

Perils of Ambiguous Advance Notice Provisions

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In 2008, two companies suffered public battles from hedge funds that circumvented advance notice provisions. In *Jana Master Fund, Ltd. v. CNET Networks, Inc.* and *Levitt. Corp. v. Office Depot, Inc.*, the Delaware Chancery Court interpreted common advance notice provision language in favor of activist shareholders resulting in the nomination of director candidates those activists proposed. According to this Commentary written by F. Mark Reuter of Keating Muething & Klekamp PLL, these cases depict increasingly widespread practices activist securityholders employ, from which many target companies are not protected.

Mr. Reuter writes: Several public companies have amended their by-laws to become less inviting take-over targets. The amendments close loopholes by explicitly stating that the advance notice provisions apply to all stockholder proposals and nominations, by requiring broader disclosure, and by moving the proposal and nomination deadlines further from the meeting date.

For example, this spring, both Coach, Inc. and Sara Lee Corp. amended their advance notice provisions, broadening the required disclosures. The changes made to each company's by-laws are nearly identical.

First, both companies added provisions that require securityholders, when making a nomination or proposal, to disclose any hedges or transactions designed either (1) to manage or mitigate the securityholder's risk or benefit or (2) to increase or decrease the securityholder's voting power. Such language prevents activist hedge funds from over- or under-representing their interests in the corporation when making nominations or proposals. [footnotes omitted]

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