Snell & Wilmer L.L.P.

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contents

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Recent Delaware Court Rulings Limit Application of Advance Notice Bylaw Provisions

Eric Kintner

Advance notice provisions in a corporation's bylaws are designed to require stockholders intending to bring proposals or nominate director candidates at a stockholder meeting to provide the corporation with timely (i.e., advance) notice of such proposal. Drafted appropriately, advance notice provisions prevent a stockholder from showing up at a meeting and nominating a director or making a proposal without providing advance notice to the corporation. However, two recent decisions in the Delaware Chancery Court, *JANA Master Fund, Ltd. v. CNET Networks, Inc.* and *Levitt Corp. v. Office Depot, Inc.*, cast a cloud over the intended effect of many common forms of advance notice provisions. Corporations (particularly those incorporated in Delaware) should review with their counsel the corporation's bylaws to ensure that any advance notice provisions could withstand a challenge based on the *JANA* and *Levitt* cases.

JANA V. CNET

On March 13, 2008, the court in *JANA* ruled that CNET's advance notice bylaw provision was inapplicable to a CNET stockholder proposal to expand CNET's board and elect its own nominees because CNET's advance notice provision only applied to stockholder proposals to be included in the corporation's proxy statement pursuant to Exchange Act Rule 14a-8—even though CNET's advance notice provision did not state that it was limited to Rule 14a-8 proposals. Rather, CNET's advance notice provision, which was drafted similarly to many other corporation's provisions, required that any stockholder intending to propose business at the annual meeting must (i) own at least $1,000 worth of stock for one year, (ii) propose the business 120 days before the one year anniversary of the mailing of the prior year's proxy statement, and (iii) include with the proposal all information required by "any applicable federal securities laws."

JANA, which had held CNET stock for only 8 months, made a proposal to nominate a slate of directors to CNET's board. Although the *JANA* court declined to consider the overall validity of CNET's advance notice bylaw provision, the court nevertheless held that that CNET's advance notice bylaw only applied to stockholder proposals submitted for inclusion in CNET's proxy statement under Rule 14a-8. The *JANA* court reasoned, in part, that the 120-day deadline in CNET's bylaws only made sense if it was designed to give the corporation time to incorporate a stockholder proposal in the corporation's proxy statement. In addition, the *JANA* court interpreted the "applicable federal securities laws" provision in CNET's bylaws as limiting CNET's advance notice provision to Rule 14a-8 stockholder proposals. As a result of the court's ruling, any CNET stockholder would be free to make proposals at the annual meeting without any advance notice requirement, including proposals made from the floor. CNET appealed the Delaware Chancery Court's ruling in *JANA* to the Delaware Supreme Court. On May 13, 2008, the Delaware Supreme Court affirmed the Delaware Chancery Court's ruling in *JANA*.

LEVITT V. OFFICE DEPOT

On April 14, 2008, the court in *Levitt* held that a stockholder proposal to nominate two directors to Office Depot's board did not need to comply with Office Depot's advance notice bylaw provision because Office Depot's annual meeting notice already included the "business" of nominating directors. Office Depot's bylaws provided that "business" could be brought before the annual meeting if (i) specified in the corporation's annual meeting notice, (ii) otherwise properly brought before the annual meeting by or at the direction of board, or (iii) proposed by a stockholder in compliance with the advance notice requirements, which included the requirement to submit stockholder proposals at less 120 days before the date the corporation's proxy statement was sent to stockholders in connection with the prior year's annual meeting.

Levitt did not attempt to give advance notice of its nominations. Nevertheless, the court held that Levitt's stockholder proposal did not need to comply with the advance notice requirements because Office Depot had brought the "business" of nominating and electing directors before the annual meeting in its own annual meeting notice. Office Depot's annual meeting notice stated that its stockholders would be asked "to elect twelve (12) members of the Board of Directors for the terms described in this Proxy Statement." The *Levitt* court concluded that this language was sufficient to include nomination of directors as an item of business to be considered at the annual meeting.

In a footnote to the opinion, the court noted that it may have reached a different decision if Office Depot's annual meeting notice had clearly stated that it was limited only to the election of the 12 board nominees named in the proxy materials, as opposed to the nomination and election of 12 board members generally. At this time, the *Levitt* decision has not been appealed to the Delaware Supreme Court.

WHAT TO DO NOW

What actions should corporations take in response to the decisions in *JANA* and *Levitt*? In the near term, corporations should consider modifying their annual meeting notices to state that "business" agenda items apply only to the election of director candidates set forth in the corporation's proxy statement and not to director nominations generally. Going forward, we believe clear-drafting in a corporation's bylaws regarding advance notice requirements, coupled with clarifying language in a corporation's annual meeting notice, is the preferable approach to limit the concept of "business" as it relates to director elections in the annual meeting notice and proxy materials. Accordingly, corporations should review with their counsel the corporation's bylaws to determine the following:

- Do the bylaws make clear that advance notice requirements apply to all stockholder proposals? The decisions in both JANA and Levitt highlight the need for advance notice provisions to be clearly drafted to expressly include all stockholder proposals—not just those brought for inclusion in the proxy under Rule 14a-8. In fact, both the JANA and Levitt courts cited the Delaware corporate law principle that when a corporation's bylaws are ambiguous, any doubt is to be resolved in favor of a stockholder's voting rights.
- Do the bylaws indicate that advance notice provisions specifically apply to stockholder proposals for nominating and electing directors? If so, the corporation should consider amending its bylaws by providing an advance notice requirement specifically for nomination and election of directors and separate from an advance notice requirement in the bylaws for presenting general "business" at the annual meeting.
- Does the advance notice provision identify the specific information that must be provided without incorporating federal securities requirements by reference? If so, the corporation should consider amending its bylaws to specify the exact information that must be provided rather than incorporating by reference all applicable federal securities laws.
- Does the advance notice provision have a deadline tied to the mailing of the previous year's proxy materials? If so, the corporation should consider amending its bylaws to make clear that the deadline is not intended to be limited to the circumstances to which Rule 14a-8 applies.
- Public companies will need to remember to file a Form 8-K (under Item 5.03) if its board approves a bylaw amendment. The Form 8-K must disclose the effective date of the bylaw amendment and a description of the provision(s) adopted or changed by amendment. In addition, if the bylaw amendment would change the procedures by which the corporation's stockholders recommend nominees to the board, the corporation will need to describe any material

changes to such nomination procedures in the corporation's next Form 10-Q (under Part II, Item 5(b)) or Form 10-K (under Part III, Item 10).

SEC Staff Updated Form 8-K Interpretative Guidance


Stefanie Abalos *Melissa Sallee*

General

In April 2008, the Securities Exchange Commission Division of Corporation Finance (the "SEC") issued updated interpretive guidance on Form 8-K. The interpretive guidance compiled and revised previous Form 8-K interpretations in the July 1997 *Manual of Publicly Available Telephone Interpretations*, the June 13, 2003 *Frequently Asked Questions Regarding the Use of Non-GAAP Financial Measures*, and the November 22, 2004 *Form 8-K Frequently Asked Questions*. The new interpretations address numerous Form 8-K sections, including these commonly used sections for which new guidance was provided:

- 1. Item 1.01 – Entry into a Material Definitive Agreement
- 2. Item 2.01 – Completion of Acquisition or Disposition of Assets
- 3. Item 3.02 – Unregistered Sales of Equity Securities
- 4. Item 5.02 – Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers

Item 1.01 - Material Definitive Agreements

Item 1.01 requires the filing of a Form 8-K upon the entry into, or the amendment of, a material definitive agreement not made in the ordinary course of business. As part of this requirement, the Form 8-K must provide a brief description of the terms and conditions of the agreement or amendments that are material. The interpretative guidance explains that simply incorporating the agreement by reference (e.g. when the agreement is filed as an exhibit to the Form 8-K) does *not* satisfy this description requirement.

Item 2.01 – Completion of Acquisition or Disposition of Assets

Item 2.01 requires the disclosure of the acquisition or disposition of a significant amount of assets. This requirement does not require the disclosure of the execution of a contract to acquire or dispose of assets, but rather the reporting requirement is tripped when such acquisition or disposition is consummated. Nevertheless, the interpretative guidance explains that the execution of an agreement could trigger an earlier Form 8-K filing under Item 1.01 when the company has entered into a material definitive agreement not made in the ordinary course of business of the company (or an amendment of such agreement that is material).

Item 3.02 – Unregistered Sales of Equity Securities

Item 3.02 requires the filing of a Form 8-K upon the sale of equity securities that are not registered under the Securities Act of 1933. The new guidance provides that:

- *Stock options grants*. The grant of stock options pursuant to an employee stock option plan does not constitute a "sale" or "offer to sell" under Section 2(a)(3) and thus the grant need not be reported under Item 3.02 of Form 8-K.
- *Unregistered sales of certain shares*. Even a sale, in an unregistered transaction, of shares of a class of equity securities that are not currently outstanding shares in excess of one percent of a company's outstanding shares must be reported under Item 3.02 of Form 8-K.
- *Agreements to issue securities*. An Item 3.02 Form 8-K filing requirement is triggered when a company enters into an agreement that is enforceable against the company to issue unregistered equity securities to a third party in exchange for services and the applicable volume threshold (generally one percent or more of the number of shares outstanding of the class of equity securities sold; five percent in the case of smaller reporting companies) is exceeded. The execution of the agreement, not the provision of the services or issuance of securities, is the triggering event.
- *Agreements to sell certain warrants or options*. An Item 3.02 Form 8-K filing requirement is triggered upon an unregistered sale of warrants or options to purchase equity securities or convertible notes, if the volume threshold under Item 3.02 is exceeded with respect to the underlying equity securities. However, if the Form 8-K that discloses the initial sale of the warrants, options, or convertible notes discloses the maximum amount of the underlying securities that may be issued, then a subsequent Form 8-K need not be filed upon the exercise of the warrants or options or conversion of the notes.

Item 5.02 – Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers

Amendments to Form 8-K, Item 5.02(e) regarding disclosure of compensatory arrangements with executive officers became effective in late 2006 and had not previously been addressed in the SEC's Form 8-K guidance. The new guidance provides as follows:

- *Equity compensation plans*. Where the adoption or amendment of a material equity compensation plan in which named executive officers are eligible to participate is subject to shareholder approval, the obligation to file a Form 8-K is triggered upon the receipt of shareholder approval, not the date of company or board approval.
- *Cash bonus plans*. If a company adopts a material cash bonus plan under which named executive officers are eligible to participate, an obligation to file a Form 8-K is triggered even if no specific performance criteria, performance goals or bonus opportunities have been communicated to plan participants.

However, if the plan is subject to shareholder approval, the receipt of shareholder approval and not the plan's adoption triggers the obligation to file a Form 8-K.

- *Specific performance goals*. Setting specific performance goals and business criteria for named executive officers that are materially consistent with the previously disclosed terms of the plan does not trigger an obligation to file a Form 8-K.
- *Cash awards*. If a company pays out a cash award upon a determination that performance criteria has been satisfied, a Form 8-K reporting such a payment would not be required under Item 5.02, provided that the payment was materially consistent with the previously disclosed terms of the plan. However, the filing of a Form 8-K is required where a company exercises discretion to pay a cash award even though the specified performance criteria had not been satisfied and that the payment was not materially consistent with the previously disclosed terms of the plan, even if the plan provided for the exercise of such discretion.
- *Competitive harm*. A company is not required to provide disclosure pursuant to Item 5.02 of target levels with respect to specific quantitative or qualitative performance related-factors, or any other factors or criteria involving confidential trade secrets or confidential commercial or financial information, if the disclosure would result in competitive harm to the company. Note: This standard is consistent with the standard for not providing confidential information under the new executive compensation rules.

Item 5.02(b) requires the filing of Form 8-K upon the retirement, resignation, removal or refusal to stand for re-election of any of a company's directors. Additionally, a Form 8-K filing is triggered under Item 5.02(d) upon the election of a new director. The new guidance provides as follows:

- *Resignation, retirement or refusal to stand for re-election*. The Form 8-K filing obligation is triggered by a notice of a decision to resign, retire or refuse to stand for re-election provided by the director, whether or not such notice is written, and regardless of whether the resignation, retirement or refusal to stand for re-election is conditional or subject to acceptance. No disclosure is required solely by reason of discussions or consideration of resignation, retirement or refusal to stand for re-election. Whether communications represent discussion or consideration, or notice of a decision is a facts and circumstances determination.
- *Election to the Board*. If a director is elected to the board of directors other than by a vote of security holders at a meeting, the reporting requirement is triggered as of the date of the director's election to the board, even if the date on which the director's term begins is at a later date. The disclosure should, however, include the date on which the director's term begins.

Finally, the interpretative guidance addressed the requirement of filing a Form 8-K upon the retirement, resignation or termination, or appointment of a company's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer or any person performing similar functions. The following is the new guidance regarding the election and termination of officers:

- *Temporary termination*. When a principal financial officer temporarily turns his or her duties over to another person, a company must file a Form 8-K under Item 5.02(b) to report that the original principal financial officer has temporarily stepped down and under Item 5.02(c) to report that the replacement principal financial officer has been appointed. If the original principal financial officer returns to the position, the company must file a Form 8-K under Item 5.02(b) to report the departure of the temporary principal financial officer and under Item 5.02(c) to report the "re-appointment" of the original principal financial officer.

- *Delay until public announcement*. If a company appoints a new executive officer, it may delay disclosure until it makes a public announcement of the event. Note: This exception does not apply to delaying announcement of the departing officer, thus creating some practical difficulties where parallel disclosure of the appointment of the new officer and resignation of the departing officer is desired.

Court Holds that California's LLC Fee Based on Total Income Is Unconstitutional

Anthony Ippolito

Foreign limited liability companies ("*LLCs*") that generate all of their income outside of California are entitled to a refund of the California LLC fee paid through the 2006 tax year as a result of a recent court ruling. The First Appellate District of the Court of Appeals for the State of California affirmed the San Francisco Superior Court's ruling that the California LLC fee in effect prior to January 1, 2007 ("former Gross Receipts Tax"),[1] which was based on the total income of the LLC, is unconstitutional as applied. There are other ongoing cases that challenge the constitutionality of the former Gross Receipts Tax in other situations. Depending on how these related cases are decided, other LLCs may also be entitled to a refund.

1 In 2007, California amended California Revenue and Taxation Code § 17942 and changed the fee calculation for all LLCs doing business within and without California for taxable years beginning on or after January 1, 2007 such that the fee is now only based on the income generated in California.

Northwest Energetic Services, LLC v. FTB[2]

Northwest Energetic Services, LLC ("NES") was an LLC organized under the laws of the State of Washington and was registered with the California Secretary of State to do business in California. However, NES conducted no business activities in California. It had no employees, agents, or independent contractors acting on its behalf in California. It made no deliveries to customers in California. The only connection NES had to California was its registration to do business in California.

Under the former Gross Receipts Tax, any LLC that did business in the state, had its articles of organization accepted by the state, or had a certificate of registration issued to it by the Secretary of State and had total income greater than $250,000 was required to pay the state a fee based on its total income, which ranged from $900 to $11,790. Total income included income from all sources, without exclusion for income earned outside of California's borders.

The Appellate Court upheld the holding that the former Gross Receipts Tax violated the Commerce Clause of the United States Constitution because the Gross Receipts Tax was not apportioned to the level of activity of the LLC in the state.

Applicability to Other LLCs

Foreign LLCs that did not generate any income from activities within California are entitled to a refund of the former Gross Receipts Tax paid in prior years to the extent the statute of limitations has not passed. The statute of limitations is four years. If the LLC has not already filed a protective claim, the period will include tax years 2004 through 2006. LLCs in this situation may now file a claim for refund with the FTB.

Currently, the issue of whether the former Gross Receipts Tax was unconstitutional as applied to foreign LLCs that earned a portion of their income from outside of California is being litigated in *Ventas Finance I, LLC v. FTB*. If the court holds that the former Gross Receipts Tax was unconstitutional as applied to this situation, similarly situated LLCs will be able to claim a refund. It is unclear whether this case will also apply to domestic LLCs with income from outside of California. LLCs in similar situations should file a protective claim for amounts paid between 2004 and 2006.

The former Gross Receipts Tax is also being challenged as to LLCs that generated their entire income from California in *Bakersfield Mall, LLC v. FTB*. However, there is a significantly greater likelihood that the statute will be upheld as applied in this situation because all of the income is generated within California, thus the Gross Receipts Tax is fully apportioned to the state that in which the income is generated. Nevertheless, out of caution LLCs may desire to file a protective claim in this situation as well.

Obtaining a Refund

If you have already filed a protective claim, verify that the claim included the following information:

2 Northwest Energetic Services, LLC v. California Franchise Tax Board, 159 Cal. App. 4th 841 (2008).

- The LLC's name and address, including the name and phone number of the managing member or designated contact person.
- The LLC's Secretary of State file number or FTB temporary LLC number (for unregistered entities) and Federal Employer Identification Number.
- Taxable year(s) involved.
- A statement that the LLC did no business in California for each of the taxable years for which the claim is being filed.

If your protective claim did not include all of this information previously, you should send the information to the FTB right away to facilitate the processing of your refund.

If you have not yet filed a protective claim, the LLC should fax a letter to the FTB stating "This letter constitutes a protective claim for refund for (taxpayer's name). – No Income Attributable to California." The letter must also include the amount of the fee for which a refund is claimed for each year and it must provide the information listed above. The LLC's managing member or representative with a power-of-attorney must sign this letter, under penalty of perjury.

Customs Duties- When Duties Paid At The Time Of Entry May Not Be The Final Reckoning

Richard Katz

Over the last few decades, U.S. import companies have taken advantage of tremendous opportunities in sourcing components and finished products abroad. However, the importing business also poses some unique risks. Many U.S. import companies assume that the Customs duties they deposit at the time of entry of their merchandise into the United States are the final duty payment. Duties paid at the time of entry are called "estimated" duties for a reason. Customs and Border Protection ("CPB") has up to one year from date of entry, and in certain cases even longer, to determine the final duties payable upon a particular entry of merchandise. Customs' final duty assessment is known as a "liquidation" and it is only 90 days after liquidation that an importer can be reasonably sure of the duties owed.

Typically, Customs liquidates duties within several months of entry, and usually at the estimated amount paid at deposit. However, there are a number of situations in which the estimated and liquidated duties can differ, sometimes significantly.

Change in Classification

It is up to the importer to declare the proper tariff classification for its merchandise on the Customs entry form filed by its Customhouse broker. Tariff classifications carry corresponding percentage (*ad valorem*) duty rates which are applied to the value of the merchandise to arrive at the assessed duties. Not surprisingly, importers will try to classify their products at lower rate classifications wherever possible. The government does not always agree and may change the entered classification to one carrying a higher duty rate. Customs then liquidates the entry and sends a bill to the importer for the duty differential. The importer may contest CPB's decision by filing a Protest within 90 days of liquidation, commencing an administrative challenge to Customs' decision.

Change in Valuation

Customs value is based on the price paid for the goods by the buyer to the seller. However, this price may be rejected by CPB in a sale between related parties. Further, when goods are sold more than once it is not always clear which sale should be used for Customs valuation purposes. And finally, CPB is permitted by statute to add commissions, royalties, and license fees, additional proceeds to the seller and assists to the price paid under prescribed circumstances. Customs has the right to request all relevant information concerning the elements of value and may increase the entered value between entry and liquidation, again billing the importer for the difference.

Antidumping and Countervailing Duties

In addition to the payment of regular Customs duties, an importer may be faced with additional deposits that are the result of unfair trade complaints filed by U.S. industry or labor groups against foreign competition. While the U.S. importer may play no role in the unfair trade practice, enforcement of the law is focused on importers because they are purchasing the offending goods and they have a U.S. presence.

The antidumping law is aimed at foreign exporters who sell goods to the U.S. market at prices below those charged for the same goods in their home market, thereby injuring U.S. manufacturers (and their workers) who are forced to compete with unfairly low-priced or "dumped" merchandise. Additional duties are assessed at a percentage calculated to offset the price differential between the foreign home market price and the price for export to the United States, the so-called dumping margin. Unfortunately for the importer, antidumping duty deposits are only an estimate of the actual duty, which may not be calculated for several years after importation. Liquidation of entries subject to dumping orders may be suspended for many years. Once the actual dumping margins are calculated by the International Trade Administration department of the U.S. Department of Commerce, importers may be billed for any difference between the estimated and assessed dumping duties. Because dumping assessments can be astronomical, occasionally reaching several times the value of the goods, themselves, importing merchandise subject to an antidumping order can be very risky.

The countervailing duty law is aimed at foreign manufacturers and exporters whose products are unfairly subsidized by their governments, thereby causing injury to the competing U.S. industry. The law provides for the levy of import duties in an amount calculated to offset or "countervail" the amount of the subsidy. As in the antidumping scenario, countervailing duty deposits may not be finalized for several years after importation.

Penalties

No discussion of the uncertainty of import costs would be complete without at least a brief mention of CPB's civil penalties. Customs may assess civil penalties against the last five years of imports for negligence and gross negligence and for five years after the date of discovery by the government of fraudulent violations. Penalties assessed using the negligence standard (a low threshold) often enable the government to charge an importer for tariff classification and valuation errors many years post-liquidation.

Importer Strategies

CPB officials often learn of duty underpayments through "Focused Assessments," Customs' current euphemism for its audits. The Focused Assessment Program stresses importer training, importer systems and risk assessment in enforcing compliance. It is, therefore, recommended that importers establish their own internal compliance programs in anticipation of a CPB focused assessment. CPB also conducts limited focus audits known as quick response audits ("QRA's"), which are usually limited to a single issue.

It is also possible to obtain a computer print of all unliquidated entries by importer number (usually a company's tax i.d.). CPB's National Finance Center will provide this information for a fee (currently $150). This information will give an import company an idea of its outstanding liability in the event of any contemplated increased duty assessment between entry and liquidation. This information is of particular value for any company that has made antidumping duty deposits and would like to assess its ultimate duty liability for its merchandise subject to the order.

ROUNDTABLE DISCUSSION

Deal or No Deal - the New Rules of the Game

Snell & Wilmer will facilitate a roundtable discussion on the latest developments in mergers and acquisitions, including the impact of new accounting rules and case law and a review of "market" deal terms in the current M&A environment.

JULY 16, 2008

Denver | Tabor Center | 1200 Seventeenth St. | Suite 1900
8:30-9:00 a.m. | Registration and Breakfast | 9:00-10:30 a.m. | Roundtable Discussion
RSVP by July 9 to Jennifer Sinquefield at 802.257.1994 or jsinquefield@swlaw.com
Underground parking available.

Las Vegas | 3883 Howard Hughes Pkwy. | Suite 1100
7:30-8:00 a.m. | Registration and Breakfast | 8:00-9:30 a.m. | Roundtable Discussion
RSVP by July 9 to Katy Ramsey at 702.784.5200 or kramsey@swlaw.com
Parking available at the parking garage next to the building.

Orange County | 600 Anton Blvd. | Suite 1400
7:30-8:00 a.m. | Registration and Breakfast | 8:00-9:30 a.m. | Roundtable Discussion
RSVP by July 9 to Christy Blackwell at 714.427.7000 or cblackwell@swlaw.com
Park in parking structure in front of building.

Phoenix | One Arizona Center | 400 E. Van Buren | Suite 1900
7:30-8:00 a.m. | Registration and Breakfast | 8:00-9:30 a.m. | Roundtable Discussion
RSVP by July 9 to the rsvp line at 602.382.6599 or rsvp@swlaw.com
Underground parking available.

Salt Lake City | Beneficial Tower | 15 West South Temple | Suite 1200
8:30-9:00 a.m. | Registration and Breakfast | 9:00-10:30 a.m. | Roundtable Discussion
RSVP by July 9 to Jennifer Sinquefield at 802.257.1994 or jsinquefield@swlaw.com
Parking available at Crossroads parking structure.

Tucson | One South Church Avenue | Suite 1500
7:30-8:00 a.m. | Registration and Breakfast | 8:00-9:30 a.m. | Roundtable Discussion
RSVP by July 9 to Sara Monreal at 520.882.1355 or smonreal@swlaw.com
Underground parking available.

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