

New SEC Coronavirus Actions: Extended Conditional Relief for Filing Deadlines, New Disclosure Guidance, Temporary Relief for EDGAR Form ID Applications

March 30, 2020

On March 25, 2020, due to the continuing impact of COVID-19, the SEC issued an order extending its previously-issued conditional relief from certain Exchange Act reporting requirements and proxy delivery requirements. In particular, the March 25 order provides U.S. public companies with a 45-day extension to file or furnish certain filings otherwise due between March 1 and July 1, 2020.¹

Also on March 25, the SEC Division of Corporation Finance (Corp Fin) issued Disclosure Guidance Topic No. 9, Coronavirus (COVID-19), offering the Corp Fin staff's current views on disclosure considerations, trading on material non-public information (MNPI) and reporting earnings and financial results (including non-GAAP measures) in light of COVID-19.²

The order provides relief for companies who may have difficulty preparing their financial statements or other aspects of their periodic reports during this uncertain time, while the guidance provides valuable insight into how companies should be thinking about upcoming disclosures, particularly in light of the SEC's continuing focus on a principles-based reporting regime.

The SEC has also provided guidance on signature and retention requirements as well as on relief from the notarization requirements for Form ID, which is required to make filings on EDGAR.³ The Form ID relief extends through July 1, subject to certain conditions.

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¹ Click [here](#) for the SEC's original March 4 order and [here](#) for the March 25 extension.

² Click [here](#) for the disclosure guidance and [here](#) for our alert memo on leading disclosure issues for U.S. public companies.

³ Click [here](#) for the guidance on signature page retention and [here](#) for the temporary final rule.



Conditional relief for filing deadlines

Scope

The March 25 order provides conditional relief for registrants and other persons impacted by COVID-19 for filings otherwise due between March 1 and July 1, 2020 under the following filing requirements:

- Exchange Act Sections 13(a), 13(f), 13(g), 14(a), 14(c), 14(f), and 15(d);
- Regulations 13A, Regulation 13D-G (except for provisions mandating the filing or amendment of Schedule 13D), 14A, 14C and 15D; and
- Exchange Act Rules 13f-1 and 14f-1.

This includes, among others, Forms 10-K, 10-Q and 20-F. We believe the filing deadline extension also extends the 120-day period for filing omitted Part III information that is incorporated by reference into the Form 10-K from the proxy statement.

Notably, the order specifically excludes Schedule 13D filings. It also fails to mention Section 16 and Section 13(p) filings (i.e., reports on Forms 3, 4 and 5 and conflict minerals, respectively). Filings under these sections remain required within usual filing deadlines.

Notwithstanding the available relief, in the companion disclosure guidance, Corp Fin encourages companies to file their reports in a timely manner if possible.

Conditions to relief

To rely on the order, a company must:

- be unable to meet a filing deadline due to COVID-19;
- furnish a Form 8-K or 6-K for each affected filing by the later of March 16 or the original filing deadline including:
 - a statement that it is relying on the order;
 - a brief description of the reasons why it could not timely file;
 - the estimated date by which it expects to file;

- a company-specific risk factor or factors explaining, if material, the impact of COVID-19 on its business; and
 - if the reason the filing is delayed relates to the inability of a person other than the company to furnish a required opinion, report or certification, attach as an exhibit a statement signed by that person stating the specific reasons for this inability; and
- make the filing no later than 45 days after the original due date, and disclose in the filing that it is relying on the order and why it could not timely file.

Effect on “current” reporting requirements

Companies that rely on the order, satisfy the conditions and were current and timely in their filings as of March 1 will be considered current and timely for purposes of Form S-3, F-3 and S-8 eligibility and Rule 144(c) current public information requirements.

Companies that rely on the order will not need to file a Form 12b-25 so long as they make the required filing within the 45-day deadline.

Proxy delivery relief

Recognizing the effect of COVID-19 on certain mail delivery services, the order also provides conditional relief from requirements to furnish and deliver proxy statements, annual reports and other soliciting materials where delivery may be impeded by COVID-19 disruptions to mail services.

Disclosure guidance

The new disclosure guidance makes clear that Corp Fin continues to monitor how companies are reporting the effects and risks of COVID-19 on their business, financial condition and results of operations. Discussion of these risks and COVID-19-related effects may be necessary or appropriate throughout a company’s disclosure and/or financial statements.

- Financial disclosure: Companies are encouraged to proactively address financial reporting matters earlier than usual, and to revise and update disclosures as facts and circumstances change. To

the extent needed, companies or their auditors should also consult with experts promptly so that reporting remains as timely as possible, as well as tailored, accurate and complete. One example of this is experts that may be needed to help assess asset valuation, including potential impairment.

- **Topics to Cover:** Corp Fin recognizes that disclosure about the evolving effects of COVID-19 and related risks will be a facts-and-circumstances analysis, specific to each company. The guidance provides a non-exhaustive list of questions to help companies assess the evolving effects of COVID-19 on their business and meet their disclosure obligations.⁴ The questions cover a range of topics, prodding companies to consider the effects of COVID-19 on their financial condition, liquidity, balance sheet, impairments, operations and demand for products and services.
- **Non-GAAP measures:** Companies are reminded of their obligations relating to the reporting of non-GAAP financial measures. If a company presents a non-GAAP financial measure or performance metric to account for COVID-19, it should highlight why management finds this useful and how it helps investors assess the impact of COVID-19 on the business. A company considering presenting metrics related to COVID-19 or changing the method by which it calculates a metric as a result of the outbreak should refer to the recent SEC guidance on the use of metrics.⁵

The guidance notes that there may be instances where a historical GAAP financial measure is not available at the time a company releases earnings, due to COVID-19 related delays. In that case, Corp Fin staff would not object if a company reconciles the non-GAAP financial measure to preliminary GAAP results that either include reasonably estimable provisional amount(s) or a range of reasonably estimable GAAP results, so long as the company provides an

explanation as to why the accounting is incomplete and what additional information or analysis is needed to complete it. This relief is similar to the practical accommodation already available in the rules for forward-looking non-GAAP financial measures, such as guidance, but this kind of approach has not previously been available for historical information. If a company does present non-GAAP financial measures reconciled to preliminary GAAP results that either include reasonably estimable provisional amount(s) or a range of reasonably estimable GAAP results, it should limit these measures to those it uses to report financial results to its board of directors. However, for filings requiring GAAP financial statements (such as Forms 10-K, 10-Q or 20-F), the guidance states that companies should only reconcile to GAAP results.

The guidance also reminds companies to consider their market activities in light of their obligations under the federal securities laws. For example, if COVID-19 has materially affected a company or presents a material risk, the company, its directors and officers, and other insiders who are aware of the information should refrain from trading in the company's securities until the information has been publicly disclosed. Companies should also consider whether previous disclosures need to be updated, to the extent they have become materially inaccurate.⁶

Both the order and the guidance emphasize the importance of the health and safety of all securities markets participants, and urge companies to contact Corp Fin with questions or requests for additional guidance or relief.

Temporary signature requirement and Form ID relief

On March 24, the Corp Fin staff provided guidance regarding the document retention requirements of Rule 302(b) in light of logistical difficulties posted by COVID-19: while documents must still be signed

⁴ See Appendix A of this memo for Corp Fin's list of questions for companies to consider.

⁵ Click [here](#) for our alert memo on SEC guidance on the use of performance metrics.

⁶ Click [here](#) for our blog post on insider trading considerations in the COVID-19 era.

manually, the staff will not object if the signatory, rather than the filer, retains the original signatures for the time being (and provides the signed signature page to the filer for retention “as promptly as reasonably practicable”).

In addition, the March 26 temporary final rule provides additional relief in light of these difficulties, specifically for Form ID applications. In order to make filings on EDGAR, a filer must complete a Form ID application online, and then upload a notarized PDF attachment to the application. This includes officers and directors who are required to file Section 16 filings. Due to teleworking and other constraints, access to a notary has proven challenging for many filers. The temporary final rule allows SEC staff to create an EDGAR account and issue access codes based on manually signed documents without the required notarization, provided the filer “indicates on the face of the signed document that it could not obtain the required notarization due to circumstances relating to COVID-19.” The staff may request that the filer provide supplemental documentation supporting its application. Within 90 days of being issued its filing codes pursuant to the temporary final rule, the filer must submit as correspondence via EDGAR a PDF of the notarized, signed document. The staff may inactivate the filer’s access codes if the PDF is not timely submitted.

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Appendix A

- How has COVID-19 impacted your financial condition and results of operations? In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near-and-long-term financial condition? Do you expect that COVID-19 will impact future operations differently than how it affected the current period?
- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook? Has your cost of or access to capital and funding sources, such as revolving credit facilities or other sources changed, or is it reasonably likely to change? Have your sources or uses of cash otherwise been materially impacted? Is there a material uncertainty about your ongoing ability to meet the covenants of your credit agreements? If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency? Consider the requirement to disclose known trends and uncertainties as it relates to your ability to service your debt or other financial obligations, access the debt markets, including commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, and counterparty or customer risk. Do you expect to disclose or incur any material COVID-19-related contingencies?
- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets? For example, will there be significant changes in judgments in determining the fair-value of assets measured in accordance with U.S GAAP or IFRS?
- 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, restructuring charges, other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on your financial statements?
- Have COVID-19-related circumstances such as remote work arrangements adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures? If so, what changes in your controls have occurred during the current period that materially affect or are reasonably likely to materially affect your internal control over financial reporting? What challenges do you anticipate in your ability to maintain these systems and controls?
- Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so? Do you face any material resource constraints in implementing these plans?
- 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? Do you expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?
- 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?