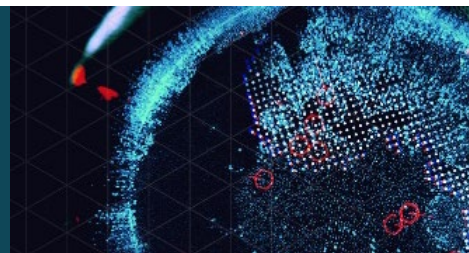


## Coronavirus/COVID-19 Managing COVID-19: Additional SEC Reporting Relief and New Disclosure Guidance



March 27, 2020

The SEC has provided additional relief for public companies and other filers affected by the COVID-19 pandemic. Also, the SEC's Division of Corporation Finance (the "Division") has issued disclosure guidance regarding COVID-19 and related business and market disruptions [Disclosure Guidance Topic No. 9](#) (the "Disclosure Topic 9"). This alert discusses the key points addressed by these actions.

1

### Conditional Reporting Relief

- On March 25, 2020, the SEC issued an [order](#) extending conditional reporting relief for public companies and other filers that are unable to meet a filing deadline due to circumstances related to COVID-19 (the "Order"). The Order provides an extension of up to 45 days for filings required under the Securities Exchange Act of 1934 that are due on or before July 1, 2020, other than filings (including amendments) on Schedule 13D. The Order supersedes and extends an [earlier order](#) issued on March 4, 2020 that applied to filings due on or before April 30.
- A company that intends to rely on this relief is required to file a Form 8-K or, for foreign private issuers, a Form 6-K, by the original filing deadline stating: (i) that the company is relying on the Order, (ii) a brief description of the reasons why it could not file the report, schedule or form on a timely basis, (iii) the estimated date when it expects to file the applicable report, schedule or form, and (iv) a company-specific risk factor explaining the impact, if material, of COVID-19 on its business. If the report cannot be filed in a timely manner due to a third party's inability to furnish an opinion, report or certification, a signed statement of that person must be provided. A separate Form 8-K or Form 6-K is required for each filing that is delayed in reliance on the Order.
- Companies relying on the Order will maintain eligibility to use Forms S-3 and S-8 if they were current and timely as of the first day of the relief period and they file all required reports within the 45-day period.

2

### Temporary Relief from Form ID Notarization Requirement

- On March 26, 2020, the SEC announced [additional temporary regulatory relief](#) to filers that experience difficulty securing the notarization required to gain access to EDGAR. The SEC indicated that it will provide such relief through July 1, 2020 to any filer that indicates on its manually signed Form ID that it could not provide the requisite notarization due to circumstances related to COVID-19 and that such filer submits a PDF copy of the notarized document within 90 days of obtaining an EDGAR account.

## Disclosure Considerations Regarding the Impact of COVID-19

- Disclosure Topic 9 highlights that companies should consider the known or reasonably likely effects of and risks presented by COVID-19 based on the facts and circumstances that exist at the time they are making disclosures. Depending on a particular company's circumstances, it may be necessary or appropriate to include disclosure regarding COVID-19 in management's discussion and analysis, the business section, risk factors, forward-looking statements, legal proceedings, disclosure controls and procedures, internal control over financial reporting, and the financial statements.
- Many companies may be considering how to report unexpected nonrecurring charges and expenses related to the COVID-19 pandemic that may present novel or complex accounting issues that take time to resolve. Accordingly, Disclosure Topic 9 suggests that companies proactively address financial reporting matters earlier than usual, including determining whether experts need to be consulted in assessing the value of companies' assets.
- Disclosure Topic 9 presents a number of illustrative topics that companies can consider in evaluating the material impacts of COVID-19 and tailoring appropriate disclosures, including:
  - Financial condition: How has COVID-19 impacted the company's financial condition and results of operations and how does the company expect COVID-19 to impact its future operating results?
  - Capital and financial resources: How has COVID-19 impacted the company's capital and financial resources, including its liquidity and outlook? Relevant considerations include: changes in the cost of capital and funding sources, including revolving credit facilities; impacts on sources or uses of cash; uncertainty about the ability to meet covenants in credit agreements; known trends or uncertainties in the ability to service financial obligations or access the capital markets; and material COVID-19-related contingencies.
  - Assets: How does the company expect COVID-19 to affect its assets and its ability to timely account for those assets? The company should consider whether there will be significant changes in judgments in determining the fair-value of its assets.
  - Material impairments: Does the company 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 the company's financial statements?
  - Business operations: Have COVID-19-related circumstances (such as remote work arrangements, travel restrictions and border closures) affected the company's ability to maintain operations? Relevant considerations include: changes or difficulties in the company's ability to maintain financial reporting systems, internal control over financial reporting and disclosure controls and procedures; challenges in implementing business continuity plans; effects on the

demand for products and services; supply chain disruptions; and impacts on human resources and productivity.

- The guidance also encourages companies to revise and update disclosures as facts and circumstances change.

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### **Certain Considerations Regarding Non-GAAP Financial Measures**

- Disclosure Topic 9 notes that some companies may choose to present non-GAAP financial measures that adjust for non-recurring expenses or other impacts of COVID-19. When doing so, Disclosure Topic 9 encourages companies to discuss why management finds the measures to be useful and how they help investors assess the impact of COVID-19 on the company's financial position and results of operations.
- Where a company discloses a non-GAAP financial measure before the comparable GAAP measure is available (as might be the case when an earnings announcement is published before the Quarterly Report on Form 10-Q is filed), a company may reconcile such non-GAAP financial measure to the comparable preliminary GAAP measure that either includes provisional amount(s) based on a reasonable estimate or a range of reasonably estimable GAAP results. Companies following this approach in their earnings releases will still be expected to disclose the most directly comparable GAAP financial measure with equal or greater prominence to the non-GAAP measure.
- In filings that require GAAP financial statements, such as Annual Reports on Form 10-K and Quarterly Reports on Form 10-Q, any reconciliation of a non-GAAP financial measure to GAAP results may not include provisional amounts or a range of estimated results.
- The Division emphasized that companies may use non-GAAP financial measures and performance metrics to share with investors how their managements and boards are analyzing the current and potential impact of COVID-19 on companies' financial condition and results of operations, and not to promote a more favorable view of themselves. In addition, Disclosure Topic 9 also cautions that companies disclosing non-GAAP financial measures that are reconciled to provisional amounts or ranges should limit their use of such measures to those that are used to report financial results to the board. Accordingly, companies considering the use of such measures should incorporate them into their internal reporting process.

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## 5

### **Continued Focus on Insider Trading and Regulation FD**

- Disclosure Topic 9 emphasizes the need for companies and their insiders to consider their market activities, including the issuance or purchase of securities, in light of their obligations under the federal securities laws. In particular, Disclosure Topic 9 cautions companies and their insiders to refrain from trading in the company's securities prior to disclosing any material impacts or risks that are related to COVID-19.

- The Division also reminded companies to take steps to avoid selective disclosure of material information related to COVID-19 by disseminating such information broadly to the public. The Division also emphasized that, although Regulation FD does not apply to foreign private issuers, those issuers are required to disclose material information in accordance with applicable stock exchange requirements and that their disclosure practices remain subject to liability for conduct that violates the antifraud provisions of the federal securities laws.

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