

## Coronavirus Disclosure Guidance for Public Companies

March 21, 2020

### Client Advisory

March 21, 2020 by Guy Ben-Ami

In response to the spread of coronavirus known as COVID-19, the US Securities and Exchange Commission has provided disclosure guidance and regulatory relief. This Client Advisory provides further detail and notes practical considerations.

**SEC Conditional Regulatory Relief.** The SEC issued an order providing conditional regulatory relief for certain filing obligations due to COVID-19. The order provides publicly traded companies with an additional 45 days to file certain disclosure reports that would otherwise have been due between March 1 and April 30, 2020. U.S issuers may delay filing a Form 10-K or 10-Q, foreign private issuers may delay filing their Form 20-Fs and Canadian issuers may also delay their 40-Fs (a similar Canadian relief exists for the AIF in Canada). If an issuer relies on such relief, they must specify in an 8-K or 6-K the reasons why the report cannot be filed timely. The additional extension provided by Form 12b-25 can still be used on top of this relief. The relief may be extended by the SEC if the pandemic persists. [Update: The 45-day extension was extended for disclosure reports that would otherwise have been due between March 1 and July 1, 2020.] Importantly, when the report is eventually filed, issuers must specify that they relied on this relief.

**Working Remotely.** We are seeing more and more governmental authorities around the globe requiring employees to work from home. The SEC staff has also largely moved to work remotely but is still responsive to inquiries and routine matters.

**SEC Assistance.** The SEC indicated that its staff is working to promptly provide guidance to market participants and targeted regulatory assistance and relief where necessary or appropriate. This is because some companies and other affected persons may require additional or different assistance in their efforts to comply with the requirements of the federal securities laws. The SEC is encouraging these companies to reach out. An example the SEC cited was the inability of an issuer to obtain a required signature due to an executive officer being located in a quarantined zone. The SEC staff will address these and any other issues on a case-by-case basis in light of their fact-specific nature.

**General Meetings; Proxy Statements.** If you have not already mailed your proxy statement and a change in the location of the meeting is likely or is being considered (given the intended location of the meeting or center of gravity of directors and officers), you should disclose the possibility of a change in the location of the meeting in the proxy statement. For domestic issuers who are subject to the proxy rules (SEC regulation 14A, 17 C.F.R. §240.14a), the SEC has recognized that the spread of COVID-19 has affected the ability to hold in-person meetings due to health, transportation, and other logistical issues. Considering these difficulties, the SEC provided regulatory flexibility to companies seeking to change the date and location of the meetings and use new technologies, such as “virtual” shareholder meetings that avoid the need for in-person shareholder attendance. Under the SEC guidance, the affected parties can announce in filings made with the SEC the changes in the meeting date or location or the use of “virtual” meetings without incurring the cost of additional physical mailing of proxy materials. Regardless, every company should evaluate its abilities to hold virtual meetings and prepare for such scenarios. As a reminder, shareholders must be able to vote so a regular “earnings call” format may not suffice. If shareholders generally do not attend your Meeting, it is likely they will not attend

now, but each issuer must satisfy its requirements pursuant to the proxy rules, its state law and bylaws and home country rules for foreign private issuers.

**Risk Factors.** All annual, quarterly reports and registration statements should have specific risk factors dealing with the virus (or with pandemics and epidemics in general including COVID-19), if COVID-19 has affected or has potential to affect your business. We are seeing risk factors dealing with supply chain issues and constraints, related to specific markets in countries like China and Italy. We are also seeing general risk factors dealing with the fact that many countries around the world have imposed quarantines and restrictions on travel and mass gatherings to slow the spread of the virus. Countries that have closed borders or have quarantines present unique risks to these markets. Companies that are required to prepare for or work remotely, or close their offices entirely, especially need to consider the economic impact of COVID-19. Companies in businesses that interact with customers need to reflect on the health risks.

You may add that the extent to which COVID-19 impacts your business will depend on future developments, which are highly uncertain and cannot be predicted, **but if you already know** that the virus will negatively impact your financial results in the first and second quarter of 2020 or beyond, you must not make a misleading statement by indicating that COVID-19 “may” impact your financial results.

**No Affirmative Requirement to Issue a General 8-K or 6-K.** There is no requirement by the SEC or NASDAQ/NYSE for issuers to furnish a current report regarding the effects of the coronavirus outbreak. Of course, such a requirement may arise if you are in financial distress and need to take a new loan or draw from a line of credit. Having said that, if you are in the process of a public financing, you need to disclose the material risks.

**Management or other Key Persons Affected by the Virus.** In the event specific key persons of an issuer begin to show symptoms, or become seriously ill, and even if such development is material to the company’s operations, there is still, normally, no affirmative requirement to disclose such event. Companies that file 8-Ks are subject to specific matters they need to disclose according to the SEC rules and this is not one of them. Foreign Private Issuers that file 6-Ks need to verify whether such disclosure is required under their home country laws. Nevertheless, we have seen many companies announce that a senior officer has entered into self-quarantine or has tested positive.

**Selective Disclosure.** Issuers need to be mindful of Regulation FD (Fair Disclosure). Therefore, management should not discuss concerns or perceived future effects of the virus outbreak with analysts or certain “privileged” shareholders. Companies are encouraged to use their normal disclosure channels.

**Press Releases.** Some companies have decided to include a specific reference to the virus in their Forward-Looking Statements Legend (i.e., the safe harbor of Section 21E of the Exchange Act) in an effort to keep investors informed about material developments, including known trends or uncertainties regarding the impact of COVID-19. Typical language:

“... in addition, there is uncertainty about the spread of the COVID-19 virus and the impact it will have on the company’s operations, the demand for the company’s products, global supply chains and economic activity in general. These and other risks and uncertainties are detailed in the company’s Securities and Exchange Commission filings.”

**SEC Enforcement Actions.** The SEC has highlighted instances where enforcement actions have been initiated against individual and companies, and even suspended trading, because of “COVID-19-related misconduct.” Be very careful not to make any misleading claims about the impact of COVID-19 or the potential of new products, drugs or tests targeted at COVID-19.

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For more information concerning the matters discussed in this publication, please contact the author **Guy Ben-Ami** (212-238-8658, [benami@clm.com](mailto:benami@clm.com)), or your regular Carter Ledyard attorney.

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*Carter Ledyard has created a COVID-19 Response Group to monitor the evolving legal landscape, address client questions and ensure client compliance with the laws and regulations issued in response to the COVID-19 pandemic. The Carter Ledyard COVID-19 Response Group consists of **Jeffery S. Boxer** (212-238-8626, [boxer@clm.com](mailto:boxer@clm.com)), **Judith A. Lockhart** (212-238-8603, [lockhart@clm.com](mailto:lockhart@clm.com)), **Bryan J. Hall** (212-238-8894, [hall@clm.com](mailto:hall@clm.com)), **Alexander G. Malyshev** (212-238-8618, [malyshev@clm.com](mailto:malyshev@clm.com)), **Melissa J Erwin** (212-238-8622, [erwin@clm.com](mailto:erwin@clm.com)) and **Leonardo Trivigno** (212-238-8724, [trivigno@clm.com](mailto:trivigno@clm.com)). Clients should contact the attorneys listed above or their regular CLM attorney for any questions concerning legal obligations arising from the COVID-19 pandemic.*

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