

# Client Alert

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## Delaware Chancery Court Confirms Right of Stockholders to Remove Directors Without Cause in the Recent *In re Vaalco* Ruling

In a recent decision by the Delaware Court of Chancery in *In re Vaalco Energy S'holder Litig.*, Vice Chancellor Laster made clear that, subject to certain exceptions, corporations cannot restrict the right of stockholders to remove directors without cause under Section 141(k) of the Delaware General Corporation Law (“Section 141(k)”) by maintaining restrictive language in their charters and bylaws. This ruling confirms the traditional interpretation that Section 141(k) provides stockholders with an absolute right to remove directors, unless a company has cumulative voting in the election of directors or a classified board, and provides clear guidance for corporations and stockholders who may be interested in seeking change.

### ***Consent Solicitation by Group 42 and Bradley Radoff***

In early November 2015, a stockholder group consisting of Group 42, Inc. and Bradley Radoff (and affiliated entities) submitted a notice to Vaalco Energy Inc. (“Vaalco”) in order to solicit written consents from stockholders to remove and replace a majority of the board without cause. Vaalco rejected the consent solicitation as “null and void” on the grounds that its charter and bylaws contained provisions that limited stockholders’ ability to remove directors to situations where cause for the removal can be established.

Such provisions typically appear in the charters of companies that have classified boards. Vaalco previously had a classified board; however, following an overwhelming vote by stockholders at its 2009 annual meeting, Vaalco amended its charter to declassify the board, but failed to remove the language requiring cause for the removal of directors.

The stockholder group challenged Vaalco’s position and argued that Section 141(k) unambiguously gave Vaalco stockholders the right to remove directors without cause and continued with its consent solicitation. Vaalco filed a consent revocation statement with the SEC and also called a special meeting of stockholders to have them vote to remove the for-cause

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language from the charter — a vote that would have required a supermajority approval.

### *Delaware Court of Chancery Case*

In early December 2015, in the midst of the contentious consent solicitation, two other stockholders filed complaints against Vaalco in the Delaware Court of Chancery. The plaintiffs argued that, in addition to public policy and legislative intent, the language in Section 141(k) was clear in giving stockholders the right to remove directors without cause subject to the enumerated exceptions — cumulative voting or a classified board — neither of which were applicable. The plaintiffs argued that the provisions in Vaalco’s governing documents restricting and preventing stockholders from removing directors without cause were invalid under Delaware law.

Vaalco characterized the issue as one of first impression for Delaware courts. It argued that Section 141(k) establishes merely a non-mandatory default rule, one that does not preclude a company from adopting restrictions against removal for cause despite not having a classified board, and since the provisions are not contrary to public policy, they should not be invalidated. Vaalco also advanced the argument that when the stockholders voted in 2009 to declassify the board, they were also voting to preserve the for-cause removal requirement.

Vice Chancellor Laster rejected Vaalco’s various arguments or its reading of Section 141(k) and granted partial summary judgment to the plaintiffs, holding that provisions “which provide for only for-cause removal in the context of a nonclassified board, conflict with Section 141(k) of the Delaware General Corporation Law and are, therefore, invalid.” The court’s ruling clearly confirmed the conventional view that Section 141(k) provides stockholders the right to remove directors with or without cause, subject to the specific statutory exceptions, and nothing to the contrary in a company’s governing documents can strip stockholders of this right.

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The court did not shy away from acknowledging the impact its ruling may have on Delaware companies. In its brief, Vaalco argued that there are potentially 175 other companies with non-classified boards who have governing documents containing such for-cause-only requirement and that the plaintiffs are seeking to have the court rewrite the governing documents of all these companies. Vice Chancellor Laster disagreed with the validity of this argument, saying “the idea that 175 other companies might have wacky provisions isn’t a good argument for validating your provision,” and further stated that “if people have to go and fix things, so be it.”

Vaalco has since settled with Group 42 and Bradley Radoff and has canceled its previously scheduled special meeting.

***Implications***

The Delaware Chancery Court ruling confirms the traditional interpretation and strict reading of Section 141(k) that stockholders have the right to remove directors without cause except where there is a classified board or cumulative voting. The ruling provides clarity on the invalidity of charter provisions restricting the statutory right to remove directors and reinforces an important right for stockholders who wish to effect change at companies between annual meetings.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys listed below if you have any questions regarding this decision or its potential impact.

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