Morgan Lewis

COVID-19: FINRA, SEC, AND STATE RELIEF AND GUIDANCE FOR BROKER-DEALERS (UPDATED)

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The Financial Industry Regulatory Authority, US Securities and Exchange Commission, and state securities regulators recognize the significant impact of the coronavirus (COVID-19) pandemic on broker-dealers, investors, and other stakeholders, and have provided important guidance and relief to broker-dealers on how to meet some of these challenges.

This LawFlash, originally published on March 24 and updated on March 29, has been updated and addresses key relief and guidance issued **through 1:00 pm ET on April 7** by the Financial Industry Regulatory Authority (FINRA), US Securities and Exchange Commission (SEC), and state securities regulators. We will continue to update this LawFlash as additional relief and guidance is published.[1]

The table below lists the topics for which relief and guidance has been issued as of the date of this update and hyperlinks to the more detailed discussions of relief or guidance included throughout this LawFlash.

FINRA	
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[1] While this LawFlash discusses actions taken that address broker-dealers' concerns specifically, Morgan Lewis has published LawFlashes regarding all regulatory action and will continue to do so. Please see our Coronavirus COVID-19 resource page for our LawFlashes addressing SEC, CFTC, and other relief. The resource page will be updated as additional regulatory actions are taken.

SEC	
Registration	• Rule 17f-2 Fingerprinting
	• Municipal Advisors – Form MA Annual Updates
Duties and Conflicts	• Form CRS and Regulation Best Interest ***NEW!***
Financial and Operational	• Paper Filings ***NEW!***
Trading Practices	• Rule 606 of Regulation NMS
	• Consolidated Audit Trail (CAT)

State Securities Regulators	
Registration	• Individual Registration
	• Form U4
	• Form BR and Temporary Locations

FINRA and SEC Status

Both FINRA and the SEC are operating entirely remotely, but for "essential personnel." Based on our direct experience to date, both organizations remain extremely responsive to email and telephone communications, including inquiries regarding COVID-19-related guidance and relief and also currently active matters (exams, membership applications, etc.).

FINRA has, however, adjusted its operational focus in recognition of the significant adjustments firms are making to comply with governmental restrictions on travel or to otherwise move staff to remote work in order to protect their health and safety. For example, FINRA will

- continue its risk monitoring, market surveillance, and enforcement programs, but is prioritizing the highest-risk matters, focusing in particular on monitoring for fraud, illicit schemes, and other manipulative activities seeking to take advantage of the conditions created by COVID-19 and ongoing market volatility;
- continue to engage in regular communications with many firms, and in some cases will make targeted requests for information regarding financial and operational capabilities, among other matters; and
- temporarily limit new routine requests for information, including in connection with cycle exams, in recognition that the resources of firms are being redirected to focus on employee safety, client service, and critical operational issues.[2]

The SEC's Office of Compliance Inspections and Examinations (OCIE) has also shifted focus. For example, OCIE will

- conduct exams offsite through correspondence, unless it is necessary to be onsite;
- work with firms to address the timing of its requests, availability of firm personnel, and other matters to minimize disruption, with health and safety measures in mind;
- not consider reliance on regulatory relief to be a risk factor utilized in determining whether to commence an exam (OCIE encourages firms to utilize available regulatory relief as needed); and
- actively engage in ongoing outreach and other efforts with many firms to assess the impacts of COVID-19 and to gather information, including challenges with operational resiliency and implementation and effectiveness of firms' business continuity plans (BCPs).

[2] For any pending requests relating to an ongoing routine cycle examination, FINRA advises firms to contact the assigned FINRA exam staff for guidance.

The co-directors of the SEC's Division of Enforcement have also emphasized in a public statement the importance of maintaining market integrity and following corporate controls and procedures. For example, they noted that, given the unique circumstances COVID-19 is presenting:

- material nonpublic information (MNPI) may hold even greater value than under normal circumstances, particularly if earnings reports or SEC disclosure filings are delayed due to COVID-19;
- greater numbers of people may have access to MNPI, and that those with such access (such as directors, officers, employees, consultants, and other outside professionals) should be mindful of their obligations to keep this information confidential and to avoid violating the antifraud provisions of the federal securities laws (*e.g.*, insider trading);
- public companies should be mindful of their established disclosure controls and procedures, insider trading prohibitions, codes of ethics, and Regulation FD, and selective disclosure prohibitions to ensure to the greatest extent possible that they protect against the improper dissemination and use of MNPI; and
- broker-dealers, investment advisers, and other registrants must comply with policies and procedures that are designed to prevent the misuse of MNPI.

FINRA Relief and Guidance

FINRA has provided COVID-19-related regulatory relief and additional guidance to firms as set forth below, through Regulatory Notice 20-08 (RN 20-08), Frequently Asked Questions (FAQs), and otherwise on its COVID-19 web resource (FINRA COVID-19 Resource). FINRA continues to work on additional relief and guidance in coordination with other regulators and is expected to provide additional relief and guidance as the nature and impact of the COVID-19 pandemic evolves. Current relief and guidance includes the following:

Forms U4 and U5

- FINRA stated in RN 20-08, and reaffirmed in an FAQ, that registered representatives who temporarily relocate due to COVID-19 are not required to update their office of employment addresses on their Forms U4; and
- Pursuant to an FAQ, firms may electronically file an initial or transfer Form U4 without obtaining the individual applicant's manual (wet) signature if the firm
    - provides the applicant with a copy of the completed Form U4 prior to filing;
    - obtains the applicant's written acknowledgment (which may be electronic) prior to filing that the information has been received and reviewed, and that the applicant agrees that the content is accurate and complete;
    - retains the written acknowledgment in accordance with Rule 17a-4(e)(1) under the Exchange Act and makes it available promptly upon regulatory request; and
    - obtains the applicant's wet signature as soon as practicable.
    - ***NEW!*** – In an FAQ, FINRA reminded firms that, following the termination of the association of a registered person, the firm with which the individual was associated must submit a Form U5 no later than 30 days to FINRA and, concurrently, provide the individual a copy of the Form U5 as filed with FINRA. This requirement does not specify the format in which firms must provide the Form U5 copy to terminated individuals, so firms may provide copies of the Form U5 to terminated individuals electronically.
    - ***NEW!*** – In another FAQ, FINRA stated that it will consider requests to refund or reduce late filing fees pertaining to Form U4 or U5 filings, in recognition that firms may encounter difficulties obtaining documents and other information needed to report such information due to the implementation of COVID-19 measures. Firms are encouraged to contact the FINRA Gateway Call Center at (301) 869-6699 for additional information.

Fingerprints

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- In an FAQ, FINRA confirmed that it is temporarily extending the period for submitting fingerprint information under FINRA Rule 1010(d), which otherwise requires firms to submit fingerprint information for individual applicants no later than 30 days after FINRA receives the applicant's Form U4. Specifically, firms that submitted, or will submit, an applicant's initial or transfer Form U4 between February 15, 2020, and April 29, 2020, will have until May 30, 2020, to submit the necessary fingerprint information. This relief follows an exemptive order the SEC recently issued, described further below, providing temporary relief from the fingerprinting requirements of Section 17(f)(2) of the Exchange Act and Rule 17f-2 thereunder for the period of March 16, 2020, until May 30, 2020.

Qualification Exams and Continuing Education (CE)

- In RN 20-08, FINRA encouraged individuals with upcoming qualification exams or CE windows that are due to expire to contact FINRA to request courtesy cancellations or extensions. FINRA has since stated on the FINRA COVID-19 Resource, however, that
  - Prometric testing centers are closed in the United States and Canada for a period of 30 days, starting March 18, 2020, and that candidates who have an existing appointment will receive an email from Prometric with instructions on how to reschedule their appointment to a future date with no rescheduling fees applied. To change an existing appointment scheduled for April 16 or later, or to schedule a new appointment, FINRA advises candidates to access the Prometric website.
  - it "will extend all enrollment windows that are currently open and scheduled to expire by the end of May. Each FINRA-administered exam enrollment end date will be extended through the same end date of May 31, 2020."
- In another FAQ, FINRA also confirmed that individuals who were designated to function as principals under FINRA Rule 1210.04 prior to February 2, 2020, will be given until May 31, 2020, to pass the appropriate exam(s). Rule 1210.04 allows eligible individuals to function in a principal capacity for 120 calendar days before having to pass the appropriate examination(s).
- ***NEW!*** – In an FAQ, FINRA confirmed that registered persons may also have additional time to complete the Regulatory Element of CE.
- FINRA Rule 1240(a) requires registered persons to complete the Regulatory Element of CE during a 120-day window based on their registration anniversary date.
- FINRA is providing an extension to any registered person whose 120-day window for completing the Regulatory Element is currently expired, or will expire, between March 16, 2020, and May 2020. The Regulatory Element end date for each registered person will be extended through the same end date of May 31, 2020, although FINRA may consider additional extensions of time as appropriate.

Form BR and Emergency Office Relocations

- FINRA stated in RN 20-08, and reaffirmed in an FAQ, that firms are not required to submit Forms BR for newly opened temporary office locations or space-sharing arrangements "established as a result of recent events."
- Notwithstanding the Form U4 and Form BR relief, FINRA advises firms that they should ("must," pursuant to a more recent FAQ) use best efforts to notify their Risk Monitoring Analysts as soon as possible after establishing new temporary office spaces or office-sharing arrangements if the locations are not currently registered as branch offices or identified as regular non-branch locations. FINRA clarified in the FAQ, however, that it does not expect to receive written notification regarding each associated person's location (*e.g.*, the person's home residence if working from home) or if another person (*e.g.*, a spouse or another immediate family member) is also teleworking in the same residence as the associated person.
- The referenced notices should include the following, at a minimum:
  - The temporary office address

- The names of each member firm that is using the location
- The names of registered personnel at the location
- A contact telephone number for the location[3]
- The expected duration, if known
- Whether the location will be shared with any other entities, and if so, the type(s) of business in which each of the other entities are engaged (*e.g.*, but not limited to, an affiliated investment adviser or an organization in the securities business).

Membership Proceedings

- FINRA will grant extensions on new or continuing membership applications, if needed.

Advertising

- In its COVID-19-related FAQs, FINRA advises that firms
  - Review their BCPs regarding communicating with customers and ensuring customer access to funds and securities during significant business disruptions that might result in significantly increased customer call volumes or online account usage (*e.g.*, due to significant market movements)
  - If unavailable to service their customers, promptly place a notice on their websites indicating to affected customers who they may contact concerning the execution of trades, their accounts, and access to funds or securities (and consider appropriate supervisory control policies and procedures that aim to mitigate risks that may arise due to the reduced ability to communicate with customers, inability to rely on mail, or other disruption to the existing controls over communications with customers)
  - Are not required to file with FINRA "non-promotional" retail communications regarding COVID-19 that do not make financial or investment recommendations or promote products or services of the firms (*see* FINRA Rule 2210(c)(7))

Internal Inspections

- FINRA stated in RN 20-08 that firms "may" need to temporarily postpone onsite internal inspections "of branch offices" during the pandemic and that the ability to complete this "annual regulatory obligation" in 2020 may need to be re-evaluated depending on the duration and severity of COVID-19. FINRA reaffirmed this in an FAQ. Although not explicit relief, we expect that FINRA's reference to annual branch exams refers to exams of OSJs and branch offices that supervise one or more non-branch locations, as such exams must be conducted on a calendar-year basis.

Temporary Offices and Office-Sharing

- In the FAQ described above regarding emergency office relocations, FINRA also reminds firms to consider the risks associated with sharing office space with another entity (*e.g.*, customer privacy, information security or recordkeeping considerations) and take steps to mitigate such risks during the emergency relocation. In addition, in instances where a non-branch location or branch office has been relocated, or customer calls are being rerouted to another office, firms must exercise diligence in validating the identity of the customer (*e.g.*, when accepting orders and request for disbursement of funds), as well as provide heightened supervision of affected customer accounts.

[3] We note that cellular telephone numbers should be acceptable contact telephone numbers, but firms may want to consider requesting landline telephone numbers from their personnel, to the extent available, in the unlikely event that the cellular system were to become overwhelmed or fail for a period of time, which has happened in the past.

Rule 3120 Reports

- In an FAQ, FINRA provides additional time to firms whose annual deadline for submitting their Rule 3120 report to senior management (detailing a firm's supervisory controls and, with respect to certain firms, additional information) falls between March 1 and May 1, 2020, allowing them to take up to and including May 31, 2020 to complete and submit the report to their senior management.

Rule 3130 Annual Certifications

- In another FAQ, FINRA states that, although the deadline for executing the Rule 3130 certification is no later than on the anniversary date of the previous year's certification (and firms may have different deadlines for their next certification), a firm whose certification deadline falls between March 1 and May 1, 2020, may take up to and including May 31, 2020 to complete its certification. Also, the condition for certification in Rule 3130 that a firm's CEO(s) (or equivalent officer(s)) has conducted at least one meeting with the firm's CCO(s) in the preceding 12 months may be satisfied by virtual meetings.

Anti-Money Laundering (AML)

- FINRA reminds firms in an FAQ that they have until December 31, 2020 to perform the annual independent testing of their AML compliance programs, as FINRA Rule 3310's reference to a "calendar-year basis" means that, for most firms, the independent testing must be performed at least once during each calendar year (*i.e.*, between January 1 and December 31). Firms may choose when to perform their independent testing within the calendar year, unless circumstances warrant more frequent testing. A similar analysis applies to those firms that are only required to perform such testing every two years (on a calendar-year basis).

Cybersecurity Measures to Consider

- In an Information Notice published on March 26, 2020, FINRA highlights its expectation that firms and their personnel "take appropriate measures to address increased vulnerability to cybersecurity attacks and to protect customer and firm data on firm and home networks, as well as devices." The notice does not create any new regulatory obligations. Rather, it provides examples of measures firms and their personnel might consider to help strengthen their cybersecurity controls given the increased use of remote offices and teleworking arrangements. The Information Notice can be read as a follow-on to RN 20-08, which, among other things, encourages firms to review their BCPs for pandemic-related disruptions and consider certain cybersecurity-related measures.

*Annual Assessments – **NEW!***

- In an FAQ, FINRA confirmed that it will permit small firms (firms with no more than 150 registered persons) additional time to pay the Gross Income Assessment and the Personnel Assessment (together, the Annual Assessment).
    - Invoices for the Annual Assessment are ordinarily distributed in April of each year, with payment due on receipt.
    - FINRA is permitting small firms to treat the invoices as billed as of August 1, 2020, rather than as due upon receipt in April. Further, small firms may opt to pay 50% of the amount due on September 1, 2020, and the remaining 50% on December 1, 2020.
- In another FAQ, FINRA confirmed that a firm that terminates its membership prior to September 1, 2020 will not be responsible for paying the Annual Assessment for 2020.

*Net Capital – Deferred Annual Assessments – **NEW!***

- If small firms opt to defer payment of their annual assessment as described above, FINRA clarified in an FAQ that, based on discussions with the SEC staff, such firms should, consistent with obligations under the net capital rules, apply Generally Accepted Accounting Principles (GAAP) to determine whether they should accrue a liability for the 2020 annual assessment.
- To the extent a liability is accrued for the unpaid annual assessment, small firms will be permitted, until September 1, 2020, to add back the amount of such liability to their net worth for purposes of computing net capital and, to the extent applicable, to exclude the liability from their aggregate indebtedness in computing their minimum net capital requirement.
- Members should include the amount of the liability that will be added back to their net worth in Item 3525 (Other (deductions) or allowable credits) and, to the extent applicable, Item 1380 (Other – Accounts payable and accrued liabilities and expenses) of FOCUS Report Part II or Item 1385 (Accounts payable, accrued liabilities, expenses and other) of FOCUS Report Part IIA.

*Net Capital – CARES Act Covered Loans – **NEW!***

- In an additional FAQ, FINRA noted that Section 1106(b) of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), provides that a recipient of a covered loan (as defined in Section 1106(a)(1)) is eligible for forgiveness of indebtedness on the covered loan in an amount (the Forgivable Expense Amount) equal to the sum of the following costs incurred and payments made during the eight-week period beginning on the date of the origination of the covered loan (the Covered Period):
    - Payroll costs (as defined in Section 1106(a)(8));
    - Any payment of interest on any covered mortgage obligation (as defined in Section 1106(a)(2)), which shall not include any prepayment of or payment of principal on a covered mortgage obligation;
    - Any payment on any covered rent obligation (as defined in Section 1106(a)(4)); and
    - Any covered utility payment (as defined in Section 1106(a)(5)).
- Asked whether firms can add back to net capital amounts that they expect to be forgiven under Section 1106, FINRA answered that
    - A firm that has included a covered loan as a liability on its balance sheet may add the Forgivable Expense Amount back to net capital *to the extent* the firm has recorded expenses for the costs and payments making up the Forgivable Expense Amount, *provided that* the add-back to net capital may not exceed the amount of the balance sheet liability for the covered loan that the firm reasonably expects to be forgiven pursuant to Section 1106 (taking into account among other things the limits under Section 1106(d) on the amount of forgiveness). Since the add-back cannot be greater than the balance sheet liability for the covered loan, the add-back cannot increase net capital by more than the balance sheet liability for the covered loan.
    - A firm that makes such an add-back must create and retain documentation of the basis of the add-back, including a record of
        - its computation of the Forgivable Expense Amount;
        - the costs and payments making up that amount; and
        - its estimate of any limits under Section 1106(d) with the basis for such estimate.
    - On the firm's FOCUS Reports, the add-back must be reported in Item 3525 (Other (deductions) or allowable credits).
- In a separate FAQ, FINRA confirmed that a firm that has obtained a covered loan and included the loan as a liability on its balance sheet may exclude the loan from aggregate indebtedness during the 8-week "covered period" after the origination of such covered loan. After the end of the covered period, such firm may exclude from aggregate indebtedness the amount of its liability for such covered loan that the firm is permitted to add back to net capital, as described above. Any part of the covered loan excluded from aggregate indebtedness may be included on the firm's Statement of Financial Condition in its FOCUS Report Part II in Item 1380 (Other –

Accounts payable and accrued liabilities and expenses") or in Item 1385 (Accounts payable, accrued liabilities, expenses and other) in its FOCUS Report Part IIA.

We have developed – and continue to develop – extensive substantive, multidisciplinary analyses of the impact of the CARES Act on our clients and their respective industries, including whether our clients will qualify for loans under the CARES Act. Visit our resource page for these materials; our lawyers stand ready to assist clients in navigating CARES Act-related matters.

Business Continuity Planning

- FINRA issued RN 20-08 on March 9, 2020, to encourage broker-dealers to review their BCPs for preparedness for pandemic-related disruptions (such as absenteeism, teleworking, travel limitations, and technological problems) and to provide relief from certain regulatory obligations, as described further below. Among other things, FINRA encourages firms to prepare for pandemic-related disruptions by
    - evaluating whether a pandemic constitutes an "emergency or significant business disruption" requiring BCP activation;
    - ensuring supervisory systems are adequately designed to provide reasonable supervision of employees' activities (regardless of their functions) while temporarily working from alternative or remote locations; and
    - taking steps to reduce the increased risk of cyber events posed by remote offices or telework arrangements, such as by: (1) ensuring that virtual private networks (VPNs) and other remote access systems are properly patched with available security updates; (2) checking that system entitlements are current; (3) employing the use of multifactor authentication to gain remote access to systems; and (4) reminding associated persons of cyber risks through education and other exercises that promote heightened vigilance.
- In an FAQ, FINRA also encourages firms to contact their assigned Risk Monitoring Analyst to discuss the activation and implementation of their BCPs, as well as to discuss any issues they may be facing, including the disruption of business operations, and whether disruptions are solved or ongoing. Furthermore, in another FAQ, FINRA advises firms that they should document any changes they make to their current written supervisory procedures in response to such disruptions and alterations in their approach to supervision.

Quarterly Customer Complaint Reporting – Rule 4530

- FINRA confirmed in an FAQ that firms will have until May 31, 2020 to report to FINRA statistical and summary information regarding written customer complaints received by the firms in the first quarter of 2020. FINRA Rule 4530(d) requires that firms report statistical and summary information regarding written customer complaints to FINRA by the 15th day of the month following the calendar quarter in which customer complaints are received by the firms.

Regulatory Filings – Annual Reports and Certain FOCUS Reports

- In FAQs, FINRA, based on discussions with the SEC staff, informed firms that they would have additional time to file their annual reports and certain FOCUS Reports with FINRA. In particular, any member that (1) meets the exemptive provisions in Rule 15c3-3(k) under the Exchange Act or (2) files a Part IIA FOCUS Report, is being provided a

  - 30-calendar day extension for submitting its annual report, as specified under Rule 17a-5 under the Exchange Act, related to fiscal years ending in January 2020 through March 2020[4]; and
  - 10-business day extension for submitting any FOCUS Report related to a period ending in February 2020 through April 2020.[5]
- Firms otherwise having difficulty making timely regulatory filings should contact their Risk Monitoring Analysts or the relevant FINRA department to seek extensions.
- FINRA may waive applicable late fees incurred by a firm based on the firm's particular circumstance.
- If data communications are disrupted, firms should retain the relevant data until it can be transmitted to FINRA.

Best Execution

- In an FAQ regarding the impact of COVID-19 and recent market volatility on best execution, FINRA reminds firms that FINRA Rule 5310 requires firms to exercise "reasonable diligence" to ascertain the best market for the security and buy or sell in that market so that the resultant price to the customer is as favorable as possible under prevailing market conditions. COVID-19 and the market volatility do not alter this standard, although the analysis is ultimately based on "facts and circumstances," such that the reasonable diligence required for best execution is assessed in the context of the characteristics of the security and market conditions, including price, volatility, relative liquidity, and pressure on available communications.

*Reporting of Transactions in US Treasury Security Executed to Hedge Primary Market Transactions – **NEW!***

- On April 1, 2020, FINRA filed with the SEC, for immediate effectiveness, a proposed rule change to provide firms with additional time to comply with previously adopted amendments to FINRA Rule 6730 related to reporting to TRACE transactions in US Treasury securities executed to hedge certain primary market transactions.[6]
- Specifically, pursuant to the amendments, as described in Regulatory Notice 19-30, firms would be required to report transactions executed to hedge a primary market transaction that meets the definition of "List or Fixed Offering Price Transaction" or "Takedown Transaction" no later than the next business day (T+1) during TRACE system hours (i.e., until 6:29:59 pm ET on T+1), and to append an appropriate modifier to identify such transactions.
- The effective date of June 1, 2020, has now been delayed until August 3, 2020.

Responses to FINRA Inquiries, Matters, and Investigations

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[4] Rule 17a-5(d)(5) under the Exchange Act requires members to submit their annual reports to FINRA no later than 60 calendar days after the date of the member's fiscal year end. The procedures set forth under Interpretation /01 under Rule 17a-5(m)(1) are waived for purposes of this extension.

[5] Every member is required to file a Financial and Operational Combined Uniform Single (FOCUS) Report as specified under Rule 17a-5 under the Exchange Act. Rule 17a-5(a) requires members to submit their FOCUS Reports no later than 17 business days after month-end. The written application and procedures required pursuant to Rule 17a-5(a)(6) under the Exchange Act, and the related Interpretations, are waived for purposes of this extension.

[6] "List or Fixed Offering Price Transactions" and "Takedown Transactions," which are identified with the "P1" modifier, generally are primary market sale transactions on the first day of trading of a security: (i) by a sole underwriter, syndicate manager, syndicate member or selling group member at the published or stated list or fixed offering price (or, for Takedown Transactions, at a discount from the published or stated list or fixed offering price) or (ii) in the case of primary market sale transactions effected pursuant to Securities Act Rule 144A, by an initial purchaser, syndicate manager, syndicate member or selling group member at the published or stated fixed offering price (or, for Takedown Transactions, at a discount from the published or stated fixed offering price). See Rule 6710(q) and (r).

- In an FAQ, FINRA stated that firms having difficulty responding to regulatory inquiries or investigations should contact their Risk Monitoring Analysts or the relevant FINRA department to seek extensions.
- As noted above in connection with regulatory filings, if data communications are disrupted, firms should retain the relevant data until it can be transmitted to FINRA.

Past Guidance on Pandemic and Disaster Preparedness

FINRA has previously provided guidance in connection with pandemics and other significant broad-based business disruptions, and has observed the following as key points firms might also consider[7]:

- *BCP "Triggers"* – Firms might consider defining BCP activation "triggers," such as linking activation to World Health Organization (WHO) declarations, Centers for Disease Control and Prevention (CDC) guidance, or events such as employees or their family members contracting the virus, infections in the vicinity of the firm, actions by local governments, schools, or health agencies, or directions from the firm's parent company. Firms might also consider updating their plans to reflect the latest COVID-19 developments.

- *Partnering with Health Organizations* – Partnering with federal, state, and local health organizations to obtain better information and priority access to medications and vaccines can aid in effective pandemic planning and response.

- *Institutional knowledge* – Increased absenteeism can present unique vulnerabilities where vital institutional knowledge is vested in specific personnel. Firms might consider cross-training employees or creating step-by-step instructions so that other employees can fulfill the functions of absent ones.

- *Key Dependencies* – Firms might consider identifying key dependencies and critical relationships (both internal and external) and the risks a pandemic poses to these relationships (*e.g.*, dependencies on clearing firms, telecommunications networks, outsourcing/offshore providers, internal departments, mail service, utilities, or other counterparties), and possibly updating service-level agreements with vendors.

In response to Hurricane Katrina and the 2007 California wildfires, FINRA also noted the following, although FINRA has not yet provided similar guidance since the COVID-19 pandemic began:

- *Introducing Firms Unable to Conduct Business* – Firms that cleared for introducing firms unable to conduct business were encouraged to accept liquidating orders from customers so that customers' access to funds was not restricted.

- *Margin* – FINRA noted that it would accept margin extensions on a case-by-case basis for reason code "Acts of God," for customers located in places affected by the disasters.

SEC and SEC Staff Relief and Guidance

Like FINRA, the SEC and its staff have been working diligently to provide COVID-19-related relief from certain broker-dealer regulatory obligations.

Rule 17f-2 Fingerprinting

[7] *See* FINRA Provides Guidance on Pandemic Preparedness, FINRA Regulatory Notice 09-59; Guidance for Members Affected by Hurricane Katrina, NASD Notice to Members 05-57; Guidance for Firms Affected by the California Wildfires, FINRA Regulatory Notice 07-49; Guidance to Members Affected by Hurricane Sandy, FINRA Regulatory Notice 12-45.

  - As noted above, on March 20, 2020, the SEC issued a conditional exemptive order temporarily exempting (i) transfer agents (TAs) from the requirements of Sections 17A and 17(f)(1) of the Exchange Act, as well as Rules 17Ad-1 through 17Ad-11, 17Ad-13 through 17Ad-20, and 17f-1 thereunder, and (ii) TAs "*and other persons subject to such requirements*, from the [fingerprinting] requirements of Section 17(f)(2) of the Exchange Act and Rule 17f-2 thereunder… " (together, the Exempted Provisions). Because broker-dealers and their partners, directors, officers, and employees are subject to Rule 17f-2, the order applies to broker-dealers and their personnel, and firms relying on the order would be required to email written notice to the SEC by May 30, 2020, with the following:
    - Notice that the registrant or other person is relying on the order
    - A description of the specific Exempted Provisions the registrant or other person is unable to comply with and a statement of the reasons why, in good faith, the registrant or other person is unable to comply with such Exempted Provisions.
- *Note: FINRA has provided the required notification to the SEC on behalf of all of its members and their employees. According to that notification, a FINRA member firm seeking to avail itself of the temporary exemptive relief must comply with FINRA's guidance with respect to FINRA Rule 1010, which is described earlier in this LawFlash.*
- Additional conditions apply to TAs seeking to rely on this relief. We will address the TA relief in more detail in a separate LawFlash.

Municipal Advisors – Form MA Annual Updates

- On March 26, 2020, the SEC issued a conditional exemptive order temporarily relieving municipal advisors (MAs) from the provisions of Section 15B of the Securities Exchange Act of 1934 (Exchange Act) and Rule 15Ba1-5(a)(1) thereunder concerning the filing of an MA's annual update to Form MA, which is otherwise required within 90 days of the end of an MA's fiscal year, or of the end of the calendar year for a sole proprietor. The relief is limited to filing obligations for which the original due date for an annual update to Form MA is on or after March 26, 2020 but on or prior to June 30, 2020. The conditions include:
    - The MA must be "unable" to meet the filing deadline for its annual update due to circumstances related to current or potential effects of COVID-19.
    - The MA relying on the order must promptly notify the SEC staff via email at munis@sec.gov stating:
        - That it is relying on the order; and
        - A brief description of the reasons why it could not file its annual update on a timely basis.
    - The MA must promptly disclose on its public website (or if it does not have a public website, promptly disclose to its clients) the information required to be emailed to the SEC staff as noted in the prior condition.
    - The MA files the annual update to Form MA "as soon as practicable but not later than 45 days after the original due date for filing."

*Form CRS and Regulation Best Interest – **NEW!***

- As we discussed in a LawFlash published on April 2, 2020, in a public statement released that same day, SEC Chairman Jay Clayton stated that the June 30, 2020 compliance date for Regulation Best Interest (Reg BI) or Form CRS will remain in place, and the SEC will not be granting an industrywide extension.
- According to Chairman Clayton, "[F]irms should continue to make good faith efforts around operational matters to ensure compliance by June 30, 2020, including devoting resources as necessary and available in light of the circumstances."
- At the same time, the SEC recognized that disruptions related to COVID-19 may impact firms' abilities to meet the compliance date, and invited those firms to engage with the SEC.

- Chairman Clayton expressed his expectation that the SEC and its staff would "take the firm-specific effects of such unforeseen circumstances (and related operational constraints and resource needs) into account in our examination and enforcement efforts." The SEC will be conducting examinations after the compliance date, but "will be focusing on whether firms have made a good faith effort to implement policies and procedures necessary to comply with Reg BI, while also providing an opportunity to work with firms on compliance and other questions."
- OCIE also issued two Risk Alerts on April 7, 2020, providing advance information to broker-dealers and investment advisers about the expected scope and content of the initial examinations for compliance with Reg BI and Form CRS. Both Risk Alerts also acknowledge that COVID-19 "has created challenges for firms" and assert that OCIE "stands ready to work with firms and our colleagues in the Division of Trading and Markets [and Investment Management, for Form CRS] on issues that may arise in the course of examinations …."

*Paper Filings – **NEW!***

- The Division of Trading and Markets (T&M staff) has stated that firms that must make filings in paper, rather than electronic, format or that must manually sign and notarize filings, including annual audited statements through EDGAR, might find it "impracticable" to obtain notarization services as a result of COVID-19.[8] Thus, for the period from and including March 16, 2020, to June 30, 2020, T&M staff will not recommend enforcement action with respect to any failure to comply with the paper format submission requirement or manual signature requirement under the following conditions:
    - Filers or submitters of such submissions contact T&M staff to discuss the appropriate process for filing or submitting the submissions electronically, in lieu of in paper format, by using, for example, a secure file transfer system. If a filer or submitter is not sure who to contact or is not able to contact a T&M staff member about filing or submitting a submission electronically, the filer or submitter should submit a request for assistance and contact information to tradingandmarkets@sec.gov;
    - The submissions are signed electronically, if a signature is required, by using a typed form of signature within the electronic submission that will take the position of the manual signature;
    - A signatory of any such submission 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, as promptly as practicable, upon request by T&M or other SEC staff;
    - Such document indicates the date and time when the signature was executed; and
    - The filer or submitter establishes and maintains policies and procedures governing this process.
- T&M staff will also not recommend that the SEC take enforcement action with respect to any failure to comply with notarization requirements applicable to the submissions or in the electronic filings of broker-dealer annual reports required under Rule 17a-5(d) that are due to be filed at the SEC no later than June 30, 2020, under the following conditions:
    - The filer indicates on the face of the signed document that, based upon relief from SEC staff and difficulties arising from COVID-19, it is making this filing without a notarization; and
    - The filer notifies the T&M staff in writing at tradingandmarkets@sec.gov, or, in the case of a broker-dealer filer, notifies its designated examining authority in writing (for example, using FINRA's broker-dealer notification system), that it was not able to obtain

[8] Although an exhaustive list has not been provided, other form filings include, but are not limited to: Form X-17A-5 Part III audited annual reports, Form 1, Form CA-1, Form 19b-4(e), Form ATS, and Form ATS-R (as well as any amendments, if applicable, that may be filed to such forms); paper submissions made by registered clearing agencies pursuant to Exchange Act Rule 17a-22, Rule 24b-2, and Rule 83(c)(3); and the report of the independent public accountant submitted by broker-dealers pursuant to Rule 17a-5(d)(1)(i)(C).

the required notarization due to difficulties arising from COVID-19 and, therefore, is making its filing without a notarization.

Rule 606 of Regulation NMS

- The SEC, by the Division of Trading and Markets pursuant to delegated authority, issued an exemptive order on March 25, 2020 exempting firms from the requirement to provide public reports on their routing of non-directed orders covering the first quarter of 2020, as required by Rule 606(a), until May 29, 2020.[9]
- The order also exempts firms engaged in outsourced routing activity from the requirements in Rule 606(b)(3) to
  - Collect monthly customer-specific data for not held NMS stock orders until June 1, 2020
  - Provide customer-specific reports covering June 2020 outsourced routing data within seven business days of customer requests for such reports that are made on or before July 17, 2020, until July 29, 2020[10]
- The SEC had previously revised the compliance dates for the amendments to Rule 606 to provide firms with additional time to implement systems and other changes necessary to comply with the amendments, most recently, on September 4, 2019, granting temporary exemptions: (1) to all broker-dealers from the requirement to collect the quarterly public data as required by Rule 606(a) until January 1, 2020 (with the first quarterly report due by the end of April 2020); (2) to all broker-dealers that engage in self-routing activity, from the requirement to collect the customer-specific monthly data for not held orders until January 1, 2020 (with the first customer-specific report of such data due seven business days after February 15, 2020, for customer requests made on or before February 15, 2020); and (3) to all broker-dealers that engage in outsourced routing activity, from the requirement to collect the customer-specific monthly data for not held orders until April 1, 2020 (with the first customer-specific report of such data due seven business days after May 15, 2020, for customer requests made on or before May 15, 2020).[11]

Consolidated Audit Trail (CAT)

- On March 16, 2020, the SEC staff issued a no-action letter related to CAT implementation, stating that it would not recommend enforcement action against participants (national securities exchanges and national securities associations)[12] that do not enforce implementation deadlines for the CAT against Industry Members.[13] Absent relief, reporting was to begin April 20, 2020, for Large Industry Members (and later for Small Industry Members). The purpose of the relief is to "allow firms to

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[9] Firms have been required to collect the order data since January 1, 2020, but they are not required to generate the initial public report of that data until the end of April 2020. Pursuant to this exemption, a broker-dealer has an additional month to prepare the public report of first quarter 2020 order data.

[10] "Outsourced routing activity" refers to when a broker-dealer uses the order routing systems of another broker-dealer, whereas "self-routing activity" refers to when a broker-dealer handles customers' orders using its own systems. The order does not provide an extension of monthly customer-specific reporting for not held orders for self-routing broker-dealers; the reporting requirement for self-routing activity has already come due and is ongoing.

[11] *See* Order Granting Application by The Financial Information Forum and Security Traders Association for an Exemption Pursuant to Rule 606(c) of Regulation NMS Under the Exchange Act from Certain Requirements of Rule 606 of Regulation NMS Under the Exchange Act, Exchange Act Release No. 86874 (Sept. 4, 2019).

[12] "Participants" currently include the BOX Exchange LLC; Cboe BYX Exchange, Inc.; Cboe BZX Exchange, Inc.; Cboe C2 Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.; Cboe Exchange, Inc.; FINRA; Investors Exchange LLC; Long Term Stock Exchange, Inc.; Miami International Securities Exchange LLC; MIAX Emerald, LLC; MIAX PEARL, LLC; Nasdaq BX, Inc.; Nasdaq GEMX, LLC; Nasdaq ISE, LLC; Nasdaq MRX, LLC; Nasdaq PHLX LLC; The Nasdaq Stock Market LLC; New York Stock Exchange LLC; NYSE Arca, Inc.; NYSE American LLC; NYSE Chicago, Inc.; and NYSE National, Inc. The list of "Participants" is subject to change.

[13] "Industry Members" include any member of a national securities exchange or a member of a national securities association.

maintain focus on operational readiness and reduce operational risk" during the COVID-19 outbreak. The relief applies until May 20, 2020, although the SEC staff may extend it at a later time.

State Securities Regulator Relief and Guidance

State securities regulators have also been active in providing COVID-19-related relief and guidance to broker-dealers and their registered agents (as well as to other state registrants), in recognition that firms' personnel may be conducting business remotely (including from locations in states in which they are not registered) as a result of being displaced from their ordinary business locations or otherwise practicing social distancing.[14]

Examples of state guidance are as follows:

Massachusetts

- Effective March 24, the Massachusetts Securities Division issued an Emergency Notice that, among other things, recognizes that broker-dealers may not be able to obtain manual (wet) signatures on Forms U4 in a timely manner as required by FINRA rules (*see* below regarding FINRA relief regarding wet signatures on Forms U4) and similar provisions of the Massachusetts Uniform Securities Act and related regulations. Such firms may submit Forms U4 electronically, without first obtaining wet signatures from individual agents, provided that the firm
    - provides the individual with a copy of the completed Form U4 prior to filing;
    - obtains the individual's written agreement prior to filing that the form's content is accurate and complete;
    - retains the written acknowledgement in accordance with Massachusetts' laws and regulations; and
    - obtains the applicant's physical signature as soon as practicable.

New Jersey

- The New Jersey Bureau of Securities (NJ Bureau) issued an Emergency Order on March 24 that, among other things, temporarily allows New Jersey residents who work and are registered in other states (*e.g.*, New York) – but not in New Jersey – to temporarily conduct activities with, or on behalf of, *existing* customers from their homes or temporary offices in New Jersey without registering in New Jersey. The order also allows out-of-state firms and agents who are displaced to temporarily conduct business with existing clients from New Jersey. Activities must be limited to servicing existing customers; solicitation of new customers in or from New Jersey is not permitted under the order.
- As with the FINRA relief described below relating to Form BR and Form U4, the order also:
    - Permits qualifying firms to open and maintain a temporary branch office or OSJ in New Jersey without registering the location, provided that email notice is provided to the NJ Bureau at Largmans@dca.njoag.gov of
        - the name and CRD number of the firm;
        - physical address of the temporary office;
        - the names, CRD numbers, and registration statuses of all persons working in the temporary office; and
        - a primary point of contact for the office with full contact information
    - Relieves any firm that opens such a temporary location from the requirement to maintain updated Form U4 information regarding the office of employment address for registered persons who temporarily relocate to that location due to the COVID-19 outbreak

[14] For a resource listing each jurisdiction that has provided relief and/or guidance, please visit the North American Securities Administrators Association (NASAA) COVID-19 resource.

  - Permits firms to submit Forms U4 electronically, without first obtaining manual (wet) signatures from individual agents, provided that the firm
    - provides the individual with a copy of the completed Form U4 prior to filing;
    - obtains the individual's written agreement prior to filing that the form's content is accurate and complete;
    - retains the written acknowledgement in accordance with the New Jersey Securities Law and regulations; and
    - obtains the applicant's wet signature as soon as practicable.
- To qualify for the relief, a firm or agent cannot be the subject of an ongoing enforcement proceeding in any jurisdiction or otherwise be in violation of the New Jersey Securities Law or related regulations.

FINRA has provided a listing with links to specific state "shelter-in-place" or "stay-at-home" orders and related guidance that it will update as additional state regulators act. In connection with this listing, FINRA stated that

> [m]ember firms should closely review the applicable state and locality orders' impacts on their operations, and make any necessary changes [and] … [i]f a member firm decides an employee is permitted to report to a physical office location, FINRA suggests that the employee carry documentation explaining that the employee works for an "essential" business, and why the employee's work requires his or her physical presence in the office.[15]

We continue to monitor these state developments and are available to assist with any questions regarding particular states and the availability and scope of any relief that has been granted.

Other Developments Impacting Broker-Dealers

Federal guidelines have been issued and a growing list of states and local governments have imposed restrictions that seek to limit movement and gathering of people in an effort to slow the spread of COVID-19. We are following these developments on a state-by-state basis as they change daily and, in some cases, hourly. For more detailed information, and jurisdiction-by-jurisdiction analysis, please consult our Coronavirus COVID-19 resource page for contacts on our Financial Services COVID-19 Task Force.

CORONAVIRUS COVID-19 TASK FORCE

For our clients, we have formed a multidisciplinary **Coronavirus COVID-19 Task Force** to help guide you through the broad scope of legal issues brought on by this public health challenge. We also have launched a resource page to help keep you on top of developments as they unfold. If you would like to receive a daily digest of all new updates to the page, please subscribe now to receive our COVID-19 alerts.

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[15] State "Shelter in Place" and "Stay at Home" Orders, March 27, 2020.

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