

LEGAL UPDATES

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Professionals

KIRSTIN P. SALZMAN
KANSAS CITY:
816.983.8316
KIRSTIN.SALZMAN@
HUSCHBLACKWELL.COM

STEVEN R. BARRETT
CHATTANOOGA:
423.757.5905
STEVE.BARRETT@
HUSCHBLACKWELL.COM

KENYON C. BRIGGS
KANSAS CITY:
816.983.8245
KENYON.BRIGGS@
HUSCHBLACKWELL.COM

A Summary of Recent SEC Guidance Responding to COVID-19

Recently, the Securities and Exchange Commission (SEC) issued guidance to assist public companies in navigating the challenging times brought on by the coronavirus (COVID-19) pandemic.

Modification to Order Granting 45-Day Filing Extension—Now Covers Filings Due Between March 1, 2020 and July 1, 2020

The SEC issued an order on March 25, 2020 modifying its March 4, 2020 conditional exemptive order that addresses filing extensions for registrants and other persons required to make filings with respect to a covered registrant. The March 4 order originally extended the due date for certain filings (including required amendments to covered filings), which would otherwise be due between March 1 and April 30, 2020, by forty-five (45) days if a number of conditions were met. Under the modified order, the forty-five (45) day extension now applies to certain filings that would otherwise be due between March 1 and July 1, 2020. Covered filings include Forms 10-K and 10-Q required under Sections 13(a) and 15(d) of the Securities Exchange Act of 1934, and the conditions required for a company to receive the extension under the SEC's revised order are as follows:

circumstances related to COVID-19 cause the company to be unable to meet the original filing deadline;

the company furnishes a Form 8-K (Item 7.01) (or if eligible, a Form 6-K) by the original filing deadline stating (i) that it is relying on the exemptive order, (ii) a brief description of why it could not timely file the report, (iii) the estimated date by which the report is expected to be filed, (iv) a company specific risk factor or factors explaining the impact, if material, of COVID-19

on its business and (v) if the reason the report cannot be filed is due to the inability to obtain any required opinion, report or certification of any other person (such as an accountant), the Form 8-K contains as an exhibit a statement signed by the person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the required filing date for the report; and

the report or form must be filed by the applicable extended deadline (45 days after the original due date) and must include disclosure that the filer is relying on the exemptive order and stating the reasons why such report or form could not be filed on a timely basis.

The relief also applies to filings required under Exchange Act Sections 13(f), 13(g), 14(a), 14(c) and 14(f), but not Section 13(d) or Section 16(a), so all Schedule 13Ds and applicable amendments and all Form 4s will still need to be timely made.

Companies that rely on the exemptive order will be considered current and timely in their Exchange Act filings requirements for the purposes of eligibility to use Form S-3 and Form S-8 and the purposes of Rule 144 if they file any report due during the relief period within 45 days of the filing deadline for the report. In addition, a company will be permitted to rely on Rule 12b-25 if it is unable to file the required reports before the extended due date.

March 25, 2020 Disclosure Guidance: How to Disclose COVID-19-Related Risks, When to Refrain from Trading & How to Report Non-GAAP Financial Measures

The SEC issued CF Disclosure Guidance: Topic No. 9 on March 25, 2020 addressing how companies can report and disclose the effects and risks of COVID-19 on their businesses. The SEC makes it clear that its disclosure requirements can apply to a broad range of evolving business risks even in the absence of a specific line item requirement that names the particular risk presented. So, when drafting disclosures relating to COVID-19, consider the following questions (each of which is addressed in further detail in the SEC guidance):

Has COVID19 impacted your financial condition and results of operations? How do you expect COVID-19 to impact your future operating results and near-and-long-term financial condition?

How has COVID19 impacted your capital and financial resources, including your overall liquidity position and outlook?

Do you expect COVID19 to affect your ability to account for balance sheet assets, and do you expect any material impairments?

Do you expect COVID-19 to materially affect your ability to maintain operations (including impacts on human capital), the demand for your products or services, or your supply chain or the distribution of your products or services?

The guidance also encourages companies and related persons to consider their market activities, including any issuance or purchase of securities, in light of their obligations under federal securities laws. If COVID-19 has affected a company in a way that would be material to investors, then the company, its directors and officers, and other corporate insiders who are aware of these matters should refrain from trading in the company's securities until such information is disclosed to the public. The SEC also reminded companies to avoid selective disclosures of information related to the impacts of COVID-19 by disseminating information broadly to the public in compliance with Regulation FD, and to consider the extent to which prior disclosures may need to be updated if information becomes materially inaccurate.

Finally, although companies have obligations under Item 10 of Regulation S-K and Regulation G with respect to the presentation of non-GAAP financial measures, the SEC realizes that companies may be facing a number of accounting issues that may take time to resolve due to COVID-19. Accordingly, the SEC will not object to companies reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP results in a release of expected earnings or other financial results in advance of finalizing the required financial statements for a reporting period. Additionally, if a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures in reliance on the above position, it should limit the measures in its presentation to those non-GAAP financial measures it is using to report financial results to the Board of Directors. The SEC makes it clear that if a company presents non-GAAP financial measures, it should explain why the line item(s) or accounting is incomplete, and what additional information or analysis may be needed to complete the accounting. The SEC also specified that, in filings where financial statements are required (such as reports on Form 10-K or 10-Q), non-GAAP financial measures should be reconciled to final GAAP results rather than estimated or provisional numbers.

The SEC also encouraged companies to reach out to the staff with any other issues that may arise with respect to their ability to comply with the requirements of the federal securities laws during the ongoing pandemic.

Annual Meeting Change in Date, Time or Location

The SEC also recognized that some companies may be changing the date, time or location of their annual stockholders' meeting in response to growing concerns about the spread of the COVID-19

virus. As a result, the SEC has taken the position that if a company has already mailed and filed its definitive proxy materials, it can notify shareholders of a change in the date, time or location of its annual meeting without mailing additional soliciting materials or amending its proxy materials if the company:

issues a press release announcing the change;

files the announcement with the SEC as definitive additional soliciting material; and

takes all reasonable steps necessary to inform other intermediaries (such as proxy service providers) and relevant market participants (such as any national securities exchange on which its shares are listed) of such change. The SEC expects that companies will make announcements of any changes to the annual meeting sufficiently in advance of the meeting so that the market is properly alerted.

If companies have not mailed or filed their proxy materials, the SEC suggested companies should consider including disclosures regarding the possibility that the date, time and place of the stockholders' meeting may be changed in response to COVID-19. The SEC's full announcement can be found [here](#).

“Virtual” and “Hybrid” Annual Shareholder Meetings

Whether a company can hold a virtual shareholder meeting (i.e., where all shareholders participate through electronic means) or a hybrid shareholder meeting (i.e., an in-person meeting that also permits shareholder participation through electronic means) is governed by applicable state law. To the extent a company plans to conduct a virtual or hybrid meeting, it must (1) notify its shareholders, intermediaries, and other market participants of such plans in a timely manner and (2) provide clear directions as to the logistical details of the meeting, including how shareholders can remotely access, participate in and vote at such meeting. If a company has not yet filed and delivered its definitive proxy materials, those directions should be included in the definitive materials. If a company has already filed and mailed its definite proxy materials and switches to a virtual or hybrid meeting, it does not need to mail additional soliciting materials (including new proxy cards) if it follows the requirements listed above regarding changing the date, time or location of the annual meeting. The SEC's full announcement can be found [here](#).

Relief for Furnishing of Proxy and Other Solicitation and Information Material When Mail Delivery is Not Possible

The updated March 25 order also reiterated that the SEC will exempt a company from the requirements to furnish proxy statements, annual reports, information statements and other soliciting materials to any affected security holder where (1) the common carrier has suspended

delivery services in the security holder's area, and (2) the company has made a good faith effort to furnish the materials to the security holder in accordance with the rules applicable to the respective types of materials. The SEC's full Order can be found [here](#).

Contact Us

Husch Blackwell's securities law team continues to monitor the evolving situation and its implications for our clients. Should you have any questions, please do not hesitate to contact Kirstin Salzman, Shari Wright, Steve Barrett, Rebecca Taylor or Kenyon Briggs.

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and unemployment, retailing, and supply chain management, among others.