

Should Your Board Adopt an Exclusive Forum Bylaw?

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Exclusive forum charter and bylaw provisions limit certain types of shareholder litigation to the corporation's jurisdiction of incorporation, and so potentially reduce or eliminate the cost and strategic difficulties of multijurisdictional challenges to corporate action. While a number of public companies have adopted these provisions over the past few years, they have drawn the ire of some shareholder activist groups, and have generally been opposed by the two principal proxy advisory firms.¹ Supporters of exclusive forum bylaws got a boost late last month from the Delaware Chancery Court, which ruled that exclusive forum bylaws adopted by the Chevron and FedEx boards were facially valid.² The opinion is subject to appeal to the Delaware Supreme Court, which is expected to support the right of a board to adopt an exclusive forum bylaw so long as the certificate of incorporation permits the board to adopt and amend bylaw provisions unilaterally.

Assuming that the Delaware Supreme Court upholds the Chancery Court opinion, it may make sense for more corporations to consider adopting exclusive forum provisions. The factors favoring such provisions include the expense and risk of multi-jurisdictional shareholder litigation and the expertise of the Delaware courts in matters of Delaware corporate law, particularly compared to the risk of litigating in jurisdictions that may be hostile to foreign corporations. Companies will have to weigh those benefits against potentially adverse shareholder reaction and activist resistance. Companies will necessarily assess these factors differently, depending on their stage of development, their shareholder profile and whether they can easily obtain shareholder approval for a charter or bylaw amendment or (if allowed by their charter) must rely on the ability of the board to adopt and amend bylaw provisions unilaterally. Approval by shareholders will presumably make it harder to attack an exclusive forum provision. Private companies may come to adopt exclusive forum provisions as a matter of course, unless there is significant opposition from venture capital and private equity fund investors, or from IPO investors at a later stage. Companies incorporated outside of Delaware may also opt for the greater efficiency and cost savings potentially offered by an exclusive forum provision, although each state's law may differ on the requirements of enacting an exclusive forum provision.

¹ Institutional Shareholder Services (ISS) has said that it will consider supporting exclusive forum provisions if the company meets certain corporate governance criteria and can demonstrate harm from multijurisdictional shareholder litigation, while Glass Lewis has said that it is generally opposed unless the company presents a compelling case for approval, meets certain governance standards and has been harmed by abuse of legal process in other jurisdictions.

² *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, Civil Action Nos. 7220-CS, 7238-CS, 2013 WL 3191981 (Del. Ch. June 25, 2013) (Strine, Ch.).

If a company adopts an exclusive forum provision, it should adopt the right one. The Chevron and FedEx bylaw provisions are good models because they are limited to specific types of litigation: derivative actions; a claim of breach of fiduciary duty to the corporation or a stockholder by an officer, director or employee of the corporation; claims arising under the Delaware General Corporation Law; and claims arising under the internal affairs doctrine. In addition, they explicitly permit the corporation to consent to the jurisdiction of a court outside of the selected forum. The Chevron bylaw amendment permits actions to be brought in federal courts in Delaware as well as in the Delaware Chancery Court, thus covering securities law claims that accompany claims under the Delaware General Corporation Law. The Chevron bylaw amendment also excludes cases where persons outside the jurisdiction of the Delaware courts are indispensable parties named as defendants.

Exclusive forum bylaw provisions are not bullet proof. The Delaware Chancery Court noted that, as in the case of a normal contractual forum selection clause, a shareholder can always argue that the clause is unreasonable or unjust as applied in a specific case. The applicability and enforceability of an exclusive forum selection bylaw provision will necessarily be tested in courts outside of Delaware where an action may be brought and the defendants will invoke the exclusive forum provision. It is unclear whether those courts will enforce bylaw provisions, particularly if approved only by directors.³

About the Authors

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³ See, e.g., *Galaviz v. Berg*, 763 .Supp.2d 1170 (N.D. Cal. 2011) (denying motions to dismiss based on exclusive forum selection bylaw approved by directors).

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