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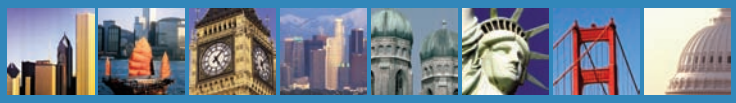
KIRKLAND M&A UPDATE

KIRKLAND & ELLIS LLP



Kirkland & Ellis LLP is pleased to present the first edition of the Kirkland M&A Update. The update will provide you with information regarding recent legal and other developments affecting the M&A market in general and developments and news relating to Kirkland's M&A practice in particular. In this issue, Kirkland partners Thomas Christopher and Jeffrey Symons will discuss how two recent Delaware Chancery Court decisions and certain practices of activist shareholders suggest it may be prudent for public companies to review and possibly amend the provisions of their bylaws providing for advance notice by shareholders of proposals to be considered and persons to be nominated for election as directors at annual meetings (collectively "advance notice bylaws"). Please see page two for the complete article.

Kirkland Ranks in the Top Legal Advisers for M&A

7th by Deal Volume,
Corporate Control Alert

9th by Deal Volume,
The American Lawyer's
Corporate Scorecard 2007

4th by Deal Volume, Bloomberg's
U.S. Legal Mergers & Acquisitions
Advisory Rankings for 2007

1st in Global and North American
Buyouts by Deal Volume,
Mergermarket's 2007 League Tables of
Legal Advisers to Global M&A

Tier 2 for Global M&A,
Tier 3 for U.S. M&A,
Chambers Global 2008

Tier 3 for Corporate M&A,
Chambers USA 2007

"Sweet Sixteen," *The Lawyer*'s
Transatlantic Elite 2008

Recent Kirkland Deals

Clearwire Corporation (NASDAQ: CLWR) in its $14.5 billion joint venture with Sprint Nextel Corporation (NYSE: S) to combine their next-generation wireless broadband businesses to form a new wireless communications company

Apax Partners in taking healthcare software company TriZetto Group, Inc. (NASDAQ: TZIX) private in a deal valued at roughly $1.4 billion

Perini Corp. (NYSE: PCR) in its $862 million merger with Tutor-Saliba Corp. to create a single, publicly traded general contractor

Walgreen Co. (NYSE: WAG) in acquiring two operators of worksite health centers, I-trax Inc. (Amex: DMX), a parent company of CHD Meridian Healthcare, LLC, for $278 million in cash, and privately held Whole Health Management

Affiliates of **Sun Capital Partners, Inc.** in their successful proxy contest for representation on the Board of Directors of Furniture Brands International Inc. (NYSE: FBN)

Affiliates of **Sun Capital Partners, Inc.** in their $542.3 million buyout of Kellwood Co. (NYSE: KWD)

Community Health Systems Inc.'s (NYSE: CYH) $5.1 billion acquisition of Triad Hospitals Inc. (NYSE: TRI) creating the largest publicly traded hospital system in the U.S.

Paxar Corporation (NYSE: PXR) in the $1.3 billion sale of the company to Avery Dennsion Corporation (NYSE: AVY)

Molson Coors Brewing Company (NYSE: TAP) in its $10 billion joint venture with SABMiller plc (SAB.L) to combine their U.S. and Puerto Rico operations in a new entity to be named MillerCoors LLC

Dade Behring Holdings, Inc. (NASDAQ: DADE) in the $7 billion sale of the company to German-owned Siemens AG (NYSE: SI)

About Kirkland's M&A Practice

Kirkland & Ellis LLP is a leading adviser to public companies on all types of mergers and acquisitions transactions, including tender and exchange offers, going private transactions, acquisitions and dispositions of subsidiaries, divisions and other assets and joint ventures. The firm is able to draw upon leaders in the areas of M&A, corporate governance, securities, tax, antitrust, intellectual property, ERISA and environmental law to provide our clients with comprehensive and innovative advice. We have experienced M&A teams in our domestic and European offices with the capability to execute complex domestic and multi-jurisdictional transactions. Our M&A practice is further bolstered by our extensive experience in corporate governance matters. We routinely counsel boards of directors and executive officers regarding significant transactions, takeover readiness, disclosure issues, Sarbanes-Oxley matters and internal investigations.

Advance Notice Bylaws: Possible Amendments to Address Director Nominations and Shareholder Activism

The Delaware Chancery Court Decisions

The first of the Delaware Chancery Court decisions was *Jana Master Fund Ltd. v. CNET Networks, Inc.*[1] In this case, Jana Master Fund, a hedge fund, was seeking to expand the size of the board of directors of CNET Networks from eight to thirteen members and to nominate seven persons for election at the company's 2008 annual shareholders meeting. Jana Master Fund contended the company's advance notice bylaw applied only to matters that a shareholder was requesting be included in the company's proxy materials pursuant to Rule 14a-8 promulgated under the Securities Exchange Act of 1934 (the "Exchange Act") or director nominations to be included in the company's proxy materials, and did not apply to director nominations to be put forth in separate proxy materials. In a decision by Vice Chancellor Chandler, the court agreed with Jana Master Fund, concluding:

- the "explicit language" of the [bylaw] "makes clear that the scope of the bylaw is limited to proposals and nominations a shareholder wishes to have included on management's form of proxy;"
- the language of the bylaw stating that a shareholder "may seek to transact other corporate business" at an annual shareholders meeting "does not make sense outside the context of Rule 14a-8;" and
- "it is reasonable to conclude that the bylaw applies only to proposals shareholders want included on management's proxy materials because the bylaw sets the deadline for notice specifically in advance of the release of management's proxy form."

The second Delaware Chancery Court decision was *Levitt Corp. v. Office Depot, Inc.*[2] In this case, Levitt Corp. was seeking to nominate two persons to the twelve-person board of directors of Office Depot at the company's 2008 annual shareholders meeting. Office Depot's advance notice bylaw provided in part that "[a]t an annual meeting of stockholders, only such business shall be conducted as shall have been properly brought before the meeting." The bylaw specified that, to be properly brought before an annual meeting:

> [B]usiness must be (i) specified in the notice of the meeting (or any supplement thereto) given by or at the direction of the Board of Directors, (ii) otherwise properly brought before the meeting by or at the direction of the Board of Directors or (iii) otherwise properly brought before the meeting by a stockholder of the corporation who was a stockholder [on the record date], who is entitled to vote at the meeting and who complied with the notice procedures set forth in this Section.

Levitt Corp. put forth various alternative arguments as to why the bylaw should not apply to the nomination of directors by a shareholder willing to prepare and distribute its own proxy materials. Specifically, Levitt Corp. argued, among other things, that:

- given Delaware law's emphasis on the importance of shareholder voting rights, an advance notice bylaw must be "clear and unambiguous" in its application to director nominations and the bylaw in question – unlike prior versions of the bylaw – did not, by its terms, expressly apply to director nominations; and
- if the bylaw in general and the word "business" in particular were interpreted to include the nomination of directors, then Office Depot's own notice to its shareholders regarding the annual meeting, which stated that the business items to be considered at the meeting included the "elect[ion] [of] twelve (12) members of the Board of Directors for the term described in this Proxy Statement," included the nomination of directors not only by Office Depot but by third parties as well.

In a decision by Vice Chancellor Noble, the court rejected Levitt Corp.'s first line of argument, holding that the advance notice bylaw applied to director nominations. However, the court accepted a second line of argument put forth by Levitt Corp., holding that Office Depot's notice to shareholders notified them that the business of the meeting included the election of directors and thus was sufficient notice to permit Levitt Corp. to nominate its own slate of nominees for election as directors at the meeting – using its own proxy materials – without the need to satisfy any advance notice requirement itself.

Shareholder Activism and Section 13(d)

This proxy season witnessed the increasingly widespread use of two practices by activist shareholders. First, it has become increasingly common for multiple hedge funds to invest in the same target company, presumably because they know they are more likely to bring about desired change at the target company through their collective action and/or voting power than if they were to invest and act by themselves.

One unanswered question is the extent to which hedge funds and other activist shareholders communicate with each other regarding their actions and plans with respect to a particular target company.

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[1] 2008 WL 660556 (Del. Ch., March 13, 2008).

[2] *Levitt Corp. v. Office Depot, Inc.*, C.A. No. 3622-VCN (Del. Ch. April 14, 2008).

Although two or more activist shareholders can communicate with one another regarding their investments in a target company, if and when they enter into a contract, arrangement, understanding or relationship with respect to their investments and they collectively hold more than 5 percent of a class of the target company's outstanding equity securities, they constitute a "group" within the meaning of Section 13(d) of the Exchange Act and the rules and regulations promulgated thereunder and become subject to the section's reporting requirements. The apparently coordinated action of multiple activist shareholders in a particular target company has fueled speculation that they may at times be acting as a group without complying with Section 13(d)'s reporting requirements. Due to evidentiary and other problems, however, attempts to ferret out violations of the "group" reporting requirement of Section 13(d) have been rare and usually unfruitful.

Second, in addition to acquiring common stock and other equity securities in target companies, activist shareholders are increasingly entering into agreements regarding derivative instruments such as swaps and hedges linked to the target's equity securities. Swaps and hedges provide activist shareholders with two advantages over accumulating and holding common stock of the target company. One, some of these derivative instruments – such as total return swaps – allow activist shareholders to leverage and thus increase their potential returns on their investments in the target companies. Two, at least for the meantime, acquiring derivative instruments linked to the equity securities of the target company allows activist shareholders to effectively invest in those equity securities without triggering reporting obligations under Section 13(d).[3] Most target companies would prefer to know which investors hold positions in their equity securities or derivative instruments linked to those securities to determine their shareholder base and market forces affecting the trading price of their equity securities.

Proposed Amendments to Advance Notice Bylaws

In light of (a) the two recent Delaware Chancery Court decisions discussed above narrowly interpreting advance notice bylaws and (b) the increasingly common parallel actions of multiple activist shareholders in a particular target company and the increasing use of swaps and hedges by activist shareholders, public companies should review their advance notice bylaws and consider amending them to:

1. Clarify that the advance notice provisions apply to director nominations as well as shareholder proposals. The best way to accomplish this is to have separate provisions that provide for advance notice of director nominations and shareholder proposals, particularly because the two advance notice provisions differ from each other in various respects (e.g., the notice required to be submitted by a shareholder for director nominations should contain information about the director nominees). If a public company would prefer to retain or use one advance notice provision for both director nominations and shareholder proposals, it should, at the very least, make sure the provision is clear and unambiguous that it applies to both cases by expressly stating so.

2. Provide that the notice required to be submitted by a shareholder for either director nominations or a shareholder proposal must disclose, among other things:

- all swaps, hedges and other derivative instruments and arrangements entered into, directly or indirectly, by the shareholder or any of its controlled affiliates; and
- all contracts, arrangements, understandings and relationships with respect to the shareholders' investment in the company, including with other shareholders, potential investors in the company and potential transaction advisers such as financial advisers, legal counsel and proxy solicitation firms.

If you have any questions about the matters addressed in this article, or to obtain a form of advance notice bylaws, please contact the following Kirkland authors or your regular Kirkland contact.

[3] The issue of whether total return swaps come within the scope of Section 13(d) is currently being litigated in the United States District Court for the Southern District of New York. See *CSX Corporation v. The Children's Investment Fund Management (UK) LLP,* et al., 08 Civ. 02764.

Meet This Issue's Authors

Thomas W. Christopher
Partner

Thomas Christopher focuses his practice on mergers and acquisitions, corporate governance, securities, restructurings and related matters. He represents principals and other parties in the purchase and sale of companies, subsidiaries, divisions, joint ventures and other assets. He specializes in representing public companies and over the years has advised numerous acquirers, targets and shareholders in both negotiated and unsolicited change-of-control transactions. Mr. Christopher also has extensive experience advising boards of directors and management of public companies regarding general corporate governance matters. In addition, Mr. Christopher has represented numerous special committees of boards of directors in connection with related party transactions. He is listed as a recommended lawyer for both mergers and acquisitions and corporate governance matters in the 2007 U.S. edition of *The Legal 500* and has been mentioned numerous times in the "Big Deals" column of *The American Lawyer*, including most recently in the November 2007 issue for his representation of Dade Behring Holdings, Inc. in connection with its approximately $7 billion acquisition by Siemens AG.

Jeffrey D. Symons
Partner

Jeffrey Symons' practice focuses on domestic and international mergers and acquisitions, joint ventures, private equity investments, corporate governance and related matters. Mr. Symons regularly represents both principals and financial advisers in negotiated and unsolicited transactions, and he has represented numerous special committees in connection with related party transactions. His practice has involved transactions in a variety of industries, including the information services, healthcare and pharmaceutical, transportation and air freight services, insurance and reinsurance, telecommunications, media and entertainment, manufacturing and retail industries. Mr. Symons has also represented both issuers and underwriters in securities offerings in the public and 144A/Regulation S markets.

Should you have any questions about the matters addressed in this issue of Kirkland M&A Update, or to obtain a form of advance notice bylaws, please contact the following Kirkland & Ellis authors or the Kirkland & Ellis attorney you normally contact:

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