

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

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SEC Staff Provides Public Companies with New Disclosure Guidance for COVID-19

SEC Extends Exemption Allowing for Delayed Filings of Form 10-Qs and Form 10-Ks

*By Howard Dicker, Adé
Heyliger and Erika Kaneko*

The Staff of the Securities and Exchange Commission (SEC) Division of Corporation Finance (Staff) issued [guidance](#) yesterday providing its views regarding disclosure and other securities law obligations companies should consider with respect to the coronavirus disease (COVID-19) and related business and market disruptions.

In addition, the Staff [announced](#) that it is extending the filing period deadlines covered by its previously enacted conditional reporting relief for certain public company filing obligations, and is also extending regulatory relief previously provided to funds and investment advisers, whose operations may be affected by COVID-19.

CF Disclosure Guidance: Topic No. 9

Guidance. The Staff noted in the [guidance](#) issued (Topic No. 9) that it is monitoring how companies are reporting the effects of COVID-19 on businesses' financial condition and results of operations. While the Staff recognizes that "the impact of COVID-19 on companies is evolving rapidly and its future effects are uncertain," nevertheless, the Staff noted that "timely, robust and complete information is essential to functioning markets," and 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 Staff also reiterated, as we have previously [stated](#), that existing disclosure rules could cover COVID-19-related disclosures to be included as necessary or appropriate in management's discussion and analysis (MD&A), the business section, risk factors, legal proceedings, disclosure controls and procedures, internal control over financial reporting, and the financial statements.

Potential COVID-19-Related Disclosure Topics. In Topic No. 9, the Staff provides an illustrative (but not exhaustive) list of questions for companies to consider as they assess the COVID-19-related effects and the overall economic outlook on their present and future operations, including:

- Financial Statements and Accounting
 - How has COVID-19 impacted financial condition and results of operations? In light of changing trends and the overall economic outlook, how is it expected to impact future results and near- and long-term financial condition? Is it expected to impact future operations differently than how it affected the current period?

- How has COVID-19 impacted capital and financial resources, including overall liquidity position, outlook, or sources and uses of cash? Has cost of/access to funding changed, or is it reasonably likely to change?
- How is COVID-19 expected to affect assets on the balance sheet and the company's ability to timely account for those assets (e.g., will there be changes to judgments underlying fair-value determinations)?
- Are 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 anticipated?
- Have COVID-19-related circumstances (such as remote work arrangements) adversely affected the company's ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures? If so, what changes in controls have occurred during the current period that materially affect or are reasonably likely to materially affect internal control over financial reporting? What challenges are anticipated in the company's ability to maintain these systems and controls?
- Operations
 - Has the company experienced challenges in implementing its business continuity plans, or does the company foresee requiring material expenditures to do so? Are there any material resource constraints in implementing these plans?
 - Does the company expect COVID-19 to materially affect demand for products and services?
 - Does the company anticipate a material adverse impact of COVID-19 on its supply chain or methods used to distribute products or services? Does the company expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?
 - Will operations be materially impacted by any constraints or other impacts on the company's human capital resources and productivity?
 - Are travel restrictions and border closures expected to have a material impact on the company's ability to operate and achieve the company's business goals?

Insider Trading. The Staff notes that where COVID-19 has affected a company in a way that would be material to investors, or where a company has become aware of a risk related to COVID-19 that would be material to investors, the company, its directors and officers, and other corporate insiders who are aware of such matters should refrain from trading in the company's securities until such information is disclosed to the public. The Staff further reminds companies to take necessary steps to avoid selective disclosures of material information.

These guidelines are consistent with a [statement](#) from the Co-Directors of the SEC's Division of Enforcement on March 23, 2020 regarding market integrity, urging public companies to "be mindful" of their obligations to keep material nonpublic information confidential and of established disclosure controls and procedures, insider trading prohibitions, codes of ethics, and Regulation FD and selective disclosure prohibitions.

The Co-Directors had noted that, "given these unique circumstances, a greater number of people may have access to material nonpublic information than in less challenging times." In these circumstances, we recommend that companies remind directors, officers, employees, consultants and other outside professionals of their obligations to comply with the federal securities laws.

Reporting Earnings and Financial Results. The Staff also encourages companies to proactively address financial reporting matters earlier than usual, in light of the ongoing and evolving impact of COVID-19, which may make it more challenging for companies and their auditors to complete the work required to maintain timely filings.

Non-GAAP Financial Measures to Explain the Impact of COVID-19. The Staff reminds companies of their obligations under Item 10 of Regulation S-K and Regulation G with respect to presenting non-GAAP financial measures, and the SEC's recent [guidance](#) on performance metrics disclosure. 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 should also 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.

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 may require additional information and analysis to complete, the Staff states 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.

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 in reliance on the above position, it should limit the measures in its presentation to those non-GAAP financial measures it is using to report financial results to the Board of Directors. Further, a company presenting such non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures, should explain, to the extent practicable, why the line item(s) or accounting is incomplete, and what additional information or analysis may be needed to complete the accounting.

Extended Exemptions from Reporting, Proxy Delivery and Filing Requirements

Public Company Relief. The SEC issued an [Order](#) providing public companies affected by COVID-19 with (i) a 45-day extension (subject to certain conditions) to file certain disclosure reports that would otherwise have been due between March 1 and July 1, 2020, extended from the original April 30, 2020 timeframe, and (ii) 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. The March 25, 2020 Order supercedes and extends the Order issued on March 4, 2020, which we previously discussed [here](#).

Investment Fund and Adviser Relief. The SEC also issued Orders (available [here](#) and [here](#)) providing certain investment funds and investment advisers affected by COVID-19 with additional time with respect to holding in-person board meetings and meeting certain filing and delivery requirements. The March 25, 2020 Orders supercede and extend the Orders issued on March 13, 2020, which we previously discussed [here](#).

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Please contact any member of Weil’s Public Company Advisory Group or your regular contact at Weil, Gotshal & Manges LLP:

Howard B. Dicker	View Bio	howard.dicker@weil.com	+1 212 310 8858
Catherine T. Dixon	View Bio	cathy.dixon@weil.com	+1 202 682 7147
Lyuba Goltser	View Bio	lyuba.goltser@weil.com	+1 212 310 8048
Adé K. Heyliger	View Bio	ade.heylinger@weil.com	+1 202 682 7095
P.J. Himelfarb	View Bio	pj.himelfarb@weil.com	+1 202 682 7208
Ellen J. Odoner	View Bio	ellen.odoner@weil.com	+1 212 310 8438
Alicia Alterbaum	View Bio	alicia.alterbaum@weil.com	+1 212 310 8207
Kaitlin Descovich*	View Bio	kaitlin.descovich@weil.com	+1 202 310 8103
Andrew Holt	View Bio	andrew.holt@weil.com	+1 212 310 8807
Erika Kaneko	View Bio	erika.kaneko@weil.com	+1 212 310 8434
Elisabeth McMorris	View Bio	elisabeth.mcmorris@weil.com	+1 212 310 8523
Evan Mendelsohn	View Bio	evan.mendelsohn@weil.com	+1 212 310 8678
Aabha Sharma	View Bio	aabha.sharma@weil.com	+1 212 310 8569

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*Not Yet Admitted in D.C.