

## Recent Delaware Decisions Affecting Advanced Notice Bylaws

In general, stockholders of Delaware corporations are entitled to raise, at an annual meeting, any matter that would properly be a subject of stockholder vote, such as election of a dissident state of directors. Stockholders are also entitled to do so at a special meeting, so long as the matter would properly relate to the purpose of the special meeting. If the board of directors is unaware that stockholders intend to raise a matter at a meeting, the board could be surprised by a stockholder proposal brought before the meeting, adversely affecting the corporation's ability to make the proposal widely known to other stockholders and board's ability to evaluate and respond to the proposal. To reduce the potential for such a surprise, corporations have adopted bylaws requiring stockholders to give advance notice of matters they intend to raise at a meeting.

The Delaware Court of Chancery has recently issued two opinions affecting advance notice bylaws. On March 13, 2008, the Court issued the opinion in *Jana Master Fund, Ltd. v. CNET Networks, Inc.*, limiting an advance notice requirement to stockholder proposals subject to SEC Rule 14a-8. Rule 14a-8 relates to nominations and proposals that a stockholder wishes to have included in management's proxy materials. Then, on April 14, 2008, the Court issued the opinion in *Levitt Corp. v. Office Depot, Inc.*, concluding that, while a bylaw requiring advance notice of business to be conducted at a meeting also required advance notice of nominations of directors by stockholders, it was not applicable in this case because the corporation had already given notice that the election of directors was to be brought before the meeting. Corporations should review and possibly update their advance notice bylaws in light of these recent deci-

sions to ensure that their bylaws achieve their intended purpose.

In *Jana Master Fund Ltd. v. CNET Networks*, the Court held that an advance notice bylaw applied only to stockholder proposals subject to SEC Rule 14a-8 and not to all stockholder proposals. CNET's bylaw provided that:

Any stockholder of the Corporation that has been the beneficial owner of at least \$1,000 of securities entitled to vote at an annual meeting for at least one year may seek to transact other corporate business at the annual meeting, provided that such business is set forth in a written notice and mailed by certified mail to the Secretary of the Corporation and received no later than 120 calendar days in advance of the date of the Corporation's proxy statement released to security holders in connection with the previous year's annual meeting of security holders (or, if no annual meeting was held in the previous year or the date of the annual meeting has been changed by more than 30 calendar days from the date contemplated at the time of the previous year's proxy statement, a reasonable time before the solicitation is made). Notwithstanding the foregoing, such notice must also comply with any applicable federal securities laws establishing the circumstances under which the Corporation is required to include the proposal in its proxy statement or form of proxy.

Jana Master Fund had held CNET stock for eight months when it made proposals to expand the board and elect dissident directors at the annual meeting. CNET responded that the proposals were not valid

under the bylaw because Jana had not owned stock for the required period of time. However, the Court construed the bylaw as applying only to stockholder proposals subject to Rule 14a-8, and thus not applicable to Jana's proposal. The Court's decision rested on three findings. First, the Court found that the language of the bylaw referring to a stockholder who "may seek to transact other corporate business" at the meeting referred to a Rule 14a-8 proposal because it is not generally necessary for stockholders to seek permission to transact business at an annual meeting. Rather, they must merely provide notice of the business to be transacted. Additionally, the bylaw specifically set the notice deadline in advance of the release of management's proxy materials, corresponding with the notice deadline for a Rule 14a-8 proposal that would be included in management's proxy materials. Finally, the Court found that the language requiring compliance with any applicable securities laws impliedly referenced Rule 14a-8 and made clear that the scope of the bylaw was limited to proposals a stockholder wished to have included in management's proxy materials. The Court thus held that the bylaw was limited to 14a-8 proposals and that Jana was entitled to make proposals at the annual meeting without any advance notice.

A month later, in *Levitt Corp. v. Office Depot, Inc.*, the Court construed an advance notice bylaw broadly, holding that a bylaw requiring notice of "business" to be proposed at an annual meeting extended to director nominations. Office Depot's bylaw provided, in part, that:

At an annual meeting of the stockholders, only such business shall be conducted as shall have been properly brought before the meeting. To be properly brought before an annual meeting, business must be (i) specified in the notice of the meeting (or any supplement thereto) given by or at the direction of the Board of Directors, (ii) otherwise

properly brought before the meeting by or at the direction of the Board of Directors or (iii) otherwise properly brought before the meeting by a stockholder of the corporation who was a stockholder of record at the time of giving of notice provided for in this Section, who is entitled to vote at the meeting and who complied with the notice procedures set forth in this Section. For 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 . . . .

To be timely, a stockholder's notice shall be received at the company's principal office . . . , not less than 120 calendar days before the date of company's proxy statement released to shareholders in connection with the previous year's annual meeting. . . .

Such stockholder's notice shall set forth as to each matter the stockholder proposes to bring before the annual meeting (i) a brief description of the business desired to be brought before the meeting and the reasons for conducting such business at the meeting and any material interest in such business of such stockholder and the beneficial owner, if any, on whose behalf the proposal is made; and (ii) as to the stockholder giving the notice and the beneficial owner, if any, on whose behalf the proposal is made (A) the name and address of such stockholder . . . , (B) the class and number of shares of the corporation which are owned of record and beneficially . . . , and (iii) in the event that such business includes a proposal to amend either the Articles of Incorporation or the Bylaws of the corporation, the language of the proposed amendment. . . .

Nothing in these Bylaws shall be deemed to affect any rights of the stockholders to request inclusion

of proposals in the corporation's proxy statement pursuant to Rule 14a-8 under the Exchange Act.

The bylaws had previously contained a specific provision for nomination of directors, but an amendment had removed that provision. Office Depot sent its notice of annual meeting, which included the election of twelve directors. Levitt then filed a proxy statement seeking to nominate two directors. However, Levitt did not comply with the advance notice requirement, and Office Depot rejected its nominations.

The Court held that the scope of "business" that could be proposed at an annual meeting included nominations and election of directors. The Court found that the plain meaning of the term "business" was "affair" or "matter," and that, for any affair or matter to be considered at the annual meeting, it must have been properly brought before the meeting. Therefore, because the nomination of directors is an affair or matter, it also must be properly brought. Additionally, the General Corporation Law includes the election of directors as business to be conducted at an annual meeting. Thus, the Court found that the nomination of directors constituted business, and any stockholder director nominations implicate the advance notice provisions. However, the Court also found that Levitt was not required to give advance notice of its intention to nominate the directors, since Office Depot had already specified in its notice that the meeting would include the election of directors.

Although *Jana Master Fund* is currently on expedited appeal, and appeal is likely in *Levitt* as well, corporations should review their bylaws to ensure that they

will not be interpreted as applying only to Rule 14a-8 proposals and that they explicitly cover stockholders proposals relating to any matter even if it is already the subject of board proposals.

**For more information about this  
Client Advisory, please contact:**

**M. RIDGWAY BARKER**

**(203) 351-8032**

**[mrbarber@kelleydrye.com](mailto:mrbarber@kelleydrye.com)**