

Client Alert

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Advance Notice Bylaws: Delaware Court Allows Activist Proxy Contest to Proceed

In *Hill International, Inc. v. Opportunity Partners, L.P.*, No. 305, 2015 (Del. July 2, 2015), the Delaware Supreme Court affirmed a lower court's ruling that allowed a dissident stockholder's director nominations to be presented at an annual meeting. Specifically, the court held that the corporation's advance notice bylaw did not require 60 days prior notice of the dissident's nominations and other proposals. Because the decision is based on the court's interpretation of the bylaw at issue, corporations should review their advance notice bylaws to determine whether changes are warranted.

Background

In *Hill*, the corporation's advance notice bylaw provided as follows:

To be timely, a stockholder's notice shall be delivered to or mailed and received at the principal executive offices of the Corporation not less than sixty (60) days nor more than ninety (90) days prior to the meeting; *provided, however, that in the event that less than seventy (70) days notice or prior public disclosure of the date of the meeting is given or made to stockholders, notice by the stockholder, to be timely, must be received no later than the close of business on the tenth (10th) day following the day on which such notice of the date of the meeting was mailed or such public disclosure was made, whichever first occurs* (emphasis added).

The corporation's 2014 proxy statement stated that the 2015 annual meeting would be held "on or about June 10, 2015." Ultimately, the 2015 annual meeting was scheduled for June 9, 2015. The corporation did not announce that date, however, until it filed its proxy statement with the SEC on April 30, 2015 — less than 70 days before the annual meeting date. On May 7, 2015 — less than 10 days after the proxy statement was filed — an activist investor gave notice of its intent to nominate two directors and submit two other proposals for consideration.

Arguments and Lower Court's Order

The corporation argued that the nominations and proposals were not timely made under the advance notice bylaw because they were not received at least 60 days prior to the meeting date. The stockholder argued that the 2014 proxy statement did not specifically announce the date of the annual meeting and, therefore, the nominations and proposals fell within the proviso in the bylaw. Vice Chancellor J. Travis Laster ruled in favor of the stockholder and entered an order enjoining the corporation from conducting any business at its annual meeting other than to adjourn it for a minimum of 21 days. This gave the dissident additional time to solicit proxies.

Supreme Court's Decision

The Delaware Supreme Court affirmed the Court of Chancery's decision, finding that the advance notice bylaw was "clear and unambiguous." The court held that the disclosure in the proxy statement that the meeting would be held "on or about June 10, 2015" did not constitute a "prior public disclosure of the date

of the meeting” as set forth in the bylaw. The court reasoned that, under the plain text of the bylaw, the corporation had to announce the “actual” date — not the “approximate, anticipated or targeted time frame” — of the annual meeting in order for the 60- to 90-day window to apply.

Take-Aways

Corporations should periodically review their advance notice bylaws to make sure they remain “state-of-the-art.” These bylaws sometimes need to be updated based on technical issues identified by Delaware courts or due to evolving tactics used by activists and hostile bidders.¹ Advance notice bylaws serve important purposes and will generally be upheld.² But, as evidenced in *Hill*, Delaware courts often construe ambiguities and technical arguments in favor of stockholders.

The construct of the advance notice bylaw in *Hill* raised issues because it imposed a deadline based on date of the meeting at issue — which would not be known to a stockholder absent a formal disclosure by the corporation. A corporation with this type of bylaw thus needs to make a definitive announcement of the meeting date at least 70 days beforehand. Unless the corporation knows a proxy contest is imminent, it is easy to see how this technical point could be overlooked.

A corporation with a bylaw similar to the one in *Hill* might amend it to impose the deadline based on the announcement of an “approximate” date, perhaps with an exception if the actual meeting date differs significantly. *Hill* will not be an issue, however, for most companies. It is more common for advance notice bylaws to impose deadlines based on *the anniversary of the prior year’s annual meeting* (or, in some cases, the anniversary of the mailing of the prior year’s proxy statement). Under that construct, stockholders have clear notice of the deadline and do not face the uncertainty associated with the construct in *Hill*. Thus, this approach is probably the more desirable “fix” for the *Hill* construct. Still, even these more common advance notice bylaws typically have an exception in which the meeting date is more than 30 or 60 days from such anniversary. In that case, the corporation should try, if possible, to give sufficient notice of the meeting date so as not to reopen the advance notice window.

Contact

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¹ See, e.g., *Levitt Corp. v. Office Depot, Inc.*, C.A. No. 3622-VCN (Del. Ch. Apr. 14, 2008) (holding that a stockholder could submit a nomination because the election of directors was an item specified in the notice of the meeting).

² See, e.g., *Goggin v. Vermillion, Inc.*, 2011 WL 2347704, at *4 (Del. Ch. June 3, 2011) (quoting *Openwave Sys. Inc. v. Harbinger Capital P’rs Master Fund I, Ltd.*, 924 A.2d 228, 238-39 (Del. Ch. 2007)) (“Advance notice requirements are ‘commonplace’ and ‘are often construed and frequently upheld by Delaware courts.’”).