

April 9, 2020

# Impact of COVID-19 on Quarterly Reporting; New Statement from SEC Chairman and Director of Division of Corporation Finance

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## Considerations for U.S. Public Companies Preparing for Their First Earnings Cycle Since the Onset of the COVID-19 Pandemic

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### SUMMARY

The evolving impact of COVID-19 will be a key focus for public companies as they prepare to report financial results for the first quarter of 2020. For companies with a December 31 fiscal year, this will be the first reporting cycle since the onset of the COVID-19 emergency around the globe. COVID-19 and the unprecedented measures taken by governmental authorities worldwide in response to the pandemic, including government-mandated closures, stay-at-home orders and extraordinary actions to stabilize markets and mitigate recessionary pressures, have affected, and will continue to affect, economic and financial market conditions globally, as well as the operations, financial results and prospects of companies across virtually all industries and geographies. The importance of the upcoming earnings cycle and related disclosure considerations was highlighted in a statement released on April 8, 2020 by the SEC Chairman, Jay Clayton, and the Director of the Division of Corporation Finance, William Hinman.<sup>1</sup>

Consistent with the SEC's continued call to public companies to report on the impact of COVID-19 in a timely manner and to focus on forward-looking information,<sup>2</sup> in the April 8 statement, Chairman Clayton and Director Hinman urged public companies "to provide as much information as practicable regarding their current financial and operating status, as well as their future operational and financial planning" related to COVID-19. In particular, they emphasized the importance of forward-looking disclosure regarding an issuer's operational and financial affairs during this uncertain time, and stated that "we would not expect

good faith attempts to provide appropriately framed forward-looking information to be second guessed by the SEC.”

Although the COVID-19 pandemic presents a unique set of fact-specific challenges for each issuer, this memorandum highlights general topics issuers should consider as they prepare for upcoming earnings announcements, quarterly reports or other public disclosures. This memorandum focuses on considerations for U.S. domestic issuers, but many of the considerations addressed are also applicable to foreign private issuers with securities listed on United States securities exchanges, and foreign private issuers which are not SEC-reporting companies but may be considering undertaking exempt securities offerings (such as pursuant to Rule 144A) in the United States. We addressed additional disclosure considerations for banking institutions in our memorandum to clients dated April 6, 2020, available [here](#).

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### DISCLOSURE CONSIDERATIONS

As public companies prepare to release first quarter earnings, they should consider carefully how COVID-19 has affected their business and the environment in which they operate, including any effect on their disclosure controls and procedures and internal control over financial reporting, and the risks and uncertainties it has created or amplified. These considerations apply not only to Form 10-Q filings, but to all aspects of their earnings reporting (including earnings releases and investor calls and presentations), and issuers should have consistent messaging across communications and disclosures.

Importantly, for virtually all companies, it is not business as usual this reporting cycle. Business continuity plans have been activated with work-from-home arrangements in place for a substantial number of employees in the United States and other jurisdictions. As a result, many companies are experiencing logistical and operational challenges that affect financial reporting and many companies have sought to address these challenges by accelerating reporting work to complete the work necessary for timely reporting. If, despite appropriate preparations, a company is unable to meet its first quarter filing deadline, the SEC has granted a limited extension, which is discussed in more detail below.

#### A. DISCUSSION OF IMPACTS

Assessing and disclosing the impact of COVID-19 will be an individual exercise for each company. All public companies, however, should focus on providing disclosures that will help investors evaluate the current and expected impact of COVID-19 through the eyes of management. As noted above, the SEC has emphasized the need to provide investors and market participants with appropriate information during this critical time of volatility and uncertainty in our markets and broader economy.<sup>3</sup> Issuers are encouraged to dampen speculation by disclosing how they are affected by and how they are responding to COVID-19 as early as practicable.<sup>4</sup>

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Chairman Clayton and Director Hinman's statement also noted that due to COVID-19 "historical information may be substantially less relevant" and investors 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." These disclosures may include the financial impacts resulting from company efforts to protect workers or, where an issuer receives financial assistance under COVID-19-related federal or state programs that has "materially affected," or is "reasonably likely to have a future material effect upon, financial condition or results of operations," disclosure regarding the nature, amounts and effects of such assistance.

With respect to specific disclosure items, on March 25, the SEC issued guidance ("Disclosure Guidance Topic No. 9") addressing the impact of COVID-19 on disclosure and other securities law obligations.<sup>5</sup> Our memorandum to clients, dated March 30, 2020, summarizing Disclosure Guidance Topic No. 9 is available [here](#). In Disclosure Guidance Topic No. 9, the SEC posed a series of questions for issuers to consider as they work through their disclosure regarding the evolving impact of COVID-19. These questions include how the COVID-19 pandemic:

- impacts financial condition and results of operations;
- affects capital and financial resources, including liquidity;
- affects assets and the ability to timely account for those assets;
- results in material impairments or material increases in allowances or charges;
- adversely affects the ability to maintain operations, including internal control over financial reporting and disclosure controls;
- affects demand for products or services;
- impacts supply chain or methods of distribution; or
- impacts operations as a result of constraints on human capital and productivity.

Disclosure Guidance Topic No. 9 also calls upon issuers to examine whether they have experienced challenges in implementing continuity plans, or whether travel restrictions and border closures are expected to affect operations and a company's ability to achieve business goals. While not exhaustive, the questions serve as a helpful starting point as issuers and management work through the impact of COVID-19 on their quarterly and other disclosure obligations. Issuers should also consider the effect of any new U.S. or international laws or regulations resulting from the COVID-19 pandemic, such as the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act").

Over the course of the last several weeks, the impact of COVID-19 on companies globally has expanded dramatically. Given the rapidly unfolding pandemic, it remains to be seen whether the pace of changes or developments with respect to COVID-19 will be maintained or accelerate over the next several weeks during which many issuers will report quarterly results. In all cases, issuers will need to ensure that their procedures are sufficient to identify and assess developments and impacts through the filing date of their

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Form 10-Q in order to satisfy disclosure requirements, including those regarding subsequent events for financial statement purposes and Management's Discussion and Analysis ("MD&A") disclosure.

Given the ongoing, changing and uncertain situation, it may be difficult for companies to accurately assess or predict the broad effects of COVID-19 on their business and operations, and, in many cases, the actual impact will depend on factors beyond a company's control and knowledge at the time they are making disclosure. As a result, disclosure addressing the impact of COVID-19 will necessarily include forward-looking statements based on assumptions and expectations of future events, and issuers should be encouraged to disclose those assumptions and expectations and will want to update and refine their disclaimers for forward-looking statements under the safe harbors of the Private Securities Litigation Reform Act of 1995 ("PSLRA") in connection with these disclosures. Chairman Clayton and Director Hinman's statement emphasized the importance of these forward-looking statements to investors and, given the uncertainty in the current business environment, recognized the potential litigation and liability concerns from making these statements and encouraged companies to avail themselves of the protections under the PSLRA.

Chairman Clayton and Director Hinman's statement also encouraged issuers to provide "meaningful," rather than boilerplate, forward-looking 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." The statement encouraged companies to "consider the broad frameworks of some of the [forward-looking health and welfare] strategies that have been suggested, how following those strategies may affect their operations and whether that analysis would be of material interest to investors."

### **B. MD&A**

One of the principal areas where issuers will need to consider addressing the impact of COVID-19 is in the MD&A. The MD&A is intended to provide both a historical analysis of the issuer's financial condition and results of operations and an analysis of known events, trends and uncertainties that are likely to impact the issuer's future financial condition and results of operations. The MD&A should address the questions posed by Disclosure Guidance Topic No. 9, to the extent applicable, to allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management. The discussion should include how COVID-19 has impacted an issuer's financial condition and results of operations, and how management expects COVID-19 could impact future operating results and near- and long-term financial condition. For example, Chairman Clayton has urged companies seeking federal relief to disclose information regarding their capital needs and future plans, to the extent they are able to do so.

The MD&A must identify and analyze known events, trends and uncertainties that will, or are reasonably likely to, have a material effect on financial condition or operating performance. Issuers should assess whether the impact of COVID-19 presents known events, trends or uncertainties that are reasonably likely

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to have a material impact on its financial condition or operating performance. In evaluating known events, trends or uncertainties, SEC guidance provides that issuers must first determine whether the trend or uncertainty is reasonably likely to come to fruition, and if so whether the event, trend or uncertainty is reasonably likely to have a material effect on the issuer's financial condition or results of operations. The standard of "reasonably likely" is a lower threshold than "more likely than not" but a higher threshold than "remote."<sup>6</sup>

Trends and uncertainties related to COVID-19 may include, but are not limited to:

- declines in revenue due to decreased demand for an issuer's products or services;
- disruptions in an issuer's operations, production, supply chain and distribution capability;
- increases in costs due to the adverse impact of COVID-19 on an issuer's supply chain or its workforce;
- longer-term effects on an issuer's operations, including from changes in customer behavior;
- increased cost or diminished access to capital and funding resources;
- an issuer's ability to service debt or meet other financial obligations;
- changes in laws or regulations as a result of COVID-19;
- asset impairment (including goodwill and deferred tax assets); and
- whether management expects COVID-19 to impact future operations differently than how it affected the current period.

Discussions should include the effects of these uncertainties on key metrics for the issuer, as well as any potential mitigation efforts and the effects of those mitigation efforts. Given the economic and financial disruptions COVID-19 has caused globally, and the highly uncertain nature of future developments, we expect most issuers will disclose future uncertainties relating to one or more financial or operational metrics in their MD&A disclosure.

### **C. RISK FACTORS**

Form 10-Q requires issuers to include any material changes from risk factors previously disclosed in their Form 10-K. Accordingly, issuers should evaluate whether their prior risk factor disclosure accurately addresses the currently known and anticipated risks presented by COVID-19. Given the rapid developments of the COVID-19 pandemic, prior general pandemic or specific COVID-19 risk disclosure in an issuer's most recently filed Form 10-K will likely need to be updated to address the increasingly far-reaching and significant effects of COVID-19. As a result, issuers should evaluate whether COVID-19 presents heightened or new risks that are not adequately addressed by existing risk factors, or that otherwise warrant further disclosure.

When drafting risk factors, issuers should avoid describing mitigation efforts except to the extent that the disclosure is necessary to contextualize the effects COVID-19 has had on an issuer's business and relates

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to such mitigation efforts potentially being ineffective, insufficient or adverse to the issuer's results of operations or business. For example, if an issuer discusses the activation of its business continuity plan and implementation of work-from-home arrangements for its workforce as a result of the COVID-19 pandemic, the discussion should focus on how continued operation under its business continuity plan and remote working present ongoing risks. Issuers should also consider noting in any risk factors that the situation is still developing and that the extent of the COVID-19 impact is unpredictable and depends on a number of factors outside the issuer's control.

Recent SEC enforcement actions highlight the need for issuers to discuss the risks they face in specific terms and to describe accurately any actual incidents that have occurred or risks that have manifested. For example, the SEC brought an enforcement action against Mylan NV in late 2019 because Mylan, among other things, disclosed in its risk factors that a governmental authority "may" take a contrary position regarding the classification of the EpiPen as a generic drug on Mylan's Medicaid submissions even though the authority had already informed Mylan that the drug had been misclassified.<sup>7</sup> This followed an enforcement action against Facebook earlier in 2019 alleging that Facebook described risk factors associated with the use of customer data as prospective and hypothetical even though those risks had already come to fruition.<sup>8</sup> Accordingly, any new or updated risk factors related to COVID-19 should not describe risks as purely hypothetical if they have actually affected an issuer.

In supplementing and updating existing risk factors, companies may consider the applicability of the following risks, among others:

- **Customer Demand.** The current and future impact on customer demand for products and services, including the impact of consumer illness or quarantine, government actions such as mandated closures, stay-at-home orders and travel restrictions, event cancellation or postponement, and shifts in demand as a result of financial hardship, loss of consumer income, or future uncertainty.
- **Production, Supply Chain and Distribution Disruption and Delay.** The impact to supply chains or methods of distribution, including disruption resulting from the closure of manufacturing facilities, warehouses or distribution centers; the loss or disruption of essential manufacturing and supply elements such as raw materials or finished products; labor shortages; transportation disruptions; or the loss of other production and distribution capability, and the costs and consequences of disruption.
- **Adverse Economic Conditions.** The impact of prolonged negative economic conditions on the issuer and its customers, counterparties, employees and other third parties.
- **Inability of Key Personnel to Perform Their Duties.** The impact of work-from-home policies instituted in response to COVID-19 and mandates from state and local governments to close all non-essential businesses, including potential loss of productivity and increased cybersecurity risks, as discussed in more detail below.
- In addition, certain age groups, which may include senior executive officers and members of an issuer's board of directors, appear to be at higher risk for COVID-19's most serious health impacts. Issuers should consider the adequacy of contingency plans and any potential risks that key employees and/or members of the board of directors are incapacitated or otherwise unable to perform their duties for an extended period of time. If an issuer has a senior executive or director

who has become incapacitated, general disclosure that this may happen will likely not suffice and issuers should consider updating the risk factor to reflect events that have occurred.<sup>9</sup>

- **Business and Travel Disruptions.** As noted above, many issuers have implemented work-from-home policies for a number of personnel and suspended business travel. Issuers should address whether they have implemented, or may implement, these measures, and should consider the impact of these policies on business operations, including any increased costs such as costs incurred to implement necessary operational changes, and risks of prolonged or material business interruption.
- **Disruption of Growth and Strategic Plans.** The spread of COVID-19 may materially adversely affect an issuer's ability to implement plans for growth and expansion, including delaying the construction or improvement of new facilities such as stores, offices or factories as a result of government-mandated shutdowns, labor shortages or negative results of operations; delaying or canceling plans for acquisitions, expansions or entry into new markets; or delaying significant capital expenditures. Issuers should also consider whether any delay or disruption to growth or strategic plans could increase the costs of executing those plans or could continue to have an adverse impact once the COVID-19 pandemic has passed.
- **Liquidity and Access to Capital.** Many issuers face increased credit and liquidity risks as a result of reduced cash flow, volatility in financial markets, increased cost or diminished access to capital and funding sources, and decreased ability to service debt or meet other financial obligations. Issuers may be aware of a high risk of financial covenant defaults under credit agreements or other liquidity sources, and the related risks of any such default should be discussed. Issuers should evaluate their liquidity and credit risks to determine if they face heightened risks that are not adequately disclosed, including the risk of default.
- **Cybersecurity.** Many issuers face increased cybersecurity risks due to the number of employees that are working remotely in regions impacted by stay-at-home orders. Increased levels of remote access create additional opportunities for cybercriminals to exploit vulnerabilities, and employees may be more susceptible to phishing and social engineering attempts due to increased stress caused by the crisis and from balancing family and work responsibilities at home. Cybercriminals may also prey on fears about COVID-19, and take advantage of the current environment in which legitimate information regarding COVID-19 is being frequently and widely disseminated, such as by including malware in emails that appear to include documents providing legitimate information for protecting oneself from COVID-19. In addition, technological resources may be strained due to the number of remote users. Issuers should evaluate their cybersecurity risks in light of these issues and update their existing risk factors for any material changes or developments.<sup>10</sup>
- **Reliance on Vendors and Other Companies.** Many issuers rely on vendors and other third parties to provide critical systems and services. Issuers should consider whether COVID-19 presents heightened or novel risks with respect to continuity of critical services. These risks include the possibility of closure or business interruption. In addition, the definitions of essential services vary by state and may result in some vendors not being able to work from their offices. Stay-at-home orders in other countries may impose stricter requirements. For example, India has instituted a widespread mandate by which nearly all commercial and private establishments are required to close for a period of 21 days, which could have a significant impact on call centers and other services that issuers may outsource to India. Issuers should consider their existing risk factors and whether they face heightened risks of business interruption that are not adequately disclosed.
- **Fluctuations in Stock Price.** Risk factors for many issuers generally note that stock prices may fluctuate and can be affected by a number of factors. Issuers should evaluate the impact of COVID-19 on their stock price and whether risk factors adequately address significant and potentially precipitous changes in price. Decreases in stock prices could have other impacts that are often addressed in risk factors, such as loss of WKSJ status, ability to meet listing requirements and susceptibility to activist activity or takeover offers.

- **Other Impacts on Financial Condition.** A prolonged pandemic may have a number of effects on issuers' financial condition. Fluctuations in the issuer's stock price and cash flow projections as a result of COVID-19 could require the revision of certain accounting estimates and judgments such as those related to the valuation of goodwill, long-lived assets and deferred tax assets, which could have a material adverse effect on an issuer's financial position and results of operations.
- **Business Interruption Insurance.** Many issuers maintain business interruption coverage. Policies, however, may not cover interruptions caused by COVID-19. Issuers should consider the costs of potential business interruptions and whether some or all of the costs may be offset by the issuer's insurance coverage. If policies do not cover interruptions caused by COVID-19 or otherwise do not adequately cover material losses, issuers should consider disclosing those facts in their risk factors.
- **Credit Ratings.** Credit rating agencies have mentioned COVID-19 as a factor in a number of cases where an issuer's credit rating was downgraded or placed on credit watch. Issuers should consider whether there is a material risk that COVID-19 and other factors could result in a credit downgrade and whether such risk is adequately disclosed in its risk factors.
- **Risks Related to Environmental, Social and Governance ("ESG") Issues and Reputational Risk.** In recent years, investors have increased their focus on ESG matters and demanded more robust ESG practices from companies. Issuers should consider possible risks, including the potential for reputational harm if the issuer is viewed as responding slowly or inappropriately to COVID-19, such as by failing to implement appropriate measures for employees or not adequately providing accommodations to customers.
- **Risks Related to Legal and Regulatory Response.** Certain issuers may be adversely impacted by legal and regulatory responses to concerns about COVID-19 and related public health issues, including through government mandates regarding production or operations; commandeering of factories, supply chains or other facilities to support the COVID-19 response; government mandates for extension of insurance coverage and benefits beyond the policy language to cover COVID-19; or government requirements to modify existing contracts such as for the suspension of payments or moratorium on actions. Issuers should be sure to evaluate risks related to any recent legislation or regulatory action, including risks arising from the CARES Act.
- **Suspension of Share Repurchases.** Issuers should consider the need for risk factor disclosure with respect to the suspension or termination of share repurchases. Many issuers have announced suspension of their share repurchase plans in response to COVID-19. Although these voluntary suspensions have generally been for specified periods, there is no assurance they will not be extended. In addition, there has been a focus on share buybacks in Washington, particularly for issuers that have or will take government assistance. For example, the recently passed CARES Act restricts companies that receive government assistance under certain provisions of the CARES Act from paying dividends or making any other capital distributions, including share repurchases, with respect to their common stock. Certain investors only invest in shares of issuers that pay cash dividends, so a cessation of dividend payments could prompt a rotation out of an issuer's shares, putting downward pressure on the issuer's stock price. Further, some issuers may decide to refrain from repurchases, paying dividends or making other capital distributions so as to not risk precluding future assistance should it be needed.

#### D. DISCLOSURE AND INTERNAL CONTROLS

Issuers generally are required to maintain disclosure controls and procedures and internal control over financial reporting, and to evaluate the effectiveness of these controls and procedures at the end of the quarter. Any change in an issuer's internal control over financial reporting during the quarter that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting must be disclosed on Form 10-Q. Additionally, the principal executive officer and principal

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financial officer will be required to provide certifications as to the effectiveness of disclosure controls and procedures for internal control over financial reporting.

Issuers will need to assess carefully their disclosure controls and internal control over financial reporting due to the impacts of COVID-19. The SEC has urged issuers “to work with their audit committees and auditors to ensure that their financial reporting, auditing and review processes are as robust as practicable in light of the circumstances in meeting the applicable requirements.”<sup>11</sup> Additionally, an issuer’s team working on financial reporting should consult with the team coordinating the issuer’s COVID-19 response to fully inform management and the parties involved in disclosure controls of the impact of COVID-19. For example, disclosure committees may need to meet more frequently as part of the quarterly reporting process in light of rapid changes and governmental responses to the pandemic.

In evaluating its internal control over financial reporting in light of COVID-19 and any related changes to the control environment, issuers should consider, among other things:

- how remote working arrangements have impacted the control environment, including as it relates to increased cybersecurity risks;
- how remote working arrangements, facility closures or other operational disruptions, such as the unavailability of personnel, have impacted the ability to appropriately test control procedures;
- how supporting evidentiary materials will be provided to internal and external auditors to support assessments of the effectiveness of the control environment; and
- what impediments there may be to the finance function meeting its responsibilities to prepare reliable financial statements.

Issuers may determine that it is necessary to add additional controls or processes or redesign controls in order to address these concerns and the accompanying risk of material misstatements in their financial statements. Issuers will also need to have in place effective controls for any accounting adjustment resulting from COVID-19. Any changes in internal controls, as well as any delays in closing the books for the quarter, may affect the timing of quarterly reporting and could, depending on the circumstances, give rise to a disclosure obligation in an issuer’s Form 10-Q.

### **E. FINANCIAL STATEMENTS**

In connection with preparing their financial statements, issuers should carefully evaluate the accounting areas that are likely to be affected by COVID-19 and the disclosures regarding adjustments and underlying assumptions and estimates regarding COVID-19. The SEC Chief Accountant recently issued a statement that reiterates the need for high-quality financial reporting in light of COVID-19, and encouraged issuers to contact the SEC’s Office of Chief Accountant (“OCA”) with questions they encounter as a result of COVID-19. In particular, the statement notes that the OCA recognizes that “accounting and financial reporting implications of COVID-19 may require companies to make significant judgments and estimates,”

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which “can be challenging in an environment of uncertainty.”<sup>12</sup> The OCA clarified that it will continue its pattern of not objecting to “well-reasoned judgments” that issuers make, and reiterated the importance of required disclosures of judgments and estimates. The statement also notes that the OCA “remains actively focused on independence matters in these unprecedented times.” Management and board of directors should continue to consider carefully any matter that could affect auditor independence.

Some of the accounting areas that may be affected by COVID-19 include:

- **Asset impairment.** Issuers will need to assess whether there are indicators of impairment (such as decreased revenues, supply chain disruptions and factory or store closures), and if so perform the required impairment tests. In performing these tests, issuers will likely need to make difficult judgments about the nature of the COVID-19 disruptions, including whether such disruptions are temporary. If an asset is determined to be impaired, issuers will then need to make judgments about the recoverable amounts of the asset, which will require making judgments about the economic conditions that will exist over the remaining life of the asset.
- **Fair value measurements.** Where issuers are required or permitted to measure assets or liabilities at fair value, such as for the valuation of investment portfolios, such measurements should reflect market participants’ views of market conditions as of the measurement date, which may be affected by COVID-19. In particular, issuers will need to consider how market participants would evaluate the effects of COVID-19 on their future expectations regarding the affected asset or liability.
- **Debt modifications or restructurings.** Issuers modifying the terms of their existing debt obligations or obtaining waivers from certain covenants as a result of COVID-19 will need to evaluate the accounting implications, including whether a debtor should account for a debt restructuring as a troubled debt restructuring or a debt extinguishment.<sup>13</sup> Issuers will also need to take into account changes in indebtedness such as draws on revolving credit facilities or defaults, and the liquidity of the issuer (see “Going concern,” below).
- **Revenue recognition.** Issuers will need to consider how uncertainties related to COVID-19 would affect the revenue they receive under contracts, including estimates regarding expectations of variable consideration. Issuers should also take into account how the COVID-19 affects the probability of collectability and any price concessions that may be offered, as well as any modifications to such agreements.
- **Going concern.** Issuers will need to evaluate their ability to continue as a going concern within one year after the date of the financial statements. If disruptions from the COVID-19 pandemic, such as prolonged plant closures or liquidity issues, raise substantial doubt about the ability to continue as a going concern, issuers will need to include appropriate disclosure, including management plans to alleviate such doubts.
- **Compensation.** Issuers will need to account for the costs of employment benefits provided due to COVID-19, including benefits to furloughed employees and postemployment benefits for terminated employees. Additionally, issuers will need to evaluate the cost of their equity-based awards, including the effects of COVID-19 on performance conditions and the effects of any modifications to the awards.
- **Subsequent events.** The SEC has emphasized that issuers should consider disclosure of events subsequent to the balance sheet date in their notes to financial statements in accordance with applicable accounting standards.<sup>14</sup> Under US GAAP, subsequent events are either recognized subsequent events, which will require adjustment to the financial statements, or unrecognized subsequent events, which may need to be disclosed in order to keep the financial statements from being misleading. Disclosures regarding material unrecognized subsequent events should include the nature of such events and an estimate of the financial

effect or a statement that such estimate cannot be made. Issuers will need to have procedures in place to evaluate the rapid developments of the COVID-19 pandemic as subsequent events, and evaluate any disclosures that should be provided regarding the effects.

In preparing their financial statements, issuers should also evaluate their disclosure regarding loss contingencies. Issuers will be required to recognize loss contingencies in their financial statements where (1) information available indicates that the loss is probable and (2) the amount of the loss can be reasonably estimated. If there is a reasonable possibility of a loss contingency, but one of the above conditions is not satisfied, issuers will be required to disclose the nature of the contingency and give an estimate regarding the possible loss or range of possible losses (or state why an estimate may not be made). In many cases, given the uncertainties regarding COVID-19, it may not be possible for issuers to provide estimates regarding losses. Issuers should also consider accounting requirements regarding risks and uncertainties, including disclosure of risks and uncertainties that could significantly affect the amounts reported in the issuer's financial statements.

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## EARNINGS RELEASE AND EARNINGS CALL CONSIDERATIONS

### A. GUIDANCE AND REGULATION FD

In light of the dynamic nature of, and the uncertainty surrounding, COVID-19, issuers that have provided guidance in the past should evaluate the appropriateness of confirming, updating or withdrawing previously issued guidance or communicating new financial guidance to the market. Determinations regarding guidance will depend on an issuer's specific circumstances, including its specific guidance policies, the kind and timeframe of the guidance it issues and the industry in which it operates, among other considerations.

As a general matter, the federal securities laws do not impose an affirmative obligation to update previously issued guidance (unless the issuer has indicated that it would update the guidance). However, in light of COVID-19, a number of issuers have determined that prior guidance is no longer accurate and have withdrawn it in advance of securities offerings or reporting their quarterly earnings, often motivated by desires to manage market expectations and facilitate discussions with analysts and investors. Issuers should also consider trends in their specific industry with respect to guidance.

With respect to facilitating discussions with analysts and investors, it is important to keep in mind the restrictions imposed by Regulation FD. Regulation FD provides that no covered person can disclose material nonpublic information ("MNPI") to market professionals or security holders unless such information is simultaneously publicly disclosed. Under Regulation FD, information is considered material if there is a "substantial likelihood that a reasonable shareholder would consider it important" or if the information "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."<sup>15</sup> Given the far-reaching effects of the COVID-19 pandemic, discussions of COVID-19 with investors or analysts could include MNPI, especially to the extent that such discussions regarding COVID-19 would bear on previously issued guidance. Consequently, issuers with outstanding guidance

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need to be very careful in any discussions with analysts and investors, and as a result, many issuers have publicly updated or withdrawn previously issued guidance.

Even without guidance in place, issuers should still consider whether discussions regarding COVID-19 with analysts and investors may contain material information. The SEC has also warned that due to the dynamic circumstances of the COVID-19 pandemic, nonpublic information may hold greater value than under normal circumstances (and therefore is more likely to be MNPI, with a correspondingly greater number of employees now having access to MNPI).<sup>16</sup> Accordingly, issuers should evaluate their Regulation FD policies and procedures to protect against the improper dissemination of MNPI.

**Quarterly reporting.** Many issuers will not have addressed the impacts of COVID-19 on their previously issued guidance by the time of their quarterly reporting or may have revised their guidance in connection with COVID-19 but have since determined that the updated guidance is no longer accurate. Issuers should review their guidance policies and involve their audit committee and auditors in connection with issuing guidance. Due to the uncertainties caused by COVID-19, many issuers may determine that they are unable to issue reliable guidance, in which case they should decline to issue guidance this quarter and consider withdrawing previously issued guidance. In many industries, this has been a common approach, and issuers should expect to receive questions about any new or outstanding guidance, including the underlying assumptions for that guidance. If an issuer feels that it is able to issue reliable guidance, it should consider disclosing the assumptions and expectations upon which the guidance was based and should include appropriate qualifiers such as that the guidance is “expected” or “anticipated.”

In issuing any guidance, issuers should be clear that the guidance constitutes forward-looking statements within the meaning of the PSLRA and, as described above, update and refine their disclaimers for forward-looking statements accordingly. Finally, as issuers provide new guidance and engage with analysts and investors, they should be mindful of their obligations under Regulation FD.

### **B. NON-GAAP FINANCIAL MEASURES AND PERFORMANCE METRICS**

Issuers including non-GAAP financial measures or performance metrics in their quarterly reporting (including in order to adjust for or explain the impact of COVID-19) should prepare their disclosure in accordance with Item 10(e) of Regulation S-K and Regulation G and other applicable SEC disclosure requirements, as well as SEC guidance on non-GAAP financial measures and performance metrics. Disclosure Guidance Topic No. 9 provides additional guidance on the use of non-GAAP measures in connection with COVID-19, including the ability to reconcile non-GAAP measures to estimates or reasonable ranges of GAAP results, other than in filings where GAAP financial statements are required. Disclosure Guidance Topic No. 9 also directs issuers reconciling to provisional amounts or estimated ranges to limit disclosures to those non-GAAP financial measures they use to report results to their boards of directors, reminding issuers that the SEC staff does not believe it is appropriate for an issuer to present non-GAAP financial measures or metrics for the sole purpose of presenting a more favorable view of the

issuer. Additionally, Disclosure Guidance Topic No. 9 notes that issuers including key performance indicators and metrics to describe the impacts of COVID-19 should be sure to comply with disclosure requirements for such metrics, including disclosing why management finds those measures useful and how those measures help investors assess the impact of COVID-19. More information on the guidance provided in Disclosure Guidance Topic No. 9 regarding non-GAAP measures and performance metrics is included in our memorandum to clients dated March 30, 2020, available [here](#), and more information on the SEC's guidance regarding performance metrics is included in our memorandum to clients dated February 5, 2020, available [here](#).

### C. EARNINGS CALLS

Due to COVID-19, issuers will likely need to conduct their earnings call differently from their normal practice. As a result, issuers should begin planning for their earnings call earlier than in the normal course, even if they are not yet able to set a date for the call, and consider the implications of any changes to their normal practices and those of their vendors.

- ***Earnings calls should be Regulation FD compliant.*** Issuers must give public notice a “reasonable period” ahead of the call, which the SEC has described as notice of several days for a quarterly earnings announcement. Due to the effects of COVID-19, issuers may not be able to finalize and announce a date for their earnings release in accordance with their customary timelines, and consequently their earnings call may occur later in the process or with less notice than normal. Even if the timeline for an earnings call changes, issuers should still provide adequate notice in advance of the earnings call.
- ***Presentations should align with earnings release and overall message.*** Issuers should carefully review whether any slide decks or other materials to be presented on the earnings call accurately reflect the current state of the business in light of COVID-19. For example, issuers may normally use standard slide deck templates that are updated for each earnings call. These slide decks should have sufficient disclosure about the impacts of COVID-19 and should not inadvertently give an overly optimistic impression.
- ***Management will need to find ways to coordinate communications while working remotely.*** Due to restrictions in movement, officers may be required to join the call from different locations and without their broader team in close proximity as may be customary. This may limit their ability to communicate with one another, including in connection with answering questions from analysts. Issuers should consider ways in which team members can coordinate during the call, and implement mechanisms for team members to be easily reached during the call.
- ***Management should be familiar with any new technology well in advance of the call.*** Due to COVID-19, issuers may be using new and different technology. As a result, call participants should conduct a dry run with any new technology in advance, and issuers should prepare for any contingencies in connection with the call, such as interruptions in service or the need to postpone the call.
- ***Be prepared to address health issues of management.*** Issuers should consider the health of each of the participants in the call and other senior executives of the issuer and be prepared to answer questions on this topic from analysts. If any senior executives are unable to participate in the call due to COVID-19-related illness, issuers should consider disclosing this in advance of the call.<sup>17</sup>

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In light of the evolving impact of COVID-19, some issuers may also consider not conducting an earnings call. While earnings calls are not required under securities laws, they are customarily part of quarterly reporting and during this time may help promote a sense of normalcy and investor transparency by demonstrating that management and other relevant parties continue to perform their normal functions despite the crisis. In addition, earnings calls frequently serve as a Regulation FD-compliant means for issuers to facilitate discussions with analysts and investors as a supplement to the disclosures made in the earnings release. If an issuer determines it will not be conducting an earnings call, it will need to be mindful of Regulation FD's prohibition on selective disclosure of MNPI in any discussions with investors and analysts.

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### TIMING CONSIDERATIONS

#### A. SEC FILING EXTENSION

In recognition of the operational and other challenges presented by COVID-19, as anticipated, the SEC recently extended the scope of conditional relief it announced earlier in March. Under the extension, issuers meeting certain conditions (discussed in our prior memorandum to clients, dated March 30, 2020, available [here](#)) may qualify for relief from some of the requirements under the Securities Exchange Act of 1934. Among other things, issuers that are unable to meet a filing deadline due to the COVID-19 crisis may receive a 45-day extension on Exchange Act reports due between March 1 and July 1, 2020 (as compared to the original March 1 to April 30, 2020 period under the SEC's March 4 order). For issuers with a fiscal year ending December 31, the Form 10-Q filing deadline would be extended from May 11 to June 25, 2020 for Large Accelerated and Accelerated Filers and from May 15 to June 29, 2020 for Non-Accelerated Filers. Even if issuers meet the requirements for the extension, they may be constrained by other agreements in availing themselves of the relief. Accordingly, issuers should review their agreements and any other obligations, particularly covenants in indentures, credit agreements and other debt agreements, to evaluate whether they impose independent deadlines on reporting that would be implicated if an issuer delayed its reporting.

#### B. CONSIDERATIONS FOR ISSUERS TAKING ADVANTAGE OF EXTENSION

Issuers that file their quarterly reports on a delayed basis may wish to provide information in the form of an earnings release or preliminary results announcement in advance of filing their Form 10-Q. Although such information may be preliminary, issuers have exposure under the securities laws for material misstatements or omissions in such disclosures. Issuers should therefore evaluate whether their internal control over financial reporting and disclosure controls and procedures are operating effectively to enable accurate disclosures, including with respect to key reporting metrics. To the extent that any results are preliminary, issuers should convey that information to investors, indicating how that information may change. Of particular concern would be positive information that leads investors to believe that the final reported results will be more favorable than they are. In deciding whether to report preliminary results, issuers will want to

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consider their confidence level in the disclosures. Issuers and their IR departments may also feel driven to report results early based on misinformation in the market as to the likely results of COVID-19 on their business. Reporting preliminary results will also provide issuers the ability to talk with analysts and investors about those results, subject to compliance with Regulation FD. As always, issuers may not convey MNPI during those discussions, but by releasing preliminary results, issuers may reduce the risk of inadvertent disclosures.

### C. REPORTING PREPARATIONS

Regardless of their timing for reporting first quarter earnings, issuers should begin planning as early as possible and involve the relevant parties, including the audit committee and auditors, early in the planning process. Additionally, issuers should monitor for new developments that would impact their disclosures and evaluate their contingency plans to account for the uncertainties and rapid changes stemming from COVID-19.

While the topics discussed in this memorandum provide general considerations for issuers, each issuer's reporting and disclosure is unique, and therefore should be carefully tailored to its particular facts and circumstances.

\* \* \*

## ENDNOTES

- 1 See SEC, The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19 (Apr. 8, 2020), available at <https://www.sec.gov/news/public-statement/statement-clayton-hinman>.
- 2 In a statement issued on April 2, 2020, SEC Chairman Clayton emphasized that while challenges may impact the timing of certain filings, the staff is “keenly focused on ensuring that issuers and other registrants continue to provide material information to investors, including information related to the current and expected effects of COVID-19, as promptly as practicable.” See SEC, Investors Remain Front of Mind at the SEC: Approach to Allocation of Resources, Oversight and Rulemaking; Implementation of Regulation Best Interest and Form CRS (Apr. 2, 2020), available at <https://www.sec.gov/news/public-statement/statement-clayton-investors-rbi-form-crs>.
- 3 See SEC, Special Meeting of the Investor Advisory Committee (Apr. 2, 2020), available at <https://www.sec.gov/news/public-statement/statement-clayton-investor-advisory-2020-04-02>.
- 4 See CNBC Transcript: SEC Chairman Jay Clayton Speaks with CNBC’s Andrew Ross Sorkin on “Squawk Box” Today (Apr. 7, 2020), available at <https://www.cnbc.com/2020/04/07/cnbc-transcript-sec-chairman-jay-clayton-speaks-with-cnbc-s-andrew-ross-sorkin-on-squawk-box-today.html>.
- 5 See Division of Corporation Finance Disclosure Guidance Topic No. 9 (Mar. 25, 2020), available at <https://www.sec.gov/corpfin/coronavirus-covid-19>.
- 6 See Division of Corporation Finance Financial Reporting Manual, Topic 9 – Management’s Discussion and Analysis of Financial Position and Results of Operations (MD&A), available at <https://www.sec.gov/corpfin/cf-manual/topic-9>.
- 7 See SEC, Mylan to Pay \$30 Million for Disclosure and Accounting Failure Relating to EpiPen (Sept. 27, 2019), available at <https://www.sec.gov/news/press-release/2019-194>.
- 8 See SEC, Facebook to Pay \$100 Million for Misleading Investors About the Risks It Faced From Misuse of User Data (July 24, 2019), available at <https://www.sec.gov/news/press-release/2019-140>.
- 9 For more information on disclosure considerations in connection with senior executive illness due to COVID-19, see our memorandum to clients, dated March 20, 2020, entitled “Senior Executive Illness Due to COVID-19,” available at <https://www.sullcrom.com/files/upload/SC-Publication-Disclosure-Considerations-Senior-Executive-Illness-Due-to-COVID-19.pdf>.
- 10 For a general discussion of heightened cybersecurity risks that may affect companies as a result of COVID-19, see our memorandum to clients, dated March 30, 2020, entitled “Heightened Cybersecurity Risks Resulting From COVID-19’s Effects on Operations: Companies Should Be Alert to Cybercriminals Exploiting Remote Working Vulnerabilities and Interest in COVID-19,” available at <https://www.sullcrom.com/files/upload/SC-Publication-Heightened-Cybersecurity-Risks-Resulting-From-COVID-19.pdf>.
- 11 See SEC, Statement on Continued Dialogue with Audit Firm Representatives on Audit Quality in China and Other Emerging Markets; Coronavirus — Reporting Considerations and Potential Relief (Feb. 19, 2020), available at <https://www.sec.gov/news/public-statement/statement-audit-quality-china-2020-02-19>.
- 12 See OCA, Statement on the Importance of High-Quality Financial Reporting in Light of the Significant Impacts of COVID-19 (Apr. 3, 2020), available at <https://www.sec.gov/news/public-statement/statement-teotia-financial-reporting-covid-19-2020-04-03>.
- 13 With respect to lender accounting of debt modifications, the CARES Act and banking regulators have provided for the ability for lenders to make short-term loan modifications in connection with COVID-19 without such modifications being considered troubled debt restructurings under US GAAP. See our memorandum to clients, dated March 29, 2020, entitled “Coronavirus Aid, Relief, and Economic Security Act,” available at [-16-](https://www.sullcrom.com/files/upload/SC-Publication-</a></li></ol></div><div data-bbox=)

ENDNOTES (CONTINUED)

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- [Coronavirus-Aid,-Relief,-and-Economic-Security-Act.pdf](#) and our memorandum to clients, dated March 22, 2020, entitled “Interagency Statement on Loan Modifications and Reporting,” *available at* <https://www.sullcrom.com/files/upload/SC-Publication-Bank-Regulators-Issue-Statement-on-COVID-19-Related-Loan-Modifications.pdf>.
- 14 See Statement on Continued Dialogue with Audit Firm Representatives on Audit Quality in China and Other Emerging Markets; Coronavirus — Reporting Considerations and Potential Relief (Feb. 19, 2020), *available at* <https://www.sec.gov/news/public-statement/statement-audit-quality-china-2020-02-19>.
- 15 Release No. 33-7881, Final Rule: Selective Disclosure and Insider Trading (Aug. 15, 2000), *available at* [https://www.sec.gov/rules/final/33-7881.htm#P110\\_41725](https://www.sec.gov/rules/final/33-7881.htm#P110_41725).
- 16 See SEC, Statement from Stephanie Avakian and Steven Peikin, Co-Directors of the SEC’s Division of Enforcement, Regarding Market Integrity (Mar. 23, 2020), *available at* <https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity>.
- 17 See *supra* note 9.

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## ABOUT SULLIVAN & CROMWELL LLP

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# Disclosure Requirements on COVID-19 Impact for Issuers in Europe

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## European Securities and Markets Authority and National Supervisory Authorities Underline Certain Disclosure Rules that Apply to Issuers in the Context of the COVID-19 Outbreak

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### SUMMARY

In light of the COVID-19 pandemic, the European Securities and Markets Authority (“ESMA”), the French Financial Market Authority (*Autorité des marchés financiers*) (“AMF”), the United Kingdom (“UK”) Financial Conduct Authority (“FCA”) and Financial Reporting Council (“FRC”) as well as the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) (“BaFin”) recently reminded market participants of their disclosure and other transparency obligations under applicable European and national laws.

In this regard, the European authorities particularly stressed the importance of the timely disclosure of inside information in accordance with Regulation (EU) No 596/2014 of the European Parliament and the Council of 16 April 2014 on market abuse (as amended, the “Market Abuse Regulation”). However, in light of the current circumstances, ESMA and the other European supervisory authorities have provided certain facilitations with respect to the forthcoming publication of the annual and half-yearly financial statements and reports. While partially focusing on different special topics, European regulators, based on harmonized European capital markets laws, are generally very consistent in their guidance to market participants.

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### DISCLOSURE REQUIREMENTS ON COVID-19 IMPACT

In view of the continuing impact of the COVID-19 outbreak on financial markets and issuers’ business activities, financial position and economic performance in Europe, ESMA and national supervisory authorities in Europe have reminded issuers of their disclosure requirements under applicable European and national regulations.

#### 1. Ad Hoc Disclosure of Inside Information

Pursuant to Art. 17 of the Market Abuse Regulation, issuers are required to inform the public as soon as possible of inside information – *i.e.*, precise, non-public information relating, directly or indirectly, to

one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of their financial instruments.<sup>1</sup>

### ***ESMA: Importance of the Disclosure Rules Regarding Inside Information in the Context of the COVID-19 Outbreak***

On March 11, 2020, ESMA emphasized the importance of such ad hoc disclosure rules in light of the current crisis.<sup>2</sup> Whereas the COVID-19 pandemic is a well-known crisis which has an impact on all sectors of the economy, the specific measures taken by each issuer to cope with the crisis or the specific impact of the crisis on the issuer could be considered as inside information if such information is price sensitive, *i.e.*, it might have a significant impact on the price of financial instruments issued by such issuer. Against this background, ESMA reminded issuers to particularly disclose as soon as possible any significant impact of the COVID-19 outbreak on their “*fundamentals, prospects or financial situation.*”

Similar statements, stressing the overall importance of the disclosure rules in times of crisis, have been issued by other national supervisory authorities in Europe. For example, the AMF made similar recommendations to ESMA on February 28, 2020, at a time when COVID-19 had just begun to spread across Europe, asking issuers to disclose without delay, through the publication of an ad hoc release, “*any knowledge of the epidemic’s significant impact on the activity, performance or prospects of the issuer*”<sup>3</sup>. Also, the FCA reminded issuers of their obligation to comply with their obligations under the Market Abuse Regulation and related FCA rules in a market bulletin published on March 17, 2020.<sup>4</sup>

### ***Specific Guidance by National Supervisory Authorities***

In addition to this rather generic advice, the BaFin, the AMF and the FCA have published more specific advice relating to the disclosure of inside information:

- ***Guidance by the BaFin:*** In FAQs published on its website on March 20, 2020, the BaFin pointed out that changes of forecasts due to the COVID-19 crisis only have to be disclosed “*if they are sufficiently probable*”<sup>5</sup> and, given recent uncertainties, issuers:
  - are entitled to maintain their previous forecasts as long as they cannot predict the actual impact of the COVID-19 crisis;
  - should withdraw their previously announced forecasts through the publication of an ad hoc release without providing new guidance in case there is a sufficient degree of likelihood that the actual results will significantly fall short of the previously announced forecasts, even if they are unable to provide a new detailed forecast; and
  - have to disclose the new forecast in the form of an ad hoc disclosure once they can provide a sufficiently detailed forecast.<sup>6</sup>

With respect to the upcoming publication of quarterly financial figures, the BaFin highlighted that it is aware of current market volatility and the associated difficulties when determining if the difference between the actual figures and market expectations has a significant effect on the prices of the related financial instrument, and would therefore need to be regarded as inside information and published as soon as possible within the meaning of the Market Abuse Regulation.<sup>7</sup>

In this regard, the BaFin pointed out that – in contrast to its usual practice pursuant to which market expectations have to be determined on the basis of the mean value (arithmetical mean) of current analyst estimates – other means of determining market expectations “*on the basis of*

*plausible information*” are permissible in case the mean value cannot be determined (e.g., because there are not enough estimates available).<sup>8</sup> Furthermore, the BaFin indicated that “on an exceptional basis” it might also be justifiable to adjust existing consensus estimates if they are “clearly no longer up-to-date and do not take into account the current situation.”<sup>9</sup>

The BaFin also stated that the mere postponement of an issuer’s annual general meeting and the associated postponement of the resolution on the distribution of profits does not in and of itself constitute inside information. However, if the issuer plans to change its dividend policy (e.g., as a result of the recommendation made by the European Central Bank to banks to not pay any dividends) or if other resolutions material to the issuer (e.g., relating to capital measures) will be postponed, such information could be regarded as inside information subject to an ad hoc disclosure obligation under the Market Abuse Regulation.<sup>10</sup>

- **Guidance by the AMF:** The AMF recommended that issuers periodically re-assess the known or anticipated impact of the COVID-19 pandemic on the issuer’s activity, performance or prospects with respect to the materiality and/or amount of such impact.<sup>11</sup> In this regard, the AMF also indicated, on March 23, 2020, that where a significant impact of the COVID-19 outbreak is known or anticipated, previously announced guidance that did not include an assumption regarding the potential impact of COVID-19 must be restated and disclosed by way of a press release from the issuer and published in accordance with the *Règlement général* of the AMF.<sup>12</sup> To date, several issuers of the French CAC40 index have issued ad hoc press releases withdrawing their previously announced forecasts without providing new guidance.<sup>13</sup>
- **Guidance by the FCA:** In addition to the points raised by the BaFin and the AMF, the FCA has also stated<sup>14</sup> that it appreciated, that, in the short term, there may be slight delays in making required disclosures as new processes are put in place to assess the situation. While there is no guidance on what is an acceptable length of delay, past cases suggest that “short” really means very short. (For example, in relation to Marconi,<sup>15</sup> the Financial Services Authority (as the FCA was then known) stated that a reasonable delay of the announcement of materially reduced expected financial performance would have been no more than 24 hours rather than the three days that it actually was taken.)

## 2. Yearly and Half-Yearly Financial Statements and Reports

Pursuant to Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (as amended, the “Transparency Directive”), issuers have to publish their financial reports (including audited financial statements and management report), at the latest, four months after the end of each financial year – i.e., issuers that closed their accounts on December 31, 2019 have to publish their financial reports on or prior to April 30, 2020.<sup>16</sup> In addition, issuers must also publish a half-yearly financial report, as soon as possible after the end of the relevant period.<sup>17</sup>

In France, the aforementioned deadlines were transposed to national law by Art. L. 451-1-2 of the French Monetary and Financial Code (*Code monétaire et financier*), in Germany by Sections 114 and 115 of the German Securities Trading Act (*Wertpapierhandelsgesetz*) and in the UK by a regulatory statement by the FCA.

### **ESMA: No Priority of Supervisory Actions Against Issuers Failing to Meet Deadlines**

In a statement published on March 27, 2020, ESMA acknowledged the difficulties encountered by issuers in preparing financial reports and the challenges faced by auditors in carrying out timely audits of accounts due to the COVID-19 pandemic, which may impair the ability of issuers to publish within

the legislative deadlines. In this regard, ESMA announced that it expected national supervisory authorities not to prioritize supervisory actions against issuers in respect of the upcoming deadlines to publish their annual and half-yearly financial reports for two-month and one-month periods, respectively, after the deadlines set out by in the Transparency Directive.<sup>18</sup>

### ***Specific Guidance by National Supervisory Authorities***

Whereas the BaFin has not issued any additional guidance with respect to the deadlines and the preparation of the financial reports,<sup>19</sup> the national supervisory authorities in France and the UK have issued further guidance as summarized below:

- ***Guidance by the AMF:*** The AMF has advised issuers that information regarding the main risks and uncertainties to which they are exposed as a result of the COVID-19 pandemic should be provided in their annual financial reports, including their management reports.<sup>20</sup> For issuers that closed their accounts on December 31, 2019, those risks and uncertainties are those that the issuer faces on the date of publication of its annual financial report (*i.e.*, on or prior to April 30, 2020). In addition, the AMF notes that the actual and potential impacts of the COVID-19 outbreak could also be considered as post-closing events requiring disclosure in issuers' year-end 2019 financial statements.<sup>21</sup> For those issuers that have already finalized and published their 2019 year-end financial reports, information regarding the impacts of the COVID-19 outbreak will need to be provided in their interim financial reporting disclosures. The AMF has also granted issuers a two-month extension to publish their annual financial reports (for issuers that have a financial year ending between December 31 and March 31) and a one-month extension to publish the half-year financial reports which would have normally been published during that same period.<sup>22</sup>
- ***Guidance by the FCA:*** The FCA has granted issuers a temporary two-month extension, to the four months from the end of their financial year they normally have, to publish their audited annual financial reports.<sup>23</sup> The FCA confirmed that it will not take normal regulatory action against issuers who avail themselves of this extension. However, the FCA reserves the right to take this action if necessary for other reasons. The FCA has also published a Q&A document providing additional information on the duration, scope and applicability of the temporary relief. Among other things, this confirms that:
  - The FCA will also give temporary relief from taking action against issuers with a UK listing that are not required to comply with the Transparency Directive, but are subject to the requirement to publish annual financial reports via other UK listing requirements.
  - The temporary relief does not extend to half-yearly financial reports which should be published within three months of the half-year end.
- ***Guidance by the FRC:*** In addition to the measures taken by the FCA, the FRC has issued further guidance<sup>24</sup> for UK companies preparing financial statements in the current uncertain environment. The guidance addresses the following topics:
  - ***Capital maintenance.*** Boards are required to pay attention to capital maintenance, ensuring that sufficient reserves are available when the dividend is made, not just when it is proposed. Relevant considerations when assessing whether a dividend is appropriate should include current and likely operational and capital needs, contingency planning and the directors' legal duties, both in statute and common law.
  - ***Forward-looking statements.*** The guidance also addresses the current difficulties in making forward-looking judgments in financial statements, including the company's strategic reports and viability statements, and aims to help boards to focus on areas of reporting of most interest to investors, and to encourage them to provide clarity on the use of key forward-looking judgments. The guidance covers in particular:
    - The need for narrative reporting to provide forward-looking information that is specific to the entity and which provides insights into the board's assessment

of business viability and the methods and assumptions underlying that assessment.

- Going concern and any associated material uncertainties, the basis of any significant judgements and the matters to consider when confirming the preparation of the financial statements on a going-concern basis.

### 3. Universal Registration Documents: Risk Factors and Financial Guidance

Another topic, which was predominantly addressed by the AMF in a statement published on March 23, 2020, is the impact of the COVID-19 pandemic on the description of the business, financial situation and outlook in the universal registration document (“URD”) of an issuer.<sup>25</sup> In accordance with Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (as amended, the “Prospectus Regulation”), the persons responsible for the prospectus must declare that, to the best of their knowledge, the information contained in the prospectus is “*in accordance with the facts*” and that “*the prospectus makes no omission likely to affect its import.*”<sup>26</sup> In this regard, the AMF stated, with respect to risk factors and financial guidance, the following:

- **Risk Factors:** In its March 23, 2020 communication, the AMF highlighted that the “Risk Factors” section of URDs and prospectuses should be up-to-date regarding COVID-19 upon filing of the URD or prospectus. The risk factors included in this section should be limited to risks which are material and specific to the issuer and its securities, as corroborated by the content of the URD or prospectus.<sup>27</sup> As regards the specificity of the risk factors, and in accordance with the relevant guidelines published by ESMA,<sup>28</sup> the AMF invited market participants to describe, where possible, the impact of the COVID-19 pandemic on their businesses and/or their main customers’ and suppliers’ specific uncertainties resulting from their businesses or geographical areas. Since the materiality and potential impact of the risk factor should be clear from the disclosure, the AMF also asked issuers to disclose any significant known or anticipated impact of the COVID-19 outbreak, along with their underlying assumptions.
- **Financial Guidance:** As regards forward-looking statements made by issuers, the AMF noted that those statements should be re-assessed in light of the current COVID-19 crisis, and the relevant disclosure included in the URD should be revised accordingly, in particular the information provided with respect to (i) item 5.4 “Strategy and objectives,” which includes a description of the issuer’s business strategy and objectives, taking into account its future challenges and prospects, and (ii) item 11 “Profit forecasts or estimates,” which should describe the issuer’s profit forecast or profit estimates, if any, and set out the principal assumptions upon which the issuer has based its forecast or estimate.

The AMF reminded issuers that where a profit forecast or estimate has been published by the issuer but is no longer valid, issuers must provide a statement to that effect in the URD along with an appropriate explanation, in accordance with Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (as amended, the “Commission Delegated Regulation”).<sup>29</sup> Given the limited visibility due to the evolving COVID-19 situation, issuers may decide to withdraw their outstanding profit forecast without disclosing a new forecast to the market and to further indicate that a new forecast cannot be provided at this stage given the uncertainty resulting from the current COVID-19 situation. This AFM guidance is in line with the corresponding BaFin FAQ (see above).

## Conclusion

In their guidance, ESMA and the national supervisory authorities of France, Germany and the UK demonstrated that they are aware of the challenges faced by issuers in the context of the COVID-19 outbreak. Although they reminded issuers to adhere strictly to the ad hoc disclosure rules pursuant to the Market Abuse Regulation, ESMA and the other European supervisory authorities have eased the regulatory burden on issuers by providing certain facilitations with respect to the forthcoming publication of the annual and half-yearly financial statements and reports. Given the level of harmonization of European capital markets law, it can be noted that all European regulators, while partially focusing on different special topics, are generally very consistent in their guidance to market participants and are thereby able to increase legal certainty in a time of great economic and financial uncertainty.

\* \* \*

## ENDNOTES

- 1 See Market Abuse Regulation, Art. 17(1).
- 2 See ESMA's press release, dated March 11, 2020, <https://www.esma.europa.eu/press-news/esma-news/esma-recommends-action-financial-market-participants-covid-19-impact>.
- 3 See AMF's press release, dated February 28, 2020, <https://www.amf-france.org/fr/actualites-publications/communiqués/communiqués-de-lamf/autorité-des-marchés-financiers-rappelle-certaines-regles-dinformation-qui-sappliquent-aux-sociétés>.
- 4 FCA 27<sup>th</sup> Primary Market Bulletin, dated March 17, 2020, <https://www.fca.org.uk/publications/newsletters/primary-market-bulletin-issue-no-27-coronavirus-update>.
- 5 See BaFin's FAQs, available at [https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus\\_node\\_en.html](https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html).
- 6 See, for example, the ad hoc releases of Infineon Technologies AG, dated March 26, 2020, <https://www.infineon.com/cms/en/about-infineon/investor/news/adhoc/>, and of Thyssenkrupp AG, dated March 23, 2020, <https://www.thyssenkrupp.com/en/newsroom/press-releases/disclosure-of-an-inside-information-according-to-article-17-mar--reliable-assessment-of-the-business-development-in-the-2019-2020-financial-year-currently-not-possible-20032.html>.
- 7 See BaFin's FAQs, available at [https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus\\_node\\_en.html](https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html).
- 8 See BaFin's FAQs, available at [https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus\\_node\\_en.html](https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html).
- 9 See BaFin's FAQs, available at [https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus\\_node\\_en.html](https://www.bafin.de/EN/Aufsicht/CoronaVirus/CoronaVirus_node_en.html).
- 10 See, for example, the ad hoc releases of Commerzbank Aktiengesellschaft, dated March 30, 2020, [https://www.commerzbank.com/en/hauptnavigation/aktionaere/service/archive/ir-nachrichten/1/2019/1/ir\\_nachrichten\\_detail\\_19\\_87818.html](https://www.commerzbank.com/en/hauptnavigation/aktionaere/service/archive/ir-nachrichten/1/2019/1/ir_nachrichten_detail_19_87818.html), and of Deutsche Lufthansa Aktiengesellschaft, dated March 13, 2020, <https://investor-relations.lufthansagroup.com/en/news/ad-hoc-releases/investor-relations-ad-hoc-releases/date/2020/03/13/lufthansa-executive-board-proposes-to-suspend-the-dividend-payment-and-decides-on-further-measures-t.html>.
- 11 See AMF's press release, dated February 28, 2020, <https://www.amf-france.org/fr/actualites-publications/communiqués/communiqués-de-lamf/autorité-des-marchés-financiers-rappelle-certaines-regles-dinformation-qui-sappliquent-aux-sociétés>.
- 12 See AMF's press release, dated March 23, 2020, <https://www.amf-france.org/fr/actualites-publications/actualites/depots-des-documents-denregistrement-universels-et-regles-dinformation-permanente-dans-le-contexte>.
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- 14 See FCA statement of Policy: Delaying annual company accounts during the corona virus crisis dated March 26, 2020, <https://www.fca.org.uk/news/statements/delaying-annual-company-accounts-coronavirus>.
- 15 FSA Final Notice Marconi plc: dated April 11, 2003, [https://www.fca.org.uk/publication/final-notices/marconi\\_11apr03.pdf](https://www.fca.org.uk/publication/final-notices/marconi_11apr03.pdf).
- 16 See Transparency Directive, Art. 4(1).
- 17 See Transparency Directive, Art. 5(1).

## ENDNOTES (CONTINUED)

- <sup>18</sup> See ESMA's press release, dated March 27, 2020, <https://www.esma.europa.eu/press-news/esma-news/esma-issues-guidance-financial-reporting-deadlines-in-light-covid-19>.
- <sup>19</sup> See BaFin press release, dated March 27, 2020, [https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Meldung/2020\\_Corona\\_andereBehoerden/meldung\\_2020\\_03\\_27\\_corona\\_virus18\\_ESMA\\_Finanzberichte.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Meldung/2020_Corona_andereBehoerden/meldung_2020_03_27_corona_virus18_ESMA_Finanzberichte.html).
- <sup>20</sup> See AMF's press release, dated February 28, 2020, <https://www.amf-france.org/fr/actualites-publications/communiqués/communiqués-de-lamf/lautorite-des-marchés-financiers-rappelle-certaines-regles-dinformation-qui-sappliquent-aux-societes>, and French *Code de commerce*, Art. L. 225-100-1.
- <sup>21</sup> See AMF's press release, dated February 28, 2020, <https://www.amf-france.org/fr/actualites-publications/communiqués/communiqués-de-lamf/lautorite-des-marchés-financiers-rappelle-certaines-regles-dinformation-qui-sappliquent-aux-societes>.
- <sup>22</sup> See AMF's press release, dated March 30, 2020, <https://www.amf-france.org/fr/actualites-publications/actualites/continuite-de-linformation-periodique-dans-le-contexte-depidemie-de-coronavirus>.
- <sup>23</sup> See FCA statement of Policy: Delaying annual company accounts during the corona virus crisis dated March 26, 2020, <https://www.fca.org.uk/news/statements/delaying-annual-company-accounts-coronavirus>.
- <sup>24</sup> FRC Guidance for Companies COVID 19 March update, [https://www.frc.org.uk/about-the-frc/covid-19/company-guidance-update-march-2020-\(covid-19\)](https://www.frc.org.uk/about-the-frc/covid-19/company-guidance-update-march-2020-(covid-19)).
- <sup>25</sup> See AMF's press release, dated March 23, 2020, <https://www.amf-france.org/fr/actualites-publications/actualites/depots-des-documents-denregistrement-universels-et-regles-dinformation-permanente-dans-le-contexte>.
- <sup>26</sup> See Prospectus Regulation, Art. 11(1).
- <sup>27</sup> See Prospectus Regulation, Art. 16(1).
- <sup>28</sup> See ESMA, Guidelines on Risk Factors under the Prospectus Regulation, dated October 1, 2019, [https://www.esma.europa.eu/sites/default/files/library/esma31-62-1293\\_guidelines\\_on\\_risk\\_factors\\_under\\_the\\_prospectus\\_regulation.pdf](https://www.esma.europa.eu/sites/default/files/library/esma31-62-1293_guidelines_on_risk_factors_under_the_prospectus_regulation.pdf).
- <sup>29</sup> See Commission Delegated Regulation, Annex I, Item 11.1.

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## PIPEs: Key Issues to Consider

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As public companies look to access sources of additional liquidity, some companies are exploring the possibility of issuing equity or convertible debt on a private placement basis in a so-called “PIPE”, or a private investment in public equity, transaction. Below we discuss select issues that issuers should consider as they explore this type of financing.

1. **Stock Exchange Shareholder Approval:** Both Nasdaq and the NYSE require listed companies to obtain shareholder approval for certain issuances of common stock or securities convertible into common stock, including certain issuances of 20% or more of the issuer’s outstanding common stock. Several of the requirements particularly as they relate to convertible securities are complex and may appear counterintuitive. Both exchanges also have exceptions from the shareholder approval requirement for issuers that face financial hardships requiring prompt access to capital, although this exception is limited in scope and requires prior approval from Nasdaq or the NYSE, as applicable. Whether Nasdaq and NYSE expand their interpretation of this exception in light of COVID-19 has not yet been tested. Issuers considering a private placement (as well as certain registered offerings) will want to consult with counsel early in the process to confirm whether shareholder approval is required and whether an exemption may be available.
2. **Charter Documents:** Issuers should review their organizational documents to ensure that they have sufficient authorized shares, whether preferred or common stock, to complete the transaction. Even if an issuer is not required to obtain shareholder approval under stock exchange rules, amendments of a company’s charter to increase the authorized shares would typically require shareholder approval. Preferred equity or convertible debt also may provide issuers with greater flexibility than issuing straight common stock, given the ability to vary conversion rates, liquidation preferences, interest and dividend rates, and other terms.
3. **Change of Control Issues:** Depending on the amount and type of equity being issued and the extent that it is being issued to a small number of investors and the nature of any related changes

in the composition of the Board of Directors, counsel should evaluate whether the transaction may result in a change of control under a company's equity incentive plans, credit documents or other contracts.

4. **Credit Agreements/Indentures:** Issuers should review their credit agreements and indentures to understand the implications of an equity or convertible debt issuance and ensure that they comply with the terms of those agreements and indentures, including with respect to any requirements relating to the use of proceeds of the issuance. Key provisions typically will include change of control, mandatory prepayment, debt and liens.
5. **Antitrust:** Depending on, among other things, the size and purpose of the investment by investors, antitrust approval (or other regulatory approval in regulated industries) may be needed in connection with the transaction. For example, the current HSR filing threshold is \$94 million, and depending on the terms of the investment, such as Board seats or other rights, the passive investor exemption from filing may not be available. Companies and investors also need to be mindful of any potential required or recommended CFIUS or similar filings. As the COVID-19 situation remains rapidly evolving and disruptive, any potential need for approval should be identified as soon as possible in order to understand how long the approval process will take in relevant jurisdictions, taking into account any potential governmental delays.
6. **Registration Rights:** For those PIPE transactions that require registration of the shares, issuers may want to consider seeking a longer period in which to register the resale of the securities in light of current circumstances affecting companies, advisers, auditors and regulators (including the SEC) that may impact the ability to prepare a registration statement and clear any related SEC review.
7. **IR:** The IR department should be prepared with a comprehensive communications plan around any PIPE transaction, particularly to the extent that investors may be alarmed by the need for perceived "rescue financing". Although investors may view an investment as positive news, if they are surprised at the issuer's need or desire to raise funds in this environment or the terms of a capital raise, the market could react negatively.
8. **Fiduciary Duties and Other Board Matters:** General counsel should be prepared to discuss the directors' fiduciary duties in connection with approving a significantly dilutive transaction. Particularly where a single investor is acquiring a sizable equity position or the potential investor has a relationship with a member of the Board or management, these issues will require careful attention in order to adequately advise and protect the Board. Counsel should also ensure that the Board is fully informed of the terms of the securities, particularly the terms of any warrants or convertible instruments that may result in additional equity being issued in the future.

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9. **Confidentiality Agreements:** Potential investors may not want to be subject to extended restrictions on their ability to buy or sell the issuer's shares in the public market due to the receipt of material nonpublic information in connection with the exploration of a transaction. As issuers consider the terms of the confidentiality agreement with potential investors, they should be prepared to address investors' requests to be "cleansed" of any material nonpublic information promptly following completion or abandonment of a transaction. Issuers, counsel and any financial advisors should work through these issues as they develop any wall-cross or other investor outreach procedures.
  
10. **Disclosure Issues:** Even though the securities issued in a PIPE are issued on an unregistered basis, issuers remain subject to 10b-5 liability for material misstatements or omissions in connection with the sale of those securities and in connection with public disclosures to existing investors regarding the status of financing efforts.

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## SEC Issues COVID-19 Disclosure Guidance and Extends Conditional Relief from Reporting Requirements

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### Staff Provides Guidance for Reporting on the Impact of the COVID-19 Crisis and Issues New Orders Extending Relief for Public Companies, Investment Funds and Investment Advisers

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#### SUMMARY

On March 25, the SEC issued [new guidance](#) (“Disclosure Guidance Topic No. 9”) setting forth the Division of Corporation Finance’s views on disclosure and other securities law obligations that companies should consider with respect to the COVID-19 crisis and the related business and market disruptions. Disclosure Guidance Topic No. 9 encourages public companies to report on the impact of COVID-19 on their businesses, financial condition and results of operations in a timely manner, while acknowledging that many companies are facing operational and other challenges and emphasizing that health and safety should not be compromised in order to meet reporting requirements.

On the same day, the SEC also extended the scope of the conditional relief it announced [earlier](#) in the month. Under the extension, public companies, investment funds and investment advisers meeting certain conditions may qualify for relief from some of the requirements under the Securities Exchange Act of 1934 (the “Exchange Act”), the Investment Advisers Act of 1940 (the “Investment Advisers Act”) and the Investment Company Act of 1940 (the “Investment Company Act”). Among other things, public companies that are unable to meet a filing deadline due to the COVID-19 crisis may receive a 45-day extension on Exchange Act reports due between March 1 and July 1, 2020 (as compared to the original March 1 to April 30, 2020 period under the SEC’s March 4 order).

## ASSESSING AND DISCLOSING THE IMPACT OF COVID-19

Disclosure Guidance Topic No. 9 addresses how companies should assess and disclose the evolving impact of COVID-19, and confirms that such an assessment will be a facts-and-circumstances analysis for each company. The SEC acknowledges that it may be difficult to assess or predict the broad effects of COVID-19 on industries or companies, and that the actual impact will depend on factors beyond a company's control and knowledge at this stage. Nevertheless, the current and anticipated effects of COVID-19, as well as a company's response to evolving events and planning around COVID-19-related uncertainties, may be material to investment and voting decisions.

Accordingly, Disclosure Guidance Topic No. 9 encourages companies to provide disclosure that will help investors evaluate the current and expected impact of COVID-19 through the eyes of management and to proactively revise and update disclosure as facts and circumstances change. To that end, the SEC's guidance provides a series of questions for companies to consider as they assess COVID-19-related effects and their disclosure obligations:

- 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?

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- 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 Division of Corporation Finance does not intend this list to be exhaustive, and individual companies will need to assess carefully COVID-19's impact and their related disclosure obligations.

Disclosure addressing these questions may involve forward-looking information based on assumptions and expectations of future events, and companies may be able to avail themselves of the safe harbors in Section 27A of the Securities Act of 1933 and Section 21E of the Exchange Act in connection with these disclosures.

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### **NO TRADING OR SELECTIVE DISCLOSURE PRIOR TO THE DISSEMINATION OF MATERIAL NON-PUBLIC INFORMATION**

As they have [emphasized](#) throughout this crisis, the SEC is focused on maintaining market integrity despite the impact of COVID-19. Consistent with this theme, Disclosure Guidance Topic No. 9 also encourages companies and other related persons to consider their market activities, such as the issuance, sale and repurchase of securities, in light of their obligations under the federal securities laws to refrain from trading on the basis of material non-public information. Specifically, companies are reminded that if they have been materially affected by COVID-19, or become aware of a risk related to COVID-19 that would be material to investors, the company, its directors, officers and other corporate insiders with knowledge of these matters may not trade in the company's securities until such information is disclosed to the public. In addition, the new guidance reminds companies to take the necessary steps to avoid selective disclosures when disclosing material information related to the impacts of COVID-19 by disseminating the information broadly to the public as required by Regulation FD. We expect that the SEC Staff will be much less accommodating to companies and individuals in connection with any trading activities conducted during the COVID-19 crisis.

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### **EARNINGS AND FINANCIAL RESULTS**

Disclosure Guidance Topic No. 9 also addresses the impact of COVID-19 on earnings estimates and other financial results companies may choose to release in advance of finalizing their required financial reporting,

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as the impact on businesses may present a number of novel or complex accounting issues that may take time to resolve. As a result, the SEC encourages companies to address reporting matters earlier than usual, recognizing it may be more difficult and take longer for companies and their auditors to complete the work required for timely filings.

The guidance also reminds companies to consider their obligations under Item 10 of Regulation S-K and Regulation G with respect to non-GAAP financial measures, as well as the SEC's recently issued guidance on performance metrics. Accordingly, if a company presents a non-GAAP financial measure or performance metric to adjust for or to explain the impact of COVID-19, it should also disclose why management finds the measure or metric useful, and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations.

In instances where a GAAP financial measure is not available at the time of the earnings release because of COVID-19-related adjustments, the SEC states that it would not object to companies reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amounts based on a reasonable estimate or a range of reasonably estimable GAAP results. For example, if a company intends to disclose its EBITDA on an earnings call, the SEC will permit it to reconcile EBITDA to either its GAAP earnings, a reasonable estimate of its GAAP earnings that includes a provisional amount, or its reasonable estimate of a range of GAAP earnings. The provisional amount or range should reflect a reasonable estimate of COVID-19-related charges not yet finalized, such as impairment charges. However, the guidance emphasizes that non-GAAP financial measures should not be disclosed more prominently than the most directly comparable GAAP financial measures (including preliminary GAAP results) or range of GAAP measures. In reports on Form 10-K or 10-Q or other filings where final (rather than preliminary) GAAP financial statements are required, non-GAAP financial measures must be reconciled to actual GAAP results.

Furthermore, if a company does present non-GAAP financial measures reconciled to provisional amounts or an estimated range of GAAP financial measures, it should limit those measures to the non-GAAP financial measures it is using to report financial results to its board of directors. The guidance notes that, as always, non-GAAP financial measures and performance metrics should be used to disclose and analyze the current and potential impact of COVID-19 on the company's financial condition and operating results through the eyes of management and the board of directors, and *not* for the purpose of presenting a more favorable view of the company.

Finally on non-GAAP financial measures, companies are reminded that their audit committees should be actively engaged in the review and presentation of non-GAAP financial measures, including any changes in the presentation of non-GAAP financial measures in accordance with Disclosure Guidance Topic No. 9.

## 45-DAY EXTENSION ON EXCHANGE ACT FILING DEADLINES BETWEEN MARCH 1 AND JULY 1, 2020

Under a previous order issued on March 4, the SEC extended the deadline for public companies to file certain annual and periodic reports, or disclosures with respect to the solicitation of proxies, as required under the Exchange Act. For reports with filing deadlines between March 1 and April 30, 2020, the SEC allows companies to file late if they:

- are unable to meet a filing deadline due to circumstances related to COVID-19;
- by the later of March 16, 2020 or the original filing deadline for the report, file with the SEC on a Form 8-K, or 6-K if eligible, a report stating (1) that they are relying on the order, (2) a brief description of why they cannot file on a timely basis, (3) the estimated date of when the report is expected to be filed, (4) a risk factor, if appropriate, explaining the impact of COVID-19 on the business, and (5) if the delay is due to the inability of a person to provide an opinion, report or certification, a statement by such person stating why they are unable to do so;
- file the required report within 45 days of the original due date; and
- in any late-filed report, disclose that the company is relying on the order and state the reasons why the company could not file the report on a timely basis.

On March 25, the SEC issued an [order](#) superseding the March 4 order and expanding the availability of this 45-day extension to Exchange Act reports that are required to be filed between March 1 and July 1, 2020. The above-mentioned conditions must still be met in order for a company to qualify for the extension.

In addition, the SEC staff have verbally informed us that they interpret the requirement of the order that the Form 8-K or 6-K be filed by the original filing deadline strictly, so that it does not apply to a filing made during the 15-day period provided by Rule 12b-25 under the Exchange Act. Accordingly, an issuer that has filed a Form 12b-25 in connection with the late filing of a report, but who did not file the Form 8-K or 6-K prior to the original deadline, will not qualify for the extension provided by the order even if it files the required Form 8-K or 6-K during the 15-day period provided by Rule 12b-25 indicating that it is unable to file its report before the expiration of that 15-day period for reasons related to COVID-19.

Although the SEC may permit late filing, companies should also review their agreements and other obligations, particularly debt covenants, to ensure they do not impose independent deadlines.

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## INVESTMENT FUND AND INVESTMENT ADVISER SPECIFIC RELIEF

The SEC issued two [new orders](#) on March 25 extending its previously announced relief for investment companies and investment advisers. On March 13, the SEC issued orders that, for the purposes of the Investment Company Act and the Investment Advisers Act:

- exempt registered management investment companies and business development companies (“BDCs”) from the requirement that certain votes of the board of directors be cast in person until June 15, 2020 provided that (1) reliance on the order is necessary or appropriate due to the effects

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of COVID-19; (2) the votes are cast at a meeting in which directors participating remotely may hear each other simultaneously; and (3) the board of directors, including a majority of the disinterested directors, ratifies the action taken by a vote cast at the next in-person meeting;

- exempt closed-end funds and BDCs from the requirement to file a notice of intention to call or redeem securities at least 30 days before such transaction, if certain conditions are met, until June 15, 2020;
- extend the deadlines for registered funds to file reports on Form N-CEN and N-PORT under the Investment Company Act for reports due on or before April 30, 2020, provided that a registered fund relying on the order (1) is unable to timely transmit the report due to the effects of COVID-19; (2) promptly notifies the SEC staff by email stating that it is relying on the order, and provides a brief description of why it cannot file on a timely basis and an estimated date of filing; (3) includes a statement on its website, and in the report on Form N-CEN or N-PORT, stating that it is relying on the order and why it cannot file the report on a timely basis; and (4) files the report as soon as practicable, but not later than 45 days after the original due date;
- extend the deadlines for registered management investment companies and registered unit investment trusts to file annual and semiannual reports to investors and unitholders under the Investment Company Act for reports due on or before April 30, 2020, provided that an entity relying on the order (1) is unable to timely transmit the report due to the effects of COVID-19; (2) notifies the SEC staff by email stating that it is relying on the order, and includes a brief description of why it cannot file on a timely basis and an estimated date of filing; (3) includes a statement on its website stating that it is relying on the order and why it could not file the report on a timely basis; and (4) files the report as soon as practicable, but not later than 45 days after the original due date; and
- extend the deadline for exempt reporting advisers to file reports on Form ADV, and for registered investment advisers to file amendments to Form ADV, deliver required disclosure to clients, and file Form PF under the Investment Advisers Act for reports, amendments or disclosures due on or before April 30, 2020, provided that an adviser relying on the order (1) is unable to meet a filing deadline or delivery requirement due to the effects of COVID-19; (2) notifies the SEC staff by email, and provides a statement on its website, stating that it is relying on the order, a brief description of why it cannot file or deliver on a timely basis, and an estimated date of filing or delivery; and (3) makes the filing or delivers the required materials as soon as practicable, but not later than 45 days after the original due date.

Under the March 25 orders, registered management investment companies and BDCs that can satisfy the applicable requirements set forth above are now exempt, until August 15, 2020, from the requirements to hold certain in-person votes of the board and to file notices of intention to call or redeem securities 30 days before a transaction. The 45-day extension to the deadline to make certain filings or deliver certain materials under the Investment Company Act and the Investment Advisers Act now includes filings and disclosures due on or before June 30, 2020. The March 25 orders also removed the requirement that an investment adviser relying on the order post on its website, and include in its email correspondence with the SEC staff, as applicable, why it was unable to meet the filing deadline or delivery requirements and an estimated date of filing or delivery in order to rely upon the relief.

In its March 13 orders, the SEC also stated that, until April 30, 2020, if a registered fund is not able to timely deliver a required prospectus to investors because of circumstances caused by COVID-19, such delay would not be considered a basis for an enforcement action, provided the fund:

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- notifies the Division of Investment Management (via email) that it is relying on the SEC's position, and includes in the notice a description of why it could not deliver the prospectus on a timely basis and the estimated date of delivery;
- publishes on its website that it intends to rely on the SEC's position and states why it could not deliver the prospectus on a timely basis;
- publishes its current prospectus on its website; and
- delivers the prospectus as soon as practicable, in any event no later than 45 days after the original deadline.

The March 25 orders extend the period during which the SEC would take the position that delay would not be considered a basis for an enforcement action until June 30, 2020. The March 25 orders also removed the requirement that a registered fund provide to the SEC staff a description of why it could not deliver the prospectus on a timely basis and an estimated date of delivery in order to rely on the SEC's position.

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### ADDITIONAL GUIDANCE / RELIEF

In its [press release](#) accompanying the new orders and Disclosure Guidance Topic No. 9, the SEC stated that it will “continue to closely track developments, and, if appropriate, consider additional relief from other regulatory requirements” for companies, accountants, investment advisers, mutual funds, brokerage firms, transfer agents, and other regulated entities and financial professionals that are affected by COVID-19, encouraging those entities and financial professionals to contact the Staff with questions or if they believe there are additional areas where guidance or temporary relief may be necessary.

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