

January 21, 2016

**Removing Directors under Maryland Law**

In a bench decision last month in *In re VAALCO Energy, Inc. S'holder Litig.*, C.A. No. 11775-VCL (Dec. 21, 2015), Vice Chancellor Laster held that a director on a non-classified board of a Delaware corporation may be removed with or without cause and that a provision of the certificate of incorporation or bylaws is not effective to override the statute. We have been receiving questions concerning the law in Maryland in this regard.

Section 141(k) of the Delaware General Corporation Law (“DGCL”) provides that a director may be removed with or without cause with only two exceptions: (a) a classified board, in which case a director may be removed only for cause unless the certificate of incorporation provides otherwise; and (b) special procedural provisions for cumulative voting. (There is also a separate provision for directors elected by a particular class of stockholders.) As Vice Chancellor Laster noted, the exception in Section 141(k) for the certificate of incorporation providing “otherwise” applies only to the standard of removal for directors serving on classified boards. Thus, the Vice Chancellor’s decision, which was based on his plain reading of the language of Section 141(k) and not a policy-based decision, was entirely unsurprising. Indeed, it is hard to see how he could have reached any other result. The case has settled and therefore the decision will not be appealed.

The statutory framework of the Maryland General Corporation Law (“MGCL”) for removing directors is much different. Section 2-406(a) of the MGCL provides that stockholders of a Maryland corporation may remove any director with or without cause by a majority of all the votes entitled to be cast except “[a]s otherwise provided in the charter of the corporation . . . .” So, unlike the DGCL, the “as otherwise provided by the charter” language in the MGCL applies to the stockholders’ right to remove directors on *both* classified and non-classified boards.

It is also important to note that a provision requiring cause for removal of a director must be in the charter, not the bylaws, and that addition of such a provision to an existing Maryland corporation’s charter would require stockholder approval.

As always, we and our colleagues are available at any time to discuss these or other Maryland law matters.

Jim Hanks  
Mike Schiffer  
Carmen Fonda

*This memorandum is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations for which Venable LLP has accepted an engagement as counsel.*