Proskauer

SEC Provides Temporary Relief and Guidance for Companies and Funds Affected by the Coronavirus

March 6, 2020

Exemptive Relief

The Securities and Exchange Commission (SEC) has issued an order (Order) providing temporary exemptive relief to public companies that are unable to meet filing deadlines due to circumstances related to novel coronavirus (COVID-19). Companies that satisfy the conditions in the Order will have an additional 45 days to file certain disclosure reports, including quarterly reports on Form 10-Q, annual reports on Form 10-K, current reports on Form 8-K, and proxy statements. The time period for the relief is from March 1, 2020 to April 30, 2020.

Conditions

The exemptive relief is subject to a number of conditions outlined in the Order. Among other things, a registrant must furnish to the SEC a Form 8-K or Form 6-K, as applicable, by the later of March 16 or the original filing deadline stating that it is relying on the Order and describing the reasons why it could not file the report, schedule, or form on a timely basis. Additional content of the Form 8-K or Form 6-K is prescribed in the Order. The subject report, schedule or form must be filed no later than 45 days after the original due date.

Proxy and Information Statements

The Order provides an additional exemption from the requirements to furnish proxy statements, annual reports, other soliciting materials and information statements when mail delivery is not possible because of circumstances related to COVID-19. Specific conditions are described in the Order.

Impact on Form Eligibility and Rule 144 Transactions

The SEC's press release announcing the Order clarified that a company relying on the temporary relief will be considered current in its Exchange Act filing requirements for purposes of Form S-3, Form S-8 and the current public information requirements of Rule 144(c) if the company's filings were current as of March 1, 2020 and the subject report is filed within 45 days of its original filing deadline.

Disclosure Considerations for All Companies

The SEC's press release announcing the Order reminded companies to consider their disclosure obligations related to the impact of the coronavirus on their businesses and operations. For example, where the coronavirus presents a risk that would be material to a company's investors, the press release suggested that companies should refrain from engaging in securities transactions with the public, and take steps to ensure directors and officers likewise refrain from initiating such transactions, until investors have been appropriately informed of the risk. Companies are also reminded to avoid selective disclosure of material information about the impact of the coronavirus.

Guidance from the Division of Investment Management

In February 2019, the Division of Investment Management (Division) issued a no-action letter to the Independent Directors Council (IDC Letter), which provided that the Staff would not recommend enforcement action if boards of registered investment companies and business development companies (funds) did not adhere to certain in-person voting requirements under the Investment Company Act of 1940, as amended, in the event of unforeseen or emergency circumstances affecting some or all of a fund's directors. Since the proliferation of COVID-19, the Division has broadened the no-action position in the IDC Letter to cover all approvals and renewals (including material changes) of contracts, plans or arrangements under Section 15(c) and Rules 12b-1 and 15a-4(b)(2) (*i.e.*, advisory agreements, principal underwriting agreements, Rule 12b-1 plans and interim advisory agreements), as well as the selection of a fund's independent public accountant pursuant to Section 32(a), where such accountant is not the same accountant as selected in the immediately preceding year.

The broadened relief now covers approvals of new contracts, including those arising as a result of a change of control event (which, by and large, were explicitly excluded from the IDC Letter). As noted in our prior Client Alert, the IDC Letter does not address the validity of contracts entered into in reliance on the Staff's relief. The Division's expanded position applies to board meetings held between March 4, 2020 and June 15, 2020. As a reminder, the IDC Letter does not require a fund board to take current action to adopt emergency-related policies in order to take advantage of the relief provided.

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