

CLIENT ALERT

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SEC ISSUES GUIDANCE REGARDING DISCLOSURE OBLIGATIONS IN LIGHT OF COVID-19

by Frank Borger-Gilligan

This past week, the Securities and Exchange Commission's Division of Corporate Finance issued guidance regarding disclosure and other securities law obligations that companies should consider with respect to the COVID-19 pandemic. The following is a summary of the Commission's release:

SEC CF DISCLOSURE GUIDANCE: TOPIC NO. 9

On March 25, 2020, the Commission issued a release that guides companies as they prepare disclosure documents during the current international health crisis and sudden unprecedented economic shutdown. Although the Commission states that it encourages timely reporting, it recognizes that the broad and unpredictable effects of COVID-19 on businesses and individuals make it difficult for companies to assess what they expect the future impact on the company, the related industry, and overall health of the economy will be. Consequently, public companies currently face the challenge of timely reporting information concerning the effects of the pandemic in order to help investors make informed decisions. In its release, the Commission offers a series of questions for companies to consider when making the required disclosures.

COVID-19-RELATED DISCLOSURES

Current SEC rules require disclosure of known or reasonably likely risks, including the type of risks presented by COVID-19 and resulting business interruptions. As with all risk factors, disclosures should be specific to the company and the related industry. Accordingly, the Commission's Guidance offers a series of questions for companies to consider in regards to their disclosure obligations. Such questions include:

- How has COVID-19 impacted your financial condition and results of operations?
- How do you expect that COVID -19 will impact future operations differently than how it affected the current period?
- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook?
- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets?
- 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 or do you foresee requiring material expenditures to do so?
- Do you expect COVID-19 to materially affect the demand for your products or services?
- Are travel restrictions and border closures expected to have a material impact on your ability to operate and achieve your business goals?

A complete, yet non-exhaustive list of questions to consider can be found [here](#).

COMMISSION CAUTIONS AGAINST TRADING ON MATERIAL NON-PUBLIC INFORMATION

The release also cautions companies and their directors and officers to refrain from trading in the company's securities if they are aware of material, non-public information regarding the effects of COVID-19 on the company's business and operations. The Commission specifically cautions that "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, the company, its directors and officers, and other corporate insiders who are aware of these matters should refrain from trading in the company's securities until such information is disclosed to the public."

The Commission further advises companies to take necessary steps to avoid disclosing selective information when disclosing material information to the public. Those steps can be found in [Regulation FD](#) which was promulgated by the Commission in 2000 to address the selective disclosure of information by publicly traded companies and other issuers. Regulation FD provides that when an issuer discloses material nonpublic information to certain individuals or entities—generally securities market professionals such as stock analysts or holders of the issuer's securities who may well trade based on the information—the issuer must make public disclosure of that information.

EARNINGS AND FINANCIAL REPORTS

Although the Commission does not specifically indicate how it will address the timeliness of filing financial reports in light of the COVID-19 pandemic, it acknowledges that the impact of the pandemic will likely make it more difficult for companies and their auditors to maintain such timely filings. The Commission, therefore, encourages companies to proactively address their financial reporting requirements to the extent possible.

The release provides further guidance with respect to the presentation of non-GAAP financial measures in a company's disclosures. Specifically, to the extent a company presents a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19, the disclosure should 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.

For further information on this release, or other securities law matters, please contact Dickinson Wright, PLLC.

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