

Client Alert

March 2020

SEC Extends Period for Delayed Filings Due to COVID-19 and Provides COVID-19 Disclosure Guidance

SEC Staff Issues Statement Regarding Manual Signature Requirement on EDGAR Filings

On March 25, 2020, the SEC took additional measures to address the COVID-19 pandemic, issuing an updated [executive order](#) and disclosure [guidance](#). The SEC Staff also recently issued a [statement](#) regarding the manual signature requirement for electronic filings.

Exemptive Order Providing Extended Filing Relief

Through its executive order, the SEC extended from April 30 to July 1 the last date of the period through which SEC reporting companies and other filers may benefit from relief from certain filing obligations. Although the March 25 order supersedes its March 4 [order](#), it did not expand coverage of the filing relief (e.g., the deadline for conflicts minerals disclosure on Form SD under Section 13(p) of Securities Exchange Act of 1934 remains unchanged). The SEC also included in the March 25 order the same relief it granted on March 4 regarding furnishing of solicitation materials to areas where mail delivery has been suspended.

With the expanded relief period through July 1, 2020, reporting companies with fiscal years ending March 31, 2020 may, if necessary, delay filing their annual reports on Form 10-K. While the relief is quite broad, it is not all-encompassing; it exempts entities subject to the reporting obligations under Section 13(a) and 15(d) of the Exchange Act and other persons an exemption from

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any requirement to file or furnish materials and any amendment thereto with the [SEC] under 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, where the conditions below are satisfied.

To qualify for relief, subject to satisfying other conditions, companies must file a current report on Form 8-K (or Form 6-K for foreign private issuers) on or before the report's regular filing deadline which 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 and, if appropriate, a risk factor explaining the impact of COVID-19 on the company's business.

Disclosure Guidance

The SEC issued [CF Disclosure Guidance Topic No. 9](#) to address disclosure and other securities law obligations relating to the effect of the COVID-19 crisis on companies' businesses. The guidance emphasized the obligation of a reporting company to disclose information material to investors so that they can view the company, including both its historical results and future trends, "through the eyes of management" and make informed investment decisions. As we mentioned in our initial [client alert](#) on this topic, the sections of periodic reports (i.e., Form 10-K, Form 10-Q) where this disclosure may be most relevant is in a filer's risk factors, management's discussion and analysis ("MD&A") and business sections as well as legal proceedings, disclosure controls and procedures, internal control over financial reporting and, of course, the notes to financial statements.

The SEC posed a number of questions with respect to companies' present and future operations for consideration as companies assess COVID-19-related effects and consider their disclosure obligations, specifically:

Financial Condition and Results of Operations

- How has COVID-19 impacted your financial condition and results of operations?
- 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?

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Liquidity and Capital Resources

- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook?
- 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?

Balance Sheet and Asset Valuation Considerations

- 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, 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?

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Business Operations and Internal Controls

- 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 in 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?
- 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? 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?

The SEC stressed that the list of questions set forth above is illustrative but not exhaustive and each company will need to carefully assess COVID-19's particular impact on it and its related material disclosure obligations. Finally, it is noteworthy that while the required MD&A analysis is limited to known trends and uncertainties, the SEC stated that many of the considerations mentioned above "address forward-looking information that may be based upon assumptions or expectations regarding future events" and encouraged reporting companies to provide more forward-looking information. In support of this encouragement, the SEC

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reminded companies of the relevant safe harbors under the Securities Act of 1933 and the Exchange Act.

The guidance also acknowledged and addressed certain considerations in respect of earnings announcements and guidance and insider trading/selective disclosure concerns, which we addressed in our initial client alert, as well as the use of non-GAAP financial measures during this disruptive economic period.

Recognizing that companies' responses to COVID-19 developments are ever-evolving, the SEC encouraged companies to contact the SEC with questions or if they believe there are additional areas where guidance or temporary relief may be necessary.

Manual Signatures to Electronically Filed Documents

The SEC Staff recently issued a [statement](#), last modified on March 24, regarding manual signature requirements and maintenance thereof to electronically filed documents. The SEC Staff reaffirmed its expectation that all persons and entities subject to Regulation S-T comply with the requirements of Rule 302(b) to the fullest extent practicable based on their particular facts and circumstances. Recognizing that some persons and entities subject to Regulation S-T may experience difficulties satisfying the signature requirements due to circumstances arising from COVID-19, the SEC Staff disclosed that it will not recommend the SEC 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 SEC Staff indicated that a signatory may also provide to the filer an electronic record (such as a photograph or pdf) of such document when it is signed. Significantly, the statement did not alter the SEC's position that digital e-signatures are not appropriate for manually signed documents that are filed with the SEC electronically.

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Olshan lawyers from multiple practice groups are working together with clients to address COVID-19-related matters, including, for example, SEC and other corporate-related matters including contractual analysis and financing, tax, restructuring, employee benefits and employment practices, insurance coverage and litigation. Click [here](#) to access our materials addressing issues raised by COVID-19.

Please contact the Olshan attorney with whom you regularly work or the attorney listed below if you would like to discuss this client alert, have questions about its content or are seeking other advice regarding COVID-19.

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