



Insights: Legal Alert

SEC Provides Relief from Due Dates for Certain Securities Filings

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On March 25, 2020, the SEC issued an order replacing its March 4, 2020 order granting exemptions for certain provisions of the Securities Exchange Act of 1934 ("Exchange Act") in response to challenges posed by the coronavirus pandemic. The March 25, 2020 order (the "Order") is effective From March 1, 2020 to July 1, 2020, and may be extended by the SEC if necessary.

Extension for Filing Forms 10-Q and 10-K

During the Order's effective period, registrants subject to the reporting requirements of Exchange Act Section 13(a) or 15(d) are exempt from requirements to file Form 10-Q and Form 10-K, among other filings, by the dates required. However, in order to avail itself of the Order's filing deadline extension, the registrant's failure to meet the original deadline must be due to circumstances related to COVID-19. In addition, registrants seeking to utilize the Order's extension period must file a Form 8-K (or Form 6-K, if eligible) with the SEC by the later of March 16 or the original filing deadline. Such Form 8-K must state:

- That the registrant is relying on the Order;
- A description of why the registrant is unable to meet the original deadline;
- The estimated date by which the filing is expected to be filed;
- Material, company-specific risk factors related to COVID-19; and
- If applicable, a signed written statement by a person unable to file a document, which document is necessary for the registrant's filing.

If a registrant complies with the above requirements, the filing must be made within 45 days of the original deadline, along with a statement that such late filing is made pursuant to the Order.

Furnishing of Proxy and Information Statements

The Order also exempts certain registrants from requirements to furnish proxy statements, among other soliciting and informative materials. In order to qualify for such exemption, the registrant must have made a good-faith effort to furnish the proxy statement, and the registrant's security holder must have a mailing address located where, as a result of COVID-19, the common carrier has suspended the type of delivery service

customarily used by the registrant to deliver proxy statements.

Division of Corporation Finance Disclosure Guidance

Concurrent with the Order, the SEC Division of Corporation Finance issued staff guidance on disclosure and other securities law obligations related to COVID-19 (the “Guidance”). As with all staff guidance, the SEC has not opined on the Guidance’s content, and the Guidance does not alter legal obligations.

The Guidance discusses various risks and circumstances that companies should consider disclosing. These items include, among others:

- How COVID-19 has affected the company’s financial condition and operations, the company’s financial resources and access to capital, and risks involving debt obligations,
- The effects of work-from-home policies, supply chain impacts, and the impacts of travel restrictions on the business,
- Any material impairments, credit losses increases or restructurings that could be material to a company’s financial statements
- Whether there have been or are expected to be challenges in implementing a company’s business continuity plans.

Companies need to assess the impact of COVID-19 on their business and tailor any disclosures to their business and information that would be materials to investors. The Guidance notes that these types of disclosures likely involve forward-looking statements, and the Division of Corporation Finance advises companies to be cognizant of the applicable safe harbors when making such statements. The Guidance also advises executives to refrain from trading in the company’s securities in contravention of insider trading laws before disseminating material, non-public information.

The Guidance also discusses the Division of Corporation Finance’s views on earnings releases. Specifically, the Guidance recognizes the potential difficulty to make timely financial reporting in light of the COVID-19 pandemic. The Guidance encourages companies to proactively engage financial experts and auditors to assess the COVID-19 pandemic’s effects on the company’s financials. A summary of key points follows:

- When using non-GAAP measures to explain the impact of COVID-19, management should explain how such measures would help investors assess the impact of the pandemic.
- In cases where a GAAP metric is not available at the time of the earnings release due to COVID-19, the Division of Corporation Finance “would not object to companies reconciling non-GAAP financial measures to preliminary GAAP results that either include provisional amounts based on a reasonable estimate, or a range of reasonably estimable GAAP results.”

If a company determines to present non-GAAP financial measures, the Guidance reminds companies that it is inappropriate to use non-GAAP financial measures for the sole purpose of presenting a more favorable view of the company’s financials, and to the extent a company presents non-GAAP financial measures that are

reconciled to provisional amounts or estimated ranges, companies should explain any additional information or analysis necessary to complete the accounting.

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