

U.S.: SEC STAFF ISSUES COVID-19 RELATED GUIDANCE

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The SEC Staff has provided guidance as to disclosure and other securities law obligations (the Guidance) related to COVID- 19 and related business and market disruptions.

The Guidance provides the SEC Staff's views on

- disclosure related to COVID-19
- material non-public information related to COVID-19 and
- reporting earnings and financial results during this period, including guidance with respect to non-GAAP measures related to COVID-19.

Assessing and Disclosing the Evolving Impact of COVID-19. The SEC Staff reminds companies that the effects COVID-19 has had on a company, what management expects its future impact will be, how management is responding to evolving events, and how it is planning for COVID-19-related uncertainties can be material to investment and voting decisions.

The Guidance lists a number of detailed questions management should consider relating to, among other things: a company's financial condition and results of operations; capital and financial resources; valuation of balance sheet assets; possible material impairments; effects on operations resulting from remote work arrangements, including on controls; business continuity plans; customer demand; supply chains; human capital resources and productivity; and the effects of travel and border restrictions.

The Staff encourages companies "to provide disclosures that allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management, and that companies proactively revise and update disclosures as facts and circumstances change."

Material Non-Public Information. The Guidance includes a reminder that if COVID-19 has affected a public company in a material way, or where the company has become aware of a risk related to COVID-19 that would be material, then the company and its insiders – including directors and officers – who are aware of such matters should refrain from trading until such information is disclosed to the public. Any such disclosure should be broadly disseminated in compliance with

Regulation FD. The Guidance also encourages companies to consider whether, depending on the particular circumstances, previous disclosures should be refreshed or updated to the extent they have become materially inaccurate.

Reporting Earnings and Financial Results; Non-GAAP Measures. Recognizing that reporting earnings and financial results may present novel or complex accounting issues, the SEC Staff encourages companies to engage any necessary experts promptly (e.g., to value assets or goodwill), so that reports may be as timely as possible.

With respect to non-GAAP financial measures that adjust for or explain the impact of COVID-19, the Staff believes it would be appropriate to highlight why management finds the measure useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations.

If a GAAP financial measure is not available at the time of the earnings release because it is impacted by COVID-19-related adjustments that may require additional information and analysis, the SEC Staff would not object to companies reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP results. In such cases,

- the provisional amount or range should reflect a reasonable estimate of COVID-19 related charges not yet finalized, such as impairment charges;
- the non-GAAP financial measure should not be disclosed more prominently than the most directly comparable GAAP financial measure or range of GAAP measures; and
- if a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures in reliance on the above position, it should (i) limit the measures in its presentation to those non-GAAP financial measures it is using to report financial results to the Board of Directors; and (ii) 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.

In filings where GAAP financial statements are required, such as on Form 10-K or 10-Q, companies must reconcile any non-GAAP financial measures to GAAP results and not include provisional amounts or a range of estimated results.

Finally, the Staff reminds companies that present metrics related to COVID-19, or changing the method by which it calculates a metric as a result of COVID-19, of the SEC's [guidance related to metrics](#) issued in January. There, the SEC stated that it would generally expect accompanying disclosures in MD&A to include:

- a clear definition of the metric and how it is calculated;

- a statement indicating the reasons why the metric provides useful information to investors; and
- a statement indicating how management uses the metric in managing or monitoring the performance of the business.

Additionally, the SEC encourages companies to consider whether there are estimates or assumptions underlying the metric or its calculation, and whether disclosure of those estimates or assumptions is necessary for the metric not to be materially misleading.

Further, if a company changes the method by which it calculates or presents the metric from one period to another or otherwise, the company should consider the need to disclose, to the extent material:

- the differences in the way the metric is calculated or presented compared to prior periods;
- the reasons for such changes;
- the effects of any such change on the amounts or other information being disclosed and on amounts or other information previously reported; and
- such other differences in methodology and results that would reasonably be expected to be relevant to an understanding of the company's performance or prospects.

Depending on the significance of the change(s) in methodology and results, the SEC believes companies should consider whether it is necessary to recast prior metrics to conform to the current presentation and place the current disclosure in an appropriate context.

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