

To the Point

SEC – relief and staff guidance

SEC extends relief and issues staff guidance on COVID-19 disclosures

The SEC extended through June the 45-day relief for affected registrants to file Exchange Act reports, and its staff issued guidance on the types of disclosures they should consider related to COVID-19.

What you need to know

- ▶ The SEC extended the temporary 45-day grace period for registrants affected by the COVID-19 pandemic to file Exchange Act reports to include reports due through 1 July 2020.
- ▶ The SEC's Division of Corporation Finance issued guidance on disclosures that registrants should consider making about COVID-19 and the effects of the related business and market disruptions on their operations and financial condition.
- ▶ The SEC staff said registrants, in limited circumstances, can report non-GAAP measures in connection with an earnings release that are reconciled to GAAP measures that include provisional amounts or ranges.

Overview

The Securities and Exchange Commission (SEC or Commission) issued an order extending the temporary 45-day grace period for registrants affected by the coronavirus (COVID-19) pandemic to file Exchange Act reports to include reports due through 1 July 2020. The SEC had previously provided this relief for reports due between 1 March and 30 April 2020.

The SEC's Division of Corporation Finance also published **Disclosure Guidance Topic No. 9, Coronavirus (COVID-19)**, which provides the SEC staff's views on disclosure and other securities law obligations that registrants should consider with respect to COVID-19 and its effects on their operations and financial condition. The guidance provides questions on a wide range of topics that registrants can use to develop disclosures about the effects of COVID-19.

The guidance also provides a limited accommodation that allows a registrant to reconcile a non-GAAP measure presented in connection with an earnings release to a GAAP measure that includes provisional amounts or a range of results.

Key considerations

Extended relief

The SEC issued an order on 4 March providing filing relief by giving registrants an extra 45 days to file Exchange Act reports (e.g., Form 10-K, Form 10-Q) that would otherwise have been due between 1 March and 30 April 2020 if they are unable to meet a filing deadline due to circumstances related to COVID-19. On 25 March, the SEC issued an **order** extending the filing relief to Exchange Act reports due on or before 1 July 2020.

A registrant relying on the relief must file a Form 8-K (or Form 6-K for a foreign private issuer) by the original report deadline that includes (1) a statement that it is relying on the order, (2) a brief description of why it could not file timely, (3) the estimated date by which the report or form is expected to be filed, and (4) if appropriate, a risk factor explaining the effect of COVID-19, if the effect is material.

If the reason the report cannot be filed timely relates to the inability of another person, other than the registrant, to furnish an opinion or report, the Form 8-K or Form 6-K must include a statement signed by that person as an exhibit, similar to the requirements of Exchange Act Rule 12b-25(c). When it files the delayed report, the registrant must also disclose that it is relying on the order and provide the reasons it could not file timely.

Any registrant relying on the order would not need to file a Form 12b-25, as long as the report is filed within 45 days of the original filing deadline. If a registrant is unable to file the report by the extended due date, it may then file a Form 12b-25 and take advantage of an additional grace period.

A registrant will remain eligible to use Forms S-3 or F-3 (including for well-known seasoned issuer status, which is based in part on Form S-3 or Form F-3 eligibility) if it files its reports subject to the relief by the extended due dates (including any additional time provided under Rule 12b-25). Similarly, a registrant will also retain its Form S-8 eligibility and meet the current public information eligibility requirements of Rule 144(c) if it makes its filings by the extended due dates.

How we see it

Registrants may encounter a broad range of issues that could warrant taking advantage of the relief. These issues include an inability to access books and records or finalize accounting measurements.

The filing relief provided by these orders is similar to the grace period that has long been available under Rule 12b-25, and affected registrants should not be reluctant to use it. Historically, we have not observed any negative consequences associated with taking advantage of the Rule 12b-25 grace period when circumstances warrant it.

Disclosure guidance

A registrant should assess and disclose the effects of COVID-19 and related risks, based on its facts and circumstances. The SEC staff guidance lists the following questions for registrants to consider when developing their disclosures:

- How has COVID-19 impacted your 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?

The SEC staff guidance lists questions affected registrants should consider when they develop their disclosures.

- ▶ 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 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 has the company 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. Do you expect to disclose or incur any material COVID-19-related contingencies?
- ▶ 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 U.S. GAAP or IFRS?
- ▶ Do you 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 your financial statements?
- ▶ 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? If so, what changes in your controls have occurred during the current period that materially affect or are reasonably likely to materially affect your internal control over financial reporting? What challenges do you anticipate in your ability to maintain these systems and controls?
- ▶ Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so? Do you face any material resource constraints in implementing these plans?
- ▶ Do you expect COVID-19 to materially affect the 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? Do you expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?
- ▶ Will your 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 your ability to operate and achieve your business goals?

The SEC staff said registrants should proactively revise and update disclosures as circumstances change. The guidance is intended to reflect the SEC's principle-based disclosure regime. As a result, disclosures may be included in risk factors, management's discussion and analysis (including the discussion of critical accounting estimates) and/or disclosures about changes in internal control over financial reporting, depending on the circumstances. The SEC staff also said that market activities such as the issuance or purchase of securities may dictate the nature and timing of disclosure.

In addition, the SEC staff issued a reminder that management should pay close attention to its obligations under the securities laws when it is in possession of material information about the effects of COVID-19 that has yet to be disclosed publicly. Regulation FD prohibits the selective disclosure of material nonpublic information, and corporate insiders are not allowed to trade on this information.

How we see it

While the list of questions the SEC staff provided is not all-inclusive, registrants should carefully consider how each question applies within the context of a particular disclosure obligation. For example, a registrant may conclude that disclosures about material changes in internal control over financial reporting made to accommodate remote work arrangements are necessary in its next periodic report but not in a securities offering it will conduct before issuing that periodic report.

Non-GAAP measures

The SEC staff provided an accommodation related to non-GAAP measures for registrants facing difficulties reporting financial results due to the pandemic. Under the accommodation, a registrant can reconcile a non-GAAP measure presented in connection with an earnings release to a GAAP measure that includes a provisional amount related to an item or a range of results. For example, a registrant intending to disclose its earnings before interest, taxes, depreciation and amortization (EBITDA) on an earnings call with analysts can reconcile its EBITDA to GAAP net income that includes a provisional amount for an impairment charge that is based on a reasonable estimate (i.e., an amount the registrant has not yet finalized).

The accommodation is limited to non-GAAP measures that management provides to the board of directors, and the other provisions of Item 10(e) of Regulation S-K and Regulation G continue to apply. In addition, a registrant that presents such a measure must explain, to the extent practicable, why the GAAP item is incomplete and what additional information or analysis may be needed to complete it.

How we see it

The non-GAAP accommodation should make it easier for a registrant to publicly report results outside of Forms 10-K or 10-Q on a timely basis when it has concluded that an interim quantitative impairment test is necessary but has encountered challenges in finalizing the test. We also recommend that registrants review the SEC staff's guidance on non-GAAP measures before reporting any measures intended to exclude the effects of the pandemic.