

Delaware Court Finds “On or About” Did Not Specify Actual Date to Trigger Advance Notice Bylaw Notification Requirements

July 8, 2015 | Client Update | 2-minute read

A company's reference to the next annual meeting date as “on or about” June 10 refers to an approximate or anticipated time frame, and not an actual specified date, held the Supreme Court of the State of Delaware in a case on appeal. As a result, a shareholder did not need to provide notice of proposals within the time period disclosed in the proxy statement under the company's advance notice bylaws.

Hill International disclosed in its 2014 proxy statement that its 2015 annual meeting would be held on or about June 10, 2015, and that shareholders must submit nominations or proposals under its bylaws between March 15 and April 15, 2015, which was 60 and 90 days before the meeting. On April 13, 2015, Opportunity Partners delivered a letter to Hill in which it gave notice of its intent to present two nominees for election to the board and two shareholder proposals at the 2015 annual meeting.

On April 30, 2015, Hill filed its 2015 proxy statement, which announced that the 2015 annual meeting will be held on June 9, 2015. On May 5, 2015, Hill asserted that Opportunity's April 13 Letter did not comply with its advance notice bylaws because it lacked information about the director nominees. Two days later, Opportunity sent Hill another letter with two new shareholder proposals and the same two director nominees. Hill challenged the letter as being untimely under its advance notice bylaws.

The company's bylaws require that notices of nominations or proposals must be delivered and received between 60 and 90 days before the meeting, but if the company provides less than 70 days' notice or prior public disclosure of the date of the annual meeting, then the shareholder's notice may be received 10 days following the date of the public notification of the annual meeting.

The Court found that the company's 2014 proxy statement did not constitute prior public disclosure of the actual date of the meeting as required under its bylaws. Instead, a specific date was identified only when the company published its proxy statement on April 30, 2015. Since at that point there were less than 70 days before the June 9, 2015 meeting, Opportunity only needed to deliver its proposal to the company within 10 days of when the 2015 proxy statement was filed.

The company's annual meeting had been postponed after the initial Court of Chancery decision in early June.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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