

ADVANCE NOTICE BYLAWS REQUIRE CAREFUL DRAFTING

April 17, 2008

To Our Clients and Friends:

Two recent Delaware Chancery Court decisions highlight the importance of careful drafting of advance notice bylaws – that is, bylaws requiring stockholders to give companies advance notice of director nominations and other proposals they intend to make at stockholder meetings. These bylaws are intended to give companies adequate time to evaluate and respond to stockholder proposals and to communicate with stockholders about them, but the two recent cases suggest a judicial inclination to interpret them narrowly. In each case, the court held that the advance notice bylaw in question did not apply to director nominations by insurgent stockholders.

In *JANA Master Fund Ltd. v. CNET Networks, Inc.*, C.A. No. 3447-CC, 2008 WL 660556 (Del. Ch. Mar. 13, 2008), the bylaws of CNET Networks required stockholders to give advance notice of any “other corporate business” they seek to transact at an annual meeting. The bylaw also required a proposing stockholder to own at least \$1,000 of voting securities for at least one year, with the notice to comply with “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.” When hedge fund JANA sought to elect directors using its own proxy statement, CNET Networks claimed the bylaw prohibited the nominations because JANA had not owned its stock for the requisite one-year period. The Delaware Chancery Court disagreed, finding that the bylaw in question applied solely to stockholder nominations and proposals intended to be included in the company’s proxy materials pursuant to Rule 14a-8.

In *Levitt Corp. v. Office Depot, Inc.*, C.A. No. 3622-VCN (Del. Ch. Apr. 14, 2008), the bylaws of Office Depot required advance notice for business properly to be brought before an annual meeting by a stockholder. Office Depot’s notice of its 2008 annual meeting specified that the business of the meeting would include electing directors. When stockholder Levitt sought to nominate its own candidates, Office Depot sought to block the nominations based on Levitt’s failure to comply with the advance notice bylaw. The Delaware Chancery Court held that, although the term “business” includes director nominations, the business of electing directors had been properly put before the meeting by the company itself. The court discerned “no persuasive reason why the business of electing directors should not include the subsidiary business of nominating directors for election.” The court also noted

that prior versions of Office Depot's bylaws explicitly required advance notice of director nominations.

Companies should review their advance notice bylaws carefully to make sure they apply to all stockholder nominations and other proposals.

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