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WHITE PAPER

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COVID-19-Related Disclosure Considerations for Upcoming Periodic SEC Reporting

The ongoing COVID-19 pandemic has resulted in unprecedented and rapidly evolving disruptions to public companies' businesses, financial condition, and results of operations, as well as broad-based economic dislocation and market volatility. Against this backdrop, companies face challenging and complex disclosure considerations.

The staff of the U.S. Securities and Exchange Commission ("SEC") has provided guidance to help clarify U.S. public companies' disclosure obligations. By adhering to SEC guidance and disclosure principles and anticipating scrutiny that may arise in the future with the benefit of hindsight, companies can manage their disclosure obligations to public investors.

In connection with upcoming periodic filings, public companies should evaluate their current business demands, filings deadlines, and disclosure obligations in light of the impact of the COVID-19 pandemic. Companies and those responsible for public reporting obligations should be proactive in addressing filing timelines and appropriate disclosure in response to the COVID-19 pandemic, consistent with the effective implementation of established disclosure controls.

TABLE OF CONTENTS

CONDITIONAL FILING DEADLINE RELIEF	1
MATERIAL NONPUBLIC INFORMATION.....	1
EARNINGS AND GUIDANCE.....	2
Earnings.....	2
Guidance.....	2
QUARTERLY REPORT ON FORM 10-Q.....	2
MD&A.....	2
Risk Factors.....	4
Legal Proceedings.....	4
Disclosure Controls & Internal Control Over Financial Reporting.....	4
Financial Statements.....	5
KEY TAKEAWAYS.....	5
LAWYER CONTACTS.....	5

The breadth of the COVID-19 pandemic, combined with stringent preventative and restrictive measures imposed by governmental authorities around the world, has significantly disrupted travel, supply chains, customer demand, and physical business operations and human capital for nearly all public companies. The reverberations throughout the global economic system have created new risks—and in some cases, opportunities—for public companies, impacted financial and performance trends, and created a host of uncertainties.

Public companies are approaching SEC reporting obligations against this challenging backdrop. For fiscal calendar year public companies, the next periodic report will be the first quarter Form 10-Q. At the same time, the SEC has reemphasized the importance of preserving market integrity, provided guidance on companies' and other market participants' disclosure and securities law obligations, and extended conditional relief to public companies facing operational challenges in satisfying reporting obligations on a timely basis. Challenging and complex disclosure determinations are likely to be carefully scrutinized in hindsight by investors, the SEC, and plaintiffs' lawyers, warranting careful consideration by those responsible for crafting and reviewing disclosure. This *White Paper* highlights recent SEC actions and guidance, reinforces the critical importance of protecting material nonpublic information, and describes the elements of periodic reports most likely to require carefully considered disclosure updates to address the impact of the COVID-19 pandemic.

CONDITIONAL FILING DEADLINE RELIEF

On March 25, 2020, the SEC [issued guidance](#) relaxing certain filing requirements to help address the unique challenges facing market participants.

In addition to rules facilitating the conduct of annual shareholder meetings [virtually or by remote participation](#), the SEC's guidance recognizes that some companies are facing unique operational and other challenges. Accordingly, the SEC has granted conditional regulatory relief affording additional time (up to 45 days) for affected companies to file certain disclosure reports, including quarterly reports, otherwise due between March 1 and July 1, 2020. To avail itself of this relief, a

public company must file a Form 8-K with the SEC by the current statutory filing deadline that:

- states that the company is relying on the SEC order granting regulatory relief;
- explains the reasons why the company could not file the report on a timely basis;
- provides the estimated date by which the company expects to be able to file the report;
- includes one or more company-specific risk factors explaining the impact, if material, of COVID-19 on the company's business; and
- if the reason the report cannot be filed timely relates to the inability of any person, other than the company, to furnish any required opinion, report, or certification, attaches an exhibit signed by that person stating the specific reasons why that person is unable to furnish the required opinion, report, or certification.

Companies should examine the impact of business and operational realities on their ability to meet filing deadlines. Among other things, a company may be able to utilize this guidance to delay its filing of any periodic report on Form 10-K or Form 10-Q, including a Form 10-K/A required to be filed within 120 days of the end of the fiscal year. In addition to conducting an annual meeting virtually or by remote participation, the relaxed deadlines could facilitate a more significant delay in an annual meeting of shareholders.

MATERIAL NONPUBLIC INFORMATION

Public companies must remain vigilant regarding their obligations under Regulation FD and insider trading laws, especially given macro-economic uncertainties and the potential for market dislocation. Companies should approach stock buybacks with caution and should continuously monitor trading windows, and insiders who are authorized to speak on behalf of the company should be careful not to reveal material nonpublic information to persons outside of the company. "Material" information in light of these unique circumstances may not always be clear, and the SEC's [Division of Enforcement has stressed](#) that it is committing substantial resources to safeguard Main

Street investors from potential fraud or illegal practices in light of the unprecedented market and economic conditions brought about by COVID-19.

EARNINGS AND GUIDANCE

Earnings

Many companies are facing difficult decisions regarding both the timing and content of earnings releases and related conference calls. In some circumstances, companies may seek to postpone reporting earnings in order to provide additional time to assess and better understand the impact of evolving COVID-19 developments, the scope of nonrecurring charges and expenses, and related accounting considerations. Regulation FD considerations should be evaluated in the context of potential delays in reporting earnings, as investors and analysts may reach out to management seeking updates on the company's expectations for the future impact of the COVID-19 pandemic.

To facilitate reporting as timely as possible, the SEC has proactively indicated that, with respect to non-Generally Accepted Accounting Principles ("GAAP") financial measures, **it would not object** to a company reconciling to preliminary GAAP results that either include provisional amounts based on a reasonable estimate or a range of reasonably estimable GAAP results. The SEC has, however, reminded companies of their obligations under Item 10 of Regulation S-K and Regulation G with respect to the presentation of non-GAAP measures.

Guidance

As a general matter, public companies have no affirmative obligation to update prior guidance; historically, companies have withdrawn, updated, or revised guidance only in limited circumstances. However, in light of unprecedented market disruption, many public companies that ordinarily provide full-year and/or quarterly earnings guidance have decided to withdraw, update, or revise guidance, or postpone the provision of further guidance because circumstances have or are expected to materially affect or create uncertainty around the company's performance.

In deciding whether to retain, revise, or withdraw prior guidance, public companies should be aware that there is no

one-size-fits-all solution. Rather, any determination requires the consideration of a number of factors, including:

- whether it is possible to provide reasonably reliable guidance given business and macro-economic uncertainties;
- the assumptions on which the guidance is based and whether they remain reasonable and appropriate in the current circumstances; and
- whether to enhance disclosure regarding material assumptions as part of guidance so that investors can better assess the impact of unanticipated future developments that might affect the company's guidance.

QUARTERLY REPORT ON FORM 10-Q

The impacts of, and risks associated with, the COVID-19 pandemic are likely to touch multiple areas of a company's Form 10-Q quarterly disclosure, including:

- management's discussion and analysis ("MD&A");
- risk factors;
- legal proceedings;
- disclosure controls and procedures and internal control over financial reporting; and
- the financial statements.

Companies should consider the SEC's principles-based disclosure obligations when evaluating their individual facts and circumstances and preparing their periodic reports, understanding disclosures made during significant market disruptions, such as the COVID-19 outbreak, will be viewed with the benefit of hindsight by investors, regulators, and other stakeholders.

MD&A

The SEC's MD&A disclosure rules and guidance require companies to discuss material changes in financial condition from the end of the preceding fiscal year and material changes in results of operations relative to the corresponding period in the preceding fiscal year, with meaningful and tailored disclosure around "any known trends or any known demands, commitments, events or uncertainties."

In preparing MD&A, companies should generally bear in mind the following intended purposes for MD&A disclosure, which are to:

- provide a narrative explanation and substantive analysis of a company's financial statements that enables investors to see the company through the eyes of management;
- enhance the overall financial disclosure and provide the context within which financial information should be analyzed; and
- provide information about the quality of, and potential variability of, a company's earnings and cash flow, so that investors can ascertain the likelihood that past performance is indicative of future performance.

More specifically, the SEC has provided [an illustrative list of questions](#) for companies to consider in evaluating the impact of COVID-19 on their present and future business, all of which may be useful considerations as you prepare your Form 10-Q.

Certain components of MD&A are likely to require special attention during the COVID-19 outbreak.

- **Tackling Known Trends and Uncertainties:** Management should carefully assess, and may be forced to make difficult judgments regarding, the likelihood of specified events and the potential objective consequences to the company if one or more of these events were to occur, including whether certain trends or events would have a material impact on liquidity, capital resources, or results of operations. Evaluating company-specific and macro-economic trends associated with the COVID-19 pandemic is likely to prove uniquely challenging because, for most companies, the impact of the pandemic will be highly uncertain and may require procedures that are more robust than contemplated by the company's ordinary-course disclosure controls. This evaluation will likely require input from a broader range of persons throughout the organization than is typical.
- **Addressing Liquidity and Capital Resources:** Management will also need to assess trends or uncertainties that may materially impact the company's liquidity. Blanket statements that a company has sufficient resources to meet its short-term and long-term cash requirements may be inadequate, unless further detail (e.g., discussion of sources, availability,

and cost of capital) would be immaterial to an investor's understanding of the company's liquidity. In recent weeks, many public companies have taken steps to strengthen their liquidity, including through borrowings under revolving credit arrangements, new debt offerings, 364-day term loan facilities, access to lending programs under the Coronavirus Aid, Relief and Economic Security Act ("CARES Act"), reduction or suspension of dividends, or other measures, all of which should be described in MD&A. In contrast, public companies that face liquidity concerns should address those concerns and the prospects for navigating any liquidity shortfall. If the company is exposed to increased cash requirements or restricted access to capital in light of known trends and uncertainties, it should address the time period over which it expects those conditions to be resolved. Moreover, in certain instances (such as where circumstances are disproportionately impacting liquidity of a reportable segment), it may be prudent for a company to separately disclose cash requirements and needs on a segment-by-segment basis. Where current economic conditions make it reasonably likely that a company may require additional equity or debt financing in the future, discussion and analysis of the amounts or ranges, and potential constraints on the nature and the terms, of available financing may be warranted.

- **Evaluating Performance Indicators and Metrics:** Management should continue to assess whether key performance indicators ("KPIs") and other metrics, which the SEC has noted may "present the pulse of the business," are useful tools for conveying insights into the company's financial condition and results of operations. For example, many public companies addressing the impact of COVID-19 on earnings guidance have noted challenges in quantifying the financial impact but have provided updates on metrics such as product volumes, store closure, and user access. Some companies may determine that it is appropriate to establish and disclose new key performance indicators related to the impacts of the COVID-19 pandemic, while others may rely on existing metrics, potentially incorporating additional adjustments in light of current circumstances.
- **Non-GAAP Metrics and COVID-19 Adjustments:** In some circumstances, it may be appropriate to use non-GAAP financial measures to help investors understand how management is analyzing the impact of COVID-19 on the

company's financial condition and operating results. In light of the unique impact from the pandemic, companies will be contemplating and perhaps utilizing novel adjustments to their non-GAAP measures in an effort to reflect changes that were attributable to the impact of COVID-19. Accordingly, it will be important for those preparing non-GAAP financial measures and explaining adjustments to have sufficient time to understand and evaluate the adjustments and related rationale. These persons should coordinate with the company's finance team and legal counsel to craft disclosure that appropriately highlights why management finds the non-GAAP measures to be helpful for investor understanding and why particular adjustments are appropriate. These persons should also ensure that non-GAAP measures are not given greater prominence than corresponding GAAP measures and that disclosure otherwise strictly adheres to the requirements of Item 10 of Regulation S-K.

Risk Factors

Companies will need to assess material changes from risk factors previously disclosed in the company's periodic reports, including changes that represent the "most significant" factors making an investment in the company risky or speculative. Companies should evaluate whether additional factors have emerged among the most significant risks facing the company, or whether the nature of existing factors presented have changed in a material way. In this regard, management's evaluation of existing risk factor disclosure should assess the specific risks that their businesses face in connection with the COVID-19 pandemic and should avoid simply reciting factual accounts of the pandemic and its broadly-applicable effects. In connection with this assessment, management may:

- consider whether the impact of the COVID-19 outbreak requires a more fulsome reworking of one or more risk factors or the risk factors as a whole, or whether a single additional risk factor is appropriate to address the additional risk of the outbreak;
- avoid unnecessarily restating or repeating risk factors that have not changed, which may be viewed as an inappropriate effort to draw attention away from the items that are, in fact, changing;
- avoid using boilerplate language that could apply to any company—the most protective risk disclosure will explain with precision how the risk affects the company; and

- avoid characterizing risks that have materialized as hypothetical risks—recent enforcement actions have highlighted the SEC's view that it may be materially misleading to suggest that a company merely faces a risk, when the company has, in fact, suffered a significant impact of such risk materializing in its business.

Legal Proceedings

Item 103 of Regulation S-K requires public companies to briefly describe any material, non-routine pending legal proceedings to which they or their subsidiaries are a party. To the extent a public company has become party to litigation relating to the COVID-19 pandemic, the materiality of that litigation should be evaluated to determine whether disclosure is required.

Disclosure Controls & Internal Control Over Financial Reporting

Item 307 of Regulation S-K requires that a company disclose the conclusions of its principal executive and financial officers regarding the effectiveness of the company's disclosure controls and procedures as of the end of the period covered by the periodic report.

In evaluating disclosure controls, executive officers will need to evaluate whether the design of existing disclosure controls and procedures was effective in light of significant disruptions to the operation of normal disclosure-related functions compared to the ordinary course reporting cycle. Specific considerations may include disruptions to the workplace, including, in some cases, lack of access to physical workspaces, substantial numbers of employees involved in reporting working remotely, capacity constraints on internet and teleconference services, and other disruptions. To ensure that all key disclosure controls and procedures operate effectively, senior management may need to accelerate certain processes and take a more hands-on approach to the management of disclosure procedures.

In addition, Item 308(c) requires disclosure of any changes in the company's internal control over financial reporting identified in connection with the evaluation of the effectiveness of internal control over financial reporting undertaken in connection with the company's annual report on Form 10-K. Companies should evaluate and describe what changes to internal controls over financial reporting, if any, were employed in order to address disruptions arising from the COVID-19

pandemic. By way of example, the following changes, to the extent material, should be described:

- newly implemented internal controls or modifications to existing internal controls to enable substantially increased remote-access work; and
- additional internal controls implemented to address increased fraud risks in connection with remote access and heightened stress.

Financial Statements

Companies should evaluate, together with their external auditors, whether disruptions and uncertainties arising from the COVID-19 pandemic have impacted accounting assumptions or conclusions relevant to the preparation of financial statements for the related quarterly report. In addition to direct impacts on the company, companies should evaluate whether heightened market volatility impacts accounting and financial reporting, particularly with respect to disclosure that is subject to sensitivities and critical assumptions.

KEY TAKEAWAYS

- Companies should examine the impact of business and operational realities on their ability to meet filing deadlines and, if necessary, discuss with securities counsel the conditions that must be met to avail themselves of the SEC's conditional regulatory relief.
- Vigilant compliance with obligations under Regulation FD and insider trading laws should remain at the forefront, especially given macro-economic uncertainties and the potential for market dislocation.
- In light of COVID-19 developments, otherwise standard decisions relating to earnings and guidance warrant fresh consideration in light of SEC disclosure obligations and a number of complex business and operational factors.

- In preparing their periodic reports, companies should revisit the SEC's principles-based disclosure obligations in light of their individual facts and circumstances, recognizing that disclosure made during significant market disruptions, such as the COVID-19 pandemic, will be viewed later with the benefit of hindsight.

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