

SEC Extends Relief, Staff Offers Further Guidance and Flexibility to Companies Affected by COVID-19

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If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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On March 25, 2020, the U.S. Securities and Exchange Commission (SEC) issued a modified order extending the time period during which public companies impacted by COVID-19 may delay by 45 days SEC filings that otherwise would (or would have) become due. The original order covered reports due beginning on March 1 through April 30, 2020.¹ The modified order extends that time period through July 1, 2020, and retains the conditions to relief, outlined below, that were in the original order.

In addition, the SEC's Division of Corporation Finance (the Division) issued "CF Disclosure Guidance: Topic No. 9" (Guidance), expressing its views regarding disclosure and other securities law obligations related to COVID-19. The Division also joined the divisions of Investment Management and Trading and Markets in issuing a no-action relief statement regarding the manual signature and document retention requirements in light of COVID-19 concerns.

A summary of the SEC's modified order and SEC staff guidance and no-action relief is included below.

Extended Relief for Certain Company Filing and Delivery Requirements

Companies impacted by COVID-19 may delay SEC filings² by 45 days that otherwise would (or would have) become due beginning on March 1 until July 1, 2020. To qualify for relief, companies must furnish to the SEC by the report's original deadline a current report on Form 8-K (or Form 6-K for foreign private issuers) that includes:

- a statement that the company is relying on the SEC's order;
- a brief description of why the company could not file its required material on a timely basis;
- an estimate of when the late material will be filed;
- if the impact of COVID-19 on the company's business is material, a company-specific risk factor explaining the impact; and

¹ See "SEC Provides Conditional Regulatory Relief and Assistance for Companies Affected by the Coronavirus Disease 2019 (COVID-19)," Skadden client alert, Mar. 5, 2020. In two other separate orders on March 25, 2020, the SEC extended, and eased certain conditions for, prior relief for investment companies and investment advisers impacted by COVID-19.

² These include reports or amendments required to be filed with the SEC under Exchange Act Sections 13(a), 13(f), 13(g), 14(a), 14(c), 14(f), 15(d) and applicable rules and regulations thereunder. With respect to Regulations 13D and 13G, the relief does not apply to those provisions mandating the filing of Schedule 13D or amendments to Schedule 13D.

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- if a company's filing is late due to the inability of a third party to furnish a required opinion, report or certification, a statement attached as an exhibit signed by such person stating the specific reasons why he or she could not provide the required opinion, report or certification in time.

In addition, any filing made later than its original due date must be filed with the SEC no later than 45 days after the original due date in order to qualify for the SEC's exemptive relief. Moreover, any filing made later than its original due date also must disclose the company's reliance on the SEC's order and explain why the report could not be filed on a timely basis.

For calendar year-end companies that timely filed their Form 10-K and incorporated certain information by reference to the annual meeting proxy statement to be filed later, the order would allow such companies to file their definitive proxy statements up to 45 days after April 29, 2020,³ subject to the conditions outlined above. Accordingly, a company relying on the SEC's order would not have to amend its Form 10-K for the sole purpose of filing information it had intended to incorporate by reference from its annual meeting proxy statement.

As noted in the SEC's related [press release](#), for purposes of determining Form S-3 eligibility and WKSJ status, a company can rely on the exemptive order and be considered current and timely in its Exchange Act filing requirements, provided that the company (i) was current and timely as of March 1, 2020, and (ii) files any report due during the relief period within 45 days of the filing deadline for the report. The foregoing also applies to a company's eligibility to file a Form S-8 and for purposes of determining whether it is current in its reports for purposes of Securities Act Rule 144(c).

The SEC's order also exempts companies required to furnish proxy statements, annual reports and other soliciting materials to a security holder where such security holder has a mailing address in an area where, as a result of the COVID-19 outbreak, delivery service has been suspended and the company making a solicitation has made a good-faith effort to furnish applicable materials to the security holder.

³ General Instruction G.(3) of Form 10-K provides that a company may file its Form 10-K without the information required in Part III of Form 10-K, provided that such information is incorporated by reference to the company's definitive proxy statement that is filed with the SEC no later than 120 days after the end of the fiscal year covered by the Form 10-K.

Division of Corporation Finance Guidance on Disclosures and Securities Law Obligations Related to COVID-19

"CF Disclosure Guidance: Topic No. 9" provides the Division's current views regarding disclosure and other securities law obligations that companies should consider with respect to COVID-19 and related business and market disruptions.

Assessing and Disclosing the Evolving Impact of COVID-19. The Guidance provides an illustrative (but non-exhaustive) list of considerations companies should take into account when making disclosure determinations. Some of these considerations include:

- How has COVID-19 impacted your financial condition and results of operations?
- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook? If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency?
- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets? 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?
- Do you anticipate any material impairments (*e.g.*, with respect to goodwill, intangible assets, long-lived assets, right of use assets or 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?
- 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? 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 regarding your ability to maintain these systems and controls?
- Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so? Do you face any material resource constraints in implementing these plans?

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- 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?

The Guidance encourages disclosure that is tailored to a company's particular facts and circumstances and provides material information about the impact of COVID-19 to investors and market participants. The Guidance also encourages companies to provide disclosures that allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management and to proactively revise and update disclosures as facts and circumstances change.

In addition, the Guidance acknowledges that many of the disclosures that would address the considerations it outlines would come in the form of forward-looking statements based on assumptions and expectations regarding future events. As such, the Guidance reminds companies that the disclosure of forward-looking information can be provided in a manner that avails itself of the safe harbor provided by the Private Securities Litigation Reform Act of 1995.⁴

Avoiding Insider Trading and Regulation FD Issues. The Guidance emphasizes that if COVID-19 has affected a company in a manner that would be material to investors, or if a company has become aware of a risk related to COVID-19 that would be material to investors, the company and corporate insiders aware of such information should refrain from trading in the company's securities until the information has been disclosed to the public. The Guidance also reminds companies of their obligations under Regulation FD to avoid selective disclosure by broadly disseminating such information to the public. In addition, the Guidance states that, depending on a company's particular circumstances, a company may need to revisit, refresh or update previous disclosures to the extent that information becomes materially inaccurate.

Reporting Earnings and Financial Results and the Use of Non-GAAP Measures. Given ongoing uncertainties regarding the impact of COVID-19, the Guidance encourages companies to proactively address financial reporting matters earlier than usual, including by promptly engaging experts, who may be needed to assess the impact of COVID-19 on assets and make impairment determinations.

Non-GAAP Adjustments and Reconciliations Impacted by COVID-19. The Guidance also reminds companies of their obligations under Regulation S-K Item 10(e) and Regulation G, and provides a roadmap to companies that determine to adjust financial measures for COVID-19-related issues and/or face difficulties reconciling non-GAAP measures to the most comparable GAAP measures at the time of an earnings release. Here is a bulleted summary of the related guidance:

- If a company presents a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19, it should 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.
- Non-GAAP financial measures and performance metrics should not be used for the sole purpose of presenting a more favorable view of the company. Instead, such measures and metrics should be used to share with investors how management and the board of directors are analyzing the current and potential impact of COVID-19 on the company's financial condition and operating results.
- Where a GAAP financial measure is unavailable at the time of the earnings release because the measure might be impacted by COVID-19-related adjustments that may require 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 (a) provisional amount(s) based on a reasonable estimate or (b) a range of reasonably estimable GAAP results. The provisional amount or range should reflect a reasonable estimate of COVID-19-related charges not yet finalized, such as impairment charges.
- If a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures in reliance on the Division's position described above, it also should:
 - limit the measures in its presentation to those non-GAAP financial measures used to report financial results to the company's board of directors; and
 - 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.

⁴ The safe harbor is set forth in Securities Act Section 27A and Exchange Act Section 21E.

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In addition, the Division reminded companies of the equal-or-greater prominence requirements of Regulation S-K Item 10(e), and that filings where GAAP financial statements are required — such as Forms 10-K and 10-Q — should include a full reconciliation of the non-GAAP financial measures to the most comparable GAAP measure (and not include provisional amounts or a range of estimated results).

No-Action Relief Statement on SEC Filing Signature Requirements

Regulation S-T Rule 302(b) requires that each signatory “manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing” no later than the time the filing is made with the SEC. Companies must retain the signed documents for five years and furnish copies to the SEC upon request.

The statement from the divisions of Corporation Finance, Investment Management and Trading and Markets conveys the expectation that covered companies and persons will still

comply with Rule 302(b) to the fullest extent practicable. However, acknowledging the difficulties of obtaining manual signatures during the pandemic, the statement indicates that the divisions will not recommend enforcement action for noncompliance with Rule 302(b), subject to the following conditions:

- the signatory retains a manually signed signature page (or other document) and provides such document, as promptly as reasonably practicable, to the company 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 company establishes and maintains policies and procedures governing this process.

For example, a signatory who is working remotely could manually sign a hard copy of the signature page and then provide that copy to the company upon his or her return to the office. The signatory also may provide an electronic record (such as a photograph or PDF) of such document when it is signed.

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