CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: Update to SEC Reporting Relief

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Authors: Brian D. Mielcusny

Update: SEC extends conditional relief from reporting deadlines, urges public companies to be mindful of corporate controls and procedures as the division of corporation finance provides relief on manual signature requirements and guidance on disclosures in the time of COVID-19.

- **The Commission extends its reporting deadline relief to filings that would have been due before July 1, 2020**
- **The Division of Enforcement reminds public companies to be mindful of insider trading amidst uncertain market and economic conditions**
- **The Division of Corporation Finance extends relief on manual signature requirements for public company filings**
- **The Division of Corporation Finance provides guidance on public company disclosure obligations in light of the COVID-19 pandemic, including questions for public companies to consider when evaluating their disclosures and encourages public companies to be proactive**

This bulletin serves as an update to COVID 19 Outbreak: Practice Tips for Public Companies found here, published in the Benesch COVID-19 Resource Center on March 16, 2020.

Extended Relief for Public Company Filing Deadlines:

On March 25, 2020, the Securities and Exchange Commission (the "Commission") issued an Order (the "Order") providing for a further extension of conditional reporting relief for certain public company filing obligations under federal securities laws. A copy of the extension order can be found here.

Relief Provided and Reporting Obligations. On March 4, 2020, the Commission announced that it was providing conditional regulatory relief for certain public company filing obligations that would have been required to be made between March 1 and April 30, 2020.

In the Order issued on March 25, the Commission, in an effort to address potential compliance concerns, modified the March 4th order and further extended the relief set forth in in that order, providing public companies with **a 45-day extension to file certain disclosure reports that would otherwise have been due between March 1 and July 1, 2020**

. Public companies looking to qualify for the filing extension established by the Order must satisfy the following conditions:

- As with the original March 4 order, the public company is unable to meet a filing deadline due to circumstances related to the COVID-19 pandemic.
- The public company must file a Form 8-K (or a Form 6-K, for foreign private issuers) **for each filing that is delayed**, on or before the original deadline of the applicable report[1].
- The Form 8-K (or Form 6-K) must contain the following:
  - that the public company is relying on the relief provided for by the Order;
  - an explanation as to why the filing deadline cannot be met;
  - the estimated date when the public company expects to make the filing;
  - a company-specific risk factor or factors explaining the impact, if material, of COVID-19 on its business; and
  - to the extent that the delay is a result of the inability of a third party to furnish a required opinion, report or certification, the Form 8-K (or Form 6-K, as applicable) must have as an exhibit a statement signed by such person with the specific reasons as to why the third party was not able to provide the required opinion, report or certification in a timely fashion.

- The public company must file the delayed report no later than 45 days after the original due date and must disclose that it is relying on the Order and state the reasons why it could not file the report on a timely basis.

Delivery of Proxy Materials. The Order also reiterates the previously-provided relief around the delivery of proxy materials where stockholders have mailing addresses located in an area where delivery has been suspended as a result of the COVID-19 outbreak and the public company has made a good faith effort to furnish the proxy materials to the stockholders.

The Commission noted that it intends to continue to monitor the situation surrounding the outbreak of COVID-19 and, if necessary, may extend the time period during which the relief provided for by the Order applies, and may impose additional conditions as it deems appropriate and/or issue other relief. Benesch will continue to monitor orders and other statements issued by the Commission and will update the resources made available here.

Manual Signature Requirements. Anticipating difficulties and potential risks that some public companies are navigating in an effort to comply with Rule 302(b) of Regulation S-T, which requires manual signatures on filings made with the Commission, on March 24, 2020, the staff of the Division of Corporation Finance, the Division of Investment Management and the Division of Trading and Markets issued a statement providing relief from the authentication documentation requirements in Rule 302(b), citing public health and safety concerns related to COVID-19. Specifically, the staff

stated that it will not recommend that the Commission take action to enforce the manual signature requirements of Rule 302(b) if the following conditions are satisfied:

- a signatory retains a manually signed signature page or other document authenticating, acknowledging, or otherwise adopting his or her signature that appears in the electronic filing and, as promptly as reasonably practicable, provides such document to the filer for retention in the ordinary course pursuant to Rule 302(b);
- the authenticating document indicates the date and time when the signature was executed; and
- the filer establishes and maintains policies and procedures governing this process.

Alternatively, the statement provides that the signatory may deliver to the filer an electronic record (such as a photograph or .pdf) of the authenticating document when it is signed. Public companies seeking to avail themselves of the benefit of this relief may need to consider adopting new policies and procedures that specifically address signatures collected in furtherance of compliance with Rule 302(b), to the extent such policies and procedures have not been adopted previously.

Public Company Controls and Procedures around Insider Trading:

On March 23, 2020, Stephanie Avakian and Steven Peikin, Co-Directors of the Commission's Division of Enforcement issued a statement emphasizing the importance of maintaining market integrity and following corporate controls, urging public companies to be mindful of their established procedures, code of ethics and prohibitions against insider trading and selective disclosure. The Division of Enforcement also announced that it is committing substantial resources to protect investors against fraud and other illegal practices that may result from the unprecedented market and economic conditions resulting from the COVID-19 outbreak. A copy of the statement can be found here.

Division of Corporation Finance Guidance on Disclosure regarding COVID-19:

On March 25, 2020, the Division of Corporation Finance (the "Division") provided guidance on its views regarding disclosure and other obligations that public companies should consider with respect to COVID-19, as well as the related business and market disruptions resulting from the pandemic.

The Division acknowledged that assessing or predicting the impact of COVID-19 will be difficult for many public companies, and published a non-exhaustive list of questions that filers might consider as they weigh their disclosure obligations:

- How has COVID-19 impacted the company's financial condition and results of operations?
- In light of changing trends and the overall economic outlook, how does the company expect COVID-19 to impact its future operating results and near-and-long-term financial condition?
- Does the company expect that COVID-19 will impact future operations differently than how it affected the current period?
- How has COVID-19 impacted the company's capital and financial resources, including its overall liquidity position and outlook?

- Has the cost of or access to capital and funding sources, such as revolving credit facilities or other sources changed, or is it reasonably likely to change?
- Have the company's sources or uses of cash otherwise been materially impacted?
- Is there a material uncertainty about the company's ongoing ability to meet the covenants of its credit agreements?
- If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency?
- Does the company expect to disclose or incur any material COVID-19-related contingencies?
- How does the company expect COVID-19 to affect assets on its balance sheet and 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 U.S. GAAP or IFRS?
- Does the company anticipate 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 that have had or are reasonably likely to have a material impact on its financial statements?
- Have COVID-19-related circumstances such as remote work arrangements adversely affected its ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures? If so, what changes in the company's controls have occurred during the current period that materially affect or are reasonably likely to materially affect its internal control over financial reporting?
- What challenges does the company anticipate in its ability to maintain these systems and controls?
- Has the company experienced challenges in implementing its business continuity plans or does it foresee requiring material expenditures to do so? Does the company face any material resource constraints in implementing these plans?
- Does the company expect COVID-19 to materially affect the demand for its products or services?
- Does the company anticipate a material adverse impact of COVID-19 on its supply chain or the methods used to distribute its products or services?
- Does the company expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?
- Will the company's operations be materially impacted by any constraints or other impacts on your 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 its business goals?

In the guidance, the Division encouraged public companies to provide "disclosures that allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management, and that public companies **proactively revise and update disclosures as facts and circumstances change**." **[emphasis added]**

The guidance by the Division acknowledges that the impact of COVID-19 will likely make it more difficult for both public companies and their auditors to complete the work necessary to maintain timely filings. The Division encourages public companies to **proactively address financial reporting matters earlier than usual.**

Additionally, the guidance by the Division touches on earnings releases. While reminding public companies of their obligations regarding the disclosure of non-GAAP financial metrics, the Division acknowledged that public companies may have a desire to present a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19. The Division notes that 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. Further, the guidance from the Division provides that there may be instances 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. In these situations, the Division would not object to public 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.

Finally, in the guidance, the Division emphasized that "health and safety are the first priority and that, as the Commission's relief and staff guidance makes clear, they should not be compromised to meet reporting requirements."

The Division's guidance in full can be found here.

[1] Note: A Form 12b-25 is not required to long as the delayed report, schedule or form is filed within the time period prescribed by the Order.

If you have any questions regarding the above, please contact a member of Benesch's Corporate & Securities Practice Group.

Brian D. Mielcusny at bmielcusny@beneschlaw.com or 216.363.6123

Sarah M. Hesse at shesse@beneschlaw.com or 312.212.4966.

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

