

March 26, 2020

Disclosure in the Time of COVID-19 –
Guidance from the Division of Corporation Finance

Yesterday, the staff of the SEC’s Division of Corporation Finance published [guidance](#) on how companies should fulfill their obligation to disclose material changes to their businesses, financial condition, and results of operations in the context of the unprecedented uncertainty created by the COVID-19 pandemic. Acknowledging the inherent difficulty of predicting the effects of the pandemic on industries or individual companies, the SEC staff advised companies to focus their disclosure efforts on how they are responding to and planning for COVID-19-related uncertainties. The SEC staff further encouraged companies to “proactively revise and update disclosures as facts and circumstances change.”

1. Assessing the Risk

The Division’s guidance advises that disclosure of the type of risks presented by COVID-19 and related effects may be “necessary or appropriate in management’s discussion and analysis, the business section, risk factors, legal proceedings, disclosure controls and procedures, internal control over financial reporting, and the financial statements.” The Division further presents a valuable set of wide-ranging questions companies should ask themselves as they assess the particular ways in which the pandemic may imperil their operations and financial condition. These questions, included in Annex A, address both the present impact of the pandemic and possible future effects. The illustrative list covers a wide variety of topics that may affect companies’ ongoing disclosures, including:

- *Financial Condition.* Companies should evaluate the potential effects of COVID-19 on their current and future financial condition and results of operations.
- *Capital and Financial Resources.* Companies should consider the impact of COVID-19 on their overall liquidity position and outlook, including such issues as asset valuation and potential material impairments.
- *Operational Considerations.* Companies should review how COVID-19 might adversely affect their business continuity plans, their financial reporting systems, demand for their products or services, their supply-chain or distribution networks and their human capital resources.

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2. Controlling Material Information

The Division of Corporation Finance’s guidance contains a reminder that companies must ensure that material, non-public information is handled appropriately and that established policies and procedures on insider trading are strictly followed. Companies are also reminded that they must adhere to the restrictions imposed by Regulation FD on selective disclosure.

3. Earnings Information

The Division of Corporation Finance addressed how companies ought to approach reporting earnings and other financial results prior to formally completing their quarterly financial statements in light of the novel or complex accounting issues that may be raised by the impact of COVID-19. Because these issues may take time to resolve, companies are encouraged to proactively address financial reporting matters earlier than usual.

As we noted in our prior [memorandum](#), nearly all large public companies now report non-GAAP metrics. In keeping with the SEC’s recent [guidance](#) on performance metrics disclosure, the Division reminded companies to highlight why management finds a particular metric useful and how it helps investors assess the impact of COVID-19 on the company.

Furthermore, Item 10(e)(1)(i)(A) of Regulation S-K states that an issuer including non-GAAP financial measures in SEC filings must present, with equal or greater prominence, the most directly comparable financial measures calculated and presented in accordance with GAAP. The rapidly developing impact of COVID-19, however, may mean that companies and auditors will need additional information and analysis to calculate the relevant GAAP financial measure. When the relevant GAAP financial measure is not available, the Division has indicated that it would not object to a reconciliation using “preliminary GAAP results that either include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP results.”

In addition, companies that avail themselves of the option to reconcile non-GAAP financial measures to provisional or estimated GAAP financial measures should only present measures used to present financial information to the Board of Directors. Non-GAAP reporting should reflect how management actually operates and views the business.

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As we noted in our [prior memoranda](#), almost every public company will need to decide what it is going to say about the impact of COVID-19 and when it is going to say it. The Division of Corporation Finance's guidance is a reminder of the importance of carefully considering these challenging issues proactively, seeking sound legal advice, and working in good faith to get it right.

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Annex A – Questions Posed By SEC Staff CF Disclosure Guidance: Topic No. 9

“As companies assess COVID-19-related effects and consider their disclosure obligations, questions to consider with respect to their present and future operations include:

- How has COVID-19 impacted your financial condition and results of operations? In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near-and-long-term financial condition? Do you expect that COVID-19 will impact future operations differently than how it affected the current period?
- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook? Has your cost of or access to capital and funding sources, such as revolving credit facilities or other sources changed, or is it reasonably likely to change? Have your sources or uses of cash otherwise been materially impacted? Is there a material uncertainty about your ongoing ability to meet the covenants of your credit agreements? If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency? Consider the requirement to disclose known trends and uncertainties as it relates to your ability to service your debt or other financial obligations, access the debt markets, including commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, and counterparty or customer risk. Do you expect to disclose or incur any material COVID-19-related contingencies?
- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets? For example, will there be significant changes in judgments in determining the fair-value of assets measured in accordance with U.S GAAP or IFRS?
- Do you anticipate any material impairments (*e.g.*, with respect to goodwill, intangible assets, long-lived assets, right of use assets, investment securities), increases in allowances for credit losses, restructuring charges, other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on your financial statements?
- Have COVID-19-related circumstances such as remote work arrangements adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures? If so, what changes in your controls have occurred during the current period that materially affect or are reasonably likely to

materially affect your internal control over financial reporting? What challenges do you anticipate in your ability to maintain these systems and controls?

- Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so? Do you face any material resource constraints in implementing these plans?
- Do you expect COVID-19 to materially affect the demand for your products or services?
- Do you anticipate a material adverse impact of COVID-19 on your supply chain or the methods used to distribute your products or services? Do you expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?
- Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?
- Are travel restrictions and border closures expected to have a material impact on your ability to operate and achieve your business goals?

The above list is illustrative but not exhaustive and each company will need to carefully assess COVID-19's impact and related material disclosure obligations.”