
SEC Exemptive Relief and Guidance on Public Company Reporting and Compliance Obligations Arising from the Impacts of COVID-19

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Beginning in January 2020 and, most recently, on March 24 and 25, 2020, in response to the coronavirus (COVID-19) outbreak, which has worsened into a pandemic with material impacts on companies' operations, the Securities and Exchange Commission (SEC) has issued guidance and exemptive relief relevant to public company reporting and compliance obligations under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). We summarize below the SEC and SEC Staff guidance and exemptive relief, with hyperlinks to the SEC statements, guidance, and exemptive order. Key items and takeaways are:

- Companies should work with their auditors to ensure that¹ applicable financial reporting requirements are satisfied. Companies may need to avail themselves of the SEC exemptive relief, which provides a conditional extension for certain SEC filings, due to disruptions to transportation, and limited access to facilities, support staff, and professional advisors;
- Subject to compliance with the requirements of the SEC's exemptive order discussed in Item III below, companies may extend the time for filing certain reports due on or before July 1, 2020 by 45 days;
- In their SEC reports, companies should provide investors with information regarding their assessment of, and plans for addressing, material risks to their business resulting from COVID-19. In addition to risk factor disclosure, companies should include appropriate disclosures in the Management's Discussion and Analysis (MD&A), including the discussion of a company's liquidity and capital resources, and in the financial statement footnotes, including, where appropriate, subsequent events disclosure;
- Since the impacts of COVID-19 may be material to companies, companies and their insiders should be reminded of their obligation not to trade on the basis of material nonpublic information, and not to selectively disclose material nonpublic information; and
- Subject to compliance with certain requirements discussed under Item IV below, the SEC Staff will not object to a company changing the date, time, or location of its annual meeting without mailing additional solicitation materials or amending its proxy materials; in addition, where a company that has already filed and mailed its definitive proxy materials wishes to switch to a virtual or hybrid meeting, the company also may do so, subject to compliance with the same requirements.

¹ The SEC also has provided relief for investment companies, investment advisors, institutional investment managers, and other market participants. The SEC's website has a [page](#) that includes selected SEC responses to COVID-19.

I. January 30, 2020 Statement from SEC Chairman Jay Clayton

In this statement, Chairman Clayton noted that the effects of COVID-19 may be difficult to assess or predict with meaningful precision, both generally and on an industry- or issuer-specific basis. Chairman Clayton further noted that, how issuers plan for that uncertainty and how they choose to respond to events as they unfold can nevertheless be material to an investment decision. The statement further indicated that the SEC Staff would monitor and, to the extent necessary or appropriate, provide guidance and other assistance to issuers and other market participants regarding disclosures related to the current and potential effects of COVID-19. This was the first statement by the SEC advising public companies to consider their disclosure obligations arising from the impacts of COVID-19.

II. February 19, 2020 Joint Statement addressing Coronavirus Reporting Considerations and Potential Relief: SEC Chairman Jay Clayton, SEC Division of Corporation Finance Director Bill Hinman, SEC Chief Accountant Sagar Teotia, and PCAOB Chairman William D. Duhnke III

In a joint statement, the SEC and PCAOB stated that in their meetings with senior leaders of the largest U.S. audit firms they discussed the potential exposure of companies to the effects of COVID-19 and the impact that exposure could have on financial disclosures and audit quality, including, for example, audit firm access to information and company personnel. More specifically, the SEC and PCAOB:

- Urged issuers to work with their audit committees and auditors to ensure that their financial reporting, auditing, and review processes meet the applicable requirements in light of their obligations and the unforeseen circumstances of the COVID-19 outbreak.
- Emphasized the need to consider potential disclosure of subsequent events in the notes to the financial statements in accordance with guidance included in Accounting Standards Codification 855, Subsequent Events.
- Noted the SEC's general policy to grant appropriate relief from filing deadlines in situations where, in light of circumstances beyond the control of the issuer, filings cannot be completed on time with the appropriate level of review and attention.

III. March 25, 2020 SEC Exemptive Order Providing Conditional Regulatory Relief for Companies Affected by COVID-19 (Press release here)

In early March, it became apparent that more targeted assistance and relief would be required for various market participants impacted by COVID-19. In March 2020, the SEC and Staff provided (i) conditional exemptive relief for public reporting companies to extend the required deadlines for making their required filings under the federal securities laws and (ii) guidance for public reporting companies that need to change the date, time, or location of their annual meetings or switch to “virtual” or “hybrid” meetings as a result of logistical issues arising from COVID-19 (see Item IV below).

On March 4, 2020, the SEC issued a conditional exemptive order providing public reporting companies with an additional 45 days to file certain disclosure reports that would otherwise have been due between March 1 and April 30, 2020 in cases where a company is unable to meet the deadline due to circumstances related to COVID-19. On March 25, 2020, the SEC extended the relief to filings due on or before July 1, 2020 with a superseding exemptive order. Companies that use the extension will be deemed to have a due date of 45 days after the filing deadline for the report and will be permitted to rely on Rule 12b-25 if they are unable to file the required reports on or before the extended due date. The SEC may further extend the time period for the relief and may provide additional relief for filings with a due date after July 1, 2020. In the press release announcing the

superseding exemptive order, the SEC encouraged public companies to provide current and forward-looking information to their investors in these uncertain times. The exemptive order provides similar exemptive relief for persons filing Schedules 13G and amendments, but the relief is not extended to Schedule 13D (and amendments) filings or Forms 3, 4, and 5 filings under Section 16(a) of the Exchange Act.

The conditions for exemptive relief for public reporting companies are as follows:

- Companies relying on the SEC exemptive order must furnish a current report on Form 8-K (or a report on Form 6-K for foreign private issuers) by the date of the original filing deadline.
- The Form 8-K (or Form 6-K) must include a statement that the company is relying on the exemptive order, a brief description of the reasons why the report could not be filed on a timely basis, and the estimated date when the report is expected to be filed.
- The Form 8-K (or Form 6-K) must include a company-specific risk factor or risk factors explaining the impact, if material, of COVID-19 on the company's business.
- If the reason the report cannot be filed in a timely manner relates to the inability of any person, other than the company, to furnish any required opinion, report, or certification, Form 8-K or Form 6-K must attach 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 required filing date of such report.
- When the report is filed within the 45-day extension period, the report must disclose that the company is relying on the SEC exemptive order and state the reasons why it could not file such report on a timely basis.

Additional exemptive relief is available for furnishing proxy materials and information statements where mail delivery is not possible.

Companies relying on the exemptive order will be considered current and timely in their Exchange Act filings for purposes of Form S-3 or Form F-3 eligibility (and well-known seasoned issuer status) if they file the reports subject to the relief within 45 days of the applicable filing deadline. Companies relying on the exemptive order also will be considered current in their Exchange Act filings for purposes of Form S-8 eligibility and Rule 144(c) if they file the reports subject to the relief within 45 days of the applicable filing deadline.

- **Further SEC Statement on Company Disclosure and Accounting Responsibilities.** In the SEC's [March 4 press release](#) announcing the March 4 conditional exemptive order, Chairman Clayton urged companies to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from COVID-19 to the fullest extent practicable, to keep investors and markets informed of material developments, noting that how companies plan for and respond to the events as they unfold can be material to an investment decision. Chairman Clayton also urged companies to work with their audit committees and auditors to ensure that their financial reporting, auditing, and review processes are as robust as practicable in light of the circumstances encountered in meeting the applicable requirements.
- **SEC Reminder Against Trading on the Basis of Material Nonpublic Information.** In the March 4 and March 25 press releases, the SEC also reminded companies and insiders that if a company has become aware of a risk related to COVID-19 that would be material to its investors, the company and its insiders should refrain from engaging in securities transactions with the public until investors have been appropriately informed about the risk.
- **SEC Reminder on Avoiding Selective Disclosure.** The SEC also reminded companies that when they do disclose material information related to the impacts of COVID-19, they must take the necessary steps to avoid selective disclosures and to disseminate such information broadly. Depending on a company's particular circumstances, the company should

consider whether it may need to revisit, refresh, or update previous disclosures to the extent that the information becomes materially inaccurate.

- **Availability of Safe Harbor for Forward-Looking Statements.** Finally, the SEC reminded companies that they may avail themselves of the safe harbor in Section 21E of the Exchange Act with respect to forward-looking information, including known trends or uncertainties regarding the coronavirus.

[IV. March 13, 2020 Staff Guidance for Conducting Annual Meetings in Light of COVID-19 \(Press release here\)](#)

On March 13, 2020, the SEC Staff published guidance designed to facilitate the ability of companies to hold their annual shareholders meetings and engage with shareholders in light of COVID-19 issues, while complying with the federal securities laws. The Staff noted that the spread of COVID-19 has affected the ability of companies to hold in-person meetings due to health, transportation, and other logistical issues. The Staff guidance provides 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 guidance, the SEC Staff will take the position that an issuer that has already mailed and filed its definitive proxy materials can notify shareholders of a change in the date, time, or location of its annual 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; and
- 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.

The guidance indicates that issuers should take such actions promptly after making a decision so that the market is alerted to the change in a timely manner.

The guidance further recognizes that issuers may wish to conduct a “virtual” meeting in lieu of an in-person meeting or a “hybrid” meeting. In cases where proxy materials have not been filed, the Staff expects the issuer to notify its shareholders, intermediaries in the proxy process, and other market participants of such plans in a timely manner and disclose clear directions as to the logistical details of the “virtual” or “hybrid” meeting, including how shareholders can remotely access, participate in, and vote at such meeting. Issuers that have already filed and mailed their definitive proxy materials would not need to mail additional soliciting materials (including new proxy cards) solely for the purpose of switching to a “virtual” or “hybrid” meeting if they follow the same steps as described above for announcing a change in the meeting date, time, or location. Issuers should be aware that, in addition to SEC requirements, state law requirements regarding notice of shareholder meetings may apply to changes to the date, time, location, or manner of attendance (remote or in-person).

The guidance also encourages companies to provide shareholder proponents with alternative means, such as by telephone, to present their proposals at annual meetings in light of the difficulties that shareholder proponents face due to COVID-19, provided that such alternatives comply with state law requirements.

V. March 23, 2020 Statement by Co-Directors of the SEC’s Division of Enforcement Regarding Market Integrity

On March 23, 2020, Stephanie Avakian and Steven Peiken, Co-Directors of the SEC’s Division of Enforcement, released a statement emphasizing the importance of maintaining market integrity and following corporate controls and procedures. They noted that in these unique circumstances, corporate insiders are regularly learning new material nonpublic information that may hold an even greater value than under normal circumstances, and that corporate insiders should be mindful of their obligations to keep this information confidential and to comply with the prohibitions on illegal securities trading. They also urged public companies to be mindful of their established disclosure controls and procedures, insider trading prohibitions, codes of ethics, and Regulation FD and selective disclosure prohibitions to ensure to the greatest extent possible that they protect against the improper dissemination and use of material nonpublic information.

VI. March 25, 2020 SEC Division of Corporation Finance Disclosure Guidance (Press release [here](#))

The SEC’s Division of Corporation Finance issued CF Disclosure Guidance: Topic No. 9 on March 25, 2020. Topic No. 9 provides the Division’s views regarding disclosure and other securities law obligations that companies should consider with respect to COVID-19 and related business and market disruptions.

In Topic No. 9, 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. The Guidance states that assessing the evolving effects of COVID-19 and related risks will be a facts and circumstances analysis. Disclosure about these risks and effects, including how the issuer and management are responding to them, should be specific to an issuer’s situation. The Division notes that disclosure of COVID-19 risks and related effects may be appropriate in the MD&A, the business section, risk factors, legal proceedings, disclosure controls and procedures, internal control over financial reporting, and the financial statements. The Division set forth an illustrative and non-exhaustive list of questions that issuers should consider in making their COVID-19 disclosures:

- How has COVID-19 impacted the issuer’s financial condition and results of operations, and how does the issuer expect COVID-19 to impact its future operations and financial condition?
- How has COVID-19 impacted the issuer’s capital and financial resources, including its overall liquidity position and outlook? Factors to consider include the cost of or access to capital and funding sources, the impact on sources or uses of cash, material uncertainty about the ongoing ability to meet the covenants of the company’s credit agreements, courses of action the issuer has taken or has proposed to take to remedy any material liquidity deficiency, known trends and uncertainties as they relate to an issuer’s ability to service debt or access the debt markets, maturity mismatches between borrowing sources and assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, counterparty or customer risk, and whether the issuer expects to incur any material COVID-19-related contingencies.
- How does the issuer expect COVID-19 to affect assets on its balance sheet and its ability to account for those assets in a timely manner?
- Does the issuer anticipate any material impairments, 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 its financial statements?

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- Have COVID-19-related circumstances such as remote work arrangements adversely affected, or are such circumstances expected to adversely affect, the issuer's ability to maintain operations, including financial reporting systems, internal control over financial reporting, and disclosure controls and procedures?
 - Has the issuer experienced challenges in implementing its business continuity plans, does the issuer foresee needing to make material expenditures to do so, or has the issuer faced any material resource constraints in implementing these plans?
 - Does the issuer expect COVID-19 to materially affect the demand for its products or services?
 - Does the issuer anticipate a material adverse impact of COVID-19 on its supply chain or the methods used to distribute its products or services?
 - Will the issuer's operations be materially impacted by any constraints or other impacts on its human capital resources and productivity?
 - Are travel restrictions and border closures expected to have a material impact on the issuer's ability to operate and achieve its business goals?

Reporting Earnings and Financial Results

The Division notes that COVID-19 could affect companies' reporting of earnings estimates. The Division recognizes that the ongoing and evolving COVID-19 impact will likely make it more difficult for companies and their auditors to complete the work required to maintain timely filings, and encourages companies to proactively address financial reporting matters earlier than usual.

The Division reminds companies of their obligation under the federal securities laws with respect to the use of non-GAAP measures and [recent guidance](#) on the same subject. The Division states that to the extent a company presents a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19, it would be appropriate to highlight why management finds the measure or metric useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations. The Division further states that where a GAAP financial measure is not available at the time of the earnings release because the measure may be impacted by COVID-19-related adjustments, a company could reconcile a non-GAAP financial measure to preliminary GAAP results that include either provisional amounts based on a reasonable estimate, or a range of reasonably estimable GAAP results. For example, under this position, if a company intends to disclose on an earnings call its earnings before interest, taxes, depreciation, and amortization (EBITDA), it could reconcile that measure to its GAAP earnings, a reasonable estimate of its GAAP earnings that includes a provisional amount, or its reasonable estimate of a range of GAAP earnings. In such cases, a company should limit the measures in its presentation to those non-GAAP financial measures it is using to report financial results to its board of directors. This position would not apply to SEC filings where GAAP financial statements are required. The Division also reminds companies that they do not believe it is appropriate for a company to present non-GAAP financial measures or metrics for the sole purpose of presenting a more favorable view of the company. If a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures, it should explain, to the extent practicable, why the line item(s) or accounting is incomplete, and what additional information or analysis may be needed to complete the accounting.

Additional Guidance

The Division states that it will provide additional guidance as events evolve, as appropriate.

VII. SEC Staff Statement Regarding Authentication Document Retention Requirements in Light of COVID-19

On March 24, 2020, the SEC Staff announced that, in light of health, transportation, and other logistical issues arising from COVID-19, companies and other persons may have difficulty complying with the requirement under Rule 302(b) of Regulation S-T regarding manually signed signature pages and their retention. The Staff will not recommend enforcement action if:

- a signatory retains a manually signed signature page or other document authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing and provides such document, as promptly as reasonably practicable, to the filer for retention in the ordinary course pursuant to Rule 302(b);
- such document indicates the date and time when the signature was executed; and
- the filer establishes and maintains policies and procedures governing this process.

The signatory may also provide to the filer an electronic record (such as a photograph or pdf) of such document when it is signed.

For further alerts, webinars, and resources from Venable relating to the COVID-19 crisis and its impact, please see Venable's [COVID-19 Resources](#).