
LEGAL UPDATES AND NEWS

SEC Extends Filing Periods and Issues Disclosure Guidance Amid COVID-19 Outbreak

In light of the impact of the coronavirus (COVID-19) pandemic on public reporting companies, on March 25, 2020, the Securities and Exchange Commission (the “SEC”) issued an order allowing public companies, subject to certain conditions, a 45-day extension to file certain periodic and other reports that would otherwise have been due between March 1 and July 1, 2020 (the “SEC Order”). On the same date, the SEC’s Division of Corporation Finance issued CF Disclosure Guidance Topic No. 9 (the “SEC Disclosure Guidance”) that provides guidance regarding its views on disclosure and other securities law obligations that companies should consider with respect to COVID-19 and related business and market disruptions.

Filing Extension for Periodic Reports

Conditions for Eligibility. If a company or any person required to make any filings with respect to such company is unable to meet a filing deadline due to circumstances related to COVID-19, the company can obtain a 45-day extension for the due date of the filing by furnishing a Form 8-K by the original filing deadline of the report that includes the following information:

- that the company is relying on the SEC Order;
- a brief description of the reasons why the company could not file on a timely basis;
- the estimated date that the filing will be made;
- a company- specific risk factor explaining the impact, if material, of COVID-19 on its business; and
- if the reason the filing could not be made in a timely manner relates to the inability of a third party to furnish a required opinion, report or certification, an exhibit to the Form 8-K of a statement signed by a third party stating the reasons why such person is unable to furnish such opinion, report or certification on a timely basis.

Any registrant relying on the SEC Order would not need to file a Form 12b-25 (which is the existing SEC Form used to extend a filing date) so long as the company complies with the conditions noted above.

Impact on Proxy Statement Disclosure. Under current rules, a company can file its annual report on Form 10-K without the Part III information that gets incorporated by reference from the proxy statement as long as the proxy statement or an amendment to the Form 10-K with the missing information is filed within 120 days after the end of the fiscal year (i.e., by April 28, 2020). Because the SEC Order also includes any amendments to the periodic reports, companies can utilize the same procedures above to extend the time they have to file the proxy statement-related information required in the Form 10-K. This can be helpful for those companies that wish to delay their annual meetings.

Effect of Delay. The SEC has indicated that if companies avail themselves of the relief granted by the SEC Order to delay the filing of required periodic reports, it will not have an adverse impact on a company’s eligibility to use Form S-3 (a short form registration statement used to register securities), its eligibility to use Form S-8 (a registration statement to register shares offered pursuant to an employee benefit plan) or its ability to satisfy the current public information requirements of Rule 144(c) of the Securities Act of 1933, as amended (which sets conditions under which restricted and control securities can be sold or resold), which in each case requires that a company has currently (and, in the case of the Form S-3, timely) filed all reports required to be filed within the previous twelve calendar months.

Relief Related to Furnishing Proxy Statements

The SEC also provided relief to companies whose delivery of proxy materials are impacted by the inability of mail to be delivered. In instances where (a) a shareholder has a mailing address located in an area where, as a result of COVID-19, the mail carrier has suspended delivery service of the type or class customarily used by the company or other person making the solicitation; and (b) the company or other person making a solicitation has made a good faith effort to furnish the proxy materials to the shareholder, then the company will be exempt from the delivery requirement otherwise contained in the securities rules.

SEC Disclosure Guidance

Disclosure Considerations. The SEC Disclosure Guidance provides the SEC's views on disclosure and other securities obligations that companies should consider in light of COVID-19 and related business and market disruptions. The SEC understands that the actual impact of COVID-19 is not yet known and will depend on many factors beyond a company's control and knowledge. Nevertheless, the SEC recommends disclosing, to the extent possible, the effects COVID-19 has had on a company, what management expects its future impact will be, how management is responding to evolving events, and how it is planning for COVID-19-related risks and uncertainties. As a result, disclosure of these risks and COVID-19-related effects may be necessary or appropriate in management's discussion and analysis, the business section, risk factors, legal proceedings, disclosure controls and procedures, internal control over financial reporting, and the financial statements.

The SEC Disclosure Guidance provides several questions for companies to consider when preparing its public disclosures regarding the impact of COVID-19, including those listed below. These questions are a helpful starting point, however, each company will need to assess the impact of COVID-19 based on its own circumstances.

- How has COVID-19 impacted your financial condition and results of operations? How do you expect COVID-19 to impact your future operating results and near- and long-term financial condition?
- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook? Has your cost of or access to capital and funding sources changed, or is it reasonably likely to change?
- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets? For example, will there be significant changes in judgments in determining the fair value of assets?
- Do you anticipate any material impairments (e.g., with respect to goodwill, intangible assets, long-lived assets, right of use assets, investment securities), increases in allowances for loan losses, restructuring charges, other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on your financial statements?
- Have COVID-19-related circumstances such as remote work arrangements adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures? If so, what changes in your controls have occurred during the current period that materially affect or are reasonably likely to materially affect your internal control over financial reporting? What challenges do you anticipate in your ability to maintain these systems and controls?
- Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so? Do you face any material resource constraints in implementing these plans?
- Do you expect COVID-19 to materially affect the demand for your products or services?

- Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?

Insider Trading. The SEC Disclosure Guidance reminds companies to consider whether COVID-19 has affected the company in a way or the company has become aware of a risk, in either case that is material to investors. In such circumstances, the company should consider limiting trading by insiders until such information has been broadly disseminated to the market.

Reporting of Earnings and Financial Results. The SEC Disclosure Guidance also provides certain additional recommendations, including:

- that, to the extent material, companies release financial results in advance of the issuance of a financial report or earnings release;
- consulting with experts well in advance to assess the impact of COVID-19, including on any fair value or goodwill analyses;
- being mindful of the disclosure requirements for non-GAAP financial measures that may adjust for the impact of the pandemic; and
- assessing whether existing disclosures or estimates require amendment or updating.

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