

From the Public Company Advisory Group of Weil, Gotshal & Manges LLP

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Getting Ready for Q1 Reporting: Addressing the Uncertainties of COVID-19

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For calendar year public companies, the Q1 earnings release, investor and analyst calls and quarterly report on Form 10-Q loom on the near horizon. As they prepare, company management in the first instance, and audit committees and boards of directors in their oversight role, will need to evaluate holistically the impact of the COVID-19 pandemic on the company's business and financial condition at quarter's end and their expectations for the remainder of 2020 and beyond. Since late March, as discussed in this Alert, the SEC Chairman and senior staff members have issued a significant amount of highly specific guidance intended to focus companies on what they see as the key disclosure challenges to be met. The most recent guidance, a statement last week by SEC Chairman Jay Clayton and Division of Corporation Finance Director William Hinman (April 8th Statement), urges companies to use the earnings release to go beyond the usual combination of historical results and reasonably foreseeable trends indicative of future performance typical of a "normal" earnings call. This guidance advocates that companies discuss where they stand operationally and financially today and, to the extent possible, provide forward-looking information about future plans and consequences of addressing the effects of COVID-19.

In this Alert we discuss upcoming Q1 disclosure about the impact of COVID-19:

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At the risk of stating the painfully obvious, the just-completed quarter has not been “normal” for public companies by any stretch of the imagination. As they turn from addressing complex operational matters and mitigation efforts to disclosure decision-making, corporate management, audit committees and boards are grappling with such questions as: Should the earnings release and conference call be delayed to give the company more time to come to grips with any number of novel or complex accounting issues generated by the “perfect storm” of the COVID-19 pandemic, global economic turmoil, and the rapid-fire pace of federal and state legislative and regulatory responses? If it has not already done so, should the company withdraw or otherwise modify earnings guidance made early in Q1? What is the impact on the company of the Coronavirus Aid Relief and Economic Security Act (CARES Act) and its regulatory progeny? Will the company need to recognize impairments? And finally, given the uncertainty about when and how the economy will reopen and whether certain industries will undergo lasting structural change, the ultimate question: what insight can be given into what the future may hold for the company?

These are just a few of the considerations that may influence the timing and content of companies’ upcoming earnings releases, investor and analyst calls, and quarterly reports on Form 10-Q. In the disclosure considerations checklists below, we discuss, where applicable, the relevant SEC and/or staff-level disclosure guidance: the April 8th Statement, available [here](#); the Statement by SEC Chief Accountant Sagar Teotia dated April 3, 2020 (the “Chief Accountant Statement”), available [here](#); and the Division of Corporation Finance’s CF Disclosure Topic #9: Coronavirus (COVID-19) (CF Topic #9) dated March 25, 2020, available [here](#). We also discuss the need for heightened vigilance to prevent insider trading and selective disclosure underscored in the Statement Regarding Market Integrity from Division of Enforcement Co-Directors Stephanie Avakian and Steven Peikin dated March 23, 2020 (Enforcement Statement), available [here](#). Our prior Alert discussing CF Topic #9 and the Enforcement Statement is available [here](#). In the checklists, we note key action items and, at the end, we suggest “What to Do Now” in further navigating this quarter’s disclosure challenges.

Q1 Earnings Release Disclosure Considerations Checklist

- *Timing: Consider minimizing the gap between the earnings release and Form 10-Q.*
 - Given the rapidly evolving nature of the impact of COVID-19 on the economy and the company, more than a short gap between the earnings release and the filing of the Form 10-Q could result in the company having to consider whether to amend or otherwise update via the Form 10-Q, information presented in the earnings release and/or accompanying call about operations, financial condition, liquidity or, in some cases, prospects for the future.
 - Closing the gap as much as possible may also provide useful extra time for the outside auditor to review the financial information to be disclosed in the earnings release for consistency with the financial disclosures the company will be making in the Form 10-Q, and for the audit committee to discuss with both senior management and the outside auditor the complex estimates and judgments (discussed further below) that underpin management’s application of existing and recently adopted accounting standards in these circumstances.
- *Content: Provide a comprehensive discussion of the impact that COVID-19 has already had on the company and consider, where possible, forward-looking information.*
 - The April 8th Statement asks companies to recognize the urgent need of investors and analysts “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” and to satisfy that need by providing as much information as possible regarding current operating status and future operating plans under various COVID-19 mitigation conditions. Specifically, the April 8th Statement calls for disclosure of the following:
 - A detailed discussion of current liquidity positions and expected financial resource needs.

- If a company will be receiving financial assistance under the CARES Act or other COVID-19 related federal and state programs, and the assistance has materially affected, or is reasonably likely to have a material future effect, upon the company's financial condition or results of operations, disclosure of the nature, amounts and effects of such assistance.
- Actions the company has taken to protect worker health and well-being and customer safety.
- The April 8th Statement acknowledges the difficulty of providing forward-looking information, particularly expected resource needs, at a time when the duration and scope of social distancing and other COVID-19 mitigation measures are uncertain. However, it encourages companies to avoid boilerplate and to instead make all reasonable efforts to convey meaningful information through the eyes of management about key operational and financial considerations and the challenges the company faces.
- In order to address companies' concerns about legal risk in the event that forward-looking information proves incorrect, the April 8th Statement emphasizes that the Commission does "not expect to second guess good faith attempts to provide to investors and other market participants appropriately framed forward-looking information." (More on this below in our discussion of the cautionary statements under the Private Securities Litigation Reform Act (PSLRA) and in our discussion of disclosure controls and procedures and material changes in internal control over financial reporting.)
- The April 8th Statement builds on the very useful set of questions set forth in CF Topic #9 that companies are urged to ask themselves in making disclosure decisions. These questions, discussed in the Form 10-Q section below under "MD&A," are highly pertinent to preparation of the earnings release as well.
- To some extent, the stage already has been set for the type of disclosure being urged in the April 8th Statement and CF Topic #9. During Q1, many companies provided business updates to address the initial impact of COVID-19 and steps taken in mitigation, including temporary or permanent store closures in certain states and/or countries; effects of the COVID-19 outbreak on a company's supply chain and related costs; new product development delays; customer purchasing and/or payment delays or cancellations; changes in the management of inventory; reduction in previously-planned operating expenses and capital expenditures; updates or withdrawals of earnings guidance; drawdowns of credit revolvers; suspension of share repurchase programs; suspension of dividends; furloughs; layoffs; staff salary cuts; reduction in senior management and board pay; and, in some cases, a CEO or CFO falling ill and/or testing positive for COVID-19.
- We expect companies that provided business updates during Q1 to revisit and refresh the information previously disclosed where appropriate and, for those companies that have not yet provided business updates, to consider including disclosure in the earnings release on many of these topics. Additional topics to be considered for discussion in Q1 earnings releases include the results of complex accounting judgments (including impairments, subsequent events, and possibly going concern qualifications), which are discussed in more detail in the Form 10-Q section below.
- *Guidance: Determine whether to withdraw annual and/or quarterly guidance previously given, suspend giving quarterly and/or annual guidance, or provide new or revised guidance, either factoring in the impacts of COVID-19 or explicitly excluding such impacts.*
- The determination whether to withdraw guidance depends upon the industry or services sector the company is in and the visibility of the impact of COVID-19. For example, for companies in the retail industry, withdrawal or suspension of guidance is not surprising given the proliferation of temporary or permanent store closures, employee terminations and/or furloughs, and similarly drastic cost-cutting measures. For companies providing essential services, such as those in the grocery, pharmacy, technology, pharmaceuticals and/or medical services sectors, there may be a reasonable basis for continuing to give guidance with appropriate disclosure about key assumptions and the time horizon of this guidance.

- *Non-GAAP Financial Measures: Continue to be mindful of prior SEC staff guidance on the use of non-GAAP financial measures; determine whether to take advantage of new SEC staff guidance regarding reconciliation to preliminary GAAP measures.*
 - CF Topic #9 indicates that companies may reconcile a non-GAAP financial measure to preliminary GAAP results that either include provisional amounts based on a reasonable estimate of GAAP results for the reporting period, or a range of reasonably estimable GAAP results. This will be helpful for companies holding their earnings call before they have finalized the financial statements to be included in their Form 10-Q. (In the Form 10-Q itself or other filings where GAAP financial statements are required, the reconciliation must of course be to the most directly comparable GAAP results.)
 - For example, under the flexibility afforded by CF Topic #9, a company that discloses EBITDA may reconcile that measure to any of the following: its GAAP earnings, a reasonable estimate of its GAAP earnings that includes a provisional amount, or a reasonable estimate of a range of GAAP earnings that include provisional amounts.
 - If used, a provisional amount or range should reflect a reasonable estimate of COVID-19 related charges not yet finalized, such as impairment charges, and the company should explain, to the extent practicable, why the accounting is incomplete, and what additional information or analysis is needed to complete the accounting.
 - Apart from the flexibility described above, the customary restrictions on the use of non-GAAP financial measures continue to apply.
 - Non-GAAP financial measures should be limited to those the company is using to report financial results to the board of directors for the purpose of analyzing the current and potential impact of COVID-19, and not created for the sole purpose of presenting a more favorable view of the company.
 - Moreover, care should be taken to include only adjustments – both charges (such as contract termination penalties) and gains (such as insurance recoveries) – that are directly attributable to COVID-19 rather than ordinary course business. Note that the SEC guidance does not permit adjustments for lost profits.
 - As always, a non-GAAP financial measure should not be disclosed more prominently than the most directly comparable GAAP financial measure or estimated or range of estimated GAAP measures – this means the GAAP results must appear first and not be omitted from release headlines.
 - Further, in this volatile environment, companies should be careful not to substitute individually tailored accounting measures for GAAP in the guise of a non-GAAP financial measure.
- *Key Performance Metrics: Carefully consider whether key performance indicators/metrics that are adjusted for the impact of COVID-19 are compliant with previous SEC and staff guidance, particularly CF Topic #9.*
 - In a recent MD&A interpretive release, available [here](#), the SEC reminded companies including metrics in their disclosure (e.g., same-store sales, revenue per subscriber) to consider existing MD&A requirements and “the need to include such further material information, if any, as may be necessary in order to make the presentation of the metric, in light of the circumstances under which it is presented, not misleading.” Elaborating on this theme, CF Topic #9 states that, to the extent a company chooses to present a performance metric to adjust for or explain the impact of COVID-19, it would be appropriate to highlight why management finds the metric useful and how it helps investors assess the impact of COVID-19 on the company’s financial position and results of operations.

- *PSLRA Cautionary Statements Legend: Carefully review, revise and update the PSLRA legend to protect disclosures of forward-looking information about the impact of COVID-19.*
 - Companies should take a fresh look at the sufficiency, for this year's Q1 earnings release and accompanying investor presentation, of the forward-looking statements legend they have used as recently as the fiscal 2019 Form 10-K.
 - Most S&P 500 companies are, at a minimum, prominently adding an explicit bullet related to COVID-19 and are considering whether COVID-19 should be referenced in any other enumerated cautionary factor as a specific example of how the factor would be impacted (e.g. the bullet on supply chain).
 - Updating this legend to reflect the extraordinary environment in which companies are now operating is particularly important for companies that are providing guidance or, as they have been urged to do in the April 8th Statement, otherwise providing an unusual degree of forward-looking information in the Q1 earnings release and/or on the earnings call.
 - The updated legend should also be included in the Q1 Form 10-Q.

Q1 Form 10-Q Disclosure Considerations Checklist

Timing of the Filing: Consider whether the company needs to take advantage of additional time to file afforded by an SEC exemptive order.

- The SEC issued an exemptive order on March 25, 2020 available [here](#), allowing up to a 45-day delay for filings through July 1, 2020. See our Alerts discussing this extension and its predecessor, available [here](#) and [here](#).
 - In order to rely on the SEC's COVID-19 45-day extension, a company must file a Form 8-K with the relevant information regardless of whether or not it files a timely Form 12b-25. [CDI 135.12]
 - Upon reaching the end of the 45-day extension, a company is then permitted to use Form 12b-25 to further extend the filing date in accordance with Rule 12b-25. [CDI 135.13]

Content: Risks and consequences of COVID-19 may need to be addressed in multiple sections of the Form 10-Q.

- As CF Topic #9 emphasizes, disclosure decisions about the risks and consequences flowing from COVID-19 (including mitigation measures) should be made from a principles-based materiality perspective. In the Q1 Form 10-Q, the disclosure of these risks and consequences may need to be addressed in one or more, or possibly all, of the following sections: risk factors, MD&A, disclosure controls and procedures, material changes in internal control over financial reporting, the financial statements (including the footnotes), and possibly legal proceedings.

Risk Factors: It is important, in this fast-changing COVID-19 world, not to simply rely on the 10-K risk factors written in January or February, and consider, instead, adding and updating risk factors in the Form 10-Q in a non-boilerplate fashion.

- Although Form 10-Q contemplates that companies may wish to add or republish risk factors, under normal circumstances many companies rely on the risk factor section of their Form 10-K for the Q1 Form 10-Q and, generally, the 10-Qs for the balance of the year. The uncertainties generated by COVID-19, however, warrant a more exacting re-examination of the current "total mix" of information against the relevant facts and circumstances that guided the drafters of the 10-K risk factors, with a view to determining whether any update or expansion is necessary or appropriate to reflect material changes in the Q1 Form 10-Q (as well as the earnings release for Q1).

- Based on our review of S&P 500 company Form 10-K filings and post 10-K Form 8-K filings, companies have:
 - added a new risk factor entirely devoted to COVID-19 when their Form 10-K was silent or made only a cursory mention of pandemics;
 - updated certain existing risk factors, where relevant, to disclose how COVID-19 may potentially exacerbate more traditional risks, such as global economic conditions, supply chain, global workforce, and changes in consumer behavior;
 - avoided boilerplate by being specific as to how the COVID-19 pandemic poses particular risks to the company, instead of relying on more sweeping generic disclosures;
 - in some cases, where appropriate, added a caveat at the beginning of the risk factors section, to indicate that many of the risk factors are, and will continue to be, exacerbated by the COVID-19 pandemic and any worsening of the economic environment; and
 - in keeping with the analytical framework outlined in prior SEC and staff guidance, available [here](#), avoided pitfalls by making clear when risks posed by COVID-19 have actually materialized (e.g., disruptions in supply chain) rather than describing such risks as potential or hypothetical.

PSLRA Cautionary Statements: Ensure consistency with the legend in the earnings release and the updated risk factors.

- As noted above, an updated legend should be included in the Form 10-Q.

Management's Discussion & Analysis: Consider expounding on "known trends and uncertainties" in light of COVID-19 to a greater degree than may be typical for the company in a Form 10-Q.

- In the Q1 MD&A, the SEC staff expects extensive "known trends and uncertainties" disclosure related to the pandemic. Certain of the questions that CF Topic #9 encourages companies to ask themselves, with a view to disclosure, are particularly relevant to preparing the "Results of Operations" section of MD&A.
 - 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?
 - 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?

- Other questions presented in CF Topic #9 are particularly relevant to preparing the Liquidity and Capital Resources section of MD&A. CF Topic #9 reminds companies to consider the requirement to disclose known trends and uncertainties as it relates to a company's ability to service its debt or other financial obligations, the company's access to the debt markets, maturity mismatches between the company's 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.
 - 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?

Controls & Procedures: Ensure that disclosure controls and procedures are sufficient to capture COVID-19 related impacts required to be disclosed; given the need for both disclosure controls and internal control over financial reporting (ICFR) to be re-calibrated, consider whether any material changes in ICFR must be disclosed.

Effectiveness of Disclosure Controls & Procedures

- Evaluating the effectiveness of disclosure controls and procedures will be unusually challenging this quarter. Areas of sensitivity include the impact of COVID-19 triggered developments such as reduction in workforce, contract terminations, reduction in customer demand due to closures and social distancing (especially as applicable to retail, hospitality, entertainment, travel), a reduction of critical supplies or services provided by third parties, and the appropriateness for disclosure or accrual of material loss and/or gain contingencies. Disclosure committees should consider the consistency of proposed disclosure with the information the board is receiving about risks, impacts and mitigation efforts.
- As discussed more fully under "What to Do Now" below, disclosure committees have a particularly important role to play in evaluating the effectiveness of controls and procedures as they have been applied to the development of non-GAAP financial measures and metrics that exclude the impact of COVID-19, as well as to guidance and other COVID-19 related forward-looking information. The basis for favorable conclusions reached by the Disclosure Committee should be carefully documented to demonstrate, should it be necessary in the future, the rigor of the process and good faith nature of the disclosure. In our view, such support will be critical to CEOs and CFOs called upon to sign the required certifications of disclosures made in the Form 10-Q.
- Given the current disclosure challenges, it may be helpful to expand the disclosure committee to include personnel on company's COVID-19 response team who are close to the company's mitigation efforts in areas such as human resources, remote working, supply chain, business continuity, and financial forecasting. This will facilitate the required materiality decisions that support the CEO/CFO certifications. It may also be helpful to hold meetings on a more frequent basis by telephone or other electronic media.
- On a related note, companies should keep in mind the guidance set forth in the Enforcement Statement and re-affirmed in CF Topic #9 to enhance controls and procedures designed to prevent selective disclosure and insider trading, as discussed in "What to Do Now" below.

Material Changes to Internal Control over Financial Reporting

- Disclosure committees, working with financial statement preparers and Internal Audit, should pay heightened attention to identifying changes in controls that have occurred during the current period and assessing whether the changes have materially affected the company's internal control over financial reporting. These changes may relate to, among other things, compensating controls put in place to address remote working arrangements, difficulties in "closing the books" due to the unavailability of company personnel or third party providers, or delays in or unavailability of third party verification, and cybersecurity concerns.
- This is also an area for heightened attention by audit committees in their dialogue with Internal Audit and the outside auditors during the review of the Form 10-Q.

Financial Statements: Accounting judgments and estimates, including a going concern analysis, are likely to be especially challenging because of COVID-19.

- The Chief Accountant Statement emphasizes the importance of high-quality financial information to help investors make decisions amidst the uncertainty created by the impact of COVID-19 and pledges that the SEC's Office of Chief Accountant (OCA) is available for consultation by preparers, auditors and other stakeholders.
- The Statement recognizes that companies may be required to make and disclose in the Q1 Form 10-Q significant accounting judgments and estimates rendered especially challenging by COVID-19. Consistent with the flexible approach taken in the April 8th Statement with regard to forward-looking information, the Statement notes that the OCA "has consistently not objected to well-reasoned judgments that entities have made, and we will continue to apply this perspective."
- The Statement identifies the following areas as ripe for significant judgments and estimates triggered by COVID-19 considerations and stresses the importance of required disclosures about them:
 - Fair value and impairment considerations for financial and non-financial assets and/or liabilities
 - Leases
 - Debt modifications or restructurings
 - Hedging
 - Revenue Recognition
 - Income taxes
 - Going concern
 - Subsequent events
 - Adoption of new accounting standards (e.g., the new current expected credit losses standard (CECL))
- This quarter, given the significant impact of COVID-19, management should expect to take a much closer look (and expect that its outside auditor likewise will be taking a much closer look in the context of the interim review process) at the company's forecasts for the ensuing year, including liquidity and covenant compliance. If, based on that analysis, substantial doubt exists about the company's ability to continue as a going concern, management and the outside auditor will need to consider management's plans to mitigate these conditions and whether they are probable of success. Anticipate in-depth discussions between and among the audit committee, senior financial management, internal audit and legal personnel, and the outside auditor.

- In addition, this quarter, because of the fast-changing nature of COVID-19 related events, management should similarly expect to take a much closer look (and expect that its outside auditor will do so as well) at whether events have occurred after the balance sheet date but before the issuance of the Q1 financial statements that need to be reflected in the footnotes to the financial statements, MD&A and/or risk factors. (We note, for example, that a number of companies that filed Form 10-Ks in late February and early March disclosed drawdowns on credit facilities after year-end in a subsequent events footnote.)
- OCA is working closely with the accounting and audit standard-setters the SEC oversees, the Financial Accounting Standards Board (FASB) and the Public Company Accounting Oversight Board, respectively, to address emerging issues that relate to COVID-19.
 - On April 8, 2020, the FASB met virtually to discuss plans to support stakeholders with respect to the impact of the pandemic on affected entities' ability to implement relatively new accounting standards (e.g., revenue recognition and leases), hear staff presentations on staff responses to technical inquiries on urgent accounting issues (e.g., lease modifications, debt payment forbearance, timing of franchisor revenue recognition, possible discontinuation of cash flow arrangements that previously qualified for GAAP hedge accounting), and effective date deferral requests for significant standards not yet effective for some non-registrant entities (e.g., private companies and certain non-profits). The seven FASB board members who participated in this meeting released a summary of their tentative decisions and the staff's presentations later that day, available [here](#), along with a statement from FASB Chair Russell Golden, available [here](#).
- Certain important areas of COVID-19 based accounting relief, as reflected in FASB staff responses to technical inquiries, include the following:
 - **Fair value and impairment considerations:** According to FASB's summary of the April 8, 2020 meeting, the staff recently received a request to suspend mark-to-market accounting citing as precedent FASB guidance allowing more flexibility in connection with fair value measurement during the 2008-2009 financial crisis. The staff responded with a reminder of the "orderly transaction" concept underpinning fair value measurement under ASC Topic 820, pointing in particular to paragraphs 820-10-35-54C through -54J, "which provide guidance for measuring fair value when the volume or level of activity for an asset or liability has significantly decreased and identifying transactions that are not orderly." Although not stated explicitly in the FASB summary, the staff's response can be read to indicate that the requesting party obtained a favorable response. In closing, the staff declared that it "stands ready to address any interpretive questions with respect to [the application of] that guidance."
 - **Leases:** On April 10, 2020, the FASB staff issued a Q&A document, available [here](#), that addresses accounting for lease concessions related to the COVID-19 pandemic. Essentially, companies will have the flexibility to elect to apply, or not to apply, the lease modification guidance contained in ASC Topic 842 (for companies that have adopted the new lease accounting standard) or ASC Topic 840 (for companies that have not yet done so). The FASB staff reminded companies choosing to forgo GAAP modification treatment of the obligation of lessors to provide disclosures about material concessions granted and of lessees to provide disclosure about material concessions received, in each case with the related accounting effects.

- **Debt modifications or restructurings:** Under Section 4013 of the CARES Act, a financial institution may elect to suspend accounting for troubled debt restructuring (TDR) GAAP during the period beginning on March 1, 2020 and ending on the earlier of (i) December 31, 2020, or (ii) the date that is 60 days after the date on which the national emergency concerning the COVID-19 outbreak declared by the President on March 13, 2020 under the National Emergencies Act terminates. For those entities that are eligible for, and elect to apply, this deferral, the Chief Accountant Statement indicates that the OCA staff would not object to the conclusion that reliance on this deferral is in accordance with GAAP for the periods for which such elections are available. FASB's summary of the April 8, 2020 meeting describes two flexible alternative positions the FASB staff views as acceptable to avoid TDR treatment of specified loan forbearance actions taken by lenders, which may have implications for recognition of interest income by such lenders. There is no indication that the staff positions are limited to banks and other financial institutions.
- **Hedging:** FASB noted, in its summary of the April 8, 2020 meeting, the flexible application by its staff of hedge accounting (ASC Topic 815) to cash flow hedging arrangements affected negatively by the COVID-19 pandemic (i.e. relief from the adverse consequences of a more than two-month delay in the forecasted transaction or transactions reflected in hedge documentation).
- **Income taxes:** Accounting for income taxes for the quarter ended March 31, 2020, and beyond, may be particularly complicated for some calendar-year companies due to passage of the CARES Act several days earlier (on March 27, 2020). Among other temporary relief measures are NOL carrybacks extended retroactively to 2013 (to offset against taxable income) and relief from limitations on corporate interest deductions. For more on the CARES Act treatment of NOLs and other tax benefits, and related agency action, see our Alerts available [here](#) and [here](#).
- **Deferred adoption of CECL:** Under Section 4014 of the CARES Act, insured depository institutions, bank holding companies and their affiliates will not be required to comply with CECL during the period beginning on March 27, 2020 and ending on the earlier of (i) the date on which the national emergency concerning the COVID-19 outbreak declared by the President on March 13, 2020 under the National Emergencies Act terminates; or (ii) December 31, 2020. For those entities that are eligible for, and elect to invoke this deferral, the Chief Accountant Statement indicates that the OCA staff would not object to the conclusion that this is in accordance with GAAP for the periods for which such elections are available. For companies that are not eligible for the statutory deferral, we understand that the SEC accounting staff may be more receptive to transition disclosures of pre-CECL data compiled and presented under the "incurred loss" model. Because this has not been confirmed in writing, however, we recommend consulting the appropriate SEC accounting staff to obtain interpretive guidance in connection with a specific set of facts and circumstances.
- Finally, it is worth noting that the Chief Accountant Statement cautions that OCA has not relaxed its focus on auditor independence, which OCA sees as "foundational to the credibility of the financial statements." It is possible, for example, that in an effort to help a resource-constrained client, the outside auditor might come a bit too close to the line between acceptable technical GAAP advice and undue involvement in management's GAAP decision-making in preparing the company's financial statements. The Chief Accountant's Statement reminds companies, audit committees and auditors that independence is a shared responsibility, and that OCA is available for consultation as needed.

What to Do Now:

- Be mindful of, and reinforce existing controls and procedures to address, the message on insider trading and selective disclosure delivered in the Enforcement Statement and re-emphasized in CF Topic #9. Reinforced controls and procedures could include subjecting added personnel who are “in the know” about how the company is being affected by COVID-19 and the company’s mitigation plans to pre-clearance procedures for securities trading; longer blackout periods; regular (virtual) meetings on the current status of classic and temporary insiders’ knowledge of MNPI in order to assess whether a special blackout need be called; refreshed training on Regulation FD and concomitant antifraud tipping prohibitions – extended to investor relations personnel and outside directors alike – to ensure that potentially material COVID-19 information is not disclosed selectively and/or inadvertently; and open trading windows only when “business updates” with all MNPI has been disclosed to the investing public in an FD-compliant manner and only for a short period of time. As underscored in the Enforcement Statement (emphasis added):

“We wish to emphasize the importance of maintaining market integrity and following corporate controls and procedures. For example, in these dynamic [COVID-19-related] circumstances, corporate insiders are regularly learning new material nonpublic information that may hold an even greater value than under normal circumstances. ***This may particularly be the case if earnings reports or required SEC disclosure filings are delayed due to Covid-19.*** Given these unique circumstances, a greater number of people may have access to material nonpublic information than in less challenging times. Those with such access – including, for example, directors, officers, employees, and consultants and other outside professionals – should be mindful of their obligations to keep this information confidential and to comply with the prohibitions on illegal securities trading. Trading in a company’s securities on the basis of inside information may violate the antifraud provisions of the federal securities laws. ***We similarly urge public companies to be mindful of their established disclosure controls and procedures, insider trading prohibitions and Regulation FD and selective disclosure prohibitions to ensure to the greatest extent possible that they protect against the improper dissemination and use of material nonpublic information.***”

- In considering the level of disclosure in response to the April 8th Statement:
 - If the company has determined that it is able to provide forward-looking information to a greater degree than it typically does:
 - carefully review and expand upon the cautionary factors in the forward-looking statement legend to cover such expanded disclosure, and make any corresponding changes to the risk factors in the Form 10-Q;
 - include disclosure of key assumptions underpinning the additional forward-looking disclosure and maintain documentation of the good-faith, reasonable basis for such assumptions;
 - ensure that the additional forward-looking information, including any estimates or assumptions underlying the information, been rigorously reviewed by the disclosure committee and discussed with the audit committee and/or the full board in connection with review of the Form 10-Q; and
 - Ensure that the forward-looking information is consistent with the information provided to the board of directors with respect to senior management’s outlook for the business.

- If the company has determined that it is not able to provide forward-looking information to a greater degree than it typically does:
 - have a plan in place for responding to investor and/or analyst questions about future performance asked either during the earnings call or of the investor relations staff following the earnings call; and
 - be cautious in describing historical performance and pre-existing plans for the business and strategy of the company to ensure that such descriptions are adequately qualified given the uncertainty posed by COVID-19.
- Regardless of whether the company is, or is not, providing more forward-looking information:
 - ensure controls and procedures are calibrated to support the accuracy and timeliness of information elevated to disclosure decision-makers about the operational and financial condition of the company in light of the fast-moving and pervasive impact of the COVID-19 pandemic;
 - under the oversight of the audit committee, and with the involvement of the outside auditor as part of the engagement team’s review process, determine whether there are undue risks underlying any of the disclosures being made;
 - enhance, as discussed above, controls and procedures aimed at preventing selective disclosure and insider trading; and
 - finally, note that, although they are working at home, the SEC staff members continue to monitor corporate disclosures for accuracy, completeness and consistency, whether “filed” with or “furnished” to the SEC, or posted on websites in the form of communications that appear aimed at investors and therefore subject to the antifraud provisions of the federal securities laws.

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Please contact any member of Weil's Public Company Advisory Group or your regular contact at Weil, Gotshal & Manges LLP:

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