

Recent SEC Actions in the Wake of COVID-19

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In light of the unprecedented disruptions associated with COVID-19, the U.S. Securities and Exchange Commission (the “SEC”) has recently released a number of public statements providing advice and regulatory relief to public companies due to the impact of COVID-19.

NYSE Waiver of Shareholder Approval Requirements

In an measure to provide regulatory relief to listed companies, on April 6, 2020, the SEC approved and made immediately effective a rule change proposed by the New York Stock Exchange (the “NYSE”) to waive, subject to conditions, certain of the shareholder approval requirements of its Listed Company Manual (the “Manual”). More specifically, NYSE proposed the temporary waiver of its rule that requires listed companies to obtain shareholder approval before certain equity issuances, including issuing securities to a related party or issuing 20% or more of its outstanding common stock other than in a public offering. The waiver of these requirements is designed to facilitate the ability of listed companies that may have an urgent need to raise cash during the pandemic. The waivers are conditional and limited to transactions where the per share purchase price of the company’s securities satisfies NYSE’s minimum price test and if the transaction involves related parties, has been reviewed by the issuer’s audit committee or a comparable committee of independent directors. This relief, however, currently expires June 30, 2020.

Staff Guidance on Distribution of Proxy Materials

The SEC staff also issued guidance on April 7, 2020 regarding the distribution of proxy materials and handling shareholder meetings during the pandemic. The SEC acknowledged that due to the difficulties arising from COVID-19, the SEC Staff “will take the position that an issuer that has already mailed and filed its definitive proxy materials can notify shareholders of a change in the date, time, or location of its shareholder meeting without first mailing additional

soliciting materials or amending its proxy materials if it: (i) issues a press release announcing such change; (ii) files an announcement as definitive additional soliciting material on EDGAR; and (iii) takes all reasonable steps necessary to inform other intermediaries in the proxy process and other relevant market participants of the change.” Additionally, if permitted by state law or governing corporate documents, the SEC Staff advised that companies seeking to conduct virtual or hybrid shareholders’ meetings must notify its shareholders, intermediaries in the proxy process, and other market participants of such plans in a timely manner and clearly disclose the logistical details of the meeting, including how shareholders can remotely access, participate in, and vote at the meeting.

SEC Chair Public Statement

In this turbulent economic climate, investors and public companies are acutely aware of the importance of forward-looking statements regarding the impact of COVID-19 on corporate performance. In recognition of the current uncertainty and the upcoming earnings reports to be issued by public companies, on April 8, 2020 the SEC Chair Jay Clayton and Director of Corporation Finance, Bill Hinman, released a public statement entitled “The Importance of Disclosure” (the “Public Statement”) focusing on future public company disclosures regarding their financial and operating status in light of COVID-19. The Public Statement encourages public companies to consider the following in their upcoming disclosures: (i) where the company stands today, operationally and financially, (ii) how the company’s COVID-19 response is progressing, and (iii) how the company’s operations and financial condition may be impacted as efforts to fight COVID-19 progress. Importantly, the Public Statement observes that “historical information may be relatively less significant.”

While recognizing that preparing forward-looking information can be challenging, Messrs. Clayton and Hinman “encourage companies...to make all reasonable efforts to convey meaningful information...that provides...a level of insight that allows [investors] to see the key operational and financial considerations and challenges the company faces through the eyes of management.” In light of these statements, public companies are well-advised to diligently prepare for their upcoming earnings reports and calls despite the constraints on resources from COVID-19. Clayton and Hinman further noted that companies should “avail themselves of the safe-harbors for [forward-looking] statements and also note that we would not expect good faith attempts to provide appropriately framed forward-looking information to be second guessed by the SEC.”

Conditional Relief for Form 144 Filings

In addition, on April 10, 2020, the SEC Division of Corporation Finance (the “Division”) issued a statement providing that it would not recommend enforcement actions relating to the paper filing requirement of Form 144 in certain circumstances. Acknowledging the difficulties associated with filing

paper Form 144s, the Division stated that it will not recommend enforcement to the SEC as long as the forms, which are required to be physically filed in paper, are submitted via e-mail as a PDF. Moreover, if the filer is unable to submit the forms with a manual signature via email, the Division also indicated that it will not recommend enforcement to the SEC if: (i) the filer types their signature, (ii) the signatory retains a manually signed signature page, (iii) the document retained indicates the date and time the signature was executed, and (iv) the filer establishes and maintains procedures for doing so. It is important to note however, that this statement only applies to those Form 144 filings submitted from April 10, 2020 to June 30, 2020.

Please contact [Michael A. Goldstein, Esq.](#), [Victor J. DiGioia, Esq.](#), or your regular Becker contact with any questions on these or related topics.

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