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SEC Reporting Companies: Considering the Impact of the Coronavirus on Public Disclosure and Other Obligations

In December 2019, an outbreak of a new strain of coronavirus, COVID-19, emerged in Wuhan, China. Within weeks, despite efforts to contain the virus in China that included widespread shutdowns of cities and businesses, the number of those infected grew significantly, and beyond China's borders. As of today, the coronavirus is reported to have spread to over 80 countries, and the list is expected to continue to grow. As the virus continues to spread and effect business operations, supply chains, business and leisure travel, commodity prices, consumer confidence and business sentiment, and as companies ponder the impact on their businesses of employees working from home and consumers shunning air travel, stores, restaurants, sports events and other venues, it is hard to imagine a business or a sector that will be unaffected. SEC reporting companies need to consider not only the impact of the coronavirus on their operations from business continuity and risk management perspectives, but also on their public disclosure and SEC filing obligations.

The coronavirus outbreak is still evolving and its effects remain unknown. As SEC Chairman Jay Clayton noted in a January statement, available [here](#), the SEC recognizes "that [the current and potential effects of the coronavirus] may be difficult to assess or predict with meaningful precision both generally and [on] an industry- or issuer-specific basis." While it may be impossible to predict the ultimate impact of the coronavirus, what is clear today is that SEC reporting companies need to consider their disclosure obligations as events unfold. The coronavirus will impact public statements generally (including earnings releases), SEC reports (including financial statements), disclosure controls and procedures ("DCP") and internal control over financial reporting ("ICFR"). The disclosure effort could require the attention of the audit committee, senior management, the financial reporting function, the legal/compliance function and internal audit. Presumably most, if not all, of these functions are represented on a company's disclosure committee. And all of this will likely be taking place in the context of broader business continuity efforts, governmental actions and market turbulence.

We highlight below some key areas of focus. We also highlight below conditional relief issued today by the SEC for reporting companies affected by the coronavirus that have SEC filings due between March 1 and April 30, 2020. The press release (the "Conditional Relief Release") is available [here](#) and the related order (the "Order") is available [here](#).

Disclosure Considerations

Speaking in March 2019, Director of the Division of Corporation Finance William Hinman used the example of Brexit as a disclosure topic that is complex, associated with uncertain risk and rapidly evolving. He noted that the SEC disclosure system, which in recent years has evolved to a more principles-based regime, emphasizes materiality and its requirements “articulate an objective and look to management to exercise judgment in satisfying that objective by providing appropriate disclosure when necessary. Management’s Discussion and Analysis [of Financial Condition and Results of Operations] (“MD&A”) and Risk Factors are examples of such disclosure requirements and are well-suited to elicit disclosure about complex and evolving areas.” He could have been speaking of the coronavirus as well.

- **Risk Factors.** Management should consider whether existing risk factors in the most recently filed Form 10-K, Form 20-F or Form 40-F annual report are adequate or need to be updated to address the coronavirus outbreak. To the extent that the coronavirus outbreak has caused material changes that make updates to the risk factors appropriate following the release of the annual report, reporting companies should consider updating risk factors in their quarterly reports (Form 10-Q) or by supplementing them in a Form 8-K. Non-U.S reporting companies should consider how best to update their risk factors, including by supplementing their risk factors in a Form 6-K submission. Reporting companies that have already filed reports with the SEC that contain risk factors related to the coronavirus have tended to include disclosure related to developments within existing risk factors related to natural disasters, public health or uncertainty regarding global macroeconomic conditions.

The SEC Staff (the “Staff”) has stressed repeatedly that risk factors should not simply consist of boilerplate language and should not present risks in the hypothetical when the risks, in fact, have occurred. In light of this, reporting companies should ensure that risk factor disclosures related to the coronavirus speak to the specific risks to their business, rather than merely offer an overly broad account of recent events and general economic impacts. In recent public statements, the Staff also has reminded reporting companies that they should communicate with the board when preparing risk factor disclosure about emerging risks so that investors have knowledge of the same risks as are discussed at the board level.

Management should, concurrently with any review of risk factors, also review the risks listed in the disclosure regarding forward-looking statements. This list tends to appear in a variety of places, and care should be taken to ensure that updates are carried across the various disclosures. Recall too that boilerplate language will not satisfy the “meaningful cautionary language” prong of the safe harbor under the Private Securities Litigation Reform Act (“PSLRA”).

- **MD&A.** A properly drafted MD&A is intended to provide investors with the information “necessary to an understanding of [a company’s] financial condition, changes in financial condition and results of operations.” Simply put, the MD&A, in the words of a former SEC Commissioner, is where

“management discusses and analyses where it has been and where it is going.” The SEC requires the identification of any known trends, demands, commitments, events and uncertainties that will, or that are reasonably likely to, impact a reporting company’s financial condition and results of operations. The Staff regularly emphasizes the need for reporting companies to focus on the importance of early warning disclosures, particularly where known trends and uncertainties are reasonably likely to create a significant disconnect between historical and future financial performance, to avoid later surprise disclosures.

In the context of the evolving and fast-spreading public health emergency, the challenge will be to address the trends and uncertainties with any degree of precision. The effects of the spread of the coronavirus and the myriad of responses could impact results of operations, as well as balance sheet items and cash flow. Management should consider whether unexpected cash needs could result in a stress on liquidity. To the extent that access to the capital markets is impaired, liquidity could become a significant issue (for example, for retailers and those in the travel and leisure sector). This, in turn, could present refinancing risks.

- **Accounting Impact.** Reporting companies should ensure that their accounting and financial reporting takes into account the current uncertainties and market volatility. Key assumptions and sensitivities should be re-evaluated. In addition, reporting companies should consider the adequacy of their disclosures regarding:
 - potential inventory write-downs and impairment losses;
 - loan defaults or covenant breaches, or amendments or waivers in lending agreements;
 - changes in credit risk of customers or others negatively impacted by current developments;
 - insurance recoveries;
 - changes in business or economic circumstances that affect the fair value of financial and nonfinancial assets and liabilities;
 - changes in growth forecasts that may impact impairment evaluations (*e.g.*, goodwill, other intangible assets); and
 - strategies and policies to manage evolving developments.
- **Subsequent Events (ASC 855).** In a recent joint [Public Statement](#) regarding coronavirus reporting considerations, SEC Chairman Jay Clayton, Director Hinman, SEC Chief Accountant Sagar Teotia and PCAOB Chairman William D. Duhnke III emphasized the “need to consider disclosure of subsequent

events in the notes to the financial statements, in accordance with the guidance” included in Accounting Standards Codification (ASC) 855-10, *Subsequent Events*. The standard requires evaluation of events subsequent to the balance sheet date through the date the financial statements are issued.

- **Access to Information.** Reporting companies need to have access to their own control locations for purposes of preparing consolidated financial statements as well as financial or other information 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). If a reporting company will have challenges accessing control locations, it should consider the effects any such limitations will have on the preparation of its audited financial statements.

Internal Controls

If a reporting company were to experience significant disruptions to operations, access to offices and travel, internal controls may need to be modified or replaced as the business implements emergency measures. These changes to internal controls could include, for example, changes to personnel or functions, shifting of reporting lines or altering access to IT systems to enable a remote workforce to operate virtually. A partial or complete evacuation of physical premises to remote home offices, by definition, has the potential to increase the pressure on the efficacy of existing internal controls.

In addition to the need to evaluate the many disruptions caused by the coronavirus in the context of ICFR, reporting companies will also need to consider the potential increase in cybersecurity risk. The spread of the coronavirus, with the attendant uncertainty and internal changes to controls and reporting, is an ideal opportunity for cyber criminals to unleash phishing and other scams, whether as part of alerts purporting to provide updates on the spread of the virus or emails purporting to be from internal sources requesting changes in procedures (or wire transfers) on an emergency basis. Press reports already note a spike in suspicious emails seeking to exploit the coronavirus, including what appears to be emails coming from the World Health Organization. Malicious emails also may be used to spread panic among business partners, employees, vendors, suppliers and others.

As the SEC noted in the context of cybersecurity, it is critical that reporting companies take all required actions to inform the market about material risks and incidents in a timely fashion, and crucial to a company’s ability to make required disclosures of risks and incidents in a timely manner are DCPs. DCPs must provide an appropriate means of discerning the impact of significant risks on the business, financial condition and results of operations, and a “protocol” for assessing materiality. To the extent a reporting company suffers a cybersecurity breach, it will also need to consider its disclosure obligations in respect of that incident.

Market Updates

In light of the recent spread of the coronavirus beyond China, a number of reporting companies that issued earnings releases in the past few weeks (as part of their regularly scheduled earnings updates) are assessing whether previously issued guidance now needs to be revised. An increasing number of reporting companies are disclosing revisions to previously issued guidance or otherwise addressing in greater detail specific effects of the spread of the coronavirus on their businesses and operations. Some reporting companies may withdraw guidance and not provide any update due to the current level of uncertainty.

The SEC, in the Conditional Relief Release, suggests that reporting companies may need to consider whether previous disclosure needs to be revisited, refreshed or updated to the extent that prior disclosures have become materially inaccurate. It also has reminded reporting companies providing forward-looking information to keep the market informed of material developments, including known trends or uncertainties regarding the spread of the coronavirus, that they can take steps to avail themselves of the safe harbor under the PSLRA.

Regulation FD

U.S. reporting companies should be mindful of their obligations under Regulation FD. Shareholders and analysts will be keen to understand as much as they can, and in the crucible of a fast moving crisis things may be said that, in fact, constitute material non-public information, the disclosure of which may constitute selective disclosure for purposes of Regulation FD. In the Conditional Relief Release, the SEC has reminded reporting companies of their obligations in respect of selective disclosure.

While the SEC has for some time recognized social media as an appropriate method for U.S. reporting companies to announce key information in compliance with Regulation FD, use of social media for this purpose has its limitations. All reporting companies should also remind employees of their social media policies as statements could well be attributed to companies and their managements for liability purposes.

Restrictions on Trading

Officers, directors and other corporate insiders should be mindful of applicable restrictions on trading in connection with developments related to the coronavirus. Recent market conditions have presented opportunities for corporate share buybacks and individual purchases by officers and directors, and many companies and individuals are taking advantage of these opportunities. While the coronavirus is common knowledge, its evolving impact on a particular company may constitute material non-public information. As a result, any trading activity – whether involving share purchases or sales of shares, including in the case of employees following option exercises, and whether or not occurring during an open trading window – should be carefully evaluated to ensure that the company or individual is not in possession of material non-public information (and otherwise complies with applicable rules).

The SEC, in the Conditional Relief Release, reminds reporting companies that, if they have become aware of a risk related to the coronavirus that would be material to investors, they should refrain from engaging in securities transactions with the public and should take steps to prevent directors and officers (and other insiders) from trading until the material risks have been disclosed. This reminder is particularly important in light of the fact that corporate securities trading policies tend to tie trading windows to the release of earnings and that reporting companies, under the Order, may delay SEC filings for up to 45 days.

The Role of the Board

Directors of reporting companies should remain mindful that the SEC is of the view that Item 407(h) of Regulation S-K and Item 7 of Schedule 14A require disclosure of a board's role in risk oversight. The SEC has, from time to time, highlighted that this disclosure is intended to provide investors with information about the role of the board, and the relationship between the board and senior management, in managing material risks. The SEC also has said that where a matter presents a material risk to the business, disclosure should address the nature of the board's role in overseeing the management of that risk. The SEC has noted this most recently in the context of cybersecurity, and since then has suggested that this principle could apply to other areas where reporting companies face emerging or uncertain risks and that the cybersecurity guidance may well be useful when preparing disclosures about other similar themes. The SEC specifically had sustainability in mind, but this applies equally to the spread of the coronavirus.

Conditional Relief

In recognition of the fact that the effects of the coronavirus may present challenges for certain reporting companies to timely meet their SEC filing obligations, the SEC has issued the Order that, subject to certain conditions, provides reporting companies with an additional 45 days to file certain reports, schedules and forms that otherwise would have been due between March 1 and April 30, 2020. The SEC has indicated it may extend the time for the relief or provide additional relief as circumstances warrant. In the absence of the relief, reporting companies would have been subject to existing deadlines and otherwise would have been able to avail themselves of a 15-calendar day extension for annual reports (on Form 10-K, Form 20-F or Form 11-K) or a five-calendar day extension for quarterly reports (on Form 10-Q), in each case by relying on Rule 12b-25 under the Securities Exchange Act of 1934 (the "Exchange Act").

To take advantage of the relief, a reporting company must be unable to meet a filing deadline due to circumstances related to the coronavirus and must furnish a Form 8-K or, if eligible, a Form 6-K by the later of March 16 and the original filing deadline, which:

- states that the reporting company is relying on the Order;
- provides a brief description of the reasons why the reporting company is unable to file the report, schedule or form on a timely basis;

- discloses the estimated date by which the report, schedule or form is expected to be filed; and
- provides, if appropriate, a risk factor explaining, if material, the impact of the coronavirus on the reporting company's business.

If the reason the report cannot be filed timely relates to the inability of any person, other than the reporting company, to furnish any required opinion, report or certification, the Form 8-K or Form 6-K must have attached as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the date such report must be filed.

The delayed filing must be made no later than 45 days after the original due date. The filing when made must 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.

The Order also provides relief from the requirement to make available a proxy statement, annual report and other soliciting materials ("Soliciting Materials") or to furnish an information statement and annual report ("Information Materials"), in each case under the Exchange Act, provided:

- the reporting company's securityholder has a mailing address in an area where, as a result of the coronavirus, common carriers have suspended delivery service of the type or class customarily used by the reporting company or other person making the solicitation; and
- the reporting company or other person making a solicitation has made a good faith effort to furnish the Soliciting Materials to the securityholder, as required by the rules applicable to the particular method of delivering Soliciting Materials to the securityholder or, in the case of Information Materials, the registrant has made a good faith effort to furnish the Information Materials to the securityholder in accordance with the rules applicable to Information Materials.

The Conditional Relief Release sets forth various Staff positions regarding eligibility to use Form S-3 (and well-known seasoned issuer status) and Form S-8 eligibility (and the current public information eligibility requirement of Rule 144(c)), in each case if the reporting company is 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. The Conditional Relief Release also states that reporting companies relying on the Order will be deemed to have a due date 45 days after the original filing deadline for an annual or quarterly report and, as such, will 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.

The SEC has indicated in the Conditional Relief Release that reporting companies facing administrative or other challenges in complying with their obligations under the securities laws by reason of the coronavirus

should contact the Staff, which will address issues raised on a case-by-basis “in light of their fact-specific nature.” Staff members have reiterated in various conversations with us that the Staff stands ready to provide assistance where possible.

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The Staff is on record as monitoring the effects of the coronavirus. Staff statements have been made largely in the context of a willingness to provide guidance and other assistance to reporting companies. The Order is one example of that willingness. At the same time, the Staff has been clear in reminding reporting companies of their ongoing disclosure obligations and the importance of internal processes. In the Conditional Relief Release, Chairman Clayton states:

“We also remind all companies to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments. How companies plan and respond to the events as they unfold can be material to an investment decision, and I urge 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.”

This is a useful reminder of the importance of transparency, accuracy and precision of public disclosure and of maintaining proper internal controls. A critical component of these efforts will be internal coordination to ensure that all of the dots are connected.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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