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CONTACT

Alexander M. Kaye
Partner
+1-212-530-5171
akaye@milbank.com

Dean W. Sattler
Associate
+1-212-530-5629
dsattler@milbank.com

Monica Arduini
Associate
+1-212-530-5169
marduini@milbank.com

Corporate Group Client Alert: Delaware Supreme Court Provides Further Guidance on How Delaware Courts Review and Interpret Advance Notice By-Laws

Hill International, Inc. (“Hill”), a publicly traded company, and one of its stockholders, Opportunity Partners L.P. (“Opportunity”), recently engaged in a dispute regarding whether Opportunity had timely submitted two proposals for items of business for consideration and two director nominations for election at Hill’s 2015 annual meeting. On appeal from the Delaware Chancery Court, the Delaware Supreme Court was called on to analyze the interpretation and application of Hill’s advance notice by-law.

On July 2, 2015, in *Hill International, Inc. v. Opportunity Partners L.P.*,¹ the Delaware Supreme Court affirmed the Court of Chancery’s holding that: (i) Hill’s board of directors *only set the date of its annual meeting of stockholders when it announced the actual date of its annual meeting in its 2015 proxy statement*, rather than a range of possible dates provided in Hill’s proxy statement from the preceding year, and (ii) Opportunity’s proposals were timely submitted in compliance with Hill’s advance notice by-law.

THE DISPUTE BETWEEN HILL AND OPPORTUNITY

The dispute arose on May 7, 2015 when Opportunity delivered to Hill a notice of intent to present two stockholder proposals and two director nominees at Hill’s 2015 annual meeting (the “**May 7th Notice**”). The May 7th Notice was delivered seven days after the Company disclosed the actual date of the annual meeting in its 2015 definitive proxy statement.

¹ Del. Supr., No. 305, 2015 (Del. July 2, 2015).

Hill rejected the May 7th Notice, arguing that it was not timely under Hill's advance notice by-law, which states that the following time frames apply for business to be properly and timely brought before the corporation's annual meeting by a stockholder:

- if Hill provides at least 70 days' notice or prior public disclosure to stockholders of the date of the annual meeting, the stockholder must deliver notice to Hill not less than 60 days nor more than 90 days prior to the meeting; or
- if Hill provides less than 70 days' notice or prior public disclosure of the date of the annual meeting, the stockholder must deliver notice to Hill no later than 10 days following the day on which such notice of the date of annual meeting was mailed or such public disclosure was made.

The by-laws contained similar time frames for stockholder nominations of directors.

To assess whether the May 7th Notice was timely, the Delaware Supreme Court first had to determine when Hill provided notice of the date of its 2015 annual meeting. Hill sent two notices that were in dispute.

The first notice was provided in Hill's 2014 definitive proxy statement, dated April 30, 2014, where Hill stated that it anticipated holding its 2015 annual meeting "on or about June 10, 2015". The 2014 proxy went on to state that in order for a proposal to be properly brought before the 2015 annual meeting, it had to be submitted no earlier than March 15, 2015 and no later than April 15, 2015.

The second notice was included in Hill's 2015 definitive proxy statement, delivered on April 30, 2015, where Hill announced that the 2015 annual meeting would be held at 9:00 a.m. on Tuesday, June 9, 2015. The court found that the timeliness of Opportunity's May 7th Notice rested on whether Hill's board of directors properly notified stockholders of the 2015 annual meeting date in the 2014 definitive proxy statement or the 2015 definitive proxy statement.

Hill argued that it had provided notice of the 2015 annual meeting date on April 30, 2014, when it was publicly disclosed in its 2014 definitive proxy statement. If Hill's interpretation was correct, it would have provided at least 70 days' notice to its stockholders, and Opportunity's May 7th Notice would have been delivered outside of the 60-to-90 day time frame required by the by-laws.

Opportunity, however, argued that Hill only announced the 2015 annual meeting date on April 30, 2015, when the specific date and time of the meeting was disclosed in its 2015 definitive proxy statement. If Opportunity's interpretation was correct, Hill would have provided less than 70 days' notice of the meeting, and the May 7th Notice

would have been properly delivered within the 10 day time period following such notice.

THE COURT'S ANALYSIS

Agreeing with the Court of Chancery's "plain meaning" construction of the advance notice by-law, the Delaware Supreme Court found that "[t]he plain meaning of 'the date' means a specific day – not a range of possible days." As such, the Delaware Supreme Court found that Hill's board of directors announced the actual date of its 2015 annual meeting for the first time on April 30, 2015, when it disseminated its 2015 annual proxy statement.

Because April 30th was less than 70 days before the date of the 2015 annual meeting, Opportunity only had to provide notice containing its proposals and nominations within 10 days of receiving such notice. Accordingly, the Delaware Supreme Court found that Opportunity's May 7th Notice was timely and upheld the Court of Chancery's order enjoining Hill from conducting any business at the June 9, 2015 annual meeting (other than adjourning the 2015 annual meeting for a minimum of 21 days).

In addition, the Delaware Supreme Court noted in dicta that although Hill's board of directors internally fixed the time and date of the 2015 annual meeting on March 12, 2015, that decision did not qualify as "notice" for purposes of the advance notice by-law because it was not disclosed to stockholders.

IMPORTANT TAKEAWAYS

The takeaways for Delaware corporations in light of the *Hill* decision are as follows:

- **By-laws are a contract.** It is an axiom of Delaware corporate law that a corporation's by-laws are a contract and Delaware courts will analyze and construe them as such, including by applying the "plain meaning" doctrine, when called on to interpret ambiguities.
- **Review your by-laws.** A Delaware corporation's advance notice by-law should be carefully and critically reviewed by the corporation and its counsel periodically, with a view to identifying and remedying any weaknesses or ambiguities that may be exploited by stockholders.
- **By-laws will be construed against the drafter.** The Hill decision should also serve as a reminder that Delaware courts will generally construe ambiguities in a corporation's advance notice by-laws against the corporation and in favor of the stockholder seeking to make a proposal.

- **Consider amending by-laws if advance notice is keyed to the date of public notice of the next annual meeting.** Many Delaware corporations use an advance notice by-law that is keyed to the anniversary of the immediately preceding annual meeting, or the anniversary of the mailing of the proxy for the immediately preceding meeting, as opposed to, as was the case in Hill, the date of public notice of the next annual meeting; if a Delaware corporation's advance notice by-law uses the public notice formulation, the board should consider amending it to base the notice deadline on the anniversary of the immediately preceding annual meeting or the mailing of the proxy.

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NEW YORK

28 Liberty Street, New York, NY 10005

Alexander M. Kaye	akaye@milbank.com	+1-212-530-5171
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Dean W. Sattler	dsattler@milbank.com	+1-212-530-5629
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