

# KIRKLAND M&A UPDATE

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## Advance Notice Bylaw Deadlines – A Warning Shot

*A recent New York state court decision highlights the risk of potential challenges to the enforcement of nomination deadlines under certain circumstances.*

We [recently noted](#) a Washington state case that upheld the validity of advance notice bylaws as “common” and supported a company’s close review of a stockholder’s director nominations for compliance with bylaw requirements. And as we have [noted in the past](#), advance notice bylaws are a near-universal feature of the organizational documents of public companies that Delaware courts have repeatedly upheld as “useful in permitting orderly shareholder meetings.”

However, a [recent decision](#) from a New York state court highlights for public company boards, particularly in the context of transaction planning, potential challenges to the enforcement of nomination deadlines under certain circumstances.

In this case, a large Xerox stockholder did not submit director nominations before the company’s advance notice deadline for its 2018 annual stockholder meeting. Nearly two months after the deadline, Xerox announced a significant business combination with its joint venture partner, Fuji. When Xerox refused to waive the nomination deadline for this stockholder, the stockholder sought a court order to compel the Xerox board to allow him to make nominations, citing the significantly changed circumstances for the company following the Fuji transaction announcement.

Relying on a 1991 Delaware Chancery Court decision, the New York court ordered Xerox to waive the advance notice deadline on the basis that a waiver is appropriate “when there is a material change in circumstances” after the nomination window closes. The court concluded that the board’s refusal to waive the nomination deadline “was without justification,” and that the directors “likely breached their fiduciary duty of loyalty” in doing so.

This decision requires attention from boards and transaction planners. Opportunistic activist shareholders or even hostile bidders may start searching for events after a company’s nomination deadline that could be argued to be material as a means to force a re-opening of the nomination window. While the decision in this case was undoubtedly colored by the court’s broader decision relating to the Fuji transaction itself (it also issued a highly unusual preliminary injunction blocking the deal) and the Delaware case that the New York court cited has always been understood to involve extremely narrow situations, companies should consider the intersection of timelines for nomination deadlines, annual meeting dates and significant corporate announcements.

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If you have any questions about the matters addressed in this *M&A Update*, please contact the following Kirkland authors or your regular Kirkland contact.

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