

From the Public Company Advisory Group of Weil, Gotshal & Manges LLP

April 9, 2020

COVID-19: Delaware and SEC Offer New Relief to Public Companies for the Proxy Season

*Address Stockholder
Meeting Notice
Requirements and “Part
III Information”*

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In light of the public health concerns stemming from the spread of the coronavirus (COVID-19), and resulting travel bans and stay-at-home orders, the Securities and Exchange Commission (SEC) and state governments, including, most recently, the State of Delaware, are providing relief from and easing certain requirements relating to stockholder meetings and related stockholder communications. By alleviating some of these burdens, the SEC and government leaders are demonstrating an understanding of the challenges many companies are facing, including logistics and other practical considerations, during proxy season as they prepare for their annual meetings.

In this Alert, we discuss the latest update on the available relief for public companies preparing for their annual meetings, as well as companies preparing for special meetings of stockholders, including:

- the executive order of the Governor of the State of Delaware easing stockholder notice requirements for companies changing the date, time or location of a stockholder meeting as a result of COVID-19;
- the extension by the Staff of the SEC Division of Corporation Finance (Staff) of the SEC’s order with respect to filing deadline extensions for “Part III information” being incorporated by reference into Form 10-K from the proxy statement; and
- the Staff’s guidance regarding the easing of “notice and access” requirements and other updates to prior guidance with respect to stockholder meetings, in each case, relating to the effects of COVID-19.

Delaware Emergency Order Accommodates Public Companies Shifting to Virtual Meetings

On April 6, 2020, the Governor of the State of Delaware updated his [emergency order](#) (Delaware Order) to ease notice requirements for public companies incorporated in Delaware that change the time, date or location of their stockholder meetings due to COVID-19. Specifically, the Delaware Order provides public companies that have given notice of an annual or special meeting of stockholders to be held at a physical location the means to change the meeting’s location to a “virtual meeting” without having to deliver a new written notice to stockholders that would otherwise have been required under the Delaware General Corporation Law (DGCL). As we discussed [here](#), the Staff published guidance offering public companies that previously filed proxy statements for in-person annual or special meetings

the flexibility to shift to virtual-only without incurring the additional costs of mailing additional proxy materials. However, the SEC relief had no bearing on state law notice delivery requirements. Citing the SEC's relief, the Governor seems to have intended to harmonize the Delaware Order with the Staff's guidance.

Under the terms of the Delaware Order, public companies incorporated in Delaware may notify stockholders of the meeting change from a physical location to a virtual meeting by filing a document with the SEC (i.e., through additional proxy soliciting materials providing notice of the date and time and the means of remote communication) and issuing a press release that includes all of the information required to be included in a notice of a stockholder meeting under the DGCL. The Delaware Order also provides that, alternatively, a company could convene the stockholder meeting at the scheduled time and location as planned, then immediately adjourn to another date or time to be held virtually. The company would need to notify stockholders by filing additional proxy soliciting materials with the SEC and issuing a press release. In both cases, the press release must also be posted to the company's website.

The Delaware Order alleviates some concerns that Delaware public companies may have had regarding whether filing additional proxy soliciting materials with the SEC and issuing a press release notifying stockholders of a change in format of a stockholder meeting satisfies the notice requirements of DGCL § 232, which requires notice of a stockholder meeting to be given by mail, courier service or e-mail. The Delaware Order notes that § 232 "suggests that there may be other means by which notice may be given effectively to stockholders" and clarifies that issuing a press release, posting it to the company's website and filing materials with the SEC are sufficient for notifying stockholders of meeting changes under these circumstances and may not be inconsistent with the statute. Because the validity of the Delaware Order could be subject to challenge, we recommend consulting with counsel prior to relying on this relief.

As we discussed [here](#), other jurisdictions, such as New York and New Jersey have also taken actions to ease compliance with statutory requirements to convene in-person meetings of stockholders during the COVID-19 outbreak.

New SEC Exchange Act Forms CDI 104.18 Addresses Form 10-K "Part III Information" Filing Deadlines

Also on April 6, 2020, the Staff issued new interpretive guidance in the form of new [CDI 104.18](#) addressing the applicability of the SEC's COVID-19 conditional exemptive order (the SEC Order) to the information required in Part III of Form 10-K (Part III information), which includes executive compensation disclosure. As we discussed [here](#) and [here](#), among other things, the SEC Order provides public companies affected by COVID-19 with a 45-day extension (subject to certain conditions) to file certain disclosure reports that would otherwise have been due between March 1 and July 1, 2020.

Companies frequently incorporate by reference Part III information into the Form 10-K from the proxy statement if appropriately filed within 120 days after the end of the company's fiscal year – i.e., by April 29, 2020 for calendar-year companies. Pursuant to CDI 104.18, companies unable to meet the 120-day deadline due to circumstances related to COVID-19 will be able to incorporate by reference Part III information from the proxy statement if such information is filed with the SEC within 45 days following the 120-day deadline (i.e., by June 13, 2020 for calendar-year companies) as long as: (1) the 120-day deadline falls within the relief period specified in the SEC Order, which currently extends through July 1, 2020; and (2) the company makes the disclosures required by the SEC Order, which generally includes, among other information, that the company is relying on the SEC Order, its reasons for doing so, an estimated date for the filing (not later than the 45-day extension deadline) and a risk factor explaining the impact of COVID-19 on the company's business, if appropriate.

The new guidance also summarizes three specific scenarios for how companies can take advantage of the relief for Part III information assuming the company's 120-day filing deadline occurs by July 1, 2020:

- For companies that have timely filed their Form 10-K: Furnish a Form 8-K by the 120-day deadline providing the disclosures required to address the delay in filing.

- For companies that have not yet filed their Form 10-K: Furnish a single Form 8-K by the original Form 10-K filing deadline providing the required disclosures with respect to both the Form 10-K and the Part III information, including the approximate dates for the filing of the Form 10-K and the proxy statement.
- For companies that have invoked the SEC Order and delayed the filing of the Form 10-K: If the company was previously silent about the ability to timely file Part III information, either include Part III information in the Form 10-K, or furnish a second 8-K with the required disclosures by the original 120-day deadline and then file the Part III information in its Form 10-K/A or proxy statement no later than 45 days following the 120-day deadline.

Updates to SEC Staff Guidance on Stockholder Meetings Address Concerns Regarding Mailing Delays and Other Clarifications

On April 7, 2020, the Staff provided an [update to its guidance](#) to assist public companies preparing for their stockholder meetings amid the public health concerns relating to COVID-19.

In particular, the Staff acknowledged that some companies are encountering delays in the printing and mailing of physical “full set” proxy materials as they, along with their proxy service providers and transfer agents, manage the impacts of COVID-19, and that, as a result, many of these companies would like to shift to “notice-only” delivery, but have concerns about satisfying all of the “notice and access” requirements under SEC Rule 14a-16. In summary, companies taking advantage of the “notice-only” option under Rule 14a-16 may deliver proxy materials by posting such materials on a website and avoid printing and mailing the proxy materials so long as, among other things, the required “Internet notice” is mailed to stockholders at least 40 calendar days before the stockholders meeting. Under the updated guidance, the Staff will not object to a company’s “notice-only” delivery of proxy materials even if it cannot satisfy all of the requirements under Rule 14a-16 as long as the company:

- provides proxy materials sufficiently in advance of the meeting for stockholders to make informed voting decisions;
- announces the change in delivery method by following the same steps as a shift to a virtual meeting under its guidance (i.e., by issuing a press release and filing additional proxy solicitation materials); and
- continues to use best efforts to send paper copies of proxy materials and annual reports to requesting stockholders, even if such deliveries would be delayed.

The updated guidance also encourages companies to “use all reasonable efforts” to achieve the primary goal of the proxy process to timely deliver information to stockholders about matters to be presented at stockholder meetings without putting the health or safety of anyone involved at risk, including by delaying the meeting in accordance with state law requirements, if needed, in order to provide materials on a timely basis.

The Staff also clarified that its prior guidance (discussed [here](#)) on changes to the date, time and location of annual stockholder meetings, including to change to a virtual meeting, also applies to companies changing locations of special meetings as a result of COVID-19.

In light of the evolving nature of the COVID-19 crisis and the accommodations that are being made to encourage compliance, companies filing quarterly or annual reports or proxy statements during the COVID-19 outbreak are advised to consult applicable SEC Staff guidance and local laws for the latest information and available relief.

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