

From the Public Company Advisory Group of Weil, Gotshal & Manges LLP

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SEC Allows an Additional 45 Days to File Form 10-Ks and Form 10-Qs Due to Coronavirus

Companies have a duty to ascertain and disclose the outbreak's impact on business and operations

By Adé Heyliger and Erika Kaneko

Yesterday, in recognition of the growing unpredictability of the coronavirus outbreak (COVID-19), the Securities and Exchange Commission (SEC) issued an Order granting companies affected by the coronavirus an additional 45 days to make certain SEC filings, such as Form 10-Ks and Form 10-Qs, that would otherwise have been due between March 1 and April 30, 2020. The Order also provides an exemption from the requirements to furnish to shareholders certain proxy and other soliciting materials when mail delivery has been suspended due to the coronavirus.

As we previously [wrote](#), the SEC stated in February that it would monitor disclosures relating to the coronavirus, and would provide guidance and assistance to issuers if needed. The SEC press release announcing the Order is available [here](#), and the Order is available [here](#).

Exchange Act Reports, Forms and Schedules

Pursuant to the Order, an SEC registrant, or any person required to make filings with respect to such a registrant, will be granted an additional 45 days from the original due date to file certain Exchange Act reports (including Form 10-Ks and Form 10-Qs), forms and schedules – *except* for Schedule 13D filings and amendments – provided that the following conditions are satisfied:

- The *registrant* or *person* must be unable to meet a filing deadline due to circumstances related to the coronavirus; and
- A *registrant* relying on the Order must furnish to the SEC a Form 8-K (or Form 6-K, as applicable) by the later of March 16, 2020 or the original filing deadline of the report, stating:
 - that it is relying on the Order;
 - a brief description of the reasons why the registrant could not file the report, schedule or form on a timely basis;
 - the estimated date by which the registrant expects to file the report, schedule or form (**no later than 45 days after the original due date**);
 - if appropriate, a risk factor explaining, if material, the impact of the coronavirus on the registrant's business; and
 - if the reason the report, schedule or form cannot be timely filed relates to the inability of any other person to furnish any required opinion, report or certification, the Form 8-K or Form 6-K will attach 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 on or before the original due date of the report.

- Furthermore, the *registrant* or *person* must disclose in the filed report, schedule or form that it is relying on the Order and state the reasons why it could not file such report, schedule or form on a timely basis.
- Note that companies that receive an extension on filing Form 10-Ks or Form 10-Qs pursuant to the Order would not need to file a Form 12b-25 so long as the Form 10-K or Form 10-Q is filed no later than 45 days after the original due date. However, companies will be permitted to rely on Rule 12b-25 if they are unable to file the required reports on or before the extended due date.

Proxy and Information Statements

Registrants are also exempt from the requirements to furnish to shareholders (i) proxy statements, annual reports and other soliciting materials (Soliciting Materials), and (ii) information statements and annual reports (Information Materials), provided that:

- The *shareholder* must have a mailing address located in an area where, as a result of the coronavirus, the common carrier has suspended delivery service of the type or class customarily used by the registrant or other person making the solicitation; and
- The *registrant* or other person making the solicitation has made a good faith effort to furnish the Soliciting Materials or Information Materials to the shareholder.

S-3 and S-8 Eligibility

In its press release, the SEC also stated that, for purposes of Form S-3 and Form S-8 eligibility, SEC staff will take the position that a company relying on the Order will be considered *current* and *timely* in its Exchange Act filing requirements if it was current and timely as of March 1, 2020 and it files any report due from March 1 to April 30, 2020 within 45 days of the filing deadline for such report.

As we previously [stated](#), and as echoed by SEC Chairman Jay Clayton in his remarks announcing the Order, companies have a duty to ascertain and disclose the outbreak's impact on their business and operations, if material, as well as plans for addressing any such material risks. In addition to the disclosures associated with the above relief, coronavirus-related disclosures may also be required in an affected company's business, risk factors, and MD&A sections of its SEC filings.

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