

SEC Extends Reporting Relief and Issues Guidance on COVID-19 Disclosure

March 26, 2020

SEC Grants Additional Relief From Filing Obligations

The SEC issued an [order](#) on Wednesday that provides companies that are unable to comply with their filing obligations as a result of COVID-19 with additional time to file certain reports that would otherwise have been due between March 1 and July 1, 2020. The order also grants relief from the requirements of furnishing proxy and information statements when mail delivery is not possible.

Yesterday's action by the SEC extends and supersedes its March 4th order which granted provisional relief for the filing of reports and the mailing of proxy materials.

Conditions to Extension of Filing Deadlines

The March 25 order provides that any public company (or person required to make a filing in respect of such company) may file certain reports, noted below, that would have been due between March 1 and July 1, 2020 no later than 45 days after the original due date, provided that:

- The company (or other person) is unable to meet the filing deadline due to circumstances related to COVID-19;
- The company files a Form 8-K (or Form 6-K) which must include:
 - a statement that the company is relying on the SEC order;
 - a brief description of the reasons why it could not file the report on a timely basis;
 - an estimated date by which the report is expected to be filed;
 - company-specific risk factors explaining the impact, if material, of COVID-19 on its business; and
 - if the reason the company cannot file the report in a timely manner relates to the inability of any person, other than the company, to furnish any required opinion, report or certification, the Form 8-K (or Form 6-K) must include 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.
 - The Form 8-K (or Form 6-K) must be filed by the later of March 16th or the original filing deadline of the report.
- The report that is the subject of the exemption must disclose that it is relying on the SEC order and state the reasons why the company could not file it on a timely basis.

The relief applies to reports required to be filed under Securities Exchange Act of 1934 Sections 13(a), 13(f), 13(g), 14(a), 14(c), 14(f), 15(d) and Regulations 13A, 13D-G, 14A, 14C and 15D, and Exchange Act Rules 13f-1, and 14f-1. The relief does not apply to the filing of a Schedule 13D or related amendments.

For purposes of Form S-3, Form S-8 and Rule 144(c) eligibility and preservation of WKSI status, a company relying on the exemption will remain eligible and preserve its status if it was current and timely in its Exchange Act filing requirements as of the first day of the relief period and it files any report due during the relief period within 45 days of the filing deadline for the report.

Relief for Proxy and Information Statements

The SEC order also provides an exemption from complying with the requirements to furnish proxy statements, annual reports and other soliciting material when mail delivery is not possible, provided that:

- the stockholder has a mailing address located in an area where mail delivery service has been suspended as a result of COVID-19; and

- the company has made a good faith effort to furnish the proxy statement, annual report and other soliciting material to its stockholders.

Guidance on COVID-19-Related Disclosure

In conjunction with the regulatory relief described above, the staff of the SEC's Division of Corporation Finance issued new [Disclosure Guidance Topic No. 9](#) reflecting the staff's current views regarding disclosure that companies should consider with respect to COVID-19 and related business and market disruptions.

The guidance emphasizes that companies should consider the need for COVID-19-related disclosure despite the potential difficulty of predicting with accuracy the effects of the disease on their businesses or industries. Additionally, the guidance makes clear that the effects that COVID-19 has had on a company, including what management believes the impact might be, how the company is planning for COVID-19-related uncertainties and how management is responding, could be material information for investors.

Disclosure Considerations

As with much of the SEC's disclosure regime, assessing whether there is a need to disclose the effects of COVID-19 will be a facts-and-circumstances analysis, including looking at how the company and management are responding to the situation. The guidance lists a number of questions that companies should consider, including:

- *Financial condition:* What is the impact of COVID-19 on the company's financial condition and results of operations and expectation of future impact?
- *Capital and liquidity:* What is the impact of COVID-19 on the company's capital and financial resources, including liquidity? Considerations include: any changes in cost of capital; impact to sources or uses of cash; possible covenant defaults in credit agreements; any known trends or uncertainties regarding ability to service financial obligations; and material COVID-19-related contingencies.
- *Assets:* What is the impact of COVID-19 on the company's assets and ability to timely account for those assets? The company should consider any significant changes in judgments in determining fair-value of assets.
- *Material impairments:* Does the company anticipate any material impairments, increases in allowances for credit losses, restructuring charges, other expenses, or changes in accounting judgments that are reasonably likely to have a material impact on the company's financial statements?
- *Business operations:* Have COVID-19-related circumstances (such as remote work arrangements and travel restrictions) adversely affected the company's ability to maintain operations? Considerations include: any material changes or challenges in the ability to maintain financial reporting systems and controls; any impact on human capital resources and productivity; supply chain disruption; difficulty in implementing business continuity plans; and demand for products and services.

Forward-looking information, including known trends or uncertainties regarding COVID-19, may be undertaken by the company in a way to avail itself of the statutory safe harbors for such information.

Dissemination of Material COVID-19-Related Information

The guidance includes a reminder to companies about the importance of disseminating material information related to the impact of COVID-19 broadly to the public. Corporate insiders should refrain from trading until such information is disclosed. In addition, companies should consider the need to "revisit, refresh, or update" previous disclosure.

Reporting Earnings and Financial Results

The staff, recognizing that the impact of COVID-19 on a company's earnings and financial results may be evolving, provides guidance on how companies should proceed when reporting uncertain earnings and financial results.

In situations where a GAAP financial measure is not yet available because its determination is being affected by COVID-19-related adjustments, the guidance provides that the staff would not object where a company reconciles a non-GAAP financial measure to preliminary GAAP results that either include provisional amounts based on a reasonable estimate or a range of reasonably estimable GAAP results. For example, if a company intends to disclose EBITDA on an earnings call, it may reconcile that measure to either its GAAP earnings, a reasonable estimate of its GAAP earnings that includes a provisional amount, or its reasonable estimate of a range of GAAP earnings. Where a provisional amount or range is used, it should reflect a reasonable estimate of COVID-19-related charges, such as impairment charges. However, in filings where GAAP financial statements are required, such as Form 10-K or Form 10-Q, companies should reconcile to GAAP results and not include provisional amounts or a range of estimated results.

In addition, if non-GAAP financial measures are reconciled to provisional amounts or an estimated range of GAAP financial measures, the company should include only those non-GAAP financial measures it uses to report financial results to its board of directors and should explain, to the extent practicable, why the line item or accounting is incomplete, and what additional information or analysis may be needed to complete the accounting.

The guidance also reminds companies that the rules and guidance pertaining to the presentation of non-GAAP metrics continue to apply. If a company presents a non-GAAP financial measure or key performance metric (KPI) to adjust for or explain the impact of COVID-19, it will be necessary to highlight why management finds the metric useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations. Companies should also consider such guidance when presenting new metrics related to COVID-19 or changing the method by which they calculate a metric as a result of COVID-19.

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