Message from the Chair

We are excitedly looking forward to the ABA Business Law Section Spring Meeting in Montreal, Quebec, Canada next week! Please note that our committee meets on Friday, April 8, 2016 from 10-11:30 a.m. Details and dial-in information are below. We will hear reports on a number of recent developments affecting director and officer liability, and from our subcommittee chairs.

Director and Officer Liability
Director and Officer Liability Committee Meeting
Friday 4/8/2016 10:00AM - 11:30AM
Fairmont
Youville, Executive Level
Toll-free dial-in number (U.S. and Canada):
(866) 646-6488
International dial-in number:
(707) 287-9583 Conference

In addition to our committee meeting, I hope you will attend our featured ethics/CLE program, "Preparing for and Ethical Issues Created by the Department of Justice's Yates Memo on Individual Accountability for Corporate Wrongdoing," on Friday afternoon, April 8, 2016 from 2:30-4:30 p.m. (Hotel Bonaventure, Verdun, Convention Floor). This topic expands upon our committee's ongoing analysis of the rights and duties of directors and officers caught up in regulatory investigations and litigation. Our distinguished panel will also address ethical issues for attorneys who represent these individuals, and insurance challenges created by recent DOJ pronouncements. The program promises to continue in the tradition of the high level of programming and cutting edge educational materials that have become our committee's trademark.

The Director and Officer Liability Committee presents many opportunities to publish or speak on topics of interest to directors and officers and those who counsel them, and I hope you will take advantage of this forum. Please feel free to contact me directly at fgoins@ulmer.com with your suggestions or ideas to improve our committee and make it more relevant to your needs.

I look forward to seeing you soon in Montreal!

Bien à vous,
FLASH REPORT: Removal of Directors: In re Vaalco Energy Shareholder Litigation  
By Brett M. Amron, Bast Amron LLP

In In re Vaalco Energy Shareholder Litigation, C.A. No. 11775-VCL (Del. Ch. Dec. 21, 2015) (TRANSCRIPT), the Delaware Court of Chancery held that, if a corporation has neither a staggered board nor provides for cumulative voting, provisions of its charter or bylaws that purport to limit director removal to "for cause" only are invalid under Delaware law.

Section 141(k) of the Delaware General Corporation Law grants stockholders the broad power to remove directors with or without cause. Section 141(k) enumerates only two exceptions to this default rule: (1) when the board of directors is classified pursuant to Section 141(d) of the Delaware General Corporation Law, or (2) where the stockholders have cumulative voting rights for the election of directors. Accordingly, where the charter does not provide cumulative voting rights, directors serving on a non-classified board who are elected by the stockholders generally may be removed with or without cause by vote of holders of a majority in voting power of the outstanding shares.

Until 2009, Vaalco's board of directors was classified and, in compliance with Section 141(k), its directors were removable only for cause. Vaalco subsequently amended its charter to declassify its board of directors. After the declassification, Vaalco left in place charter and bylaw provisions purporting to limit the removal of directors "for cause" only.

In late 2015, an activist investor sought to remove certain Vaalco directors without cause. In response, Vaalco contended that, pursuant to its organizational documents, any removal had to be for cause. In response,
plaintiff stockholders brought suit, seeking a declaratory judgment that, absent a staggered board or cumulative voting provision, Vaalco’s director removal "for cause" only provisions violated Section 141(k). Agreeing with Plaintiffs, the Court held that the provisions at issue were invalid under Delaware law, as they violated the plain language of the statute.

In so holding, the Court acknowledged that, as Vaalco had demonstrated, approximately 175 Delaware companies with non-classified boards have provisions in their organization documents limiting the removal of directors "for cause" only. The Court found unavailing Vaalco's argument that, based on the relative prevalence of such provisions, it should validate Vaalco's "for cause" only provisions under Section 141(k). Thus, in light of Vaalco, these companies have little recourse but to take steps to amend their organizational documents to eliminate such provisions. (It should be noted, however, that where the corporation's certificate of incorporation does not allow for stockholder action by written consent in lieu of a meeting and the organizational documents do not permit stockholders to call special meetings, the issue may not be as urgent, given that stockholders will not in any event have the ability to take action in between the regular annual meeting cycle to remove directors).

Vaalco did not appeal the Court's ruling. Therefore, the Vaalco opinion provides the latest court guidance to boards and their stockholders on removal of directors under Section 141(k).

Delaware corporations with plurality voting should review the impact of this ruling on their corporate defense profile as the validity or invalidity of these provisions could impact challenges to board composition in the future.

**FLASH REPORT: Advancements of Fees and Expenses for Former Corporate Officials: Marino v. Patriot Rail Company LLC**

*By Brett M. Amron, Bast Amron LLP*

In *Marino v. Patriot Rail Company LLC*, C.A. No. 11605-VCL (Del. Ch. Feb. 29, 2016), the Delaware Court of Chancery confirmed that, under Section 145 of the Delaware General Corporation Law (the "DGCL"), the advancement and indemnification rights of officers and directors for actions taken while serving in that capacity: (i) continue after an officer or director leaves office; (ii) do not cover actions taken after an officer or director leaves office; and (iii) cannot be amended or eliminated retroactively unless the source of such rights explicitly provided otherwise at the time coverage was authorized or ratified. The opinion is also noteworthy for underscoring the importance of parties addressing how to deal with the issue of contingent liabilities—for example, pending litigation—in connection with the purchase of a company.

*Patriot Rail* involved an underlying suit between Patriot Rail Company, LLC (the "Company") and Sierra Railroad Company ("Sierra"), which ended in favor of Sierra. Sierra moved to amend its judgment to add Gary Marino, the former Chairman, President and CEO of the Company, as a judgment debtor. Marino sought advancement from the Company to cover the legal expenses he would incur to defend against Sierra’s efforts to add him as an individual party and
collect against him as a judgment debtor. When the Company denied his request, Marino commenced this action seeking advancements of attorneys' fees and expenses; the Company answered, and the parties cross-moved for summary judgment.

Article VIII of the Company's certificate of incorporation stated: "This Corporation shall indemnify and shall advance expenses on behalf of its officers and directors to the fullest extent permitted by law in existence either now or hereafter." The parties agreed that had Marino been sued by reason of his status as an officer while he was serving in that capacity, the Company would have been obligated to provide advancements. The issue, instead, was whether this language in the Company's charter continued to cover Marino for the same types of claims after he ceased serving as an officer.

Because the Company's charter contemplated advancement "to the fullest extent permitted by law," the answer turned on the language of Delaware's indemnification and advancement statute. 8 Del. C. § 145. After looking at the statutory history of Section 145 and case precedent, the Court held that Marino was entitled to the requested advancements for actions he had taken while serving in his capacity as an officer of the Company.

The Court paid particular attention to three subsections of Section 145: Section 145(e), which authorizes advancement; Section 145(j), which addresses the extent to which a covered person's indemnification and advancement rights for actions taken during the person's period of service continue after the person has ceased to serve; and Section 145(f), which limits a corporation's ability to cause a covered person's rights to terminate after the person has served in reliance upon them.

The Court explained that Section 145 authorizes a corporation to grant mandatory advancement rights to officers and directors that provide coverage conditioned solely on an undertaking (Section 145(e)). Such rights provide coverage for actions taken by individuals during their service, even after the individuals have ceased to serve, and continue to provide coverage unless the governing provision specifically states otherwise (Section 145(j)). Moreover, unless the governing provision provides otherwise, the granted rights cannot be altered or eliminated retroactively with respect to prior actions, after a director or officer has already exposed themselves to liability by acting on the corporation's behalf (Section 145(f)).