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Delaware Court Finds That an Annual Meeting Notice Allows a Dissident Stockholder to Circumvent Advance Notice Bylaw Provisions

In *Levitt Corp. v. Office Depot, Inc.*, C.A. No. 3622-VCN (Del. Ch. Apr. 14, 2008), the Delaware Court of Chancery held that a dissident stockholder could proceed with its director nominations at a company's annual meeting without providing advance notice pursuant to the company's bylaws. The court found that the bylaw provision, which restricted business that could be conducted at annual meetings to matters contained in the meeting notice and matters otherwise properly brought by the stockholders in accordance with certain advance notice requirements, did not preclude the dissident's director nominations because the annual meeting notice stated broadly that the business of director elections would be considered. *Levitt* is the second recent Delaware decision allowing dissident stockholders to circumvent advance notice requirements based on narrow and technical readings of bylaws.

Levitt involved a proxy contest waged by a one percent stockholder of Office Depot, Inc., who did not provide 120 days advance notice to the corporation of its partial slate of director nominees as seemingly required under the com-

pany's bylaws. The bylaws provided that "only such business shall be conducted as shall have been properly brought before the meeting." The dissident argued that this provision did not govern director nominations because the term "business" applied only to other types of stockholder proposals. The court disagreed, concluding that the plain meaning of "business" included both stockholder proposals and stockholder director-nominations.

The court then turned to the company's bylaw provision governing the manner in which business had to be brought before an annual meeting. The provision stated that:

To be properly brought before an annual meeting, business must be (i) specified in the notice of the meeting... (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... who complied with the [advance] notice procedures set forth in this Section.

The court rejected Office Depot's argument that the dissident's director nominations were improper because the dissident did not comply with the advance notice procedures required by clause (iii) of the bylaw. Instead, the court looked to the "items of business" set forth in the company's annual meeting notice, which included "To elect twelve (12) members of the Board of Directors for the term described in this Proxy Statement." It concluded that the dissident's director nominations were "properly brought" before the meeting pursuant to clause (i) of the bylaw because the meeting notice "specified" the election of directors and was sufficiently broad to include all director nominations—not just those on management's slate. In reaching this decision, the court noted that Office Depot's bylaws did not contain any provisions specifically addressing the director nomination process.

Levitt is an important decision and follows shortly after the opinion rendered in *JANA Master Fund Ltd. v. CNET Networks, Inc.*, 2008 WL 660556 (Del. Ch. Mar. 13, 2008). Both decisions construed bylaw provisions narrowly

and permitted dissident stockholders to proceed with proxy contests without providing advance notice to the corporation. Although *JANA* is subject to an appeal and *Levitt* may be appealed as well, the opinions are significant because advance notice bylaw provisions serve

an important purpose in corporate governance and, among other things, ensure the orderly conduct of stockholders meetings. Accordingly, we reiterate our recommendation issued after *JANA* that all corporations closely review their advance notice provisions and

takeover defenses generally. We also recommend that corporations take *Levitt* into account in drafting their stockholder meeting notices.

Please contact us if you have any questions about this decision or its implications for you or your business.

Hunton & Williams Corporate Securities & Governance Contacts

[Allen C. Goolsby](#)

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8289
agoolsby@hunton.com

[W. Alan Kailer](#)

1445 Ross Avenue, Suite 3700
Dallas, TX 75202-2799
(214) 468-3342
akailer@hunton.com

[C. Porter Vaughan III](#)

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8285
pvaughan@hunton.com

[Jerry E. Whitson](#)

200 Park Avenue
New York, NY 10166-0091
(212) 309-1060
jwhitson@hunton.com

[Gary E. Thompson](#)

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8787
gthompson@hunton.com

[Steven M. Haas](#)

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-7217
shaas@hunton.com

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