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SEC Urges Cos. To Stay On Top Of COVID-19 Disclosures

By **Tom Zanki**

Law360 (June 24, 2020, 8:01 PM EDT) -- With the second quarter nearing its end, U.S. Securities and Exchange Commission officials are urging public companies to thoroughly update their disclosures so investors have a clear picture about corporations' financial health and whether they can survive pandemic-related disruptions.

The SEC's Division of Corporation Finance on Tuesday supplemented its guidance on COVID-19 disclosures, urging companies to "proactively revise and update disclosures as facts and circumstances change." The updated guidance came the same day SEC Chief Accountant Sagar Teotia reiterated the need for "high-quality financial reporting" in light of the coronavirus pandemic.

The guidance supplement — the division's first since its original COVID-19-related guidance was issued on March 25 — specifically called on public companies to explain operational changes that they have undertaken since the pandemic.

"These types of adjustments may have an effect on a company that would be material to an investment or voting decision, and affected companies should carefully consider their obligations to disclose this information to investors," the updated guidance said.

These changes could include supply chain adjustments or implementation of work-from-home policies. SEC staff said noteworthy changes could also include financing that companies have executed to keep their businesses running amid the pandemic, including accessing credit facilities or raising capital via public or private markets. Some of these funding sources may have novel terms and structures, SEC officials said.

"It is important that companies provide robust and transparent disclosures about how they are dealing with short- and long-term liquidity and funding risks in the current economic environment, particularly to the extent efforts present new risks or uncertainties to their businesses," said the Division of Corporation Finance, which reviews corporate disclosures for materiality and advises the full SEC on policy.

The guidance also notes that, while some companies have already included such disclosures in their first-quarter earnings releases, companies should consider whether this information should be included in the "management discussion and analysis" section of its periodic quarterly reports.

Given uncertainty over how long the pandemic will last — and how recovery will unfold — one lawyer interpreted the SEC staff's guidance as indicating that COVID-19 disclosures could be a fixture in companies' periodic filings for some time, and not just limited to recent quarters.

"It could include the third quarter, it could be the whole year," Mayer Brown LLP counsel Laura Richman said Wednesday. "I think there is a growing recognition that we don't know much longer the pandemic will be around."

Tuesday's guidance provides detailed questions companies should address when filing updated disclosures. The current fiscal quarter ends on June 30 for many companies, meaning a wave of second-quarter reports will be filing starting in early July.

SEC officials want companies to describe any government aid they have received through the $2 trillion Coronavirus Aid, Relief and Economic Security, or CARES, Act — be it low-interest loans or tax relief. If companies have serious doubts about their ability to continue operating or meet obligations, they must disclose that as well, the guidance said.

"Where there is substantial doubt about a company's ability to to continue as a going concern or the substantial doubt is alleviated by management's plans, management should provide the respective disclosures in the financial statements," the guidance said.

The guidance added that if a company is facing hardships, such as defaulting on outstanding obligations, or is dealing with labor challenges or work stoppages, those matters should be addressed in the "management discussion and analysis" section of a company's disclosure.

That point was echoed by Teotia, who also called on auditors to scrutinize the financial statements and disclosures of companies that are facing difficulty operating.

"Auditors also have responsibility to evaluate an entity's ability to continue as a going concern based on their knowledge of relevant conditions that exist at or occurred prior to the date of the auditor's report," Teotia said.

The updated guidance comes before a roundtable on second-quarter reporting that SEC Chairman Jay Clayton has scheduled for June 30 with market participants. As the pandemic unfolded in March, Clayton called on companies to be as upfront with investors as they can, while acknowledging there are hard judgment calls to make given the uncertainty of events.

--Editing by Alanna Weissman.