

Goodwin Alerts

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SEC COVID-19 Disclosure Considerations and Exemptive Relief: Some FAQs

by John O. Newell

The Securities and Exchange Commission (SEC) recently published a [press release](#) that reminds public companies of several important disclosure obligations that they should consider in light of the potential impacts of COVID-19. The SEC also issued an [order](#) providing companies and others that are subject to SEC reporting obligations with an additional 45 days to make certain reports and other filings that would otherwise have been due between March 1 and April 30, 2020, if the company or other filer is unable to meet a filing deadline due to circumstances related to COVID-19. The SEC relief is subject to certain conditions, including a requirement to furnish a Form 8-K or Form 6-K report that includes specified disclosures by the later of March 16 or the original filing deadline. The SEC order also provides conditional relief for delivery of proxy materials to security holders in areas where common carrier delivery has been suspended. The SEC press release also describes how SEC staff will treat annual and quarterly reports filed in reliance on the SEC order for purposes of Form S-3 and Form S-8 eligibility, the Rule 144(c) “current public information” requirement, and Rule 12b-25. This alert summarizes the SEC order and press release in FAQ (question and answer) form.

WHAT DISCLOSURE CONSIDERATIONS DOES THE SEC PRESS RELEASE DISCUSS?

In the press release accompanying the order, the SEC encourages all companies and other related persons to consider their disclosure obligations under the federal securities laws. Among others, these may include:

Insider Trading. If a company is aware of a risk related to COVID-19 that would be material to its investors, the company should refrain from engaging in securities transactions with the public. The company should also take steps to prevent directors, officers and other company insiders who are aware of the risk from engaging in these transactions until the company has made adequate public disclosure of the risk.

Selective Disclosure. When companies disclose material information about the impacts of COVID-19, they should avoid selective disclosure. Companies should disseminate material information broadly, in compliance with Regulation F-D and applicable stock exchange requirements, as they would disclose any other material information. Companies should also consider whether they need to revisit, refresh, or update previous disclosure that may have become materially inaccurate.

Risk Factor Disclosure Does Not Cover Existing Events or Trends. Companies should avoid relying on disclosure of potential or hypothetical risks where the relevant risk has already affected the company or where the company has become aware of an existing, rather than hypothetical, trend. In recent years, the SEC has brought several enforcement actions against companies that relied on risk factor-type disclosure of hypothetical risks or trends that had already had a material effect on the company.

Safe Harbor for Forward-Looking Statements. Companies that make forward-looking statements in an effort to inform investors about material developments related to COVID-19, including potential impacts of known trends or uncertainties, should consider taking steps to the protections of the safe harbor in Section 21E of the Exchange Act.

WHICH FILERS ARE SUBJECT TO THE SEC ORDER?

Reporting Companies. All reporting companies and other persons that are required to file reports with the SEC under any of the sections of the Securities Exchange Act of 1934 (Exchange Act) listed in the next section that have been impacted by COVID-19. Note that this includes all reporting companies, including emerging growth companies, smaller reporting companies and foreign private issuers, as well as companies required to file reports under Section 15(d) of the Exchange Act. In all cases, the SEC order provides relief only if the filer satisfies the conditions specified in the SEC order, which are described in a later section of this FAQ.

Schedule 13G and 13F Filers, but Not Schedule 13D Filers. The SEC order also applies to persons or entities required to file under Sections 13(f) and 13(g), Rule 13f-1 and Regulations 13A and 13D-G if they have been affected by COVID-19. **The SEC order does not apply to persons or entities required to file Schedule 13D or amendments to Schedule 13D.**

Section 16 Filers Not Covered. The SEC order **does not apply to persons required to file Form 3, Form 4 or Form 5 reports** under Section 16 of the Exchange Act.

Proxy/Soliciting Materials Filers Other than the Company. The SEC order provides conditional relief for persons, in addition to the relevant company, that are required to furnish proxy statements, annual reports and other soliciting material to the company's security holders under Exchange Act Sections 14(a) and (c) and Regulations 14A and 14C and Exchange Act Rule 14f-1.

WHAT FILINGS ARE COVERED BY THE SEC ORDER?

Companies with a December 31 Fiscal Year-End. The SEC order provides relief for reporting companies affected by COVID-19 that have a December 31 year-end for the following reports, among others:

- Form 10-K reports (due dates March 2 (large accelerated filers), March 16 (accelerated filers) and March 30, 2020 (non-accelerated filers))
- Form 10-K/A amendments (due date April 29, 2020 for all filers) filed in lieu of incorporating information about biographical and compensation information for executive officers and directors and other information contained in Part III of Form 10-K from the company's definitive proxy statement
- Definitive proxy and information statements, annual reports and other soliciting materials (due date not later than the date first sent or given to security holders) required to be furnished to security holders, although this relief is only available with respect to soliciting materials required to be furnished to security holders who have a mailing address in an area where delivery by common carrier has been suspended

Form 10-Q reports by companies with a fiscal year-end other than December 31 may be subject to relief under the SEC order if the Form 10-Q would be due during the period starting March 1 and ending April 30, 2020.

Due Dates for Covered Filings. Importantly, the SEC order only provides relief for Exchange Act filings **required to be filed from and including March 1, 2020 to April 30, 2020.** As a result, Form 10-Q reports for companies with a December 31 fiscal year-end, which are due on May 11 (large accelerated filers and accelerated filers) or May 15 (non-accelerated filers), are not covered by the SEC order. The SEC has stated that it intends to monitor the current situation and may, if necessary, extend the time period during which this relief applies, with any additional conditions the SEC deems appropriate and/or issue other relief.

Filings Covered by the SEC Order. The SEC order applies to reports and other materials required to be filed or furnished with the SEC under Exchange Act Sections 13(a), 13(f), 13(g), 14(a), 14(c), 14(f) and 15(d), Exchange Act Regulations 13A, 13D-G, 14A, 14C and 15D, and Exchange Act Rules 13f-1, and 14f-1 during the period described above. Examples of filings potentially subject to relief under the SEC order include the following, among others:

- Form 10-K and Form 10-K/A
- Form 10-Q and Form 10-Q/A
- Form 8-K and Form 8-K/A
- Definitive proxy statement and related soliciting materials, and amendments
- Schedule 13G and amendments

Filings Not Covered by the SEC Order. As stated above, the SEC order does not apply to Schedule 13D filings or amendments to a previously-filed Schedule 13D. The SEC order also does not apply to Section 16 beneficial ownership reports on Forms 3, 4 and 5.

WHAT CONDITIONS MUST BE SATISFIED UNDER THE SEC ORDER?

The SEC order provides relief for the filings described above if the company or other filer satisfies the following conditions:

- The company or other filer must be “unable to meet a filing deadline due to circumstances related to COVID-19”;
- A reporting company must furnish a Form 8-K (or, if applicable, a Form 6-K) by the **later** of March 16 or the original filing deadline for the report containing:
 - A statement that the company is relying on the SEC order;
 - A brief description of the reasons why it could not file the report, schedule or form on a timely basis;
 - The estimated date by which it expects to file the report, schedule or form;
 - If appropriate, a risk factor explaining, if material, the impact of COVID-19 on its business; and
 - If the reason the filing cannot be made on a timely basis relates to the inability of any person (for example, the company’s independent auditor), other than the company, to furnish any required opinion, report or certification, the Form 8-K or Form 6-K must include as an exhibit a statement signed by that person stating the specific reasons why that person is unable to furnish the required opinion, report or certification on or before the date such report must be filed;
- The company or any other person required to make any filings with respect to the company files with the SEC any report, schedule, or form required to be filed no later than 45 days after the original due date; and
- In any report, schedule or form that is filed by the applicable deadline pursuant to the immediately preceding bullet point above, the company or any other person required to make any filings with respect to the company must disclose that it is relying on the SEC order and state the reasons why it could not file such report, schedule or form on a timely basis.

Companies that rely on the SEC order are not required to file a Form 12b-25 with respect to a late filing if the report, schedule, or form is filed within the time period prescribed by the order.

The SEC order states that risk factor disclosure explaining material impacts of COVID-19 on a company’s business, to the extent they contain “forward-looking statements,” would be subject to the safe harbor for forward-looking statements under Section 21E of the Exchange Act.

HOW DOES THE SEC ORDER APPLY TO DELIVERY OF PROXY STATEMENTS AND INFORMATION STATEMENTS?

The SEC order provides relief for companies and other persons required to furnish proxy and information statements, annual reports and other soliciting material to security holders under Exchange Act Sections 14(a) and (c) and Regulations 14A and 14C and Exchange Act Rule 14f-1 if the following conditions are satisfied:

- The company’s security holder has a mailing address located in an area where, as a result of COVID-19, the common carrier has suspended delivery service of the type or class customarily used by the company or other person making the solicitation; and

- The company or other person making a solicitation has made a good faith effort to furnish the soliciting materials to the security holder, as required by the rules applicable to the particular method of delivering soliciting materials to the security holder, or, in the case of information statements and related materials, the company has made a good faith effort to furnish the information materials to the security holder in accordance with the rules applicable to information materials

HOW DOES THE EXTENDED FILING DATE FOR ANNUAL AND QUARTERLY REPORTS UNDER THE SEC ORDER AFFECT FORM S-3/FORM S-8 ELIGIBILITY, RULE 144 AND RULE 12B-25?

The press release accompanying the SEC order states that, in connection with the order, the SEC staff will take the following positions with respect to certain due dates and filing obligations under the Securities Act of 1933 and the Exchange Act:

- **Form S-3.** For purposes of eligibility to use Form S-3 (and for well-known seasoned issuer status, which is based in part on Form S-3 eligibility), a company relying on the SEC order will be considered to be both current and timely in its Exchange Act filing requirements if (1) it was current and timely as of the first day of the relief period and (2) the company files any report due during the relief period within 45 days of the filing deadline for the report.
- **Form S-8 and Rule 144(c).** For purposes of the Form S-8 eligibility requirements and the current public information eligibility requirements of Rule 144(c), a company relying on the exemptive order will be considered to be current in its Exchange Act filing requirements if (1) it was current as of the first day of the relief period and (2) the company files any report due during the relief period within 45 days of the filing deadline for the report.
- **Rule 12b-25.** If a company satisfies the conditions to extend the filing date for a Form 10-K or Form 20-F annual report or a Form 10-Q quarterly report pursuant to the SEC order, the SEC staff will consider the filing date for the report to be 45 days after the original filing deadline for the report. As a result, the SEC staff will permit these companies to rely on Rule 12b-25 if they are unable to file the required report on or before the extended due date provided by the SEC order.

Please visit Goodwin's [Coronavirus Knowledge Center](#), where lawyers from across Goodwin are issuing new guidance and insights to help clients fully understand and assess the ramifications of COVID-19 and navigate the potential effects of the outbreak on their businesses.

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