

COVID-19: SEC ANNOUNCES CONDITIONAL RELIEF FOR COMPANIES AFFECTED BY CORONAVIRUS

Date: 5 March 2020

Capital Markets Alert

By: Mark L. Johnson, Sean M. Jones, Coleman Wombwell

BACKGROUND

On March 4, 2020, the Securities and Exchange Commission ("SEC") issued an order (the "Order") providing conditional relief to reporting companies affected by the novel coronavirus disease, or COVID-19. In recognition of the potential disruptions to transportation and limitations on access to facilities, support staff and professional advisors caused by COVID-19, the Order provides reporting companies with an additional 45 days to file certain disclosure reports that would otherwise have been due between March 1 and April 30, 2020, subject to certain conditions.

HIGHLIGHTS OF SEC ORDER

Relief Provided: Extension of Deadlines to File or Furnish Certain SEC Reports

The Order provides that any registrant (as defined in Rule 12b-2 of the Securities Exchange Act of 1934 (the "Exchange Act")), and any person required to make any filings with respect to a registrant, may take an additional 45 days to file or furnish certain materials with the SEC that are otherwise due between March 1 and April 30, 2020.

Exchange Act reports due during this time period include: (i) Form 10-K filings for registrants with a calendar fiscal year, (ii) Form 20-F filings for foreign private issuers with a calendar fiscal year, (iii) Form 10-Q filings for registrants with a non-calendar fiscal year, (iv) definitive proxy statements if Part III of a registrant's Form 10-K incorporates information from its proxy statement by reference, and (v) Current Reports on Form 8-K that become due during such time. The Order also applies to any Schedule 13G (or amendment thereto) that is due between March 1 and April 30, 2020, but notably excludes from relief requirements to file any Schedule 13D (or amendment thereto). Additionally, the Order does not apply to beneficial ownership reports required under Section 16 of the Exchange Act, such as Forms 3 and Forms 4.

The Order also provides relief relating to the obligations of a registrant or other person under Exchange Act Sections 14(a) and (c) and Regulations 14A and 14C to furnish soliciting materials to any security holder where the security holder has a mailing address located in an area where, as a result of COVID-19, the common carrier has suspended the delivery service customarily used and the registrant or other person has made a good faith effort to furnish the soliciting materials to the security holder as otherwise required by the applicable rules.

The press release announcing the Order adds that, for Form S-3 eligibility purposes, a registrant relying on the Order will be considered current and timely in its Exchange Act filing requirements if it was current and timely as of March 1, 2020 and files any report due during the relief period within 45 days of the filing deadline of such report. Similarly, for purposes of Form S-8 eligibility and the current public information requirements of Rule 144(c) of the Securities Act of 1933, a registrant relying on the Order will be considered compliant in its Exchange Act reporting requirements if it was compliant as of March 1, 2020 and files any report due during the relief period within 45 days of the filing deadline of such report. Additionally, registrants will be able to rely on Exchange Act Rule 12b-25 to obtain extensions for filing deadlines for reports that were previously delayed in reliance on the Order.

Conditions to Relief

Any registrant relying on the Order must furnish to the SEC a Form 8-K or Form 6-K, as applicable, by the original filing deadline of the subject report stating (i) that it is relying on the Order, (ii) a brief description of the reasons why it could not file such report on a timely basis, (iii) the estimated date by which the report is expected to be filed, and (iv) if material, a risk factor explaining the impact of COVID-19 on its business. Additionally, if the reason that the subject report cannot be filed timely relates to the inability of any person, other than the registrant, to furnish any required opinion, report or certification (e.g., an auditor's opinion on audited financial statements), the Form 8-K or Form 6-K must attach as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification in time. The registrant then must file the subject report no later than 45 days after the original filing deadline. The subject report, when filed, must disclose that the registrant is relying on the Order and state the reasons why the registrant could not file such report on a timely basis.

In the SEC's press release announcing the Order, Chairman Clayton clarified that registrants providing forward-looking information in an effort to keep investors informed about trends or uncertainties regarding COVID-19 can avail themselves of the Exchange Act's safe harbor for forward-looking statements.

CONCLUSION

The outbreak of COVID-19 is rapidly developing and has created much uncertainty in markets worldwide. The Order recognizes the fluidity of the situation by extending relief to registrants with operations in "affected areas" without adding any context as to where those areas are located. Just as the SEC has quickly acted to announce relief through the Order, it is possible that the Nasdaq Stock Market and New York Stock Market, as well as other self-regulatory agencies, may follow suit.

The SEC's press release announcing the Order acknowledges the balancing act presented by the need to protect the health and safety of market participants while also serving investors' need for timely information. Similarly, affected registrants must ensure accurate disclosure when it may not be feasible by customary deadlines, even in the face of demanding investor expectations.

KEY CONTACTS



MARK L. JOHNSON
PARTNER
BOSTON
+1.617.261.3260
MARK.JOHNSON@KLGATES.COM



SEAN M. JONES
PARTNER
CHARLOTTE
+1.704.331.7406
SEAN.JONES@KLGATES.COM



COLEMAN WOMBWELL
ASSOCIATE
CHARLOTTE
+1.704.331.7551
COLEMAN.WOMBWELL@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.