

COVID-19 NEWS OF INTEREST

# Latest Broker-Dealer Guidance and Relief Associated with the COVID-19 Outbreak

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With the ongoing measures being taken by federal, state, and local governments in connection with the COVID-19 outbreak, both the U.S. Securities and Exchange Commission (“SEC”) and the Financial Industry Regulatory Authority, Inc. (“FINRA”) continue to issue guidance on, and provide relief from, a number of existing and upcoming regulatory obligations.

This Client Alert provides an overview of a number of recent measures by the SEC and FINRA in their efforts to address the effects of the outbreak as they relate to broker-dealers as well as a reminder of past guidance that may be useful to firms dealing with issues resulting from the outbreak, including firm-specific measures, such as encouragement of teleworking and deployment of business continuity plans. These measures are particularly important in light of the fact that the financial services sector is considered a critical infrastructure sector,<sup>1</sup> and certain broker-dealer employees are deemed to be essential, which means that they are required to “maintain [a] normal work schedule.”<sup>2</sup>

<sup>1</sup> See Memorandum from U.S. Secretary of Treasury to Financial Services Sector (Mar. 22, 2020), available [here](#) (“Treasury Memo”).

<sup>2</sup> The Treasury Memo identified the following financial sector employees as “essential”: (i) Workers who are needed to process and maintain systems for processing financial transactions and services, such as payment, clearing and settlement services, wholesale funding, insurance services and capital market activities; (ii) Workers who are needed to provide consumer access to banking and lending services, including ATMs, movement of currency (e.g., armored cash carriers); and (iii) Workers who are needed to support financial operations, such as those staffing data and security operations centers.

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## Latest Broker-Dealer Guidance and Relief Associated with the COVID-19 Outbreak

This Alert reviews recent SEC and FINRA guidance and statements in the following key areas as they relate to the COVID-19 pandemic:

- Business Continuity Plans
- Remote Working and Telecommuting Issues
- Consolidated Audit Trail (“CAT”) Reporting Relief
- SEC Relief
- FINRA Rule Relief and FAQ Guidance
- Operational Impact to FINRA and Its Effect on Firms

### **Business Continuity Plans (“BCPs”)**

FINRA Rule 4370 (Business Continuity Plans and Emergency Contact Information) requires FINRA member firms to create, maintain, review at least annually, and update a written BCP identifying procedures relating to an emergency or significant business disruption. A BCP “must be reasonably designed to enable the member to meet its existing obligations to customers . . . and must address the member’s existing relationships with other broker-dealers and counterparties.”<sup>3</sup> Because each firm is unique, it must determine how best to tailor its BCP to its particular size and needs; however, each firm’s BCP must address the specific elements listed in Rule 4370(c) to the extent applicable.<sup>4</sup> Rule 4370 also requires each firm to provide emergency contact information to FINRA.<sup>5</sup>

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<sup>3</sup> FINRA Rule 4370(a).

<sup>4</sup> Those elements are: (1) data backup and recovery (hard copy and electronic); (2) all mission critical systems; (3) financial and operational assessments; (4) alternate communications between customers and the member; (5) alternate communications between the member and its employees; (6) alternate physical location of employees; (7) critical business constituent, bank, and counterparty impact; (8) regulatory reporting; (9) communications with regulators; and (10) how the member will assure customers’ prompt access to their funds and securities in the event that the member determines that it is unable to continue its business. See FINRA Rule 4370(c). Elements that are not applicable to the firm need not be addressed in the BCP; however, the firm must document its rationale for not including any required elements in its BCP. *Id.* If a firm “relies on another entity for any one of the above-listed categories or any mission critical system, [its BCP] must address this relationship.” *Id.* For purposes of determining “mission critical systems,” the rule defines that term as “any system that is necessary, depending on the nature of a member’s business, to ensure prompt and accurate processing of securities transactions, including, but not limited to, order taking, order entry, execution, comparison, allocation, clearance and settlement of securities transactions, the maintenance of customer accounts, access to customer accounts and the delivery of funds and securities.” FINRA Rule 4370(g)(1).

<sup>5</sup> See FINRA Rule 4370(f).

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In 2009, FINRA provided guidance on pandemic preparedness and steps firms should take in addressing these issues as part of their BCPs in response to the outbreak of influenza A (H1N1) or swine flu.<sup>6</sup> On March 9, 2020, FINRA published *Regulatory Notice 20-08*, reminding firms to “consider pandemic-related business continuity planning, including whether their [BCPs] are sufficiently flexible to address a wide range of possible effects in the event of a pandemic in the United States” and encouraging firms to review their emergency contacts to ensure that FINRA can contact firms if necessary.<sup>7</sup> FINRA noted that this review should include whether a firm’s BCP is sufficiently flexible to address a wide range of possible effects, which may include “staff absenteeism, use of remote offices or telework arrangements, travel or transportation limitations and technology interruptions or slowdowns.”

With respect specifically to communications with customers, FINRA encouraged firms to review their BCPs and ensure customer access to funds and securities. FINRA noted that if registered representatives are unavailable to service their customers, firms are “encouraged to promptly place a notice on their websites indicating to affected customers who[m] they may contact concerning the execution of trades, their accounts, and access to funds or securities.” Moreover, “[a] firm’s supervisory control policies and procedures should address ways 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.”<sup>8</sup>

### **Remote Working and Telecommuting Issues**

FINRA’s *Regulatory Notice 20-08* also provides guidance regarding issues that may arise as a result of steps that become necessary in light of the pandemic, including the fact that firms may need to employ a variety of methods, including “social distancing, travel restrictions, revised sick leave policies, special pandemic leave time, or specialized seating plans for densely populated floors or buildings.” In addition, associated persons may increasingly be required to work from remote offices or via telework arrangements.<sup>9</sup>

If a firm needs to implement these types of alternative work arrangements, it is incumbent on the firm to devise ways to supervise its associated persons who change their work locations or arrangements. With respect to oversight obligations,

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<sup>6</sup> *Regulatory Notice 09-59* (Oct. 2009).

<sup>7</sup> See *Regulatory Notice 20-08* (Mar. 2020). FINRA also noted that, if a firm is unable to contact FINRA through its usual contact, the firm should call FINRA’s Call Center at (301) 590-6500. *Id.*

<sup>8</sup> *Regulatory Notice 20-08*. The *Notice* also states that “[m]ember firms are encouraged to contact their assigned FINRA 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.” *Id.*

<sup>9</sup> FINRA had addressed remote working responsibilities previously as well. See, e.g., *Regulatory Notice 09-59* (“Since associated persons may need to work from remote locations during a pandemic, it is important that firm’s [sic.] supervisory systems are adequately designed to provide reasonable supervision of employees’ activities (regardless of their functions) while working from remote locations.”).

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FINRA does recognize that a firm's scheduled on-site inspections of branch offices may need to be temporarily postponed during the pandemic, and a firm's "ability to complete this annual regulatory obligation in 2020 may need to be re-evaluated depending on the duration and severity of the pandemic."<sup>10</sup>

In addition, a member firm may find it helpful to test the broad use of remote offices or telework arrangements by associated persons prior to activating its BCP, including the ability to connect to critical firm systems and the adequacy of remote connectivity (for example, via residential internet access networks). As a result, firms may need to assess the need for secure premium or dedicated service for connectivity.

FINRA also noted that, as firms' employees increasingly work remotely, firms should consider the increased risk of cyber events that these types of arrangements present. Although FINRA acknowledged that firms would be focused on a number of issues, including business resiliency and the health and safety of individuals, FINRA noted that firms must nonetheless continue to protect against cyber threats and take steps to reduce their risks. FINRA specifically identified the four following steps firms could take in this regard: "(1) ensuring that virtual private networks (VPN) and other remote access systems are properly patched with available security updates; (2) checking that system entitlements are current; (3) employing the use of multi-factor authentication for associated persons who access systems remotely; and (4) reminding associated persons of cyber risks through education and other exercises that promote heightened vigilance." In an *Information Notice* issued on March 26, 2020, FINRA provided further details of steps that individuals and firms can consider to enhance protection against cyber threats.<sup>11</sup>

### **Consolidated Audit Trail ("CAT") Reporting Relief**

In addition to the relief provided by FINRA, on March 16, 2020, in recognition of the "new stresses and competing priorities on the infrastructure and staff required to implement the [CAT]," the SEC staff issued no-action relief to the self-regulatory organizations ("SROs") charged with implementing the CAT, stating that the staff would not recommend enforcement action to the SEC if the SROs do not enforce the CAT implementation deadlines against firms until May 20, 2020.<sup>12</sup> The letter noted, however, that the SEC could extend that date if appropriate. Prior to the relief, firms with CAT

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<sup>10</sup> With respect to the relief provided in the *Notice*, FINRA specifically noted that "as coronavirus-related risks decrease, member firms should expect to return to meeting any regulatory obligations for which relief has been provided"; however, FINRA undertook to publish a *Regulatory Notice* announcing a termination date for the regulatory relief so that firms will have sufficient notice and time to make any necessary operational adjustments.

<sup>11</sup> See *Cybersecurity Alert: Measures to Consider as Firms Respond to the Coronavirus Pandemic (COVID-19)*, *Information Notice* (Mar. 26, 2020).

<sup>12</sup> See Letter from Brett W. Redfearn, Director, Division of Trading and Markets, U.S. Securities and Exchange Commission, to Michael Simon, Chair, CAT NMS Plan Operating Committee, dated March 16, 2020. A copy of the letter is available [here](#).

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reporting obligations were required to begin reporting data to the CAT regarding certain equity orders beginning on April 20, 2020.

Notwithstanding the relief provided by the SEC staff, on March 19, the SROs submitted a no-action request that would relieve the SROs “from enforcing CAT Equities Phase 2a implementation deadlines against Industry Members through Monday, June 22, 2020, and from enforcing CAT Options Phase 2b implementation deadlines against Industry Members through Monday, July 20, 2020.”<sup>13</sup> The SROs noted that “they also would not enforce their CAT Compliance Rules generally during this period, including, without limitation, applicable reporting error rates and compliance thresholds for [firms] that begin reporting during the no-action periods.”

### **SEC Relief**

The SEC provided relief for financial intermediaries, such as broker-dealers, as well as for company and fund issuers from obligations to delivery proxy statements, annual reports, information statements and other soliciting materials in an area where delivery has been suspended due to COVID-19 or the person is unable to make the delivery after a good-faith effort to do so.<sup>14</sup>

### **FINRA Rule Relief and FAQ Guidance**

FINRA has provided additional specific relief regarding a number of its rules in light of the ongoing challenges firms are confronting during the COVID-19 outbreak, and published a list of FAQs that it is updating regularly as issues emerge.<sup>15</sup> Of note, FINRA has published the following relief from certain FINRA regulatory obligations:

- FINRA has temporarily suspended the requirement on firms to maintain updated Form U4 information regarding office of employment address for registered persons who temporarily relocate due to COVID-19.<sup>16</sup>

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<sup>13</sup> See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Brett Redfearn, Director, Division of Trading and Markets, U.S. Securities and Exchange Commission, dated March 19, 2020. A copy of the letter is available [here](#).

<sup>14</sup> See Order Under Section 36 of the Securities Exchange Act of 1934 Modifying Exemptions from the Reporting and Proxy Delivery Requirements for Public Companies, SEC Rel. No. 34-88465 (Mar. 25, 2020).

<sup>15</sup> See *Frequently Asked Questions Related to Regulatory Relief Due to the Coronavirus Pandemic*, available [here](#) (hereinafter “Coronavirus FAQs”).

<sup>16</sup> See *Regulatory Notice 20-08*.

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- Firms are not required to submit branch office applications on Form BR for any newly opened temporary office locations or space-sharing arrangements established as a result of relocations due to COVID-19 responses; however, FINRA has indicated that firms should use their best efforts to provide FINRA staff with notification.<sup>17</sup>
- Due to the temporary closing of testing centers, FINRA has extended expiring qualification examination windows until May 31, 2020, for individuals who, prior to February 2, 2020, were designated to function as principals for up to 120 calendar days pursuant to FINRA Rule 1210.04. Consequently, these individuals now have until May 31, 2020, to pass the appropriate examination(s).<sup>18</sup>
- [Although FINRA Rule 1010\(c\)](#) requires that every initial and transfer electronic Form U4 filing be based on a Form U4 that has been manually signed, FINRA has stated that it will permit firms to electronically file an initial or transfer Form U4 without a manual signature if the firm:
  - provides the applicant with a copy of the completed Form U4 before filing;
  - obtains the applicant's written acknowledgment (which may be electronic) before 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 Exchange Act Rule 17a-4(e)(1) and makes it available promptly upon regulatory request; and

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<sup>17</sup> See *id.* FINRA stated that if a firm "relocates personnel to a temporary location that is not currently registered as a branch office or identified as a regular non-branch location, the firm should use its best efforts to provide written notification to its FINRA Risk Monitoring Analyst as soon as possible after establishing a new temporary office or space-sharing arrangement, to include at a minimum the office address, the names of each member firm involved, the names of registered personnel, a contact telephone number and, if possible, the expected duration." FINRA also noted that "[t]he notification should also indicate whether the member firm's personnel will be sharing space with another entity, and if so, the type of business in which it is engaged (e.g., an affiliated investment adviser or an organization in the securities business)." *Id.* FINRA also reminded firms that, even if emergency relocations are necessary, "firms should take into account the risks associated with sharing office space with another entity (e.g., customer privacy, information security or recordkeeping considerations) and take steps to mitigate the risks during the emergency relocation." *Id.*

<sup>18</sup> See *Coronavirus FAQs*. FINRA Rule 1210.04 provides that "[s]ubject to the requirements of Rule 1220.03, a member may designate any person currently registered, or who becomes registered, with the member as a representative to function as a principal for a period of 120 calendar days prior to passing an appropriate principal qualification examination as specified under Rule 1220(a), provided that such person has at least 18 months of experience functioning as a registered representative within the five-year period immediately preceding the designation and has fulfilled all applicable prerequisite registration, fee and examination requirements prior to designation as a principal."

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- obtains the applicant's manual signature as soon as practicable.<sup>19</sup>
- FINRA has, based on discussions with SEC staff, provided additional time for certain firms to file financial reports with FINRA.<sup>20</sup> Specifically, Exchange Act Rule 17a-5(d)(5) requires FINRA member firms to submit their annual reports to FINRA no later than 60 calendar days after the date of the firm's fiscal year end, and Exchange Act Rule 17a-5(a) requires firms to submit their FOCUS reports no later than 17 business days after month-end. FINRA is providing certain extensions of these deadlines if a firm (1) meets the exemptive provisions in Exchange Act Rule 15c3-3(k) or (2) files a Part IIA FOCUS Report. For those firms, FINRA has provided a 30 calendar day extension for submitting to FINRA an annual report related to fiscal years ending in January 2020 through March 2020 and a 10 business day extension for submitting any FOCUS report to FINRA related to a period ending in February 2020 through April 2020.<sup>21</sup>
- FINRA Rule 6490 requires that issuers provide FINRA with notice of certain corporate actions in accordance with Exchange Act Rule 10b-17, which includes timeframes in which issuers must provide the required notice. Notices submitted after the timeframes set forth in the rule are deemed "late" and are subject to a late fee, as set forth in Rule 6490(c). On March 12, 2020, FINRA issued a Uniform Practice Advisory to advise issuers that it may not deem a notice as "late" for purposes of assessing the late fees where, due to the COVID-19 outbreak, an issuer is unable to provide notice sufficiently in advance of the record or effective date.<sup>22</sup>

FINRA has also published FAQs related to these and other key topics. These FAQs cover a range of topics and are being updated on a frequent basis. In addition to subjects noted elsewhere in this Client Alert, other notable topics include the following:

- *Advertising:* FINRA notes that communications with members relating to potential COVID-related business disruption notifications as well as other non-promotional communications should be posted to member websites in keeping with firm BCPs; however, communications need not be filed with FINRA, provided that they include no financial or investment recommendation or promote a product or service of a member. Consequently, general information regarding a firm's response to COVID-19 should not need to be filed.

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<sup>19</sup> *Coronavirus FAQs.*

<sup>20</sup> More generally, FINRA has recognized that firms may have difficulties in meeting filing requirements or responding to inquiries or investigations. FINRA has indicated that, in that event, firms should contact their Risk Monitoring Analysts or the relevant FINRA department to seek an extension.

<sup>21</sup> *Coronavirus FAQs.*

<sup>22</sup> Uniform Practice Advisory UPC #06-20: Pandemic-Related Guidance in Connection with Company-Related Action Submissions (Mar. 12, 2020), available [here](#).

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- *Anti-Money Laundering* (“AML”): FINRA provides a reminder to perform annual independent testing of AML programs by December 31, 2020; however, the annual test must be conducted on a calendar-year basis (rather than every 365 days). FINRA also reminds firms which members may be eligible for two-year testing.
- *Best Execution*: FINRA has also provided a reminder to firms to exercise “reasonable diligence” in ascertaining the best market for a security, which must be assessed in the context of the characteristics of the security and market conditions, including price, volatility, relative liquidity, and pressure on available communications. Consequently, while firms still have best execution obligations when handling customer orders, the market impacts of the COVID-19 outbreak could affect a firm’s best execution determinations.

### **Operational Impact to FINRA and Its Effect on Firms**

In addition to regulatory relief and guidance, FINRA has announced certain operational impacts to the organization that may also affect its member firms and individuals registered or seeking registration.<sup>23</sup> Specifically:

- Membership Applications. FINRA announced that pre-filing meetings and membership interviews for both new and continuing membership applications will be conducted via video conference. FINRA also indicated that it will grant a courtesy extension on new or continuing membership applications if needed.
- Arbitration and Mediation. FINRA has postponed all in-person arbitration and mediation proceedings scheduled through May 31, 2020; however, other case deadlines are not affected and must be timely met unless the parties jointly agree otherwise.
- Office of Hearing Officer (“OHO”) Hearings. Hearings of disciplinary proceedings (with the exception of pending expedited proceedings) scheduled through April 2020 have been postponed; however, OHO will serve and accept service of notices, pleadings, and other documents by email.
- Qualification Examinations. FINRA will extend all examination enrollment windows that are currently open and scheduled to expire by the end of May. FINRA stated that it will extend each FINRA-administered exam enrollment end date until May 31, 2020.

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<sup>23</sup> FINRA is maintaining a web page dedicated to issues involving COVID-19. More information on the items noted below is available on that page, [here](#).



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Willkie has multidisciplinary teams working with clients to address coronavirus-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters. Please click [here](#) to access our publications addressing issues raised by the coronavirus. For advice regarding the coronavirus, please do not hesitate to reach out to your primary Willkie contacts.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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