



COVID-19 Pandemic: Recent SEC Developments and Hot Topics

Karen E. Deschaine
Cooley LLP

March 30, 2020

attorney advertisement

Copyright © Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304. The content of this packet is an introduction to Cooley LLP's capabilities and is not intended, by itself, to provide legal advice or create an attorney-client relationship. Prior results do not guarantee future outcome.

Conditional Filing Relief

- Public companies have 45-day extension for filings under most Exchange Act filing requirements due between March 1 and July 1, 2020
 - Does not apply to: Schedule 13D, Section 16 reports, nor conflict mineral reports (Form SD)
 - In order to rely on extension:
 - Company must be unable to file timely due to circumstances related to COVID-19
 - Company must furnish an 8-K/6-K by the original filing deadline (see next slide)
 - Eventual filing must disclose that the company relied on the order and explain why the filing wasn't timely
 - No Form 12b-25 is required

Updated/Extended Order Issued by SEC on March 25, 2020

March 30, 2020

Conditional Filing Relief (continued)

- The 8-K/6-K must include:
 - Statement that the company is relying on the order
 - Provide a brief description of the reasons why it could not file on a timely basis
 - State the estimated date by which the filing is expected to be filed
 - Include, if material, company-specific risk factors explaining the impact of COVID-19 on the business
 - If the reason the report cannot be filed timely relates to the inability of any person to furnish an opinion, report or certification, an exhibit must be included from such person stating the specific reasons they cannot provide the opinion, report or certification
 - Forward-looking statements are subject to the safe harbor

Conditional Filing Relief (continued)

- If the company was current and timely in its Exchange Act reporting as of March 1, 2020 and files all reports within the 45-day relief period and complies with other relief requirements:
 - it won't effect Form S-3, F-3 (or WKSI) eligibility
 - the company will be considered current for purposes of Rule 144(c)
 - the company will be considered current for purposes of Form S-8 eligibility
- Rule 12b-25 is available if the company is unable to meet the 45-day delayed filing deadline

Conditional Filing Relief (continued)

- The order also provided relief for furnishing proxy statements, information statements, annual reports and other soliciting materials where:
 - the security holder's mailing address is located where mail has been suspended due to COVID-19; AND
 - the company has made a good faith effort to furnish the materials

Flexibility for Annual Meetings

- Applies to companies who change the date, time and/or location (e.g. move to “virtual”) of the annual meeting after filing and mailing proxy materials
- Such companies will not be required to mail additional soliciting materials or amend proxy materials
- Instead, the companies can simply notify shareholders of the change
- Requires that the company promptly:
 - Issue press release announcing the change(s)
 - File the announcement on EDGAR as “additional soliciting materials”
 - Take all reasonable steps to inform others of the change, such as any proxy service provider and the securities exchange

Guidance Issued by SEC on March 13, 2020

Flexibility for Annual Meetings (continued)

- SEC advised that, if a company has not yet mailed meeting materials, it should consider including disclosures regarding the possibility of a COVID-19-related change
- If moving to a “virtual” meeting:
 - make timely notification
 - provide clear directions re: the logistics
- SEC encourages flexibility for shareholder proposal proponents
 - COVID-19 will be “good cause” under Rule 14a-8(h)

BIG Caveats for Annual Meeting Guidance

- Cooley has been advised by Delaware counsel that a new/revised notice must be mailed to stockholders at least 10 days prior to the annual meeting in the case of a changed meeting, and that merely issuing a press release and filing that press release on EDGAR would **not** by itself meet the statutory requirement
- The SEC's guidance may not work under a company's charter and bylaws, which would control

Other SEC Developments

- Certain rulemaking (unrelated to COVID-19) is suspended
 - Some senators are encouraging all non-COVID-19 rulemaking to stop at all agencies
- Limited relief regarding manual signatures – the signer can hold onto the manual signature page (dated and timed) until able to deliver to the filer
- From March 26 – July 1, 2020: a filer can obtain EDGAR codes without a notarized signature (subject to certain requirements)

What may be coming next?

- On March 23, the SEC warned about “market integrity” (read: insider trading). Included reminder that companies must follow their disclosure controls and policies.
- On March 25, the SEC issued extensive guidance about COVID-19-related disclosures.
 - included reminder to use FLS safe harbors
 - reiterated importance of controls
 - reminder about Reg FD

Other Considerations

- Proxy Statement Disclosure:
 - Companies should consider disclosing the pandemic as a material risk that the board is monitoring, identifying the committee, if any, to which primary oversight responsibility has been assigned, and the nature and frequency of management reporting to the board or committee.
- Guidance:
 - Depending on a company's particular circumstances, it should consider whether it may need to revisit, refresh, or update previous disclosure to the extent that the information becomes materially inaccurate.
 - If the company is aware that it will likely miss its estimates, it should refrain from trading in company securities and close trading windows until all material nonpublic information is disclosed.
- Disclosure outside of periodic reports:
 - To the extent that the risks and impact of the COVID-19 pandemic is determined to be material, companies may consider voluntary disclosure on Form 8-K or, in the case of foreign private issuers, Form 6-K, to maintain the accuracy and completeness of effective shelf registration statements and promptly advise the public of material information.
- Trading windows
- Paying dividends

Resources

- cooleypubco.com
- cooley.com/landing/covid19

Questions?
Email Karen Deschaine
kdeschaine@cooley.com

Cooley