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Developments in Advance Notice Bylaws

The Delaware Chancery Court decided two cases dealing with advance notice bylaws in 2008 that are worth noting. The primary objective of an advance notice bylaw is to ensure orderly business at stockholder meetings. It requires a stockholder to submit "advance notice" of his or her intention to nominate director candidates or to propose other business at a meeting. In light of these decisions, it is prudent for companies to review their advance notice bylaws to be certain to avoid unintended consequences.

Jana Master Fund Ltd. v. CNET Networks, Inc.¹

In *Jana Master Fund Ltd. v. CNET Networks, Inc.*, Jana sought to gain control of the classified board of CNET by nominating director candidates and increasing the size of the board. CNET contended that Jana did not comply with CNET's advance notice bylaw because it did not own stock for the requisite period of one year. The court interpreted CNET's advance notice bylaw to apply only to proposals and nominations that are intended to be included in the company's proxy materials pursuant to Rule 14a-8. Under Rule 14a-8, company management must include a stockholder proposal in the company's own proxy materials, but certain conditions must be met and management may exclude such proposals for certain reasons set forth in the rule. Because Jana did not request that CNET include its proposals or nominations in the company's proxy materials (rather Jana was independently funding its own proxy solicitation), Jana was not required to comply with the advance notice bylaw requirement. The court's decision was buttressed by the long-recognized rule that Delaware courts are reluctant to interfere with the shareholder voting process which they interpret to include director nominations.

Levitt Corp. v. Office Depot, Inc.²

The *Levitt* case also centered on a stockholder's attempt to nominate director candidates at a company's annual stockholder meeting. Office Depot filed its proxy materials and notice of annual meeting with the Securities and Exchange Commission. The notice stated that an item of business for the annual meeting was to "elect twelve (12) members of the Board of Directors." Shortly thereafter, Levitt filed its own proxy statement soliciting proxies in support of its two nominees. Concurrently, Levitt sued Office Depot in the Delaware Chancery Court seeking confirmation that no additional notice was required to nominate director candidates. Office Depot argued that advance notice was not provided by Levitt as required by the bylaws. In particular, the bylaws required that "[f]or business to be properly brought before an annual meeting by a stockholder, the stockholder must have given timely notice thereof in writing to the Secretary." The court concluded that Levitt was relieved of complying with the advance notice provision because the business of nominating directors had already been properly brought before the meeting. The court broadly interpreted the term "business" set forth in the advance notice bylaw to include director nominations and found that the business of nominating and electing directors had already been brought before the annual stockholder's meeting by Office Depot via its notice to stockholders included as part of the company's proxy statement.

The *Jana* and *Levitt* cases illustrate that Delaware courts favor narrow interpretations of advance notice bylaw language. We recommend companies review and update their advance notice bylaw provisions to ensure they will operate as intended, and in an effective manner.

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¹*Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 2008 WL 660556 (Del. Ch. March 13, 2008).

²*Levitt Corp. v. Office Depot, Inc.*, 2008 WL 1724244 (Del. Ch. April 14, 2008).

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