DEAL LAWYERS

Vol. 5, No. 4 July-August 2011

Tweeting Transactions: Social Media, Business Combinations & the Federal Securities Laws

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The recent expansion in the use of social media has led many companies to disseminate corporate information through Twitter, Facebook, corporate blogs and similar social media outlets. In fact, a majority of Fortune 500 companies had Twitter accounts, Facebook profiles or both in 2010.[2] Information disclosed by companies and the methods of dissemination are subject to regulation under federal securities laws.[3]

Routine corporate communications are subject to a number of rules, including anti-fraud provisions, Regulation FD, Regulation G and, in connection with proxy solicitations, the proxy rules. A company participating in a business combination must also comply with additional rules when communicating about the transaction.[4] While the SEC has generally relaxed restrictions on oral and written communications with security holders in connection with business combinations,[5] social media communications, due to their immediate distribution and abbreviated style, pose increased risks of non-compliance. Although existing corporate policies and procedures may help manage social media communications, a company evaluating a business combination should prepare well in advance of any announcement to ensure compliance with the communications rules.

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[2] Nora Ganim Barnes, Center for Marketing Research at the University of Massachusetts Dartmouth, The Fortune 500 and Social Media: A Longitudinal Study of Blogging, Twitter and Facebook Usage by America's Largest Companies.

[3] The Securities and Exchange Commission (the "SEC") has provided guidance on the use of electronic media in a number of contexts, though none of this guidance specifically addresses social media outlets and their unique issues. See Commission Guidance on the Use of Company Web Sites, SEC Release No. 34-58288, 73 Fed. Reg. 45862 (Aug. 1, 2008) (the "2008 Release") and SEC Interpretation: Use of Electronic Media, SEC Release Nos. 33-7856 and 34-42728, 65 Fed. Reg. 25843 (April 28, 2000) (the "2000 Release").

[4] Rule 165(f)(1) under the Securities Act of 1933, as amended (the "Securities Act"), defines a "business combination" as a transaction specified in Rule 145(a) or an exchange offer. 17 C.F.R. § 230.165(f)(1). Rule 145(a) transactions include mergers and consolidations, reclassifications of securities, other than stock splits, reverse stock splits and change in par value, which involve the substitution of a security for another security and certain transfers of assets. 17 C.F.R. § 230.145(a).

[5] See Final Rule: Regulation of Takeovers and Security Holder Communications, SEC Release No. 33-7760, 64 Fed. Reg. 61408 (Oct. 22, 1999) (the "1999 Release"). In the 1999 Release, the SEC stated "[w]e recognize the many recent developments in technology that have enabled companies to communicate more frequently with security holders at a significantly reduced cost. . . . In light of the rapid pace of change in the securities markets and developments in technology, we believe the time has come to update the proxy rules to permit security holder communications to flow more freely and to facilitate a more informed security holder base." II.C.1. Given the even more significant developments in technology since 1999, is it time for the SEC to once again update its rules?

TABLE OF CONTENTS

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ISSN 1944-7590

SEC's Regulation of Business Combination Communications

Securities Act Considerations

Absent an applicable exemption, Section 5(c) of the Securities Act prohibits oral and written "offers" prior to the filing of a registration statement.[6] In addition, during the period between the filing of a registration statement and its effective date, Section 5(b)(1) of the Securities Act limits written offers of securities to a statutory prospectus meeting the information and form requirements of the Securities Act and the rules thereunder.[7] Because of the broad definition of the term "offer," the acquirer in a business combination in which securities are to be issued (as opposed to, for example, an all cash merger), must be careful that its public statements regarding the transaction are not deemed to be "offers" of such securities. Rule 165 under the Securities Act, however, provides an exemption from the provisions of Section 5, permitting the offeror of securities in a business combination transaction to make certain public statements without the risk of violating Section 5.

Rule 165 provides generally that written communications in connection with or relating to a business combination must

(1) include a prominent legend to investors, urging them to read the relevant offering or proxy materials, when available, and informing them how to receive such materials for free,

(2) be filed with the SEC under Rule 425 (or, in some cases, Rule 424) on or before the date of first use, and

(3) comply with any applicable tender offer, proxy or information statement rules.[8]

Rule 165 applies to all public communications made in connection with or relating to a business combination, commencing with the first public announcement of the transaction and ending with the closing of the transaction. Routine communications that relate only to ordinary business matters and refer to the transaction in a "non-substantive way" need not include a legend or be filed.[9]

Finally, the rule applies to communications made by any party to a business combination, including persons authorized to act on behalf of such parties.[10] Therefore, the requirements of Rule 165 apply to company statements and may apply to statements by senior officials or other authorized employees, such as investor relations personnel. Rule 165 may also apply to a statement by an unrelated third party if the company was involved in its preparation or if the company endorses or approves the statement.[11]

Proxy Rule Considerations

The solicitation of security holder votes in connection with a business combination is subject to the SEC's proxy rules.[12] In general, Rule 14a-3(a) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), requires that no solicitation of a proxy be made unless each person solicited is furnished with a proxy statement meeting the requirements of Regulation 14A.[13] Because of the broad definition of the term "solicit," the parties to a business combination in which proxies are to be solicited must be careful that their public statements regarding the transaction are not deemed to be "solicitations." Rule 14a-6(o) under the Exchange Act, however, allows solicitations to be made before furnishing a definitive proxy statement if they are made in accordance with Rule 14a-12.[14]

Rule 14a-12 requires generally that

(1) each written communication must include

(a) the identity of the participants in the solicitation and a description of their direct or indirect interests, by security holdings or otherwise, or a prominent legend advising security holders where they can obtain that information; and

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[6] 15 U.S.C. 77e(c).

[7] 15 U.S.C. 77e(b)(1).

[8] 17 C.F.R. § 230.165.

[9] See the 1999 Release at II.A.3.

[10] 17 C.F.R. § 230.165(f)(2).

[11] The 2008 Release at II.B.2 and the 2000 Release at II.B.1.

[12] 17 C.F.R. § 240.14a-101. The SEC's proxy rules apply in addition to the rules under the Securities Act which would apply in a business combination in which securities are to be issued.

[13] 17 C.F.R. § 240.14a-3(a).

[14] 17 C.F.R. § 240.14a-6(o).

(b) a prominent legend to security holders, advising them to read the proxy statement, when available, and informing them how to receive the proxy statement and any other relevant documents for free;

(2) no form of proxy is furnished until a proxy statement meeting the requirements of Rule 14a-3 is delivered; and

(3) the written communication must be filed with the SEC no later than the date the material is first published, sent or given to security holders.[15]

Tender Offer Considerations

Communications in connection with tender offers raise different challenges. Under the SEC's rules, the "commencement" of the offer triggers certain requirements.[16] Rule 14d-2(b) under the Exchange Act, however, makes clear that written communications by the bidder will not be deemed to constitute commencement of a tender offer if the written communication

(1) does not include the means for security holders to tender their shares into the offer;

(2) is filed with the SEC no later than the date of the communication; and

(3) includes a prominent legend to security holders, advising them to read the tender offer statement, when available, and informing them how to receive the tender offer statement and any other relevant documents for free.[17]

For registered exchange offers, Rule 14d-2(b) applies in addition to the Securities Act rules. A bidder's written communication relating to an exchange offer, however, need only be filed under Rule 425, and the communication will be deemed filed under Rule 14d-2(b).[18]

Application to Social Media Communications—Four Possible Scenarios

In the current age of instant communications, companies want to communicate important corporate news, including business combinations, to their security holders, securities analysts and others as quickly and efficiently as possible. Social media outlets have become an indispensable tool for companies to disseminate this information. While press releases and SEC filings are generally picked up quickly by market professionals with Bloomberg terminals and Internet access, tweets and Facebook posts are picked up virtually instantaneously by anyone with as little as a cellular phone. Social media communications have important advantages in publicizing corporate information but also have significant limitations and risks.

To illustrate how the federal securities laws would impact social media communications in connection with business combinations, we offer the following potential scenarios:

Scenario A: Company B agrees to acquire Company T in a stock-for-stock merger. The merger is subject to a vote of the security holders of both Company B and Company T. The parties intend to issue a press release announcing the merger. Company B's public relations coordinator wants to post an announcement about the merger on Company B's Facebook page and send a tweet to followers of Company B on Twitter.

Discussion: The press release, Facebook post and tweet would each be subject to the requirements of Rule 165 since all are transaction-related communications by the companies or by a person authorized to speak on behalf of one of the companies. Rule 14a-12 is also applicable because the communications may be viewed as solicitations. Each communication must include the legends and participant information required by Rule 165 and Rule 14a-12.

Company B must file the communications under Rule 425 or, in the case of firm use, the communications will be deemed filed under Rule 14a-12. Company T must file the press release under cover of Schedule 14A on the date of issuance. Company T's filing may also need to

[15] 17 C.F.R. § 240.14a-12. If the written communication is filed under Rule 424 or 425, as required by Rule 165, the communication will be deemed filed under Rule 14a-12.

[16] For example, Rule 14d-3 under the Exchange Act requires a bidder to file its tender offer statement with the SEC upon commencement of the offer. 17 C.F.R. § 240.14d-3.

[17] 17 C.F.R. § 240.14d-2(b). Rule 14d-9(a) under the Exchange Act requires that pre-commencement communications by the subject company include a similar legend and be filed with the SEC no later than the date of the communication. 17 C.F.R. § 240.14d-9(a).

[18] See Instruction 2 to Rule 14d-2(b)(2). 17 C.F.R. § 240.14d-2(b)(2).

include the Facebook post and tweet if Company T is viewed as joining in these solicitations with Company B.[19]

Scenario B: Company B agrees to acquire Company T in a cash tender offer and uses the same communication methods described in Scenario A.[20]

Discussion: The press release, Facebook post and tweet would each be subject to the tender offer rules. To avoid triggering "commencement" of the offer, the communications should not include a means for security holders to tender into the offer. Each communication must include the legend required by Rule 14d-2(b). As a joint communication, the press release must also include the legend required by Rule 14d-9(a).

Company B should file the communications under cover of Schedule TO on the date of first use. Company T should file the press release under cover of Schedule 14D-9 on the date of issuance.

Scenario C: Professor C criticizes the stock-for-stock merger on his M&A blog. David, Company B's senior vice president, posts a comment on the M&A blog and defends the merger.

Discussion: David's comment may be subject to Rule 166 since it is a transaction-related communication, and David is likely authorized to speak on behalf of Company B. The comment may also be viewed as a solicitation subject to Rule 14a-12. Therefore, the comment should include the legend and participant information required by both rules and should be filed by Company B under Rule 425 on the date of first use; the comment will be deemed filed under Rule 14a-12. Given the difficulty of including the required legends on the blog posting, David may be better advised not to comment.

Scenario D: NewsCo posts a positive article about the stock-for-stock merger on its web site. Ellen, Company B's vice president of investor relations, tweets "The B-T merger—everyone benefits!" and provides a link to NewsCo's article on Company B's Twitter account.

Discussion: Rules 166 and 14a-12 would apply to Ellen's tweet. The tweet must include the appropriate legends and be filed by Company B under Rule 425 on the date of the tweet.[21] Moreover, Company B may be required to file NewsCo's article with the SEC, since Ellen's tweet may be seen as endorsing or approving third party material, thereby "adopting" the article as the company's own communication.[22]

Unless Company B and Company T previously educated their employees about the communications rules, the statements described in these scenarios would not include the required legends or be filed with the SEC. Without proper procedures, many social media communications by companies and their employees will be non-compliant with the communications rules and may violate other applicable securities law rules.

As an additional complication, certain social media platforms limit the length of communications. Tweets, for example, are limited to 140 characters. With limited space, how should a communication include the required legends? The SEC has yet to provide specific guidance in this regard. In an attempt to comply with the SEC's requirements while communicating with investors through social media outlets, some companies have included a hyperlink with a tweet or Facebook posting that points investors to a web page containing the required legends.[23]

It is clear that the use of social media by companies and their employees will continue to increase. If not already in place, companies should consider adopting policies to manage social media communications. The need for employee education is even more important for companies evaluating a business combination. Statements on company blogs, tweeted by authorized personnel or posted on the company's or an employee's Facebook page are subject to the requirements of the federal securities laws, and company policies should treat such social media communications similar to all other company communications.

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[19] Note that, with respect to the filing requirements discussed in scenarios A-D, if a party files a communication on a Form 8-K, it can check the box on the 8-K cover page to satisfy the filing requirements of Rules 425, 14a-12 or 14d-2(b). A filing required by Rule 14d-9(a), however, must be filed under cover of Schedule 14D-9.

[20] In this scenario, it is assumed that any second-step merger will not require a security holder vote.

[21] See the discussion below about character limitations on tweets and the ability to comply with the legend requirements.

[22] Under certain circumstances, Company T may need to file the tweet and article under cover of Schedule 14A (for example, if Company T is viewed as joining in the solicitation).

[23] See, *e.g.*, Rule 425 filing by Southwest Airlines Co. in connection with its acquisition of AirTran Holdings, Inc., at http://www.sec.gov/Archives/edgar/data/92380/000119312510217669/d425.htm, filed on September 27, 2010, and Schedule 14A filing by ExpressJet Holdings, Inc., in connection with its acquisition by SkyWest, Inc., at http://www.sec.gov/Archives/edgar/data/1144331/000119312510176785/ddefa14a.htm, filed on August 4, 2010.

The Current State of the Poison Pill

By Andrew L. Bab and Sean P. Neenan of Debevoise & Plimpton LLP[1]

Having been buffeted by sustained attacks by activists and proxy-voting advisors over the past years, the shareholder rights agreement is no longer as prevalent as it once was, a phenomenon that has been documented by many corporate governance observers like The Conference Board. However, the most recent case law confirms the validity of poison pills that are properly structured, adopted, and administered. This report discusses that recent case law and new trends and issues, all of which should help inform boards considering whether to adopt a pill and how to formulate its terms.

Despite the continued decline in the number of outstanding poison pills maintained by U.S. public companies, the Delaware courts in several cases in 2010 and early 2011 have steadfastly confirmed the continuing legal vitality of pills that are properly structured, adopted and administered. The most recent of these cases[2] demonstrates how powerful a poison pill can be when working in tandem with a classified board: Air Products withdrew its 16-month long hostile pursuit of Airgas promptly after the Delaware Court of Chancery upheld Airgas' combined defenses. It is interesting, therefore, that fewer and fewer companies are maintaining classified boards; companies may find that without them, the effectiveness of their poison pills may be significantly reduced.

Two novel uses of poison pills were tested in the Delaware courts in 2010. In one case, a poison pill established to protect a company's net operating loss carryforwards ("NOLs") emerged unscathed,[3] while another pill, implemented to protect the company's unique corporate culture, did not survive scrutiny.[4]

What are "Poison Pills"?

The shareholder rights agreement (or "poison pill") first became popular in the 1980s as a way to provide a target board with negotiating leverage in the face of a hostile takeover attempt. Today, despite a widely documented decline in its prevalence over the past five to 10 years, the poison pill continues to be an effective anti-takeover tool for public corporations.[5] Indeed, a company board that does not maintain a poison pill in the ordinary course may nonetheless in general, subject to its fiduciary duties, adopt a pill swiftly in response to a particular hostile overture.

Poison pills are generally aimed at protecting shareholders against a change of control transaction that fails to provide them with an appropriate control premium. A corporation customarily installs a poison pill through board action. Rights dividended to the corporation's stockholders automatically attach to the holders' shares of common stock. If a potential acquirer increases its "beneficial ownership" of the corporation's common stock in excess of a certain threshold percentage (usually 10-20 percent), all shareholders—except the potential acquirer—may purchase additional shares at a deep discount, thereby substantially diluting the acquirer's position.

Much depends on how the pill documents define "beneficial ownership." Is the definition broad enough to capture a "group" of shareholders acting in concert and who jointly hold more than the threshold percentage, while individually owning less than the same threshold percentage? Is the definition broad enough to cover all relevant forms of indirect economic ownership, including ongoing developments in derivative instruments? Some commentators have questioned whether the standard beneficial ownership language is sufficient, and some companies have experimented with more expansive language.

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[2] *Air Prods. & Chems., Inc. v. Airgas, Inc.*, C.A. Nos. CIV.A. 5249-CC, CIV.A. 5256-CC, 2011 WL 519735 (Del.Ch. Feb 15, 2011).

[3] *Versata Enterprises v. Selectica, Inc.*, 5 A.3d 586 (Del. 2010).

[4] *eBay Domestic Holdings v. Newmark*, C.A. No. 3705-CC, 2010 WL 3516473 (Del. Ch. Sept. 9, 2010).

[5] See Matteo Tonello and Judit Torok, *The 2010 Directors' Compensation and Board Practices Report*, The Conference Board, Research Report 1467, 2010, p. 45.

The decision of a Delaware corporation's board to implement a poison pill (or refuse to redeem an already adopted pill) in response to a perceived threat to the corporation will generally be measured against the *Unocal* standard:[6]

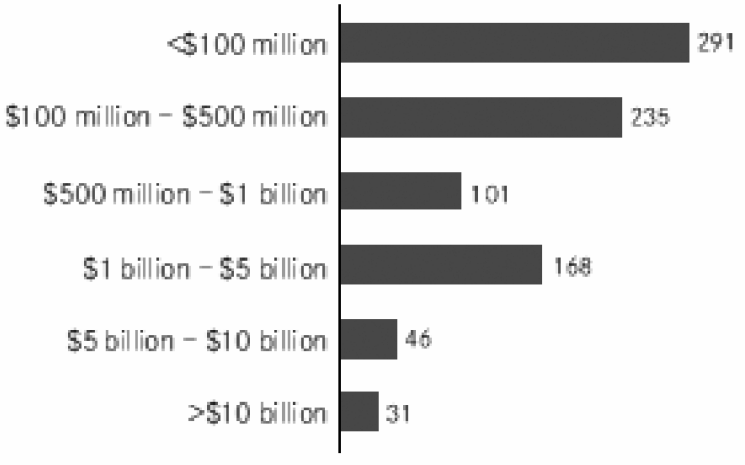
1. Did the board show that it reasonably believed that a threat to corporate effectiveness and policy existed?
2. If so, was the board's response coercive or preclusive, or was it outside the range of reasonable responses to the threat?

The Decline of the 1980s Poison Pill

Over the past decade, fewer and fewer public companies have maintained traditionally structured poison pills. In 2001, over 2,200 corporations had poison pills in effect;[7] a recent search found that fewer than 900 corporations had poison pills in effect.[8] In recent years, the number of smaller companies adopting such pills has increased, while many larger companies have allowed their in-force pills to expire.[9] Moreover, fewer pills are being adopted in the absence of a specific threat, and more of those adopted are aimed at protecting NOLs instead of a potential control premium (Chart 1).[10]

Chart 1

Number of corporations with poison pills, by market cap (as of 1/4/11)



Source: Capital IQ, retrieved from www.capitaliq.com.

One reason for the decline in traditional poison pills has been the increase in pressure from shareholder activists and other institutional investors to remove them. They argue that poison pills and other takeover defenses can entrench management and unfairly deprive shareholders of a potentially significant and current return on their investment. Additionally, Institutional Shareholder Services (ISS) revised its guidance for the 2010 proxy season in a manner likely to continue the downward trend in the number of poison pills. In the past, ISS had recommended that shareholders vote against or withhold their votes for directors who voted to adopt or renew a poison pill of any duration without shareholder approval (or without commitment to put the pill up for shareholder approval within 12 months of adoption or

[6] See *Unocal Corp. v. Mesa Petroleum*, 493 A.2d 946 (Del. 1985).

[7] John Laide, "A New Era in Poison Pills–Specific Purpose Poison Pills," SharkRepellent.net (website), April 1, 2010 (www.sharkrepellent.net/request?an=dt.getPage&st=1&pg=/pub/rs_20100401.html&Specific_Purpose_Poison_Pills&rnd=372936).

[8] Public reporting companies with poison pills in place, Capital IQ (website), retrieved January 4, 2011 (www.capitaliq.com).

[9] Laide, "A New Era in Poison Pills—Specific Purpose Poison Pills."

[10] Ibid.

renewal).[11] Beginning with the 2010 proxy season, ISS started to recommend a vote against or withhold vote for any director of a corporation up for election who voted to:

- adopt a poison pill with a term of more than 12 months;
- renew a poison pill of any duration without shareholder approval; or
- make a material adverse change to any existing poison pill without shareholder approval.

Prior to this revision, ISS would have made a voting recommendation only in the year that the pill was implemented or renewed. Under the revised guidelines, a director's voting record on the company's poison pill will factor into ISS's recommendation concerning that director every time he or she is up for election. ISS did note that a commitment by the directors to put newly adopted pills up for a binding shareholder vote may offset an adverse vote recommendation.[12]

ISS Vote Recommendations: Directors and Poison Pills

Vote withhold/against the entire board of directors (except new nominees, who should be considered CASE-BY-CASE), for the following:

Poison Pills:

1.3 The company's poison pill has a "dead-hand" or "modified dead-hand" feature. Vote withhold/against every year until this feature is removed;

1.4 The board adopts a poison pill with a term of more than 12 months ("long-term pill"), or renews any existing pill, including any "short-term" pill (12 months or less), without shareholder approval. A commitment or policy that puts a newly-adopted pill to a binding shareholder vote may potentially offset an adverse vote recommendation. Review such companies with classified boards every year, and such companies with annually elected boards at least once every three years, and vote AGAINST or WITHHOLD votes from all nominees if the company still maintains a non-shareholder-approved poison pill. This policy applies to all companies adopting or renewing pills after the announcement of this policy, November 19, 2009);

1.5 The board makes a material adverse change to an existing poison pill without shareholder approval.

Vote CASE-BY-CASE on all nominees if:

1.6 The board adopts a poison pill with a term of 12 months or less ("short-term pill") without shareholder approval, taking into account the following factors:

- The date of the pill's adoption relative to the date of the next meeting of shareholders—i.e., whether the company had time to put the pill on ballot for shareholder ratification given the circumstances;
- The issuer's rationale;
- The issuer's governance structure and practices; and
- The issuer's track record of accountability to shareholders.

Source: Institutional Shareholder Services, Inc., *2011 U.S. Proxy Voting Guidelines Summary* December 16, 2010 (www.issgovernance.com/files/ISS2011USPolicySummaryGuidelines20101216.pdf).

[11] See *2008 U.S. Proxy Voting Guidelines Summary—ISS Governance Services*, RiskMetrics Group, (Dec. 17, 2007), (www.riskmetrics.com/sites/default/files/2008PolicyUSSummaryGuidelines.pdf).

[12] *U.S. Corporate Governance Policy, 2010 Update*, RiskMetrics Group (November 19, 2009) (www.riskmetrics.com/sites/default/files/RMG2010USPolicyUpdates.pdf). Note that ISS will consider new nominees for director positions on a case-by-case basis.

The Decline of Board Classification

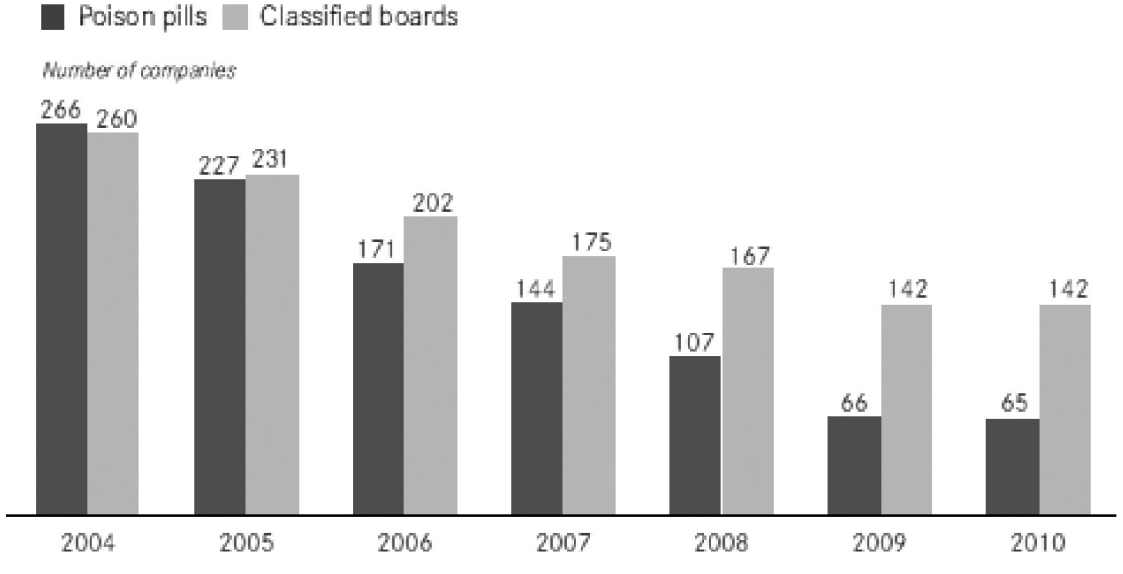
Just as poison pills can be implemented legally through board action alone, so can they usually only be dismantled by board action, either through amendment or redemption of the rights. An acquirer who is unable to convince a board of the merits of its offer may appeal to the shareholders, but only by asking them to replace a majority of the current board with candidates more receptive to the acquirer's bid.

For this reason, the effectiveness of a poison pill is enhanced if the target company has a staggered board, which would typically provide for three classes of directors, with only one class up for election each year. To replace a majority of a determined target's board, the acquirer would need to win two consecutive annual proxy contests—a formidable task. Indeed, once the Delaware Court of Chancery refused to require Airgas to redeem its poison pill, Air Products—already the winner of one election contest—nevertheless felt compelled to withdraw its $5.9 billion hostile offer for Airgas rather than wait another seven to eight months to try its luck at winning a second vote. And yet, whether at the behest of activist shareholders or on their own accord, many companies no longer have staggered boards. Only 141 of the S&P 500 companies currently have staggered boards,[13] compared to 360 at the end of 2004.[14] And although the poison pill may often be adopted rapidly by board action in the face of a surprise unsolicited offer, creating a staggered board generally requires a time-consuming, often unpredictable shareholder vote.

Chart 2

Poison pills and classified boards of S&P 500 companies, 2004–2010

Based on takeover defense trend analysis year end snapshot from 2004–2010.



Source: www.SharkRepellent.net

The "NOL Pill": Versata v. Selectica

Many companies have amassed significant NOLs, due in part to the recent financial crisis. Because NOLs can be used to offset future taxable income, they can be a valuable corporate asset. However, the use of existing NOLs to offset profits can be impaired if a company undergoes an "ownership change," as defined in Section 382 of the Internal Revenue Code.[15] Although the determination of whether an ownership change has occurred is extremely fact specific and complex, one trigger is a change in the stock ownership of the corporation by more than 50 percent over a rolling three-year period. However, under

[13] *Takeover Defense Trend Analysis 2010 Year End Snapshot,* FactSet Research Systems Inc., 2011 (www.sharkrepellent.com).

[14] *Takeover Defense Trend Analysis 2004 Year End Snapshot,* FactSet Research Systems Inc., 2005 (www.sharkrepellent.com).

[15] I.R.C. § 382 "Limitations on net operating loss carryforwards and certain built in losses following ownership change," 2006.

Section 382, only those shareholders of 5 percent or more of a company's stock are generally considered in the analysis.

To protect their NOLs, a number of corporations have installed poison pills with triggers below 5 percent (typically 4.99 percent), which, considering that most traditional pills have triggers between 10 percent and 20 percent, is relatively low. Approximately 60 of these "NOL pills" were in place when a Capital IQ search was performed in January 2011.[16] Prior to the 2009 proxy season, ISS would not differentiate NOL pills from traditional ones. Now, the proxy advisor firm recommends that any proposal to implement an NOL pill be evaluated on a case-by-case basis, unless the proposal refers to NOL pills that do not automatically expire prior to the earlier of the pill's third anniversary and the exhaustion of the NOLs, in which case the proposal should be voted against.[17]

In the 2010 decision *Versata v. Selectica*, the Delaware Supreme Court upheld the validity of an NOL pill despite its "low trigger." The decision affirmed a prior decision of the Delaware Court of Chancery that Selectica, Inc., a micro-cap software company, had not acted improperly by allowing its NOL pill to be exercised when one of its shareholders and competitors, Versata Enterprises, Inc., intentionally tripped the 4.99 percent threshold.[18]

Since it became a public company, Selectica had never made a profit; on the contrary, it has amassed $160 million in NOLs over its lifetime. Versata had a complicated relationship with Selectica, having previously made acquisition offers to Selectica's board and brought a patent-infringement suit against Selectica that ultimately resulted in Versata being awarded $17.5 million in damages. In November 2008, Versata, after Selectica rejected its takeover bid, began purchasing shares of Selectica on the open market.

Selectica knew that its NOLs were a valuable asset and commissioned an update of multiple studies it had requested in the past to determine whether the company was currently at risk of undergoing an "ownership change" under Section 382. In light of Versata's recent open-market purchases of Selectica shares, Selectica's board was advised it was at risk. Selectica then announced on November 17, 2008, that it had implemented an NOL pill with a 4.99 percent threshold.

A month later, Versata began trying to "buy through" Selectica's NOL pill, quickly bringing its ownership percentage up to 6.7 percent. A representative of Versata stated that the NOL pill was intentionally tripped in order to "bring accountability" to Selectica's board and to "expose" the "illegal behavior" of Selectica in creating a poison pill with such a low threshold. Another representative stated that Versata wanted to "accelerate discussions" regarding the settlement money that Selectica still owed Versata.[20]

Selectica's board offered to amend its NOL pill to exempt Versata from the adverse consequences of the pill if Versata entered into a standstill agreement. Versata refused, and, in early January 2009, Selectica exchanged each right under the NOL pill held by shareholders other than Versata for an additional share of Selectica stock as permitted under the pill, thereby doubling the number of shares held by all shareholders other than Versata and diluting Versata's share holdings from 6.7 percent to 3.3 percent. Selectica then put a replacement NOL pill in place. This was the first time that a poison pill had been intentionally tripped and exercised.

The Chancery Court, applying the *Unocal* standard, found that Selectica's directors reasonably believed that the NOLs had value and were worth protecting, and that allowing the NOL pill to be exercised was a reasonable response to Versata's threat.[21]

On October 4, 2010, the Supreme Court affirmed the Chancery Court's decision.[22] The Supreme Court noted that Selectica's board conducted a lengthy analysis regarding the value of, and the risks to, the

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[16] Public reporting companies with poison pills with 5 percent triggers in place, Capital IQ (website), retrieved January 4, 2011 (www.capitaliq.com).

[17] *2011 U.S. Proxy Voting Guidelines Summary*, Institutional Shareholder Services, Inc., December 16, 2010 (www.issgovernance.com/files/ISS2011USPolicySummaryGuidelines20101216.pdf).

[18] *Versata Enterprises v. Selectica, Inc.*, 5 A.3d 586, at 607 (Del. 2010).

[19] Ibid.

[20] *Versata*, 5 A.3d at 596.

[21] *Selectica, Inc. v. Versata Enterprises*, C.A. No. 4241-VCN, 2010 WL 703062, at 24–25 (Del. Ch. Feb. 26, 2010).

[22] *Versata*, 5 A.3d at 607.

company's NOLs. The board could reasonably have concluded that there was a real and significant threat that the NOLs could be impaired if no action was taken. The Supreme Court pointed to Selectica's efforts to resolve the issue by offering Versata the option of not being diluted in return for entering into a standstill agreement. Versata's refusal, together with evidence that could reasonably have led the board to conclude that Versata may have tried to cause an ownership change that would significantly devalue the NOLs, made it clear that exercising the NOL pill was a reasonable response.

The Supreme Court also found that setting the NOL pill's threshold at 4.99 percent was appropriate because it was driven by the definition in Section 382 and not by an arbitrarily low level set by Selectica. The Supreme Court made it clear, however, that its decision in this case does not give license to all corporations that have (or do not have) NOLs to implement a poison pill with a 4.99 percent threshold.[23]

Protection of Corporate Culture: eBay v. Newmark (Craigslist)

On September 9, 2010, the Chancery Court issued its decision in *eBay v. Newmark*, in which the court for the first time reviewed the validity of a poison pill installed by a closely held company (Craigslist).[24] Interestingly, the threat that Craigslist identified was not that shareholders might be deprived of a reasonable control premium in a change of control transaction. Instead, the concern seems to have been that Craigslist's unique corporate culture, which is focused on serving the community rather than maximizing profits, might be destroyed—not now, but sometime in the future—if the heirs or estates of the two controlling shareholders decided to sell out to eBay or another corporate, profit-maximizing giant.

In late 2004, eBay entered into an investment agreement with Craig Newmark and James Buckmaster, the controlling shareholders of the online classified ad service. Under the arrangement, eBay became a 28.4 percent minority shareholder while retaining the right to compete with Craigslist. In the event that eBay did compete, however, it would lose many of its rights under the agreement and all rights of first refusal over any Craigslist shares would fall away. This meant that Newmark and Buckmaster would lose their rights of first refusal over the shares held by eBay.

On June 27, 2007, eBay launched Kijiji.com, an online classified ads site that directly competed with Craigslist. In response, Newmark and Buckmaster attempted to unwind the relationship with eBay, but eBay was not receptive to this idea and instead offered to buy the remainder of the shares of Craigslist. Concerned with the free transferability of eBay's shares, Newmark and Buckmaster, without eBay's approval, implemented three defensive measures. In addition to implementing a staggered board and offering to issue one new share of Craigslist stock for every five shares over which a shareholder granted Craigslist a right of first refusal, the company put in place a poison pill with a 15 percent threshold. As eBay held slightly less than 30 percent of the shares of Craigslist, the poison pill would make it impossible for eBay to transfer its shares in one block. eBay in turn sued Newmark and Buckmaster in the Chancery Court, alleging they had breached their fiduciary duties as directors and controlling shareholders of Craigslist.

The Chancery Court rescinded the poison pill.[25] In applying the Unocal standard to the adoption of the pill, the Chancery Court found that there was no reasonable risk that eBay could take control of Craigslist or even increase its holdings because Newmark and Buckmaster controlled all the remaining shares. As for Newmark's and Buckmaster's concerns over the future of Craigslist's corporate culture, the Chancery Court found that the for-profit corporate form in which Craigslist operates "is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment."[26] The Chancery Court instead found that Newmark and Buckmaster were punishing eBay for competing with Craigslist.

The Chancery Court upheld the staggered board under the business judgment rule, but rescinded the one-for-five share issuance measure as a violation of Newmark's and Buckmaster's fiduciary duties under the entire fairness standard.

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[23] Ibid.

[24] *eBay Domestic Holdings v. Newmark*, C.A. No. 3705-CC, 2010 WL 3516473 (Del. Ch. Sept. 9, 2010).

[25] *eBay Domestic Holdings v. Newmark*, 2010 WL 3516473 at 24.

[26] eBay, 2010 WL 3516473 at 23.

Both the Craigslist and Selectica cases addressed relatively new uses of poison pills. In much more traditional uses of poison pills described in the next two examples, the Chancery Court demonstrated that, despite the hostility of many shareholders to their use, under Delaware law poison pills that are properly structured, adopted and administered will generally be upheld by the courts.

Continued Legal Validity of Poison Pills: Yucaipa v. Riggio

On August 12, 2010, the Chancery Court issued its ruling in Yucaipa v. Riggio.[27] Investor Ronald Burkle, through his Yucaipa funds, sued Barnes and Noble (B&N), a publicly traded company, and its founder Leonard Riggio when B&N implemented a poison pill in response to Yucaipa's rapid increase in its holdings of B&N stock.

In November 2008, Burkle bought an 8 percent share of B&N. Before doing so, he told Riggio, who held approximately 30 percent of B&N shares, that Yucaipa would be investing. Soon thereafter, Burkle and Riggio met to discuss the future of B&N and Yucaipa's intentions. Burkle floated ideas about B&N's potential future, including partnering with a technology company and purchasing some of Borders' successful stores. Riggio felt that the purchase of stores from Borders would expose B&N to additional real estate holdings, which he felt was not a good strategy in light of the probable retail slowdown in 2009. Burkle agreed that Riggio's position made sense.

In August 2009, B&N announced that it was going to acquire Barnes & Noble College Booksellers, an independent company that was owned by Riggio and his wife, for $596 million and the transaction closed at the end of September 2009. Burkle was infuriated by this acquisition, in part because he felt it was inconsistent with Riggio's prior statements regarding real estate exposure. Yucaipa then began to rapidly purchase B&N shares, having increased its holdings to 17.6 percent by mid-November 2009. Fearing that Yucaipa planned to take control of B&N, the B&N board adopted a poison pill with a 20 percent threshold. The pill would, however, allow Riggio to maintain his holdings of over 30 percent of B&N shares, but not to increase his holdings. Yucaipa then sued, challenging the validity of the poison pill, arguing, among other things, that adopting the pill was outside a reasonable range of responses to any threat posed by Yucaipa, and that keeping the pill in place would prejudice Yucaipa in any proxy contest given the large block of shares controlled by Riggio and his allies.

Applying the *Unocal* standard, the Chancery Court found that B&N's implementation of the poison pill was reasonable in light of the threat posed by Burkle, noting Yucaipa's sudden accumulation of additional shares and other evidence that Burkle was exploring strategic options for B&N by meeting with investment bankers.[28] The Chancery Court also noted that Yucaipa would be able to prevail in a proxy contest despite holding slightly less than 20 percent of B&N's common shares, a point Yucaipa ultimately conceded during post-trial argument.[29] The Chancery Court noted that Yucaipa's director nominees would stand a good chance of succeeding in a proxy contest due to the likely support they would receive from ISS and other proxy advisory services.[30]

"Just Say No": Air Products v. Airgas

In one of the most closely followed takeover stories of the past year, the Delaware Court of Chancery addressed the question of whether a board of directors, consistent with its fiduciary responsibilities, may allow a poison pill to remain in place when it prevents informed shareholders of a target company subject to a non-coercive, all-cash, fully financed tender offer from deciding for themselves whether to sell their shares into the offer.[31] In *Air Products and Chemicals, Inc. v. Airgas, Inc.*, the Chancery Court upheld Airgas' pill under Delaware Supreme Court precedent; promptly after the decision was handed down, Air Products ended its 16-month pursuit of Airgas.

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[27] *Yucaipa American Alliance Fund II, L.P. v. Riggio,* 1 A.3d 310 (Del. Ch. 2010).

[28] *Yucaipa*, 1 A.3d at 348.

[29] *Yucaipa*, 1 A.3d at 354.

[30] *Yucaipa*, 1 A.3d at 354–355.

[31] *Air Prods. & Chems., Inc. v. Airgas, Inc.*, C.A. Nos. CIV.A. 5249-CC, CIV.A. 5256-CC, 2011 WL 519735 (Del.Ch. Feb 15, 2011).

Airgas had adopted its poison pill in May 2007.[32] Beginning in September 2009, Air Products made several private overtures to Airgas, but faced with repeated rebuffs from the Airgas board, Air Products eventually launched a tender offer for Airgas in February 2010. Air Products' initial $60 per share tender offer was conditioned on Airgas redeeming its poison pill, among other things. After reviewing Airgas' management's five-year strategic plan and receiving inadequacy opinions from three investment banks, Airgas' board recommended that its shareholders not tender their shares into the offer, concluding that the $60 per share offer grossly undervalued the company. The board recommended against each subsequent increased offer made by Air Products over the following months, each time after careful consideration, finding each of them inadequate and ultimately asserting that Airgas was worth at a minimum $71 a share. Air Products also commenced and won a proxy campaign, electing to Airgas' staggered board at the September 15, 2010 annual meeting a slate of three directors who would take a "fresh look" at Air Products' offer.

Air Products also received enough support from shareholders at the 2010 annual meeting to advance Airgas' 2011 annual meeting to January 2011. Air Products hoped to elect another three directors to Airgas' staggered board in short order, thereby quickly taking control of the 10-member board. However, the Delaware Supreme Court invalidated this maneuver,[33] and Air Products was forced either to persuade the courts to require the Airgas board to redeem the pill or wait another seven or eight months to seek to win control of Airgas' board.

While the Chancery Court was considering Air Products' lawsuit, Air Products made its "best and final" $70 bid for Airgas. The Airgas board—this time including Air Products' own nominees—unanimously rejected this offer too as inadequate. Presumably to Air Products' surprise, its nominees, after being elected to the Airgas board, retaining separate counsel and persuading Airgas to hire a third independent investment bank, were favorably impressed with Airgas' management's strategic plan and found the underlying assumptions to be reasonable.

On February 15, 2011, the Chancery Court, analyzing the case under the *Unocal* standard, found that the board's decision not to redeem the poison pill was a reasonable response to the risk that the majority of shareholders would tender their shares for an inadequate price. The Chancery Court was persuaded that the board reasonably believed that Air Products' "best and final" offer was inadequate, not only by the careful consideration given the offer by the Airgas board, the unanimous conclusion of the board, including Air Products' three nominees, and the inadequacy opinions rendered by three investment banks, but also by the quality of the Airgas strategic plan. By all accounts, it was a detailed plan, developed in the ordinary course of Airgas' business well before the Air Products bid materialized, and had not been adjusted in response to the offer. The Air Products nominees were favorably impressed not only by the plan and its assumptions, which they found were thoughtful and conservative, but also by how well the board understood the plan.

The Delaware Supreme Court has held that "substantive coercion" is a legally cognizable threat under *Unocal*.[34] Substantive coercion exists where a hostile bid is inadequate and there is a risk that shareholders will nonetheless sell into the inadequate offer either because they are ignorant of management's analysis as to the underlying value of the company or because they misunderstand or disbelieve it. Here, the risk was slightly different, but no less of a legitimate threat because a large number of Airgas' shareholders were short-term speculators, they were likely to sell into Air Products' inadequate offer in order to lock in a quick profit, regardless of the intrinsic adequacy of the price. The court went on to hold, citing Versata for the proposition that "the combination of a classified board and a Rights Plan does not constitute a preclusive defense,"[35] and noting that Air Products could realistically win a second proxy contest, that Airgas' defenses were not preclusive and were a reasonable response to the outstanding threat.

The case is an example of the continued vitality of the "just say no" defense in Delaware, at least under the right circumstances. Moreover, it underscores that in Delaware, directors are tasked with managing the affairs of a corporation—even in the realm of takeover defense—and directors can exercise their

[32] *Air Prods. & Chems., Inc. v. Airgas, Inc., et al.*, C.A. 5249-CC (Del. Ch. December 23, 2010).

[33] *Airgas, Inc. v. Air Prods. & Chems.*, Inc., 8 A.3d 1182 (Del.2010).

[34] *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140 at 1153 (Del.1990).

[35] *Air Prods. & Chems., Inc. v. Airgas, Inc.*, C.A. Nos. CIV.A. 5249-CC, CIV.A. 5256-CC, 2011 WL 519735 at 43 (Del.Ch. Feb 15, 2011) (quoting Selectica, 5 A.3d 586 at 604 (Del.2010)).

"managerial discretion, so long as they are found to be acting in good faith and in accordance with their fiduciary duties (after rigorous judicial fact-finding and enhanced scrutiny of their defensive actions)."[36] But boards of Delaware corporations cannot always "just say 'no'" in the face of hostile offers. "The Board does not now have unfettered discretion in refusing to redeem the rights."[37] Critical to the Airgas court's decision was the comprehensive, realistic, pre-existing strategic Airgas management plan that the Airgas board used to value the company, the views of Air Products' own nominees that the offer was inadequate and the thorough, good faith efforts made by the Airgas board at every stage in the process. These factors are not likely to appear in all takeover contests.

Beneficial Ownership

One trend that could be interesting to watch in 2011 and beyond is whether companies are addressing concerns over the breadth of the "beneficial ownership" definition in poison pills. In 2010, only a handful of poison pills—21 of the approximately 900 pills outstanding at the end of the year—were amended or adopted with language intended to capture the panoply of derivative instruments that can confer voting control over, or the economic benefit of, shares to a person without actually placing the shares in the person's hands. (For sample language, see "An Example of Derivatives Included in a Definition of 'Beneficial Ownership")

An Example of Derivatives Included in a Definition of "Beneficial Ownership"

A Person shall be deemed the "Beneficial Owner" of, and shall be deemed to "beneficially own," and shall be deemed to have "Beneficial Ownership" of, any securities:

- that are the subject of, or the reference securities for or that underlie, any Derivative Interest of such Person or any of such Person's Affiliates or Associates, with the number of Common Shares deemed Beneficially Owned being the notional or other number of Common Shares specified in the documentation evidencing the Derivative Interest as being subject to be acquired upon the exercise or settlement of the Derivative Interest or as the basis upon which the value or settlement amount of such Derivative Interest is to be calculated in whole or in part or, if no such number of Common Shares is specified in such documentation, as determined by the Board in its sole discretion to be the number of Common Shares to which the Derivative Interest relates;

"Derivative Interest" shall mean an interest in any derivative securities (as defined under Rule 16a-1 under the Exchange Act) that increase in value as the value of the underlying security increases, including, but not limited to, a long convertible security, a long call option and a short put option position, in each case, regardless of whether (x) such interest conveys any voting rights in such security, (y) such interest is required to be, or is capable of being, settled through delivery of such security or (z) transactions hedge the economic effect of such interest.

Source: Compellent Techs., Inc., Form 8-K, December 16, 2010.

Despite some commentators' and practitioners' unease, most pills still do not include this derivative-driven language. One reason may be concern over the unintended consequences of untested wording. Does the language cover too much? Might it run afoul of the *Unocal* standard if its reach is too expansive? By being inadvertently too precise, could new developments in the derivatives markets (perhaps conceived specifically to work around the new language) be excluded from the definition? Another reason could be that it is not at all clear that the customary formulation is insufficient.

In the *CSX* case, the United States District Court for the Southern District of New York pointed to Rule 13d-3(b) under the Securities Exchange Act of 1934, a rule aimed at preventing arrangements that have

[36] *Air Prods.,* 2011 WL 519735 at 50.

[37] *Moran v. Household Int'l Inc.,* 500 A.2d 1346 at 1354 (Del. 1985).

the purpose or effect of circumventing the rules requiring reporting of beneficial ownership.[38] The court in that case found, given all the facts and circumstances, that the use of total return swaps conferred beneficial ownership of the notional shares on the activist hedge funds as a result of the application of Rule 13d-3(b). Since the concept of beneficial ownership in poison pills has been imported from the Exchange Act, many issuers may conclude that the concept imbedded in Rule 13d-3(b) will protect them against the use of instruments intended to get around the beneficial ownership definition.

What You Should Do Now

The recent case law suggests that poison pills are alive and well and can still be effective in deterring inadequate unsolicited takeover offers. Although proxy advisory firms and many institutional investors have a general bias against them, when used in the proper circumstances to protect shareholder value, even ISS and others may support a target's adoption of a poison pill, as long as it is put up for shareholder approval and does not have certain restrictive features.

Except in connection with an NOL pill, where management may be unaware of trades of 5% or more of the company's stock until it's too late, maintaining a pill in the absence of a specific threat is not necessary and can engender shareholder hostility to the board. Boards can adopt poison pills swiftly when needed, but it makes sense to be prepared for the eventuality by having a fully drafted poison pill ready to go when the need suddenly arises. Boards should consult with counsel as to what trigger to use, how to phrase the beneficial ownership definition, whether to include an exchange feature and the like, and be in a position to adopt a fully-baked pill on short notice.

Companies should also think carefully about whether they truly want to eliminate their staggered board provision. Adopting a staggered board requires a shareholder vote, which in today's world is unlikely to be successful. As the Airgas decision demonstrated, the combination of a poison pill with a staggered board can be a formidable defense.

Finally, boards should, when possible, plan ahead by insisting that management regularly maintain a realistic, defensible, sensible up-to-date business plan. Even better is if the plan is regularly and thoroughly reviewed by management and the board. Boards defending against hostile takeover offers can use such plans to support their valuation of the company and their conclusion that the hostile offer is inadequate. Plans hastily put together for the purpose of defending against the offer are not nearly as credible.

It will be interesting to watch for changes in poison pill activity in 2011, as companies react to these recent prominent cases, as hedge funds get back into the activism game and as M&A activity continues to grow.

A version of this article originally appeared in Director Notes, a publication of The Conference Board©.

[38] *CSX Corp. v. The Children's Inv. Fund Mgmt. (UK) LLP, et al.*, 562 F. Supp. 2d 511 (S.D.N.Y. 2008).

Advance Notice Bylaws: The Current State of Second Generation Provisions

By Kevin Douglas, Stephen Hinton and Eric Knox of Bass, Berry & Sims PLC[1]

A significant number of public companies have amended their advance notice bylaw provisions since 2008 to address perceived limitations or ambiguities in their bylaws as the result of case law developments and shareholder activism trends. In early 2008, the Delaware Chancery Court interpreted ambiguous advance notice bylaw provisions in favor of insurgent shareholders attempting to nominate their own slate of director nominees in two highly publicized cases, *Jana Master Fund, Ltd. vs. CNET Networks, Inc. ("CNET")*[2], and *Levitt Corp. vs. Office Depot, Inc. ("Office Depot")*.[3]

Later, in September 2008, a Second Circuit decision in *CSX Corporation vs. The Children's Investment Fund* highlighted the potential vulnerability of a public company to an activist shareholder acquiring a significant position in a company through the acquisition of derivatives without making a filing under Section 13 of the Securities Exchange Act as the result of the shareholder holding beneficial ownership of less than 5% of a company.[4] This article analyzes and surveys various provisions frequently included in so-called "second generation" advance notice bylaws adopted by Delaware corporations since 2008.

Although the level of law firm commentary regarding advance notice bylaws has diminished since 2008, advance notice bylaws remain an important aspect of a public company's preparedness for shareholder activism. In this regard, advance notice bylaws assist public companies in obtaining relevant information with respect to shareholder director nominations or proposals to be made at an annual or special meeting and facilitate the ability of boards to respond to and present alternatives to such shareholder proposals if necessary.

Shareholder activists and proxy advisory firms have generally shown less resistance to public companies amending their advance notice bylaws to include second generation provisions in comparison to certain other defensive actions taken by public companies, such as renewing or adopting a shareholder rights plan or maintaining a classified board.[5] In this regard, the decision of a company to amend its advance notice bylaws will not trigger a withhold recommendation from ISS for a company's directors under ISS's proxy voting guidelines.[6] Moreover, public companies typically have the ability to amend their bylaws via board action without shareholder approval, and most do not submit advance notice bylaw amend-

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[2] 954 A.2d 335 (Del. Ch. 2008). In *CNET*, Jana sought to gain control of CNET's classified board by replacing two existing directors, expanding the size of CNET's board by five directors, and electing its own slate to fill the seven open seats. Following receipt of notice from Jana of its intent to conduct its own proxy solicitation, CNET asserted that Jana had not complied with CNET's advance notice bylaw requirement that proponents hold at least $1,000 worth of CNET stock for at least one year. In *CNET*, the court interpreted CNET's advance notice bylaws as only applying to Rule 14a-8 shareholder proposals, and that therefore Jana's nominations and proposals were not subject to CNET's advance notice bylaw requirements.

[3] 2008 WL 1724244 (Del. Ch. 2008). In *Office Depot*, Levitt Corp. nominated its slate of directors and filed its own proxy materials after Office Depot had filed its definitive proxy materials with the SEC, but did not comply with the advance notice requirements of Office Depot's bylaws, which required that "[f]or business to be properly brought before an annual meeting by a shareholder, the shareholder must have given timely notice thereof in writing to the Secretary." In *Office Depot*, the court held that the term "business" in the foregoing quoted provision included director nominations, and that because Office Depot had brought this "business" of nominating and electing directors (whether its own nominees or a competing slate) through Office Depot's own proxy materials, Levitt Corp. was not required to comply with Office Depot's advance notice bylaw provisions.

[4] 2008 WL 4222848 (2nd Cir. 2008). In *CSX,* a hedge fund entered into cash-settled total return swaps with eight counterparties covering over 14% of CSX's shares but did not file a Schedule 13D since the shareholder's beneficial ownership remained just under 5%. Moreover, as is common in such arrangements, the counterparties to such swaps hedged their positions by purchasing the shares underlying the swaps. In *CSX*, the court held that the tactics of the hedge fund violated the anti-evasion provision of SEC Rule 13d-3(b), but that the court did not have the authority to interfere with the voting power of the hedge fund's or its counterparties' shares.

[5] However, note, for example, the Corporate Governance Policies of the Council of Institutional Investors, which provide that "[a]dvance notice bylaws, holding requirements, disclosure rules and any other company imposed regulations on the ability of shareowners to solicit proxies beyond those required by law should not be so onerous as to deny sufficient time or otherwise make it impractical for shareowners to submit nominations or proposals and distribute supporting proxy materials." (Available at http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2009-29-10%20FINAL.pdf).

[6] With respect to advance bylaw proposals submitted to shareholders for approval, under ISS's 2011 proxy voting guidelines, ISS will review such proposals on a case-by-case basis considering certain criteria set forth in these guidelines. See also footnote 21 below.

ments approved by their board to shareholders for approval.[7] Therefore, public companies have greater practical flexibility in adopting effective advance notice bylaw provisions than they do in taking certain other protective actions.

Although a significant number of Delaware public companies have adopted second generation advance notice bylaws since 2008, many have not. Approximately 58% of S&P 500 large-cap Delaware corporations have amended their bylaws since 2008 to include at least some second generation advance notice bylaw provisions discussed below, compared to approximately 51% of S&P 400 mid-cap Delaware corporations and 37% of S&P 600 small-cap Delaware corporations.[8] Moreover, if the SEC's proxy access rules adopted in August 2010 are ultimately judicially upheld in their current form, then we believe a large number of public companies will elect to amend their advance notice bylaws in response to proxy access. Those public companies amending their bylaws in response to proxy access should use this opportunity to incorporate second generation advance notice bylaw provisions into their bylaws to the extent they have not already done so.

Impact of Proxy Access

On August 25, 2010, the SEC issued final rules regarding proxy access, under which shareholders may require a public company to include director nominees of shareholders in the company's proxy statement within certain parameters set forth in new Rule 14a-11 (the rules also amended Rule 14a-8 to facilitate the ability of shareholders to include bylaw amendment proposals in a company's proxy statement that would provide for more permissive proxy access than mandated by Rule 14a-11). Following a lawsuit brought by the U.S. Chamber of Commerce and Business Roundtable challenging the validity of the SEC's proxy access rules, the SEC issued an order on October 4, 2010 which delayed the effectiveness of proxy access pending the resolution of this lawsuit. This lawsuit is currently pending before the D.C. Circuit Court of Appeals, and an opinion related to this lawsuit is expected soon, but has not been issued at the time of the submission of this article.

Assuming that the SEC's proxy access rules are ultimately judicially upheld, the implementation of these rules will have a significant impact on the landscape of advance notice bylaws. Although the interaction between the final proxy access rules and advance notice bylaw requirements was not clear in the view of many commentators based on the text of the SEC's proxy access adopting release, statements made by the SEC staff following the adoption of the rules clarified that shareholders' ability to utilize proxy access is predicated on the right to nominate directors under state law. Therefore, it appears that a company may apply its advance notice bylaw provisions in connection with Rule 14a-11 nominations and disregard a Rule 14a-11 nomination not made in compliance with a company's advance notice bylaws, at least to the extent that such provisions are enforceable under state law and do not cause a company to effectively opt out of Rule 14a-11 or unfairly discriminate against Rule 14a-11 nominees.

Following the adoption of final proxy access rules, a small number of public companies amended their advance notice bylaws in response to proxy access.[9] However, the SEC's stay of the effectiveness of proxy access in October 2010 stalled further movement in this regard, as the vast majority of public companies have deferred taking action in response to proxy access until the fate of the SEC's proxy access rules is known.

Although it is beyond the scope of this article to discuss in detail what actions public companies should consider taking in response to the SEC's proxy access rules, if these rules are ultimately upheld, many public companies will want to amend their advance notice bylaw provisions in response to proxy access. In this regard, there are two general approaches a company may take: either provide that a company's

[7] The majority of jurisdictions authorize both the board of directors and the shareholders of a company to amend the company's bylaws, in some cases subject to any limits in the company's charter. The Delaware General Corporation Law provides that shareholders may amend a corporation's bylaws but also provide that the company's certificate of incorporation may authorize amendment by the board of directors without shareholder approval. See Delaware General Corporation Law Section 109.

[8] According to data from FactSet SharkRepellent.net. In addition, based on FactSet SharkRepellent.net data, with respect to U.S. public companies incorporated outside of Delaware, approximately 51% of non-Delaware S&P 500 corporations, 37% of non-Delaware S&P 400 corporations and 34% of non-Delaware S&P 600 corporations have amended their advance notice bylaws since 2008.

[9] See, for example, Section 12(a)(5) of the Amended and Restated Bylaws of MGM Resorts International, filed as Exhibit 3.1 on its Current Report on Form 8-K filed on December 20, 2010 at www.sec.gov.

advance notice bylaws pertaining to director nominations do not apply to Rule 14a-11 nominations (similar to the exclusion typically included in advance notice bylaws for Rule 14a-8 proposals), or provide that at least some of a company's advance notice bylaw provisions pertaining to director nominations also apply in the Rule 14a-11 context.[10]

We believe there is some benefit in following the latter approach. In this regard, the information required to be provided to a company by shareholder proponents under second generation advance notice bylaws is generally more extensive than that required under Rule 14a-11, and we believe that public companies should give consideration to requiring a shareholder proponent to comply with these advance notice bylaw information requirements when making a Rule 14a-11 nomination in addition to complying with the informational requirements of Rule 14a-11.

Overview of Delaware Law Regarding Advance Notice Bylaw Provisions

Before moving to an analysis of second generation advance notice bylaw provisions, a brief overview of Delaware jurisprudence regarding advance notice bylaw provisions is instructive. In the absence of an advance notice bylaw or other provision to the contrary, Delaware law does not require shareholders to provide a corporation with advance notice of proposals or nominations to be made at an annual meeting.[11] However, advance notice bylaw provisions of some sort (whether or not second-generation) are standard among public companies, and Delaware courts have frequently upheld them as valid.[12] Nevertheless, under Delaware law, advance notice bylaws must not unduly restrict the shareholder franchise or be applied inequitably.[13] Furthermore, Delaware courts have routinely construed any ambiguity found in advance notice bylaw provisions in favor of shareholders, which highlights the importance of clear drafting with respect to advance notice bylaws.[14]

Although there are a fair number of Delaware cases interpreting advance notice bylaws, we are not aware of any cases (Delaware or otherwise) interpreting any prototypical second-generation advance notice bylaw provisions as described below. We expect that legal challenges to the enforceability of second-generation advance notice bylaw provisions will occur in the future, which may provide additional guidance regarding the drafting of these provisions.

Analysis and Survey of Second Generation Advance Notice Bylaw Provisions

This article analyzes and surveys provisions frequently included in second generation advance notice bylaw provisions. For purposes of this survey below, we have reviewed advance notice bylaw provisions of 100 Delaware corporations (consisting of 33 S&P 500 large-cap, 33 S&P 400 mid-cap and 34 S&P 600 small-cap companies) which have amended their advance notice bylaws since 2008.[15]

A. Bedrock Second Generation Provisions

A brief summary of key provisions included in virtually all second generation advance notice bylaw provisions are as follows:

Disclosure of Derivatives Holdings. Second-generation advance notice bylaws customarily require more detailed and broader disclosure regarding the extent of the ownership interests of the shareholder proponent and affiliated and associated persons than required under Section 13 of the Securities Exchange Act, including the disclosure of derivatives and short positions. The importance of including such a provision in advance notice bylaws was highlighted by the fact pattern in *CSX*, in which a hedge fund

[10] See "IV.B. Survey and Analysis of Other Second Generation Provisions: (i) Advance Notice Periods" below for a discussion of the interaction between timing of the notice period for proxy access nominations under Rule 14a-11 and the notice period under advance notice bylaws.

[11] *Goggin v. Vermillion, Inc.*, C.A. No. 6465-VCN at 10 (Del. Ch. June 3, 2011).

[12] *Openwave Sys. Inc. vs. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 238-39 (Del. Ch. 2007) (citing *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 728 A.2d 25, 43 (Del. Ch. 1998)).

[13] *Id.* at 239.

[14] See, for example, *CNET* at 18 (referencing Delaware court's "rule of construction in favor of franchise rights"); *Office Depot* at 7 (indicating that "[bylaw] restrictions that are not clear and unambiguous should not be interpreted to limit shareholder democracy").

[15] We have limited our review to companies incorporated in Delaware to ensure the consistency of the underlying law governing applicable bylaw provisions and to focus on companies directly impacted by the Delaware decisions in *CNET* and *Office Depot*.

entered into cash-settled total return swaps covering over 14% of CSX's shares but did not make any public filing under Section 13 of the Securities Exchange Act as the result of holding beneficial ownership of less than 5% of CSX's shares.[16]

Exclusive Means. Second generation advance notice provisions typically clarify that the submission of a proposal or nomination in compliance with the company's advance notice bylaws is the exclusive means by which a shareholder may bring a proposal or nomination. This language has become commonplace as the result of the *CNET* and *Office Depot* decisions, in which advance notice bylaw drafting ambiguities led the Delaware court to conclude that the advance notice provisions of the subject company did not apply to director nominations made by a shareholder, thereby allowing the shareholder proponent to make director nominations outside the scope of the company's advance notice bylaws.

Clarification of Interaction with Rule 14a-8. Advance notice bylaw provisions customarily include a provision that the advance notice bylaws do not affect the right of a shareholder to include a proposal in the company's proxy statement under Rule 14a-8. This language is advisable based on SEC no-action letter guidance[17] that a public company may not exclude a Rule 14a-8 shareholder proposal from a company's proxy statement as the result of the proponent's failure to comply with the company's advance notice bylaws.[18]

Disclosure of Relationships. Second generation advance notice bylaws typically require broad disclosure of relationships between any shareholder proponent or persons associated with such proponent, and any other persons, in connection with any nomination or proposal (and, more generally, customarily require that a proponent disclose to the company any additional information that a proponent would be required to disclose in a proxy statement or other filing in connection with the solicitation of proxies or consents by such proponent under the Exchange Act).

Consequences of Failure to Comply with Advance Notice Bylaws. Second generation advance notice bylaw provisions typically explicitly provide that in the event a proponent fails to comply with a company's advance notice bylaws, the proposal or nomination brought by such shareholder will be disregarded by the presiding officer at the meeting (alternatively, some second generation advance notice bylaws provide that a presiding officer will have the authority to disregard a proposal under these circumstances, but do not mandate this conclusion). The inclusion of such a provision (whether mandatory or discretionary) is advisable and may allow a company to exclude a proposal or nomination not made in compliance with a company's advance notice bylaws and/or increase the leverage of a company in negotiating with a shareholder proponent who has failed to comply with a company's advance notice bylaws. Companies should be mindful, however, that there may be equitable limitations under Delaware law (or shareholder relations considerations) that may impact the ability of a company to enforce certain advance notice bylaw provisions against a shareholder proponent to the extent that the proponent's noncompliance with these provisions is *de minimis*.

B. Survey and Analysis of Other Second Generation Provisions

A survey and analysis of other advance notice bylaw provisions often included in second generation advance notice bylaw provision are set forth below.

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[16] The Dodd-Frank Act amended Section 13(d) under the Exchange Act in several respects, including providing the SEC with the authority to shorten the ten-day filing deadline under Section 13(d) and providing that a person will be deemed to acquire beneficial ownership based on the purchase and sale of a security-based swap only to the extent that the SEC may determine by rule. However, the Dodd-Frank Act did not address the application of Section 13(d) to cash-settled total return swaps (as utilized in *CSX*), and the application of Section 13(d) to derivatives remains unclear in the absence of SEC rulemaking (underscoring the benefit of including a derivatives disclosure provision in a company's advance notice bylaws). The SEC is currently engaged in a project to modernize reporting under Exchange Act Sections 13(d) and 13(g). See "Beneficial Ownership Reporting Requirements and Security-Based Swaps," SEC Release No. 34-64628, June 8, 2011.

[17] See *Dollar Tree Stores, Inc.*, SEC No-Action Letter (March 7, 2008). *See also Cleco Corporation*, SEC No-Action Letter (January 29, 2010).

[18] This conclusion contrasts with the recently-expressed views of the SEC staff noted above that a company may (at least in certain circumstances) require a proponent making a proxy access director nomination to comply with the company's advance notice bylaws as a condition to such shareholder having the right to include such nomination in the company's proxy statement.

i. Advance Notice Periods

Advance notice bylaws generally provide for a window during which a shareholder proponent may make a proposal or director nomination, customarily a period of time prior to the anniversary date of last year's annual meeting or the anniversary date of last year's proxy statement.

Recent legal developments have impacted advance notice period in two respects. First, in *CNET*, a key element of the court's holding that the advance notice bylaw provision only applied to Rule 14a-8 proposals was that the advance notice period was tied to the date of CNET's proxy statement for the previous year, not the date of its annual meeting. Following this decision, many public companies amended their advance notice bylaws to tie the advance notice period to the date of the company's previous year's annual meeting rather than the previous year's proxy statement to avoid any possible interpretation that a company's advance notice bylaws did not apply outside the context of Rule 14a-8.

The SEC's proxy access rules may cause companies to revisit their advance notice period construct again, however, if and when these rules are ultimately judicially upheld. Under the SEC's proxy access rules, Rule 14a-11 director nominations must be made within 120-150 days of the date of last year's proxy statement of a company (irrespective of the time period for director nominations set forth in a company's advance notice bylaws). In light of this mandatory advance notice period for Rule 14a-11 nominations (which is earlier than the advance notice period found in almost all public company advance notice bylaws), we believe companies should give consideration to amending their advance notice bylaws to alter their advance notice period for director nominations made outside of Rule 14a-11 to match the advance notice period under Rule 14a-11, if proxy access is ultimately upheld.

This approach will allow companies to consider and react to director nominations made by shareholders both under and outside of Rule 14a-11 (including whether to resist or settle with shareholder proponents making such nominations) within the same time period, and have a full understanding of the number and nature of shareholder dissidents and nominees when making these decisions, rather than reacting to Rule 14a-11 nominations without knowing whether another shareholder may make subsequent nominations outside of the Rule 14a-11 context. While this approach is not free from enforceability concerns,[19] the fact that the SEC has provided for an advance notice period for Rule 14a-11 nominations of 120-150 days prior to the delivery of last year's proxy statement may influence a Delaware court considering whether such a notice period unduly impedes the shareholder franchise under state law.

Our review of the advance notice period of Delaware corporations that have adopted second generation advance notice bylaws revealed the following:[20]

- Of the surveyed companies that have adopted second generation advance notice bylaws, 92% have tied the advance notice period to the date of last year's annual meeting, while only 8% have tied the advance notice period to the date of last year's proxy statement.[21]
- Of the surveyed bylaws, 86% have a window period of 30 days, 7% have a window period of greater than 30 days but no more than 90 days, 3% have a window period of between 20-25 days, and 10% do not have a window period but only require that proposals or nominations be made prior to a specified date (for example, 90 days prior to last year's annual meeting).
- Of the surveyed bylaws that have a window period of 30 days that is tied to last year's annual meeting, 64% provide for a notice period of 90-120 days prior to the meeting, 9% provide for a notice period 60-90 days prior to the meeting and 7% provide for a notice period of 120-150 days prior to the meeting.

[19] While no Delaware court has directly upheld a bylaw with an advance notice period of such duration, the Delaware Court of Chancery recently found that an advance notice provision in excess of 150 days prior to the annual meeting included in the proxy statement for the previous year's meeting (but not in the company's bylaws) would not likely be found to be unreasonably long or unduly restrictive of the plaintiff shareholder's franchise rights. *Goggin v. Vermillion, Inc.*, C.A. No. 6465-VCN (Del. Ch. June 3, 2011).

[20] In contrast to the survey data set forth below, under ISS's 2011 proxy voting guidelines, ISS supports advance notice window periods of at least 30 days which expire no earlier than 60 days prior to the date of last year's meeting.

[21] This does not take into account the alternative notice period mechanism included in many public companies' bylaws which provides for a separate deadline in the event a company's annual meeting is more than a specified period of time (often, 30 days) prior to or following the date of the company's last annual meeting.

ii. Conscious Parallelism: Acting in Concert

Some second generation advance notice bylaws require a proponent to not only provide requested information with respect to the proponent and its nominees, affiliates and associates, but also those persons with whom the proponent is acting in concert.[22] This "conscious parallelism" concept, whereby a company attempts to group (and require disclosure of) shareholders who may not have an explicit agreement with each other but are engaging in wolf pack behavior, has also been the subject of recent commentary in the shareholder rights plan arena.[23] Of the companies that have adopted second generation advance notice bylaws included in our survey, 51% of the surveyed bylaws require some form of disclosure with respect to persons "acting in concert" with the proponent.

When responding to an advance notice bylaw which requires disclosure of this nature, a shareholder proponent may take a narrow view of what other persons (if any) are "acting in concert" with the proponent. Nevertheless, including a bylaw provision of this nature may possibly elicit useful information about persons acting in concert with a proponent, or (perhaps more likely) deter overt wolf pack behavior among potential shareholder proponents who desire to avoid triggering disclosure under a company's advance notice bylaws that they are "acting in concert."

iii. Requirement of Director Nominees to Complete Questionnaire and/or Provide Additional Information

A significant number of companies adopting second generation advance bylaws require shareholder nominees to complete a questionnaire provided by the company and/or provide certain additional information which may be requested by the company. Of the surveyed companies that have adopted second generation advance notice bylaws included in our survey, 64% of the surveyed bylaws require a shareholder nominee to complete a questionnaire and/or provide additional information if requested by the company.

These questionnaire and informational requirements may be used by a company to elicit information regarding, among other things, whether a director nominee would be an independent director of the company, the relationship between the director nominee and the shareholder proponent, and whether the election of a director could give rise to legal issues for a company (such as in connection with the Clayton Act's restrictions on interlocking directorships). The enforceability of a bylaw requirement of this nature has not been tested under Delaware law, although we believe that, at a minimum, requiring a shareholder nominee to complete a questionnaire in the same form as the questionnaire completed by other directors of the company would be judicially upheld.

iv. Requirement to Update Information

Some second-generation advance notice bylaws only require a proponent to deliver information to a company at the time the proponent is making a proposal, while others require a proponent to update information if there is any material change (or inaccuracy) in the information previously provided. While there are various formulations of this requirement, this update is often required to be provided a short period of time following the record date of the company. Of the surveyed companies that have adopted second generation advance notice bylaws included in our survey, 55% of the surveyed bylaws require that some or all of the information provided by a proponent at the time of a submission of a nomination or proposal be updated as necessary, while 45% do not include any updating provision.

Requiring a shareholder proponent to update information previously provided is consistent with the purpose of advance notice bylaws to ensure that a company and its shareholders are provided complete and accurate information about shareholder proposals to be made at a meeting, and we believe the inclusion of such a provision is likely enforceable under Delaware law.

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[22] See, for example, Section 5(a) of the Amended and Restated Bylaws of DST Systems, Inc. filed as Exhibit 3.2 on its Current Report on Form 8-K filed on May 17, 2010 at www.sec.gov.

[23] See "Second Generation Advance Notice Bylaws and Poison Pills," by Charles Nathan and Stephen Amdur of Latham & Watkins LLP, posted at The Harvard Law School Forum on Corporate Governance and Financial Regulation on April 22, 2009 (available at http://blogs.law.harvard.edu/corpgov/2009/04/22/second-generation-advance-notice-bylaws-and-poison-pills/).

v. Requirement of Proponent to Attend Meeting

Second-generation advance notice bylaws typically require a shareholder proponent (or its representative) to appear at the meeting to present the nomination or proposal (similar to the requirement under Rule 14a-8). Of the companies that have adopted second generation advance notice bylaws included in our survey, 66% of the surveyed bylaws either required a proponent (or its representative) to appear at the meeting to present the proposal or required a proponent to include a representation to this effect.

We think it is helpful to include such a requirement in a company's advance notice bylaws. However, a more difficult question is how a company should react if a shareholder proponent (whether making a proposal under a company's advance notice bylaws or Rule 14a-8) does not, in fact, attend the annual meeting. In this regard, even if a company has the ability to disregard a proposal or nomination under Delaware law under these circumstances, there may be public relations and shareholder relations consequences of doing so. In addition, even if a company elects to disregard a proposal under these circumstances in accordance with the company's advance notice bylaws, it may be helpful, based on shareholder relations and other considerations, to disclose the voting results under Item 5.07 of Form 8-K with respect to the disregarded proposal or nomination.[24]

vi. Solicitation of Proxies

Second-generation advance notice bylaws often require a shareholder proponent to disclose whether the proponent intends to solicit proxies from other shareholders in support of a nomination. Of the companies that have adopted second generation advance notice bylaws included in our survey, 52% of the surveyed bylaws included such a provision.

While most shareholders who provide advance notice to a company of the shareholder's proposal or nomination intend to solicit proxies in support of the nomination or proposal, there are certain circumstances under which a proponent does not intend to solicit proxies, and it may be helpful for a company to have advance notice of the shareholder's intention in this regard. For example, a proponent may nominate a director nominee under a company's advance notice bylaw provision with the hope that a company's board will nominate such candidate on management's slate (but without any intent to solicit proxies in support of a nomination if the board does not take this action). In addition, occasionally a shareholder may desire to make a floor proposal at a meeting for the sake of publicity without soliciting proxies or otherwise having any realistic expectation that such proposal will pass.[25]

vii. Proper Matter for Shareholder Action

Second-generation advance notice bylaws often explicitly provide that, for a shareholder proposal to be valid, such proposal must be a proper matter for shareholder action. Of the companies that have adopted second generation advance notice bylaws included in our survey, 64% of the surveyed bylaws included such a provision.

Although it is arguably implicit that a shareholder proposal could not be presented at a meeting if it were not a valid matter for shareholder action (for example, if a shareholder proposes an amendment to the certificate of incorporation of a company without prior board approval) irrespective of whether such language is included in a company's bylaws, there is some benefit to including such language in a company's bylaws to eliminate any ambiguity regarding the treatment of such a proposal.

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[24] See the results for Proposal 5 disclosed in Item 5.07 of the Current Report on Form 8-K filed on May 24, 2011, by Southwest Airlines Co. (a Texas corporation) at www.sec.gov, where Southwest noted that the proponent did not properly present a proposal as the result of failing to appear at the meeting but nevertheless reported the voting results of such disregarded proposal.

[25] See, for example, the definitive 2011 proxy statement of JPMorgan Chase & Co. filed on April 7, 2011, which references the intent of a group of shareholders to make a floor proposal with respect to JPMorgan's membership in and interaction with the U.S. Chamber of Commerce.

C. Other Noteworthy Provisions

A sampling of other creative provisions, which, though not common, have been included in the second generation advance notice bylaws of Delaware corporations are as follows:

- A requirement that the proponent consent to the public disclosure by the company of information provided by the proponent under the company's advance notice bylaws.[26]
- A requirement that the proponent disclose the investment strategy or objective of the proponent and provide copies of any prospectus or offering memorandum provided to investors in the proponent.[27]
- A requirement that the proponent provide, to the extent known, the names of other shareholders supporting the proponent's nominee or proposal.[28]
- A requirement that the proponent disclose any significant equity interests, derivative positions or short interests held by the proponent in any principal competitor of the company.[29]
- A requirement that the proponent have held at least 1% of the company's outstanding stock entitled to vote at the meeting for at least one year prior to giving notice.[30]

Conclusion

In sum, we believe that advance notice bylaws should continue to be a focus of public companies in light of the current era of shareholder activism and potential future legal developments that may impact advance notice bylaws such as proxy access. Moreover, if possible, it is advisable for companies to adopt appropriate advance notice bylaw provisions prior to the appearance of an activist shareholder, as courts may show greater deference to a decision made by a board to adopt advance notice bylaw provisions in advance of the heat of an activist campaign.[31] Thus, although the vast majority of public companies are not subject to a contested director election or an activist campaign in any given year, maintaining up-to-date and effective advance notice bylaws is a relatively low-cost step companies can take to protect themselves against potentially abusive or coercive campaigns by activist shareholders.

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[26] See Section 1.5(c)(iii)(F) of the Amended and Restated Bylaws of Electronic Arts Inc., filed as Exhibit 3.1 to its Current Report on Form 8-K filed on May 11, 2009 at www.sec.gov.

[27] See Section 2.2.B.(4)(b) of the Fourth Amended and Restated Bylaws of Ventas, Inc., filed as Exhibit 3.1 to its Current Report on Form 8-K filed on October 4, 2010, at www.sec.gov.

[28] See Section 2(e)(v) of the Bylaws of Baxter International Inc. filed as Exhibit 3.1 to its Current Report on Form 8-K filed on November 17, 2008 at www.sec.gov.

[29] See Section 2(e)(v) of the Amended and Restated Bylaws of The Home Depot, Inc. filed as Exhibit 3.1 to its Current Report on Form 8-K filed on June 7, 2011 at www.sec.gov.

[30] See Section 3(a) of the Amended and Restated Bylaws of MDU Resources Group, Inc., filed as Exhibit 3.2 to its Current Report on Form 8-K filed on May 2, 2010 at www.sec.gov.

[31] See *Goggin* at 11 (noting that, in upholding a company's enforcement of its advance notice deadline set forth in its proxy statement, the setting of the deadline "was made on a proverbial 'clear day'").

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