

COVID-19 NEWS OF INTEREST

# SEC Issues COVID-19 Disclosure Guidance

## SEC Also Extends Period for Delayed Filings Due to COVID-19

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### AUTHORS

**Jeffrey S. Hochman** | **Antonio Yanez, Jr.**

In light of the ongoing COVID-19 pandemic and the great uncertainty concerning its duration and impact, yesterday the SEC Division of Corporation Finance issued disclosure guidance reminding registrants of their related disclosure obligations under the federal securities laws.<sup>1</sup> The guidance, which reinforces the SEC's principles-based disclosure regime<sup>2</sup> in this context, emphasizes a reporting company's obligation to disclose information material to investors so that they can view the company, including both its historical results and future trends, "through the eyes of management" and make informed investment decisions.

The guidance suggests that disclosure of the risks presented by COVID-19 and related effects may be appropriate in a registrant's management's discussion and analysis ("MD&A"), business section, risk factors, legal proceedings, disclosure controls and procedures, internal control over financial reporting and financial statements. The guidance also acknowledges the unprecedented challenges companies are facing at this time and encourages companies to submit any questions or requests for further relief to the SEC staff for consideration.

<sup>1</sup> See SEC Division of Corporation Finance, CF Disclosure Guidance: Topic No. 9, Coronavirus (COVID-19) (March 25, 2020), available [here](#).

<sup>2</sup> For more information on recent SEC proposals and guidance related to principles-based disclosure, see our client memorandum *SEC Proposes MD&A Amendments that Continue Shift to Principles-Based Disclosure* (February 6, 2020), available [here](#).

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### **Assessing and Disclosing the Evolving Impact of COVID-19**

Particularly with circumstances changing rapidly, companies should carefully review and update the disclosures in their next periodic report, or earlier if they are providing updated guidance or other updated information. Changes are likely necessary to disclosures made in risk factors<sup>3</sup> and MD&A, and to the financial statements to the extent there may be impairments related to COVID-19. Importantly, disclosures should *not* be boilerplate; rather, the updated disclosure should be tailored to the company's particular facts and circumstances to better "allow investors to evaluate the current and expected impact of COVID-19" on the company's specific situation.

According to the SEC, questions that should be considered when reviewing and updating disclosures include:

- *Financial Condition and Results of Operations*
  - How has COVID-19 impacted your (historical) financial condition and results of operations?
  - In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near- and long-term financial condition?
  - Do you expect that COVID-19 will impact future operations differently than how it affected the current period?
- *Liquidity and Capital Resources*
  - How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook?
  - Has your cost of or access to capital and funding sources, such as revolving credit facilities or other sources, including from your current operations, changed, or is it reasonably likely to change?
  - Have your sources or uses of cash otherwise been materially impacted?
  - Is there a material uncertainty about your ongoing ability to meet the covenants of your credit agreements?
  - If a material liquidity deficiency has been identified, what course of action have you taken or proposed to take to remedy the deficiency?
  - Consider the requirement to disclose known trends and uncertainties as it relates to your ability to service your debt or other financial obligations, access the debt markets, including commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral and counterparty or customer risk.
  - Have you incurred, or do you expect to incur, any material COVID-19-related contingencies?

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<sup>3</sup> Note that Item 1A of Form 10-Q requires disclosure of material changes from the risk factors previously disclosed in the registrant's Form 10-K.

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- *Balance Sheet and Asset Valuations*
  - How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets? For example, will there be significant changes in judgments in determining the fair value of assets measured in accordance with GAAP?
  - Do you anticipate any material impairments (e.g., with respect to goodwill, intangible assets, long-lived assets, right of use assets or investment securities), increases in allowances for credit losses, restructuring charges or other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on your financial statements?
- *Business Operations and Controls*
  - Have COVID-19-related circumstances, such as remote work arrangements, adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures?
  - Have you experienced challenges in implementing your business continuity plans and do you foresee requiring material expenditures to do so? Do you face any material resource or other constraints in implementing these plans?
  - Do you expect COVID-19 to materially affect demand for your products or services?
  - Do you anticipate a material adverse impact of COVID-19 on your supply chain or the methods used to distribute your products or services?
  - Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?

While the required MD&A analysis is limited to **known** trends and uncertainties, the SEC notes that many of the considerations mentioned above “address forward-looking information that may be based upon assumptions or expectations regarding future events.” In encouraging registrants to provide more of this forward-looking information, the guidance reminds companies of the relevant safe harbors under the Securities Act and the Securities Exchange Act.

### **Trading and Regulation FD**

The guidance notes that where COVID-19 has impacted or created a risk for a company in a manner that would be material to investors, under Regulation FD, such information cannot be selectively disclosed. While in possession of such material non-public information, insiders should abstain from trading in the company’s securities until such information is publicly and broadly disclosed.

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### **Non-GAAP Financial Measures**

Since companies may be presenting non-GAAP financial measures adjusting for COVID-19-related matters, the guidance reminds registrants of their obligations under Item 10 of Regulation S-K and Regulation G. To the extent a company presents a non-GAAP financial measure to adjust for or explain the impact of COVID-19, it should explain why management finds the measure useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations.

The SEC recognizes that a corresponding GAAP financial measure may not be available at the time of a company's earnings release because the measure may be impacted by COVID-19-related adjustments that may require additional information to complete. In these situations, the SEC staff permits reconciling the non-GAAP financial measure to preliminary GAAP results that include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP results. In such situations, the registrant should limit the measures in its presentation to those non-GAAP financial measures it is using to report financial results to its board of directors.

### **Extension of Period For Delayed Filings Due to COVID-19**

Yesterday, the SEC issued an additional order<sup>4</sup> extending the exemptive period for filing SEC reports due through July 1, 2020 (from April 30, 2020 under the previous SEC order<sup>5</sup>) for registrants that are unable to timely file due to COVID-19-related circumstances. Registrants may avail themselves of this relief to take an additional 45 days to file the required report with the SEC by submitting a Form 8-K noting certain information, including the COVID-19-related reasons why they could not timely file such report and when such report is expected to be filed.

The order also repeats the earlier relief under the proxy rules regarding the delivery of proxy materials to shareholders where mail delivery is not possible. Registrants are exempt from furnishing proxy statements, annual reports and other soliciting materials where (a) the shareholder has a mailing address located in an area where, as a result of COVID-19, the common carrier has suspended delivery service, and (b) the registrant has made a good faith effort to furnish the materials to the shareholder.

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<sup>4</sup> See SEC Release No. 34-88465 (March 25, 2020), available [here](#).

<sup>5</sup> See SEC Release No. 34-88318 (March 4, 2020), available [here](#).

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Willkie has multidisciplinary teams working with clients to address COVID-19-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters. Please click [here](#) to access our publications addressing issues raised by COVID-19. For advice regarding COVID-19, please do not hesitate to reach out to your primary Willkie contacts.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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**Jeffrey S. Hochman**

212 728 8592

[jhochman@willkie.com](mailto:jhochman@willkie.com)

**Antonio Yanez, Jr.**

212 728 8725

[ayanez@willkie.com](mailto:ayanez@willkie.com)

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