

April 8, 2020

What to Say on Your Next Earnings Call in the Time of COVID-19 –
SEC Chairman Jay Clayton and CorpFin Director Bill Hinman Lead the Way

This evening, in an unusual and groundbreaking [statement](#), the Chairman of the Securities and Exchange Commission and the Director of the SEC's Division of Corporation Finance proactively addressed a challenging question that every U.S. publicly traded company is wrestling with: how to handle the upcoming earnings call now that the unprecedented global, human and economic impacts of COVID-19 are apparent? Their statement answering that question is a must-read for directors and senior executives, and it is attached in full.

Unlike most January and February year-end earnings releases and conference calls, the upcoming calls to be held by public companies within the next several weeks into next month will occur during a period of great uncertainty and concern, "will not be routine" (far from it) and will be consumed by a vastly broader audience than ever before that includes employees, supply-chain partners and customers as well as Main Street and institutional investors seeking insights and assurances as to corporate health, industry performance, measures being taken to protect stakeholders and modify operations, mitigation efforts, going-forward plans and whether or not business matters are under control. SEC Chair Clayton also recognizes that the nation's strategies for addressing COVID-19 will continue to evolve to address health risks effectively "while fostering a meaningful, responsible increase in economic activity."

In this demonstration of fascinating leadership sensitive to the reduced resources and bandwidth of many companies, the SEC's new call for disclosure action encourages America's private sector to use upcoming earnings calls not as a forum to showcase historical results that may now be "relatively less significant," but instead as an opportunity to address "(1) where the company stands today, operationally and financially, (2) how the company's COVID-19 response, including its efforts to protect the health and well-being of its workforce and its customers, is progressing, and (3) how its operations and financial condition may change as all our efforts to fight COVID-19 progress."

Recognizing that "producing forward-looking disclosure can be challenging," the SEC's senior leadership nevertheless urges companies that "taking on that challenge is appropriate" and suggests that doing so, in addition to benefiting investors and market valuation, will enable "the broad dissemination and exchange of firm-specific plans for addressing the effects of COVID-19 under various scenarios" and "substantially contribute to our nation's collective effort to fight and recover from COVID-19." The statement also directly addresses potential litigation and liability concerns from making forward-looking statements in this environment, assuring companies that "we encourage companies that respond to our call for forward-looking disclosure to avail themselves of

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the safe-harbors for such statements and also note that we would not expect good faith attempts to provide appropriately framed forward-looking information to be second guessed by the SEC.”

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. We have counseled companies to consider the challenging disclosure issues carefully and proactively, seek sound legal advice and work in good faith to get it right. SEC Chair Clayton and Director Hinman make clear that this quarter’s upcoming earnings call is also an opportunity for corporate America to convey what they are doing, how they are helping and coping and where they are going – in other words, to show, and strike a tone of, real leadership.

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The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19

SEC Chairman Jay Clayton

William Hinman Director, Division of Corporation Finance

The SEC's three part mission—maintain market integrity, facilitate capital formation and protect investors—takes on particular importance in times of economic uncertainty. Disclosure—providing the public with the information necessary to make informed investment decisions—is fundamental to furthering each aspect of our mission.[\[i\]](#)

In the coming weeks, our public companies will be issuing earnings releases and conducting analyst and investor calls. We urge companies to provide as much information as is practicable regarding their current financial and operating status, as well as their future operational and financial planning. In an effort to facilitate robust disclosure and engagement, we provide the following observations and requests (discussed in more detail below):

- Our collective national effort to mitigate the COVID-19 pandemic has caused a deep contraction in vast areas of our economy, with many workers and businesses facing profound challenges.
- There is broad support for this national, full-mitigation response to COVID-19, but also broad recognition that our strategy must evolve to effectively address the health risks of COVID-19 while fostering a meaningful, responsible increase in economic activity.
- Executing such a strategy will require constant coordination among workers, consumers, businesses, governmental authorities and investors, both broadly and at the individual and firm-specific level.
 - There now appears to be an emerging consensus that, as we develop more tools to fight COVID-19—increased testing, enhanced monitoring, data analysis, and identification of effective therapeutics—we can, anchored by advice of healthcare specialists, incrementally foster economic activity.
- Company disclosures should reflect this state of affairs and outlook and, in particular, respond to investor interest in: (1) where the company stands today, operationally and financially, (2) how the company's COVID-19 response, including its efforts to protect the health and well-being of its workforce and its customers, is progressing, and (3) how its operations and financial condition may change as all our efforts to fight COVID-19 progress. Historical information may be relatively less significant.
- Providing detailed information regarding future operating conditions and resource needs is challenging, including because our response strategies are in their incipient stages (and are likely to change), but it is important on many levels. Updating and refining these estimates should become less difficult over time.

- High quality disclosure will not only provide benefits to investors and companies, it also will enhance valuable communication and coordination across our economy—including between the public and private sectors—as together we pursue the fight against COVID-19.
 - This transparency can foster confidence in countless specific instances, for example, between a supplier and a manufacturer as well as between an investor and a company, which in combination will benefit all.
- We encourage companies that respond to our call for forward-looking disclosure to avail themselves of the safe-harbors for such statements and also note that we would not expect good faith attempts to provide appropriately framed forward-looking information to be second guessed by the SEC.

Detailed Discussion of the Importance of Disclosure, Particularly Forward-Looking Disclosure, for Investors, Markets and our Fight Against COVID-19

Our Collective, Full Mitigation Response to COVID-19 Has Substantially Affected our Economy and Our Markets. In less than one month, in the interest of saving as many lives as possible, we—all Americans—have undertaken, with remarkable spirit and selflessness, a massive restriction in how we interact. This collective, full-mitigation response to COVID-19 has resulted in a sharp contraction in many aspects of our economy and increased volatility and uncertainty in our capital markets. Policymakers have responded to the most apparent and acute economic and market consequences with unprecedented monetary and fiscal policy actions.

SEC Actions Have Focused on Market Integrity and Function. In response, the women and men of the SEC have taken dozens of actions, many in close coordination with the Federal Reserve, the Treasury Department and other U.S. and international authorities. These actions have focused on facilitating market function and preserving market integrity, as well as providing guidance and relief to market participants affected by COVID-19.^[ii] In crafting and executing these responsive measures, our colleagues have been guided by our commitment to market integrity and the long term interests of our Main Street investors, knowing that more than 52 percent of US households have investments in our capital markets.^[iii]

There is Broad Support Among Market Participants for COVID-19 Mitigation Efforts. Over the past several weeks, we have engaged with a wide array of market participants—retail investors, institutional investors, exchanges, public companies, small businesses and workers—as well as various members of the Executive and Legislative branches^[iv] regarding our current course of action to combat COVID-19 and its effect on our economy. Laudably, to a person, they have expressed unequivocal support for the efforts to mitigate the spread of COVID-19, recognizing both the enormous economic cost of following social-distancing instructions and the reality that current guidelines and directives are likely to continue at least through April.^[v] They also express awe and profound thanks to the healthcare workers on the front lines, as well as to those working countless hours to provide much-needed equipment to, and otherwise support, our front-line heroes.

There is Broad Recognition of the Need for a Transition to Forward-Looking, Health and Welfare Strategies. In these meetings, we have also discussed the stark reality that virtually all participants in our highly integrated economy—including our workers, our retail investors and our small businesses—are facing profound economic challenges and personal uncertainties that are not of their own making and over which they have little control. Discussions of the scope and size of these millions of individual challenges inevitably lead to near unanimous agreement that the current strategy—combining dramatic health-focused mitigation efforts with massive monetary and fiscal intervention—must evolve over the longer-term. This, in turn, leads to a question that is in the minds of investors, market participants and almost every American: What strategy or strategies, nationally and regionally, and by industry and company, should we follow? We agree with the emerging view that, during this period of intense mitigation, all of us should strive to identify and, as appropriate, pursue a course of action that continues to mitigate and (hopefully) more effectively treat the health risks of COVID-19 while fostering responsible increased economic activity.[\[vi\]](#) We also recognize that, as we move forward, course corrections will be required and they may be significant.

Frameworks for Forward-Looking Health and Welfare Strategies are Coming Into Focus. We are optimistic that broad frameworks for such forward-looking strategies are coming into focus.[\[vii\]](#) We expect that, in the coming months, as we all learn more from the ongoing efforts to address the current pandemic, and develop more tools to fight COVID-19—including increased testing, enhanced monitoring and data analysis, and identification and acceptance of effective therapeutics—we can, anchored by the advice of our healthcare specialists, tailor our mitigation efforts and correspondingly foster economic activity more generally. One key component of any strategy will be continuing to target the fiscal assistance provided by the CARES Act and related efforts on those workers and businesses that remain constrained by health and safety directives. Another key component will be adjusting operational norms to ensure continued worker and customer safety, including complying with health guidelines as they are modified and supplemented.

Extensive Coordination Across the Public and Private Sectors Will Be Essential to Our Success in Fighting COVID-19. Importantly, in the same way that the magnitude and speed of our society’s collective commitment to “stop the spread” saved and will continue to save many lives, our nation’s ability to move forward with a thoughtful, nimble, combined health and economic strategy will significantly affect future health and economic outcomes. Effectively executing such a strategy will require constant coordination among workers, consumers, businesses, governmental authorities and investors, both broadly and at the individual and firm-specific level. Said another way, in our highly integrated economy, isolated, uncoordinated strategies—whether active or passive—are less likely to prove successful.

Q1 Earnings Reports and Related Investor and Analyst Calls Will Not be Routine. In the coming weeks, our public companies will be doing what they routinely do after quarter-end—issuing earnings statements and convening calls with analysts and investors. This quarterly routine is fundamental to the functioning of our equity and credit markets. SEC-registered public companies—which include over 60 of the world’s 100 largest companies—provide investors and our markets with information, in many cases extensive information, regarding their operational and financial condition at least quarterly. This information, particularly the

quantitative information (*e.g.*, financial statements) is predominately historical. Investors and analysts use this information, including management commentary regarding trends, and future expectations of financial condition and risks, to gauge value and estimate future firm performance. These historically-based projections of future performance have long been among the most meaningful drivers of investment decisions.

There is Intense Investor Interest in Company-Specific Operational and Financial Status and Plans for Addressing the Effects of COVID-19. This quarter, earnings statements and calls will not be routine. In many cases, historical information may be substantially less relevant. Investors and analysts are thirsting to know where companies stand today and, importantly, how they have adjusted, and expect to adjust in the future, their operational and financial affairs to most effectively work through the COVID-19 health crisis. Producing comprehensive financial and operational reports, may present challenges for companies in the current circumstances, particularly reports that include forward-looking information. We recognize these challenges, as well as the heightened importance of issuer-investor engagement in this uncertain time, and the SEC staff has encouraged earnings and related disclosures that are as timely, accurate and robust as practicable under the circumstances.[\[viii\]](#)

We Request that Companies Provide as Much Information as is Practicable Regarding Their Current Status and Plans for Addressing the Effects of COVID-19. Speaking for ourselves, and recognizing the challenges inherent in our request, we urge our public companies, in their earnings releases and analyst calls, as well as in subsequent communications to the marketplace, to provide as much information as is practicable regarding their current operating status and their future operating plans under various COVID-19-related mitigation conditions. Detailed discussions of current liquidity positions and expected financial resource needs would be particularly helpful to our investors and markets. Beyond the income statement and the balance sheet effects, we recognize that COVID-19 may significantly impact operations, including as a result of company efforts to protect worker health and well-being and customer safety. The impact of company actions and policies in this area may be of material interest to investors, and we encourage disclosures that address that interest. In addition, companies and financial institutions may be receiving financial assistance under the CARES Act or other similar COVID-19 related federal and state programs. Such assistance may take various forms and is intended to mitigate COVID-19 effects for companies and their workers. If these or other types of financial assistance have materially affected, or are reasonably likely to have a material future effect upon, financial condition or results of operations, the affected companies should provide disclosure of the nature, amounts and effects of such assistance.

We Recognize that Producing Forward-Looking Disclosure Can be Challenging and Believe that Taking On that Challenge is Appropriate. We recognize that for many companies, providing forward-looking information, particularly detailed information regarding future operating conditions and resource needs, may present difficulties, including because any shift to a forward-looking health and welfare strategy is at most in its incipient stage. As time passes, and our strategies come into greater focus, making and refining these estimates should become less difficult.

We know from experience in various scenarios that estimates of the type we are requesting are unavoidably based on a mix of assumptions, including assumptions regarding matters beyond the control of the company. For example, in the context of our current challenges, key drivers of future operational status and financial results—most notably, the time frames for current COVID-19 social distancing guidelines and other mitigation-related requirements—are not uniform and are likely to undergo material change. We also recognize that, in light of these forecasting challenges, it may be tempting to resort to generic, or boilerplate, disclosures that do little to inform investors of company-specific status, operational strategies and risks. We encourage companies and their advisers to make all reasonable efforts to convey meaningful information—information that provides investors a level of insight that allows them to see the key operational and financial considerations and challenges the company faces through the eyes of management. In this regard, we encourage companies to consider the broad frameworks of some of the strategies that have been suggested, how following those strategies may affect their operations and whether that analysis would be of material interest to investors.

Robust, Forward-Looking Disclosures Will Benefit Investors, Companies and, More Generally, Our Fight against COVID-19. Such Disclosures Will Facilitate Communication and Coordination Among the Public and Private Sectors. This request that companies strive to provide, and update and supplement, as much forward-looking information as is practicable is driven by three primary considerations: (1) the information will benefit investors, (2) market digestion of the information will benefit the company, and (3) the broad dissemination and exchange of firm-specific plans for addressing the effects of COVID-19 under various scenarios will substantially contribute to our nation’s collective effort to fight and recover from COVID-19.

The first two points require limited elaboration. The more investors know about how management is assessing, planning for, and taking steps to address, the effects of COVID-19, the better investment decisions investors will make. Relatedly, the more confidence investors (and the markets more generally) have that a company has a well thought out and executable strategy for addressing the effects of COVID-19, the more willing investors will be to provide credit and other financing to the company.

The third point is less familiar.^[ix] Investors are not the only ones who are interested in how companies will adjust their affairs as we pursue our collective fight against COVID-19. As discussed above, broad and extensive coordination across workers, firms, investors and governmental officials will be critical to successfully emerge from this fight. The exchange of forward-looking information is essential to that coordination. As just one of millions of examples, if the owner of an industrial laundry business becomes comfortable that the hotel industry is soon to pursue a credible plan for increasing activity, the laundry business may be less likely to furlough (or may plan to rehire) employees. More broadly, when a company articulates its strategy publicly, it gives investors and the public a heightened level of confidence and understanding. This increased confidence and understanding reduces risk aversion and facilitates action. This type of positive dynamic plays out across our economy in countless ways and further demonstrates the need for, and the power of, a coordinated, dynamic and forward-looking public-private strategy for fighting COVID-19.

Discussion of Investor Protection, Market Integrity and Legal Risk

In closing, a few words about investor protection, market integrity and legal risk. The SEC's commitment to investor protection and market integrity is unwavering, and we are laser-focused on identifying bad actors who would seek to use the current uncertainty to prey on our investors. In addition, our Divisions of Enforcement and Corporation Finance recently issued statements^[x] reminding companies to practice good corporate hygiene, particularly with regard to the protection and distribution of material non-public information. In this regard, companies and their investors are well served when the type of information we outlined above is held closely until disclosed, and, when disclosed, is broadly disseminated.

We further recognize that companies often are cautioned to limit their forward-looking disclosures, and particularly specific estimates, to those required by our rules to limit legal risk in the event the forward-looking estimates prove to be incorrect. In this regard, we encourage companies to avail themselves of the safe-harbors for forward-looking statements.^[xi] We appreciate that in many cases actual financial and operational results may differ substantially from what would now appear to be reasonable estimates. Given the uncertainty in our current business environment, we would not expect to second guess good faith attempts to provide investors and other market participants appropriately framed forward-looking information.

We and our colleagues at the SEC welcome engagement on these matters. We particularly encourage market participants who are facing challenges as a result of COVID-19 to continue to reach out to us.

^[i] This statement represents the views of the Chairman and the Director of the Division of Corporation Finance of the U.S. Securities and Exchange Commission ("SEC" or "Commission"). It is not a rule, regulation, or statement of the SEC. The Commission has neither approved nor disapproved its content. This statement does not alter or amend applicable law and has no legal force or effect. This statement creates no new or additional obligations for any person.

^[ii] See SEC Coronavirus (COVID-19) Response, available at <https://www.sec.gov/sec-coronavirus-covid-19-response>.

^[iii] See Jesse Bricker *et al.*, "Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances," Federal Reserve Bulletin, vol. 103 (September 2017), available at

<https://www.federalreserve.gov/publications/files/scf17.pdf>; Kim Parker and Richard Fry, Pew Research Center, *More than half of U.S. households have some investment in the stock market* (March 25, 2020), available at <https://www.pewresearch.org/fact-tank/2020/03/25/more-than-half-of-u-s-households-have-some-investment-in-the-stock-market/>.

^[iv] Including officials at the United States Treasury, Federal Reserve Board and the National Economic Council.

^[v] On March 29, 2020, President Trump extended social distancing guidelines until April 30, 2020.

^[vi] Several weeks ago, Chairman Clayton issued a statement regarding the deep and essential connections among markets, businesses, and workers, and the importance of those connections to our fight against COVID-19. Chairman Jay Clayton, *The Deep and Essential Connections Among Markets, Businesses, and Workers and the Importance of Maintaining those Connections in our Fight Against COVID-19* (March 24, 2020), available at <https://www.sec.gov/news/public-statement/statement-clayton-covid-19-2020-03-24>.

^[vii] See, e.g., Scott Gottlieb, MD, *et al.*, *National Coronavirus Response: A Road Map to Reopening* (March 29, 2020), available at <https://www.aei.org/wp-content/uploads/2020/03/National-Coronavirus-Response-a-Road-Map-to-Recovering-2.pdf>.

^[viii] Starting with our fundamental commitments to investor protection and transparency, and recognizing the operational hardships and challenges posed to companies by COVID-19, our Division of Corporation Finance issued extensive disclosure and other guidance to assist issuers as they consider their disclosure obligations in connection with their assessment of the potential effects of COVID-19 on their operations. See Division of Corporation Finance, *CF Disclosure Guidance: Topic No. 9* (March 25, 2020), available at <https://www.sec.gov/corpfin/coronavirus-covid-19>.

^[ix] Chairman Clayton described the value of market prices and other market information as "public goods" in remarks to the Economic Club of New York on September 9, 2019, available at <https://www.sec.gov/news/speech/speech-clayton-2019-09-09>.

^[x] *Id.*; Statement from Stephanie Avakian and Steven Peikin, Co-Directors of the SEC's Division of Enforcement, *Regarding Market Integrity* (March 23, 2020), available at <https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity>.

^[xi] See Section 27A of the Securities Act and Section 21E of the Exchange Act.