

## Recent Delaware Cases Highlight the Importance of Specificity in Advance Notice Bylaw Provisions and Annual Meeting Notices

A pair of Delaware Court of Chancery decisions narrowly interpreted advance notice bylaw provisions. As a result, Delaware corporations should consider revisiting their advance notice bylaw provisions and annual meeting notices to remedy any ambiguities, or otherwise risk easing the way for dissident stockholder proposals and director nominations.

In *Levitt Corp. v. Office Depot, Inc.*, the Levitt Corporation filed a preliminary proxy statement in support of two dissident director nominations. Office Depot rejected the submission of Levitt's nominations for not complying with the advance notice provision of Office Depot's bylaws. The Court of Chancery held that Office Depot's bylaw provision requiring advance notice of "business" to be conducted at the corporation's annual meeting encompassed director nominations by stockholders. The Court of Chancery relying upon general contract interpretation principles reasoned that such nominations fell within the plain meaning of the term "business" under Delaware General Corporation Law. In particular, the court found that because the annual meeting notice sent by the corporation generally stated that the business to be considered at the meeting included the election of directors, a dissident stockholder that intended to nominate its own slate of directors need not separately comply with the corporation's advance notice bylaw provision, as the election of all director nominees, including both those nominated by the corporation and those nominated by the stockholder, was already before the meeting. The court also indicated that the meeting notice could have been drafted to avoid this outcome by stating that the stockholders would be voting specifically on the *nominating committee's* candidates. Moreover, the court observed that the bylaws did not have a separate advance notice provision for the nomination of directors, and consequently, could have avoided any ambiguity found in the general notice provision.

*JANA Master Fund, Ltd. V. CNET Networks, Inc.* arose out of a proxy fight whereby Jana Master Fund, Ltd. sought to replace two current directors and expand the size of CNET's board. In *JANA*, the Court of Chancery held that CNET's advance notice bylaw provision only applied to stockholder proposals brought pursuant to Exchange Act Rule 14a-8; and therefore, did not apply to a proxy solicitation independently financed by a stockholder of the corporation. In finding that the advance notice provision only applied to Rule 14a-8 proposals, the court based its holding on the following rationale:



- (1) the language of the bylaw that stated “any stockholder . . . *may seek* to transact other corporate business at the annual meeting,” conflicted with the fact that a stockholder is *not* required to *seek* a corporation’s approval for proxy solicitations independently financed by such stockholder (which Rule 14a-8 essentially requires);
- (2) the bylaw’s advance notice deadline mirrored the deadline for a Rule 14a-8 proposal, i.e. “not less than 120 calendar days before the date of the [corporation]’s proxy statement released to shareholders in connection with the previous year’s annual meeting[;]” and
- (3) the court found most persuasive the provision’s language stating that any advance notice given under the provision must “comply with any applicable federal securities laws establishing the circumstances under which [the corporation] is required to include the proposal in its proxy statement...” The Court of Chancery concluded that this provision governed the entire advance notice provision and could only be properly interpreted to apply to Rule 14a-8 proposals sought to be included in the corporation’s proxy materials, and could not apply to proposals outside of Rule 14a-8.

Together, these rulings chip away at the traditional advance notice protection that Delaware corporations have enjoyed in defending against dissident stockholder proposals and director nominations. In addition, these cases further underline the Court of Chancery’s theme of protecting stockholders’ voting franchise. To avoid the interpretation problems of these cases and to accurately reflect the corporation’s intent regarding advance notice, corporations should revisit their advance notice bylaw provisions. Specifically, advance notice bylaw provisions should:

- (1) clearly state the advance notice requirements for stockholder proposals generally, and distinctly for stockholder board nominations specifically;
- (2) make it clear that advance notice provisions apply to all stockholder proposals, and not just those proposals that stockholders desire to include in a proxy statement in accordance with Rule 14a-8;
- (3) set the notice deadline based upon the date of the annual meeting, and not based upon the prior year’s mailing date of proxy materials; and
- (4) not reference the securities rules, but rather expressly address the information to be given and other requirements necessary for the stockholder to comply with the applicable advance notice provision.

For information on topics covered in this issue or if you would like to discuss the impact of these two rulings, please contact the authors, Andrew Hough or Kevin McGill, or any member of the Private Equity & Venture Capital team:

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