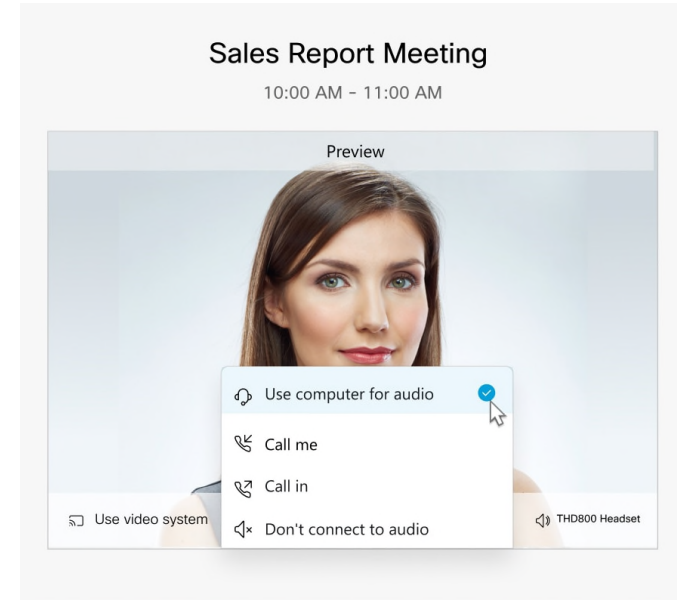
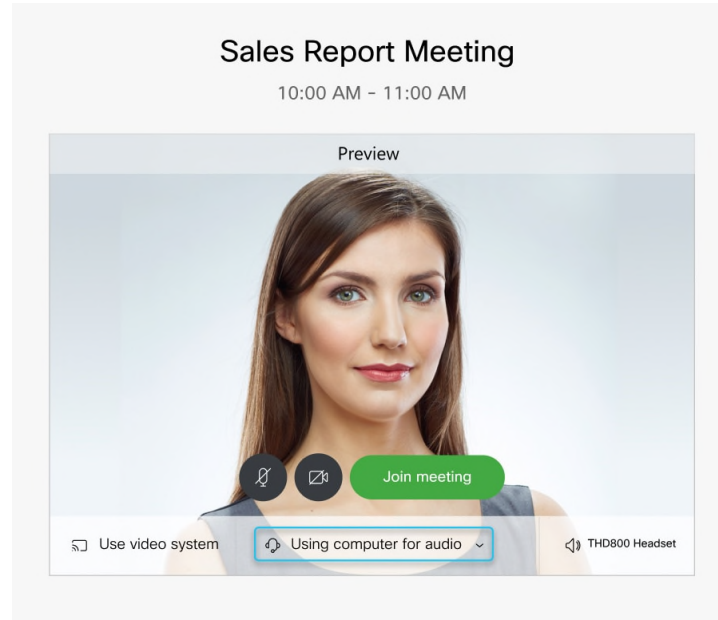


Welcome and thank you for joining us for today's presentation. Our topic is **“SEC/Corporate Filings in the Time of COVID-19.”**

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SEC/Corporate Filing in the Time of COVID-19

May 13, 2020

Laura M. Holm
Jesse R. Fishman

Agenda

- **Overview of SEC Guidance regarding COVID-19**
- **Form 10-Q Requirements – Risk Factors, MD&A and More**
- **New Rules and Exemptions by the SEC and Exchanges**
- **Compliance Issues – Insider Trading, Reg FD, Stock Buybacks and Disclosure Issues for Named Executive Officers Diagnosed with COVID-19**
- **Virtual Shareholder Meetings**
- **Conclusion**



SEC Guidance

- SEC Chair Clayton statement on January 30, February 19, March 20, March 24 and April 8, 2020
- Order on March 4, 2020 providing conditional regulatory relief
- Order on March 25, 2020 extending the relief in the March 4 order (extend filing date for periodic reports)
- Staff Guidance for Conducting Annual Meetings in Light of COVID- 19 Concerns, March 13, 2020
- CorpFin Disclosure Guidance Topic No. 9 Coronavirus (COVID-19), March 25, 2020
- SEC Corp Fin CDI Interpretations, March 31 and April 6, 2020
- SEC CorpFin COVID-19 FAQs, May 4, 2020



CF Disclosure Guidance Topic No. 9

- On March 25, the Division of Corporate Finance issued CF Disclosure Guidance Topic No. 9, which provides its views regarding disclosure and other securities law obligations that companies should consider with respect to the COVID-19 and related business and market disruptions.
- Division of Corporate Finance’s statement in CF Disclosure Guidance Topic No. 9:
“The impact of COVID-19 on companies is evolving rapidly and its future effects are uncertain. The Division is monitoring how companies are reporting the effects and risks of COVID-19 on their businesses, financial condition, and results of operations and is providing this guidance as companies prepare disclosure documents during this uncertain time. ... The Division encourages timely reporting while recognizing that it may be difficult to assess or predict with precision the broad effects of COVID-19 on industries or individual companies. We also recognize that the actual impact will depend on many factors beyond a company’s control and knowledge.”



CF Disclosure Guidance Topic No. 9

Issued March 25

The SEC tells issuers that the following information can be **material** to an investor's investing and voting decision.

To the SEC that means disclosing:

- The effects that COVID-19 has on the company
- What management expects the future impact to be
- How management is responding to evolving events
- How the company is planning for COVID-19 related uncertainties



CF Disclosure Guidance Topic No. 9

Where might we need to disclose?

- Risk Factors
- Management Discussion and Analysis
- Business
- Legal Proceedings
- Disclosure Controls and Procedures
- Internal Controls
- Financial Statements



CF Disclosure Guidance Topic No. 9

Illustrative Topics to Consider from the SEC

SEC suggests companies consider the following questions with respect to their present and future operations:

- How has COVID-19 impacted your financial condition and results of operations?
- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook?
- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets?
- Do you anticipate 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, or changes in accounting judgments that have had or are reasonably likely to have a material impact on your financial statements?



CF Disclosure Guidance Topic No. 9

Illustrative Topics to Consider from the SEC

SEC suggests companies ask how COVID-19 has affected:

- Have COVID-19 related circumstances such as remote work arrangements adversely affected your ability to maintain operations, including disclosure controls and procedures?
- Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so?



CF Disclosure Guidance Topic No. 9

Illustrative Topics to Consider from the SEC

SEC suggests companies ask:

- Do you expect COVID-19 to materially affect the demand for your products or services?
- Do you anticipate a material adverse impact of COVID-19 on your supply chain or the methods used to distribute your products or services?
- Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?
- Are travel restrictions and border closures expected to have a material impact on your ability to operate and achieve your business goals?



Forward Looking Statements

Safe harbor for forward-looking statements contained in Section 27A of the Securities Act of 1933, as amended and Section 21E of the Securities Exchange Act of 1934, as amended.

Identify the statements as forward-looking:

- Companies can identify the statements as “forward-looking” by using qualifying words such as “anticipates,” “believes,” “expects,” “looks,” “hopes,” “potential,” “may,” “suggests” and such similar expressions.

Cautionary Language:

- Accompany the statements with meaningful cautionary language which describes the specific risks and uncertainties that could cause forward-looking statements not be true.
- Most S&P 500 companies include an explicit reference to COVID-19 as an uncertainty



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Forward Looking Statements

State of Mind:

- Statements have a reasonable basis in fact and are made in good faith

Application of the Safe Harbor:

- Written statements made in press releases, Form 8-K's, Form 10-Q's and 10-K's
- Oral statements if a safe harbor disclosure is read prior to the presentation and you refer the investors to the company's SEC filings with the risk factors



10Q – Risk Factors

Item 1A of Part II of Form 10-Q requires companies to disclose any material changes from the risk factors that were included in their most recent Form 10-K.

- Risk factors related to:
 - Changes in demand – (airline, cruise and other travel businesses)
 - Cybersecurity issues relating to more employees working at home
 - Supply chain disruption
 - Financial markets and economic conditions
 - General uncertainty
- Discuss the most significant factors that make an investment in a company speculative or risky
 - Specific and tailored to your company
 - No generic or hypothetical risk factors
 - Review risk factors of peer companies (same SIC code)
- Form 10-Q Risk Factors
 - One comprehensive COVID risk factor
 - Updating several or all risk factors from the 10-K



10Q – Management’s Discussion & Analysis

Information “necessary to an understanding of its financial condition changes in financial condition and results of operations.”

10-Q is both backward-looking (quarter ended) and forward-looking (known trends and uncertainties)

Known trends and uncertainties that are reasonably likely to have a material effect on the company:

- Decreased revenue due to changes in demand
- Increased costs due to issues in the supply chain

Liquidity and capital resources:

- Cash on hand and other capital resources
- Credit facilities
- Suspension of payment of stock dividends or stock repurchase

Other considerations:

- New section discussing COVID-19
- Health and safety of employees and customers
- CARES Act
- Accounting issues



10Q – Other Issues

Financial Statements

- Accounting issues – fair value and impairment considerations, debt modification and restructurings, revenue recognition, income taxes, going concern, subsequent event footnotes

Legal Proceedings

- Material, non-routine pending legal proceedings related to COVID-19

Disclosures Regarding Controls and Procedures

- Larger group of people involved in disclosure controls.
- Examine effectiveness of existing controls in light of COVID-19

Signatures

- Signatories can keep signature pages at home until they return to the office
- Does not address electronic signatures



SEC Regulatory Relief

How do you obtain relief under the SEC Division of Corporate Finance March 25 order “C&DI”?

- The order extends filing dates for all Exchange Act periodic and current reports, and all proxy and information statements (previously discussed) for an additional 45 days. The 45-day extension is available for filings due on or before July 1, 2020.
- To benefit from the filing extensions offered, a company is required to file a Form 8-K prior to or on the original filing deadline of the late report.



SEC Regulatory Relief

- The Form 8-K should:
 - Disclose that the company is relying on the March 25 order
 - Provide a brief description of why it could not file the report on a timely basis
 - Provide the estimated date by which the report is expected to be filed
 - If applicable, provide risk factor(s) explaining any material impact that COVID-19 has had on the company's business
 - State if the delay relates to a third party. If the reason the report cannot be timely filed relates to the inability of a third party (e.g., an independent audit firm) to furnish an opinion or report, the Form 8-K or 6-K must include as an exhibit a statement from the third party as to why they are unable to furnish such opinion or report



SEC Regulatory Relief

- If the company needs more than a 45-day extension it can rely on Rule 12b-25 (C&DI 135.12)
 - With a 10-Q filing this would give a company a total of 50 days extension.
 - With a 10-K filing this would give a company a total of 60 days extension.
- If a company relies on Rule 12b-25 prior to filing a Form 8-K relying on the March order, the March order 45-day extension becomes unavailable (C&DI 135.13).



SEC Regulatory Relief

- How does this affect S-3 eligibility?
 - If you met the required Exchange Act filing obligations as of March 1 **and** file any Exchange Act report due during the period March 1-July 1 within the 45-day extended filing deadline for that report, you will remain S-3 eligible (assuming you satisfy all other eligibility requirements).



SEC Regulatory Relief

- How does this impact S-8 eligibility?
- How does this impact my ability to rely on Rule 144?
 - ALL HAVE THE SAME ANSWER
 - If the company met the required Exchange Act filing obligations as of March 1 **and** filed any Exchange Act report due during the period March 1-July 1 within the 45-day extended filing deadline for that report, you will remain S-8 eligible (assuming you satisfy all other eligibility requirements).



Form 10-K Part III Information

- C&DI Question 104.18 issued April 6, 2020
 - This C&DI addresses public companies' ability to rely on relief provided by a March 25 SEC order regarding the obligation to provide information required by Part III of Form 10-K within 120 days after the end of the related fiscal year in a definitive proxy or information statement or as an amendment on Form 10-K/A.
 - The deadline for filing the Part III information falls before July 1



Form 10-K Part III Information

- The C&DI applies to the following three scenarios:
 - Companies that timely filed a Form 10-K but seek relief in filing the Part III information
 - Companies that have not filed a Form 10-K and seek relief with respect to the filing of both the Form 10-K and the Part III information
 - Companies that previously sought relief in filing Form 10-K, but have not yet sought relief in filing the Part III information



Form 10-K Part III Information

Form must include:

- A brief description of the reasons why it could not file such Part III information on a timely basis
- The estimated date by which the Part III information is expected to be filed
- A company-specific risk factor or factors explaining the impact, if material, of COVID-19 on its business
- The company files a Form 8-K or Form 6-K on, or prior to, the date the Part III information is due



Form 10-K Part III Information

- If the reason the Part III information cannot be filed timely relates to the inability of any person, other than the company, to furnish an opinion, report or certification, the Form 8-K or Form 6-K shall have attached as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the date such report must be filed.



NYSE/Nasdaq Waive Certain Listing Requirements

- NYSE provided relief through June 30 so that certain PIPEs do not need shareholder approval
- Nasdaq provided relief through June 30 so that certain PIPEs do not need shareholder approval
- On April 16, Nasdaq provided relief for companies through June 30 for failure to meet continued listing requirements relating to minimum bid price and market value of publicly held shares
- Nasdaq provides proxy mailing relief



NYSE 20% Rule

- Section 312.03(c) the NYSE Listed Company Manual requires shareholder approval prior to the issuance of common stock, or securities convertible into or exercisable for common stock, if
 - The common stock has, or will have upon issuance, an amount that equals or exceeds 20% of the voting power outstanding before the issuance of such stock; or
 - The number of shares of common stock to be issued is, or will be upon issuance, equal to or in excess of 20% of the number of shares of common stock outstanding before the transaction, other than a public offering for cash.



NYSE 20% Rule – Temporary Relief

- Exceptions include “bona-fide private financings,” which require:
 - That no purchaser acquire more than 5% of the issuer’s common stock or voting power; and
 - The price of securities in the offering must not be lower than the lesser of the closing price as immediately prior to the offering or the average closing price for the five trading days immediately prior to the offering.
- NYSE removed the 5% portion of the exception so this rule now functions similar to the Nasdaq 20% rule where any investor may purchase more than 5% of the company’s common stock or voting power.



Nasdaq 20% Rule – Temporary Relief

- New temporary Nasdaq Listing Rule 5636T provides a limited temporary exception to its requirement of shareholder approval for private issuances of 20% or more of the company's common stock or voting power at less than market price.
- Under the “financial viability” exception to this rule, a company may apply to Nasdaq for a waiver when a delay in securing shareholder approval would seriously jeopardize the financial viability of the company.
- If approved by Nasdaq, the company must mail an alert to all shareholders not later than 10 days before the issuance.
- The temporary rule would provide an additional exception besides financial viability that would allow companies in some instances to bypass waiting for Nasdaq approval and, in all instances, to issue a press release or Form 8-K at least two business days before the issuance instead of mailing notice to all shareholders at least 10 days before.



Nasdaq 20% Rule – Temporary Relief

In order to qualify for the exception under the temporary rule, a company must certify to Nasdaq that:

- The need for the transaction is due to circumstances related to COVID-19
- The delay in securing shareholder approval would either:
 - Have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan
 - Result in workforce reductions
 - Adversely impact the company's ability to undertake new initiatives in response to COVID-19
 - Seriously jeopardize the financial viability of the enterprise
- The company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company; and
- The company's audit committee (or a comparable body of the board of directors comprised solely of independent, disinterested directors) has expressly approved reliance on this exception and has determined that the transaction is in the best interest of shareholders



Nasdaq 20% Rule – Temporary Relief

- Additionally, a company must file a Form 8-K (where required) or issue a press release, as promptly as possible, but no later than two business days before the issuance of the securities, disclosing:
 - The terms of the transaction (including the number of shares that could be issued and the consideration received)
 - That shareholder approval would ordinarily be required under Nasdaq rules but for the fact that the company is relying on this temporary exception to the shareholder approval rules
 - That the audit committee (or a comparable body of the board of directors) expressly approved reliance on the exception and determined that the transaction is in the best interest of shareholders



Nasdaq Continued Listing Requirements

- Nasdaq Listing Rule 5550(a)(2) provides that for 30 consecutive business days, if a company trades below \$1.00 at close, Nasdaq will send a deficiency notice to the company advising the company that it is in breach of this rule.
- It will also advise that the company is granted a “compliance period” of 180 calendar days to regain compliance.
- It is possible to obtain a second 180-day grace period.



Nasdaq Continued Listing Requirements – Temporary Relief

- This temporary Nasdaq rule stops, or tolls, compliance with these bid price requirements through and including June 30, 2020.
- After the end of the tolling period, the company will be entitled to receive any remaining time during the periods to regain compliance.



Nasdaq Proxy Mailing Relief

- **Nasdaq Rule 5250(d)**

- Requires that a company makes available its proxy statements
- However, if common carrier service has been suspended due to COVID-19, Nasdaq will waive those requirements if the company complies with the SEC's Order (discussed earlier) addressing the issue of mailings (e.g., making a good faith effort to deliver such materials)
- Nasdaq-listed companies that satisfy the conditions and requirements in the SEC's Order are exempt from Regulation 14A (including Rule 14a-16) and therefore will satisfy Nasdaq Listing Rules 5250(d)



Insider Trading

The SEC believes that COVID-19 has heightened the risk of insider trading.

Companies should realize:

- More employees have access to material, non-public information (“MNPI”)
 - Employees at all level of the organization have access to MNPI (not just high-level executive officers)
 - Accidental release of information may be more likely due to employees working at home
- Material, non-public information may be more valuable due to COVID-19 (esp. if an earnings release or SEC filing is delayed)



Insider Trading

Due to these heightened concerns, companies should:

- Provide virtual training to employees at all levels on the insider trading laws
- Issue regular reminders to employees about keeping confidential information confidential
- Review independent contractor agreements for insider trading provisions and send emails reminding them about their responsibilities under the federal securities laws
- Review insider trading policy and update, if necessary



Regulation FD (Fair Disclosure)

- Regulation FD requires that all disclosures of material non-public information must be broadly distributed to all shareholders and not selectively to market professionals, such as analysts, institutional investors and select shareholders.
- Regulation FD was designed to level the playing field and protect market integrity/confidence.
- Compliance suggestions:
 - Companies should adhere to established corporate policies for communications with analysts, institutional investors, brokers and shareholders. Generally, overseen by the Investor Relations Team (“IR Team”)
 - Provide virtual training on Regulation FD to IR team and other employees
 - Remind all employees against the dangers of posting business related matters on their personal social media accounts
 - Review Regulation FD policy and update, if necessary



Stock Repurchases

- Companies can be subject to liability if they purchase when they have material non-public information (similar to insiders)
 - Disclose material, non-public information prior to adopting a Rule 10b5-1 repurchase plan in a press, Form 8-K or other SEC filing
- Rule 10b5-1 requirements
 - Must not be in possession of material non-public information at the time of the adoption of the plan
 - Plan must specify share amounts price and dates, provide a written formula or algorithm for determining amounts, dates and prices or grant trading discretion to a third party
 - Once a plan is adopted, you should not make amendments or changes
- Rule 10b-18 safe harbor
 - Manner, timing, pricing and volume conditions
- CARES Act
 - Certain restrictions on public companies engaging in stock repurchase programs



Disclosure – Executive Officer Diagnosed with COVID-19

- Can the executive officer perform his or her duties and is it material to the company?
- NYSE and Nasdaq require companies to promptly disclose any information that might reasonably be expected to materially affect the market for its securities.
- Public health issues associated with COVID-19. Disclosure to employees and others who have worked with the executive officer.
- Materiality decisions are based on the facts and circumstances.
- Disclosure decisions are always reviewed in hindsight.



SEC Guidance – Virtual and Hybrid Meetings

If a company has already mailed and filed its definitive proxy materials, the company can notify shareholders of a change in the date, time or location of its shareholder 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
- 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



SEC Guidance – Virtual and Hybrid Meetings

- To the extent companies have not yet mailed and filed their definitive proxy materials, they should consider whether to include disclosures regarding the possibility that the **date, time or location** of the meeting will change due to COVID-19.
- The staff expects the company to notify its shareholders, intermediaries in the proxy process and other market participants of such plans in a timely manner and to provide clear directions on the logistical details of the “virtual” or “hybrid” meeting, including how shareholders can remotely access, participate in and vote.



SEC Guidance – Virtual and Hybrid Meetings

- Consult state law, charter and bylaws
- What type of notice is required?
- Many states have responded to the COVID-19 pandemic by providing guidance on, and in some cases short-term relief from, corporation law statutes precluding virtual shareholder meetings



SEC Guidance – Virtual and Hybrid Meetings

- Delaware allows companies to hold virtual shareholder meetings. Delaware General Corporation Law Section 211 mandates that if a company holds a virtual-only meeting it must:
 - Reasonably verify that each person deemed present and allowed to vote remotely is a stockholder or proxy holder
 - Ensure that shareholders have a reasonable opportunity to participate, including the opportunity to read or hear the proceedings concurrently
 - Keep a record of votes cast by remote communication
- On April 6, 2020, the governor of Delaware issued an [executive order](#) providing that a public company “may notify stockholders of the change solely by a document publicly filed by the corporation with the SEC pursuant to Section 13, 14 or 15(d) of the Exchange Act and a press release, which shall be promptly posted on the corporation’s website after release of changing the location of the meeting from a physical location to a virtual location.”



COVID-19: A Quick and Deep Impact

Thank you for joining us today!

Visit the Fox Rothschild COVID-19 Resource Center for the latest developments at <https://www.foxrothschild.com/coronavirus-resources/>



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