminder for corporations to periodically review their organizational documents and takeover defenses.

Frechter v. Zier, C.A. No. 12038-VCG, mem. op. (Del. Ch. Jan. 24, 2017), involved a stockholder challenge to a bylaw, which provided that the annually elected directors could only be removed by a vote of “not less than 66 and two-thirds percent...of the voting power of all outstanding shares” of the company. The court agreed with the plaintiff that the bylaw was inconsistent with Section 141(k) of the Delaware General Corporation Law (the DGCL), which provides, in pertinent part, that “[a]ny director... may be removed, with or without cause, by the holders of a *majority* of the shares then entitled to vote at an election of directors” (emphasis added). The court noted that Section 102(b)(4) of the DGCL permits a certificate of incorporation to impose higher voting requirements for corporate actions,¹ but this case involved a bylaw and thus was not authorized by that provision.

Corporations should also consider the Court of Chancery’s ruling in *In re Vaalco Energy, Inc. S’holder Litig.*, Consol. C.A. No. 11775-VCL (Del. Ch. Dec. 21, 2015), where the court invalidated a provision in a certificate of incorporation purporting to limit removal of an annually elected board to “cause.” The court held that under the DGCL, removal can be limited to cause only in the case of a staggered board.

Frechter and *Vaalco* are important reminders for corporations to periodically review their organizational documents and takeover defenses for legal compliance and for updates based on evolving practices.

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¹ Specifically, Section 102(b)(4) of the DGCL authorizes a certificate of incorporation to include “[p]rovisions requiring for any corporate action, the vote of a larger portion of the stock or of any class or series thereof, or of any other securities having voting power, or a larger number of the directors, than is required by this chapter.”