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## Legal Updates & News

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#### Delaware Courts Provide Another Narrow Reading of an Advanced Notice Bylaw Provision

April 2008

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On April 14, 2008, in *Levitt Corp. v. Office Depot, Inc.*, 2008 WL 1724244, the Delaware Chancery Court issued another opinion narrowly construing a bylaw requiring advance stockholder notice of an intent to submit a proposal at an annual stockholders' meeting. In the *Levitt* case, the Office Depot bylaws restricted "business" that could be brought before an annual meeting to business specified in the management's notice of meeting, or otherwise brought before the meeting by or at the direction of the board of directors or by a stockholder of record who complied with the advance notice bylaws provision. That advance notice provision required that a notice be received by the corporation not less than 120 calendar days before the date the corporation's proxy statement was released to stockholders in connection with the prior year's annual meeting. Levitt Corporation, a stockholder of Office Depot, sought to submit its own two nominees for directors at the annual meeting without giving the advance notice required by the Office Depot bylaws. Although the Office Depot advance notice bylaw did not expressly deal with nomination of directors, the court concluded that because management's notice of meeting indicated that election of 12 directors would be considered at the annual meeting, that was sufficient to include nomination of directors as an item of "business" to be considered at the meeting, and relieved Levitt Corp. of the need to submit its own advance notice of its proposal to nominate two persons for two of the 12 director positions to be filled at the annual meeting.

The *Levitt* decision follows closely on another Delaware Chancery Court opinion in *Jana Master Fund Ltd. v. CNET Network Inc.*, 2008 Del. Ch. Lexis 35, issued a month earlier on March 13, 2008, narrowly construing an advance notice bylaw of CNET Networks as inapplicable to a proposal by a stockholder (Jana) to expand CNET's board and elect its own nominees, on the ground that CNET's advance notice bylaw only applied to stockholder proposals submitted for inclusion in CNET's own proxy statement pursuant to SEC Proxy Rule 14a-8. ([See our prior Alert on Jana.](#)) The *Jana* decision has been appealed to the Delaware Supreme Court which heard argument on April 16, 2008.

Unless the Delaware Supreme Court reverses the Chancery Court's decision in the *Jana* case, and the *Levitt* case is appealed and reversed by the Delaware Supreme Court, Delaware corporations with advance notice bylaw requirements for stockholder proposals should consider clarifying the applicability of their bylaws in two respects:

1. Make clear that the requirement for advance stockholder notice applies to stockholder proposals to nominate and elect directors other than those proposed by management in its proxy materials. This is commonly done by providing an advance notice requirement specifically for nomination and election of directors, separate from an advance notice requirement in the bylaws for presenting other proposals at the annual meeting.
2. Make clear that the requirement for advance stockholder notice will apply whether or not the stockholder seeks to have its proposal included in the company's proxy statement pursuant to SEC proxy rules or intends to present its proposal independently at the annual stockholders' meeting.

When preparing the company's proxy materials, care also should be taken to comply with SEC Rule 14a-4(c). That rule permits a management proxy to confer discretionary authority in management to

vote at an annual meeting of stockholders *only if* a specific statement is made, in the proxy statement or form of proxy, that the proxyholder has the authority to so vote in its discretion on proposals presented to the annual meeting of which the company did not have notice at least 45 days before the date on which the company first sent its proxy materials for the prior year's annual meeting (or the date specified by an applicable advance notice provision). If a company fails to include such a statement in its proxy material and its advance notice bylaw is construed by a court as inapplicable to a particular stockholder proposal, as occurred in the *Levitt* and *Jana* cases, management may not have the discretion to vote its own proxies to oppose the stockholder proposal, although those proxies still could be voted to elect management's own proposed slate of directors as described in the proxy statement.