

Client Alert

March 2020

SEC Provides Temporary Relief and Guidance Due to COVID-19 Pandemic

Publicly traded companies need to consider COVID-19's effect on disclosure obligations

Despite the continuing coronavirus global pandemic, business marches on, including compliance with applicable regulatory requirements. Regulatory bodies recognize that the reduced staffing, “social distancing” and other factors could hamper efforts to comply with various regulations. The U.S. Securities and Exchange Commission (“SEC”) has acted to ameliorate certain of the burdens publicly traded companies are currently facing. In addition, companies need to take into account the effects of COVID-19 on their businesses and regulatory disclosures, and we have highlighted certain significant considerations below.

Form 10-K and Proxy Statement Relief. With the continued spread of COVID-19 in the United States, the SEC issued an [order](#) on March 4, 2020, providing conditional regulatory relief to publicly traded companies that may have been affected by the coronavirus. The SEC’s order provides qualifying companies an additional 45 days to file certain required reports, including annual reports on Form 10-K and proxy statements, that otherwise would be due between March 1, 2020 and April 30, 2020, so long as certain conditions are met.

In order to qualify for this filing grace period, on or prior to the relevant filing deadline, each subject company must file a Form 8-K (or Form 6-K for foreign private issuers) with SEC that explains why the relief is necessary given the company’s particular circumstances. Additional disclosure regarding the filing extension would need to be made in the delayed (but timely) filing. In recognition of the effect of the coronavirus on domestic markets and business operations, weighed against public companies’ disclosure obligations to ensure timely public reporting -- “a cornerstone of well-functioning markets” -- the SEC is providing this filing relief on a case-by-case basis.

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Annual Meeting Relief. On March 13, 2020, the SEC staff issued [guidance](#) for publicly traded companies facing the dilemma of holding their annual meetings in light of government-mandated “social distancing” obligations. The SEC staff stated that it “understands that some issuers are contemplating possible changes in the date, time, or location of their annual meetings due to the difficulties arising from COVID-19.” The staff’s position for the foreseeable future will be that a public company that has already mailed and filed its definitive proxy materials can save time and money if it notifies shareholders of a change in the date, time, or location of its annual meeting without mailing additional soliciting materials or amending its proxy materials if it:

- issues a press release announcing such change;
- files the announcement as definitive additional soliciting material on EDGAR; and
- takes all reasonable steps necessary to inform other intermediaries in the proxy process (such as any proxy service provider) and other relevant market participants (such as the appropriate national securities exchanges) of such change.

Companies were instructed to take these actions promptly after making a decision to change the date, time, or location of the meeting and sufficiently in advance of the meeting so the market is alerted to the change in a timely manner. The SEC staff instructed companies that have not yet mailed and filed their definitive proxy materials to consider whether to include disclosures regarding the possibility that the date, time, or location of the annual meeting will change due to COVID-19. The SEC staff indicated that these determinations should be made on a case-by-case basis taking into account each company’s particular facts and circumstances and the reasonable likelihood of such a change.

“Virtual” Shareholder Meetings. The SEC staff took this opportunity to remind publicly traded companies that the ability to conduct a “virtual” meeting is governed by state law, where permitted, and companies’ governing documents. Companies are expected to notify “shareholders, intermediaries in the proxy process, and other market participants of such plans in a timely manner and disclose clear directions as to the logistical details of the ‘virtual’ or ‘hybrid’ meeting, including how shareholders can remotely access, participate in, and vote at such meeting.” Companies that have not yet filed and delivered their definitive proxy materials, should include such disclosure in the definitive proxy statement and other soliciting materials, while companies that have already filed and mailed their definitive proxy materials should follow the steps described above for announcing a change in the meeting date, time, or location for the purpose of switching to a “virtual” or “hybrid” meeting.

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Presentation of Shareholder Proposals. In the SEC staff's March 13 guidance, it explained that in light of the possible difficulties for shareholder proponents to attend annual meetings in person to present their proposals, it encourages issuers, to the extent feasible under state law, to provide shareholder proponents or their representatives with the ability to present their proposals through alternative means, such as by phone, during the 2020 proxy season in order to satisfy shareholders' obligations under Rule 14a-8(h) promulgated under the Securities Exchange Act of 1934 to appear and present their proposals at the annual meeting. The SEC staff further stated that to the extent a shareholder proponent or representative is not able to attend the annual meeting and present the proposal due to the inability to travel or other hardships related to COVID-19, the SEC staff would consider this to be "good cause" under Rule 14a-8(h) if companies were to assert Rule 14a-8(h)(3) as a basis to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years.

Financial Forecasts/Earnings Guidance. Within the past week, several dozen public companies from FedEx Corp. and Expedia Group Inc. to Nordstrom Inc. and Denny's have withdrawn their financial forecasts for 2020, which they made only months before. The disruption of U.S. and global business activity caused by the coronavirus pandemic is making forecasts for the rest of the year an extremely difficult exercise.

Financial forecasts, sometimes called earnings guidance, are voluntary disclosures made by public companies. But, once made, best practices based on SEC guidance require a public company to update the forecasts (or withdraw them altogether) when its management believes the forecasts of future operating results or financial condition no longer have a reasonable basis because the assumptions underlying the forecasts have materially changed. These assumptions would include expected sales and cash flow, sufficient production capacity and labor, availability of capital and uninterrupted supply of commodities, all of which have been significantly impacted in recent weeks. Absent an update to a company's financial forecasts when the assumptions are no longer reasonable, subsequent periodic SEC reports may serve to effectively reaffirm the original financial forecasts and potentially jeopardize the applicability of the SEC's safe harbor from liability for forward-looking statements.

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Form 10-K/10-Q/8-K Disclosures. Many companies that use the calendar year as their fiscal year have not filed their annual report on Form 10-K (or Form 20-F for foreign private issuers). Consequently, the actual or potential effects of COVID-19 and the global coronavirus pandemic on such companies' businesses must be considered as they prepare their annual report. Chief among the potential sections where such disclosure may be relevant are Risk Factors, Business, including known trends and uncertainties, Management's Discussion and Analysis of Financial

Position and Results of Operations (MD&A) and companies' cash and liquidity needs over next 12 months/foreseeable future. For companies that have already filed with the SEC their annual reports, management should be cognizant of the current disclosure obligations under Form 8-K as well as updates that may be required in future quarterly reports on Form 10-Q, including risk factor updates as relevant. Finally, management of all companies should be mindful of Regulation FD and the proscriptions on selective disclosure.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys listed below if you would like to discuss this matter or have questions.

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