Advance Notice Bylaws: The Current State of Second Generation Provisions

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A significant number of public companies have amended their advance notice bylaw provisions since 2008 to address perceived limitations or ambiguities in their bylaws as the result of case law developments and shareholder activism trends. In early 2008, the Delaware Chancery Court interpreted ambiguous advance notice bylaw provisions in favor of insurgent shareholders attempting to nominate their own slate of director nominees in two highly publicized cases, *Jana Master Fund, Ltd. vs. CNET Networks, Inc. ("CNET")*[2], and *Levitt Corp. vs. Office Depot, Inc. ("Office Depot")*.[3]

Later, in September 2008, a Second Circuit decision in *CSX Corporation vs. The Children's Investment Fund* highlighted the potential vulnerability of a public company to an activist shareholder acquiring a significant position in a company through the acquisition of derivatives without making a filing under Section 13 of the Securities Exchange Act as the result of the shareholder holding beneficial ownership of less than 5% of a company.[4] This article analyzes and surveys various provisions frequently included in so-called "second generation" advance notice bylaws adopted by Delaware corporations since 2008.

Although the level of law firm commentary regarding advance notice bylaws has diminished since 2008, advance notice bylaws remain an important aspect of a public company's preparedness for shareholder activism. In this regard, advance notice bylaws assist public companies in obtaining relevant information with respect to shareholder director nominations or proposals to be made at an annual or special meeting and facilitate the ability of boards to respond to and present alternatives to such shareholder proposals if necessary.

Shareholder activists and proxy advisory firms have generally shown less resistance to public companies amending their advance notice bylaws to include second generation provisions in comparison to certain other defensive actions taken by public companies, such as renewing or adopting a shareholder rights plan or maintaining a classified board.[5] In this regard, the decision of a company to amend its advance notice bylaws will not trigger a withhold recommendation from ISS for a company's directors under ISS's proxy voting guidelines.[6] Moreover, public companies typically have the ability to amend their bylaws via board action without shareholder approval, and most do not submit advance notice bylaw amend-

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[2] 954 A.2d 335 (Del. Ch. 2008). In *CNET*, Jana sought to gain control of CNET's classified board by replacing two existing directors, expanding the size of CNET's board by five directors, and electing its own slate to fill the seven open seats. Following receipt of notice from Jana of its intent to conduct its own proxy solicitation, CNET asserted that Jana had not complied with CNET's advance notice bylaw requirement that proponents hold at least $1,000 worth of CNET stock for at least one year. In *CNET*, the court interpreted CNET's advance notice bylaws as only applying to Rule 14a-8 shareholder proposals, and that therefore Jana's nominations and proposals were not subject to CNET's advance notice bylaw requirements.

[3] 2008 WL 1724244 (Del. Ch. 2008). In *Office Depot*, Levitt Corp. nominated its slate of directors and filed its own proxy materials after Office Depot had filed its definitive proxy materials with the SEC, but did not comply with the advance notice requirements of Office Depot's bylaws, which required that "[f]or business to be properly brought before an annual meeting by a shareholder, the shareholder must have given timely notice thereof in writing to the Secretary." In *Office Depot*, the court held that the term "business" in the foregoing quoted provision included director nominations, and that because Office Depot had brought this "business" of nominating and electing directors (whether its own nominees or a competing slate) through Office Depot's own proxy materials, Levitt Corp. was not required to comply with Office Depot's advance notice bylaw provisions.

[4] 2008 WL 4222848 (2nd Cir. 2008). In *CSX*, a hedge fund entered into cash-settled total return swaps with eight counterparties covering over 14% of CSX's shares but did not file a Schedule 13D since the shareholder's beneficial ownership remained just under 5%. Moreover, as is common in such arrangements, the counterparties to such swaps hedged their positions by purchasing the shares underlying the swaps. In *CSX*, the court held that the tactics of the hedge fund violated the anti-evasion provision of SEC Rule 13d-3(b), but that the court did not have the authority to interfere with the voting power of the hedge fund's or its counterparties' shares.

[5] However, note, for example, the Corporate Governance Policies of the Council of Institutional Investors, which provide that "[a]dvance notice bylaws, holding requirements, disclosure rules and any other company imposed regulations on the ability of shareowners to solicit proxies beyond those required by law should not be so onerous as to deny sufficient time or otherwise make it impractical for shareowners to submit nominations or proposals and distribute supporting proxy materials." (Available at http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2009-29-10%20FINAL.pdf).

[6] With respect to advance bylaw proposals submitted to shareholders for approval, under ISS's 2011 proxy voting guidelines, ISS will review such proposals on a case-by-case basis considering certain criteria set forth in these guidelines. See also footnote 21 below.

ments approved by their board to shareholders for approval.[7] Therefore, public companies have greater practical flexibility in adopting effective advance notice bylaw provisions than they do in taking certain other protective actions.

Although a significant number of Delaware public companies have adopted second generation advance notice bylaws since 2008, many have not. Approximately 58% of S&P 500 large-cap Delaware corporations have amended their bylaws since 2008 to include at least some second generation advance notice bylaw provisions discussed below, compared to approximately 51% of S&P 400 mid-cap Delaware corporations and 37% of S&P 600 small-cap Delaware corporations.[8] Moreover, if the SEC's proxy access rules adopted in August 2010 are ultimately judicially upheld in their current form, then we believe a large number of public companies will elect to amend their advance notice bylaws in response to proxy access. Those public companies amending their bylaws in response to proxy access should use this opportunity to incorporate second generation advance notice bylaw provisions into their bylaws to the extent they have not already done so.

Impact of Proxy Access

On August 25, 2010, the SEC issued final rules regarding proxy access, under which shareholders may require a public company to include director nominees of shareholders in the company's proxy statement within certain parameters set forth in new Rule 14a-11 (the rules also amended Rule 14a-8 to facilitate the ability of shareholders to include bylaw amendment proposals in a company's proxy statement that would provide for more permissive proxy access than mandated by Rule 14a-11). Following a lawsuit brought by the U.S. Chamber of Commerce and Business Roundtable challenging the validity of the SEC's proxy access rules, the SEC issued an order on October 4, 2010 which delayed the effectiveness of proxy access pending the resolution of this lawsuit. This lawsuit is currently pending before the D.C. Circuit Court of Appeals, and an opinion related to this lawsuit is expected soon, but has not been issued at the time of the submission of this article.

Assuming that the SEC's proxy access rules are ultimately judicially upheld, the implementation of these rules will have a significant impact on the landscape of advance notice bylaws. Although the interaction between the final proxy access rules and advance notice bylaw requirements was not clear in the view of many commentators based on the text of the SEC's proxy access adopting release, statements made by the SEC staff following the adoption of the rules clarified that shareholders' ability to utilize proxy access is predicated on the right to nominate directors under state law. Therefore, it appears that a company may apply its advance notice bylaw provisions in connection with Rule 14a-11 nominations and disregard a Rule 14a-11 nomination not made in compliance with a company's advance notice bylaws, at least to the extent that such provisions are enforceable under state law and do not cause a company to effectively opt out of Rule 14a-11 or unfairly discriminate against Rule 14a-11 nominees.

Following the adoption of final proxy access rules, a small number of public companies amended their advance notice bylaws in response to proxy access.[9] However, the SEC's stay of the effectiveness of proxy access in October 2010 stalled further movement in this regard, as the vast majority of public companies have deferred taking action in response to proxy access until the fate of the SEC's proxy access rules is known.

Although it is beyond the scope of this article to discuss in detail what actions public companies should consider taking in response to the SEC's proxy access rules, if these rules are ultimately upheld, many public companies will want to amend their advance notice bylaw provisions in response to proxy access. In this regard, there are two general approaches a company may take: either provide that a company's

[7] The majority of jurisdictions authorize both the board of directors and the shareholders of a company to amend the company's bylaws, in some cases subject to any limits in the company's charter. The Delaware General Corporation Law provides that shareholders may amend a corporation's bylaws but also provide that the company's certificate of incorporation may authorize amendment by the board of directors without shareholder approval. See Delaware General Corporation Law Section 109.

[8] According to data from FactSet SharkRepellent.net. In addition, based on FactSet SharkRepellent.net data, with respect to U.S. public companies incorporated outside of Delaware, approximately 51% of non-Delaware S&P 500 corporations, 37% of non-Delaware S&P 400 corporations and 34% of non-Delaware S&P 600 corporations have amended their advance notice bylaws since 2008.

[9] See, for example, Section 12(a)(5) of the Amended and Restated Bylaws of MGM Resorts International, filed as Exhibit 3.1 on its Current Report on Form 8-K filed on December 20, 2010 at www.sec.gov.

advance notice bylaws pertaining to director nominations do not apply to Rule 14a-11 nominations (similar to the exclusion typically included in advance notice bylaws for Rule 14a-8 proposals), or provide that at least some of a company's advance notice bylaw provisions pertaining to director nominations also apply in the Rule 14a-11 context.[10]

We believe there is some benefit in following the latter approach. In this regard, the information required to be provided to a company by shareholder proponents under second generation advance notice bylaws is generally more extensive than that required under Rule 14a-11, and we believe that public companies should give consideration to requiring a shareholder proponent to comply with these advance notice bylaw information requirements when making a Rule 14a-11 nomination in addition to complying with the informational requirements of Rule 14a-11.

Overview of Delaware Law Regarding Advance Notice Bylaw Provisions

Before moving to an analysis of second generation advance notice bylaw provisions, a brief overview of Delaware jurisprudence regarding advance notice bylaw provisions is instructive. In the absence of an advance notice bylaw or other provision to the contrary, Delaware law does not require shareholders to provide a corporation with advance notice of proposals or nominations to be made at an annual meeting.[11] However, advance notice bylaw provisions of some sort (whether or not second-generation) are standard among public companies, and Delaware courts have frequently upheld them as valid.[12] Nevertheless, under Delaware law, advance notice bylaws must not unduly restrict the shareholder franchise or be applied inequitably.[13] Furthermore, Delaware courts have routinely construed any ambiguity found in advance notice bylaw provisions in favor of shareholders, which highlights the importance of clear drafting with respect to advance notice bylaws.[14]

Although there are a fair number of Delaware cases interpreting advance notice bylaws, we are not aware of any cases (Delaware or otherwise) interpreting any prototypical second-generation advance notice bylaw provisions as described below. We expect that legal challenges to the enforceability of second-generation advance notice bylaw provisions will occur in the future, which may provide additional guidance regarding the drafting of these provisions.

Analysis and Survey of Second Generation Advance Notice Bylaw Provisions

This article analyzes and surveys provisions frequently included in second generation advance notice bylaw provisions. For purposes of this survey below, we have reviewed advance notice bylaw provisions of 100 Delaware corporations (consisting of 33 S&P 500 large-cap, 33 S&P 400 mid-cap and 34 S&P 600 small-cap companies) which have amended their advance notice bylaws since 2008.[15]

A. Bedrock Second Generation Provisions

A brief summary of key provisions included in virtually all second generation advance notice bylaw provisions are as follows:

Disclosure of Derivatives Holdings. Second-generation advance notice bylaws customarily require more detailed and broader disclosure regarding the extent of the ownership interests of the shareholder proponent and affiliated and associated persons than required under Section 13 of the Securities Exchange Act, including the disclosure of derivatives and short positions. The importance of including such a provision in advance notice bylaws was highlighted by the fact pattern in *CSX*, in which a hedge fund

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[10] See "IV.B. Survey and Analysis of Other Second Generation Provisions: (i) Advance Notice Periods" below for a discussion of the interaction between timing of the notice period for proxy access nominations under Rule 14a-11 and the notice period under advance notice bylaws.

[11] *Goggin v. Vermillion, Inc.*, C.A. No. 6465-VCN at 10 (Del. Ch. June 3, 2011).

[12] *Openwave Sys. Inc. vs. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 238-39 (Del. Ch. 2007) (citing *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 728 A.2d 25, 43 (Del. Ch. 1998)).

[13] *Id.* at 239.

[14] See, for example, *CNET* at 18 (referencing Delaware court's "rule of construction in favor of franchise rights"); *Office Depot* at 7 (indicating that "[bylaw] restrictions that are not clear and unambiguous should not be interpreted to limit shareholder democracy").

[15] We have limited our review to companies incorporated in Delaware to ensure the consistency of the underlying law governing applicable bylaw provisions and to focus on companies directly impacted by the Delaware decisions in *CNET* and *Office Depot*.

entered into cash-settled total return swaps covering over 14% of CSX's shares but did not make any public filing under Section 13 of the Securities Exchange Act as the result of holding beneficial ownership of less than 5% of CSX's shares.[16]

Exclusive Means. Second generation advance notice provisions typically clarify that the submission of a proposal or nomination in compliance with the company's advance notice bylaws is the exclusive means by which a shareholder may bring a proposal or nomination. This language has become commonplace as the result of the *CNET* and *Office Depot* decisions, in which advance notice bylaw drafting ambiguities led the Delaware court to conclude that the advance notice provisions of the subject company did not apply to director nominations made by a shareholder, thereby allowing the shareholder proponent to make director nominations outside the scope of the company's advance notice bylaws.

Clarification of Interaction with Rule 14a-8. Advance notice bylaw provisions customarily include a provision that the advance notice bylaws do not affect the right of a shareholder to include a proposal in the company's proxy statement under Rule 14a-8. This language is advisable based on SEC no-action letter guidance[17] that a public company may not exclude a Rule 14a-8 shareholder proposal from a company's proxy statement as the result of the proponent's failure to comply with the company's advance notice bylaws.[18]

Disclosure of Relationships. Second generation advance notice bylaws typically require broad disclosure of relationships between any shareholder proponent or persons associated with such proponent, and any other persons, in connection with any nomination or proposal (and, more generally, customarily require that a proponent disclose to the company any additional information that a proponent would be required to disclose in a proxy statement or other filing in connection with the solicitation of proxies or consents by such proponent under the Exchange Act).

Consequences of Failure to Comply with Advance Notice Bylaws. Second generation advance notice bylaw provisions typically explicitly provide that in the event a proponent fails to comply with a company's advance notice bylaws, the proposal or nomination brought by such shareholder will be disregarded by the presiding officer at the meeting (alternatively, some second generation advance notice bylaws provide that a presiding officer will have the authority to disregard a proposal under these circumstances, but do not mandate this exclusion). The inclusion of such a provision (whether mandatory or discretionary) is advisable and may allow a company to exclude a proposal or nomination not made in compliance with a company's advance notice bylaws and/or increase the leverage of a company in negotiating with a shareholder proponent who has failed to comply with a company's advance notice bylaws. Companies should be mindful, however, that there may be equitable limitations under Delaware law (or shareholder relations considerations) that may impact the ability of a company to enforce certain advance notice bylaw provisions against a shareholder proponent to the extent that the proponent's noncompliance with these provisions is *de minimis*.

B. Survey and Analysis of Other Second Generation Provisions

A survey and analysis of other advance notice bylaw provisions often included in second generation advance notice bylaw provision are set forth below.

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[16] The Dodd-Frank Act amended Section 13(d) under the Exchange Act in several respects, including providing the SEC with the authority to shorten the ten-day filing deadline under Section 13(d) and providing that a person will be deemed to acquire beneficial ownership based on the purchase and sale of a security-based swap only to the extent that the SEC may determine by rule. However, the Dodd-Frank Act did not address the application of Section 13(d) to cash-settled total return swaps (as utilized in *CSX*), and the application of Section 13(d) to derivatives remains unclear in the absence of SEC rulemaking (underscoring the benefit of including a derivatives disclosure provision in a company's advance notice bylaws). The SEC is currently engaged in a project to modernize reporting under Exchange Act Sections 13(d) and 13(g). See "Beneficial Ownership Reporting Requirements and Security-Based Swaps," SEC Release No. 34-64628, June 8, 2011.

[17] See *Dollar Tree Stores, Inc.*, SEC No-Action Letter (March 7, 2008). *See also Cleco Corporation*, SEC No-Action Letter (January 29, 2010).

[18] This conclusion contrasts with the recently-expressed views of the SEC staff noted above that a company may (at least in certain circumstances) require a proponent making a proxy access director nomination to comply with the company's advance notice bylaws as a condition to such shareholder having the right to include such nomination in the company's proxy statement.

i. Advance Notice Periods

Advance notice bylaws generally provide for a window during which a shareholder proponent may make a proposal or director nomination, customarily a period of time prior to the anniversary date of last year's annual meeting or the anniversary date of last year's proxy statement.

Recent legal developments have impacted advance notice period in two respects. First, in *CNET*, a key element of the court's holding that the advance notice bylaw provision only applied to Rule 14a-8 proposals was that the advance notice period was tied to the date of CNET's proxy statement for the previous year, not the date of its annual meeting. Following this decision, many public companies amended their advance notice bylaws to tie the advance notice period to the date of the company's previous year's annual meeting rather than the previous year's proxy statement to avoid any possible interpretation that a company's advance notice bylaws did not apply outside the context of Rule 14a-8.

The SEC's proxy access rules may cause companies to revisit their advance notice period construct again, however, if and when these rules are ultimately judicially upheld. Under the SEC's proxy access rules, Rule 14a-11 director nominations must be made within 120-150 days of the date of last year's proxy statement of a company (irrespective of the time period for director nominations set forth in a company's advance notice bylaws). In light of this mandatory advance notice period for Rule 14a-11 nominations (which is earlier than the advance notice period found in almost all public company advance notice bylaws), we believe companies should give consideration to amending their advance notice bylaws to alter their advance notice period for director nominations made outside of Rule 14a-11 to match the advance notice period under Rule 14a-11, if proxy access is ultimately upheld.

This approach will allow companies to consider and react to director nominations made by shareholders both under and outside of Rule 14a-11 (including whether to resist or settle with shareholder proponents making such nominations) within the same time period, and have a full understanding of the number and nature of shareholder dissidents and nominees when making these decisions, rather than reacting to Rule 14a-11 nominations without knowing whether another shareholder may make subsequent nominations outside of the Rule 14a-11 context. While this approach is not free from enforceability concerns,[19] the fact that the SEC has provided for an advance notice period for Rule 14a-11 nominations of 120-150 days prior to the delivery of last year's proxy statement may influence a Delaware court considering whether such a notice period unduly impedes the shareholder franchise under state law.

Our review of the advance notice period of Delaware corporations that have adopted second generation advance notice bylaws revealed the following:[20]

- Of the surveyed companies that have adopted second generation advance notice bylaws, 92% have tied the advance notice period to the date of last year's annual meeting, while only 8% have tied the advance notice period to the date of last year's proxy statement.[21]
- Of the surveyed bylaws, 80% have a window period of 30 days, 7% have a window period of greater than 30 days but no more than 90 days, 3% have a window period of between 20-25 days, and 10% do not have a window period but only require that proposals or nominations be made prior to a specified date (for example, 90 days prior to last year's annual meeting).
- Of the surveyed bylaws that have a window period of 30 days that is tied to last year's annual meeting, 84% provide for a notice period of 90-120 days prior to the meeting, 9% provide for a notice period 60-90 days prior to the meeting and 7% provide for a notice period of 120-150 days prior to the meeting.

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[19] While no Delaware court has directly upheld a bylaw with an advance notice period of such duration, the Delaware Court of Chancery recently found that an advance notice provision in excess of 150 days prior to the annual meeting included in the proxy statement for the previous year's meeting (but not in the company's bylaws) would not likely be found to be unreasonably long or unduly restrictive of the plaintiff shareholder's franchise rights. *Goggin v. Vermillion, Inc.*, C.A. No. 6465-VCN (Del. Ch. June 3, 2011).

[20] In contrast to the survey data set forth below, under ISS's 2011 proxy voting guidelines, ISS supports advance notice window periods of at least 30 days which expire no earlier than 60 days prior to the date of last year's meeting.

[21] This does not take into account the alternative notice period mechanism included in many public companies' bylaws which provides for a separate deadline in the event a company's annual meeting is more than a specified period of time (often, 30 days) prior to or following the date of the company's last annual meeting.

ii. Conscious Parallelism: Acting in Concert

Some second generation advance notice bylaws require a proponent to not only provide requested information with respect to the proponent and its nominees, affiliates and associates, but also those persons with whom the proponent is acting in concert.[22] This "conscious parallelism" concept, whereby a company attempts to group (and require disclosure of) shareholders who may not have an explicit agreement with each other but are engaging in wolf pack behavior, has also been the subject of recent commentary in the shareholder rights plan arena.[23] Of the companies that have adopted second generation advance notice bylaws included in our survey, 51% of the surveyed bylaws require some form of disclosure with respect to persons "acting in concert" with the proponent.

When responding to an advance notice bylaw which requires disclosure of this nature, a shareholder proponent may take a narrow view of what other persons (if any) are "acting in concert" with the proponent. Nevertheless, including a bylaw provision of this nature may possibly elicit useful information about persons acting in concert with a proponent, or (perhaps more likely) deter overt wolf pack behavior among potential shareholder proponents who desire to avoid triggering disclosure under a company's advance notice bylaws that they are "acting in concert."

iii. Requirement of Director Nominees to Complete Questionnaire and/or Provide Additional Information

A significant number of companies adopting second generation advance bylaws require shareholder nominees to complete a questionnaire provided by the company and/or provide certain additional information which may be requested by the company. Of the surveyed companies that have adopted second generation advance notice bylaws included in our survey, 64% of the surveyed bylaws require a shareholder nominee to complete a questionnaire and/or provide additional information if requested by the company.

These questionnaire and informational requirements may be used by a company to elicit information regarding, among other things, whether a director nominee would be an independent director of the company, the relationship between the director nominee and the shareholder proponent, and whether the election of a director could give rise to legal issues for a company (such as in connection with the Clayton Act's restrictions on interlocking directorships). The enforceability of a bylaw requirement of this nature has not been tested under Delaware law, although we believe that, at a minimum, requiring a shareholder nominee to complete a questionnaire in the same form as the questionnaire completed by other directors of the company would be judicially upheld.

iv. Requirement to Update Information

Some second-generation advance notice bylaws only require a proponent to deliver information to a company at the time the proponent is making a proposal, while others require a proponent to update information if there is any material change (or inaccuracy) in the information previously provided. While there are various formulations of this requirement, this update is often required to be provided a short period of time following the record date of the company. Of the surveyed companies that have adopted second generation advance notice bylaws included in our survey, 55% of the surveyed bylaws require that some or all of the information provided by a proponent at the time of a submission of a nomination or proposal be updated as necessary, while 45% do not include any updating provision.

Requiring a shareholder proponent to update information previously provided is consistent with the purpose of advance notice bylaws to ensure that a company and its shareholders are provided complete and accurate information about shareholder proposals to be made at a meeting, and we believe the inclusion of such a provision is likely enforceable under Delaware law.

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[22] See, for example, Section 5(a) of the Amended and Restated Bylaws of DST Systems, Inc. filed as Exhibit 3.2 on its Current Report on Form 8-K filed on May 17, 2010 at www.sec.gov.

[23] See "Second Generation Advance Notice Bylaws and Poison Pills," by Charles Nathan and Stephen Amdur of Latham & Watkins LLP, posted at The Harvard Law School Forum on Corporate Governance and Financial Regulation on April 22, 2009 (available at http://blogs.law.harvard.edu/corpgov/2009/04/22/second-generation-advance-notice-bylaws-and-poison-pills/).

v. Requirement of Proponent to Attend Meeting

Second-generation advance notice bylaws typically require a shareholder proponent (or its representative) to appear at the meeting to present the nomination or proposal (similar to the requirement under Rule 14a-8). Of the companies that have adopted second generation advance notice bylaws included in our survey, 66% of the surveyed bylaws either required a proponent (or its representative) to appear at the meeting to present the proposal or required a proponent to include a representation to this effect.

We think it is helpful to include such a requirement in a company's advance notice bylaws. However, a more difficult question is how a company should react if a shareholder proponent (whether making a proposal under a company's advance notice bylaws or Rule 14a-8) does not, in fact, attend the annual meeting. In this regard, even if a company has the ability to disregard a proposal or nomination under Delaware law under these circumstances, there may be public relations and shareholder relations consequences of doing so. In addition, even if a company elects to disregard a proposal under these circumstances in accordance with the company's advance notice bylaws, it may be helpful, based on shareholder relations and other considerations, to disclose the voting results under Item 5.07 of Form 8-K with respect to the disregarded proposal or nomination.[24]

vi. Solicitation of Proxies

Second-generation advance notice bylaws often require a shareholder proponent to disclose whether the proponent intends to solicit proxies from other shareholders in support of a nomination. Of the companies that have adopted second generation advance notice bylaws included in our survey, 52% of the surveyed bylaws included such a provision.

While most shareholders who provide advance notice to a company of the shareholder's proposal or nomination intend to solicit proxies in support of the nomination or proposal, there are certain circumstances under which a proponent does not intend to solicit proxies, and it may be helpful for a company to have advance notice of the shareholder's intention in this regard. For example, a proponent may nominate a director nominee under a company's advance notice bylaw provision with the hope that a company's board will nominate such candidate on management's slate (but without any intent to solicit proxies in support of a nomination if the board does not take this action). In addition, occasionally a shareholder may desire to make a floor proposal at a meeting for the sake of publicity without soliciting proxies or otherwise having any realistic expectation that such proposal will pass.[25]

vii. Proper Matter for Shareholder Action

Second-generation advance notice bylaws often explicitly provide that, for a shareholder proposal to be valid, such proposal must be a proper matter for shareholder action. Of the companies that have adopted second generation advance notice bylaws included in our survey, 64% of the surveyed bylaws included such a provision.

Although it is arguably implicit that a shareholder proposal could not be presented at a meeting if it were not a valid matter for shareholder action (for example, if a shareholder proposes an amendment to the certificate of incorporation of a company without prior board approval) irrespective of whether such language is included in a company's bylaws, there is some benefit to including such language in a company's bylaws to eliminate any ambiguity regarding the treatment of such a proposal.

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[24] See the results for Proposal 5 disclosed in Item 5.07 of the Current Report on Form 8-K filed on May 24, 2011, by Southwest Airlines Co. (a Texas corporation) at www.sec.gov, where Southwest noted that the proponent did not properly present a proposal as the result of failing to appear at the meeting but nevertheless reported the voting results of such disregarded proposal.

[25] See, for example, the definitive 2011 proxy statement of JPMorgan Chase & Co. filed on April 7, 2011, which references the intent of a group of shareholders to make a floor proposal with respect to JPMorgan's membership in and interaction with the U.S. Chamber of Commerce.

C. Other Noteworthy Provisions

A sampling of other creative provisions, which, though not common, have been included in the second generation advance notice bylaws of Delaware corporations are as follows:

- A requirement that the proponent consent to the public disclosure by the company of information provided by the proponent under the company's advance notice bylaws.[26]
- A requirement that the proponent disclose the investment strategy or objective of the proponent, and provide copies of any prospectus or offering memorandum provided to investors in the proponent.[27]
- A requirement that the proponent provide, to the extent known, the names of other shareholders supporting the proponent's nominees or proposal.[28]
- A requirement that the proponent disclose any significant equity interests, derivative positions or short interests held by the proponent in any principal competitor of the company.[29]
- A requirement that the proponent have held at least 1% of the company's outstanding stock entitled to vote at the meeting for at least one year prior to giving notice.[30]

Conclusion

In sum, we believe that advance notice bylaws should continue to be a focus of public companies in light of the current era of shareholder activism and potential future legal developments that may impact advance notice bylaws such as proxy access. Moreover, if possible, it is advisable for companies to adopt appropriate advance notice bylaw provisions prior to the appearance of an activist shareholder, as courts may show greater deference to a decision made by a board to adopt advance notice bylaw provisions in advance of the heat of an activist campaign.[31] Thus, although the vast majority of public companies are not subject to a contested director election or an activist campaign in any given year, maintaining up-to-date and effective advance notice bylaws is a relatively low-cost step companies can take to protect themselves against potentially abusive or coercive campaigns by activist shareholders.

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[26] See Section 1.5(c)(iii)(F) of the Amended and Restated Bylaws of Electronic Arts Inc., filed as Exhibit 3.1 to its Current Report on Form 8-K filed on May 11, 2009 at www.sec.gov.

[27] See Section 2.2.B.(4)(b) of the Fourth Amended and Restated Bylaws of Ventas, Inc., filed as Exhibit 3.1 to its Current Report on Form 8-K filed on October 4, 2010, at www.sec.gov.

[28] See Section 2(e)(v) of the Bylaws of Baxter International Inc. filed as Exhibit 3.1 to its Current Report on Form 8-K filed on November 17, 2008 at www.sec.gov.

[29] See Section 2(e)(v) of the Amended and Restated Bylaws of The Home Depot, Inc. filed as Exhibit 3.1 to its Current Report on Form 8-K filed on June 7, 2011 at www.sec.gov.

[30] See Section 3(a) of the Amended and Restated Bylaws of MDU Resources Group, Inc., filed as Exhibit 3.2 to its Current Report on Form 8-K filed on May 2, 2010 at www.sec.gov.

[31] See *Goggin* at 11 (noting that, in upholding a company's enforcement of its advance notice deadline set forth in its proxy statement, the setting of the deadline "was made on a proverbial 'clear day'").

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