

SEC Eases Filing and Signature Requirements, and Provides Disclosure Guidance Due to Coronavirus

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In late March, the SEC eased certain filing and [signature requirements](#) related to periodic reports and other filings in an effort to address the compliance obstacles created by the coronavirus (COVID-19). The Division of Corporation Finance also [issued Disclosure Guidance Topic No. 9](#) on its views regarding disclosure and other securities law obligations to consider with respect to the coronavirus and related business and market disruptions.

Filing Requirements

On March 25, 2020, the SEC [announced](#) that it issued a follow-up order (the “Current Order”) to its earlier March 4 order, the SEC has extended its 45-day extension to file certain disclosure reports from reporting and proxy delivery requirements that would otherwise be due on or before July 1, 2020, subject to certain conditions. SEC Chairman Jay Clayton stated that, “These actions provide temporary, targeted relief to issuers, investment funds and investment advisers affected by COVID-19.”

In order to rely upon the Current Order, companies must furnish a Form 8-K or Form 6-K by the original reporting deadline. The 8-K or 6-K must state:

- that it is relying upon the Current Order;
- the reasons why it could not file on a timely basis;
- the estimated date by which the report, form or schedule is expected to be filed;
- if appropriate, a risk factor explaining, if material, the impact that the coronavirus is having on its business; and
- if the reason the report cannot be timely filed is because a person, other than the registrant, is unable to furnish a required opinion, report or certification, file a statement as an exhibit stating the reasons why the person is unable to furnish the required materials by the date the report must be filed.

The SEC staff will also take the following positions with respect to filings under the Securities Act and the Exchange Act:

- a company relying upon the Current Order will be considered current and timely in its Exchange Act filing requirements if it was current and timely as of the first day of the relief period and it files any report due during the relief period within the 45 days of the filing deadline for the report for purposes of eligibility to use Form S-3, Form F-3 or Form S-8 and for well-known seasoned issuer status and the current public information eligibility requirements of Rule 144(c).

- companies that rely on this extension on filing Exchange Act annual reports or quarterly reports will be considered to have a due date 45 days after the filing deadline for such reports. As such, those companies will be permitted to rely upon Rule 12b-25 if they are unable to file the required reports on or before the extended due date.

Signature Requirements

Rule 302(b) of Regulation S-T requires SEC filings to be manually signed in the form of the typed signature in EDGAR filings and provided to the filer before or at the time the electronic filing is made. Given the difficulties in satisfying this delivery requirement due to circumstances arising from the coronavirus, the staff of the Division of Corporation Finance, the Division of Investment Management and the Division of Trading and Markets will not recommend the SEC take enforcement action with respect to Rule 3-20(b) if:

- a signatory who is teleworking holds the manually-signed signature page for delivery to the filer upon the signatory's return to the place of work;
- the document indicates the date and time when the signature was executed; and
- the filer establishes policies and procedures governing this process.

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

Disclosure Considerations Around the Evolving Impact of the Coronavirus

On March 25, 2020, the Division of Corporation Finance issued CF Disclosure Topic No. 9 on the coronavirus and insider trading, selective disclosure, forward-looking information and the possible need to update such information that has become materially inaccurate as well as guidance on non-GAAP financial measures when the GAAP information may not be available due to the evolving impact of the coronavirus on that measure.

The Division suggested many examples of the types of coronavirus-related effects that companies should assess in considering their disclosure obligations, including: its financial condition and results of operations, the impact on capital and financial resources, the effect on assets and the potential for material impairments, the ability to maintain operations on a remote basis, the impact on demand for products or services, the impact on their supply chain, and travel restrictions and border closures.

If a company has become aware of a risk related to the coronavirus that would be material to investors, that company should not engage in securities transactions with the public and should discourage its directors and officers (and other insiders who are aware of the nonpublic, material information) from buying or selling the company's securities until investors have been appropriately informed of such information. In the event the company or its insiders are engaged in such transactions, consideration should be given as to what disclosures are required to inform the public of the new material development.

The staff also reminded companies that are disclosing material information to do so in a manner that will distribute it broadly and avoid selective disclosure. For instance, the information should not be provided to an analyst or others who might trade on the information before the information has been publicly disseminated.

Companies should also consider whether they may need to revisit, refresh or update previous disclosures to the extent that the information becomes materially inaccurate. The safe harbor related

to forward-looking information under Section 21E of the Exchange Act may be available to companies providing forward-looking information in an effort to keep investors informed about material developments, including known trends or uncertainties regarding the coronavirus as long as the proper steps are taken.

The guidance also discusses how to report the evolving impact of the coronavirus in light of nonrecurring charges and expenses. As always, if a company decides to present a non-GAAP financial measure or performance metric to adjust for or explain the impact of the coronavirus, it should highlight why management finds it useful and how it helps investors assess the impact of the coronavirus on the company's financial position and results of operations.

For instance, if at the time of an earnings release the measure impacted by the coronavirus requires additional information and analysis to complete, the Division would not object to companies reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amounts based on reasonable estimates, or a range of reasonably estimable GAAP results. In addition, in filings in which GAAP financial statements are required, such as in Form 10-K or Form 10-Q, companies should reconcile to GAAP results and not include provisional amounts or a range of estimated results.

Companies should limit the measures in its presentation to those non-GAAP financial measures it is using to report financial results to the Board, not solely for the purpose of presenting a more favorable view of the company. Companies should also explain, to the extent practicable, why the information is incomplete, and what additional information or analysis may be needed to complete the accounting.

Assistance regarding this guidance is available from the staff of the Division of Corporation Finance at (202)551-3500 or at www.sec.gov/forms/corp_fin_interpretive.

For questions regarding filing and signature requirements or any of the recent guidance, please contact your GableGotwals attorney or a member of our [Corporate & Securities team](#).



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