

Covid-19 coronavirus – SEC public company disclosure considerations

April 2020

The Covid-19 virus and the global efforts to control its spread have created unprecedented effects on our economy and great uncertainty as to what the future holds. Notwithstanding the “fog of war”, US public companies and other companies with SEC reporting obligations (including foreign private issuers with US listings) have an obligation to ensure the accuracy and completeness of their public disclosures. The SEC and its staff have issued guidance (and some limited regulatory relief) intended to help issuers comply with their reporting obligations in the current environment. We summarize this guidance and relief below.

Public Company Relief

A. SEC Order Granting Relief from Specified Provisions of the Exchange Act and Certain Rules Thereunder

On March 25, 2020, in response to the ongoing effects of Covid-19, the SEC issued an [order](#) that, subject to certain conditions, provides public companies with a 45-day extension to furnish or file certain disclosure reports that would otherwise have been due between March 1 and July 1, 2020. Among other conditions, a company must continue to furnish via current report a summary of why the relief is needed in the company’s particular circumstances for any periodic report that is delayed.

Public Company Disclosure Guidance

B. Division of Corporation Finance Disclosure Topic No. 9

On March 25, 2020, the Division of Corporation Finance issued [Disclosure Guidance Topic No. 9](#), providing the staff’s current views regarding disclosure and other securities law obligations that companies should consider with respect to Covid-19 and related business and market disruptions. The Division has been monitoring how companies are reporting the effects and risks of Covid-19 on their businesses, financial condition, and results of operations, and provided the guidance as companies prepare disclosure documents during this uncertain time. The guidance encourages timely reporting while recognizing that it may be difficult to assess or predict with precision the broad effects of Covid-19 on industries or individual companies.

Additional Public Company Disclosure Considerations

C. Statement on the Importance of High-Quality Financial Reporting in Light of the Significant Impacts of Covid-19

On April 3, 2020, SEC Chief Accountant, Sagar Teotia, released a [public statement](#) on the importance of high-quality financial reporting in light of the significant impacts of Covid-19.

D. The Importance of Disclosure – For Investors, Markets and Our Fight Against Covid-19

On April 8, 2020, SEC Chairman, Jay Clayton, and the Director of the Division of Corporation Finance, William Hinman, released a joint [public statement](#) that addresses the need for public companies to continue to provide detailed disclosure, and particularly forward-looking disclosure, in the context of the enormous policy question we are facing regarding maintaining health and safety as a primary priority while reviving the economy.

While certain aspects of this alert are primarily directed at US public companies, many aspects addressed are also relevant for any companies facing Covid-19-related challenges meeting disclosure obligations under US federal securities laws, including foreign private issuers with securities listed on US securities exchanges.

These recent disclosure developments are part of the broader [response effort](#) of the SEC, its Chairman, Divisions, Offices and Staff in connection with monitoring the impact of issues raised by Covid-19.

A. Order Granting Relief from Specified Provisions of the Exchange Act and Certain Rules Thereunder

Conditions for Relief

The March 25 order provides that registrants (and other persons required to make a filing with respect to such registrant) may file certain reports, noted below, that otherwise would have been due between March 1 and July 1, 2020 no later than 45 days after the original due date, provided that:

- The company (or other person) is unable to meet a filing deadline due to circumstances related to Covid-19;
- The company furnishes a Form 8-K (or Form 6-K) for each affected filing, which must include:
 - a statement that the company is relying on the SEC order;
 - a brief description of the reasons why it could not file the report on a timely basis;
 - the estimated date by which it expects to file the report;
 - a company-specific risk factor or factors explaining, if material, the impact of Covid-19 on its business; and
 - if the reason the filing is delayed relates to the inability of a person other than the company, to furnish a required opinion, report or certification, attach as an exhibit a statement signed by that person stating the specific reasons for this inability;
- The Form 8-K (or Form 6-K) must be filed by the later of March 16th or the original filing deadline of the report; and
- The report that is the subject of the exemption must disclose in the filing that it is relying on the SEC order and state the reasons why the company could not file it on a timely basis.

The relief applies to reports required to be filed under Securities Exchange Act of 1934 Sections 13(a), 13(f), 13(g), 14(a), 14(c), 14(f), and 15(d); Regulations 13A, Regulation 13D-G (except for provisions mandating the filing or amendment of Schedule 13D), 14A, 14C and 15D; and Exchange Act Rules 13f-1 and 14f-1. This includes, among others, Forms 10-K, 10-Q and 20-F.

The order does not extend the deadline for filings required pursuant to Section 16 (i.e., reports on Forms 3, 4 and 5).

Notwithstanding this available relief, the Division of Corporation Finance Disclosure Topic No. 9 encourages companies to file their reports in a timely manner if possible.

Subject to compliance with certain specified conditions, the order also provides relief from requirements to furnish and deliver proxy statements, annual reports and other soliciting material in circumstances involving mail delivery service suspension as a result of Covid-19.

B. Division of Corporation Finance Disclosure Topic No. 9

In connection with the regulatory relief described above, the staff of the SEC's Division of Corporation Finance published guidance on how companies should fulfill their obligation to disclose material changes to their businesses, financial condition, and results of operations in the context of the unprecedented circumstances of Covid-19, including related business and market disruptions. Acknowledging the challenge of assessing and predicting the evolving effects of Covid-19 and related risks on industries or individual companies, the guidance advises companies to consider their disclosure obligations in light of how company management is responding to evolving events and planning for Covid-19-related uncertainties. The guidance emphasizes the need to proactively revise and update disclosures as facts and circumstances change.

Assessment of Risk and Disclosure Considerations

As is common in other SEC disclosure contexts, the guidance highlights that assessing the evolving effects of Covid-19 will be a facts and circumstances analysis. Disclosure about these risks and effects, including how the company and management are responding to them, should be specific to a company's situation. As companies consider their disclosure obligations, illustrative aspects to consider with respect to present and future operations include Covid-19-related effects with respect to:

- Financial condition and results of operation;

- Capital and financial resources, including liquidity position and outlook;
- Assets on the balance sheet and ability to timely account for those assets;
- Material impairments, increases in allowances for credit losses, restructuring charges, other expenses, or changes in accounting judgments;
- Ability to maintain operations, systems and controls, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures;
- Challenges in implementing business continuity plans;
- Impact on demand for products or services;
- Impact on supply chain or distribution;
- Impact on human capital resources and productivity; and
- Impact of travel restrictions and border closures on operations and ability to achieve business goals.

The guidance includes a helpful set of illustrative questions that companies should consider as they assess the current and expected impact of Covid-19.

The guidance also highlights that forward-looking information, including known trends or circumstances, may be undertaken by a company in a way to avail itself of the statutory safe harbors for this information.

Dissemination of Material Covid-19 Information

The guidance highlights a few reminders for companies, including the following points:

- *Companies and other related persons need to consider their market activities, including the issuance or purchase of securities, in light of their obligations under the federal securities laws.* For example, 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, corporate insiders should refrain from trading in the company's securities until such material non-public information is disclosed to the public.
- *Avoid selective disclosure.* When companies disclose material information related to the impacts of Covid-19, they are reminded to take the necessary steps to avoid selective disclosures by disseminating such information broadly to the public. The guidance highlights that depending on a company's particular circumstances, it should consider whether it may need to revisit, refresh, or update previous disclosure.

Reporting Earnings and Financial Results

In recognition that the impact of Covid-19 on a company's earnings and financial results may be complex and evolving, the guidance addresses certain considerations to assist companies in reporting earnings and financial results.

Use of preliminary GAAP measures. In earnings releases, companies may present reconciliations of a non-GAAP financial measure to preliminary GAAP measures, where a final GAAP financial measure is not available at the time of an earnings release because the measure may be impacted by Covid-19-related adjustments that may require additional information and analysis to complete.

- Preliminary GAAP measures may include either provisional amount(s) based on a reasonable estimate, or a range of reasonable estimates.
- If a company presents non-GAAP financial measures that are reconciled to preliminary GAAP measures:

- 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; and
 - it 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.
- In filings where GAAP financial statements are required, such as filings on Form 10-K or 10-Q, companies should not use preliminary GAAP measures.

Presentations of financial measures adjusted for the impact of Covid-19 must comply with existing requirements for presentation of non-GAAP financial measures and SEC guidance with respect to performance metrics disclosure.

Usefulness to investors. The guidance highlights that to the extent 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.

C. Statement on the Importance of High-Quality Financial Reporting in Light of the Significant Impacts of Covid-19

On April 3, 2020, the SEC's Chief Accountant, Sagar Teotia, released a public statement on the importance of high-quality financial reporting in light of the unprecedented impacts of Covid-19. The statement emphasizes that while the SEC's Office of the Chief Accountant (OCA) recognizes the challenges for companies and their auditors in an environment of uncertainty as a result of Covid-19, OCA expects all participants in the financial reporting system to continue to provide investors with high-quality financial information. The statement acknowledges that the accounting and financial reporting implications of Covid-19 may require companies to make significant judgments and estimates in many accounting areas, including but not limited to: fair value and impairment considerations, leases, debt modifications or restructurings, hedging, revenue recognition, income taxes, going concern, subsequent events, and adoption of new accounting standards.

In light of the significant judgments and estimates that companies likely will have to make in the challenging and uncertain Covid-19 environment, the statement notes that OCA has not "objected to well-reasoned judgments that entities have made, and ... will continue to apply this perspective." Note, however, that due to the heightened litigation and enforcement risk associated with the unprecedented environment of volatility and uncertainty of Covid-19, companies would be well advised to pay particular attention to the disclosure and applicable updates reflecting evolving circumstances.

D. Statement of Chairman Jay Clayton and Director of the Division of Corporation Finance William Hinman

On April 8, 2020, SEC Chairman, Jay Clayton, and the Director of the Division of Corporation Finance, William Hinman, released a joint public statement that addresses the need for public companies to continue to provide detailed disclosure, and particularly forward-looking disclosure, in the context of the enormous policy question we are facing regarding maintaining health and safety as a primary priority while reviving the economy.

Company disclosures should reflect the evolving state of affairs and outlook and, in particular, respond to investor interest in:

- where the company stands today, operationally and financially;
- how the company's Covid-19 response, including its efforts to protect the health and well-being of its workforce and its customers, is progressing, and
- how its operations and financial condition may change as efforts to fight Covid-19 progress.

The statement acknowledges that providing detailed information regarding future operating conditions and resource needs is challenging, including because response strategies are in their incipient stages (and are likely to change). The statement notes that updating and refining these estimates should become less difficult over time and that high quality disclosure will not only provide benefits to investors and companies, it also will enhance valuable communication and coordination across our economy.

The statement urges public companies, in their earnings releases and analyst calls, as well as in subsequent communications to the marketplace, to provide as much information as is practicable regarding their current operating status and their future operating plans. Among others, the statement encourages company disclosures to include:

- Detailed discussions of current liquidity positions and expected financial resource needs;
- Beyond the income statement and the balance sheet effects, Covid-19 impact on operations, including as a result of company efforts to protect worker health and well-being and customer safety. The impact of company actions and policies in this area may be of material interest to investors; and
- Receipt of financial assistance under the CARES Act or other similar Covid-19-related federal and state programs. Such assistance may take various forms and is intended to mitigate Covid-19 effects for companies and their workers. If these or other types of financial assistance have materially affected, or are reasonably likely to have a material future effect upon, financial condition or results of operations, the affected companies should provide disclosure of the nature, amounts and effects of such assistance.

The statement acknowledges that such estimates may be based on a mix of assumptions, including assumptions regarding matters beyond the control of the company. For example, in the context of our current challenges, key drivers of future operational status and financial results—most notably, the time frames for current Covid-19 social distancing guidelines and other mitigation-related requirements—are not uniform and are likely to undergo material change.

The statement discourages public companies from resorting to generic, or boilerplate, disclosures that do little to inform investors of company-specific status, operational strategies and risks. Instead, the statement encourages companies and their advisers to make all reasonable efforts to convey meaningful information—information that provides investors a level of insight that allows them to see the key operational and financial considerations and challenges the company faces through the eyes of management.

The statement urges companies to strive to provide, and update and supplement, as much forward-looking information as is practicable, noting three primary considerations:

- Benefit of information to investors – the more investors know about how management is assessing, planning for, and taking steps to address, the effects of Covid-19, the better investment decisions investors are equipped to make;
- Benefit to the company of market digestion – increased confidence of investors (and the markets more generally) that a company has a well thought out and executable strategy for addressing the effects of Covid-19, may impact the willingness of investors to provide credit and other financing to the company; and
- Benefit of broad dissemination and exchange of firm-specific plans for addressing the effects of Covid-19 under various scenarios to the collective effort to fight and recover from Covid-19.

The statement encourages public companies making such forward-looking disclosure to avail themselves of the safe-harbors for forward-looking statements, and notes that given the uncertainty in the current business environment, the Chairman and the Director of the Division of Corporation Finance would not expect to second guess good faith attempts to provide investors and other market participants appropriately framed forward-looking information.

While the statement represents the views of the Chairman and the Director of the Division, it is not a rule, regulation or statement of the SEC.

Public companies should be considering proactively, together with their auditors and counsel, where appropriate, how to report the evolving impact of Covid-19 and the novel or complex disclosure and accounting issues that, depending on the particular facts and circumstances, may take time to resolve.

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