

March 2020

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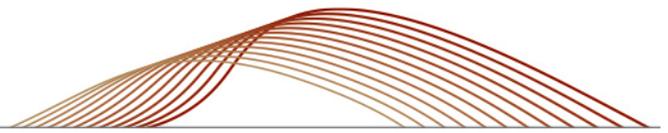
SEC Provides Additional Disclosure Guidance for COVID-19: What Public Companies Have Been Disclosing and What to Expect as Q1 Draws to a Close

By Teri O'Brien, James Shea & Melissa Garcia

With much of the country shut down due to COVID-19, public companies have been operating in territory that is anything but “business as usual.” Since we issued our Stay Current alert on March 13, 2020¹ (which is available [here](#)), public companies facing unprecedented levels of economic slowdown, restrictions on business operations, and restrictions on personal mobility have made thousands of disclosures to investors through Securities and Exchange Commission filings about the specific impacts of the novel coronavirus, COVID-19, on their current business operations and prospects. On March 25, 2020, the Staff of the Division of Corporation Finance issued guidance on disclosure and other securities law obligations companies should consider with respect to COVID-19 (the “SEC Staff Guidance”).² In this alert, we summarize the key trends seen in SEC filings to date, frequently asked questions, and key considerations going forward from an SEC-disclosure perspective as public companies navigate the uncertainty and massive operational disruptions they are facing.

Key Takeaways

- Public company disclosures have expanded beyond risk factors, Management’s Discussion and Analysis of Financial Condition and Results of Operations (“MD&A”), and subsequent event footnotes, with many companies providing real-time updates to the market.
- SEC Staff Guidance has been published explaining when public companies should consider making disclosures to the public relating to COVID-19.
- Issuers impacted by COVID-19 and corporate insiders must refrain from engaging in securities transactions if they are in possession of material nonpublic information, which may include knowledge of risks related to COVID-19. Likewise, in the face of increased inbound investor inquiries, companies must continue to be mindful of their obligations under Regulation FD and avoid selective disclosure.
- The SEC Staff Guidance provides information and certain limited relief relating to upcoming earnings reports and the use of non-GAAP measures reflecting the impact of COVID-19, but



reiterates the obligation of public companies to comply with Regulation G and Item 10 of Regulation S-K in preparing those non-GAAP financial measures.

Disclosure Guidance: Topic 9 (COVID-19)

As the first quarter draws to a close, the SEC Staff Guidance acknowledges the difficulties faced by public companies operating in a time of unprecedented uncertainty. While the SEC Staff Guidance recognizes that it may be difficult for a company to assess or predict with certainty the broad effects that COVID-19 will ultimately have on its business or operations (as many factors are beyond a company's control), the guidance also reminds companies that the risks and effects that they have experienced to date, or expect to experience in the future, and the ways in which their management is responding to the evolving circumstances may be material to investors and market participants.

The SEC Staff Guidance provides an illustrative list of questions that public companies should consider with respect to their present and future operations as they assess the effects of COVID-19 and consider their disclosure obligations. These questions cover a broad range of topics, including the effects of COVID-19 on demand for products and services, supply chains, distribution methods, liquidity and capital resources, human capital, and internal controls and financial reporting. Public companies should consider these and other factors relevant to their specific circumstances as they assess the effects of COVID-19 on their businesses and operations and their resulting disclosure obligations.

In addition, companies and their directors, officers, and other corporate insiders must refrain from engaging in securities transactions, including buybacks and offerings, or otherwise trading in the company's securities, if COVID-19 has affected the company in a way that would be material to investors until such information is disclosed to the public—companies must also take the necessary steps to avoid selective disclosure by disseminating such information broadly to the public.³

SEC Filings to Date

Public company disclosures in the past few weeks have included the following types of disclosures:

- Form 10-K and Form 10-Q filings that include risk factors relating to COVID-19, discussion of COVID-19 as a trend or factor affecting results in MD&A, and subsequent event footnote disclosures relating to COVID-19;
- Form 8-K filings updating or withdrawing previously provided guidance as a result of the impacts of COVID-19, as well as earnings press releases where companies have opted not to provide guidance for 2020 or interim periods given the uncertainty created by COVID-19;
- Form 8-K filings providing business operations updates (such as store closures, supply chain interruptions, etc.), typically as Regulation FD disclosure under Item 7.01, that provide specific and detailed information about the business and operational impacts of COVID-19 faced by particular companies or industries;
- Form 8-K filings reporting new material commercial contracts for businesses engaged in providing goods, pharmaceuticals, medical devices, or other supplies that may be used in combatting the pandemic;
- Form 8-K filings disclosing draws on revolving credit facilities as part of a company's COVID-19 preparedness strategy;



- Form 8-K filings disclosing capital structure updates, such as dividend suspensions, the suspension of share buyback programs, and the implementation of share buyback programs;
- Form 8-K filings including updated risk factors and/or trends and factors affecting MD&A disclosures from previously filed periodic reports;
- Form 8-K filings disclosing the temporary departure of an executive officer due to COVID-19;
- Form 8-K filings disclosing voluntary and involuntary salary or compensation reductions taken by Named Executive Officers (“NEOs”) in response to COVID-19; and
- Form 8-K filings and proxy statement disclosures regarding upcoming annual meetings—either being held using virtual means, or reserving the right to change to a virtual meeting depending on the developments with COVID-19—as well as bylaw amendments to allow for virtual meetings.

As many companies approach the end of their fiscal quarters on March 31, new questions will emerge, particularly, regarding the ways that public companies will disclose the financial impacts of COVID-19, including through addbacks to their non-GAAP financial measures such as adjusted earnings before interest, taxes, depreciation, and amortization (Adjusted EBITDA), or through other quantitative metrics that are reported in MD&A and earnings press releases.

Frequently Asked Questions

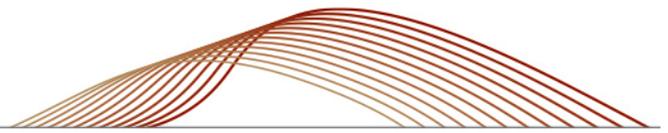
In light of the SEC Staff Guidance and our experience with public companies navigating these uncertain and ever-changing times, below is a set of FAQs about reporting considerations for public companies.

Q: Are we obligated under SEC rules to update investors about the impacts of COVID-19 on our business?

A: Yes. There are a number of existing federal securities laws and regulations that require disclosure about the known or reasonably likely impacts of and the types of risks presented by COVID-19, and companies are well-advised to keep a close eye on such requirements, including the requirements of Form 10-Q and Form 8-K.⁴ Even in the absence of specific disclosure requirements, as noted by the SEC in its March 4, 2020 statement, “[d]epending on a company’s particular circumstances, it should consider whether it may need to revisit, refresh, or update previous disclosure to the extent that the information becomes materially inaccurate.”⁵ In addition, listed companies should be mindful of their obligations under applicable stock exchange rules. The New York Stock Exchange, for instance, requires listed companies to disclose promptly any news that is likely to have a material impact on the trading price of a company’s listed securities. To the extent that a company has not yet disclosed material effects on its business resulting from COVID-19, it should consider imposing a blackout period on corporate insiders privy to such information.

Q: How frequently are we obligated to update investors about impacts, particularly where our business is changing day-to-day?

A: The SEC Staff Guidance encourages companies to proactively revise and update their disclosures as facts and circumstances change. However, a company will generally not be required under the federal securities laws to update investors about the impacts of COVID-19 during the period between its



periodic filings unless a mandatory filing obligation, such as a Form 8-K disclosure requirement, is triggered.

Q: Can we continue to provide guidance in our earnings release? If so, what should we disclose about COVID-19?

A: Yes, but many companies have recently decided to withdraw their guidance, update their guidance, or abandon the practice of giving guidance in light of the ever-changing and uncertain impacts of COVID-19. If you want to continue to give guidance, consider the following:

- explain your assumptions regarding COVID-19 and its impact on the business in the periods presented;
- avoid assumptions that COVID-19 will not implicate your business—if you believe it will not, state so explicitly; and
- indicate and explain, where possible, the expected quantitative implications. That way, if situations develop and you update the market with ongoing information, investors will be able to understand where your assumptions are no longer correct and that guidance may no longer be reliable.

While many investors have historically become accustomed to guidance, given the incredible uncertainty that currently exists, it may be more prudent to decline to give guidance and focus on disclosing risks, business impacts, and trend information relating to COVID-19 at this time.

Q: We previously released guidance—do we have to update it?

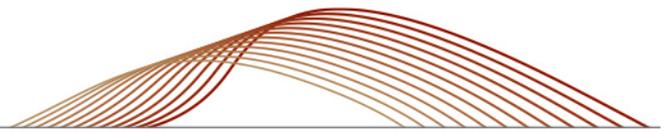
A: There is no affirmative duty under the federal securities laws to update or confirm prior earnings guidance. However, a company may wish to update, confirm, or withdraw prior earnings guidance to reduce the risk of potential liability under the antifraud provisions of the Exchange Act. Case law indicates that the decision to update or confirm prior earnings guidance should take into account the materiality of a new event or information, whether the new event or information renders prior earnings guidance misleading or inaccurate in a material way, and whether the new information is something that would presently factor in the mind of a reasonable investor. In addition, where a company released guidance that contained certain assumptions about the impact of COVID-19 and those assumptions are no longer accurate, it may be advisable to withdraw the previously issued guidance.

Q: What do we do if an executive falls ill with COVID-19?

A: Depending on the title and function of the executive, a Form 8-K filing may be required. For example, if a company's CEO, CFO, principal accounting officer, principal operating officer, or any person performing similar functions, or any named executive officer temporarily turns over his or her duties to another person for any reason, including as a result of a COVID-19 exposure or illness, the company must file a Form 8-K under Item 5.02(b) to report that the original officer has temporarily stepped down and, under Item 5.02(c), to report that the replacement officer has been appointed.⁶ A separate Form 8-K will be required when the original officer resumes his or her role.

Q: Do we need to disclose temporary pay cuts for officers and employees?

A: Disclosure is not generally required for temporary pay cuts to employees but, depending on the title and function of the officers impacted by the temporary pay cuts, Item 5.02(e) of Form 8-K may



require disclosure if such pay cuts represent a new material compensatory plan or a material amendment to an existing plan. Especially where pay cuts are accompanied by a reduction in hours worked or other significant modifications in employment terms, companies need to consider whether a Form 8-K filing obligation has been triggered.

Q: What liability do we have for statements made relating to COVID-19? Are the forward-looking statements we make protected from liability?

A: A company may be held liable, under the antifraud provisions of Section 10(b) and Rule 10b-5 under the Exchange Act, for any false statement about, or omission of, a material fact, including statements or omissions in its SEC reports. However, the SEC Staff Guidance confirms that forward-looking information that is provided in an effort to keep investors informed about material developments, including known trends or uncertainties regarding COVID-19, can be undertaken pursuant to the safe harbors in Section 27A of the Securities Act and Section 21E of the Exchange Act. Subject to certain exceptions, these provisions provide protection from liability for statements that are (i) identified as forward-looking and (ii) either immaterial or accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those set forth in the forward-looking statement.⁷

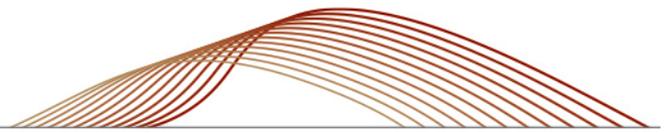
Q: We are a foreign private issuer. How should we think about our obligations under the U.S. securities laws?

A: Foreign Private Issuers (“FPIs”) are not subject to the Form 8-K reporting requirements; however, they may have securities listed on a stock exchange and need to be mindful of the obligations to disclose information that may materially affect the price of their listed securities. In addition, Form 6-K requires FPIs to furnish any material disclosures made to their securities holders under applicable home country laws. Nonetheless, FPIs may wish to follow to guidance set forth in the SEC Staff Guidance as a means of determining when and what to disclose to their investors, absent clearer guidance under home country rules. In particular, FPIs that are finalizing their annual reports on Form 20-F for fiscal year 2019 should consider including sufficient disclosure regarding COVID-19 in risk factors and other sections addressing known or expected business impacts and trend information.

Considerations for March 31 Quarter-End Financial Reporting

Some companies with fiscal quarters ending on or before February 29, 2020 have started to report earnings for those fiscal periods. To date, a handful of companies have reported financial impacts from COVID-19, but given the heightened impact throughout the month of March, companies with fiscal quarters ending March 31 are likely to have significantly greater impacts on their financial performance.

To date, those few companies with fiscal quarters ending in February have presented financial results that describe the impacts of COVID-19 on their financial performance. Companies have disclosed, for instance, the impact of COVID-19 on revenue and on earnings per share, on both a GAAP and non-GAAP basis. So far, we have not seen issuers making adjustments to Adjusted EBITDA to account for COVID-19.



As companies prepare for their quarterly reporting, below are a few key FAQs for consideration:

Q: We are having trouble meeting our filing deadlines due to COVID-19. Is there anything we can do?

A: Yes. On March 4, 2020, the SEC issued an exemptive order that, subject to certain conditions and exceptions, provides relief for issuers unable to meet their filing deadlines due to COVID-19. On March 25, 2020, the SEC extended this order to cover any filings (by both domestic and foreign private issuers) that otherwise would have been due between March 1, 2020, and July 1, 2020.⁸ The SEC order requires an issuer seeking relief to file a Form 8-K (or Form 6-K) advising the market of the reasons for its inability to file on time.

Q: How should we report the financial impacts of COVID-19 in our fiscal quarter ended March 31?

A: Companies that experience unexpected nonrecurring charges and expenses should account for them in their quarterly reports, and the SEC Staff Guidance anticipates that the ongoing and evolving impact of COVID-19 will likely make it more difficult to assess the accounting implications of COVID-19. Issuers should begin discussing with their auditors and advisers how to account for these unexpected, nonrecurring charges and expenses.

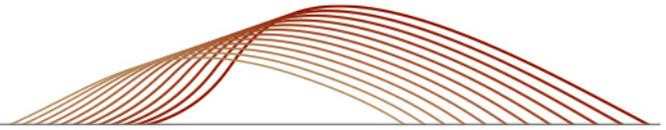
Q: Can we make adjustments to our non-GAAP financial measures like Adjusted EBITDA for the impact of COVID-19?

A: Yes. The SEC Staff Guidance contemplates that issuers may reflect the nonrecurring charges and expenses associated with COVID-19 in their non-GAAP financial measures. However, issuers must ensure that any non-GAAP financial measures comply with Item 10 of Regulation S-K and Regulation G, including the following:

- highlighting why the measure or metric is useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations;
- taking care to afford equal or greater prominence to the most comparable GAAP measures;
- reconciling non-GAAP measures to the most comparable GAAP measures; the Staff will, for purposes of COVID-19 related disclosures, allow issuers to reconcile non-GAAP financial measures to preliminary GAAP results, or a range of preliminary GAAP results, that may require additional information and analysis to complete;
- if a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures in reliance on the above position, it should limit the measures in its presentation to those non-GAAP financial measures it is using to report financial results to its board of directors; and
- if a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures, it should explain, to the extent practicable, why the line item(s) or accounting is incomplete, and what additional information or analysis may be needed to complete the accounting.

Q: Should our key performance indicators take into account COVID-19?

A: Yes. The SEC recently published guidance on the disclosure of key performance indicators and metrics,⁹ and the SEC Staff Guidance reiterates that the same principles apply to any metrics presented relating to COVID-19.



Q: Should we issue preliminary results (or “pre-release” earnings) for the quarter?

A: In lieu of updating or withdrawing guidance, some issuers have contemplated issuing preliminary results for the quarter ended March 31, 2020 as one way of indicating how the company will track compared to previously released guidance or street expectations. Companies that wish to pre-release earnings may do so, provided that the results are appropriately described as preliminary and are disclosed under Item 2.02 of Form 8-K. Companies should work closely with their auditors to ensure that they are only issuing results that are ready for public consumption and have undergone rigorous internal control testing in accordance with the company’s disclosure controls and procedures. In the absence of such information, companies may be better served by withdrawing their existing guidance (as described above).

Q: Should we update the risk factors in our Form 10-Q?

A: Yes. Form 10-Q filing requirements generally necessitate that issuers update for any material changes to risk factors contained in their most recent Form 10-K. Given the wide-ranging impacts of COVID-19 (including macroeconomic impacts that affect most businesses), and the rapid developments on operations, supply chain, workforces, and the like since many Form 10-Ks were filed only a few weeks ago, almost every public company should consider including a risk factor about the specific impacts of COVID-19 on its business operations.

Most importantly, companies should avoid repeating the fairly generic risk factors that became the norm when many issuers were filing their Form 10-Ks in early February. Rather, public companies should endeavor to draft highly tailored risk factors that address a wide range of impacts, including macroeconomic factors, employee illness, impacts of a remote workforce, impacts of store closures or supply chain disruptions, potential impacts of recessionary effects, and any other known or foreseeable risks.

Q: Should we update our MD&A section on trends and factors affecting results with COVID-19?

A: Yes. Form 10-Q requires issuers to disclose known trends in MD&A that may be different from the trends and factors affecting results previously disclosed in Form 10-K. As with risk factors, companies should tailor these trends to their specific businesses.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

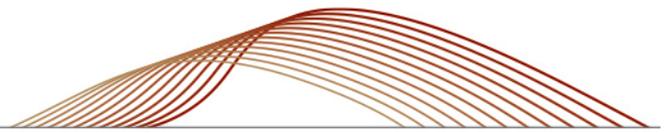
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- ¹ See PH COVID-19 Client Alert Series: The Impact of Coronavirus on SEC Reporting Obligations and Public Disclosure, (Mar. 13, 2020), <https://www.paulhastings.com/publications-items/details/?id=3c6cf06e-2334-6428-811c-ff00004cbded>; see also SEC Release No. 34-88465 (Mar. 25, 2020), <https://www.sec.gov/rules/exorders/2020/34-88465.pdf> (which superseded the SEC order issued on Mar. 4, 2020 and extended relief to filings due on or before July 1, 2020).
 - ² SEC, Division of Corporation Finance, CF Disclosure Guidance: Topic No. 9 (Mar. 25, 2020), https://www.sec.gov/corpfin/coronavirus-covid-19#_ftn4.
 - ³ See Regulation FD, 17 C.F.R. § 243.100, *et seq.*
 - ⁴ SEC, Form 8-K, <https://www.sec.gov/files/form8-k.pdf>.
 - ⁵ Press Release, SEC, SEC Provides Conditional Regulatory Relief and Assistance for Companies Affected by the Coronavirus Disease 2019 (COVID-19) (Mar. 4, 2020), <https://www.sec.gov/news/press-release/2020-53>. Although there is no federal securities law, rule, or regulation expressly imposing a duty to update forward-looking information, courts have analyzed the possible duty to update under Exchange Act Section 10(b) and Rule 10b-5, and courts are divided as to whether a duty to update exists for forward-looking information that becomes inaccurate or misleading due to the passage of time. Courts that have found a duty to update focus on whether a reasonable investor would continue to rely on such prior disclosure.
 - ⁶ SEC, Exchange Act Form 8-K, Question 2017.02 (Apr. 2, 2008), <https://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm>.
 - ⁷ See PH COVID-19 Client Alert Series: COVID-19 and Emerging Theories of Federal Securities Fraud (Mar. 22, 2020), <https://www.paulhastings.com/publications-items/details/?id=af9ffb6e-2334-6428-811c-ff00004cbded>.
 - ⁸ SEC Release No. 34-88465 (Mar. 25, 2020), <https://www.sec.gov/rules/exorders/2020/34-88465.pdf>.
 - ⁹ Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-10751 (Jan. 30, 2020), <https://www.sec.gov/rules/interp/2020/33-10751.pdf>.

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