COVID-19: SEC ADVISES COMPANIES PREPARING FOR EARNINGS COMMUNICATIONS AMIDST THE COVID-19 PANDEMIC

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U.S. Capital Markets Alert

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Last week, the chairman of the Securities and Exchange Commission (the "SEC") and the director of the SEC's Division of Corporation Finance issued a joint statement urging public companies to be transparent and thorough in their earnings-related disclosures, despite—or perhaps because of—the widespread uncertainty caused by the novel coronavirus ("COVID-19") pandemic. This statement followed disclosure guidance issued by the Division of Corporation Finance on March 25, 2020, addressing disclosure and other securities law obligations that companies should consider with respect to COVID-19 and recent business and market disruptions.

JOINT STATEMENT

As many public companies prepare to issue quarterly results and hold investor calls for the first time since President Trump declared a national emergency in response to COVID-19 on March 13, 2020, Jay Clayton, SEC chairman, and William Hinman, director of the Division of Corporation Finance, issued a joint statement on April 8, 2020 (the "Joint Statement"), encouraging companies to be expansive in their disclosures for the benefit of investors and, more broadly, to aid in the economy's recovery from the impacts of COVID-19. The Joint Statement recognizes that companies' communications to the public are predominantly historical and that even projections and guidance are typically rooted in past results. This practice is understandable, as companies do not want to assume the risks inherent in publishing estimates and predictions based on assumptions that may not prove to be accurate. While companies may be inclined to become guarded in their upcoming disclosures, historical information will be even less significant to investors (and likely less predictive of future results) than in the past given the heightened uncertainty caused by COVID-19.

The Joint Statement thus encourages companies to provide detailed information regarding future operating conditions and resource needs, noting that updating and refining these estimates should become less difficult over time as strategies come into greater focus. Specifically, the Joint Statement asks that a company's upcoming disclosures address (1) its current operational and financial status, (2) how its response to the COVID-19 pandemic is progressing, and (3) how its operations and financial condition may evolve as the fight against COVID-19 continues. For instance, many companies are seeking financial assistance under the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, and similar COVID-19-related federal and state programs. To the extent these types of financial assistance may have a material effect on a company's financial condition, the Joint Statement suggests disclosure of the nature, amounts, and effects of the assistance.

DIVISION OF CORPORATION FINANCE DISCLOSURE GUIDANCE

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The Joint Statement reiterates many of the themes contained in the disclosure guidance issued by the Division of Corporation Finance on March 25, 2020 (the "Disclosure Guidance"), discussed more fully in our alert, COVID-19: SEC Extends Conditional Relief and Provides Disclosure Guidance.

Disclosure Considerations

The Disclosure Guidance set forth a list of topics for public companies to consider when preparing disclosures in the COVID-19 era, such as disclosures included on earnings calls and in the Management's Discussion and Analysis section of Form10-Q and 10-K filings. These topics include, among others:

- The impact of COVID-19 on a company's financial condition and results of operations, and the company's expectations of its effect on future results;
- COVID-19's influence on a company's capital and financial resources, including its overall liquidity position, access to capital, sources and uses of cash, and ability to comply with credit agreement covenants;
- Accounting considerations, including whether a company will disclose any material COVID-19-related contingencies or impairments with respect to goodwill, intangible assets, right of use assets, or investment securities;
- Changes in a company's operations, such as remote work arrangements, business continuity plans, and travel restrictions, and how these adjustments may affect internal control over financial reporting and a company's ability to maintain disclosure controls and procedures; and
- Expectations regarding COVID-19's impact on a company's supply chains and demand for products or services.

Presentation of Non-GAAP Financial Measures

Item 10 of Regulation S-K and Regulation G require that public disclosures of material information that include any non-GAAP financial measure, such as EBITDA or pro forma or adjusted results, be accompanied by a reconciliation to the most directly comparable measure calculated in accordance with GAAP. The Disclosure Guidance recognizes that a final GAAP financial measure may not be available at the time of a public company's earnings release due to the need for COVID-19-related adjustments that require additional information and analysis to complete. To accommodate this circumstance, the Division of Corporation Finance will not object to companies' reconciling non-GAAP financial measures to preliminary GAAP results that include either a provisional amount based on a reasonable estimate or a range of reasonably estimable GAAP results. The Disclosure Guidance cautions that use of this accommodation should be limited to non-GAAP financial measures used to report financial results to a company's board of directors, rather than non-GAAP measures disclosed to present a more favorable view of the company.

Insider Trading and Regulation FD

It is a basic tenet of securities law that a public company's securities should not be traded on the basis of material nonpublic information. The Disclosure Guidance urges companies to be particularly vigilant during a time when COVID-19 is creating so much uncertainty that it may be difficult to differentiate a company's material nonpublic information from general economic and societal impacts of the pandemic. The Disclosure Guidance reminds companies, their directors and officers, and other corporate insiders of their obligations to refrain from trading

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based on material nonpublic information and to broadly disseminate any such information in accordance with Regulation FD.

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