

CORPORATE AND SECURITIES LAW

Alert

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Advance Notice and Indemnification Bylaw Provisions Should Be Reviewed In Light of Recent Delaware Court Decisions

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As you may be aware, several recent decisions of the Delaware Chancery Court, which are summarized below, have narrowly interpreted bylaw provisions relating to advance notice requirements for stockholders seeking to introduce business at a stockholders' meeting and indemnification rights of directors and officers. In light of these decisions, companies should review their bylaws to ensure that provisions relating to advance notice requirements and indemnification rights are unambiguous and will therefore operate as intended.

Applicability of Advance Notice Bylaws Following *CNET* and *Office Depot* Decisions

In *Jana Master Fund, Ltd. v. CNET Networks, Inc.*, a decision by the Delaware Chancery Court that was recently affirmed by the Delaware Supreme Court, investment fund Jana sought to gain control of the classified board of CNET by nominating its own director candidates and proposing to increase the size of the board in connection with CNET's 2008 annual meeting. Following receipt of notice from Jana that it intended to conduct its own proxy solicitation with respect to its nominations and proposals, CNET took the position that Jana had failed to comply with the provisions of CNET's bylaws that required that a stockholder seeking to "transact other corporate business" at the annual meeting (which, in CNET's view, included the nomination of directors) beneficially own at least \$1,000 of CNET common stock for at least one year. At the time of CNET's 2008 annual meeting, Jana would have been a stockholder for only eight months. The Delaware Chancery Court, however, took the view that CNET's advance notice requirement applied only to proposals that stockholders wanted to have included in CNET's proxy statement pursuant to Rule 14a-8 of the Securities Exchange Act of 1934. Since Jana was not requesting that CNET include its nominations and proposals in the company's proxy statement, Jana was not required to comply with the advance notice bylaw requirements.

Levitt Corp. v. Office Depot, Inc., decided by the Delaware Chancery Court after *CNET*, similarly involved a stockholder's attempt to nominate its own director candidates at Office Depot's 2008 annual meeting. Shortly after Office Depot filed its definitive proxy materials with the Securities and Exchange Commission, the stockholder filed its own competing proxy materials with its alternate candidates but did not give advance notice to the company of its intention to propose director candidates. Office Depot argued that its bylaws, which required that "[f]or business to be properly before an annual meeting by a stockholder, the

stockholder must have given timely notice thereof in writing to the Secretary,” required advance notice to the company in order for the stockholder nominations to be properly brought before the meeting. While the Delaware Chancery Court agreed with Office Depot that “business” included director nominations, it unexpectedly concluded that the company itself had brought the business of nominating and electing directors (including both its own nominees and the competing slate) before the annual meeting via its notice to stockholders included as part of the company’s proxy statement and that the stockholder could separately solicit proxies for an alternate slate of directors notwithstanding the fact that it had not given advance notice of its intent to do so to Office Depot.

Overall, both *CNET* and *Office Depot* emphasize the need for companies to closely review the advance notice provisions in their bylaws and update them if necessary to account for the findings in these two cases. Among other things, advance notice bylaws should clearly differentiate between director nominations and other business to be considered at a stockholders’ meeting. Additionally, advance notice bylaws should clearly distinguish the requirements under the bylaws for matters to be brought before the meeting from the requirements of Rule 14a-8 for companies to include stockholder proposals in the company’s proxy statement. As *CNET* demonstrates, any ambiguity in these areas may be construed against the company and in favor of an activist stockholder. In light of *Office Depot*, companies may also wish to specify in the notice of meeting that the agenda item on director elections applies only to the election of director candidates described in the company proxy statement and not to competing nominations.

Indemnification and Expense Advancement Bylaws Following *Schoon* Decision

In another surprising decision, the Delaware Chancery Court recently held in *Schoon et al. v. Troy Corporation* that a former director’s right to advancement of expenses did not vest until an indemnifiable claim was asserted against him and that, prior to such time, the corporation could amend its bylaws to eliminate the right to advancement of expenses with respect to the former director. While it is uncertain whether *Schoon* will be followed by the Delaware Supreme Court or applied outside of its specific fact pattern, companies seeking to offer strong indemnification protection should review and, if necessary, revise their bylaws to specify that (1) indemnification and advancement provisions apply to officers and directors who serve in such capacity during the time such provisions are in effect, whether or not they continue to serve in such capacity at the time expense advancement or indemnification is sought, and (2) such provisions represent contractual rights and cannot be retroactively amended to adversely affect the rights of indemnified persons arising in connection with acts or omissions occurring prior to such amendment. Companies may also want to consider entering into separate indemnification agreements with their officers and directors that cannot be amended without the consent of both parties.

If you have any questions about this Corporate and Securities Law Alert, or would like any additional information, please contact any Bass, Berry & Sims attorney in the Corporate and Securities Practice Area.

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