ESSAY

ACCOUNTABILITY DOES NOT REQUIRE CONSTANT VULNERABILITY: A SIMPLE BUT NECESSARY UPDATE TO THE DELAWARE GENERAL CORPORATION LAW

TREVOR S. NORWITZ*

Delaware is the most important jurisdiction in the United States for corporate law. More than half of all public corporations are incorporated in the First State. The interrelated strengths that explain this extraordinary concentration are well known. Its corporation statutes, primarily the Delaware General Corporation Law (or DGCL), are highly regarded for their common sense approach to business governance and their enabling posture, eschewing bright line mandates where possible so as to allow the various constituencies making up business entities to structure them to best suits their needs and objectives. Delaware's judiciary is renowned for its sophistication in corporate law, with judges capable of efficiently resolving business disputes, and dispensing equity while combining doctrinal integrity with business savvy. Likewise, the state's legislature is highly attuned to matters of corporate law (understandably, given the legal industry's significance for the state's budget and prestige), well advised by a council of leading practitioners and experts, and willing to move efficiently to address issues needing their attention. These factors combine to create a "network effect:" more companies incorporate in Delaware because there are more companies incorporated in Delaware. This effect in turn creates a very strong case-flow in the court system, fashioning a uniquely rich body of legal precedent and creating the possibility of rapidly addressing evolving issues (and occasionally judgments that require reconsideration).[1] In short, Delaware is at the top of the class in corporate law. But even a leader can sometimes be overtaken by events and have to play catch-up.

Today, in most states (generally those that follow the Model Business Corporation Act, or MBCA), public corporations are able to

---

*Trevor S. Norwitz is a partner in the Corporate Department at Wachtell, Lipton, Rosen & Katz where he focuses primarily on mergers and acquisitions, corporate governance and securities law matters. He is also an adjunct lecturer at Columbia Law School. Contact information: 51 West 52nd Street, New York, NY 10019, 212.403.1333, TSNorwitz@wlrk.com.

[1] *See* Jeffrey M. Gorris, Lawrence A. Hamermesh, & Leo E. Strine, Jr., *Delaware Corporate Law And The Model Business Corporation Act: A Study In Symbiosis,* 74 LAW & CONTEMP. PROBS. 107, 115-16, n. 53 (2011). The authors discuss the appeal of Delaware as a jurisdiction for incorporation and observe that the state's willingness to keep its corporate statute up-to-date and engage contemporary issues in corporate law drive its appeal.

structure their governance affairs so that they are vulnerable to a hostile takeover bid; or a hostile activist campaign, just once per year—at the annual shareholders meeting. Of course threats to the corporation from a raider or activist can emerge at any time and that can be a serious distraction, but the most worrisome vulnerability—the one that commands attention at the highest levels of the corporation—is to an actual change of control, the replacement of part or all of the corporation's board of directors. In most states, public corporations can stipulate in their charter documents (which must, of course, be approved by shareholders, whether before or after the corporation goes public) that directors can only be removed and replaced without cause at the annual meeting. Almost all public corporations incorporated in Delaware today, however, are by law not able to limit this vulnerability to the annual meeting. Instead, they are required by the DGCL to be continuously vulnerable to a change in control in a "California-style" recall election at special meetings and in some cases even more sudden changes in corporate control through consent solicitations.[2] This temporally protracted vulnerability means that Delaware corporations have to be constantly on high alert for external threats to their corporate mission, distracting directors and managers from the work of maximizing shareholder value, and exacerbating the already intense pressure on them to focus on short-term goals rather than the long-term success of their organization.

This threat arises because, as highlighted the recent decision of the Delaware Court of Chancery, *In re Vaalco Energy Shareholder Litigation,*[3] Section 141(k) of the DGCL[4] provides that directors may be

---

[2]In a consent solicitation, no shareholder meeting is called but the shareholder decision, including, for example, a decision to remove and replace directors, is taken by the written vote of the number of shares required to take the action, typically a bare majority of the outstanding shares. Although considered a "fundamental shareholder right" by shareholder activist groups, in a situation where the shareholders have the right to call special meetings, it is questionable whether action by written consent provides any significant shareholder benefit in the case of a widely-held public corporation, although it clearly makes a company much more vulnerable to opportunistic takeover bids. *See* Trevor Norwitz, *Institutional Investors Should Not Facilitate Corporate "Ambushes,"* THE CLS BLUE SKY BLOG (Mar. 15, 2013), http://tinyurl.com/clsbluesky-norwitz.

[3]*In re* Vaalco Energy, Inc. S'holder Litig., No. 11775 VCL (Del Ch. Dec. 21, 2015) (Hon. J. Travis Laster, Vice Chancellor, ruling orally on cross motions for summary judgment).

[4]DGCL Section 141(k) provides in relevant part: "Any director or the entire board of directors 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, except as follows: (1) Unless the certificate of incorporation otherwise provides, in the case of a corporation whose board is classified as provided in subsection (d) of this section, stockholders may effect such removal only for

removed at any time by the shareholders, with only two exceptions. The first exception applies to corporations that allow cumulative voting in director elections, which, for good reasons, is very rare in public corporations.[5] The second exception until recently largely swallowed the rule: for corporations that have classified boards, typically, boards where one third of the directors are elected each year for staggered three-year terms, shareholders may only remove directors for cause. "Cause" is a high standard but it basically requires that the director have done something wrong warranting his or her removal. This exception is necessary because it allows the classified board to fulfill its purpose of ensuring a degree or continuity and stability for the corporation by ensuring that control of the board of directors could not change against the will of a majority of the board at a single shareholder meeting.[6] In theory, this exception allows Delaware corporations, with shareholder approval, to arrange their affairs so that directors can only be replaced without cause by being voted out of office at the annual meeting.[7] Until fairly recently, most Delaware corporations had availed themselves of this classified board exception and consequently benefited from the stability it provided, but as a practical matter this possibility is increasingly unavailable.

Fifteen years ago, a majority of S&P 500 corporations, most of which are incorporated in Delaware, had staggered boards; accordingly, directors of these corporations were not subject to removal without cause. As a result of relentless shareholder activism, less than 10% of S&P 500 corporations now have staggered boards and the number continues to decline.[8] An obvious implication of this decline of the staggered board is that American corporations, incorporated in Delaware and elsewhere, are now more vulnerable to opportunistic hostile takeover bids and activist campaigns than ever before, because a raider or activist would not have to wait through two annual election cycles to gain control of the board. A secondary effect of this demise of the staggered board is

---

cause; or (2) In the case of a corporation having cumulative voting . . ." Del. Code tit. 8, § 141.

[5]*See, e.g.*, John F. Coyle, *Altering Rules, Cumulative Voting, and Venture Capital*, THE CLS BLUE SKY BLOG (Mar. 7, 2016), http://tinyurl.com/clsbluesky-coyle.

[6]Some legal systems, like Canada and several European jurisdictions, afford classified boards but still allow shareholders to remove directors at will. This reflects a narrower purpose for the classified board, namely to provide a degree of continuity as long as there is no change in control.

[7]In response to the *Vaalco* holding, several Delaware corporations have already moved to replace their "for cause" removal provisions with a no-cause removal bylaw provision. *E.g. Level 3 Communications Inc. Form 8-K*, 2016 WL 00777042 (Mar. 1, 2016).

[8]*Classified Boards Year Over Year*, SHARK REPELLENT, https://www.sharkrepellent.net/.

that such a corporation also loses its exception in Section 141(k), making the corporation vulnerable to a director recall election at any time.

Now that shareholder activists and institutional investors have effectively eliminated staggered boards from large American corporations (a campaign that may well prove myopic and damaging to individual corporations and the broader economy),[9] the question arises whether corporations should be constantly vulnerable to recall elections, which are most likely to advance takeover bids and activist campaigns, or should have a measure of stability for most of the business year and only face the prospect of an upheaval of that degree at their annual meeting. Reasonable people may have different views on that question, but it is difficult to imagine a sensible argument for the position that even if a corporation (acting through its board of directors) and its shareholders wish to structure its affairs so that they are not constantly at risk, the law should deny them the ability to do so. Yet that is exactly what the current Delaware statute provides.

A simple amendment to DGCL Section 141(k) allowing corporations to provide in their charters that directors may not be removed without cause—by inserting at the start of that subsection the words "Unless the certificate of incorporation otherwise provides"—would remedy this untenable situation. While this amendment may seem like a significant change to a law that has been in place for quite some time, in fact, as described above, it is the recently changed circumstances that necessitate this update to the statute.

---

[9] *See, e.g.*, Martijn Cremers, et al., *Staggered Board and Firm Value, Revisited* (July 14, 2014), http://tinyurl.com/cremers-ssrn (finding that in the "time series" firm value *improves* after firms stagger, and *declines* after firms destagger, with the effects stronger at firms seemingly more focused on the long-term); Martin Lipton & Marshall Shaffer, *Staggered Boards, Long-Term Investments and Long-Term Firm Value*, THE CLS BLUE SKY BLOG (Dec. 3, 2015), http://tinyurl.com/lipton-ltv (surveying studies that conclude that staggered boards result in long-term value creation); Martin Lipton, et al., *Harvard's Shareholder Rights Project is Wrong*, HARV. LAW SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Mar. 23, 2012), http://tinyurl.com/lipton-harvard ("There is no persuasive evidence that declassifying boards enhance stockholder value over the long-term, and it is our experience that the absence of a staggered board makes it significantly harder for a public company to fend off an inadequate, opportunistic takeover bid, and is harmful to companies that focus on long-term value creation."); Martin Lipton, et al., *"Just Say No" – The Long-Term Value of the Poison Pill*, HARV. LAW SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Dec. 18, 2015), http://tinyurl.com/lipton-ltv-pp.

The Proposed Revision Would Help Delaware Attract Newly Public Corporations

Amending Section 141(k) is advisable if Delaware is to remain the jurisdiction of choice for newly public corporations, that is, corporations going public either by way of a public stock offering or as a result of a spin off or other separation from their parent corporation. Because the shareholders of a newly public entity approve its charter before the spin-off or IPO, the parent corporation doing the spin-off, or the entrepreneurs and early investors promoting the IPO, are able to dictate what the charter documents say, subject to legal limits and what the underwriters tell them about the marketing impact on the stock of any defensive provisions they wish to include. For many years, newly public corporations typically included robust takeover defenses, including a staggered board, although more recently these have been moderated, often having the staggered board last only for a transitional period, so as to limit the young company's exposure to outside threats while it found its feet.

In the last year or two, the shareholder activist community has begun to apply direct pressure on newly public companies, their sponsors and directors to avoid staggered boards. Activists frequently pressure newly formed companies with staggered boards to include short sunset periods after which all directors are to be annually elected.[10] These investors assert that they want greater accountability; it is by no means

[10]*See* Noam Noked, *Activism and the Move Toward Annual Director Elections*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Jan. 15, 2012), http://tinyurl.com/noked-activism. Various shareholder activists, including Carl Icahn, have aggressively sought to, and achieved, non-staggered boards at various companies, particularly spin-off entities. *See, e.g.*, Schedule 13D, Exhibit 1, Letter Agreement between the Icahn Group and Gannet Co., Inc. (Mar. 1, 2015) (providing that a spun off entity from Gannet would have annual director elections, not a staggered board); Press Release, Carl Icahn (Jan. 21, 2015), http://tinyurl.com/icahn-ebay (announcing that Paypal, a spin-off of eBay, would not have a staggered board); William Alden, *Manitowoc to Split in Two after Pressure from Activists*, DEALBOOK (Jan. 29, 2015), http://tinyurl.com/dealbook-manitowoc (describing that Manitowoc would be split in two, and each entity would provide for a non-staggered board). The Council of Institutional Investors recently called on companies going public to have "shareholder-friendly" governance, including a "one share, one vote" structure, simple majority vote requirements, independent board leadership and annual elections for board directors." *See* Press Release, Council of Institutional Investors, Institutional Investors Call on IPO Companies to Adopt Equity Structures, Governance Provisions that Protect Shareholders (Mar. 23, 2016), http://tinyurl.com/cii-ipo-position. Similarly, Institutional Shareholder Services has expressed that it will generally issue adverse recommendations for directors at the meeting following an IPO if a pre-IPO board amends the company's bylaws or charter prior to or in connection with the IPO to diminish shareholder rights. *See* ISS Proxy Voting Guidelines Updates, 2016 Benchmark Policy Recommendations.

clear that in addition to accountability on an annual basis, most of them also expect an immediate recall right, which gives rise to the constant vulnerability concern described above. But under current Delaware law, these two have to go hand-in-hand: you cannot have annual accountability without constant vulnerability. This inefficient coupling need not be the case.

In stark contrast to the DGCL, the MBCA and many states that follow it, sometimes called "Model Act" states, do permit corporations to provide in their charters that directors may only be removed for cause. As emerging corporations are assessing how they are best able to position themselves to be able to focus on their long-term objectives in the current activist-driven environment, Model Act states may become more attractive as incorporation jurisdictions if they offer greater ability for company founders and investors to structure their governance arrangements, while Delaware insists on corporate charters that render corporations constantly vulnerable to destabilization. That would be regrettable as Delaware has so much to offer emerging companies as a preferred jurisdiction of incorporation. In addition, if corporation sponsors are not permitted to protect themselves in their certificates of incorporation against the threat of constant recall elections, they may feel compelled to adopt legal but less shareholder-friendly measures to ensure that they will be able to operate with a long-term focus, such as dual-class stock structures. Allowing corporations to opt out of recall elections in their charters is a more measured, tailored and appropriate way to achieve the right balance between the competing imperatives of accountability and stability. The shareholders should be able to replace directors whom they feel are not doing their job well, but corporations should be able to pursue their long-term objectives without the constant threat of recall elections.

The Proposed Revision May Benefit Existing Delaware Public Corporations

Modifying Section 141(k) should also benefit existing Delaware public corporations. The modification would allow shareholders to approve charter amendments adopting a for-cause removal provision. Even though this may seem to go against the recent corporate governance tide, several responsible institutional investors have recently been vocally expressing concerns about short-termism that has seized much of corporate America. These institutions, including BlackRock, Vanguard and State Street[11] would likely see the damage to value wrought by the constant vigilance currently required of Delaware corporations under the present 141(k) provisions. It is possible that they may favor annual accountability over continuous vulnerability.

This proposed revision would also unequivocally eliminate a potential ambiguity in the DGCL, which is presently attracting the attention of the Delaware plaintiffs' bar. Although most Delaware corporations are silent on the question of director removal (and therefore are governed by the default rule that directors can be removed at any time without cause), some do have removal provisions in their charters, permitting removal but requiring a supermajority vote of shareholders to achieve it. It has historically been understood that supermajority provisions in certificates of incorporation are specifically validated in DGCL Section 102(b)(4), and therefore binding on shareholders. Section 102(b)(4) provides, in relevant part, that "the certificate of incorporation may also contain . . . [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[.]"[12]

Perhaps, emboldened by Court of Chancery decision in *Vaalco*, some members of the Delaware Bar are currently litigating the legality of the supermajority vote requirement given the language in Section 141(k) specifying that "[a]ny director or the entire board of directors 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*."[13] This argument seems unpersuasive because of the express authorization for supermajority voting provisions in Section 102(b)(1), but the inclusion for the words "Unless the certificate of incorporation otherwise provides," at the start of Section 141(k) would also eliminate any possible ambiguity on that score.

---

[11] *See* Letter from Larry Fink, Chairman & Chief Exec. Officer, BlackRock (Feb.1, 2016) ("Over the past several years, I have written to the CEOS of leading companies urging resistance to the powerful forces of short-termism afflicting corporate behavior. Reducing these pressures and working instead to invest in long-term growth remains an issue of paramount importance . . ."), *available at* http://tinyurl.com/fink-letter.

[12] Del. Code tit. 8, § 102.

[13] Del. Code tit. 8, § 141 (emphasis added).

Corporations with For-Cause-Only Director Removal Charter Provisions

The shareholders of many Delaware corporations have in fact already spoken on the issue of recall elections and approved charters that do not allow removal without cause in between annual meetings. In some cases, those approvals were part of the classified board provision and in others they were free-standing for-cause-only ("FCO") director removal provisions in the corporate charter. Notwithstanding the expression of support by shareholders for those FCO provisions, in cases where a corporation subsequently removed its staggered board (usually under shareholder pressure) but retained in its charter the FCO removal clause, the validity of that clause was in serious doubt on the basis of the wording of DGCL Section 141(k).

Uncertainty on this score has now been largely removed as a result of the *Vaalco* decision. Based on a plain reading of Section 141(k), Vice Chancellor Laster held in *Vaalco* that a provision in the certificate of incorporation of a corporation with no classified board that purported to deny shareholders the right to remove directors without cause was *per se* invalid. Although this decision was not very surprising in light of the wording of Section 141(k), it shone a spotlight on the recall election risk to which Delaware corporations are, almost uniquely, required to be subject. The case also brought to light a curious ambiguity in the Delaware statute. DGCL Section 141(d) permits corporations to classify their board into one, two or three classes, raising the possibility that a corporation may have a "classified" board with only one class.[14] Although the Vice Chancellor found that this was not in fact done in *Vaalco*, and noted in dictum that he thought it was not the better interpretation of the statute,[15] it remains a possibility that a corporation might explicitly determine that it has a classified board with a single class of directors for purposes of Section 141(k).

It is unlikely that many public corporations that have already destaggered their board could present a record of having made this determination of classification into a single class, and this might be politically difficult to achieve for a public corporation that is

---

[14]Del. Code tit. 8, § 141. Although this may seem somewhat contrived, some meaning should be ascribed to the wording of the statute, especially given that, for example, Section 8.08 of the Model Business Corporation Act explicitly allows corporations to classify their boards into only two or three classes.

[15]*In re* Vaalco Energy, Inc. S'holder Litig., No. 11775 VCL (Del Ch. Dec. 21, 2015), at 9.

destaggering its board in the future. This approach, however, may well be feasible in the case of a newly public (IPO or spin-off) corporation, which might specify in its charter, for example, that their board is to be classified into three classes for two years, two classes for the next year, and one class thereafter, and that directors may not be removed except for cause. Litigation would of course ensue, and it is not entirely certain how the Delaware courts would rule. Allowing corporations to take this approach would be true to the literal wording of the statute, more consistent with the generally enabling approach of the DGCL, and would be very defensible as a policy matter, but it would be a most peculiar way to arrive at the appropriate outcome. The amendment to Section 141(k) proposed in this article would unambiguously embrace this sensible result.

Although the Delaware Supreme Court has not specifically ruled on the issue, in light of *Vaalco*, many assume that FCO director removal provisions that remain in charters of Delaware corporations today are invalid.[16] As part of adopting the proposed amendment to Section 141(k), which would allow such provisions on a prospective basis, the Delaware legislature could specify that such provisions that already exist in corporate charters are valid. This would be more politically sensitive than simply allowing such provisions prospectively, because it would amount to retroactively validating provisions that under the words of the statute as interpreted by the Court of Chancery are invalid. This position is defensible however, both on the public policy grounds described above, and also on the basis of the contractual relationship between a corporation and its shareholders as expressed by its certificate of incorporation and bylaws, and the legitimate expectations of all parties as a result of those instruments. For those corporations with freestanding FCO removal provisions in their charters, those provisions were specifically approved by shareholders,[17] and at the time of their inclusion

[16] *See, e.g.*, Jason M. Halper, et al., *But Everybody's Doing It: Delaware Chancery Court Invalidates VAALCO's "Wacky" Charter and Bylaws Provisions Despite Use by Other Companies*, ORRICK (Jan. 5, 2016), http://tinyurl.com/orrick-blog; Paul Srivano & Sarah Young, *Simply Because a Provision Is in the Charter or Bylaws Does Not Necessarily Mean It Is Enforceable*, O'MELVENY (Mar. 8, 2016), http://tinyurl.com/omm-vaalco; Abigail Pickering Bomba, et al., *Practice Points for Delaware Companies with Non-Classified Boards after Chancery Court's Vaalco Energy Decision*, FRIED FRANK (Feb. 5, 2016), http://tinyurl.com/ff-vaalco-pp; Daniel E. Wolf & Matthew Solum, *Director Removal Without Cause – Delaware Default Rule is in Fact the Rule*, KIRKLAND & ELLIS (Dec. 29, 2015), http://tinyurl.com/wolf-solum.

[17] In the case of an independent FCO removal charter provision, one could say the shareholders actually approved it a second time when approving the destaggering charter amendment without removing the FCO provision, but opponents could argue with some credence that shareholders were not approving the FCO provision which, if they thought about it at all, they knew would be invalid once the staggered board was removed.

in the charter were unquestionably valid and binding on shareholders. DGCL Section 102(b)(1) allows the charter to contain any provision for the management of the business of the corporation, and any provision defining, limiting or regulating the powers of the corporation, the directors and the shareholders, as long as those provisions are not contrary to Delaware law, which the FCO removal provisions were not.[18] The fact that the corporation subsequently removed its classified board may under DGCL Section 141(k) mean that shareholders have a statutory no-cause removal right that trumps the contractual restriction to which they had previously agreed. In making the amendment advocated in this article, the Delaware legislature could decide that the longstanding expectations of a corporation and its shareholders should be respected, notwithstanding that there was a brief period in which those expectations were frustrated by the statutory invalidity of the FCO removal provision.[19]

For Future Consideration: A More Sweeping Revision to Section 141(k)

This article urges that the Delaware legislature should act as soon as possible to implement the simple but important amendment to DCGL Section 141(k) described above. A strong policy argument can also be made for a more sweeping revision to Section 141(k) to reverse the statutory default and specify that directors may only be removed without cause in between annual meetings if that is specifically *permitted* in the certificate of incorporation. This would, of course, be a far more controversial and politically difficult revision to achieve, as the shareholder activist community would undoubtedly vociferously argue

---

[18]DGCL Section 102(b)(1) provides, in relevant part, that "the certificate of incorporation may also contain any or all of the following matters: (1) Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the members of a nonstock corporation; if such provisions are not contrary to the laws of this State." Del. Code tit. 8, § 102.

[19]This article is not intended as legal advice to corporations with FCO removal charter provisions as to what action they should take in that regard. At this time it seems that most companies with this concern are taking action to eliminate the FCO removal provisions in light of the *Vaalco* decision and the cottage industry of actions by plaintiffs' firms that it spawned. However, it may be possible for companies in that position, if they have reason to believe that the Delaware legislature might amend the DGCL to specify that those charter provisions are valid, to keep their options open by describing in their public filings the state of the law and saying that they will not enforce the provision unless and until its validity is clarified by the Delaware Supreme Court or legislature.

that the right to remove directors at will is a fundamental shareholder right.

Both the simple change argued for in this article and a reversal of the default rule would be consistent with Delaware's policy of enabling private ordering so that corporate participants can design their own structure—whether an annual accountability or continuous vulnerability regime—to best achieve their goals. It is only the *status quo* that is inconsistent with that enabling approach. Because most corporate charters are silent on the issue of director removal, if the DGCL were amended to reverse the default rule that would mean that directors could *not* be removed without cause in between annual meetings; that is, there would be annual accountability but not constant vulnerability. If shareholders dislike that result, they can propose a precatory resolution urging the board to propose to shareholders a charter amendment permitting no-fault removal. And if a majority of the shareholders support that proposal, then the board will likely follow their guidance. If they do not, then Institutional Shareholder Services ("ISS"), the powerful proxy advisory firm, will recommend a withhold vote against those directors[20] and (with the overwhelming majority of corporate elections now applying a majority vote standard, as opposed to the plurality standard of a few years ago) some or all of the board will likely not be reelected. Conversely, for those corporations that do have an express provision in their charter allowing director removal without cause, if the board considers such provision inconsistent with the goal of maximizing shareholder value, then it can propose to shareholders an amendment to remove that provision. Either way, the appropriate result will be reached through the interplay between the board of directors and the shareholders of each corporation.

Statutorily Compelled Recall Elections are Bad Policy

Annual elections provide substantial accountability of directors to shareholders. A compelling case can be made that there is no reason for the shareholders of a corporation with annually elected directors to have the power to remove directors without cause more frequently. However, even if one disagrees with that perspective, corporations and their shareholders should have the ability to decide for themselves how they wish to distribute power among and between the various corporate constituencies.

---

[20]Institutional Shareholder Services, U.S. Proxy Voting Policies and Procedures (excluding Compensation-Related) 17-18, *available at* http://tinyurl.com/iss-faq-dec15.

As the shareholder activist community continues its drive to shift decision-making power from directors with fiduciary duties (the traditional Delaware model) into the hands of shareholders who are permitted to act in their own self-interest, they are pressing for corporations to facilitate shareholder-called special meetings with smaller and smaller minorities and to repeal charter provisions restricting the ability of shareholders to act by majority written consent without a meeting. ISS recommends that 10% of shareholders should be able to call a special meeting at any time, and considers the right to act by written consent a fundamental shareholder right. As a result of these trends, the practical implications of Section 141(k) have made Delaware corporations substantially more vulnerable to opportunistic takeover bids and activist campaigns over time. While the market for corporate control and the availability of proxy contests are important elements of well-functioning capital markets, it is vital to strike an appropriate balance because hostile takeover bids and activist campaigns often distract management and directors and divert considerable corporate resources from the productive goals of the corporation. These dramatic changes in corporate governance not only present serious challenges for individual corporations, but also add to the pressure on corporations to pursue short-term agendas that many have noted represent a threat to the American economy in general.[21]

Conclusion

This commentary proposes that the Delaware legislature should act with alacrity to revise DGCL Section 141(k) to permit corporations to provide in their certificates of incorporation that directors may only be removed for cause in between annual shareholder meetings.

As a secondary matter, this article suggests that the legislature should consider expressly providing for the validity of the longstanding contractual expectations established by existing shareholder-approved for-cause-only director removal provisions that some corporations have in their charters.

Finally, without delaying the primary revision proposed, the legislature may also wish to consider reversing the statutory default in DCGL Section 141(k) to provide that directors can only be removed without cause in between annual shareholder meetings if the certificate of incorporation provides for such removals.

---

[21] *See supra* note 7.