

KIRKLAND M&A UPDATE

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Advance Notice Bylaws in Light of Corvex/Williams – Displacing the Placeholder Nomination

Companies may wish to consider enhancements to their advance notice bylaws in light of the use of ‘placeholder’ nominations in the upcoming proxy contest at Williams.

Advance notice bylaws are a near universal feature of the organizational documents of public companies. In their simplest form, they set a deadline, usually between 60 and 120 days before an upcoming stockholder meeting, by which a stockholder must give notice to the company of its intention to nominate director candidates and identify those nominees. Delaware courts have repeatedly upheld the validity of these provisions holding that they are “useful in permitting orderly shareholder meetings”.

In recent years, many companies have implemented enhanced advance notice bylaws that require the nominating stockholder, as well as the director nominee, to provide additional information about themselves and their holdings in the company in order to be a valid nomination. Some bylaws go further and include “director qualification” provisions where, for example, certain representations (e.g., about willingness to comply with company policies and not being party to voting commitments) are required from the nominee. While these enhanced features have not been tested in Delaware courts, the prior cases suggest that they should be upheld as long as they do not “unduly restrict the stockholder franchise” and are not “applied inequitably”.

A recent announcement by Corvex, an activist hedge fund, of its intention to nominate a full competing slate of directors for the upcoming annual meeting of The Williams Companies highlights a potential gap in advance notice bylaws that companies may wish to consider closing. With an impending deadline for nominations under Williams’ bylaws, Corvex announced that it would nominate 10 of its own employees to stand for election. These nominees were described as “placeholders” until Corvex could identify qualified candidates ahead of the annual meeting. The Corvex nominees, if elected, would commit to resign immediately following their election and replace themselves with the qualified independent candidates that are identified in the intervening months.

The Corvex tactic is untested and may not survive a court challenge. In the meantime companies may wish to consider modifications to their existing advance notice bylaws to require any nominees to represent that they currently intend to serve as directors for the term for which they are standing for election. Such a requirement would be consistent with the long-standing justification for these bylaws - ensuring that adequate time and information is available for stockholders to properly evaluate the true candidates in a director election. Given that courts have more critically scrutinized advance notice bylaw amendments that occur in the midst of a potential proxy contest, board meetings scheduled for this fall (proxy “off-season” for most companies) may represent a “clear day” opportunity to consider this bylaw enhancement especially if other bylaw amendments are already on the agenda.

While the validity of the “placeholder” tactic as well as the possible bylaw fix suggested above are both untested, the continued evolution and escalation of activist hedge funds challenges requires companies to assess their ability to defend against potential attacks on a level playing field.

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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