

## Recent Developments in Advance Notice Bylaws

We want to bring to your attention three recent developments that warrant reviewing your advance notice bylaw, which requires stockholders desiring to nominate directors or to propose other business at a meeting of stockholders to notify the company a certain number of days before the meeting.

### 1. *JANA v. CNET* – Advance Notice Bylaw Held to Apply Only to Rule 14a-8 Proposals

In *JANA Master Fund v. CNET Networks, Inc.*, a case decided last month by the Delaware Chancery Court and currently on appeal to the Delaware Supreme Court, the court interpreted the wording of CNET's advance notice bylaw to limit the requirement to those director nominations or stockholder proposals intended to be included in the company's proxy statement pursuant to Rule 14a-8. As a result, CNET's advance notice bylaw was held not to apply to JANA's independently funded proxy solicitation. Unless this decision is reversed or upheld on other grounds, other companies should revise their advance notice bylaws to clarify that they apply to all director nominations and stockholder proposals and to avoid the language that led the court to limit CNET's advance notice bylaw to Rule 14a-8 proposals.

### 2. *Levitt v. Office Depot* – Advance Notice Requirement Held Not to Apply to Stockholder Nominations Where Notice of Meeting Identified Election of Directors as an Item of Business

Earlier this week, in *Levitt Corp. v. Office Depot, Inc.*, the Delaware Chancery Court held that, under the language of Office Depot's advance notice bylaw, disclosure in the company's Notice of Annual Meeting that the election of directors was among the business to be conducted at the meeting relieved Levitt from the obligation to provide advance notice of its intention to nominate an alternative slate. The court found that electing directors is within the meaning of an annual meeting's "business" and that part of electing directors is nominating them, and it noted that a differently worded bylaw could have led to a different result. Although this decision is also likely to be appealed, we advise public companies incorporated in Delaware to review their advance notice bylaws in light of *Levitt* to ensure that advance notice requirements apply to director nominations and other business proposed by stockholders even when the company has provided advance notice of the business item in general.

### 3. *Sara Lee Corp. and Others* – Disclosure of Hedging Activity and Derivative Transactions

In several recent transactions, hedge funds and other activist stockholders have used hedging strategies and other derivatives to "uncouple" the voting rights and economic interests that traditionally have been unified in stock ownership. These techniques can be used, on the one hand, to obtain the right to vote shares without sharing any economic risk ("empty voting") and, on the other hand, to assume the economic risk and benefit of ownership without acquiring the voting or investment control that trigger disclosure under Section 13(d) of the Securities Exchange Act ("hidden ownership"). The interests of stockholders employing these techniques might not be aligned with those of more traditional stockholders, and the proposals they make might not be in the best interests of the company.

In response to these concerns, several companies recently amended their advance notice bylaws to require that stockholders seeking to nominate directors or to propose other business disclose any hedging or other derivative transactions with respect to the company's stock. Such disclosure could expose whether the economic interests behind the director nominations and stockholder proposals coincide with the interests of other, longer-term investors or the company. A mere disclosure requirement would not prevent director nominations or other proposals by hedged stockholders, but it serves the purpose of making public the underlying interests of the proposing stockholder. And, of course, unless a company were to amend its poison pill, this disclosure requirement would not apply to stock owned by a counterparty in a hedging transaction that is not an affiliate of or acting in concert with the proposing stockholder.

## For Further Information

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