

SEC Issues Conditional Regulatory Relief for Companies Affected by Coronavirus

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Coronavirus-Related Conditional Relief and Assistance

On March 4, 2020, the Securities and Exchange Commission (the “**SEC**”) announced that it would provide conditional regulatory relief with respect to certain filing and mailing obligations under the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”) for registrants, and other persons making filings with respect to a registrant, affected by the impacts of the coronavirus (COVID-19). According to the [SEC press release](#), the impact of the continued spread of the coronavirus may present challenges for certain companies in meeting their reporting and mailing obligations. The order also notes that the SEC may provide further extensions as it deems appropriate or necessary as it continues to monitor the global spread of the virus.

Relief with Respect to Filings with the SEC

The [SEC order](#) provides registrants an additional 45 days to file or furnish materials with the SEC that would have otherwise been due between March 1, 2020 and April 30, 2020 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. Filings and materials covered by these sections include Forms 10-K, 20-F, 10-Q, 8-K and 6-K as well as proxy statements. Note that relief is not available with respect to Schedule 13D filings or amendments to Schedule 13D filings.

In order to obtain relief under the order, a registrant, or any person required to make any filings with respect to the registrant, must meet the following conditions:

- The registrant, or any person required to make filings with respect to the registrant, must be unable to meet a filing deadline due to circumstances related to COVID-19;
- The registrant must furnish a Form 8-K or, if eligible, a Form 6-K by the later of March 16 or original filing deadline stating:
 - that it is relying on the order;
 - a brief description of the reasons why it could not file the report, schedule or form on a timely basis;
 - the estimated date by which the report, schedule, or form is expected to be filed;
 - if appropriate, a risk factor explaining, if material, the impact of COVID-19 on its business; and

- if the reason the report cannot be filed timely relates to the inability of any person, other than the registrant, to furnish any required opinion, report or certification, the Form 8-K or Form 6-K must include, in an exhibit, a statement signed by the person stating the specific reasons why the person is unable to furnish the required opinion, report or certification on or before the date such report must be filed.
- The registrant, or any person required to make filings with respect to the registrant, files with the SEC any report, schedule, or form required to be filed no later than 45 days after the original due date; and
- In any report, schedule or form filed by the applicable deadline pursuant to the order, the registrant, or any person required to make filings with respect to the registrant, must disclose that it is relying on the order and state the reasons why it could not file such report, schedule or form on a timely basis.

A registrant relying on the order would not need to file a Form 12b-25 so long as the report, schedule, or form is filed within the time period prescribed by the order. In addition, the SEC noted that it believes such statements, as furnished, to the extent they contain “forward-looking statements,” would be subject to the safe harbor under Section 21E of the Exchange Act.

The SEC staff has also noted that it will take the following positions with respect to the relief granted:

- For eligibility under Form S-3, Form S-8 and Rule 144(c), those relying on the order will be considered current and timely in their Exchange Act filings if they were current and timely as of the first day of the relief period and file any report due during the relief period within 45 days of the original filing deadline for the report.
- Companies that receive an extension on filing annual or quarterly reports will be permitted to rely on Rule 12b-25 if they are unable to file on or before the extended due date.

Relief with Respect to Furnishing Materials to Security Holders

With respect to proxy and information statements, the SEC order also provides relief with respect to furnishing materials to security holders when delivery service to the security holder has been suspended as a result of COVID-19. While companies may not be able to benefit from this relief today, it is something to consider as the situation develops.

The order exempts a registrant, or any other person, from the requirements of the Exchange Act and the rules thereunder to furnish proxy statements, information statements, annual reports, and other soliciting materials (the “**Soliciting Materials**”) where the conditions below are satisfied:

- The registrant’s security holder has a mailing address located in an area where, as a result of COVID-19, the common carrier has suspended delivery service of the type or class customarily used by the registrant or other person making the solicitation; and
- The registrant, or other person making a solicitation, has made a good faith effort to furnish the Soliciting Materials to the security holder, as required by the rules applicable to the particular method of delivering the Soliciting Materials to the security holder.

Disclosures Related to the Coronavirus Outbreak

SEC Chairman Jay Clayton has noted that while there is uncertainty surrounding the potential effects of COVID-19 on companies (including the fact that the effects will depend on many factors beyond the control and knowledge of issuers), how issuers plan for that uncertainty and how they choose to respond to events as they unfold can be material to an investment decision.

In light of the evolving situation related to COVID-19, U.S. public companies should consider the following with respect to disclosures relating to COVID-19:

- **Companies Potentially Impacted by COVID-19.** Companies that may be materially impacted by COVID-19 include not only U.S.-listed companies with significant operations in China or other jurisdictions affected by COVID-19, but also companies that do not have operations in China or other affected jurisdictions but that depend on companies that do have operations in those jurisdictions, including, for example, as suppliers, distributors and/or customers.
- **Risk Factors.** Companies should consider specific risk factors that address the potential risks of COVID-19 to their operations and financial condition. Depending on the registrant's business, risk factor disclosure pertaining to COVID-19 may require more substantive discussion than a generalized economic risk factor covering epidemics or global pandemics:
 - Registrants with operations in mainland China or other affected areas¹ - including those with brick-and-mortar locations, factories, and transportation or hospitality operations - should discuss the extent and effects of location closures and operation cancellations.
 - A registrant with supply chain or upstream exposure to China or other affected areas should provide detailed risk factor disclosure, particularly if the registrant relies on suppliers, vendors, and logistics providers in China or such other affected areas.
 - Even companies that do not maintain a physical presence in China or other affected areas should evaluate whether they have indirect exposure to such affected areas and the coronavirus outbreak. For example, service providers with demand risk exposure, companies with plans to expand into China or other affected areas, or registrants with investment exposure to such affected areas should discuss the indirect effects associated with the coronavirus outbreak.

Between January 1, 2020 and March 5, 2020, over 800 annual and quarterly reports included risk factors that mentioned the coronavirus or COVID-19.

- **Insider Trading.** Where a company is aware of a risk related to the coronavirus that would be material to its investors, the company should refrain from engaging in securities transactions with the public and take steps to prevent directors and officers (and other corporate insiders who are aware of these matters) from trading in the company's securities until investors have been appropriately informed about the risk.
- **Guidance.** Companies should consider whether the potential impact of COVID-19 impacts the company's previously provided guidance and outlook disclosures. Some companies are noting the potential impact of COVID-19 on their first quarter results, but companies should also consider whether the potential impact may have a material effect on the company's

operations and financial results over a longer time period.

- *Regulation FD.* When companies do disclose material information related to the impacts of COVID-19, they are reminded to take the necessary steps to avoid selective disclosures and to disseminate the information broadly.
- *Financial Reporting Processes.* Companies should work with their audit committees and auditors to ensure that their reporting and auditing processes remain robust in light of the potential impacts of the coronavirus outbreak. As this is very much a dynamic and evolving situation, it is critical that audit committees and auditors are kept informed of the latest developments.
- *Subsequent Event Disclosures.* Companies should consider potential disclosure of subsequent events in the notes to the financial statements in accordance with guidance included in Accounting Standards Codification 855, Subsequent Events.
- *Forward-Looking Statements.* Companies should consider whether to include the potential impact of COVID-19 as a factor impacting forward-looking statements. The SEC has noted that companies providing forward-looking information in an effort to keep investors informed about material developments, including known trends or uncertainties regarding COVID-19, can take steps to avail themselves of the safe harbor in Section 21E of the Exchange Act for this information.
- *Monitoring Developments.* Companies should continue to monitor the global spread of the virus and evaluate whether additional disclosure is necessary.
- *Contacting the SEC.* The SEC has noted that it welcomes questions regarding the reporting of matters related to the potential effects of COVID-19.

For additional information please contact any member of Haynes Boone's [Capital Markets and Securities Practice Group](#).

¹ As of the date of this publication, several countries outside of China have seen a particularly high concentration of infection and sustained local transmission of the virus, including Japan, Italy, Iran, and South Korea.