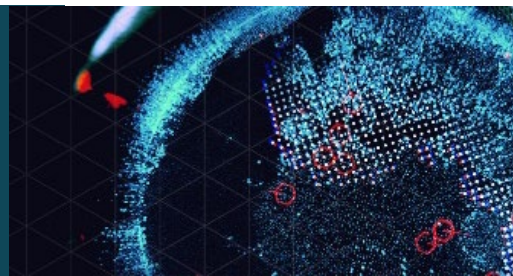


## Coronavirus/COVID-19 Managing COVID-19: More SEC Filing Odds and Ends



April 9, 2020

The SEC and its staff have responded to the COVID-19 pandemic by providing public companies and other filers affected by the pandemic with relief from certain reporting requirements, as well as helpful disclosure guidance. Most importantly, 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”). For more information, please see our prior alert, [Managing COVID-19: Additional SEC Reporting Relief and New Disclosure Guidance](#). Since the Order was issued, the SEC’s Division of Corporation Finance (“the Division”) has issued several compliance and disclosure interpretations (“C&DIs”) clarifying certain issues related to the Order. In addition, the SEC staff (the “Staff”) recently issued [a statement](#) indicating it will not recommend the SEC take enforcement action in certain cases where companies experience difficulties complying with the manual signature requirements of Rule 302(b) of Regulation S-T due to circumstances related to COVID-19, as well as [a statement](#) providing relief to companies experiencing delays in printing and mailing proxy materials. This alert discusses the key points addressed by the Staff’s recent guidance.

1

### C&DI 135.12

- In this interpretation, the Division addresses the interplay between the Order and Rule 12b-25, which provides a temporary grace period for filing deadlines where a company is unable to timely file a report without unreasonable effort or expense. If a company is uncertain whether it can file the report within the grace period available under Rule 12b-25, and the delay in filing is due to COVID-19 circumstances, the Division encourages the company to rely on the relief granted by the Order, and not on Rule 12b-25. In this event, the company would need to file a Form 8-K or Form 6-K and include the statements required by the Order.
- If a company only files a Form 12b-25 (but not a Form 8-K or a Form 6-K) by the original due date of the relevant report, it will not be able to avail itself of the 45-day relief period provided by the Order. The company instead only will be able to take advantage of the grace periods provided by Rule 12b-25 (15 additional days to file an annual report and five additional days to file a quarterly report).

2

### C&DI 135.13

- In this interpretation, the Division notes that a company that files a Form 12b-25 may not subsequently rely on the Order to extend the filing deadline for the relevant report.

Unless a company that files a Form 12b-25 also furnishes a Form 8-K or Form 6-K satisfying the conditions of the Order by the original due date of the relevant report, it would not be able to rely on the Order.

- The interpretation also notes that if a company satisfies the conditions of the Order with respect to a report and thereby extends the due date of the report by 45 days, it would subsequently be permitted to rely upon Rule 12b-25 to further extend the filing deadline of the report in accordance with such rule.

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## 3

### C&DI 104.18

- In this interpretation, the Division clarifies that a company that plans to incorporate the Part III information in its annual report on Form 10-K from its definitive proxy statement, but is unable to file the proxy statement (or an amendment to its Form 10-K) within 120 days of the end of its fiscal year, may take advantage of the relief provided by the Order as long as the 120-day deadline falls within Order's 45-day relief period and the company meets the conditions of the Order.
- The Division details three situations in which a company may take advantage of this relief:
  - A company that timely filed its Form 10-K without relying on the Order may furnish a Form 8-K with the required disclosures by the 120-day filing deadline and then provide the Part III information within 45 days of such deadline.
  - A company that has not yet filed its Form 10-K may invoke the Order with respect to both its Form 10-K and the Part III information by furnishing a single Form 8-K by the original Form 10-K filing deadline, providing the disclosures required by the Order and indicating the company will incorporate the Part III information by reference within 45 days of the original 120-day filing deadline.
  - A company that properly invoked the Order with respect to its Form 10-K, but was silent on its ability to timely file the Part III information may either (i) include the Part III information in its Form 10-K filed within 45 days of the original Form 10-K deadline or (ii) furnish a second Form 8-K with the disclosures required by the Order by the original 120-day filing deadline and then file the Part III information within 45 days of such deadline.

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## 4

### **The Staff's Recommendation regarding SEC Enforcement of Rule 302(b)**

- On March 24, 2020, the Staff issued a statement recognizing that some persons or entities may experience difficulties satisfying the manual signature requirements of Rule 302(b) of Regulation S-T due to COVID-19 circumstances.
- In light of these difficulties, the Staff will not recommend the SEC take enforcement action with respect to the requirements of Rule 302(b) if:

- the signatory (i) retains the signature page adopting his or her typed signature in the filing, as required under Rule 302(b) and (ii) provides such document, as promptly as reasonably practicable, to the company for retention pursuant to Rule 302(b);
- such document indicates the date and time the signature was executed; and
- the company establishes and maintains policies and procedures governing this process.

## 5

### Staff Guidance on Managing Delays in Printing and Mailing Proxy Materials

- On April 7, 2020, the Staff issued a statement with its recommendations regarding how companies may manage delays in printing and mailing a full set of proxy materials. This statement is in response to concerns expressed by some companies that would like to switch to the “notice-only” delivery method due to delays in mailing and printing caused by COVID-19-related difficulties, but that may not be able to meet the requirement in Rule 14a-16 to send the notice 40 calendar days prior to the meeting date. This 40-day delivery requirement can pose challenges because it requires the company to provide beneficial shareholder information to intermediaries in advance of that 40-day period so that intermediaries can mail the notice to their clients.
- The Staff reminded companies that the primary goal of the proxy process is to provide shareholders with material information about the matters to be presented at a shareholder meeting in a timely manner so they can make informed voting decisions. However, the Staff made clear that this goal should be achieved without putting the health and safety of anyone at risk.
- In circumstances where delays in printing and mailing a full set of proxy materials are unavoidable due to COVID-19-related issues, the Staff indicated it would not object to companies using the “notice-only” delivery option in a manner that, while not satisfying all applicable notice and timing requirements, would provide shareholders with proxy materials sufficiently in advance of the meeting to review the materials and make an informed decision.
- In such case, the Staff reminded companies that they would need to announce the change in delivery method in the same manner they would announce a change in a shareholder meeting date, time or location by (i) issuing a press release announcing such change; (ii) filing the announcement as definitive additional soliciting material on EDGAR and (iii) taking all reasonable steps necessary to inform intermediaries in the proxy process and other relevant market participants of such change.

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