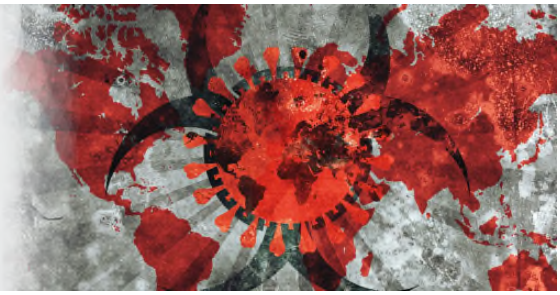

Securities Quarterly Update

April 2020

Preparing Quarterly Reports in Light of COVID-19 and other First Quarter Developments

Welcome to the third issue of Securities Quarterly*, a publication that provides updates and guidance on securities regulatory and compliance issues. In this edition, we look at developments during the first quarter of 2020, affecting periodic reporting requirements that public companies should consider as they prepare their Form 10-Q filings for the first quarter of 2020, as well as other general updates in securities laws and regulations.*

COVID-19 Updates

The coronavirus (COVID-19) pandemic has caused significant logistical, legal and operational challenges for public companies. This section summarizes recent developments in securities regulations and guidance published by the U.S. Securities and Exchange Commission (the "SEC") as well as practical tips for navigating the obstacles created by COVID-19.

Form 10-Q Filing Deadline. Reporting companies are generally required to file their quarterly reports on Form 10-Q between 40 and 45 days after the end of their respective fiscal quarters. On March 25, 2020, the SEC issued an order (the "COVID-19 Order") that, subject to conditions, extends filing deadlines by 45 days for companies that are unable to meet the original filing deadlines due to the circumstances related to COVID-19. This relief is available for reports, including quarterly reports on Form 10-Q, due by July 1, 2020. In order for companies to utilize the extension, they are required to furnish a Current Report on Form 8-K no later than the original filing deadline that includes a brief description of the reasons why the company cannot file the report for which the extension is needed, the estimated date the report is expected to be filed and risk factor(s) explaining the impact, if material, of COVID-19 on the company's business. If the company meets these conditions and files the report by the extended deadline, it does not need to file a Notification of Late Filing on Form 12b-25. The company will still be permitted to rely on Rule 12b-25 if it is unable to file the required report on or before the extended deadline.

The following table summarizes the potential extended Form 10-Q filing deadlines for companies whose fiscal quarters end on March 31, 2020 (assuming a fiscal year-end of December 31):

Filer Status	Form 10-Q Deadline without Extension	Form 10-Q Deadline Applying COVID-19 Order
Large Accelerated Filer	May 10, 2020	June 24, 2020
Accelerated Filer	May 10, 2020	June 24, 2020
Non-Accelerated Filer	May 15, 2020	June 29, 2020

Changes to "Accelerated" and "Large Accelerated" Filer Definitions. The SEC has recently adopted amendments to the "accelerated filer" and "large accelerated filer" definitions, which, among other things, exclude from these definitions "smaller reporting companies" that had annual revenues of less than $100 million in the last fiscal year. The amendments become effective on April 27, 2020. Most significantly, as a result of the amendments, some smaller public companies will no longer be required to incur the expense of the SOX 404(b) auditor assessment of the effectiveness of internal control over financial reporting. Management's report on the effectiveness of internal control over financial reporting will still be required. The amendments further increase the thresholds for exiting "accelerated" and "large accelerated" filer status and create more complexity by adding a revenue test to the exit thresholds. The company's status as a "non-accelerated filer," an "accelerated filer" or a "large accelerated filer" determines the company's filing deadlines for periodic reports, with non-accelerated filers enjoying longer timeframes. Note that companies with non-affiliate public floats between $75 million and $250 million remain subject to all of the accelerated filer requirements unless their annual revenues are less than $100 million.

Proxy Statement Deadline. The instructions to Form 10-K allows Part III (compensation- and corporate governance-related) information to be incorporated by reference from a company's definitive proxy statement, or, under certain circumstances, filed as an amendment to the Form 10-K, not later than 120 days after the end of the applicable fiscal year. Similar to the above, companies whose 120-day deadline to file the Part III information falls within the relief period specified above may delay their filing of the Form 10-K/A or the proxy statement by 45 days; provided that the company is unable to meet the original filing deadline due to the circumstances related to COVID-19 and furnishes a Form 8-K as described above.

Deadlines for Schedule 13D and Section 16 Filings. The COVID-19 Order does not apply to Schedule 13D filings, amendments to Schedule 13D filings and Section 16 filings.

MD&A. Companies should carefully analyze and disclose any material impact of COVID-19 on results of operations, liquidity and capital resources during the quarter and going forward. In addition, even if COVID-19 did not materially impact the company in the first quarter, or if the impact of COVID-19 continues to be uncertain, companies are required to discuss any known, material trends and uncertainties that may impact the company's financial position and results of operations in future periods. To quote SEC Chairman Clayton, companies should "provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments. How companies plan and respond to the events as they unfold can be material to an investment decision…."

On April 8, 2020, SEC Chairman Clayton and SEC Division of Corporation Finance Director Hinman issued yet another statement requesting that company disclosures "respond to investor interest in: (1) where the company stands today, operationally and financially, (2) how the company's COVID-19 response, including its efforts to protect the health and well-being of its workforce and its customers, is progressing, and (3) how its operations and financial condition may change as all our efforts to fight COVID-19 progress."

As companies prepare their disclosures, they should also be cognizant of plaintiff law firms monitoring SEC filings for potential securities law claims.

Risk Factors. Although most companies have already included risk factors describing the potential risks of pandemics and, in particular, COVID-19, in their annual reports on Form 10-K, when preparing their quarterly reports, companies should reassess and update those risk factors, as needed, to account for specific developments relating to the COVID-19 pandemic as they continue to unfold over time. The SEC views hypothetical, future descriptions of potential risks as inadequate when actual events have already occurred. In those cases, risk factors should instead disclose that the company has experienced the negative impact and describe the adverse events that have taken place to date. Other, non-pandemic risk factors

may also require updating, as those other risks may be exacerbated by COVID-19.

Forward-Looking Statements. Similar to risk factors, most companies have included updated forward-looking statement safe harbor disclosures in their Forms 10-K. We remind filers to update those forward-looking statement disclosures in light of developments during the COVID-19 pandemic.

Earnings Guidance. Due to the ongoing uncertainty caused by COVID-19, companies may wish to consider not providing future earnings guidance for upcoming quarters until the company has sufficient certainty to provide reasonable estimates. If a company decides that previously published guidance is no longer accurate, it should consider withdrawing guidance rather than issuing new guidance, in light of the rapidly changing COVID-19 situation. If the company chooses to update rather than withdraw, keep in mind that if the guidance relies on material assumptions, such assumptions must be objectively reasonable. In addition, consider fleshing out those assumptions more than usual so that investors understand the basis for the company's guidance. Companies should continue to use words such as "anticipate," "expect," or "project" in the guidance to identify forward-looking statements and should ensure that the earnings release, earnings call materials, and any conversations subsequent to the earnings call disclose consistent information.

Forms 8-K. As companies navigate the COVID-19 pandemic, they should be aware of potential requirements to file a Form 8-K. We are seeing the following specific Form 8-K items being triggered in recent weeks due to COVID-19:

- *Item 1.01*: *Entry into a Material Definitive Agreement* – Many companies have found it necessary to enter into amendments to material agreements to extend payment schedules. (Terminations of material agreements would generally be reportable under Item 1.02.)
- *Item 2.03*: *Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement* – Disclosure may be required under this item if the company enters into a material financing agreement or draws on an existing credit facility as a result of COVID-19.
- *Item 2.04*: *Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement* – A default or breach of a covenant in a material credit facility or other material agreement, such as an asset purchase agreement or merger agreement, caused by disruption of business in connection with COVID-19 would trigger a disclosure obligation. As another example, some companies have recently filed Form 8-Ks as they were not able to fund margin calls received under their financing arrangements and did not expect to be able to fund the anticipated volume of margin calls in the near future as a result of COVID-19.
- *Item 2.05*: *Costs Associated with Exit or Disposal Activities* – Cost savings initiatives implemented in response to COVID-19 may result in restructuring of operations or workforce reductions due to terminations or furloughs.
- *Item 5.02*: *Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers* – Disclosure under this item may be required if any executive officer of the company has been diagnosed with COVID-19, takes a temporary medical leave, and turns his or her duties to another person, or if certain changes are made to the executive compensation program in light of COVID-19.

In addition, a Form 8-K filing may also be necessary or recommended in the following situations:

- As mentioned above, if the company is utilizing the filing deadline extensions under the COVID-19 Order, a Form 8-K is required. Most companies include such disclosure under Item 8.01.
- If a company has a pending financing transaction or other material transaction previously disclosed that is impacted by the COVID-19 pandemic, the company should provide disclosures regarding the impact and risk to the company due to COVID-19.
- Lastly, companies should consider providing material information and updates on the company's business in connection with COVID-19 developments, and as they are taking mitigating

actions (i.e., closure of facilities, suspension of dividends, termination of stock repurchase programs) in response to COVID-19, under Item 7.01 or 8.01.

General COVID-19 Disclosure Guidelines. The SEC published its Disclosure Guidance Topic No. 9 on March 25, 2020, providing the staff's current views regarding disclosure and securities law obligations with respect to the impact of COVID-19. Specifically, the staff has noted that companies should consider the following:

- Impact of COVID-19 on the financial condition and results of operations;
- Impact of COVID-19 on future operating results and near- and long-term financial condition;
- Impact of COVID-19 on capital and financial resources, including the company's overall liquidity position and outlook, and its ability to, and costs of, accessing capital and funding sources;
- Material uncertainty about ongoing ability to meet the covenants of any agreements, including credit agreements;
- If a material liquidity deficiency has been identified, the course of action the company has taken or proposed to take to remedy the deficiency;
- Disclosure of known trends and uncertainties as it relates to the company's ability to service its 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;
- Impact of COVID-19 on assets on the balance sheet and the ability to timely account for those assets;
- 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 the company's financial statements;
- COVID-19-related circumstances, such as remote work arrangements, that adversely affect the ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures, and what changes in controls have occurred during the current period that materially affect or are reasonably likely to materially affect internal control over financial reporting, and challenges anticipated in the ability to maintain these systems and controls;
- Challenges in implementing business continuity plans and any anticipated material expenditures to do so and their effect on the business;
- Material impact of COVID-19 on demand for the company's products or services;
- Material adverse impact of COVID-19 on supply chain or the methods used to distribute the company's products or services, and any anticipated material change to the relationship between costs and revenues;
- Material impact of COVID-19 on human capital resources and productivity; and
- Material impact on the ability to operate and achieve operational goals caused by travel restrictions and border closures.

Insider Trading. In addition to disclosure obligations, the SEC reminds companies and insiders of the obligation to refrain from trading prior to the dissemination of material non-public information, including where COVID-19 has impacted the company in a material way or the company becomes aware of a material risk related to COVID-19. The guidance also reminds companies to avoid selective disclosure issues and that, depending on a company's particular circumstances, it may need to update previous disclosure to the extent such information becomes materially inaccurate. Accordingly, companies may wish to review their insider trading and communication policies to ensure that they cover COVID-19-related developments, monitor if special trading blackouts should be imposed, and implement additional disclosure controls and procedures, as needed.

Non-GAAP Financial Measures. If a company presents a non-GAAP financial measure to adjust for or explain the

impact of COVID-19, the company should disclose why management finds the measure useful for investors to assess the impact of COVID-19 on the company's financial statements. In the case where a GAAP measure is not available at the time of an earnings release because it is impacted by COVID-19-related adjustments that require additional information and analysis, the SEC has indicated that it will not object if a company reconciles a non-GAAP measure to preliminary GAAP results that either include reasonable, estimated provisional figures, or a range of reasonable, estimated GAAP results, and the company includes the reason why the line item is not yet complete and what additional information or analysis is needed. The company should also limit the measures in its presentation to those non-GAAP measures that it is using to report financial results to the company's board of directors as SEC guidance notes that non-GAAP measures should be used for the purpose of indicating how management and the board are analyzing the current and potential impact of COVID-19 on the company's financial condition and operating results (and not for the sole purpose of presenting a more favorable view of the company).

In filings, such as Forms 10-Q and 10-K, where GAAP financial statements are required, companies should reconcile non-GAAP measures to GAAP results and not include provisional amounts or a range of estimated results. As is currently the case, non-GAAP measures should not be disclosed more prominently than the most directly comparable GAAP measure or range of GAAP measures.

Key Performance Indicators. In preparing first quarter reports, companies should also review the SEC's guidance regarding key performance indicators issued on January 30, 2020. The SEC expects key performance metrics used by management in managing business (e.g., operating margins, same store sales, sales per square foot, total number of customers or subscribers, etc.) to be discussed in the MD&A. The guidance describes disclosure that should accompany such metrics (i.e., definition of the metric, explanation of calculation, reasons why the metric is useful to investors and how it is used by management, and any material estimates and assumptions) and disclosure that would be expected if the calculation or presentation of such metric is changed from one period to another. The requirements are similar to those for non-GAAP financial measures.

On February 19, 2020, the SEC announced charges against, and a resulting $5 million settlement with, Diageo plc for failing to disclose "the trends that resulted from shipping products in excess of demand, the positive impact the overshipping had on sales and profits [and higher growth in key performance indicators], and the negative impact that the unnecessary increase in inventory would have on future growth."

Regulation FD. As companies prepare their first quarter reports, they should take extra care to ensure that those involved in the process are mindful of the company's obligations under Regulation FD. In particular, as companies consider potential disclosure regarding the impact of COVID-19, they should be careful to not selectively discuss such disclosure with market participants, such as investors or analysts, unless it is done in manner consistent with Regulation FD.

Notary Requirements for Form ID. On March 26, 2020, the SEC issued some relief to address potential issues filers may have in securing the notarization required to gain access to make filings on the SEC's EDGAR system (e.g., when new officers or directors join the company). The SEC has adopted a temporary final rule that provides relief from the notarization requirement through July 1, 2020, subject to certain conditions. Among those conditions are that the filer indicates on its manually signed Form ID that it could not provide the required notarization due to circumstances relating to COVID-19, and that the filer submits a PDF copy of the notarized manually signed document within 90 days of obtaining an EDGAR account.

Forms 144. On April 10, 2020, the SEC staff has issued some relief for Forms 144, which filers can choose to submit in paper rather than through the SEC's EDGAR system. The relief statement provides that, through June 30, 2020, filers can email a complete Form 144 as a PDF attachment to: PaperForms144@SEC.gov as opposed to mailing it. The SEC has also provided some temporary relief for manual signatures.

Virtual Shareholder Meetings

With the prevalence of various state stay-at-home orders, many companies are choosing to hold virtual or hybrid shareholder meetings. A virtual-only meeting is held entirely online and/or telephonically, providing shareholders the means to attend, raise proposals in accordance with their respective corporate governance procedures, and vote remotely. A hybrid meeting is hosted at a physical location, but allows shareholders virtual means to attend, raise proposals in accordance with their respective corporate governance procedures, and vote remotely.

Although the SEC has issued guidance providing that companies that have filed their proxy materials may notify shareholders of a change in date, time, and location of the annual meeting without mailing additional soliciting materials or amending their proxy materials, companies should take care in including sufficient information and flexibility to change annual meeting logistics. If the company needs to change the location or logistics of its annual meeting, remember to take the following actions:

- Issue a press release announcing such change;
- File with the SEC the press release as definitive additional soliciting material;
- Take all reasonable steps to inform other parties involved, such as the company's proxy service provider and the stock exchange on which the company is listed, of such change; and
- Provide any notices to shareholders that may be required under the company's bylaws and state law.

On April 7, 2020, the SEC relaxed certain "notice and access" requirements (including the 40-day notice mailing deadline) for companies that need to change to providing their proxy materials electronically due to the COVID-19-related circumstances.

Securities Litigation Update – The U.S. Supreme Court Appears Poised to (Finally) Limit the Scope of SEC Disgorgement

During the oral argument on March 3, 2020, in the closely watched case of *Liu v. Securities & Exchange Commission*, No. 18-1501, the Justices squarely addressed the issue presaged in *Kokesh v. SEC*: whether the SEC has the authority to seek and to obtain disgorgement in actions filed in court. The contours of the *Liu* argument were clearly laid out: the provision governing remedies in a federal SEC proceeding, Section 21 of the Exchange Act, specifically authorizes only three forms of relief: injunctive relief, civil monetary penalties and "equitable relief that may be appropriate or necessary for the benefit of investors." The SEC has maintained that disgorgement constitutes "equitable relief," while the appellant pointed to the Supreme Court's statement in Kokesh that disgorgement constitutes a penalty for purposes of evaluating the relevant limitations period.

During oral argument, a majority of justices expressed an interest in redefining the proper scope of disgorgement to align it with equitable principles, as opposed to finding it unauthorized. Justices Ginsburg, Kagan, Sotomayer, Alito and Kavanaugh – although acknowledging the punitive nature of disgorgement that the SEC has previously sought and received – asked whether disgorgement would fall within "a traditional form of equitable relief" *if* ***"it were limited to net profits and [] every effort was made to return the money to the victims of the fraud."*** Transcript at 8, 10, 12-13, 17 (emphasis added).

If the Court ultimately rules that disgorgement constitutes equitable relief, permissible under Section 21, only where it reflects net profits and is fashioned to compensate investors, it will dramatically alter the issues that may be pressed by counsel including the imposition of joint and several liability, as well as any request for disgorgement in cases where no "victim" can be identified (e.g., Foreign Corrupt Practices Act and insider trading matters). A decision is expected in July. For more information about this case, contact Maranda E. Fritz.

FOR MORE INFORMATION

For more information, please contact a member of our Corporate Transactions & Securities group.