

Clients & Friends Memo

COVID-19 Update: SEC Guidance on Shareholder Meetings and Filing Deadline Extensions in Light of COVID-19 Concerns

March 26, 2020

In light of the recent COVID-19 global outbreak, on March 13, 2020, the Securities and Exchange Commission provided guidance to assist issuers, shareholders and other market participants affected by COVID-19 with meeting their obligations under the federal proxy rules. Additionally, on March 4, 2020, the SEC issued an order that, subject to certain conditions, provides publicly traded companies with an additional 45 days to file certain disclosure reports that otherwise would have been due between March 1 and April 30, 2020. On March 25, 2020, the SEC issued an order modifying the filing deadline extensions to cover filings due on or before July 1, 2020.

Changing the Shareholder Meeting

The SEC recognizes that issuers are contemplating possible changes in the date, time or location of their annual shareholder meetings because of COVID-19 concerns. The SEC's guidance provides that, subject to the conditions described below, an issuer that has already filed and mailed its definitive proxy materials can notify shareholders of the change of its shareholder meeting without amending its proxy materials (and subsequently filing such amended materials on EDGAR and also posting them to a publicly-accessible, non-EDGAR website), as is generally required under Rule 14a-6(h) of the Securities Exchange Act of 1934. Specifically, the issuer must: (1) issue a press release announcing such change to their annual shareholder meeting; (2) file such announcement as definitive additional soliciting material on EDGAR; and (3) take all reasonable steps necessary to inform other intermediaries in the proxy process and other relevant market participants of such change. The SEC encourages those issuers that have not yet mailed and filed their definitive proxy materials to consider whether to include disclosures regarding the possibility that the date, time or location of the annual meeting will change because of COVID-19.

“Virtual” Shareholder Meeting

Because the spread of COVID-19 has affected the ability to hold in-person meetings due to health and transportation issues, many issuers are contemplating conducting a “virtual” shareholder meeting in lieu of an in-person meeting.¹

An issuer’s ability to hold a “virtual” shareholder meeting depends on its governing documents and the laws of the state in which the issuer is incorporated. For example, under Delaware law, if an issuer’s organizational documents do not require holding the annual meeting at a physical location, the issuer’s annual meeting can be held “virtually.”² If the issuer has time to give its stockholders at least ten days’ notice of the new “virtual” meeting, the issuer should distribute a new notice to its stockholders by physical mail or e-mail.³ The new notice should include, among other information, the time and date of the “virtual” meeting, as well as instructions on how to join the meeting and the means by which stockholders may be deemed present in person and vote at such “virtual” meeting. On the other hand, if the issuer has fewer than ten days to notify its stockholders of the “virtual” meeting, the issuer could adjourn the meeting to a “virtual” location, since notice of an adjourned annual meeting ordinarily is not required.⁴

The SEC urges those issuers planning to conduct a “virtual” shareholder meeting to notify its shareholders and other market participants of such plans in a timely manner and disclose clear directions with respect to the logistical details of such meeting. Specifically, the SEC’s guidance provides that those issuers that have not yet filed their definitive proxy materials should include such disclosure in their definitive proxy statement and other soliciting materials. Those issuers that have already filed their definitive proxy materials would not need to amend such materials if they satisfy the same conditions for announcing a change in the meeting date, time or location, as discussed above.

For issuers facing a contested shareholder meeting, the use of a “virtual” meeting raises additional issues that would need to be considered by issuers and their advisors, including the process for matters to be presented by shareholders, the ability of shareholders making proposals to speak at the meeting, the timing and mechanics for voting at the “virtual” meeting (including via a legal proxy) and the process for any challenges initiated by a shareholder. In addition, issuers will need to confirm with their “virtual” meeting service providers whether they can provide “virtual” meetings for contested solicitations. Issuers may want to consider permitting the proponents of contested matters and their advisors to be present in person to make statements as well as to deliver proxies and ballots in order to avoid later challenges over the conduct of the meeting. Relatedly, because of

¹ Starbucks Corporation held a “virtual-only” annual shareholder meeting on March 18, 2020.

² See Delaware General Corporation Law § 211(a)(1).

³ See Delaware General Corporation Law § 222(b).

⁴ See Delaware General Corporation Law § 222(c).

shareholders' restricted abilities to attend shareholder meetings in person and the expected increase in the number of "virtual" meetings, the SEC's guidance encourages issuers to provide shareholder proponents with the ability to present their Rule 14a-8 proposals through alternative means, such as by telephone.

Filing Deadline Extension

The SEC understands that COVID-19 may present challenges to issuers and persons in timely meeting their filing obligations under the federal securities laws. Many of those affected "may include U.S. companies with significant operations in the affected areas, as well as companies located in those regions."⁵ The SEC order provides that, subject to certain conditions, any registrant or person required to make filings under certain sections, rules and regulations of the Securities Exchange Act of 1934⁶ may be afforded an additional 45 days to file such reports (had such reports otherwise been due between March 1 and April 30, 2020). In order to take advantage of this deadline extension, the filer must satisfy the following conditions:

- The filer is unable to meet the filing deadline because of circumstances related to COVID-19;
- Any registrant relying on the SEC order furnishes to the SEC a Form 8-K (or Form 6-K, if applicable)⁷ by the later of March 16, 2020 or the original filing deadline stating:
 - that it is relying on the SEC order;
 - a description of the reasons why it could not file such report on time;⁸
 - the estimated date by which the report is expected to be filed;
 - if appropriate, a risk factor explaining, if material, the impact of COVID-19 on its business; and
 - if the reason the report cannot be filed timely relates to the inability of any person to furnish any required opinion, report or certification, the Form 8-K (or Form 6-K) shall attach as an exhibit a statement signed by such person stating the reasons why such person cannot furnish the documentation on or before the original deadline.

⁵ Securities Exchange Act Release No. 34-88318 (March 4, 2020).

⁶ Securities Exchange Act Sections 13(a), 13(f), 13(g), 14(a), 14(c), 14(f) and 15(d); Securities Exchange Act Regulations 13A, 13D-G (except for those provisions mandating the filing of Schedule 13D or amendments to Schedule 13D), 14A, 14C and 15D; and Securities Exchange Act Rules 13f-1 and 14f-1.

⁷ In the order issued on March 25, 2020, the SEC noted that registrants relying on the exemption must furnish a Form 8-K (or Form 6-K, if applicable) for each delayed filing.

⁸ As of March 17, 2020, 20 companies had taken advantage of the 45-day extension afforded by the SEC order. A majority of the reasons why these companies could not timely file their reports are travel-related and logistical (*e.g.*, delays in on-site audits, closures of offices by local order, inability to access physical documents, travel restrictions, etc.).

- The filer files the report with the SEC no later than 45 days after the original deadline; and
- The filer discloses on such report that it is relying on the SEC order and states the reasons why it could not file such report on a timely basis.

Additionally, the SEC order exempts registrants and persons from furnishing proxy statements, annual reports, information statements and other soliciting materials to shareholders who have a mailing address located in an area where, as a result of COVID-19, the common carrier has suspended delivery service of the type used by the registrant making the solicitation.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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