

March 30, 2020

SEC Issues COVID-19 Disclosure Guidance and Extends Conditional Relief from Reporting Requirements

Staff Provides Guidance for Reporting on the Impact of the COVID-19 Crisis and Issues New Orders Extending Relief for Public Companies, Investment Funds and Investment Advisers

SUMMARY

On March 25, the SEC issued [new guidance](#) (“Disclosure Guidance Topic No. 9”) setting forth the Division of Corporation Finance’s views on disclosure and other securities law obligations that companies should consider with respect to the COVID-19 crisis and the related business and market disruptions. Disclosure Guidance Topic No. 9 encourages public companies to report on the impact of COVID-19 on their businesses, financial condition and results of operations in a timely manner, while acknowledging that many companies are facing operational and other challenges and emphasizing that health and safety should not be compromised in order to meet reporting requirements.

On the same day, the SEC also extended the scope of the conditional relief it announced [earlier](#) in the month. Under the extension, public companies, investment funds and investment advisers meeting certain conditions may qualify for relief from some of the requirements under the Securities Exchange Act of 1934 (the “Exchange Act”), the Investment Advisers Act of 1940 (the “Investment Advisers Act”) and the Investment Company Act of 1940 (the “Investment Company Act”). Among other things, public companies that are unable to meet a filing deadline due to the COVID-19 crisis may receive a 45-day extension on Exchange Act reports due between March 1 and July 1, 2020 (as compared to the original March 1 to April 30, 2020 period under the SEC’s March 4 order).

ASSESSING AND DISCLOSING THE IMPACT OF COVID-19

Disclosure Guidance Topic No. 9 addresses how companies should assess and disclose the evolving impact of COVID-19, and confirms that such an assessment will be a facts-and-circumstances analysis for each company. The SEC acknowledges that it may be difficult to assess or predict the broad effects of COVID-19 on industries or companies, and that the actual impact will depend on factors beyond a company's control and knowledge at this stage. Nevertheless, the current and anticipated effects of COVID-19, as well as a company's response to evolving events and planning around COVID-19-related uncertainties, may be material to investment and voting decisions.

Accordingly, Disclosure Guidance Topic No. 9 encourages companies to provide disclosure that will help investors evaluate the current and expected impact of COVID-19 through the eyes of management and to proactively revise and update disclosure as facts and circumstances change. To that end, the SEC's guidance provides a series of questions for companies to consider as they assess COVID-19-related effects and their disclosure obligations:

- 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?

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- 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?

The Division of Corporation Finance does not intend this list to be exhaustive, and individual companies will need to assess carefully COVID-19's impact and their related disclosure obligations.

Disclosure addressing these questions may involve forward-looking information based on assumptions and expectations of future events, and companies may be able to avail themselves of the safe harbors in Section 27A of the Securities Act of 1933 and Section 21E of the Exchange Act in connection with these disclosures.

NO TRADING OR SELECTIVE DISCLOSURE PRIOR TO THE DISSEMINATION OF MATERIAL NON-PUBLIC INFORMATION

As they have [emphasized](#) throughout this crisis, the SEC is focused on maintaining market integrity despite the impact of COVID-19. Consistent with this theme, Disclosure Guidance Topic No. 9 also encourages companies and other related persons to consider their market activities, such as the issuance, sale and repurchase of securities, in light of their obligations under the federal securities laws to refrain from trading on the basis of material non-public information. Specifically, companies are reminded that if they have been materially affected by COVID-19, or become aware of a risk related to COVID-19 that would be material to investors, the company, its directors, officers and other corporate insiders with knowledge of these matters may not trade in the company's securities until such information is disclosed to the public. In addition, the new guidance reminds companies to take the necessary steps to avoid selective disclosures when disclosing material information related to the impacts of COVID-19 by disseminating the information broadly to the public as required by Regulation FD. We expect that the SEC Staff will be much less accommodating to companies and individuals in connection with any trading activities conducted during the COVID-19 crisis.

EARNINGS AND FINANCIAL RESULTS

Disclosure Guidance Topic No. 9 also addresses the impact of COVID-19 on earnings estimates and other financial results companies may choose to release in advance of finalizing their required financial reporting,

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as the impact on businesses may present a number of novel or complex accounting issues that may take time to resolve. As a result, the SEC encourages companies to address reporting matters earlier than usual, recognizing it may be more difficult and take longer for companies and their auditors to complete the work required for timely filings.

The guidance also reminds companies to consider their obligations under Item 10 of Regulation S-K and Regulation G with respect to non-GAAP financial measures, as well as the SEC's recently issued guidance on performance metrics. Accordingly, if a company presents a non-GAAP financial measure or performance metric to adjust for or to explain the impact of COVID-19, it should also disclose why management finds the measure or metric useful, and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations.

In instances where a GAAP financial measure is not available at the time of the earnings release because of COVID-19-related adjustments, the SEC states that it would not object to companies reconciling 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 its EBITDA on an earnings call, the SEC will permit it to reconcile EBITDA 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. The provisional amount or range should reflect a reasonable estimate of COVID-19-related charges not yet finalized, such as impairment charges. However, the guidance emphasizes that non-GAAP financial measures should not be disclosed more prominently than the most directly comparable GAAP financial measures (including preliminary GAAP results) or range of GAAP measures. In reports on Form 10-K or 10-Q or other filings where final (rather than preliminary) GAAP financial statements are required, non-GAAP financial measures must be reconciled to actual GAAP results.

Furthermore, if a company does present non-GAAP financial measures reconciled to provisional amounts or an estimated range of GAAP financial measures, it should limit those measures to the non-GAAP financial measures it is using to report financial results to its board of directors. The guidance notes that, as always, non-GAAP financial measures and performance metrics should be used to disclose and analyze the current and potential impact of COVID-19 on the company's financial condition and operating results through the eyes of management and the board of directors, and *not* for the purpose of presenting a more favorable view of the company.

Finally on non-GAAP financial measures, companies are reminded that their audit committees should be actively engaged in the review and presentation of non-GAAP financial measures, including any changes in the presentation of non-GAAP financial measures in accordance with Disclosure Guidance Topic No. 9.

45-DAY EXTENSION ON EXCHANGE ACT FILING DEADLINES BETWEEN MARCH 1 AND JULY 1, 2020

Under a previous order issued on March 4, the SEC extended the deadline for public companies to file certain annual and periodic reports, or disclosures with respect to the solicitation of proxies, as required under the Exchange Act. For reports with filing deadlines between March 1 and April 30, 2020, the SEC allows companies to file late if they:

- are unable to meet a filing deadline due to circumstances related to COVID-19;
- by the later of March 16, 2020 or the original filing deadline for the report, file with the SEC on a Form 8-K, or 6-K if eligible, a report stating (1) that they are relying on the order, (2) a brief description of why they cannot file on a timely basis, (3) the estimated date of when the report is expected to be filed, (4) a risk factor, if appropriate, explaining the impact of COVID-19 on the business, and (5) if the delay is due to the inability of a person to provide an opinion, report or certification, a statement by such person stating why they are unable to do so;
- file the required report within 45 days of the original due date; and
- in any late-filed report, disclose that the company is relying on the order and state the reasons why the company could not file the report on a timely basis.

On March 25, the SEC issued an [order](#) superseding the March 4 order and expanding the availability of this 45-day extension to Exchange Act reports that are required to be filed between March 1 and July 1, 2020. The above-mentioned conditions must still be met in order for a company to qualify for the extension.

In addition, the SEC staff have verbally informed us that they interpret the requirement of the order that the Form 8-K or 6-K be filed by the original filing deadline strictly, so that it does not apply to a filing made during the 15-day period provided by Rule 12b-25 under the Exchange Act. Accordingly, an issuer that has filed a Form 12b-25 in connection with the late filing of a report, but who did not file the Form 8-K or 6-K prior to the original deadline, will not qualify for the extension provided by the order even if it files the required Form 8-K or 6-K during the 15-day period provided by Rule 12b-25 indicating that it is unable to file its report before the expiration of that 15-day period for reasons related to COVID-19.

Although the SEC may permit late filing, companies should also review their agreements and other obligations, particularly debt covenants, to ensure they do not impose independent deadlines.

INVESTMENT FUND AND INVESTMENT ADVISER SPECIFIC RELIEF

The SEC issued two [new orders](#) on March 25 extending its previously announced relief for investment companies and investment advisers. On March 13, the SEC issued orders that, for the purposes of the Investment Company Act and the Investment Advisers Act:

- exempt registered management investment companies and business development companies (“BDCs”) from the requirement that certain votes of the board of directors be cast in person until June 15, 2020 provided that (1) reliance on the order is necessary or appropriate due to the effects

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of COVID-19; (2) the votes are cast at a meeting in which directors participating remotely may hear each other simultaneously; and (3) the board of directors, including a majority of the disinterested directors, ratifies the action taken by a vote cast at the next in-person meeting;

- exempt closed-end funds and BDCs from the requirement to file a notice of intention to call or redeem securities at least 30 days before such transaction, if certain conditions are met, until June 15, 2020;
- extend the deadlines for registered funds to file reports on Form N-CEN and N-PORT under the Investment Company Act for reports due on or before April 30, 2020, provided that a registered fund relying on the order (1) is unable to timely transmit the report due to the effects of COVID-19; (2) promptly notifies the SEC staff by email stating that it is relying on the order, and provides a brief description of why it cannot file on a timely basis and an estimated date of filing; (3) includes a statement on its website, and in the report on Form N-CEN or N-PORT, stating that it is relying on the order and why it cannot file the report on a timely basis; and (4) files the report as soon as practicable, but not later than 45 days after the original due date;
- extend the deadlines for registered management investment companies and registered unit investment trusts to file annual and semiannual reports to investors and unitholders under the Investment Company Act for reports due on or before April 30, 2020, provided that an entity relying on the order (1) is unable to timely transmit the report due to the effects of COVID-19; (2) notifies the SEC staff by email stating that it is relying on the order, and includes a brief description of why it cannot file on a timely basis and an estimated date of filing; (3) includes a statement on its website stating that it is relying on the order and why it could not file the report on a timely basis; and (4) files the report as soon as practicable, but not later than 45 days after the original due date; and
- extend the deadline for exempt reporting advisers to file reports on Form ADV, and for registered investment advisers to file amendments to Form ADV, deliver required disclosure to clients, and file Form PF under the Investment Advisers Act for reports, amendments or disclosures due on or before April 30, 2020, provided that an adviser relying on the order (1) is unable to meet a filing deadline or delivery requirement due to the effects of COVID-19; (2) notifies the SEC staff by email, and provides a statement on its website, stating that it is relying on the order, a brief description of why it cannot file or deliver on a timely basis, and an estimated date of filing or delivery; and (3) makes the filing or delivers the required materials as soon as practicable, but not later than 45 days after the original due date.

Under the March 25 orders, registered management investment companies and BDCs that can satisfy the applicable requirements set forth above are now exempt, until August 15, 2020, from the requirements to hold certain in-person votes of the board and to file notices of intention to call or redeem securities 30 days before a transaction. The 45-day extension to the deadline to make certain filings or deliver certain materials under the Investment Company Act and the Investment Advisers Act now includes filings and disclosures due on or before June 30, 2020. The March 25 orders also removed the requirement that an investment adviser relying on the order post on its website, and include in its email correspondence with the SEC staff, as applicable, why it was unable to meet the filing deadline or delivery requirements and an estimated date of filing or delivery in order to rely upon the relief.

In its March 13 orders, the SEC also stated that, until April 30, 2020, if a registered fund is not able to timely deliver a required prospectus to investors because of circumstances caused by COVID-19, such delay would not be considered a basis for an enforcement action, provided the fund:

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- notifies the Division of Investment Management (via email) that it is relying on the SEC's position, and includes in the notice a description of why it could not deliver the prospectus on a timely basis and the estimated date of delivery;
- publishes on its website that it intends to rely on the SEC's position and states why it could not deliver the prospectus on a timely basis;
- publishes its current prospectus on its website; and
- delivers the prospectus as soon as practicable, in any event no later than 45 days after the original deadline.

The March 25 orders extend the period during which the SEC would take the position that delay would not be considered a basis for an enforcement action until June 30, 2020. The March 25 orders also removed the requirement that a registered fund provide to the SEC staff a description of why it could not deliver the prospectus on a timely basis and an estimated date of delivery in order to rely on the SEC's position.

ADDITIONAL GUIDANCE / RELIEF

In its [press release](#) accompanying the new orders and Disclosure Guidance Topic No. 9, the SEC stated that it will “continue to closely track developments, and, if appropriate, consider additional relief from other regulatory requirements” for companies, accountants, investment advisers, mutual funds, brokerage firms, transfer agents, and other regulated entities and financial professionals that are affected by COVID-19, encouraging those entities and financial professionals to contact the Staff with questions or if they believe there are additional areas where guidance or temporary relief may be necessary.

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