

COVID-19 Impact on Public Disclosure of SEC Reporting Companies

April 1, 2020

KEY POINTS

The 2019 novel coronavirus (COVID-19) pandemic and responses to this crisis, including actions taken by federal, state and local governments, have had an impact on the operations of virtually every business and business sector. Furthermore, the stock market has been severely adversely impacted and is experiencing a period of high volatility, with the Dow Jones Industrial Average Index down approximately 18 percent and the NASDAQ Composite Index down approximately 14 percent from March 2 to March 31, 2020. The stock prices of some companies, particularly in hard-hit industries like oil and gas, retail, airlines, hospitality and other travel and leisure businesses, have declined to a much greater degree. In light of current circumstances arising from the COVID-19 pandemic, reporting companies must evaluate what they can, should or are obligated to say publicly regarding the effects of this pandemic, including in reports required to be filed with the Securities and Exchange Commission (SEC).

Specifically, reporting companies should:

- consider their disclosure obligations relating to COVID-19 in periodic reports, proxy statements, registration statements and prospectuses, including as to risk factors, MD&A, financial statements, material legal proceedings and compensation matters;
 - evaluate the need to file current reports to disclose material COVID-19-related developments and consider whether, in some cases, voluntary filing of current reports or other elective public disclosure may be appropriate;
 - ensure that disclosure controls and procedures and internal controls over financial reporting are effective in the current environment as impacted by the COVID-19 pandemic;
 - refrain from revealing any material nonpublic COVID-19-related information privately and refrain from engaging in any securities transactions with the public, including share buybacks and individual purchases or sales (unless and until such material information has been publicly disclosed); and
 - if presenting a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19, highlight why management believes the measure or metric to be useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations.
-

Periodic Reports (10-K, 20-F, 40-F, 10-Q)

Risk Factors

Reporting companies are required to include risk factors in periodic reports filed under the Securities Exchange Act of 1934 (the Exchange Act), including annual reports on Form 10-K, 20-F and 40-F and, under certain circumstances described below, quarterly reports on Form 10-Q, as well as in registration statements and prospectuses. The instructions to Item 105 of Regulation S-K provide that a reporting company must “not present risks that could apply generically to any registrant or any offering” but is instead required to “[e]xplain how the risk affects the registrant or securities being offered.” SEC staff has repeatedly asked companies in comment letters to revise risk factors that are too generic and could apply to any company, stating in Updated Staff Legal Bulletin No. 7, issued in June 1999, that “[w]hen drafting risk factors, be sure to specifically link each risk to your industry, company, or investment, as applicable” and has also cautioned that it is not appropriate for risk factors to use conditional language and wording that implies a future event that has not happened yet, if the reporting company is already experiencing or has already experienced such an event. Furthermore, in the Disclosure Guidance Topic No. 9, issued by the SEC’s Divisions of Corporation Finance on March 25, 2020 (Disclosure Guidance Topic No. 9, the full text of which may be found [here](#)), to address disclosure and other securities law obligations that companies should consider in respect of COVID-19 and related business and market disruptions, the SEC staff stressed that disclosure about the “evolving effects of COVID-19 and related risks will be a facts and circumstances analysis” and should “be specific to a company’s situation.” Accordingly, a reporting company should ensure that COVID-19-related risk factors refer to particular threats faced by its business and does not provide a simplistic, broad description of recent events and general economic impact. For example, if a reporting company has previously included a risk factor regarding force majeure or other similar disruptive events that mentions public health crises, it may be necessary to now revise such risk factor in order to narrowly tailor it to the specific risks posed by COVID-19 to such company. Companies should also consider whether to include an appropriately tailored, stand-alone COVID-19-related risk factor, as various reporting companies have already done. At this stage in the COVID-19 pandemic, such risk factors should identify the specific events and circumstances that have occurred as necessary to put the associated risks in context and not only present COVID-19-related risks in hypothetical or general terms.

Although most reporting companies have already filed annual reports for 2019, such companies may encounter an obligation to update their risk factors in an upcoming quarterly report. Part II, Item 1A of Form 10-Q requires reporting companies to “[s]et forth any material changes from the risk factors as previously disclosed in the registrant’s Form 10-K.” It seems clear that nearly all reporting companies that have not included risk factors related to COVID-19 in their most recently filed annual report (or a subsequent filing) should now update risk factors for this event on their upcoming quarterly report. Furthermore, to the extent reporting companies previously included risk factors regarding COVID-19 in their most recently filed periodic reports, such companies should now evaluate whether those risk factor disclosures remain accurate and complete or require further updates in their upcoming Form 10-Q (or Form 6-K, as applicable). A reporting company may also consider supplementing its risk factors in a Form 8-K (particularly if it is raising capital in the public markets), as discussed below, if as a result of the COVID-19 pandemic such reporting company has encountered, or believes it will encounter, any material risks not detailed in its risk factors as of its last SEC filing.

Due to the increasingly far-reaching effects of COVID-19, hundreds of reporting companies have already referenced the COVID-19 pandemic in the risk factors section of their periodic reports. Initially, companies with operations or production in China were most directly impacted by the outbreak of COVID-19 and, therefore, included COVID-19-related issues, discussing, for example, the extent and effects of closures of key locations or cancelled operations in their risk factors. However, as this pandemic has become global and its spread has reached critical proportions, the effects of COVID-19 have impacted the operations, business and industries of

virtually every public company listed in the United States. Accordingly, reporting companies should consider all significant issues they may face, including disruptions in business operations due to:

- mandated or anticipated brick-and-mortar location closures as a result of quarantines and other precautions to slow transmission of COVID-19;
- reduced staffing due to employee illnesses;
- constraints or other impacts on human capital resources or productivity;
- travel restrictions and border closures;
- regulatory changes;
- shifts to remote work arrangements, suspension of non-essential work travel and postponement of sponsored events;
- supply chain, production and distribution delays as a result of scarcity of certain materials and closures of manufacturing facilities, warehouses and distribution centers;
- challenges in implementing business continuity plans;
- effects on consumer demand caused by travel restrictions, quarantines, loss of income, market volatility and future uncertainty, among others; and
- financial impact, credit and liquidity risks as a result of extreme volatility in financial markets, covenant breaches and lower consumer spending.

The SEC staff suggested specific questions reporting companies should consider with respect to a reporting company's present or future operations in Disclosure Guidance Topic No. 9. The questions include:

- Do you expect that COVID-19 will impact future operations differently than how it affected the current period?
- If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency?
- 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?
- 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?
- Do you expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?

Numerous other potential or actual risks could arise as the situation continues to unfold.

Cautionary Language Regarding Forward-Looking Statements

At any time a reporting company updates its risk factors, it should similarly evaluate whether the risks listed in its disclosure regarding forward-looking statements are adequate. When issuing forward-looking information, to take advantage of the safe harbor in the Private Securities Litigation Reform Act of 1995 (and/or the related "bespeaks caution" doctrine), which protects a registrant from private lawsuits relating to such forward-looking statements, registrants must include meaningful cautionary statements identifying specific items that could cause their results to be materially different from those presented. Meaningful cautionary language should be tailored to the specific reporting company, its business and projections, so as to not be misleading, but need not contain an

explicit disclosure of the risk factor that ultimately contradicts a forward-looking statement to be protected by the safe harbor. Boilerplate or vague cautionary language does not suffice and may not protect reporting companies and those acting on their behalf from securities fraud claims based on forward-looking statements. As a result, registrants should update their cautionary language regarding forward-looking information to highlight potential impacts caused by the COVID-19 pandemic. Further, by including in the cautionary note a cross reference to risk factors that are updated and revised as discussed above in respect of COVID-19, the cautionary note should similarly be deemed updated. In summary, it is critical for a reporting company to regularly review its cautionary statement and risk factor disclosures and, in particular in light of COVID-19, to ensure that it continues to be relevant and meaningful to the reporting company's business. We note that this review should not only apply to periodic reports (such as Form 10-Ks and 10-Qs), but also to current reports (such as 8-Ks and 6-Ks) and ordinary-course communications with the market that typically contain forward-looking statements, such as earnings and other press releases.

Management's Discussion and Analysis (MD&A)

Item 303 of Regulation S-K requires reporting companies to include a "Management's discussion and analysis of financial condition and results of operations" (MD&A) section in applicable filings, including periodic reports. Instruction 3 to Item 303(a) of Regulation S-K states that this discussion should "focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition." The SEC staff's December 2003 interpretive release on MD&A emphasizes that "[o]ne of the most important elements necessary to an understanding of a company's performance, and the extent to which reported financial information is indicative of future results, is the discussion and analysis of known trends, demands, commitments, events and uncertainties." As a result, disclosure of a trend, demand, commitment, event or uncertainty (such as the COVID-19 pandemic) is required unless a company is able to conclude (1) that it is not reasonably likely that the trend, uncertainty or other event will occur or come to fruition or (2) that a material effect on the reporting company's liquidity, capital resources or results of operations is not reasonably likely to occur. Accordingly, a company's MD&A should discuss the extent to which the effects of the COVID-19 pandemic, including business disruptions and continuity concerns, governmental policy decisions made in response and market volatility, can generally be expected to have an impact on reporting companies' financial condition and create substantial discrepancies between past and future performance. Disruptions in operations, temporary closings of facilities or manufacturing, staffing shortages, supply chain issues and insurance concerns, among other items, resulting from the COVID-19 pandemic are reasonably likely to affect reporting companies' results of operations, balance sheet items, cash flow, debt payment issues, capital expenditures and liquidity and/or capital resources. Furthermore, reporting companies, particularly in sectors that have been especially impacted, may face immediate cash needs that could cause a stress on such company's liquidity. If access to capital markets or other sources of liquidity (including asset-backed revolving credit facilities) is diminished, liquidity stresses may become an even more serious issue and also result in refinancing risks. All of the foregoing matters should be evaluated and appropriately reflected by reporting companies in the MD&A. Additionally, to the extent reporting companies suffer credit rating downgrades, they may further need to disclose the impact on covenants of their investment grade debt and secured debt to ensure investors understand the company's true liquidity outlook. COVID-19 discussions in MD&A should include the potential impact on key performance indicators, as well as any potential steps the reporting company may take to mitigate the impact of the pandemic.

Business

A reporting company that files a report for which a business description is required, such as in a Form 10-K pursuant to Item 101 of Regulation S-K or in a Form 20-F pursuant to Item 4.B, should consider whether its previous disclosure remains adequate or whether the COVID-19 pandemic has materially changed its business lines, segments or operations, or had a material impact on its products, services, relationships with customers or suppliers, or competitive conditions, thus requiring the reporting company to make new or additional disclosures to that effect. Business disclosure related considerations include, for example, whether the reporting company has had

to (1) exit any business lines, (2) close brick-and-mortar locations, offices or other facilities, (3) consider or utilize alternative suppliers due to difficulty sourcing inventory, to the extent available, (4) furlough or lay off workers as a result of closed facilities or lower consumer demand or suffer a shortage in staffing due to employee illness or (5) postpone or otherwise modify growth initiatives and strategic acquisitions.

Legal Proceedings

In addition to disclosure that may be appropriate or required elsewhere in periodic reports, such as the risk factors, MD&A and financial statements, Item 103 of Regulation S-K requires reporting companies to disclose information relating to material pending legal proceedings to which they or their subsidiaries are a party. The COVID-19 pandemic may result in litigation for reporting companies, for example claims for breach of contract due to an inability to perform caused by COVID-19, violation of material debt agreements or dealings with employees, or claims that a company's disclosure (or its failure to provide disclosure) regarding COVID-19's impact was materially misleading or inadequate to inform investors regarding risks associated with the pandemic and the resulting disruption to operations. Reporting companies may also face shareholder litigation, including securities class action or breach of fiduciary duty claims resulting from stock price declines and other matters, as a result of matters relating directly or indirectly to the COVID-19 pandemic (such as the recent class action lawsuit filed against Norwegian Cruise Line Holdings Ltd. on March 12, 2020). If a reporting company is subject to material legal proceedings relating to COVID-19, the legal proceeding, including the name of the court in which the proceedings are pending, the date the proceedings are instituted, the principal parties involved, a description of the factual basis alleged to underlie the litigation and the relief sought, would need to be disclosed by the reporting company.

Financial Statements

There are a myriad of potential accounting and reporting implications of the COVID-19 pandemic, even to companies whose operations have not been directly impacted by the COVID-19 pandemic. For example, all reporting companies are likely to be impacted by the COVID-19 pandemic as a consequence of a broader economic downturn and decline in financial markets. The current volatility of financial markets and resulting future uncertainty may also impact reporting companies' key assumptions and sensitivities for accounting and financial reporting. Reporting companies should consider the potentially far-reaching financial reporting effects of the COVID-19 pandemic, including in respect of the following:

- loss of revenue;
- diminished future cash flow;
- inventory write-downs and impairment losses;
- loan defaults or covenant breaches, or amendments or waivers in lending agreements;
- value and impairment of financial and nonfinancial assets (including receivables, investments, long-lived assets, right of use assets and intangible assets such as goodwill) and liabilities (including loans);
- loss contingencies and increases in allowances for credit losses;
- changes in credit risk of customers or others;
- claims related to breach of contract;
- insurance recoveries and premiums;
- lease rent concessions;
- value of defined benefit plan assets and obligations;
- employment termination benefits;

- restructuring charges;
- modification to performance-based stock compensation, among others; and
- going concern and like considerations regarding viability of the enterprise.

Additional items to consider are included in Disclosure Guidance Topic No. 9.

Among other things, particularly during this tumultuous time, reporting companies preparing a periodic report should keep in mind the requirement in Accounting Standards Update (ASU) 2014-15, “Presentation of Financial statements –Going Concern” that “[i]f conditions or events raise substantial doubt about an entity’s ability to continue as a going concern, and substantial doubt is not alleviated after consideration of management’s plans, an entity should include a statement in the footnotes indicating that there is substantial doubt about the entity’s ability to continue as a going concern within one year after the date that the financial statements are issued (or available to be issued).” The ASU requires this assessment to be made by management of a reporting company for each annual and interim reporting period.

Furthermore, in response to the COVID-19 pandemic, on March 4, 2020, SEC Chairman Jay Clayton “urge[d] companies 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.” To the extent reporting companies encounter difficulties in physically accessing locations, appropriate disclosures and strategies should be considered regarding such limitations on the preparation of audited financial statements, as well as financial or other information required from equity method investees (Regulation S-X Rule 3-09), guarantors (Regulation S-X Rule 3-10) and acquired/to be acquired businesses (Regulation S-X Rule 3-05 or 3-14).

It should be noted that disclosure of a COVID-19 pandemic related matter may be included in the financial statements or notes to the financial statements even if it occurs after the fiscal period covered by such financial statements if the matter constitutes a “subsequent event” under Accounting Standard Codification (ASC) 855. Under ASC 855, a subsequent event is one that occurs after a balance sheet date but before the date financial statements are issued. Subsequent events may be categorized under two types: recognized subsequent events, which require adjustment to the financial statements, and unrecognized subsequent events, which do not require adjustment to the financial statements but may need to be disclosed (such as in the footnotes) to prevent the financial statements from being misleading. SEC Chairman Clayton highlighted specifically, on February 19, 2020, that reporting companies and their auditors should consider whether disclosure about COVID-19 is appropriate in the subsequent events footnote. As the pandemic first began to materialize globally, many companies with supply chains or significant operations in China, and those in the travel and hospitality industries, elected to make such disclosures in their recently filed annual reports on Form 10-K. However, with the rapid impact of the COVID-19 pandemic, other reporting companies filing annual or quarterly reports should also consider whether events after the date of the latest balance sheets included in their Form 10-Q (or, as applicable, Form 10-K) require disclosure as “subsequent events.” Furthermore, relevant accounting guidance requires that reporting companies consider disclosing an estimate of effects on the financial statements, or a statement that such an estimate cannot be made, and ensure that the subsequent events disclosure is tailored to the specific circumstances and operations of such company.

Internal Controls and Disclosure Controls

As a reminder, most reporting companies are required to maintain and evaluate disclosure controls and procedures and internal control over financial reporting as of the end of each fiscal quarter, as well as to disclose any material changes in internal control over financial reporting that occurred over such quarter. Reporting companies should ensure that internal controls over financial reporting and disclosure controls and procedures are designed to provide reasonable assurance that information about the range and magnitude of the financial impacts from the

COVID-19 pandemic will be accurately reported in financial statements. Disclosure controls and procedures should be evaluated and updated as needed, particularly to ensure material information regarding the impact of the COVID-19 pandemic is adequately provided to senior management, so as to allow for timely and accurate public disclosure determinations. Given the fast-changing landscape of the COVID-19 pandemic, disclosure committees may be required to meet more frequently as part of the quarterly reporting process. It may also be necessary for reporting companies to make changes to its Sarbanes-Oxley certification process, if key employees are working remotely or become incapacitated, and to take additional steps to ensure all employees relevant to the disclosure process can communicate effectively while working remotely during the periodic reporting process.

Reporting companies may additionally be required to update or replace existing internal controls as they implement emergency measures to manage the major disruptions to operations and access to offices and travel that have been caused by the COVID-19 pandemic. The need for evaluation and changes to internal controls, particularly, arises as a result of the current partial or full relocation of employees from a reporting company's physical premises to remote home offices and an increase in cybersecurity risks, including phishing and other scams. A reporting company that experiences a cybersecurity breach in the current COVID-19 environment would also need to consider disclosure obligations relating to that event.

Current Reports (8-K or 6-K)

A reporting company may also consider the need to file a Form 8-K or Form 6-K for other material developments resulting from COVID-19-related events. Between March 2 and March 31, 2020, over 250 current reports have been filed by S&P 500 companies which reference COVID-19 or coronavirus. Specifically, as a result of the COVID-19 pandemic, reporting companies have furnished or filed, as applicable, current reports to, among other things, (a) withdraw or update guidance, (b) provide a business update, (c) announce entry into credit facilities or loan agreements, including amendments thereto or drawdowns thereof (if material for such reporting company), (d) announce special investor calls, (e) supplement or update previously disclosed MD&A and risk factors, (f) announce changes to operations (such as closings of facilities or schedule changes), (g) announce cancellations of events, (h) disclose actions taken to benefit customers impacted by COVID-19 (such as relief from payments that are due or access to unlimited wireless data or additional payments to employees), (i) announce a positive test of a senior executive or of other key personnel for COVID-19 and related leaves of absence (although, as of March 31, 2020, only a handful of companies had filed a Form 8-K or Form 6-K to announce a positive COVID-19 test of a senior executive), or (j) announce suspension of a stock repurchase program, dividend, sale process or tender offer. Although, as of March 31, 2020, current reports had most commonly been used to provide business updates, address credit facilities or loan agreements and update or withdraw guidance; more recently, such reports are more frequently being used to update or supplement risk factors. Many of these filings have been of an elective nature, designed to keep the market informed of significant development; however, there are certain potential COVID-19-related events that would, in fact, mandate the filing of a Form 8-K within four business days of their occurrence, including (1) entry into or termination of a material definitive agreement (such as entry into, or amendments to, credit facilities or loan agreements), (2) bankruptcy or receivership, (3) completion of an acquisition or disposition of assets (such as from selling certain business lines), (4) disclosure of results of operations and financial condition (such as pre-releases of earnings), (5) creation of or triggering events that accelerate or increase a direct financial obligation or obligation under an off-balance sheet arrangement (such as drawdowns of credit facilities, loan defaults or covenant breaches), (6) costs associated with exit or disposal activities (such as from exiting certain business lines), (7) material impairments to assets, (8) notice of delisting or failure to satisfy a continued listing rule or standard, (9) compensatory arrangements of certain officers (including amendments to incentive plans or awards to set or adjust performance targets, as further described under "*Proxy Materials–Compensation Programs*" below), (10) temporary suspension of trading under registrant's employee benefit plans and (11) disclosure of information pursuant to Regulation FD (such as dissemination of material nonpublic information to the public, to be filed simultaneously, in case of intentional disclosure, and promptly, in case of non-intentional selective disclosure).

As reflected in numerous current reports recently filed in respect of COVID-19-related matters, reporting companies may determine that it is advisable to file such reports to provide information to the public that is not otherwise required to be disclosed on current reports. See the discussion below, under “*Other Disclosure Considerations – Material Nonpublic Information*” for considerations relating to voluntary disclosure of material developments.

Proxy Materials

A reporting company’s proxy statement for a shareholder meeting requires disclosure of the board of directors’ role in risk oversight. In such instances, where concerns relating to the effects of the COVID-19 pandemic result in a material risk to the business, reporting companies should consider disclosing the nature of the board’s role in overseeing management of that particular risk.

Compensation Programs

COVID-19 may impact performance-based compensation, and reporting companies should consider appropriate proxy statement disclosure in the Compensation Discussion and Analysis (CD&A). Reporting companies may need to consider disclosing the rationale behind setting and/or adjusting any performance targets, whether as part of the CD&A or through footnotes to the compensation tables. Additionally, if a reporting company adopts or modifies an incentive plan or award to set or adjust performance targets to account for the impact of COVID-19, it may be required to report such adoption or modification on a Form 8-K, if (1) certain executive officers are party to, or are participants in, the applicable plan or award, and (2) the adjustments are material and not pursuant to previously disclosed terms of the plan or award. Note also that insiders’ reporting obligations under Sections 13 (e.g., as to Schedule 13D Amendments) and under Section 16 (i.e., as to Form 4 filing obligations) also need to be considered.

Annual Meetings

In the wake of the COVID-19 pandemic and the public health concerns it raises, reporting companies may determine to hold a “virtual-only” (or “hybrid”) stockholder meeting in lieu of holding the meeting only at a physical location and caution stockholders that the annual meeting date and logistics are subject to change. Recently issued SEC staff guidance provides that a reporting company may change the date, time, location or logistics of a previously announced annual meeting without mailing additional proxy materials or amending its existing proxy materials, if the reporting company (1) issues a press release announcing and detailing the logistics of the change, (2) files the announcement with the SEC as definitive additional soliciting material and (3) takes all reasonable steps necessary to inform other intermediaries in the proxy process and other relevant market participants of the change. Thorough discussions regarding making changes to annual meetings previously announced in a reporting company’s proxy materials, as well as to the practical considerations reporting companies should consider in making a determination to hold a virtual stockholder meeting, are available [here](#) and [here](#).

Registration Statements

An issuer of securities in a public offering pursuant to a registration statement filed with the SEC may be subject to liability under Sections 11 and 12 of the Securities Act of 1933, as amended, if the registration statement or related prospectus includes material misstatements or omissions, whether the information in such offering materials is incorporated by reference to the issuer’s prior public filings or directly included in that offering document. In addition, an issuer can also be liable under the general antifraud provisions of the Exchange Act. As such, reporting companies that are considering, or actively engaging in, public securities offerings at this time are cautioned to ensure their disclosures regarding the impact of the COVID-19 pandemic are materially complete and accurate and to revise or update inadequate disclosures. Reporting companies relying on a shelf registration statement are particularly advised to review their disclosure package and revise, or update, disclosures through periodic or current reports, such as by adding updates to their risk factors, among other COVID-19 disclosures described earlier in the sections titled “*Periodic Reports (10-K, 20-F, 40-F, and 10-Q)*” and “*Current Reports (8-K or 6-K)*.”

In addition, underwriters of public securities offerings, who (like directors and signing officers) must establish their due diligence defense to avoid liability, have recently been engaging in expanded due diligence in order to evaluate the impact of the COVID-19 pandemic on an issuer's business and the adequacy of the issuer's disclosure in that regard. For offerings subject to SEC review, reporting companies should be prepared to respond to additional comments from the staff relating to the COVID-19 pandemic.

Other Disclosure Considerations

Earnings Guidance and Earnings Pre-Releases

A company is generally not obligated to update previously issued guidance to reflect new developments outside the context of a public securities offering or other communication of financial results, although this may be desirable in order to maintain credibility with investors and analysts by avoiding a surprise when the company reports its earnings, and to reduce the overall negative impact on the reporting company's stock price. Reporting companies should consider whether any previously issued earnings guidance can appropriately be continued to be relied upon in light of the change in circumstances resulting from the COVID-19 pandemic. If a reporting company determines that such guidance may no longer be relied upon, either because the company knows it will no longer be able to achieve such earnings or there is too much uncertainty about its ability to achieve such earnings, the reporting company may consider updating that guidance to reflect the impact that the COVID-19 pandemic will, or is reasonably likely to, have on earnings. Approaches reporting companies have taken to earnings guidance revisions include updating earnings guidance for the full year or simply updating such guidance for the first quarter while leaving the full year unchanged. However, as of March 31, 2020, only a few companies have chosen to revise their earnings guidance for the impact of the COVID-19 pandemic.

As the COVID-19 situation is rapidly evolving, and because the ultimate effects of the pandemic are still largely unknown, for most reporting companies it may be more prudent to merely withdraw any previously-issued earnings guidance. Alternatively, existing guidance could be qualified by saying it does not take the impact of COVID-19 into account. To the extent a reporting company has not yet issued earnings guidance, it will likely be advisable to refrain from issuing any such guidance in the near term. As of March 31, 2020, numerous reporting companies had opted to withdraw their previously issued earnings guidance without providing any new guidance.

Furthermore, a reporting company that determined it is likely to significantly miss its outstanding earnings guidance, in addition to disclosure of revised earnings guidance or the withdrawal of such guidance, may consider a "pre-release" of its earnings results earlier than it otherwise ordinarily would have released such earnings. However, reporting companies are cautioned against pre-releasing earnings where the final reported operating results could differ materially from those included in the pre-release. Further, such pre-releases may not be beneficial under the COVID-19 circumstances, as, unless a company has affirmatively reiterated its previous guidance (as done by less than a handful of companies as of March 31, 2020), the market is likely to not be surprised by a negative COVID-19 impact and expectations that the company will miss such outstanding guidance may already be reflected in the company's stock price.

Material Non-Public Information

Regulation FD

Many reporting companies may be under pressure from market professionals and shareholders to provide information to them regarding the impact of the COVID-19 pandemic on the company's business and operations. However, it is important to keep in mind, particularly in the present circumstances of volatile markets and rapidly changing circumstances caused by the COVID-19 pandemic, that US reporting companies may not reveal any material nonpublic information privately, as such private disclosure will likely violate Regulation FD and may also constitute selective disclosure in violation of general anti-fraud provisions of the federal securities laws. This

concern extends to statements made by employees on social media that may be attributed to reporting companies and their management for liability purposes. If a reporting company has inadvertently engaged in selective material disclosure regarding COVID-19, it must promptly disseminate such information to the general public. Reporting companies that are considering issuing public statements or press releases in a Regulation FD-compliant manner are also cautioned, as discussed above, of the need for such statements to be materially complete and accurate so as to not be misleading. Furthermore, while it may be advisable, in order to keep the market informed, to maintain credibility with investors and avoid negative surprises to the market prior to publicly disseminating any information that is not required to be disseminated in current reports, reporting companies should consider, among other factors, (1) how long such information will remain accurate and complete (e.g., whether the information may be out of date by the next week or even the next day), (2) whether there would be any requirement to update or correct such information at a later time, and (3) whether they are creating an expectation that they will continue to update the market. Due to the rapidly changing circumstances involving the COVID-19 pandemic, if reporting companies are uncertain of important factors and the effects they may have on the business, such companies may in some cases be better off simply stating their uncertainty and inability to predict such effects.

Buybacks and Trading of Stock

Related to the disclosure considerations discussed above is the duty of issuers and insiders to abstain from trading while aware of material non-public information. As the COVID-19 pandemic continues to rapidly unfold and create uncertainty in the market, reporting companies may be considering whether to opportunistically buy back stock or otherwise take advantage of the current market turbulence or to continue previously established stock repurchase programs. In that regard, reporting companies and their directors, officers and other corporate insiders should be aware of any possible trading restrictions resulting from COVID-19's impact on such companies. Except in the case of trades made under a pre-established Rule 10b5-1 trading plan, reporting companies and insiders must refrain from engaging in any securities transactions with the public, including share buybacks and individual purchases or sales (including following option exercises in the case of employees), whether or not occurring during an open trading window, once they become aware of COVID-19-related information that would be material to investors, until such material information has been publicly disclosed. Reporting companies should also consider whether to close their trading windows for insiders, even if it is during a time in the quarter where such trading windows would ordinarily be open. Furthermore, although reporting companies theoretically (to the extent they have cash available for such purpose) could continue to buy back stock, and insiders could continue to sell stock under existing Rule 10b5-1 plans without violating any securities laws, such transactions could be subject to increased scrutiny and other factors may make buybacks not as advantageous as in other circumstances. For example, under current market circumstances, companies may not even see the full benefit of a buyback, as other market forces may counter the positive impact on share price that would otherwise result from a buyback. Accordingly, in light of recent circumstances, companies that already have established repurchase programs may wish to evaluate whether to suspend or terminate their current plans. Companies with discretionary repurchase plans may suspend or terminate their plans by electing to cease repurchases. On the other hand, reporting companies that desire to modify existing Rule 10b5-1 plans may only do so if they are not in possession of material non-public information at the time of the modification and can otherwise satisfy the Rule 10b5-1 requirements for a new plan (including that they are making the change in good faith). On the other hand, reporting companies that desire to terminate a Rule 10b5-1 plan may do so even while in possession of material non-public information, provided that doing so is not part of a scheme or plan to violate insider trading rules. While SEC staff guidance cautions that terminating a Rule 10b5-1 plan or cancelling individual transactions under such plan may, in some circumstances, jeopardize the protections provided by Rule 10b5-1 for prior plan transactions, a termination of a Rule 10b5-1 plan in today's COVID-19 market environment on its face should not raise any such concerns. For Rule 10b5-1 plans previously disclosed to the public, reporting companies should assess the materiality of any termination of such plan and consider whether public disclosure through the issuance of a press release and/or filing of a Form 8-K is warranted. Additionally, it may more

generally be advisable for a reporting company to review, and if necessary revise, its insider trading policy in order to ensure that it appropriately protects against insider trading under the current COVID-19 circumstances.

Non-GAAP Disclosures

Disclosure Guidance Topic No. 9 reminds reporting companies of their obligations under Item 10 of Regulation S-K and Regulation G with respect to the presentation of non-GAAP financial measures and also references the SEC staff's recent guidance on performance metrics disclosure (the full text of which is available [here](#)). In this guidance, the SEC staff indicated that reporting companies may reflect the nonrecurring charges and expenses associated with COVID-19 in their non-GAAP financial measures; however, the SEC staff also reiterated that to the extent a reporting company presents a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19, it should highlight why management believes the measure or metric to be useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations. The guidance also provides some relief when GAAP financial measures are not available at the time of an earnings release because the measure may be impacted by COVID-19-related adjustments that may require additional information and analysis to complete. In such cases, reporting companies may reconcile non-GAAP financial measures to preliminary GAAP results that either include provisional amount(s) based on reasonable estimates or a range of reasonably estimable GAAP results. If a reporting company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures in reliance on the above position, it should (1) limit the measures in its presentation to those non-GAAP financial measures it is using to report financial results to its board of directors and (2) explain, to the extent practicable, why the line item(s) or accounting is incomplete, and what additional information or analysis may be needed to complete the accounting. The SEC staff also explicitly discouraged the use of non-GAAP measures solely for the purpose of disclosing results adjusted to eliminate the impact of COVID-19. As of March 31, 2020, very few reporting companies had attempted to quantify the potential financial impact of COVID-19 on non-GAAP measures of future operating results (e.g. Adjusted EBITDA).

SEC Conditional Relief Regarding Filing Deadlines

On March 4, 2020, recognizing the impact of the COVID-19 pandemic on reporting companies, the SEC issued a conditional relief order (the Order) allowing an additional 45 days for reporting companies to file certain reports, schedules and forms due between March 1 and April 30, 2020, provided that they meet certain conditions. On March 25, 2020, the SEC extended the filing periods covered by the Order for reporting companies affected by COVID-19 to those with filings due between March 1 and July 1, 2020. Additionally, the SEC may extend the current 45-day relief period or provide additional relief as necessary. Reporting companies are eligible for this 45-day relief, if they are unable to meet a filing deadline due to circumstances related to the COVID-19 pandemic and must furnish a Form 8-K or Form 6-K (as applicable) containing specified items designed by the Order by the original filing deadline. When made, the required filing must also disclose that the reporting company is relying on the Order and must state the reasons why it could not file the report, schedule or form on a timely basis. In addition, the Order provides relief from the requirement to make available a proxy statement, annual report and other soliciting materials or to furnish an information statement and annual report, in each case under the Exchange Act, when mail delivery is not possible and certain other requirements are met.

In connection with the Order, the SEC also stated that, for purposes of Form S-3 or Form F-3 (and well-known seasoned issuer status) and Form S-8 eligibility (and the current public information eligibility requirement of Rule 144(c)), reporting companies will be considered current or current and timely, as applicable, in its Exchange Act filing requirements, if it was current as of the first day of the relief period, and it files any report due during the relief period within 45 days of the filing deadline of the report. In addition, reporting companies that receive an extension on filing Exchange Act annual reports or quarterly reports pursuant to the Order will be deemed to have a due date 45 days after the original filing deadline for such report and will also be permitted to rely on Rule 12b-25, if they are unable to file the annual or quarterly report on or before the extended due date.

Conclusion

Given the uncertainties of the COVID-19 pandemic and how quickly conditions can change, reporting companies must monitor new developments closely to ensure their disclosures accurately reflect the current situation. It is also important for reporting companies to carefully consider the voluntary disclosure of information relating to COVID-19, balancing the advantages of keeping the market informed and tempering negative impact and surprises with the drawbacks of disclosing incomplete or inaccurate information that will require additional updates or corrections and creating a continuing expectation of providing voluntary updates. Our team at Katten will continue to monitor these developments and will keep clients apprised of relevant changes as they occur.

The full text of the SEC press release is available [here](#). The full text of the Order is available [here](#). The full text of Disclosure Guidance Topic No. 9 is available [here](#).

As the COVID-19 situation continues to evolve, please consult the COVID-19 Resource Center (accessible [here](#)).

CONTACTS

For more information, or if you have any questions regarding any of the topics discussed in this advisory, please contact the authors of this advisory directly: Mark Wood, Farzad Damania, Irina Nica, and Gregory Segal; the other members of the Katten [Corporate Securities](#) practice listed below; or your primary Katten attorney.



Farzad Damania
+1.212.940.3838
farzad.damania@katten.com



Brian Hecht
+1.212.940.8516
brian.hecht@katten.com



Larry Levin
+1.312.902.5654
lawrence.levin@katten.com



Mark Reyes
+1.312.902.5612
mark.reyes@katten.com



Jonathan Weiner
+1.212.940.6349
jonathan.weiner@katten.com



Mark Wood
+1.312.902.5493
mark.wood@katten.com

Katten

katten.com

CENTURY CITY | CHARLOTTE | CHICAGO | DALLAS | HOUSTON | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SHANGHAI | WASHINGTON, DC

Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.

©2020 Katten Muchin Rosenman LLP. All rights reserved.

Katten refers to Katten Muchin Rosenman LLP and the affiliated partnership as explained at [kattenlaw.com/disclaimer](#).

4/1/20