

Public Company Advisory

Recent developments governing public companies and their officers, directors and investors

Delaware Decisions Call Into Question Effectiveness of Advance Notice Bylaws

Two recent decisions from the Delaware Court of Chancery raise issues concerning the operation of advance notice bylaws. Advance notice bylaws set deadlines and other procedural requirements on a stockholder's ability to submit nominations or other proposals for consideration at a stockholder meeting. These provisions allow a company to be able to maintain an orderly process and assure that stockholders have a reasonable opportunity to thoughtfully consider nominations and other proposals.

In *Jana Master Fund, Ltd. v. CNET Networks, Inc.*, No. 3447 (Del. Ch. March 13, 2008), the court ruled that the company's advance notice bylaw was applicable only to stockholder proposals that proponents sought to have included in the company's proxy statement under Rule 14a-8 of the Securities Exchange Act of 1934 and not to a dissident stockholder's proposed nomination of candidates for election to the company's board of directors because the dissident intended to use its own proxy statement. In *Levitt Corp. v. Office Depot, Inc.*, No. 3622 (Del. Ch. April 14, 2008), the court ruled that a dissident stockholder was entitled to nominate director candidates from the floor of the annual meeting, despite failing to comply with the company's valid advance notice bylaw. In light of these decisions, companies should review their advance notice bylaws to confirm that such provisions clearly effect the desired intent and avoid the ambiguities that left CNET and Office Depot without the benefit of these bylaws.

In *CNET*, which is currently the subject of an expedited appeal before the Delaware Supreme Court, Jana had informed the CNET board that it intended to run a proxy contest for control of CNET and requested certain stockholder information from the board. The CNET board refused to provide Jana with the requested information because, at the time of the request, Jana had not owned CNET stock for one year, as required under CNET's advance notice bylaw. In its decision, the court closely scrutinized the language of the bylaw and concluded that the only reasonable interpretation was that the bylaw applied solely to proposals and nominations sought to be included in CNET's proxy statement, despite the absence of any express limitation to that effect. The court's decision left CNET effectively with no limitations against stockholder proposals being brought at any time by any stockholder so long as the stockholder made an independent proxy solicitation – a stockholder could even raise a matter for the first time on the floor of the annual meeting.

In *Office Depot*, Levitt sought to nominate two directors at Office Depot's 2008 Annual Meeting after Office Depot had already mailed the notice of the Annual Meeting and the related proxy statement. Levitt's nominations did not comply with Office Depot's advance notice bylaw that any "business" brought before an Annual Meeting meet certain advance timing and informational requirements. While the court agreed with

Office Depot that the term “business” necessarily includes the nominations of directors, it also found that, by stating in its notice of the meeting that the election of directors was to be considered, Office Depot had opened the door to stockholders considering any and all director nominees, including nominees from dissident stockholders such as Levitt, regardless of when such nominations were made. Thus, the court held that Levitt was not required to comply with the company’s advance notice bylaw because the company had “properly brought the business of electing and nominating directors before the Annual Meeting through the Notice.”

Taken together, these two decisions emphasize the paramount importance the Delaware courts place on protecting stockholder franchise and construing any limitations narrowly. As the court in *CNET* stated, “[t]o the extent there is any ambiguity in interpreting bylaws, ‘doubt is resolved in favor of the stockholders’ electoral rights.’” Thus, companies should, with the assistance of their legal counsel, review their advance notice bylaws to ensure that such provisions are clear and unambiguous on their face and minimize the possibility that a narrow reading by a court would render the bylaw ineffective.

An additional solution that companies should consider is to make clear in their notice for Annual Meeting that the election of directors included as an agenda item relates only to the election of directors *nominated by the company’s board*, and is not opening the door to any and all nominations. This should not, however, be considered as a substitute for a review of a company’s advance notice bylaws, as discussed above.

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