

INSIGHTS

THE CORPORATE & SECURITIES LAW ADVISOR

Volume 29 Number 7, July 2015

IN THE COURTS

Delaware Supreme Court Provides Guidance on Drafting Advance Notice Bylaws

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On July 2, 2015, the Delaware Supreme Court in *Hill International, Inc. v. Opportunity Partners L.P.*,¹ affirmed the Court of Chancery's order² enjoining Hill International, Inc. (Hill) from conducting any business at its 2015 annual meeting, other than convening the meeting for the sole purpose of adjourning it for a minimum time period necessary to allow Opportunity Partners L.P. (Opportunity), the stockholder-plaintiff, to present items of business and director nominations at Hill's 2015 annual meeting.

The key issue in the case was whether Opportunity had complied with Hill's advance notice bylaw in connection with its proposal to present its items of business and nominations before the meeting.³ Unlike many advance notice

bylaws where the timeliness of stockholders' notice of intent to make nominations or propose business is based on the anniversary of the prior year's meeting or the mailing of the prior year's proxy statement,⁴ Hill's advance notice bylaw is keyed off the current year's meeting date. Interpreting Hill's advance notice bylaw in accordance with its plain meaning, the Delaware Supreme Court held that the time period in which stockholders were required to provide notice of their intent to make nominations or propose business had not commenced until Hill had announced the actual date, as opposed to an approximate date, of its 2015 annual meeting. Although its construction of Hill's advance notice bylaw resulted in Opportunity retaining the ability to present its proposals and nominations at the meeting, the Delaware Supreme Court's opinion provides corporations and practitioners clear guidance on drafting advance notice bylaws to ensure that they provide the protection they are designed to afford.

Background

As with those of many public companies, Hill's bylaws require stockholders seeking to propose business or make nominations at a meeting of stockholders to provide advance notice of their intention to do so. The Delaware courts have recognized that a principal function of advance notice bylaws is "to permit

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orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations.”⁵ Such bylaws “serve[] the proper purpose of assuring that stockholders and directors will have a reasonable opportunity to thoughtfully consider nominations and to allow for full information to be distributed to stockholders, along with the arguments on both sides” and “to afford adequate time for information and reflection.”⁶

Because the precise date on which a corporation’s annual meeting is held tends to vary from year to year, many public companies, in order to establish a specific time frame for receiving notice of stockholders’ intent to make nominations or propose business well in advance of their upcoming meeting, have bylaws requiring notice to be given within specified time frame before the anniversary of the prior year’s meeting. By basing the time frame for notice on the anniversary of the prior year’s meeting, a specific date that is known well in advance of the expiration of the time period fixed for notice in the bylaws, a corporation can ensure that it has sufficient time to respond to stockholder nominations and business proposals.

The advance notice bylaw at issue in *Hill*, however, did not include an advance notice provision based on the anniversary of the prior year’s annual meeting. Rather, Hill’s advance notice bylaw provides that notice must be given within a specified time frame before the current year’s annual meeting or, in the event that notice or prior public disclosure of the date of the meeting is given to stockholders less than seventy days prior to the date of the meeting, no later than the close of business on the tenth day following the day on which such notice is given or such prior public disclosure is made.⁷

On April 30, 2014, Hill publicly disclosed in its 2014 definitive proxy statement that it

anticipated that its 2015 annual meeting would be “on or about June 10, 2015” and that stockholders who wished to submit a proposal for the 2015 annual meeting must submit their proposal no later than April 15, 2015.⁸ The following year, on April 13, 2015, Opportunity delivered to Hill a notice of its intent to propose business and nominate two directors at Hill’s 2015 annual meeting. On April 30, 2015, Hill filed its definitive proxy statement for its 2015 annual meeting and announced that its 2015 annual meeting would be held on June 9, 2015. Subsequently, on May 5, 2015, Hill asserted that Opportunity’s April 13 notice was defective because it failed to include information about the director nominees required by the bylaws. On May 7, Opportunity delivered another notice to Hill of its intent to present at the 2015 annual meeting two different proposals than had been included in its April 13 notice as well as nominations for election to Hill’s board of the same two nominees as had been named in the April 13 letter. On May 11, Hill notified Opportunity that its notice was untimely under Hill’s advance notice bylaw and that its proposals and nominations would not be presented at the 2015 annual meeting. Opportunity brought suit in the Court of Chancery claiming its notice was timely under Hill’s bylaws.

Analysis of the Court of Chancery

In support of its contention that Opportunity’s notice was untimely, Hill argued that the disclosure in its 2014 definitive proxy statement that the annual meeting would be held “on or about June 10, 2015” constituted prior public disclosure of the date of the meeting such that Opportunity was required to notify Hill of its intent to propose business and nominations not less than 60 days prior to the meeting. In response, Opportunity claimed that the first notice of the date of the meeting—June 9, 2015—was not given until April 30, less than 70 days prior to the date of the annual meeting, such that its May 7 notice was timely.

The Court of Chancery agreed with Opportunity, explaining that, although Hill could have triggered the requirement for at least 60 days' advance notice of proposals and nominations by announcing the specific date of the meeting prior to the filing of its definitive proxy statement, because it did not, Opportunity had 10 days from the date of that filing to submit its notice to Hill. Therefore, because the May 7 notice was timely, the Court of Chancery held that Hill was violating the plain language of its bylaws and that, because Opportunity would suffer irreparable harm absent injunctive relief and the balance of hardships favored Opportunity, Opportunity was entitled to mandatory injunctive relief.

Reviewing the bylaws *de novo*, the Delaware Supreme Court held that Hill's "clear and unambiguous" advance notice bylaw required Hill to provide notice of the specific day—and not a range of possible days—on which the annual meeting was to occur in order to trigger the time periods under the advance notice bylaw.⁹ In particular, the Court explained:

The plain meaning of "the date" means a specific day—not a range of possible days. The 2014 Proxy Statement's reference to "on or about June 10, 2015" does not refer to "the date" of Hill's 2015 Annual Meeting. Rather, "on or about" refers to an approximate, anticipated, or targeted time frame that is intended to encompass more than one "date"—i.e., June 10—apparently in order to give Hill some flexibility in scheduling. Thus, the 2014 Proxy Statement did not provide "prior public disclosure of the date" of Hill's 2015 Annual Meeting.¹⁰

As such, because Hill did not provide notice of the specific date of its annual meeting until it filed its proxy statement for the 2015 annual meeting on April 30, 2015 announcing the June 9 date, the Court held that Opportunity's May 7 notice was timely.

Analysis of the Delaware Supreme Court

In affirming the Court of Chancery's grant of mandatory injunctive relief, the Delaware Supreme Court provided guidance to practitioners in drafting advance notice bylaws. Notably, the Court suggested that corporations could avoid the situation in which Hill found itself by either pegging the notice period for timely stockholder proposals and director nominees to the anniversary date of the corporation's prior annual meeting or by publicly announcing the specific date of its annual meeting prior to the sending of notice of such annual meeting in the manner required by Section 222 of the Delaware General Corporation Law, which requires, among other things, that such notice be sent not more than 60 days prior to the annual meeting.¹¹ The Court noted that the Hill board had fixed the June 9, 2015, date of the 2015 meeting on March 12, 2015, but made no announcement when it did so.¹²

Key Takeaways

Corporations with advance notice bylaws that have reasonable time frames for notice based on the date of the prior year's meeting or the mailing of the prior year's proxy statement need not revisit their bylaws or take further action to address the matters raised in *Hill*, as they do not face the same issue that left Hill exposed to an otherwise untimely notice. Corporations with advance notice bylaws that base the notice period for stockholder proposals and nominations on the current year's meeting date, however, cannot rely on the statement of anticipated meeting date in the prior year's proxy statement as announcing the meeting date. They therefore will need to make public announcement of the specific meeting date once it has been fixed and prior to any deadline in the bylaws for prior public announcement of the meeting date for the regular advance notice period to apply. Alternatively, such corporations may consider amending their advance notice bylaws to base the notice period on the anniversary of the prior year's annual meeting

or the date of mailing of the prior year's proxy statement.

Notes

1. --- A.3d ----, 2015 WL 4035069 (Del. July 2, 2015).
2. *Opportunity Partners L.P. v. Hill International, Inc.*, C.A. No. 11025-VCL (Del. Ch. June 5, 2015).
3. *Hill*, 2015 WL 4035069, at *1.
4. Advance notice bylaws may provide, for example, that a business proposal or nomination, to be timely, must be given not less than 90, nor more than 120, days prior to the anniversary of the prior year's annual meeting.
5. *Openwave Systems Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 238-39 (Del. Ch. 2007); see also *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 952 (Del. Ch. 2013) (noting that advance notice bylaws "help organize what could otherwise be a chaotic stockholder meeting").
6. *Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at *13 (Del. Ch. Jan. 14, 1991).
7. Specifically, Hill's bylaw provides that "[t]o be timely, a stockholder's notice shall be delivered to or mailed and received at the principal executive offices of the Corporation not less than sixty (60) days nor more than ninety (90) days prior to the meeting; provided however, that in the event that less than seventy (70) days notice or prior public disclosure of the date of the meeting is given or made to stockholders, notice by the stockholder, to be timely, must be received no later than the close of business on the tenth (10th) day following the day on which such notice of the date of the meeting was mailed or such public disclosure was made, whichever first occurs." *Hill*, 2015 WL 4035069, at *2 (emphasis added).
8. *Id.* at *1.
9. *Id.* at *7.
10. *Id.* at *8.
11. *Id.* at *8 n.31.
12. *Id.* ("Hill could have triggered the 30-Day Window requiring 60-90 days advance notice of shareholder proposals and director nominees by announcing the actual date of the annual meeting earlier—for example, on March 12, 2015, when Hill's Board of Directors met and fixed the date of the 2015 Annual Meeting. Because Hill waited to announce the actual date, the 10-Day Notice Period applies.").

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