

Memorandum

SEC Issues Disclosure Guidance for Companies Affected by COVID-19 and Extends Conditional Exemptions From Reporting Requirements

March 27, 2020

On March 25, 2020, the staff of the SEC's Division of Corporation Finance ("Corp Fin") provided [guidance](#) to assist public companies with disclosure and other securities laws obligations with respect to the coronavirus disease 2019 ("COVID-19").

Additionally, the SEC issued a [modified order](#) (the "Modified Order") on March 25, 2020 that, subject to certain conditions, extends until July 1, 2020 the time period during which public companies may delay their SEC filings by up to 45 days from the original due date if unable to meet the due date as a result of circumstances relating to COVID-19. This extension enables companies with a December 31 fiscal year end to delay the filing of their first quarter 2020 Form 10-Q report if necessary due to the current crisis.

Disclosure Guidance

Corp Fin is encouraging timely reporting while recognizing the difficulties in assessing or predicting the broad effects of COVID-19 on industries or individual companies. Corp Fin's guidance notes that disclosure of the risks and COVID-19 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 the financial statements. Given most calendar year-end companies have already filed their Form 10-K for fiscal 2019, we would expect that some of this incremental disclosure will need to be disclosed in first quarter Form 10-Q's or in separate Form 8-K's filed concurrently with earnings releases or the launch of securities offerings.

In order to help companies assess their disclosure obligations Corp Fin offered a number of illustrative questions that public companies should consider, which touch on, among other factors, the following with respect to present and future operations:

- the impact of COVID-19 on the company's financial condition, results of operations, capital and financial resources, including overall liquidity position and outlook, balance sheet and ability to timely account for assets;
- any anticipated 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; and

- adverse effects on a company's ability to maintain operations (including financial reporting systems, internal control over financial reporting and disclosures controls and procedures), challenges implementing business continuity plans, demands for products or services and impact on supply chains.

The SEC's guidance also stresses the importance of refraining from trading prior to the dissemination of material non-public information related to COVID-19 and reminds companies to take the necessary steps to avoid selective disclosure in violation of Regulation FD.

Reporting Earnings and Financial Results

The Corp Fin guidance also acknowledges that public companies may be considering how to report the evolving impact of COVID-19 in their earnings releases in light of unexpected nonrecurring charges and expenses and prior to finalizing the required financial reporting for the relevant period. While reminding companies of their obligations with respect to non-GAAP financial measures under Item 10 of Regulation S-K and Regulation G, the guidance indicates that Corp Fin may be flexible in situations where a GAAP financial measure is not available at the time of the earnings release because the measure may be impacted by COVID-19 related adjustments that require additional information and analysis to complete. In these situations, Corp Fin has indicated that it 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.

For example, if a company intends to disclose EBITDA information in its earnings release or the related earnings call, Corp Fin would permit the company to reconcile that measure 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 guidance states that if a provisional amount or range is used, it should reflect a reasonable estimate of COVID-19 related charges not yet finalized, such as impairment charges.

In addition, if a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures, the guidance states that such measures should be limited to non-GAAP financial measures that are actually reported to the company's Board of Directors and that it would not be appropriate for a company to present new non-GAAP financial measures or metrics solely for the purpose of presenting the company's results in a more favorable light.

Finally, Corp Fin expects that companies may consider presenting new operating metrics related to COVID-19, or changing the method by which the company calculates a metric as a result of COVID-19. In these cases, Corp Fin has reminded companies of the principles it provided in its recent [guidance](#) related to key performance indicators and metrics in MD&A disclosure.

Modified Order for Reporting Deadlines

On March 25, 2020, the SEC issued the Modified Order that, subject to certain conditions, extends until July 1, 2020 the time period during which public companies may delay their SEC filings by up to 45 days from the original due date.

In order for a public company to utilize this relief for any filing, it must file a Form 8-K or, if eligible, a Form 6-K by the original due date stating:

- it is relying on the Modified Order;
- a brief description of the reasons why it could not file the report on a timely basis;
- the estimated date by which the report is expected to be filed;
- a company specific risk factor explaining the impact, if material, of COVID-19 on its business; and
- if the reason the report cannot be filed timely relates to the inability of any person, other than the registrant, to furnish any required opinion, report or certification, the Form 8-K or Form 6-K must attach as an exhibit a statement signed by such person stating the specific reasons why such person is unable to timely furnish the required opinion, report or certification.

When ultimately filed, the delayed report must also state that it has been filed on a delayed basis in reliance on the Modified Order.

In addition, the [press release](#) that accompanied the Modified Order indicated that the SEC will take the following positions with respect to certain obligations under the Securities Act and the Exchange Act:

- For purposes of eligibility to use Form S-3 or Form F-3 eligibility (and for WKSJ status), a company relying on the Modified Order will be considered current and timely in its Exchange Act filing requirements if it was current and timely as of the first day of the relief period and it files any report due during the relief period within 45 days of the filing deadline for the report.
- The above position will also apply for purposes of the current reporting requirements for Form S-8 eligibility and the current public information eligibility requirements of Rule 144(c).
- Companies relying on the Modified Order 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.

For further information regarding this memorandum, please contact one of the following:

NEW YORK CITY

Bradley P. Goldberg

+1-212-455-2064
bgoldberg@stblaw.com

Joseph H. Kaufman

+1-212-455-2948
jkaufman@stblaw.com

Karen Hsu Kelley

+1-212-455-2408
kkelley@stblaw.com

PALO ALTO

William B. Brentani

+1-650-251-5110
wbrentani@stblaw.com

WASHINGTON, D.C.

Joshua Ford Bonnie

+1-202-636-5804
jbonnie@stblaw.com

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.