



Is It Time to Adopt a Forum Selection Bylaw?

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While the Chancery Court's decision resolves the core issues of the facial statutory validity and contractual enforceability of forum selection bylaws under Delaware law, there are nevertheless several considerations that boards of directors should take into account in deciding whether to move forward with the adoption of such a provision:

- *Reaction of Courts in Other Jurisdictions.* It remains to be seen whether courts in other jurisdictions will honor forum selection bylaws adopted by the boards of Delaware corporations and dismiss intra-corporate suits brought in non-Delaware jurisdictions. In 2011, a federal court in California refused to enforce such a provision that had been adopted by a board without stockholder approval.⁴ That decision, however, was made without the benefit of the precedent of the recent Delaware decision. In addition, the board in that case was seeking to invoke the bylaw with respect to claims regarding events that occurred prior to the bylaw's adoption. In a recent ruling, the Delaware Chancery Court declined to temporarily enjoin a suit brought in Louisiana against a company whose charter contained a provision designating Delaware as the exclusive forum, citing potential issues of interforum comity and preferring that such a provision be first considered by the court where the plaintiff filed its litigation.⁵ The court also expressed concern about a potential lack of personal jurisdiction over the plaintiff, noting that the company's forum selection provision did not specify that shareholders were deemed to have consented to personal jurisdiction in Delaware.⁶ In light of this ruling, it would be prudent for

companies to include in their forum selection provisions a shareholder consent to jurisdiction.

- *Stockholder Reaction.* It may be difficult to gauge stockholder reaction to the adoption of a forum selection provision. Since the beginning of the 2011 proxy season, fewer than 15 management proposals to amend corporate charters to add exclusive forum provisions have gone to a vote, and in almost all instances the amendments passed, generally by a narrow margin, except where there was sizable insider ownership. In addition, in 2012, two stockholder proposals seeking repeal of forum selection bylaw provisions went to a vote and both proposals failed. Now that opponents of forum selection provisions have lost on key challenges in the Delaware Chancery Court, they may focus more of their efforts on introducing stockholder proposals seeking repeal of such provisions during next year's proxy season. The Council of Institutional Investors and the AFL-CIO both have policies against the adoption of forum selection provisions.⁷
- *Proxy Advisory Firm Positions.* The major proxy advisory firms generally oppose forum selection provisions. In late 2012, Glass Lewis, which historically had uniformly opposed such provisions, revised its policy to provide that it will consider recommending in favor of a forum selection provision if the company (i) has a compelling argument as to why the provision would directly benefit stockholders, (ii) provides evidence of abuse of legal process in other, nonfavored jurisdictions and (iii) maintains a strong record of good corporate governance practices. However, Glass Lewis' 2013 guidelines also provide that Glass Lewis will recommend a vote against the governance committee chair if the board adopted a forum selection provision without shareholder approval in the past year. ISS states that it reviews forum selection proposals on a case-by-case basis, taking into account whether the company has a specified set of good governance practices⁸ and whether the company discloses in its proxy statement that it has been materially harmed by stockholder litigation outside its jurisdiction of incorporation. Notwithstanding its stated policy indicating that, at least in some circumstances, a forum selection proposal can pass muster, it is clear that ISS sets a high bar. For example, in 2012, ISS supported a stockholder proposal to repeal a forum selection bylaw at United Rentals, Inc., even though the company had good corporate governance practices and included disclosure in its proxy materials about prior and pending multi-jurisdictional lawsuits. ISS stated that it

was unable to determine whether the company had been “materially” harmed by the litigation.

- *Documentation.* In light of the risk of potential litigation, a board of directors adopting a forum selection bylaw should make sure that the board minutes accurately and fully reflect the board’s deliberations and the reasons why the board believes the provision is in the best interests of the corporation and its stockholders.

This post was excerpted from our Top 10 Topics for Directors in 2014 alert. To read the full alert, please [click here](#).

¹ *Boilermakers Local 154 Retirement Fund, et al. v. Chevron Corporation, et al.*, C.A. No. 7220-CS, and *IClub Investment Partnership v. FedEx Corporation, et al.*, C.A. No. 7238-CS (Del. Ch. June 25, 2013). The plaintiffs appealed the decision to the Delaware Supreme Court but dropped their appeal in October 2013.

² This means that a forum selection bylaw will be enforced in accordance with the principles set forth by the U.S. Supreme Court in *The Bremen v. Zapata Off-Shore Co.* Under *Bremen*, forum selection clauses are valid provided they are “unaffected by fraud, undue influence, or overweening bargaining power” and should be enforced unless shown to be “unreasonable.” In addition, the application of a forum selection bylaw remains subject to challenge in any specific situation on grounds that the board breached its fiduciary duties.

³ In 2011, a federal court in California applying federal common law refused to enforce an exclusive forum provision that was adopted by the board of directors of a Delaware corporation without stockholder approval. *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (Jan. 3, 2011).

⁴ *Id.*

⁵ See transcript of Vice Chancellor Travis Laster’s decision in *Edgen Group Inc. v. Genoud*, C.A. No. 9055-VCL (Del. Ch. Nov. 5, 2013).

⁶ *Id.*

⁷ Council of Institutional Investors Corporate Governance Guidelines Section 1.9; AFL-CIO Proxy Voting Guidelines Section D.16 (2012).

⁸ Specifically, an annually elected board, majority voting and the absence of a non-shareholder approved poison pill.

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