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Further SEC and Delaware Guidance on COVID-19 Disclosure and Shareholder Meeting Impacts

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The U.S. Securities & Exchange Commission (SEC) has made numerous statements providing additional guidance relating to the COVID-19 public health crisis, and the governor of Delaware has also clarified some points of state law regarding annual shareholders' meetings. Below, we summarize the most recent guidance and explore how companies should consider their compliance processes during the COVID-19 outbreak.

SEC Chairman and Corporate Finance Division Director Issue Statement on Quarterly Disclosure and Forward-Looking Statements

SEC Chairman Jay Clayton and Corporate Finance Division Director William Hinman issued a statement on April 8, 2020 encouraging public companies "to provide as much information as is practicable regarding their current financial and operating status, as well as their future operational and financial planning"—particularly with regard to several topics enumerated in the statement—in their upcoming quarterly earnings releases and analyst and investor calls.

The Chairman and Director stated that, in light of the profound impact of COVID-19 on the capital markets, historical information—like discussions of financial statements and developments in the prior quarter—may be substantially less relevant to investors and analysts; rather, these stakeholders are interested in obtaining forward-looking information on how companies expect to operate going forward in light of COVID-19. In their own words, "[i]nvestors and analysts are thirsting to know where companies stand today and, importantly, how they have adjusted, and expect to adjust in the future,

their operational and financial affairs to most effectively work through the COVID-19 health crisis."

Given this thirst for information, the Chairman and Director urge companies to avail themselves of the federal securities laws' safe harbors for forward-looking statements (e.g. Section 27A of the Securities Act and Section 21E of the Exchange Act) to provide information that is as detailed as reasonably practicable regarding future operations under the current COVID-19 mitigation efforts and communicating the material effect that this may be expected to have on earnings. The Chairman and Director state that they do not expect to "second guess good faith attempts to provide investors and other market participants appropriately framed forward-looking information" given the uncertainty of the current business environment. That said, forming appropriate disclosures of material information in light of the current uncertainties is certain to be a challenge for many companies and may be impossible for others. Furthermore, although the Chairman and Director can assure public companies that the SEC will not "second guess good faith attempts to provide … appropriately framed forward-looking information," they cannot fully mitigate the risk companies face from other market participants doing the same. We therefore note that, notwithstanding this encouragement from the Chairman and Director for public companies provide as much forward-looking information as possible in reliance on the available safe harbors, maintaining appropriate documentation of – and disclosing – the material assumptions underlying such projections remains as important as ever.

In addition to these requested disclosures regarding future plans and operating conditions, the Chairman and Director encourage companies to provide the following types of disclosures to help investors and other market stakeholders address the effects and uncertainties of COVID-19:

Discussions of any financial assistance received under the CARES Act or other COVID-19 related federal and state programs that have materially affected or are reasonably likely to have a material future effect upon, a company's financial condition or results of operations, including the nature, amounts and effects of such assistance.

Detailed discussions of current liquidity positions and expected financial resource needs.

The impact on companies of actions, policies and efforts undertaken to protect worker health and well-being and customer safety.

SEC Chief Accountant's Statement on Financial Reporting in Light of COVID-19

Sagar Teotia, the SEC's Chief Accountant, issued a statement on April 3, 2020 highlighting the challenge that COVID-19 presents for public companies' auditing and accounting functions. The Chief Accountant's statement builds on earlier SEC guidance efforts, which we previously discussed, and addresses how the accounting and financial reporting implications of COVID-19 may require

companies to make significant judgments and estimates in their disclosures, which may be uncertain and challenging in the current economic climate. He stated that the SEC's Office of Chief Accountant (OCA) remains steadfast in its commitment not to object to significant judgments or estimates when made in a well-reasoned manner.

The OCA previously indicated that forming well-reasoned judgments "typically involves a lot of effort and underscores the importance of a robust implementation process… [that] includes adequate and advance planning, a focus on contractual terms and areas of judgment, and a thorough evaluation of controls." The statement identified the following as some of the core accounting areas that will involve significant judgments and estimates in light of COVID-19:

Fair value and impairment determinations;

Accounting for Leases;

Debt modifications or restructurings;

Hedging;

Revenue recognition;

Income taxes;

Going concern evaluations;

Subsequent event disclosures; and

Disclosures related to the adoption of new accounting standards (such as the new credit losses standard – with respect to which the OCA confirmed that certain financial institutions eligible for temporary relief under Sections 4013 and 4014 of the Coronavirus Aid, Relief and Economic Security (CARES) Act would continue to be deemed in compliance with U.S. GAAP to the extent they elect to take advantage of such relief).

In addition to public companies' use of well-reasoned accounting estimates and judgments, the Chief Accountant's statement addresses the following topics with respect to public company audits and auditing firms:

OCA and the Public Company Accounting Oversight Board (PCAOB) have taken steps to provide PCAOB-registered auditing firms with general relief for a period of up to 45 days from most PCAOB inspections and have suspended international travel for the time being;

OCA is working with IASB to address the international accounting implications of COVID-19 in light of the global reach and interconnectivity of the capital markets; and

OCA has been meeting and will continue to meet with stakeholders across the capital markets spectrum, both domestic and international, to address the effect of COVID-19 on audit quality.

The OCA encourages companies to reach out to its 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.

SEC Division of Corporate Finance Staff Issues Two New C&DIs Related to COVID-19 and Reporting Obligations

The Division issued new Compliance and Disclosure Interpretations (C&DIs) on April 6, 2020 to (a) address the effect of COVID-19 on public companies' periodic reporting obligations and (b) interpret the SEC's March 25, 2020 order on filing extensions for public companies (and other persons required to make filings with respect to a covered registrant). We have previously discussed the Order here. In brief, it extended the due date for certain filings (including required amendments to covered filings), which would otherwise be due between March 1 and July 1, 2020, by 45 days if a number of conditions are met.

The first new C&DI, Exchange Act Forms Question 104.18, addresses the ability of a public company to rely on the relief provided by the order with respect to its obligation to provide information required by Part III of Form 10-K within 120 days after the end of the related fiscal year in a definitive proxy or information statement or as an amendment on Form 10-K/A. The Division takes the position that a public company may take advantage of the order's relief so long as (a) the deadline for filing the Part III information falls before July 1, 2020 and (b) the company meets the other conditions in the order. The C&DI covers three potential scenarios:

Companies that filed a timely Form 10-K but need relief in filing the Part III information: A company that timely filed its annual report on Form 10-K without relying on the order should furnish a Form 8-K with the order's required disclosures by the one-hundred twenty (120) day deadline for Part III information. The company would then need to provide the Part III information within 45 days of the 120-day deadline by including it in a Form 10-K/A or definitive proxy or information statement.

Companies that have not filed a Form 10-K and wish to seek relief as to the filing of both the Form 10-K and the Part III information: A company may invoke the order's relief with respect to both the Form 10-K and the Part III information by furnishing a single Form 8-K by the original deadline for the

Form 10-K that (1) provides the order's required disclosures, (2) indicates that the company will incorporate the Part III information by reference, and (3) provides the estimated date by which the Part III information will be filed. The Part III information must then be filed no later than 45 days following the 120-day deadline for Part III information.

Companies that sought relief in filing Form 10-K but have not yet sought relief in filing the Part III information: A company that properly invoked the order's relief with respect to its Form 10-K by furnishing a Form 8-K but was silent on its ability to timely file Part III information may (1) include the Part III information in its Form 10-K filed within 45 days of the original Form 10-K deadline, or (2) furnish a second Form 8-K with the Order's required disclosures by the original 120-day deadline and then file the Part III information no later than 45 days following the 120-day deadline by including it in a Form 10-K/A or definitive proxy or information statement.

The second new C&DI, Exchange Act Forms Question 112.02, addresses whether Canadian filers utilizing the Multijurisdictional Disclosure system (MJDS) that comply with Canadian COVID-19 relief provisions also must separately comply with the order for relief when filing Form 40-F. The Division takes the position that where an MJDS filer is required to file its Form 40-F on the same day the information included therein is due to be filed with any securities commission or equivalent regulatory authority in Canada, the MJDS filer may properly rely on any applicable Canadian COVID-19-related relief for extension of its filing deadline with the securities commission or equivalent regulatory authority, and compliance with the Order on the original due date of the Form 40-F is not required. The Division notes, however, that MJDS filers should consider promptly disclosing their intent to rely on Canadian COVID-19-related relief.

SEC Revises Guidance on Virtual and Hybrid Meetings and Offers New Guidance on Proxy Printing and Mailing Delays

We previously discussed the SEC's guidance on shareholder meetings in light of COVID-19 concerns in our March 30, 2020 alert; however, the SEC amended that guidance on April 7, 2020. The key changes are:

Clarification from the SEC that the guidance applies to special, as well as annual, meetings of shareholders for public companies;

New guidance on delays in the printing and mailing of proxy materials, and how public companies should handle those issues while navigating the federal securities laws; and

Clarification from the SEC on the position of the Division of Investment Management that the guidance applies to meetings by investment companies in connection with business combinations and other transactions described in a registration statement on Form N-14, except that in lieu of the announcement of the change being filed as additional definitive soliciting material, the SEC would expect the announcement to be filed as a prospectus supplement under Rule 49.

As updated on April 7, the guidance for public company shareholder meetings now provides as follows:

Changes in Date, Time or Location for an Annual or Special Meeting of Shareholders

The SEC recognizes that some companies may be changing the date, time or location of their annual or special shareholders' meetings in response to growing concerns about the spread of COVID-19. 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.

"Virtual" and "Hybrid" Annual or Special 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.

Delays in Printing and Mailing Full Sets of Proxy Materials

The SEC recognizes that some companies are encountering delays in the printing and mailing of the "full set" of their proxy materials—the definitive proxy statement, annual report (if required for an annual meeting), and proxy card—for their upcoming shareholder meetings due to the impact of COVID-19. The SEC also understands that although some companies would like to furnish their proxy materials through the "notice-only" delivery option permitted by Rule 14a-16 under the Exchange Act, those same companies may have concerns about their ability to comply with certain provisions of the rule, including its 40-day advance notice requirement and the requirement to provide paper proxy materials within three business days at the request of shareholders.

The SEC's guidance states that companies affected by printing and mailing delays caused by COVID-19 should use all reasonable efforts to ensure shareholders are given the opportunity to thoroughly review their proxy materials and make an informed vote without putting the health or safety of anyone involved at risk. The SEC understands that this may mean delaying a meeting in accordance with state law and the procedures described above to provide materials on a timely basis. Or, where delays are entirely unavoidable due to COVID-19 related difficulties, it may mean a company first announces a change in the delivery method of the proxy materials by following the steps described above for announcing a change in the meeting date, time, or location, and then uses the "notice-only" delivery option in a manner that does not meet all aspects of the notice and timing requirements of Rule 14a-16, but still provides shareholders with proxy materials sufficiently in advance of the meeting to make an informed vote.

The SEC urges affected companies to continue using their best efforts to send paper copies of proxy materials and annual reports to requesting shareholders, even if such deliveries would be delayed, and encourages public companies and other affected parties to contact the SEC to discuss any concerns resulting from any late filings caused by delays in the printing and mailing of proxy materials.

Governor of Delaware Provides Clarity on Notices of Annual Meeting Changes for Purposes of Compliance with the Delaware General Corporation Law (DGCL)

The Governor of Delaware issued an order on April 6, 2020 modifying the state of emergency declaration for Delaware and clarifying Delaware's position with respect to how a public company's change from a physical shareholder meeting to a virtual or hybrid shareholder meeting should be communicated under Delaware law. Companies switching from physical to virtual or hybrid shareholder meetings, after having already mailed their initial Notice for an in-person meeting, have faced uncertainty about whether following the SEC's guidance on communicating the change (discussed above) would provide sufficient "notice" to communicate the change to comply with Section 222 of the DGCL, or whether a new notice to shareholders was necessary. The Governor's Order provides that a public company's compliance with the SEC's guidance is sufficient notice under the DGCL to change a public company's annual shareholders meeting in the following circumstances:

If as a result of the public health threat caused by the COVID-19 the board of directors wishes to change a meeting currently noticed for a physical location to virtual or hybrid meeting, it may notify shareholders of the change by complying with the SEC's guidance on announcing such a change and releasing a press release which shall be promptly posted on the company's website after release.

If it is impracticable to convene a currently noticed meeting of shareholders at the physical location for which it has been noticed due to the public health threat caused by the COVID-19, a company may adjourn such meeting to another date or time, to be held virtually or in a hybrid fashion, by complying with the SEC's guidance on announcing such a change and releasing a press release which shall be promptly posted on the company's website after release.

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, Kenyon Briggs or Brandon Warrington, or your Husch Blackwell attorney.

Comprehensive CARES Act and COVID-19 Guidance

Husch Blackwell's CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly changing orders on a state-by-state basis. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.