

[Securities Regulation Daily Wrap Up, PUBLIC COMPANY REPORTING AND DISCLOSURE—Securities Docket webcast examines impact of COVID-19 on financial reporting and enforcement, \(Jun. 26, 2020\)](#)

Securities Regulation Daily Wrap Up

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By [Amanda Maine, J.D.](#)

The panelists stressed that complete, accurate, and non-boilerplate disclosure is essential.

Representatives from Latham & Watkins and FTI Consulting discussed compliance, financial reporting, and litigation considerations in light of the COVID-19 pandemic during a recent webcast [hosted](#) by Securities Docket. The panelists drew on SEC guidance related to disclosing the impacts and risks associated with the pandemic and examined litigation related to COVID-19 issues.

Financial reporting. Todd Rahn, senior managing director at FTI, said that COVID-19 has resulted in an unprecedented amount of stress and uncertainty in financial disclosures. There is a wealth of information available on the pandemic which has impacted disclosures, he advised, and the SEC has provided guidance on financial disclosures, the most [recent](#) of which was issued by the SEC's Office of the Chief Accountant earlier this week.

Rahn stressed that SEC registrants must approach upcoming quarterly filings with a real-time, fresh focus towards the ongoing impact of COVID-19 on business operations. Some key considerations for registrants include revenue recognition, the company's financial condition, results of operation, supply chain interruptions, human capital constraints, and reforecasting given the availability of new information, Rahn said. He emphasized that fair value accounting and estimates permeate through all these areas.

The pandemic has also highlighted the importance of robust controls and procedures, Rahn said. Maintaining internal controls over financial reporting has presented challenges due to COVID-19, including those related to working from home, the health of personnel, and supply chain disruptions.

Rahn also discussed impairment charges related to the pandemic. It is important to provide as much information as possible relating to an impairment charge, and the disclosure must be specific and not boilerplate, he said. The quarter-to-quarter disclosures need to be specific to the company and not just a roll-forward of those made in the prior 90 days, he added. FTI Managing Director Marion L. Duffy also discussed the issue of impairment, echoing Rahn's comments that impairment analysis needs to be backed up. While having robust impairment accounting policies is good, overly aggressive accounting in the time of COVID is not a good idea. You shouldn't use impairment charges related to COVID-19 to hide what should have been disclosed before, she advised.

Keith L. Halverstam, a partner at Latham & Watkins, discussed whether COVID-19 disclosures should be made in the near term on Form 8-K or if they should be disclosed on Form 10-Q. He warned against "kitchen sink disclosure," emphasizing that cutting and pasting boilerplate language is not explaining how the pandemic is affecting a business. Doing so can put the company at risk of litigation, he cautioned. Halverstam said that he advises his clients to wait until the next 10-Q to update their COVID-19 disclosures. However, in certain circumstances, it may be appropriate to file a Form 8-K when previous disclosures are no longer current, he added.

Based on the SEC's guidance released to date, Halverstam recommended that companies drafting their Forms 10-Q and 10-K focus on:

- operating results, capital and financial resources;
- cost of or access to capital;

- compliance with credit agreement covenants;
- ability to service debt;
- material COVID-19-related contingencies;
- timely accounting of assets on the balance sheet;
- material impairments or restructuring charges;
- challenges or material costs associated with implementation of business continuity plans;
- demand for products and services;
- supply chain impacts;
- ability to maintain operations in light of remote work arrangements; and
- impact on operations of travel restrictions and border closures.

Halverstam also advised against using the term "material adverse effect" when it comes to making COVID-related disclosures related to company operations. While it might look good to the SEC, other parties such as the company's lenders might see it as a violation of a covenant, making it harder for the company to draw on their revolving credit. Instead of using "material adverse effect," companies can say, for example, that the pandemic has had "significant effects on revenue," he recommended.

Ryan J. Maierson, a partner at Latham & Watkins, discussed the disclosure of non-GAAP financial information. He noted that the SEC was an "early mover" in providing [guidance](#) on non-GAAP disclosures related to COVID-19, which was discussed in CorpFin's [Topic No. 9](#) guidance issued on March 25. The SEC had this foresight because there are a number of non-GAAP measures that companies regularly report, the reconciliation of which becomes more challenging in light of the uncertainty introduced by the pandemic, according to Maierson.

The SEC's guidance reiterated that if a non-GAAP measure is used, it still must be reconciled to a GAAP financial measure. However, because the measure may be impacted by COVID-19-related adjustments requiring additional information and analysis to complete, the SEC will not object to companies reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amounts based on a reasonable estimate, or a range of reasonably estimable GAAP results, Maierson advised. He emphasized, however, that provisional or estimated non-GAAP reconciliation must explain why it is incomplete and what additional information would be needed to complete the accounting.

Litigation and enforcement. Rob Malionek, a partner at Latham & Watkins, said that Halverstam's suggestions to companies for drafting their Forms 10-Q and 10-K also make a good list for litigation risk assessment. There have been a number of lawsuits filed related to COVID-19, including actions against cruise lines (including [Norwegian Cruise Lines](#)), a wrongful death lawsuit filed against Walmart, lawsuits against Lyft and Uber alleging labor law violations, claims related to the CARES Act's Paycheck Protection Program (including a lawsuit against [Wells Fargo](#)), and lawsuits against insurance companies claiming that business interruption coverage excludes losses related to COVID-19, Malionek said.

Christopher Clark, a former prosecutor and currently a partner at Latham & Watkins, said that mitigating COVID-19 litigation risks involves companies taking proactive steps to review and update their risk disclosures. Pointing to guidance from the SEC itself, he said that companies can mitigate risks by providing their investors with insight regarding their assessment of, and plans for, addressing material risks to their business and operations. He also noted that the SEC has reminded companies to avoid selective disclosures and to disseminate COVID-19 information broadly. Clark further advised that proactive disclosures can help mitigate future damage claims. Erring on the side of more disclosure can mitigate both the securities litigation risk and damage claims in the event a litigation does happen, he explained.

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Companies: FTI Consulting

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