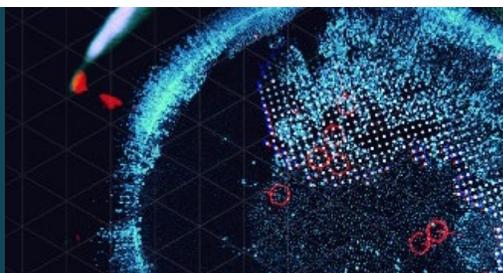


Coronavirus/COVID-19 Managing COVID-19: Additional Relief from the SEC



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The SEC and its staff continue to respond to the COVID-19 pandemic by providing public companies and other filers with relief from certain reporting requirements, as well as rule amendments. Recently, the SEC's Division of Corporation Finance (the "Division") issued several [frequently asked questions](#) ("FAQs") relating to the SEC's [March 25, 2020 Order](#) that extends filing deadlines for public companies and other filers (the "COVID-19 Order") (as discussed in our prior [alert](#)). The FAQs offer guidance on requirements for public companies to avail themselves of the relief provided by the COVID-19 Order, as well as the implications of reliance on that relief in the context of registered securities offerings.¹ Further, the SEC recently [adopted](#) temporary rule amendments to Regulation Crowdfunding (the "Crowdfunding Relief") to facilitate expedited crowdfunding offerings for small businesses. Finally, the Division issued a [statement](#) about filing requirements for Form 144 paper filings (the "Form 144 Relief"). This alert discusses the key aspects of these developments.

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COVID-19 Order – Required Disclosure

- In the FAQs, the Division reiterates that the ability to take advantage of the extended filing deadlines under the COVID-19 Order is conditioned on making prescribed disclosures. The FAQs underscore that the following disclosures are necessary for reliance on the COVID-19 Order:
 - *Current Reports.* A company that intends to rely on the COVID-19 Order is required to file a Form 8-K or, for foreign private issuers, a Form 6-K, by the original filing deadline disclosing: (i) that the company is relying on the COVID-19 Order; (ii) a brief description of the reasons why it could not make the filing on a timely basis; (iii) the estimated date when it expects to make the applicable filing; and (iv) a company-specific risk factor explaining the impact, if material, of COVID-19 on its business. If the filing cannot be made on a timely basis due to a third party's inability to furnish an opinion, report or certification, a signed statement of that person, giving the reasons why the required material could not be furnished on time, must be provided as an exhibit to the Form 8-K or 6-K, as applicable.
 - *Report, Schedule or Form.* In addition, in any report, schedule or form filed by the extended deadline, the company must disclose that it is relying on the COVID-19 Order and state the reasons why it could not file such report, schedule or form on a timely basis.

¹ For information about certain other issues related to the COVID-19 Order, please see our prior [alert](#).

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Effective Registration Statements

- The FAQs clarify that a company may continue to conduct takedowns from an already effective Form S-3 registration statement when it has not filed a required periodic report (including a Form 10-K) in reliance of the COVID-19 Order, if the prospectus used in the takedown complies with Section 10(a) of the Securities Act of 1933 (the “Securities Act”). Section 10(a)(3) requires that when a prospectus is used more than nine months after the effective date of the registration statement, the information included must be as of a date not more than 16 months prior to such use so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense. In addition, a shelf offering under Rule 415 under the Securities Act requires an undertaking to reflect in the prospectus any facts or events arising after the effective date of the registration statement which represent a fundamental change in the information in the registration statement. The Division cautioned that companies, which are relying on the COVID-19 Order to conduct a takedown offering between the original filing deadline for a Form 10-K and the extended deadline under the COVID-19 Order, will need to determine when it is necessary to update the prospectus to comply with the requirements for registration statements under the Securities Act.

- When a company has relied on the COVID-19 Order to delay filing its Form 10-K, which will serve as a Section 10(a)(3) update to an effective Form S-3, a question arises as to when the company must reassess its eligibility to remain on Form S-3. The FAQs confirm that in this circumstance the company should reassess its Form S-3 eligibility when it files the Form 10-K that will serve as a Section 10(a)(3) update. In effect, when a company properly relies on the COVID-19 Order, the due date for filing the Form 10-K is extended, and the company must reassess its eligibility when it files the Form 10-K. At that time, to remain on Form S-3, the company must meet all of the requirements of Form S-3, including that it has filed all the material required to be filed pursuant to Section 13, 14 or 15(d) for a period of at least 12 calendar months immediately preceding the Section 10(a)(3) update. The Form 10-K will be considered timely if it meets all the conditions of the COVID-19 Order with respect to the filing.

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Form S-3

- The FAQs confirm that a company may file a new Form S-3 registration statement between the original deadline of a required filing and the extended deadline provided by the COVID-19 Order, even if it has not filed the required periodic report prior to the time it files the registration statement. To be considered current and timely in its Exchange Act reporting obligations, a company must properly file the Form 8-K or 6-K as required by the COVID-19 Order. However, the Division noted that it is unlikely to accelerate the effective date of a Form S-3 until the company files any information required to be included in the Form S-3. The Division also stated that companies with “compelling and well-documented facts” may contact the Staff to discuss the company’s specific capital-raising needs.

Crowdfunding Relief to Expedite Offerings By Small Businesses

- On May 4, 2020, the SEC adopted the Crowdfunding Relief to provide smaller companies affected by COVID-19 temporary, conditional relief from certain requirements related to timing and availability of financial statements under Regulation Crowdfunding. The Crowdfunding Relief seeks to provide smaller companies the opportunity to access capital in a timely and cost-effective manner to meet their urgent funding needs.
- *Eligibility.* The Crowdfunding Relief is available to a company that already meets the eligibility criteria under Regulation Crowdfunding, as long as that company has been organized and operating for at least six months and, if the company previously sold securities in a Regulation Crowdfunding offering, has complied with Section 4A(b) of the Securities Act and related requirements of Regulation Crowdfunding.²
- *Offers and investment commitments.* Under the Crowdfunding Relief, financial statements may initially be omitted from an offering document if not otherwise available. However, investment commitments may only be accepted if an amended offering statement includes the financial statements previously omitted. A company that is relying on the Crowdfunding Relief must prominently disclose under temporary Securities Act Rule 201(z) that: (i) the omitted financial information is not otherwise available and will be provided by an amendment to the offering materials; (ii) the investor should review all of the offering materials, including previously omitted financial information, prior to making an investment decision; and (iii) no investment commitments will be accepted until such financial information has been provided.
- *Sales and cancellations.* The Crowdfunding Relief allows a company to launch sales as soon as it has received binding investment commitments, rather than wait until an offering statement is publicly available for at least 21 days, as is required ordinarily under Regulation Crowdfunding. The SEC noted that under the Crowdfunding Relief commitments are not binding until 48 hours after they are given and cautioned that the company must have provided the required financial information before accepting any investment commitments. A company must provide prominent disclosure that the offering is being conducted on an expedited basis due to circumstances relating to COVID-19 and pursuant to the Crowdfunding Relief. Sales conducted under the Crowdfunding Relief may be cancelled by the investor for any reason for 48 hours from the time of the investment commitment (or a later period as the company may designate). After the 48-hour period, an investment commitment may not be cancelled unless there is a material change to the offering or to the information provided by the company.
- *Early closings.* The Crowdfunding Relief also permits an early closing as soon as binding commitments are received that reach the target amount in the offering if: (i) the company has complied with disclosure requirements in temporary Rule 201(z), including disclosure related to the time period to cancel the commitment and the possibility for early closing; (ii) the intermediary provides notice that the target offering

² The temporary exemption is not available to reporting companies, non-U.S.-based issuers, investment companies, blank check companies, companies that are disqualified under Regulation Crowdfunding's disqualification rules, and companies that have failed to file annual reports required under Regulation Crowdfunding during the two years immediately prior to the filing of the offering statement.

amount has been met; and (iii) at the time of the closing of the offering, the company continues to meet or exceed the target offering amount.

- *Financial Statements required when company is offering more than \$107,000 and not more than \$250,000 in a 12-month period.* Finally, the Crowdfunding Relief permits companies to raise between \$107,000 and \$250,000 in a 12-month period with an offering statement that includes financial statements and tax information from the company's federal income tax returns that are certified by the company's principal executive officer, rather than an independent public accountant. This relief is only available if the company's reviewed or audited financial statements are not otherwise available. The company must provide prominent disclosure that the financial information is certified by its principal executive officer, rather than an independent public accountant. Previously, Regulation Crowdfunding allowed companies to raise up to only \$107,000 with financial statements and tax information certified by the company's principal executive officer. The Crowdfunding Relief seeks to mitigate the difficulties in obtaining reviewed or audited financial statements due to COVID-19.
- *Applicable time periods.* The Crowdfunding Relief is effective from May 4, 2020 through March 1, 2021 for securities offerings initiated under Regulation Crowdfunding between May 4, 2020 and August 31, 2020.
- *Required disclosure.* A company relying on any of the temporary rules is required to provide clear and prominent disclosure, among others, that the offering is being conducted on an expedited basis due to circumstances relating to COVID-19 and pursuant to the Crowdfunding Relief.

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Other Developments: Form 144 Paper Filings

- In light of the ongoing health and safety concerns related to COVID-19, the Division issued the Form 144 Relief to permit email submission of Forms 144, which are otherwise required to be filed in paper. Under this relief, a PDF of the complete Form 144 should be attached to the email and sent to PaperForms144@SEC.gov.³ The Form 144 Relief covers Forms 144 submitted from April 10, 2020 to June 30, 2020. The submitter may continue to submit paper filings of Forms 144 to the SEC, but the Division warned that there may be delays in processing them.
- For signatures, the Division will not recommend enforcement action if the submitter provides a typed form of signature instead of the manual signature if: (i) the 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 submission and provides such document promptly upon request by the Division or other SEC staff; (ii) such document indicates the date and time when the signature was executed; and (iii) the filer or submitter (unless a natural person) establishes and maintains policies and procedures governing this process.

³ Additionally, a company must file Forms 144 with the national securities exchange on which its securities are listed. We understand that the NYSE is accepting electronic Form 144s that are submitted by email to nyselib@nyse.com and that Nasdaq is accepting electronic Form 144s that are submitted to SECFilings@nasdaq.com.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Securities and Capital Markets practice:

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