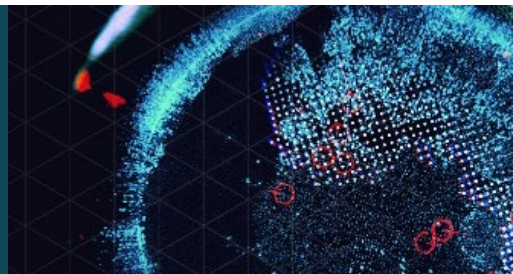


Coronavirus/COVID-19

Managing COVID-19: New Disclosure Guidance from the SEC



July 9, 2020

The second quarter of 2020 is the first period in which most U.S. public companies were fully confronted with challenges presented by the COVID-19 global pandemic. The SEC and its staff (the “Staff”) have recently issued a number of statements regarding disclosure considerations and updates to reporting relief that will affect various aspects of companies’ second quarter reporting. Of greatest relevance to public companies is the additional COVID-19 disclosure guidance in [CF Disclosure Guidance: Topic No. 9A](#) (“Topic 9A”), which was issued by the SEC’s Division of Corporation Finance (the “Division”) on June 23, 2020. This alert discusses key highlights of Topic 9A and also summarizes recent SEC statements and regulatory developments that provide accounting and disclosure guidance and regulatory relief.

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Topic 9A: Disclosures Regarding Operations, Liquidity and Capital Resources

Topic 9A expands on [CF Disclosure Guidance: Topic No. 9](#) (“Topic 9”), which the Division issued on March 25, 2020, by providing the Staff’s expectations regarding operations, liquidity and capital resources disclosures as companies continue to respond to the impact of COVID-19. Topic 9A encourages public companies to provide disclosures that allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management, and to revise and update disclosures proactively as facts and circumstances change. This guidance underscores the importance of providing clear disclosure related to the management of short- and long-term liquidity and funding risks in the current economic environment. Below are key factors noted by the Staff to be considered when preparing earnings releases and periodic SEC filings:

- Operations
 - Topic 9A advises companies to consider and disclose material challenges that management and the board are monitoring and evaluating. Some of the operational challenges highlighted by the Staff are adjustments relating to a transition to telework; modifications to supply chains and distribution networks; and the suspension or modification of operations for health and safety purposes. Companies are well advised also to consider disclosure of health and safety policies for employees, contractors and customers and challenges related to employees returning to the workplace.
- Liquidity
 - Topic 9A advises companies to consider how their liquidity positions and outlooks are evolving, noting particularly the impact of reduced revenues on sources and uses of funds and whether decreases in cash flow from operations might impact the company’s liquidity position and outlook. Companies may also consider disclosing

material changes to their ability to access traditional funding sources or to cost of capital. The Staff also pointed to the impact of operational challenges, as noted above, on financial condition and short- and long-term liquidity.

- If a company includes metrics, such as cash burn rate or daily cash use, in its disclosures, Topic 9A encourages such disclosures to also include a clear definition of the metric and an explanation of how management uses the metric in managing or monitoring liquidity. The Staff drew attention to the SEC's January 30, 2020 [interpretive guidance](#) on the use of metrics and key performance indicators, which emphasized the importance of disclosing estimates and assumptions underlying such metrics to prevent them from being considered misleading.
 - This focus on metrics and key performance indicators mirrors the emphasis in Topic 9 on companies' obligations under Item 10(e) of Regulation S-K and Regulation G with respect to the presentation of non-GAAP financial measures.
- Debt Obligations
 - Companies should consider disclosing whether and to what degree they are able to timely service their debt and other obligations and have taken advantage of payment deferrals, forbearance periods or other concessions. Where companies have accessed revolving lines of credit or there has been a change or a potential change to their credit rating, disclosure may be warranted. The Staff also noted the potential need for disclosure about financing terms that limit the ability of a company to obtain additional funding, any uncertainty of additional funding and whether any liquidity challenges may arise when concessions and accommodations end.
 - Topic 9A advises companies to consider appropriate disclosure if they are at material risk of not meeting covenants in credit or similar arrangements.
 - The Staff noted possible disclosure of extensions of credit to customers, in the form of extended payment terms, refund periods or otherwise modified contractual arrangements (including in a company's role as a lender or landlord), with the key consideration being whether such modifications materially impact a company's financial condition or liquidity position.
- Capital Expenditures
 - The Staff advised companies to consider appropriate disclosure regarding whether capital expenditures have been reduced and if so, how. Here, attention is drawn to actual or planned modifications to share repurchase programs, dividend payments, and human capital resource expenditures, as well as any cessation or disposition of a material business operation, asset or line of business. Important information regarding these modifications might include their timing and duration, factors that will determine whether they will extend or curtail these modifications and whether any of the modifications will impact revenue generation or existing and future financial obligations.
- Specific Cash Flow Programs
 - Topic 9A recommends enhanced disclosures regarding the liquidity and balance sheet implications of supplier finance programs, supply chain financing, structured trade payables, reverse factoring or vendor financing.
- Disclosure of Subsequent Events
 - The Staff advised companies to assess whether material events that have occurred after the end of a reporting period, but before financial statements have been filed,

will have or are reasonably likely to have an impact on liquidity and capital resources. The Staff specifically noted that companies might consider “whether disclosure of subsequent events in the financial statements and known trends or uncertainties in MD&A is required.” This signals the Staff’s expectation that discussions of material impacts on liquidity and capital resources be included in MD&A disclosures, even if the relevant event occurred after the end of the quarter, and not solely in a subsequent events footnote to the financial statements.

□ Going Concern Considerations

- Topic 9A reminds public companies of the need to consider whether conditions and events, taken as a whole, raise substantial doubt about the company’s ability to meet its obligations as they become due within one year after the issuance of the financial statements. Where these circumstances exist, appropriate disclosure should be included in the financial statements, and the company should also consider including appropriate disclosures regarding the circumstances and the company’s plans to address them in MD&A disclosures.

□ CARES Act Considerations

- Topic 9A also outlines a series of disclosure considerations for companies that have accepted government financial assistance through the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”). Highlights in this area are limitations on a company’s ability to pursue other means of financing, material tax consequences (including material tax refunds), and significant accounting estimates or judgments implicated by the receipt of federal financing assistance, such as the probability a loan will be forgiven, and what uncertainties are involved in applying the related accounting guidance. The Staff also noted that it would expect any foreign private issuer that received similar home country government assistance to make comparable disclosures.

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Additional Accounting, Disclosure and Enforcement Guidance

The SEC’s Chief Accountant [released a statement](#) on June 23, 2020 addressing a number of financial reporting considerations in light of the significant impacts of COVID-19. The statement acknowledges that, in addressing the financial reporting effects of the pandemic, companies have been required to make significant estimates and judgments regarding a variety of accounting and financial reporting matters, and that, as a general matter, the Staff will not object to well-reasoned judgments. Companies should ensure that significant estimates and judgments are disclosed in a manner that accurately reflects their facts and circumstances and are understandable and useful to investors. The Chief Accountant’s statement also urges companies preparing their second quarter reports to carefully evaluate the effectiveness of their disclosure controls and procedures, any changes to their internal control over financial reporting and whether new or updated disclosures are required regarding the company’s ability to continue as a going concern. The statement also notes the importance of active oversight by audit committees to enhance the quality of financial reporting.

On June 30, 2020 SEC Chairman Jay Clayton and Division Director Bill Hinman moderated a roundtable discussion titled “[Q2 Reporting: A Discussion of COVID-19 Related Disclosure Considerations](#)” to hear the views of a panel of investors and asset managers. During the roundtable, the panelists emphasized the importance of tailored and forward-looking disclosures to allow investors to assess the specific impacts of the pandemic on individual

companies. Importantly, Messrs. Clayton and Hinman noted that the SEC and its Staff will be closely monitoring companies' disclosures related to COVID-19, emphasizing the importance of forward-looking disclosures that are based on reasonable assumptions and expectations at the time they are made, with care to also disclose the material assumptions and risks related to those assumptions.

At the same time, the SEC's Division of Enforcement Co-Director Steven Peikin stated in a [recent speech](#) that the Division of Enforcement is actively monitoring company disclosures during the COVID-19 pandemic, with a focus on identifying disclosures that appear to be significantly out of step with disclosures made by companies in the same industry. Further, the Division of Enforcement is looking closely at disclosures, impairments, or valuations that are attributed to the effects of COVID-19 but may in fact be intended to disguise previously undisclosed problems or weaknesses. Mr. Peikin noted that structural risks, such as excessive debt, extreme leverage and possible liquidity disruptions, may be viewed with concern as indications of potential issues.

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Update on Certain Regulatory Relief

SEC Chairman Jay Clayton, along with the directors of the Division of Corporation Finance, Division of Investment Management and Division of Trading and Markets, issued a [public statement](#) on June 26, 2020 (the "June 2020 Statement"), providing an overview of the SEC's intra-agency relief efforts in the context of COVID-19. The June 2020 Statement outlines the current expectations regarding which categories of temporary relief and assistance will be extended and which will expire. Of note are the following:

- [Additional Time to File Public Company Reports](#). In March 2020, the SEC provided temporary relief granting companies a 45-day extension to file certain reports that otherwise would have been due on or before July 1, 2020. The June 2020 Statement confirmed that this relief expired as scheduled.
- [Shareholder Meetings](#). In March 2020 (and as later updated in April 2020) the Staff of the Divisions of Corporation Finance and Investment Management issued a statement providing interpretive relief with respect to certain requirements of the proxy rules for virtual and hybrid shareholder meetings, in light of COVID-19. The Staff's positions remain in effect, but the number of companies relying on this relief is expected to decrease now that most calendar-year reporting companies have held their annual shareholder meetings.
- [Proxy Material Delivery Accommodation](#). In March 2020, the SEC provided conditional relief from the requirement to furnish proxy soliciting materials to security holders when mail delivery is not possible. While the relief remains in effect, the Staff noted that it does not expect companies to need to avail themselves of the relief for domestic mailing addresses, although the relief may have enhanced utility for international mailing addresses.
- [Regulation Crowdfunding](#). The Division will provide a recommendation to the SEC in the coming months on whether to extend current relief, as discussed in our previous [client alert](#), beyond August 31, 2020.
- [EDGAR Notarization Relief](#). The June 2020 Statement indicates that the EDGAR Business Office will continue to work with filers to accept electronic and remote online notarizations in connection with EDGAR access requests.

4**Extention of Relief for Certain Manual Signature Requirements and Electronic Filing for Certain Paper Documents**

- Manual Signature Requirement. On March 24, 2020, the Division of Corporation Finance, the Division of Investment Management and the Division of Trading and Markets issued a [statement](#) acknowledging that some persons or entities may experience difficulties satisfying the manual signature requirements of Rule 302(b) of Regulation S-T due to COVID-19 circumstances. The Staff stated that it would not recommend enforcement action if signatories exercised certain document retention practices and filers established policies and procedures to govern this process. On June 25, 2020 the Division [announced](#) that this temporary relief will remain in effect until the Staff provides a public notice stating otherwise. Such notice will be published at least two weeks before the termination date.

- Temporary Extension of Relief for Certain Paper Filings. In light of the continuing impact of COVID-19, on June 25, 2020 the Division extended relief provided in April 2020 regarding [Form 144 paper filings](#) and [certain additional filings](#), including annual reports and other documents furnished on Form 6-K by foreign private issuers. The updated guidance extends the previously granted accommodation to permit the electronic filing of such forms which would otherwise be filed in paper format. The Division noted that this accommodation will apply until the Staff provides public notice that it will no longer be in effect, which will be published at least two weeks before the termination date.

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