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Legal Update

SEC Extends Conditional Reporting Relief and Issues COVID-19 Guidance for Public Companies

On March 25, 2020, the US Securities and Exchange Commission (SEC) extended the filing periods covered by its previous conditional reporting relief order for certain public company filing obligations impacted by COVID-19. At the same time, the SEC's Division of Corporation Finance (Division) issued guidance on disclosure considerations and other securities law obligations related to COVID-19.

SEC Exemptive Order for Public Companies

On March 25, 2020, the SEC issued a new exemptive order[1] (Public Company Order) under the Securities Exchange Act of 1934 (Exchange Act) to provide relief to public companies and persons required to make filings with respect to public companies. The Public Company Order superseded and extended the exemptive order that the SEC previously issued on March 4, 2020, and covers the period from March 1, 2020, to July 1, 2020.

Under the Public Company Order, any public company that is unable to timely make a filing due to COVID-19 is given extra time, provided that the company otherwise complies with the order's provisions. Any company relying on the Public Company Order must furnish to the SEC a current report on Form 8-K or, if a foreign private issuer, a Form 6-K no later than the original filing deadline for each filing that is delayed. This interim disclosure must state that the company is relying on the Public Company Order and briefly describe the reasons why the company could not file the report, schedule or form (Required Document) on a timely basis. In addition, the interim disclosure must state the estimated date by which the company expects to file the Required Document and include company-specific risk factors explaining the impact, if material, of COVID-19 on the company's business. If the Required Document cannot be filed on time because of the inability of a third person to furnish a necessary opinion, report or certification, the interim disclosure must attach as an exhibit a statement signed by such third person explaining the reason for the delay. The company or the person relying on the Public Company Order must file the Required Document with the SEC no later than 45 days after its original due date and must disclose in the Required Document that the Public Company Order is being relied on and the reasons why it could not be filed on a timely basis.

Any company complying with the provisions of the Public Company Order will be considered current and timely in its Exchange Act filing requirements for purposes of eligibility to use Form S-3 or Form F-3 (and for well-known seasoned issuer status), if it was current and timely as of the first day of the relief period and it files the Required Document that was due during the relief period within 45 days of its original filing deadline. A company relying on the Public Company Order will also be deemed to satisfy Form S-8 and Rule 144(c) requirements if it was current as of the first day of the relief period and it files the Required Document that was due during the relief period within 45 days of its original filing deadline. Companies will be permitted to rely on Rule 12b-25 if they are unable to file a Form 10-K or 10-Q, or comparable reports filed by a foreign private issuer, on or before the extended due date.

The Public Company Order also provides relief relating to the obligations under the SEC's proxy rules to furnish materials to security holders when mail delivery is not possible, as long as certain conditions are satisfied. For this exemption to apply, the security holder must have a mailing address located in an area where the common carrier has suspended delivery of service of the type or class usually used for the solicitation as a result of COVID-19, and the company or other person making the solicitation must have made a good faith effort to furnish the soliciting materials to the security holder.

Staff Guidance

Also on March 25, 2020, the Division issued CF Disclosure Guidance: Topic No. 9[2] (Guidance) to provide guidance on disclosure and other securities law obligations that companies should consider with respect to COVID-19. The Guidance recognized that it may be difficult for companies to assess or predict with precision the broad effects of COVID-19 and that its actual impact will depend on many factors beyond a company's control and knowledge. At the same time, the Guidance observed that "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 uncertainties can be material to investment and voting decisions."

The Guidance emphasized that under the SEC's principles-based disclosure framework, "disclosure requirements can apply to a broad range of evolving business risks even in the absence of a specific line item requirement that names the particular risk presented." As examples, the Guidance noted that COVID-19-related disclosures "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."

Assessing and Disclosing the Evolving Impact of COVID-19. To illustrate the types of impacts COVID-19 may have that could give rise to disclosure obligations, the Guidance included a non-exhaustive series of questions for companies to consider with respect both to their present and future obligations, including:

- How has COVID-19 impacted your financial condition and results of operations?
- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook?
- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets?
- Do you anticipate any material impairments, increases in allowances for credit losses, restructuring charges, other expenses or changes in accounting judgments?

- Have COVID-19-related circumstances such as remote work arrangements adversely affected your ability to maintain operations, including controls and procedures?
- Have you experienced challenges in implementing your business continuity plans, or do you foresee requiring material expenditures to do so?
- 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?
- 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 Guidance encouraged disclosure that is tailored to the company's business, providing material information about the impact of COVID-19 through the eyes of management. In addition, the Guidance encouraged companies to "proactively revise and update disclosures as facts and circumstances change." The Guidance noted that companies that they can present forward-looking information in a manner that would be covered by the safe harbors in Section 27A of the Securities Act of 1933 and Section 21E of the Exchange Act.

Trading Before Dissemination of Material Non-Public Information. The Guidance reminded companies and related persons that they need to consider their federal securities law obligations when issuing or trading in their company's securities. The Guidance emphasized that when companies, directors, officers and other corporate insiders are aware of material COVID-19 impacts or risks to their company that have not been publicly disclosed, they "should refrain from trading in the company's securities until such information is disclosed to the public."

In addition, the Guidance warned companies to avoid selective disclosures regarding the impact of COVID-19 by broadly disseminating such material information. According to the Guidance, companies should consider, depending on their particular circumstances, whether they "need to revisit, refresh, or update previous disclosure to the extent that the information becomes materially inaccurate."

Reporting Earnings and Financial Results. The Guidance also addressed earnings releases recognizing that the ongoing and evolving COVID-19 situation "may present a number of novel or complex accounting issues, that, depending on the particular facts and circumstances, may take time to resolve." Therefore, the Guidance encouraged companies to address financial reporting matters earlier than usual, consulting with experts as needed.

The Guidance also reminded companies of their obligations with respect to non-GAAP financial measures, including the SEC's recent guidance with respect to disclosure of key performance indicators and metrics.[3] For example, if 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 to highlight 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."

According to the Guidance, if a GAAP financial measure is not available at the time of the earnings release because COVID-19-related adjustments require additional information and analysis to complete, "the Division would not object to companies 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." The non-GAAP financial measure should not be disclosed more prominently than the most directly comparable GAAP financial measure or range of GAAP measures. However, for SEC filings, such as Form 10-K or Form 10-Q, where GAAP financial statements are required, companies should reconcile to GAAP results and not include provisional amounts or a range of estimated results.

The Guidance specified that in a circumstance where a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures, the company must only include non-GAAP financial measures that it uses to report financial results to its Board of Directors. According to the Guidance, companies should use non-GAAP financial measures and performance metrics "for the purpose of sharing with investors how management and the Board are analyzing the current and potential impact of COVID0-19 on the company's financial condition and operating results," and not for the purpose of presenting a more favorable view of the company. When reconciling non-GAAP financial measures to provisional amount(s) or an estimated range of GAAP financial measures, companies should explain to the extent practicable why the line item(s) or accounting is not complete and what additional information or analysis may be needed.

Practical Considerations

Investors and the SEC are likely to review any COVID-19 disclosure carefully. Therefore, public companies should start thinking now about upcoming COVID-19 disclosures in order to allow time for drafting and internal review of appropriate language. For example, it would be useful for companies to begin drafting more detailed risk factors relating to COVID-19 for inclusion in their next SEC filing for which risk factor disclosure is required or otherwise appropriate. Such disclosure should be specific and must be tailored to the specific impacts to the company's operations from the COVID-19 outbreak. Similarly, companies should also start preparing and discussing the COVID-19 disclosure in advance of their next SEC filing requiring a management's discussion and analysis section, as well as discussing potential accounting and financial reporting issues that COVID-19 may create.

As companies prepare to report their earnings, they should take into account the portion of the Guidance relating to non-GAAP financial measures, while also being mindful of the SEC's guidance in recent years regarding the limited and careful approach that companies must take when presenting non-GAAP financial measures. Companies should also consider whether it would be appropriate to revise or update any COVID-19-related disclosure.

Companies should coordinate their responses when responding to COVID-19 inquiries. It is important not to selectively disclose material non-public information to any investor. To the extent a company has material non-public information to disclose relating to COVID-19, that information should be disclosed in a Regulation FD compliant method. If there has been an inadvertent selective material disclosure regarding COVID-19, the company must promptly disseminate such information by a press release or a Form 8-K.

Because of the rapidly changing COVID-19 situation and related impacts on companies, it is especially important for companies to take into account all aspects of their business, including reaching out to business units that may not normally be part of their disclosure controls and procedures, to ascertain whether

anything is happening that could require disclosure.

Companies and related persons should take into account the Guidance's reminder that the SEC is concerned about trading on the basis of material non-public information regarding the impact of COVID-19.

The SEC has expressed its willingness to discuss on a case-by-case basis issues in complying with federal securities laws that may arise in connection with COVID-19, in addition to the ones addressed in the Public Company Order and the Guidance. Companies that have particular concerns should reach out to the SEC staff to discuss how to handle issues that may arise.

As the COVID-19 pandemic continues and governments and companies take additional precautionary measures that may impact businesses, more disclosure-related and filing or compliance issues may arise. Therefore, companies should monitor the SEC for any further developments.

The Public Company Order and Guidance are part of an evolving COVID-19 response that is moving across regulatory agencies. Please visit our website[4] to learn more. In addition, companies might find the SEC's COVID-19 Response webpage[5] to be a helpful resource.

For more information about the topics raised in this Legal Update, please contact the author Laura D. Richman, any of the following lawyers or any other member of our Corporate & Securities practice.

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Endnotes

[1] Available at https://www.sec.gov/rules/exorders/2020/34-88465.pdf.

[2] Available at https://www.sec.gov/corpfin/coronavirus-covid-19.

[3] See our Legal Update, "SEC Issues MD&A Guidance," dated February 4, 2020, available at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2020/02/sec-issues-mda-guidancev4.pdf.

[4] Available at https://www.mayerbrown.com/en/capabilities/key-issues/coronavirus-covid-19?tab=overview.

[5] Available at https://www.sec.gov/sec-coronavirus-covid-19-response.

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