ROPES & GRAY

CORONAVIRUS INFORMATION & UPDATES

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SEC Extends Conditional Regulatory Relief for Companies Affected by COVID-19, and SEC Staff Issues COVID-19 Disclosure Guidance

The SEC and its staff continue to monitor the impact of COVID-19 on companies and have provided targeted regulatory relief in light of evolving circumstances. On March 25, 2020, the SEC extended its conditional regulatory relief to public companies affected by the COVID-19 pandemic. In addition, the SEC's Division of Corporation Finance issued guidance on disclosure and other securities law obligations companies should consider with respect to COVID-19 and related business and market disruptions. This Alert discusses the SEC's new exemptive order and summarizes key aspects of the staff's guidance.

March 25th Order

Under the SEC's March 25th exemptive order, public companies that are unable to meet a reporting deadline due to circumstances related to COVID-19 will have an additional 45 days to file certain Exchange Act reports (e.g., Forms 10-K, 10-Q, 20-F, and 8-K) and any amendments thereto that would otherwise have been due between March 1 and July 1, 2020.[1] The order supersedes the SEC's March 4th exemptive order (which we described in this previous Ropes & Gray Alert).

The March 25th order did not substantively change the conditions for relief. A company must furnish a Form 8-K or Form 6-K (for foreign private issuers) for each filing that is delayed and include an explanation of why the company is unable to meet the deadline. As a result, companies seeking to rely on this relief must furnish a Form 8-K or Form 6-K by the original filing deadline of the report that includes:

- a statement that it is relying on the order;
- a brief description of the reasons why it could not file such report, schedule or form on a timely basis;
- the estimated date by which the report, schedule or form is expected to be filed;
- company-specific risk factor disclosure explaining the impact, if material, of COVID-19 on the company's business; and
- an exhibit signed by any person, other than the company, stating the specific reasons why such person is unable to furnish any required opinion, report or certification, if the inability to furnish such required opinion, report or certification is the reason why the subject report cannot be timely filed.

[1] By its terms, the exemptive order does not apply to Form SD filings since those are required to be made pursuant to Exchange Act Section 13(p) and Rule 13p-1.

In addition, a company must file the report, schedule or form no later than 45 days after the original due date, and such filing must disclose that the company is relying on the order and provide the reasons why the report, schedule or form was not timely filed.

The March 25th order also continues to provide relief to companies that are furnishing proxy statements, annual reports and other soliciting materials to stockholders that are located in an area where, as a result of COVID-19, mail delivery service has been suspended.

The SEC may provide extensions to the time period for relief, with any additional conditions it deems appropriate, or provide additional relief as circumstances warrant.

Disclosure Guidance

The Division of Corporation Finance also issued Disclosure Guidance Topic No. 9, providing the staff's current views regarding disclosure and other securities law obligations that companies should consider with respect to COVID-19 and related business and market disruptions.

The guidance encourages timely reporting while recognizing that it may be difficult to assess or predict with precision the broad effects of COVID-19 on industries or individual companies.

Companies should consider COVID-19-related disclosures within the context of the federal securities laws and its principles-based disclosure system. A number of existing disclosure rules require disclosure regarding known or reasonably likely effects of, and the types of risks presented by, COVID-19. As a result, disclosure of COVID-19 risks and related effects may be necessary or appropriate in MD&A, the business section, risk factors, legal proceedings, disclosure controls and procedures, internal control over financial reporting, and financial statements.

Assessing and Disclosing the Evolving Impact of COVID-19

The guidance contains an illustrative (but not exhaustive) list of questions that companies should review when assessing the effects of COVID-19 and considering disclosure obligations. These questions are reproduced on Annex A. Companies should avoid boilerplate disclosure and seek to tailor information to permit investors to understand management's evaluation of the current and expected impact of COVID-19. In addition, companies should proactively revise and update disclosure as facts and circumstances change. The staff also reminded companies of applicable safe harbors for forward-looking information.

Trading Restrictions

The staff reminded companies to consider their market activities, including the issuance or purchase of securities, in light of their disclosure obligations under the federal securities laws. For example, where COVID-19 has affected a company in a way, or where a company has become aware of a risk related to COVID-19, that would be material to investors, the staff has advised that such a company, its directors and officers should refrain from trading in the company's securities until such information is disclosed to investors. Companies must also disclose any material information in a Regulation FD-compliant manner.

Earnings Guidance and Financial Results

Engage with Auditors and Experts Early. The guidance encourages companies to address proactively financial reporting matters earlier than usual as the ongoing and evolving COVID-19 impact will likely present novel and complex accounting issues that, depending on the particular facts and circumstances, may take time to resolve. To the extent a company or its auditors will need to consult with experts to determine how the evolving COVID-19 situation may impact assets, including impairment of goodwill, engaging with those experts as promptly as possible would be prudent.

Non-GAAP Financial Measures. The guidance states that, to the extent a company presents a non-GAAP financial measure or performance metric to adjust for, or explain the impact of, COVID-19, it would be appropriate for the company to highlight why its management finds the measure or metric useful and how the measure or metric helps investors assess the impact of COVID-19 on the company's financial position and results of operations.

Where a GAAP financial measure is not available at the time of an earnings release because the measure may be impacted by COVID-19-related adjustments, the Division would not object to a company reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amount(s) based on a reasonable estimate or a range of reasonably estimable GAAP results. If a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures, the staff believes it should limit the measures in its presentation to those non-GAAP financial measures used in reporting financial results to the company's Board of Directors. The staff reminded companies that it is inappropriate for a company to present non-GAAP financial measures or metrics for the sole purpose of presenting a more favorable view of the company.

If a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures, it should explain, to the extent practicable, why the line item(s) or accounting is incomplete, and what additional information or analysis may be needed to complete the accounting. Companies should also continue to comply with all applicable SEC rules and guidance regarding the use of non-GAAP financial measures (e.g., non-GAAP financial measures should not be disclosed more prominently than the most directly comparable GAAP financial measure or range of GAAP measures).

In filings where GAAP financial statements are required, such as filings on Form 10-K or Form 10-Q, companies should reconcile to GAAP results and not include provisional amounts or a range of estimated results.

Key Performance Indicators. Companies that are considering the presentation of metrics related to COVID-19, or changing the method by which it calculates an existing metric due to COVID-19, should review the SEC's recent guidance on the use of metrics (which we summarized in this previous Ropes & Gray Alert).

Requests for Additional Assistance or Guidance Relating to COVID-19

In its press release, the SEC encouraged companies facing administrative difficulties in the filing process (e.g., inability to obtain a required signature due to an executive officer being located in a quarantined zone) to contact the staff. The staff also acknowledged that its guidance does not address all disclosure considerations relating to the impact of COVID-19 and encouraged companies to contact the staff with questions or if they believe there are additional areas where guidance or temporary relief may be necessary.

A day earlier, the staff also provided no-action relief to persons and entities experiencing COVID-19-related difficulties from complying with Rule 302(b) of Regulation S-T, which requires that each signatory to documents electronically filed with the SEC under the federal securities laws "manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing." In addition, on March 26, 2020, the SEC adopted a temporary final rule that provides relief through July 1, 2020 from the Form ID notarization requirement to parties seeking to gain access to EDGAR that are affected by COVID-19, subject to certain conditions.

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If you would like to learn more about the issues in this Alert, please contact your usual Ropes & Gray attorney.

ANNEX A

Questions for Companies to Consider When Assessing and Disclosing the Evolving Impact of COVID-19

- How has COVID-19 impacted your financial condition and results of operations? In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near-and-long-term financial condition? Do you expect that COVID-19 will impact future operations differently than how it affected the current period?
- 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, such as revolving credit facilities or other sources changed, or is it reasonably likely to change? Have your sources or uses of cash otherwise been materially impacted? Is there a material uncertainty about your ongoing ability to meet the covenants of your credit agreements? If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency? Consider the requirement to disclose known trends and uncertainties as it relates to your ability to service your debt or other financial obligations, access the debt markets, including commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, and counterparty or customer risk. Do you expect to disclose or incur any material COVID-19-related contingencies?
- 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 measured in accordance with U.S GAAP or IFRS?
- 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 credit 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?
- Do you anticipate a material adverse impact of COVID-19 on your supply chain or the methods used to distribute your products or services? Do you expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?
- Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?
- Are travel restrictions and border closures expected to have a material impact on your ability to operate and achieve your business goals?