PUBLIC COMPANIES: HOW REGULATORS AND ISSUERS ARE RESPONDING TO A PANDEMIC

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Since our previous Public Companies alert, Annual Meetings in a World Without Meetings: The Impact of COVID-19 on Public Companies, regulators and issuers have taken unprecedented actions to address the impact of the coronavirus (COVID-19) on public companies and the financial markets where their securities trade and where they access capital. This alert provides a high-level overview of these responses to assist public companies and their officers and directors in navigating the numerous disclosure, fiduciary and other corporate issues they are facing during these challenging times.

Securities and Exchange Commission Actions

In general, the Securities and Exchange Commission (SEC) has responded, on the one hand, by providing issuers with relief from deadlines and other technical filing obligations given the practical difficulties arising from COVID-19 and, on the other hand, by reminding issuers and their officers and directors of their continuing and unchanging obligations under the securities laws. Issuers that need relief from the technical and timing requirements described below should ensure that they appropriately comply with the exemptions for such relief and consider follow-on impacts (e.g., compliance with credit facilities). All issuers should continue to be vigilant with their disclosures, both in their filings and for compliance with Regulation FD when speaking with investors and other market participants. Particularly given the rapidly changing pace of the COVID-19 pandemic and investors’ thirst for information, exercising utmost caution in all communications is of paramount importance.

We have catalogued in summary fashion below each of the key actions by the SEC related to COVID-19 since our previous alert. For additional detail, please refer to the links to the underlying guidance and do not hesitate to contact us with any questions regarding your particular situation.

- **Division of Enforcement Statement Regarding Market Integrity** (March 23, 2020):
  - **Reminder Regarding Market Integrity**: The Co-Directors of the SEC’s Division of Enforcement issued a statement emphasizing the importance of companies’ maintaining market integrity in light of the COVID-19 pandemic, including by following corporate controls and procedures to protect against the improper dissemination and use of material nonpublic information. This statement highlighted concerns regarding longer periods of insider access to material nonpublic information resulting from delayed filings and earnings reports and the potential for greater than usual numbers of people within companies with access to such information.
  - **Enforcement Division Priority**: The statement concluded with a general warning that the Division of Enforcement is committing substantial resources to enforcement in connection with these matters.
Staff Statement Regarding Rule 302(b) of Regulation S-T in Light of COVID-19 Concerns (March 24, 2020):

- Reminder of Manual Signing Obligations: The SEC Staff reminded issuers of their obligations to obtain and retain manually signed signature pages or other authentication documents from officers and directors with respect to their signatures set forth in typed form in SEC filings. This manual signature requirement remains in effect even though, outside of the SEC filing context, e-signatures are widely used and accepted.

- No-Action Relief: Acknowledging the practical difficulties of this requirement, the Staff stated that it would not recommend enforcement action if (i) the signatory manually signs the signature page or other authenticating document and provides the original to the issuer as soon as reasonably practicable, (ii) the document states the date and time it was executed and (iii) the filer establishes and maintains policies and procedures governing this process. In addition, the signatory may also provide to the filer a scan or other electronic record (such as a photograph) of the document when it is signed.

- No Requirement to Sign a Signature Page: This no-action relief makes clear that a signatory may sign a separate document authenticating his or her signature. Thus, for example, if the signatory is unable to print and sign the filing's signature page, he or she may instead write out a short authenticating statement on a separate piece of paper, which will serve as the authenticating statement for purposes of Rule 302(b).

SEC’s Modified COVID-19 Exemptive Order (March 25, 2020):

- Relief from Filing Obligations: The SEC issued a modified exemptive order superseding its March 4, 2020, order exempting public companies from the requirement to make filings under the Securities Exchange Act of 1934, as amended (Exchange Act), by the original reporting deadlines for those filings due to COVID-19-related matters. The filing relief remains in effect until July 1, 2020, and the SEC has stated that it may be further extended. In general, a public company can avail itself of this relief by filing a Form 8-K (or Form 6-K, if applicable) by the original reporting deadline disclosing that it is relying on the order, why it cannot make the particular filing on a timely basis, the estimated date by which the filing will be made, a company-specific risk factor explaining the impact of COVID-19 on its business and, if the filing delay is due to a third party’s inability to furnish a required report, opinion or certification, a statement signed by that third party.[1] On March 31, 2020, the Staff of the Division of Corporation Finance issued two Compliance and Disclosure Interpretations, Exchange Act Rule CDI 135.12 and Exchange Act Rule CDI 135.13, confirming that issuers must timely file a Form 8-K (or Form 6-K, if applicable) to utilize this relief. A number of companies have utilized this exemption to delay their periodic filings, but this is certainly a minority position.

- Relief from Mailing Obligations: The order also exempts issuers and other soliciting persons from the obligation to furnish solicitation materials to security holders when mail delivery is not possible (i.e., because the common carrier has suspended delivery service of the type or class the person making the solicitation customarily uses, and the person making the solicitation has made a good faith effort to furnish the materials to the security holder).

CF Disclosure Guidance: Topic No. 9 (March 25, 2020): The Staff of the SEC’s Division of Corporation Finance issued guidance to public companies regarding its current views with respect to public companies’ disclosure and other securities law obligations in light of the COVID-19 pandemic. These include the following (categorized in a manner consistent with Topic No. 9):
○ **Assessing and Disclosing the Evolving Impact of COVID-19:** The Staff reminded issuers of the importance of providing issuer-specific disclosures regarding the risks and effects of COVID-19 based on each issuer’s particular facts and circumstances. To do so, the Staff provided a nonexhaustive list of 10 questions that each issuer should ask itself. These generally relate to how COVID-19 will impact the issuer’s financial condition; results of operations and business, including from customer demand (or lack thereof); valuation issues (fair value determinations and impairments); remote working and travel restrictions (including such restrictions’ impact on the issuer’s ability to conduct its business); and access to capital.

○ **Need to Refrain from Trading Prior to Dissemination of Material Non-Public Information:** The Staff reminded issuers and their officers and directors of the prohibition on trading on inside information (including material information related to the company’s assessment regarding the impact of COVID-19), the need to comply with Regulation FD by disseminating information in a manner that is not selective and the need to consider updating previously disclosed information as circumstances change.

○ **Reporting Earnings and Financial Results:** The Staff advised issuers to proactively work with auditors and valuation specialists to minimize delays in filings. In addition, the Staff provided guidance on the use of non-GAAP measures adjusting for the impact of COVID-19, including the permissibility of reconciling to preliminary GAAP results in certain circumstances, subject to certain requirements.

**SEC Temporary Final Rule—Relief for Form ID Filers** (March 26, 2020):

○ **Background:** Any person that is required to make filings in EDGAR (including public companies, their directors and executive officers, issuers making Form D filings and others) must complete a Form ID to initially obtain access to the EDGAR filing system. Form ID requires the person signing the form (either the filer or an attorney-in-fact on behalf of the filer, such as outside counsel) to have his or her signature on the Form ID notarized. Under the laws of many states, including North Carolina, remote notarization (e.g., by means of a videoconference) is not permitted (although draft legislation was recently submitted to North Carolina’s legislative leaders to enable remote notarization during the current state of emergency). Therefore, mandatory stay at home requirements and the need for social distancing have, for the time being, created significant impediments to having Form IDs notarized.

○ **SEC Relief:** Pursuant to the SEC’s temporary final rule, through July 1, 2020, the SEC Staff will not require notarized signatures on Form IDs provided that the filer (i) indicates on the face of the manually signed Form ID that it could not obtain the required notarization due to circumstances relating to COVID-19 and (ii) submits as correspondence via EDGAR a PDF copy of the notarized manually-signed Form ID within 90 days of the issuance of EDGAR codes. This relief has been welcomed by filers and their law firms that are working remotely during this time and will allow for an orderly and safe notarization process once social distancing is no longer required.

**Congress: The CARES Act**

As more fully described in our separate alert, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law on March 27, 2020. The CARES Act generally does not differentiate between public and private companies, but there are certain provisions that either only apply or are likely to be more relevant to public companies. These include the following:
• **Financial Assistance**: Companies that receive loans and loan guarantees under Title IV of the CARES Act will be subject to the following requirements (these requirements do not apply to companies only receiving relief through the Paycheck Protection Program under Title I of the CARES Act):
  ○ **Shareholder Distributions**: In general, companies that participate in the CARES Act’s lending program are prohibited from making repurchases of equity securities listed on a national securities exchange or paying dividends with respect to common stock (or making capital distributions with respect to common stock equivalents) while the loan is outstanding and for 12 months thereafter (with special requirements for air carriers and contractors).
  ○ **Equity Kickers**: For companies that are listed on a national securities exchange, the Treasury Department must receive a warrant or equity interest in the company as part of providing direct lending or loan guarantees. For companies that are not listed on a national securities exchange, the Treasury Department may receive senior debt instead of a warrant or an equity interest.
  ○ **Executive Compensation**: Participants in the lending program will be required to adhere to a period of significant restrictions on compensation of and severance or other termination benefits paid to individuals who received more than $425,000 in “total compensation” (as defined in the CARES Act) during 2019 from the participant company. The restricted period begins upon entering into a program loan or loan guarantee and extends for one year after the loan or loan guarantee is no longer outstanding. The restrictions generally cap total compensation during any consecutive 12 months during the restricted period at an individual’s 2019 total compensation (unless such individual’s 2019 total compensation exceeded $3 million, in which case a different formula applies) and appears to limit the amount of severance or other benefits paid to that individual upon termination of his or her employment during the restricted period to twice that individual’s 2019 total compensation (although there is ambiguity in the legislation’s drafting). Public companies will need to factor these restrictions into their compensation committee processes and public disclosures, and a range of practical questions regarding the provisions of the CARES Act remain outstanding and may require additional consideration with counsel and as guidance develops over time (similar to how the compensation restrictions under the Troubled Asset Relief Program (TARP) unfolded during the Great Recession).

• **CECL Delay**: The CARES Act provides that insured depositary corporations, bank holding companies and their affiliates are not required to adopt Financial Accounting Standards Board Accounting Standards Update No. 2016-13 (Topic 326), Measurement of Credit Losses on Financial Statements (CECL), until the earlier of December 31, 2020, or the date that the President terminates the declared national emergency concerning COVID-19. Banks and bank holding companies that are SEC filers (other than smaller reporting companies) were required to begin complying with CECL for fiscal years beginning after December 15, 2019 (i.e., calendar year 2020).

**Public Companies**

Practically all public companies are impacted in some way by COVID-19, and there are already thousands of SEC filings that refer to the pandemic. While each situation is different, as we initially discussed in our previous alert, public companies are focusing on disclosures in the following areas:

• **Annual Meetings**:
  ○ **Proxy Statement Disclosures**: Proxy statements for annual meetings are shifting to virtual annual meetings, providing for physical annual meetings with an option to attend virtually and/or stating that
the company currently intends to hold an in-person annual meeting but is continuing to monitor the COVID-19 situation and may decide to switch to an entirely virtual annual meeting or to an in-person annual meeting with an option to attend virtually. Particularly with shelter-in-place orders being issued across the country, most companies should be prepared to at least allow remote participation in their near-term annual meetings.

- **Glass Lewis Policy Update:** On March 19, 2020, Glass Lewis issued an update to its guidelines regarding virtual-only meetings due to COVID-19, stating that, while it acknowledges concerns with virtual-only meetings, with respect to meetings held through June 30, 2020, Glass Lewis will generally refrain from recommending a vote against members of the governance committee on this basis so long as the company discloses, at a minimum, its rationale for holding a virtual-only meeting, including citing COVID-19.

- **Standalone Financial and Operational Updates; Suspending or Withdrawing Guidance:** A number of companies are issuing press releases announcing the potential impact of COVID-19 on their business, financial condition and results of operations and the steps they are taking in response to the virus (including, in many cases, suspending share repurchase programs or dividends). Companies are also either filing (under Item 8.01) or furnishing (under Item 7.01) these press releases on Form 8-K. Companies are also suspending or withdrawing guidance in light of the crisis. These disclosures can help mitigate Regulation FD issues, but they should be carefully vetted to avoid overly positive disclosures (presenting the risk of shareholder lawsuits if the company’s guidance is wrong, especially if the company accesses the capital markets after having provided such updates) and overly negative disclosures (presenting risks associated with triggering material adverse effect breaches under credit agreements or corporate insiders buying stock at an overly depressed price).

- **Business, MD&A and Financial Statements:** Issuers are describing, in the Business and MD&A sections of their Form 10-K filings and elsewhere, the current and projected impact of COVID-19 on their businesses, operations, financial condition and liquidity. A number of issuers are also adding disclosures regarding the COVID-19 pandemic to their subsequent events footnotes to their financial statements. With respect to the inclusion of any forward-looking statements included in the subsequent events footnotes (or other portions of the financial statements), issuers should take great care as these statements are not protected by the forward-looking statements safe harbor under the Private Securities Litigation Reform Act.

- **Forward-Looking Statements Safe Harbor and Risk Factors:** In forward-looking statements safe harbor and risk factor disclosures, companies are routinely discussing the current and potential risks to their businesses raised by the current scope and unpredictable nature of the COVID-19 pandemic. The SEC’s guidance discussed above provides issuers with helpful context to consider their risk profile, but companies should not limit their analysis to that guidance. Each company is different, and each disclosure committee should ensure that all relevant and material information from all functional areas of the company are considered as part of updating and disclosing the company’s evolving risk profile resulting from the COVID-19 pandemic. Companies are including this disclosure in periodic filings, registration statements and Form 8-Ks (so that it can be incorporated into already effective registration statements).

- **Impact on Directors and Executive Officers:** A number of companies have announced temporary reductions in board and executive officer compensation, with some reductions for executive officer compensation based on the board’s determination and others disclosed as voluntary actions by executives. We have seen one instance of a company announcing the resignation of a director as a result
of personal reasons related to COVID-19. Companies are also carefully considering how to disclose situations when executives become ill with COVID-19, particularly given the heightened potential for such information to be leaked to the market compared to other executive illnesses given the current public focus on COVID-19.

- **Debt:** Given the uncertainty in the market and with respect to future revenues, a number of companies are accessing their revolving credit lines and/or increasing their borrowing ability. Companies generally appear more likely than before the pandemic to conclude that significant drawdowns under existing lines of credit should be disclosed under Item 2.03 of Form 8-K. In connection with these disclosures, companies are often issuing press releases and are also disclosing the drawdowns as “precautionary measures” to provide additional “flexibility” given the uncertain environment.

Public companies and their officers and directors will need to continue to monitor the impact of COVID-19 and adjust their activities and disclosures accordingly. In particular, as companies shift out of Form 10-K and proxy season and into their first quarter earnings releases and Form 10-Q filings, the actual initial impact of COVID-19 on their financial results and businesses will need to be disclosed with appropriate contextual background and risk factor disclosures.

If you have any questions related to this alert, please do not hesitate to contact any member of the Public Companies group or your regular Smith Anderson lawyer. Additionally, please visit and bookmark our firm’s [Coronavirus (COVID-19) Business Resource Center](#), which is continuously updated with useful materials and resources related to COVID-19. This tool has been made available to ensure that our clients and the broader business community stay informed on key issues that may impact their operations and to navigate the related business and legal issues during these challenging times.

[1] In addition, on March 26, 2020, the SEC also provided temporary relief from the reporting obligations of Regulation Crowdfunding and Regulation A, essentially providing a 45-day extension for such filings so long as appropriate public disclosure regarding the filing delay is made.

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PRACTICE AREAS

Corporate & Transactional

Public Companies