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Advance Notice Bylaws in the Spotlight:
Hedging Disclosure Gains Traction; Delaware Opinion Emphasizes Careful Drafting

We have been receiving many questions about our March 7 memo in which we reported that, for the past year, we have been recommending to clients advance notice bylaw provisions requiring a stockholder proposing a nominee for director or making a new business proposal to disclose the extent to which the proponent has hedged its interest in the company. We have now advised more than 20 NYSE-listed operating companies, real estate investment trusts and investment companies in adopting a hedging-disclosure provision. All of these companies are formed under Maryland law but there is no reason why this same concept would not work for companies formed under Delaware law. These provisions have recently begun to receive positive media coverage.

We continue to believe that a hedging-disclosure provision promotes good corporate governance by providing boards of directors and stockholders with important information about a stockholder proponent's economic interest in the company and whether it is aligned with the interests of other stockholders. This type of provision also provides information about a stockholder proponent's voting power and whether it is proportional to the proponent's economic interest in the company.

In an unrelated development, the Delaware Chancery Court on Monday held that an advance notice bylaw provision of a Delaware corporation that did not provide a procedure for stockholder nominations for directors, but only for "business" to be brought before an annual meeting, applied to the election of directors but did not require a stockholder making a nomination to give advance notice. The Court reasoned that the corporation itself had already brought the election of directors before the meeting through its notice of the meeting and that the "business of electing directors" includes nominating directors. Thus, according to the Court, both the election and nomination of directors had already been "properly brought before the meeting."

This reasoning seems unduly narrow as any annual meeting will involve the election of directors and the nomination of candidates for election as directors is a quite different act from the election itself. However, the corporation could have avoided the Court's interpretation by specifically including director nominations in its advance notice bylaws. Similarly, last month another judge on the Delaware Chancery Court ruled in favor of a stockholder proponent based on a strict reading of a company's advance notice provisions.

We have received questions about the applicability of this decision to advance notice bylaws in Maryland. The decision turned principally on the drafting of the advance notice bylaw provision. As noted above, the bylaws at issue failed to separately require advance notice of director nominations in addition to business proposals. Our form of advance notice provisions refers both to "nominations for election to the Board of Directors" and to "other business" and thus we do not believe that the Delaware decision will be problematic for Maryland corporations and real estate investment trusts with our (or a similarly drafted) form of advance notice bylaws.

We are glad to discuss this decision, our hedging-disclosure provision or other enhancements to advance notice bylaws with you

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