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SEC provides additional relief for certain filing and proxy delivery obligations, and issues disclosure guidance relating to the impacts of COVID-19

By Kelly D. Babson, Lloyd H. Spencer, Pierce Haesung Han, and Bohao Zhou

The Securities and Exchange Commission (SEC or Commission) today extended certain relief for public companies from filing deadlines and proxy delivery requirements due to the impact of the coronavirus (COVID-19) pandemic. In addition, staff of the SEC's Division of Corporation Finance issued new disclosure guidance for companies to consider in light of COVID-19.

Separately, on March 24, 2020, the staff of the SEC's Division of Corporation Finance, Division of Investment Management, and Division of Trading and Markets issued a joint statement that they will not recommend the Commission take enforcement action with respect to the manual signature requirements of Rule 302(b) of Regulation S-T under certain circumstances, providing needed flexibility for obtaining original manually signed signature pages and retention of such signature pages due to circumstances arising from COVID-19.

45-day filing extension

On March 25, 2020, the SEC issued a [new order](#), which supersedes a [prior order](#) issued on March 4, 2020, providing public companies, and persons required to make filings with respect to such companies, with relief from deadlines for filing or furnishing certain disclosure reports, schedules, and forms with the Commission (for example, Forms 10-K, 20-F, 10-Q, 8-K, 6-K, and proxy statements) that otherwise would have been due between March 1 and July 1, 2020, if each of the conditions below are met.

Conditions for extension

- (a) The public company or any person required to make any filings with respect to such company is unable to meet a filing deadline due to circumstances related to COVID-19.
- (b) The company relying on the order furnishes a Form 8-K or, if eligible, a Form 6-K by the later of March 16, 2020, or the original filing deadline of the report, which:
 - States that it is relying on the order;

- Provides a brief description of the reasons why it cannot file the report, schedule, or form on a timely basis;
 - States the estimated date by which such report, schedule, or form is expected to be filed;
 - Includes a company-specific risk factor or factors explaining the impact, if material, of COVID-19 on its business; and
 - If the reason the subject report cannot be filed timely relates to the inability of any person, other than the company, to furnish any required opinion, report, or certification, the Form 8-K or Form 6-K, includes 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 date such report must be filed.
- (c) The company or any person required to make any filings with respect to such company files the subject report, schedule, or form required to be filed no later than 45 days after the original due date.
- (d) In such report, schedule, or form filed by the applicable above deadline, the company or any person required to make any filings with respect to such company must disclose that it is relying on the order and state the reasons why it could not file such report, schedule, or form on a timely basis.

Filings for which relief is available

The order provides conditional relief from any requirement to file or furnish materials (and any related amendments) with the Commission under Securities Exchange Act of 1934 (Exchange Act) Sections 13(a), 13(f), 13(g), 14(a), 14(c), 14(f), 15(d) and Regulations 13A, 13D-G (except for those provisions mandating the filing of Schedule 13D or amendments to Schedule 13D), 14A, 14C and 15D, and Exchange Act Rules 13f-1, and 14f-1, as applicable, that otherwise would have been due between March 1 and July 1, 2020. This relief is available to all companies subject to the reporting requirements of Exchange Act Section 13(a) or 15(d) and any person required to make any filings with respect to such a company, regardless of filer status, and applies, for example, to calendar year-end reporting companies who will shortly be preparing to file their first quarter 2020 Quarterly Report on Form 10-Q.

However, this relief does not apply to reports required to be filed under Section 13 with respect to the filing of Schedule 13D or amendments to Schedule 13D or Section 16 (including Forms 3, 4 and 5) of the Exchange Act.

Additional considerations

In the press release announcing the extended provisional relief, the SEC reiterated that its staff will take the following positions in connection with the relief granted by the order:

- For purposes of Form S-3 or Form F-3 eligibility (as well as well-known seasoned issuer status), a company relying on the order will be considered current and timely in its Exchange Act filing requirements if it was current and timely as of March 1, 2020, and files any report due during the relief period within 45 days of the report's filing deadline.

- For purposes of Form S-8 eligibility and the current public information eligibility requirements of Rule 144(c), a company relying on the order will be considered current in its Exchange Act filing requirements if it was current as of March 1, 2020, and files any report due during the relief period within 45 days of the report's filing deadline.
- Companies that receive an extension on filing Exchange Act annual or quarterly reports pursuant to the order will be considered to have a due date 45 days after the report's filing deadline and will be allowed to rely on Rule 12b-25 for the applicable extension period if they are unable to file the required reports on or before the extended due date provided by the order.

The Commission also encouraged companies with questions or in need of additional assistance from the SEC staff related to deadlines, delivery obligations, or their public filings to contact the Division of Corporation Finance.

Exemption from proxy delivery requirements

In addition, the SEC has provided an exemption from the requirements of the Exchange Act and the rules thereunder to furnish proxy statements, annual reports, and other soliciting materials, as applicable (Soliciting Materials), as well as to furnish information statements and annual reports, as applicable (Information Materials), if each of the following conditions for relief are met.

Conditions for relief

- (a) The company's security holder has a mailing address located in an area where, as a result of COVID-19, the common carrier has suspended delivery service of the type or class customarily used by the registrant or other person making the solicitation.
- (b) The company or other person making a solicitation has made a good faith effort to furnish the Soliciting Materials or the Information Materials, as applicable, to the security holder, as required by the applicable rules.

Disclosure guidance

The Division of Corporation Finance staff issued [CF Disclosure Guidance: Topic No. 9](#) for entities impacted by COVID-19 and related business and market disruptions (the Guidance). The Guidance encourages timely reporting but also recognizes that it may be difficult to assess or predict with precision the broad effects of COVID-19 on industries or individual companies.

Specifically, the Guidance (a) provides an illustrative list of questions to consider for companies assessing the COVID-19-related risks and effects; (b) highlights the need for companies and corporate insiders to refrain from trading company securities before disseminating material non-public information; (c) advises companies to take necessary steps to avoid selective disclosures by disseminating such information broadly to the public; and (d) encourages companies to proactively address financial reporting matters earlier than usual.

Assess and disclose COVID-19-related risks and impacts

Assessing COVID-19-related risks and impacts requires a facts-and-circumstances analysis, and disclosure should be specific to a company's situation. The Guidance encourages tailored disclosure

that provides material information about COVID-19-related risks and impacts to investors and market participants and also allows investors to evaluate such current and expected risks and impacts through the eyes of management. Companies should proactively revise and update disclosures as facts and circumstances change.

The Guidance provides the following illustrative but non-exhaustive list of questions for companies to consider with respect to assessing and disclosing risks related to COVID-19 and its impact:

<ul style="list-style-type: none"> — How has COVID-19 impacted your financial condition and results of operations? <ul style="list-style-type: none"> ○ 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?
<ul style="list-style-type: none"> — How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook? <ul style="list-style-type: none"> ○ 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?
<ul style="list-style-type: none"> — How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets? <ul style="list-style-type: none"> ○ 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?
<ul style="list-style-type: none"> — 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?
<ul style="list-style-type: none"> — 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? <ul style="list-style-type: none"> ○ 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?
<ul style="list-style-type: none"> — Have you experienced challenges in implementing your business continuity plans, or do you foresee requiring material expenditures to do so? <ul style="list-style-type: none"> ○ 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? <ul style="list-style-type: none"> ○ 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?

Refrain from trading prior to dissemination of material non-public information and avoid selective disclosure

Companies and other related persons should consider market activities in light of their obligations under the federal securities laws, such as the need for companies, directors, and officers, and other corporate insiders to refrain from trading company securities before disclosing to the public any material information of COVID-19-related risks and impacts. The Guidance also reminds companies to take the necessary steps to avoid selective disclosure and update previous disclosure when the evolving circumstances render certain material information inaccurate.

Earnings and financial results reporting matters

The Guidance encourages companies to proactively address financial reporting matters complicated by the ongoing and evolving COVID-19-related impacts earlier than usual in order to maintain timely, complete, and accurate filings.

To the extent companies present a non-GAAP financial measure or performance metric to adjust for or explain COVID-19-related impacts, it would be appropriate to highlight why management finds the measure or metric useful and how it helps investors assess COVID-19-related impacts on the company’s financial position and results of operations. The Guidance reminds companies of their obligations under Regulation S-K and Regulation G with respect to the presentation of non-GAAP financial measures, and the Commission’s recent guidance with respect to performance metrics disclosure.

When a GAAP financial measure is not available at the time of the earnings release because COVID-19-related adjustments may require additional information and analysis, the Guidance provides that the Division of Corporation Finance will not object to companies reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amount(s) based on a reasonable estimate or a range of reasonably estimable GAAP results. The provisional amount or range should reflect a reasonable estimate of COVID-19-related changes not yet finalized. Companies, however, 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. In filings where GAAP financial statements are required, such as filings on Form 10-K or 10-Q, companies should reconcile to GAAP results and not include provisional amounts or a range of estimated results.

In providing this accommodation to reconcile non-GAAP financial measures to provisional amounts or estimated ranges, the Division staff noted that companies “should limit the measures in

its presentation to those non-GAAP financial measures it is using to report financial results to the Board of Directors.” The Guidance emphasizes that companies should not present non-GAAP financial measures or metrics for the sole purpose of presenting a more favorable view of the company. Rather, companies should use non-GAAP financial measures and performance metrics for the purpose of sharing with investors how management and the board are analyzing the current and potential COVID-19-related impacts on the company’s financial condition and operating results.

Joint statement regarding manual signature compliance

Rule 302(b) of Regulation S-T requires that each signatory to documents electronically filed with the Commission under the federal securities laws manually sign a signature page or other document before or at the time the electronic filing is made, authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing. Electronic filers must retain such documents for a period of five years and furnish copies to the Commission or its staff upon request.

In response to inquiries from entities subject to Regulation S-T regarding the authentication document retention requirements under Rule 302(b) in light of COVID-19-related impacts and difficulties, the staff of the Division of Corporation Finance, the Division of Investment Management, and the Division of Trading and Markets issued a joint statement that they will not recommend the Commission take enforcement action with respect to the requirements of Rule 302(b) 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.

To ensure the ability to utilize the relief provided in the joint statement, we recommend that companies either add to their existing policy or establish a temporary policy that sets forth appropriate procedures for authorizing the filing of reports under the federal securities laws by manual signatures of authorized personnel working remotely.

For more information on the content of this alert, please contact our [Coronavirus Response team](#), your Nixon Peabody attorney, or:

- Kelly D. Babson at kdbabson@nixonpeabody.com or 617-345-1036
 - Lloyd H. Spencer at lspencer@nixonpeabody.com or 202-585-8303
 - Pierce Haesung Han at phan@nixonpeabody.com or 202-585-8139
 - Bohao Zhou at bzhou@nixonpeabody.com or 617-345-6079
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