



Securities Law ADVISORY ■

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Keep Mystery to a Minimum in Your SEC COVID-19 Disclosures

On March 25, 2020, the staff of the Securities and Exchange Commission's Division of Corporation Finance (SEC) issued guidance on the effect that the coronavirus (COVID-19) pandemic has had on registrants' reporting obligations. While the staff acknowledged that COVID-19's potential effects on a registrant may be difficult to predict or assess, they emphasized that these uncertainties, particularly as they relate to management's assessment of COVID-19's impact and any planned responses, can be material to investment and voting decisions. The SEC further affirmed that certain existing rules or regulations require disclosure of the known, or reasonably likely, risks or effects of COVID-19 and reminded registrants that providing forward-looking statements is a way to avail themselves of the safe harbors under the securities laws.

While the staff's guidance does not break new ground in the application of long-standing, good disclosure principles to COVID-19 concerns, it provides a helpful (and likely not exhaustive) list of items for registrants to consider as they think through their disclosure.

Disclosure of the Impacts of COVID-19

In furtherance of these goals, the SEC enumerated certain areas that registrants should consider in assessing the necessity of making COVID-19 disclosures:

- Has COVID-19 impacted the registrant's current operations and is that impact expected to change in the short and long terms?
- Has COVID-19 impacted the registrant's capital and financial resources?
- Will the registrant's assets or ability to account for assets on its balance sheet be affected (for example, changes in fair value of assets)?
- Are there any expected material impairments that are reasonably likely to materially impact financial statements, such as impairments in goodwill, intangible assets, long-lived assets, right-of-use assets, or investment securities?
- Have there been any implemented changes in controls that are likely to affect the registrant's control over financial reporting, and are any challenges expected?

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- Have there been or will there be any challenges, material expenditures, or material resource constraints related to implementing a business continuity plan?
- Are any material impacts on demand for products or services or effects on cost/revenue relationships expected?
- Will operations be materially impacted by constraints on human-capital resources and productivity?
- Is the registrant's ability to operate and achieve business goals impacted by travel restrictions and border closures?

Prohibition of Insider Trading

The SEC further advised that, when the COVID-19 outbreak has materially impacted a registrant in a way that would be material to investors, the registrant and its directors, officers, and other insiders who might be aware of those matters should not trade in the registrant's securities until the information is publicly disclosed. As always, companies should be careful to avoid selective disclosures and should update information when it becomes materially inaccurate.

Non-GAAP Measures

The SEC emphasized that, while a non-GAAP financial presentation may be implemented in an earnings release due to COVID-19-related adjustments, it is not appropriate for a registrant to present non-GAAP financial results solely to present a more favorable view of the registrant's business. However, if a GAAP measure is truly not feasible, a non-GAAP financial measure that either includes a reasonable estimate of provisional amount(s) or a range of reasonably estimable GAAP results may be used. The provisional amount or range should reflect a reasonable estimate of COVID-19-related charges. A non-GAAP financial measure should not be disclosed more prominently than the most directly comparable GAAP financial measure or range of GAAP measures.

Relief to "Manual Signature" Retention Requirement in Light of COVID-19 Concerns

In a separate statement, the SEC also discussed a registrant's obligation to retain manually signed signature pages for all documents electronically filed with the SEC. Under current rules, filing companies must also *retain such documents for a period of five years* and furnish copies to the SEC upon request.

In light of the circumstances arising from COVID-19, the SEC staff *will not recommend enforcement action if:*

- A signatory retains a manually signed signature page or other document authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing and provides such document, as promptly as reasonably practicable, to the filer for retention in the ordinary course.
- The document indicates the date and time when the signature was executed.
- The filer establishes and maintains policies and procedures governing this process.

The signatory may also provide to the filer an electronic record (such as a photograph or pdf) of the document when it is signed.

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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