

Criticism of Governance Provisions in Proxy Contest Leads to Reincorporation

May 31, 2017 | Client Update | 2-minute read

Among the settlement terms in the proxy contest between Arconic Inc. and Elliot Management is an agreement to reincorporate to Delaware due to the corporate governance provisions in the company's charter.

As the surviving company of Alcoa Inc., which spun off parts of its business into a new entity called Alcoa Corp., the renamed Arconic was governed under a charter that staggered board elections and required 80% of outstanding shares to amend the terms for fair price protection, change the classified board or remove its directors. About eight years ago, shareholder proposals favored by a majority of the votes cast asked the board to amend those provisions. Though the company made several efforts by sponsoring management proposals that the board supported, the company never obtained the requisite 80% of outstanding shares necessary to effect the changes. In fact, it appears that the number of shares voted on any proposal may have never reached that level.

Those charter provisions became one of the criticisms that Elliot hurled against the company when it nominated a competing slate of directors earlier this year. The activist also faulted the board for allowing the CEO to sit on two other S&P 500 company boards, as well as what it claimed was the CEO's participation on a total of 15 boards, committees, councils, advisory groups and organizations.

Elliot used newly formed Alcoa Corp. to enliven its rhetoric, pointing out that it adopted "best-in-class corporate governance" when it separated from Arconic in 2016, by electing to incorporate in Delaware instead of Pennsylvania, holding annual elections for its board, having simple majority requirements to amend charter or bylaw terms, and being led by an independent chairman. The activist derided Arconic's prior efforts to amend its charter when it previously operated as Alcoa Inc., arguing that there "have long been a number of options available to it" if the company really wanted to make changes.

When it filed its own proxy statement for the proxy contest in February, the company's ballot included yet again four management proposals asking shareholders to amend the charter to declassify the board and remove the three supermajority requirements. This time, the company indicated that if the proposals receive less than 80% of the outstanding shares in support, the company intended to reincorporate in Delaware. In response, Elliot contended that the company could have simply asked shareholders to vote for reincorporation, since there was no particular reason to believe that these efforts would now obtain the requisite number of votes.

The two sides settled recently, and among other things, Arconic agreed before the end of this year to effectuate a reincorporation in Delaware, destagger its board and remove all supermajority provisions.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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