

## Goodwin Alerts

# March 26, 2020

### SEC Extends COVID-19 Relief for Filing and Proxy Statement Requirements and Issues Updated Disclosure Guidance

by John O. Newell

On March 25, 2020, the Securities and Exchange Commission (SEC) [announced](#) that it has issued an [order](#) that extends the filing periods covered by its [earlier order](#) providing conditional relief for certain filing obligations and obligations to furnish proxy and information statements for public companies and other persons. The March 25, 2020 order extends the period covered by the March 4, 2020 order to cover the period starting March 1, 2020 and ending July 1, 2020, extended from the earlier April 30, 2020 termination date. The staff of the SEC Division of Corporation Finance also issued [CF Disclosure Guidance Topic No. 9](#), "Coronavirus (COVID-19)," to provide important guidance on its views concerning disclosure considerations in light of the COVID-19 crisis. The SEC announcement also confirms the SEC's earlier statement concerning the impact of reliance upon the order for purposes of eligibility to use Forms S-3, S-8 and F-3, the current public information requirement of Rule 144(c), and reliance on Rule 12b-25. The SEC may extend the time period for the relief provided by the order as necessary.

#### CONDITIONAL RELIEF FOR FILING REQUIREMENTS

The relief for filing requirements is subject to conditions similar to those required by the earlier order described in a [Goodwin client alert](#). The new order requires filers to satisfy the following conditions:

- The company or any person required to make any filings with respect to a company is unable to meet a filing deadline due to circumstances related to COVID-19;
- Any company relying on the order furnishes to the SEC a Form 8-K or, if eligible, a Form 6-K, for each delayed filing by the later of March 16 or the original filing deadline of the report stating:
  - that it is relying on the order;
  - a brief description of the reasons why it could not file such report, schedule or form on a timely basis;
  - the estimated date by which the report, schedule, or form is expected to be filed;
  - a company-specific risk factor or factors explaining the impact, if material, of COVID-19 on its business, which may be subject to the protections of the statutory safe harbor for forward-looking statements; and
  - if the reason the report cannot be filed timely relates to the inability of any person, other than the company, to furnish any required opinion, report or certification, the Form 8-K or Form 6-K shall have attached 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 person required to make any filings with respect to such a 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 filed by the applicable deadline pursuant to the immediately preceding bullet above, the company or any person required to make any filings with respect to a company must disclose that it is relying on the order, and state the reasons why it could not file the report, schedule or form on a timely basis.

The order restates the earlier guidance that a company relying on the order would not need to file a Form 12b-25 so long as the report, schedule, or form is filed within the time period prescribed by the order.

As a reminder, 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.

## CONDITIONAL RELIEF FOR FURNISHING PROXY AND INFORMATION STATEMENTS

The order also extends the time period for the conditional relief provided by the earlier order for those seeking to comply with the requirements of Sections 14(a) and (c) and Regulations 14A and 14C and Rule 14f-1 under the Securities Exchange Act of 1934 (Exchange Act) to furnish materials to security holders when mail delivery is not possible.

## PUBLIC COMPANY DISCLOSURE GUIDANCE

The staff of the SEC Division of Corporation Finance has 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 "during this uncertain time." The guidance encourages timely reporting while also recognizing that it may be difficult for companies to assess or predict the broad effects of COVID-19 on industries or individual companies, and specifically discusses the following topics:

- Assessment and disclosure of the evolving impacts of COVID-19;
- Disclosure of material non-public information in the context of securities issuances and repurchases, and trading by company insiders; and
- Presentation of non-GAAP financial measures and other key metrics in earnings releases and other materials, including important accommodations for company disclosures that are not filed with the SEC.

**Assessment and Disclosure.** The guidance states that assessment of the evolving impact of COVID-19 and the related risks will depend on the facts and circumstances specific to each company. Consistent with other SEC guidance, the guidance encourages disclosure that allows investors to evaluate current and expected COVID-19 impacts "through the eyes of management." The guidance observes that this disclosure may involve forward-looking statements, and reminds companies that they should consider taking advantage of the safe harbors in Section 27A of the Securities Act of 1933 (Securities Act) and Section 21E of the Exchange Act for this information.

The guidance provides an illustrative but not exhaustive series of questions for companies to consider as they assess and disclose the impact of COVID-19 on current and future operations. These questions are summarized below, but companies are encouraged to review the full text of these questions in the SEC staff guidance:

- How has COVID-19 impacted the company's financial condition and results of operations? How does the company expect that COVID-19 will impact future operations, and is it possible that these impacts be different than current period impacts?

- How has COVID-19 impacted the company's capital and financial resources, including the company's overall liquidity position and outlook? Are there material uncertainties about the company's ongoing ability to meet the covenants of the company's credit agreements or similar obligations? *In making these disclosures, companies should consider the requirement to disclose known trends and uncertainties as it relates to the company's ability to service the company's 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.*
- How does the company expect COVID-19 to affect assets on the company's balance sheet and the company's ability to timely account for those assets?
- Does the company anticipate any material impairments, increases in allowances for credit losses, or other impacts that have had or are reasonably likely to have a material impact on the company's financial statements?
- Have COVID-19-related circumstances, such as remote work arrangements, adversely affected the company's ability to maintain its operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures?
- Has the company experienced challenges in implementing its business continuity plans or does it foresee incurring material expenditures to do so?
- Does the company expect COVID-19 to materially affect demand for the company's products or services?
- Does the company anticipate a material adverse impact of COVID-19 on the company's supply chain or the methods used to distribute the company's products or services, or a material change the relationship between costs and revenues?
- Will the company's 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?

**Disclosure of Material Non-Public Information and Impact on Securities Issuances and Repurchases and Insider Trading.** The guidance reminds companies and other affected persons that they must consider the requirements of the federal securities laws on market activities, including the issuance or repurchase of the company's securities and trading by company insiders who may be aware of material non-public information about the impact of COVID-19 and related risks on the company. The guidance also reminds companies of their obligations to avoid selective disclosure under Regulation F-D, which requires broad public dissemination. The guidance also observes that, depending upon a company's specific circumstances, it may be appropriate to consider updating previous disclosures that may have become materially inaccurate.

**Non-GAAP Financial Measure Presentation and Related Considerations.** The guidance recognizes that "companies may be considering how to report the evolving impact of COVID-19 in light of unexpected nonrecurring charges and expenses" and that "the impact of COVID-19 on businesses may present a number of novel or complex accounting issues that, depending on the particular facts and circumstances, may take time to resolve." The guidance provides important guidance on several issues.

**Timely Reporting: Experts.** In particular, the guidance acknowledges that COVID-19 impacts “will likely make it more difficult for companies and their auditors to complete the work required to maintain timely filings.” In these cases, the staff encourages companies to engage any necessary experts promptly, in order to ensure that the company’s reporting remains timely, complete and accurate.

**Non-GAAP Financial Measures.** The staff provides important guidance accommodations and reminders for companies presenting non-GAAP financial measures and key performance metrics, while also reminding companies of their obligations under Regulation G and Item 10 of Regulation S-K, including the prohibition against presenting non-GAAP financial measures more prominently than the most directly comparable GAAP financial measure or range.

**Reconciliation to preliminary GAAP results or range.** SEC rules require companies to reconcile non-GAAP financial measures to the most directly comparable GAAP measure. The guidance states that the staff will not object if a company reconciles a non-GAAP financial measure to preliminary GAAP results that include either provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP results. **This guidance does not apply to filings that require GAAP financial statements, such as Form 10-Q and Form 10-K.** Companies must reconcile non-GAAP financial measures to GAAP results in these filings, and must not include provisional amounts or a range of estimate results when doing so.

**Limited to non-GAAP financial measures presented to the Board of Directors.** The guidance specifically states that “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.” The guidance also states the staff’s view that it is inappropriate for a company “to present non-GAAP financial measures or metrics for the sole purpose of presenting a more favorable view of the company.”

**Changes in calculation method: disclosure of new metrics.** The guidance reminds companies that when they present metrics related to COVID-19, or change the method by which they calculate a metric as a result of COVID-19, they should review the disclosure in light of the SEC’s [recent guidance](#) on metrics. This includes, among other things, considering what additional information may be necessary to provide adequate context for an investor to understand the metric presented. The SEC generally expects the following disclosures to accompany such metrics, depending on the facts and circumstances:

- A clear definition of the metric and how it is calculated;
- A statement indicating the reasons why the metric provides useful information to investors; and
- A statement indicating how management uses the metric in managing or monitoring the performance of the company’s business.

The guidance on metrics also states that a company should consider whether disclosure of any estimates or assumptions underlying the metric or its calculation is necessary for the metric not to be materially misleading. In addition, that guidance states that, when a company changes the method by which it calculates or presents the metric from one period to another or otherwise, the company should consider the need to disclose, to the extent material:

- the differences in the way the metric is calculated or presented compared to prior periods;
- the reasons for the changes;

- the effects of any such change on the amounts or other information being disclosed and on amounts or other information previously reported; and
- any other differences in methodology and results that would reasonably be expected to be relevant to an understanding of the company's performance or prospects.

Finally, the guidance on metrics states that the company should also consider whether it is necessary to recast prior metrics to conform to the current presentation and place the current disclosure in an appropriate context, depending on the significance of the change(s) in methodology and results.

## IMPACT OF THE ORDER ON SEC FORM ELIGIBILITY AND RELATED MATTERS

The [press release](#) announcing the SEC order states that, in connection with the relief provided by 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.
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## CONTACTS:

**John O. Newell**

Counsel

+1 617 570 1475

[jnewell@goodwinlaw.com](mailto:jnewell@goodwinlaw.com)

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