

# Financial Regulatory Agencies Issue Guidance and Call for Industry Preparedness Plans as the COVID-19 Outbreak Unfolds

March 13, 2020

As the novel coronavirus, COVID-19—which the World Health Organization declared a global pandemic just two days ago—continues to spread in the United States, causing widespread disruptions to nearly every industry, financial institutions are understandably focused on business continuity planning (“BCP”) and preparedness. In recent days, financial regulatory authorities have made clear that they expect that focus.

Below we summarize guidance from the Federal Financial Institutions Examination Council (“FFIEC”) and Financial Industry Regulatory Authority (“FINRA”) as well as a significant information request by the New York Department of Financial Services (“NYDFS”). We also describe common themes from the guidance and additional considerations for financial institutions.

We are monitoring developments closely and will provide additional updates as warranted.

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## FFIEC Interagency Statement on Pandemic Planning

On March 6, 2020, the FFIEC, which includes as members each of the federal banking agencies, revised its Pandemic Planning guidance, detailing how banks should prepare for and respond to business continuity events caused by widespread outbreaks of infectious diseases.<sup>1</sup> First issued in 2007, and reissued in light of the COVID-19 epidemic, this guidance explains the agencies’ expectations but does not carry the force of law.

### Unique Features of Pandemics

The FFIEC explains that pandemics differ materially from other types of business continuity events that affect a discrete location or region, such as terrorist attacks or natural disasters, and call for a banking institution’s BCP to contemplate disruptions

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<sup>1</sup> FFIEC, Interagency Statement of Pandemic Planning (Mar. 12, 2006); National Credit Union Administration, “Letter to Credit Union 06-CU-06 - Influenza Pandemic Preparedness” (Mar. 2006), *available at* <https://www.ncua.gov/files/letters-credit-unions/LCU2006-06.pdf>.

that could be wider in scope and longer in duration. In particular, substantial absenteeism among a bank's workforce—as high as 40% during “peak weeks” of an outbreak—should be assumed.

### Elements of an Effective Pandemic BCP regarding Pandemic Planning

Pandemic-specific plans within a bank's BCP should, according to the FFIEC, include the following:

- *a program to prevent* significant operational disruptions, including monitoring potential outbreaks, educating employees and communicating with service providers and suppliers through all phases of an outbreak;
- *a documented strategy to mitigate* the effects of a pandemic event that contemplates: differing risks at each stage of outbreak; “triggering events” that will cause management to take identified actions; and plans for resuming regular operations;
- *a comprehensive framework for maintaining* critical business functions and operations despite large-scale employee absences; and
- *a program for testing, overseeing, reviewing and updating* pandemic planning protocols, including through engagement of the bank's Board of Directors and executive management.

### A Risk-Focused and Flexible Approach

The FFIEC makes clear that there is no “one-size-fits-all” approach to pandemic planning, and that a bank's BCP should be both tailored to its size and profile and flexible and dynamic enough to account for pandemic-related disruptions that inevitably will vary depending on the nature of an outbreak.

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## FINRA Regulatory Notice Guidance on Member Firm's Business Continuity Plans

On March 9, 2020, FINRA issued Regulatory Notice 20-08 (the “Notice”) to member firms, updating pandemic preparedness guidance first issued in 2009 and providing specific types of regulatory relief in light of COVID-19.<sup>2</sup>

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<sup>2</sup> See FINRA, Regulatory Notice 09-59, FINRA Provides Guidance on Pandemic Preparedness (Oct. 2009), available at <https://www.finra.org/sites/default/files/NoticeDocument/p120207.pdf> [hereinafter FINRA Regulatory Notice 09-59].

## Expectations for Pandemic Preparedness

Member firms are expected to review their BCPs required under Rule 4370 to ensure that they are adequately prepared for a pandemic event. BCPs are generally required to include:

- a supervisory system to ensure continued oversight of personnel working remotely;
- testing elements of the BCP prior to implementation to minimize potential disruptions, including testing remote working arrangements and remote offices to ensure personnel are able to connect to the essential firm systems and that residential internet access networks are sufficient; and
- a customer communication plan that allows firms to adequately communicate with clients, including placing notices on the firm's website, and ensures clients have continued access to their funds and securities.

Although the Notice gives firms additional flexibility in implementing temporary relocations under a BCP, the guidance emphasizes that the BCP should be reasonably designed to enable a member firm to satisfy its obligations to customers and to maintain reasonable supervision of associated persons who change work locations. Member firms should review whether the BCP is appropriately tailored to the specific operations of the institution and pandemic preparedness including:

- whether they are sufficiently flexible to address a wide range of possible effects of a pandemic, such as staff absenteeism;
- use of remote offices or telework arrangements;
- potential imitations on travel or transportation; and
- technology interruptions or slowdowns.

## Considerations Prior to Implementing the BCP

Prior to implementing the pandemic preparedness plan and activating the BCP, firms should conduct an analysis to determine whether the pandemic constitutes an emergency triggering the activation of the BCP and contact their FINRA Risk Monitoring Analyst to discuss implementation of the BCP and any expected, or actual, business disruptions. FINRA also suggests testing use of remote office or telework arrangements prior to triggering the BCP.

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## Specific Relief from FINRA Office Registration and Reporting Requirements

- **Suspension of Form U4 and Form BR Requirements.** FINRA is temporarily suspending the requirement to maintain updated Form U4's for registered persons who are forced to temporarily relocate their place of employment as a result of COVID-19. Additionally, FINRA has suspended the requirement for a Form BR, giving firms and their personnel reasonable flexibility to relocate activities that normally would need to be conducted in registered branches to non-registered locations. The notice recognizes that member firms may need to temporarily postpone scheduled inspections of remote branch offices and that FINRA may need to reevaluate the annual inspection requirement for 2020.
- **Best Efforts Notice of Temporary Relocations.** If a member firm relocates to an unregistered temporary office, FINRA has advised its members to use best efforts to provide written notification to their FINRA Risk Monitoring Analyst as soon as possible.
- **Additional Time for Filing and Response Obligations.** In light of expected difficulties in fulfilling regulatory filing obligations and responding to regulatory inquiries or investigations, FINRA is urging member firms that may require additional time to complete their filing or investigatory response obligations to contact their assigned FINRA Risk Monitoring Analyst to request an extension.

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## Common Themes in the Federal Guidance

Reading the FFIEC and FINRA guidance documents together, certain common themes emerge that are useful for institutions to consider as they develop and implement their pandemic plans:

- **Reducing Social Interactions and Encouraging Proper Hygiene.** Both the FFIEC and FINRA encourage institutions to implement policies and procedures that limit social interaction and discourage large gatherings of employees.<sup>3</sup> These policies should also include pandemic sick leave policies, special pandemic leave or specialized

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<sup>3</sup> See FFIEC, Interagency Statement on Pandemic Planning, p. 8, (Mar. 6, 2020), available at <https://www.ffiec.gov/press/PDF/FFIEC%20Statement%20on%20Pandemic%20Planning.pdf> [hereinafter FFIEC Interagency Statement]; FINRA, Regulatory Notice 20-08, Pandemic-Related Business Continuity Planning, Guidance and Regulatory Relief, p. 3, (Mar. 9, 2020), available at <https://www.finra.org/rules-guidance/notices/20-08> [hereinafter FINRA Regulatory Notice 20-08].

eating plans.<sup>4</sup> In addition, the firm should be educating employees on proper and preventative hygiene and providing hand sanitizer in common areas.<sup>5</sup>

- ***Encouraging Remote Working and Telecommuting Arrangements.*** A key step to reducing social interactions is to encourage employees to work remotely and to provide appropriate telecommuting arrangements.<sup>6</sup>
- ***Testing and Maintaining Proper Infrastructure.*** Prior to implementing company-wide telecommuting, institutions should conduct tests to ensure that the infrastructure can maintain and support widespread telecommuting.<sup>7</sup>
- ***Overseeing Cybersecurity Protections.*** With increased remote working arrangements, the institution should ensure that the firm's cybersecurity measures are adequate and appropriate in accordance with applicable guidance<sup>8</sup> and that the firm remains vigilant against cyberattacks.<sup>9</sup>
- ***Mitigating the Risk to Third-Party/Vendor Relationships.*** When assessing pandemic-related risks, the FFIEC instructs institutions to identify third-party/vendor relationships that are critical to the institution's business operations and the risks that the pandemic poses to these relationships.<sup>10</sup> Relatedly, FINRA advises that institutions review service agreements to ensure they adequately address the potential impacts of a pandemic.<sup>11</sup> As an additional risk mitigation technique, the FFIEC encourages institutions to consider cooperative arrangements with other financial intuitions to mitigate the risk of disruption to essential operations and services.<sup>12</sup>

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<sup>4</sup> See FINRA Regulatory Notice 20-08, p.3.

<sup>5</sup> See FFIEC Interagency Statement, pp. 3, 8.

<sup>6</sup> See FINRA Regulatory Notice 20-08, p. 3.

<sup>7</sup> See FFIEC Interagency Statement, p. 8-9; FINRA Regulatory Notice 20-08, p. 3.

<sup>8</sup> For example, institutions subject to regulation by the New York State Department of Financial Services must ensure that their telecommuting and remote working arrangements comply with applicable state and federal regulations. See, e.g., 23 N.Y.C.R.R. § 500.12 (generally requiring multifactor authentication for any individual accessing a regulated institution's internal networks from an external network). For further discussion of cybersecurity considerations and requirements, please refer to the Debevoise Client Update, Federal Financial Regulators to Propose Enhanced Cyber Risk Management Standards (Oct. 25, 2016), available at <https://www.debevoise.com/insights/publications/2016/10/federal-financial-regulators-to-propose-enhanced>.

<sup>9</sup> For a discussion of cybersecurity considerations in light of COVID-19, please refer to the Debevoise Client Debrief, Debevoise Coronavirus Checklists—Cybersecurity (Mar. 11, 2020), available at <https://www.debevoise.com/insights/publications/2020/03/debevoise-alert-dfs-seeking-coronavirus-plans-and>.

<sup>10</sup> See FFIEC Interagency Statement, p. 7.

<sup>11</sup> See FINRA Regulatory Note 09-59.

<sup>12</sup> See FFIEC Interagency Statement, p. 7.

- **Communication with Authorities.** Both FINRA and the FFIEC advise that institutions coordinate their pandemic planning efforts with public health and other government authorities.<sup>13</sup> Institutions should notify local and state agencies when significant employee absenteeism is caused by a pandemic outbreak.<sup>14</sup>

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## NYDFS Industry Letter Requiring Operational and Financial Preparedness Plans

On March 10, the NYDFS issued two separate but related Industry Letters to the CEO (or equivalent responsible executive) of all financial institutions within the agency's jurisdiction—including state-licensed banks, branches of foreign banking organizations, broker-dealers, money transmitters and insurance companies—requiring submission of COVID-19-focused (1) operational preparedness and (2) financial preparedness plans to the NYDFS within 30 days, no later than April 9, 2020.

### Operational Preparedness Plan

NYDFS expects the operational preparedness plans to describe, at minimum:

- measures tailored to the institution's profile to reduce the risk of operational disruptions, including identifying the impact on customers, outside-party service providers and counterparts;
- a scalable strategy implemented consistently through each stage of an outbreak, including evaluating how quickly measures can be adopted and the durability of operations at each stage;
- policies and procedures to ensure continued operation of critical functions, including assessing and testing the institution's infrastructure to prevent or mitigate operational disruptions;
- a plan to ensure continued communication with affected parties and the public to deliver important information and to establish question-and-answer forums; and
- oversight of the plan by a response team responsible for continuously reviewing and updating the plan.

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<sup>13</sup> See FFIEC Interagency Statement, p. 7; FINRA Regulatory Notice 09-59.

<sup>14</sup> See FFIEC Interagency Statement, p. 7.

### **Financial Preparedness Plan**

Similarly, the NYDFS expects the financial preparedness plans to include an assessment of:

- Credit risk ratings of customers, counterparties and business sectors impacted by COVID-19;
- Credit exposures to third-parties impacted by COVID-19 arising from financial transactions, including any credit modifications, extensions and restructurings;
- Adversely impacted credits that are, or potentially will be, non-performing/delinquent, including stress testing and/or sensitivity analysis of loan portfolios and adequacy of loan loss reserves;
- Valuation of assets and investments impacted by COVID-19;
- Overall impact of COVID-19 on financial performance measures (earnings, profits, capital and liquidity); and
- Reasonable and prudent steps to assist institutions impacted by COVID-19.

### **Board and Senior Management Involvement**

Consistent with other pandemic guidance, and supervisory expectations generally, the NYDFS expects appropriate governance of these preparedness plans. Specifically, Boards of Directors are expected to assess the adequacy of the plans and to ensure senior management has sufficient resources to implement the plan. Senior management must also confirm readiness to implement the preparedness plans and effectively communicate their requirements throughout the institution.

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Please do not hesitate to contact us with any questions.

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