

# Best Practices for Earnings Calls and Investor Updates

April 2020

# Agenda

- During today's webcast, we aim to provide a comprehensive overview of best practices for earnings calls and investor updates for public companies.

We will address:

- Materiality and when an issuer has a duty to disclose
- Trend information and earnings guidance
- Non-GAAP financial measures and KPIs
- Forward-looking statements and cautionary statements
- SEC guidance related to COVID-19
- Financings after earnings announcements and before quarterly reports are filed

# “Materiality,” the Duty to Disclose” and the Timing of Disclosures

# Materiality

- Information is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision
- “Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the ‘total mix’ of the information available”
- The concept of whether a fact is material or not is a mixed question of law and fact, and the SEC has noted that the issuer is in the best position to know what is likely to be material to investors
- Materiality is often judged with the benefit of hindsight, and the SEC has often looked to trading volume and price movements as evidence of materiality

# Materiality *(cont'd)*

- Even after the Sarbanes-Oxley Act, the principle survives that material information need not be disclosed currently unless there is a specific event or circumstance that affirmatively triggers a disclosure duty
- The registrant should add to the 10-K and other Exchange Act filings such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading
  - *Exchange Act Rule 12b-20; Instruction C(3) to Form 10-K*

# MD&A – known trends

- “Reasonably Likely”
  - While there is no definition of the term “reasonably likely,” the SEC has indicated that this disclosure threshold is lower than “more likely than not”
    - Disclosure may be required even when the likelihood of occurrence of a known trend or uncertainty is less than 50/50
    - 2002 Commission Statement noted that market price changes, economic downturns, defaults on guarantees, or contractions of operations that have material consequences for the company’s financial position or operating results can be “reasonably likely” to occur under some conditions
- “Known Trends”
  - Material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. (Instruction 3 to Item 303(a)) Known trends include both:
    - Matters that would have an impact on future operations and have not had an impact in the past; and
    - Matters that have had an impact on reported operations and are not expected to have an impact upon future operations

# MD&A – known trends *(cont'd)*

- In a 1989 Interpretive Release, the SEC set forth a two-step analysis for determining when known trends and uncertainties must be disclosed
- This analysis differs from traditional materiality analysis, and sets an arguably lower disclosure threshold:
  - Is the known trend, demand, commitment, event, or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required
  - If management cannot make that determination, it must evaluate the consequences of the known trend, demand, commitment, event, or uncertainty on the assumption that it will come to fruition
    - Disclosure is then required unless management determines that a material effect on the company's financial condition or results of operations is not reasonably likely to occur
- Recent court cases, including the Leidos case, have raised concerns regarding Item 303(a)(3)(ii) and whether it creates a duty to disclose
  - If an issuer's MD&A omits information required by Item 303, does that create a predicate for Section 10 liability?

# Duty to disclose – the court’s view

- *Richman v. Goldman Sachs Group, Inc., et al.*, 10 Civ 3461 (June 21, 2012, United States District Court for the Southern District of New York)
- Under the federal securities laws, there is no general obligation for issuers to disclose material information; rather, issuers are required to do so only where the federal securities laws specifically impose such a duty
- “[W]hen a corporation chooses to speak—even where it lacks a duty to speak—it has a ‘duty to be both accurate and complete’”
- “[A] corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact”

# Duty to disclose – CorpFin’s view

- “We also understand that materiality is not an easily applied litmus test. If there [are] any gray areas — and as disclosure lawyers I would suspect that you more frequently see shades of gray, rather than black and white — the company is likely to include the disclosure in its filing. And why wouldn’t you? Why would you take the risk of omitting disclosure that might be material? But are too many items in the obviously immaterial category being included?”
  - *“Disclosure Effectiveness: Remarks Before the American Bar Association Business Law Section Spring Meeting” – Keith F. Higgins, Director, Division of Corporation Finance, April 11, 2014*

# Timing of disclosures

- A complete failure to speak (an omission) is a violation of Rule 10b-5 **only if there is a duty to speak**
  - “A corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact. Rather, an omission is actionable under the securities laws, only when the corporation is subject to a duty to disclose the omitted facts”

*In re Time Warner, 1993*
- **No obligation under the securities laws to make a disclosure immediately or by a certain date unless**
  - A specific SEC rule requires that disclosure be made by a certain date
  - A “half-truth” is uttered and disclosure of the additional information is necessary in order to make the statement not misleading
  - Disclosure is required by a duty to update a prior affirmative statement that is no longer accurate
  - Disclosure is required by a duty to correct a statement that was untrue when made

# Timing of disclosures *(cont'd)*

- Companies regularly should consider:
  - The pattern of disclosures that they have established
  - Whether, at the time it is releasing “good” news, the company has “bad” news – or the so-called “bad news doctrine”
  - Timing disclosures in proximity to offerings
  - The effect of the timing of disclosures on other matters, such as the company’s blackout periods/trading windows, as well as other planned actions, such as any proposed redemption or repurchases of securities

# Regulation FD

# Regulation FD – background

- Regulation FD (for “Fair Disclosure”) was adopted to address the problem of selective disclosure of material information by companies, in which “a privileged few gain an informational edge – and the ability to use that edge to profit – from their superior access to corporate insiders, rather than from their skill, acumen, or diligence”
- Primary goal of Regulation FD is to allow all investors to have equal access to a company’s material disclosures at the same time
- Regulation FD fundamentally reshaped the ways in which public companies conducted conference calls, group investor meetings and “one-on-one” meetings with analysts and investors. Even in the case of a pandemic, it is essential to keep core principles intact

# Where does Regulation FD fit?

**Periodic Reports:** Filed with SEC; require “line-item” disclosures while applying a principles-based approach

- Annual Reports and Quarterly Reports

**Current Reports:** Filed with SEC; requires reporting of specified events and permits voluntarily reporting of other events

- Form 8-K or 6-K

**Regulation FD:** Does not call for specific subject matter; instead, if a company provides material non-public information to someone, the company generally must provide that information to everyone

# Basic rule

## What Does Regulation FD Actually Require?

### ***Whenever***

- A public company, or any person acting on its behalf
- Discloses material non-public information to certain enumerated persons

### ***then***

- The company must disclose that information, either
  - Simultaneously (in the case of intentional disclosures) or
  - Promptly (in the case of unintentional disclosures)
- Using a reasonable method of broad public disclosure

# Scope of Regulation FD

## What is “non-public information”?

- Information is considered “non-public” until it has been disseminated in a manner making it available to investors generally
- For information to be made public, “it must be disseminated in a manner calculated to reach the securities marketplace in general through **recognized channels of distribution**, and public investors must be afforded a **reasonable waiting period** to react to the information”

# Scope of Regulation FD *(cont'd)*

- **Who are the “enumerated persons” covered by Regulation FD?**

Regulation FD **only covers** disclosures to certain enumerated persons:

- Securities market professionals such as brokers, dealers, investment advisors, institutional investment managers and sell-side or buy-side analysts
- Shareholders who it is reasonably foreseeable would trade on the basis of the information

Regulation FD **does not cover** disclosures to:

- Customers, suppliers, strategic partners and government regulators in ordinary course business communications
- Attorneys, investment bankers, accountants and others who owe a duty of confidence to the company
- Public media

# Scope of Regulation FD *(cont'd)*

## Exempted Communications

Regulation FD ***does not apply to*** disclosures in the following categories:

- Communications to a person who owes the company a duty of trust or confidence, such as legal counsel, financial advisers and other so-called “temporary insiders”
- Communications to any person who expressly agrees to maintain the information in confidence
- Communications in connection with a capital raising transaction registered under the Securities Act of 1933 (i.e., a “public offering” by the company)

# Scope of Regulation FD *(cont'd)*

## Methods of Public Disclosure to Satisfy Regulation FD

A required disclosure under Regulation FD may be made by either of two methods:

- Public filing under the Securities Exchange Act of 1934, such as by means of a Form 8-K, which has two topics that are used most frequently for this purpose:
  - Item 7.01 “Regulation FD Disclosure”
  - Item 8.01 “Other Matters”
- A method or combination of methods of public disclosure reasonably designed to provide ***broad, non-exclusionary distribution of the information to the public***, which may include some or all of the following:
  - Press release distributed through a widely circulated news or news wire service, such as Dow Jones, Bloomberg, Business Wire, PR Newswire or Reuters
  - News conference to which the public is granted access and for which advance notice is given
  - Simultaneous webcast of a news conference or analyst conference call
  - Posting of the information on the company’s website – subject to conditions
  - Making available to the public a replay of the company’s news conference or conference call
  - Social media – subject to conditions

# Scope of Regulation FD *(cont'd)*

## Using Company's Website to Satisfy the Public Disclosure Requirement

**Prior to a potentially selective disclosure:** three considerations in determining whether information previously disclosed solely on the company's website qualifies as "public disclosure":

- Is the company's website a recognized channel of distribution?
- Is information posted on the website in a manner that makes it generally available to investors and the securities marketplace?
- Has the information been posted for a reasonable period of time (a "reasonable waiting period") so that it has been absorbed by investors?

**After a selective disclosure:** four considerations in determining whether a website posting following a selective disclosure qualifies as "public disclosure":

- Same first two factors as those listed above for consideration prior to disclosure
- Are the company's website postings "reasonably designed to provide broad, non-exclusionary distribution of the information to the public"?
- Do the company's website postings meet the "simultaneous" and "prompt" timing requirements of Regulation FD?

# Scope of Regulation FD *(cont'd)*

## **“Simultaneous” Public Disclosure for Intentional Selective Disclosures**

- Selective disclosure is “intentional” when the individual making the disclosure knows, or is reckless in not knowing, that the information he or she is communicating is both material and non-public
- Thus, even unplanned, off-the-cuff remarks that include information that the speaker knows to be, or is reckless in not knowing is, material and non-public to select analysts is an intentional selective disclosure
- Absent advance preparation to enable simultaneous public disclosure, it is very difficult for a company to avoid a violation of Regulation FD for unplanned intentional selective disclosures

# Scope of Regulation FD *(cont'd)*

## **“Prompt” Public Disclosure for Unintentional Selective Disclosures**

- Selective disclosure is “unintentional” when the individual making the disclosure did not know, and was not reckless in not knowing, that the information he or she was communicating was both material and non-public
- Regulation FD defines “promptly” as “as soon as reasonably practicable” but in no event after the later of:
  - 24 hours, or
  - The start of the next day’s trading on the NYSE, in both cases after a senior company official learns of the disclosure

# Earnings Announcements

# Earnings releases

- Key compliance considerations for the earnings release and call:
  - Section 10(b) and Rule 10b-5, which prohibit material misstatements or omissions
  - Regulation FD
  - Protecting forward-looking statements
  - Compliance with SEC non-GAAP measure rules
  - Compliance with SEC guidance concerning KPIs
  - Compliance with Item 2.02 of Form 8-K
  - Securities Act restrictions on making “offers”

# Earnings release content

- Striking the right balance between providing too much detail versus providing sufficient information that is useful for analysts and investors, while avoiding misstatements or omissions
- Leveraging the company's supplemental data, such as monthly operating information
- Considering the usefulness of non-GAAP measures and key performance indicators
- Relationship between the information provided in the earnings release and information that is covered on the earnings call
- Competitive considerations: what are your peers doing?
- Consistency with other communications made by company representatives

# The SEC's historic views

- In the course of reviewing periodic filings, the SEC Staff has been increasingly focused on information communicated in earnings releases and earnings calls
- Consistency of disclosure in filings versus those made elsewhere
  - Disclosure must be consistent across the various means for communications
  - Companies' use of social media is a particular area of concern for the Staff
- Non-GAAP financial measures and operating metrics or key performance indicators

# Best practices

**Design procedures to satisfactorily effect *broad, non-exclusionary distribution of information to the public***

**SEC expressly approved the following procedures:**

- “First, issue a press release, distributed through regular channels, containing the material information
- Second, provide adequate notice, by a press release and/or website posting, of a scheduled conference call to discuss the material information, giving investors both the time and date of the conference call, and instructions on how to access the call
- Third, hold the conference call in an open manner, permitting investors to listen in either by telephonic means or through Internet web casting”

# Best practices *(cont'd)*

## **Providing Earnings Guidance**

- SEC has paid particular attention to the practice of providing guidance (and subsequent confirmation of guidance) to analysts
- Companies take on a “high degree of risk under Regulation FD” when engaging in private discussions with analysts seeking guidance or affirmation of prior guidance

# Best practices *(cont'd)*

## Dealing with Analysts

- ***No earnings guidance without simultaneous public disclosure.*** Do not give earnings guidance (or other material guidance) to analysts one-on-one, unless the same guidance is announced simultaneously to the public
- ***Affirmation of prior guidance without simultaneous public disclosure has serious risks***
  - Reiterating guidance may have the same effect as providing guidance originally – provides material non-public information to analyst
  - SEC will interpret broadly language that may be deemed to confirm guidance
- Many companies elect not to discuss guidance outside of methods that fall within the definition of “public disclosure” and observe strict “no comment” policies regarding confirmation of guidance
- Many companies also impose “quiet periods” until earnings are released

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# Other Investor Interactions

# Interactions with the “investment community”

- The investment community includes analysts, major shareholders and potential partners
- Communications policies and procedures should apply during analyst calls, investor conferences, and any other setting where the senior leadership team could be deemed to speak on behalf of the company
- Social media activity, business development conferences and non-deal road shows are all part of the company’s investment community interaction by the company that should comply with Regulation FD

# Interactions with the “investment community”

*(cont'd)*

- For “typical” analyst calls, presentations and other organized interactions determine who speaks for the company
- Recommend at least two representatives be present at any one-on-one meetings with analysts and investors
- Consider quiet period ahead of release of earnings or other material news
- Script talking points and develop a consistent message
- Track all communications and have an emergency response team for when inadvertent disclosures occur
- Be careful about reaffirming guidance of any type
- Avoid long, nuanced answers
- If requested by an analyst to review a research report, do not comment except to correct errors of fact

# Non-GAAP Financial Measures

# Non-GAAP financial measure basics

- A non-GAAP financial measure is a numerical measure of historical or future performance, financial position, or cash flows that either:
  - Excludes (or adjusts) amounts included in the most comparable GAAP measure; or
  - Includes (or adjusts) amounts excluded from the most comparable GAAP measure
- Item 10 of Regulation S-K
  - Applies only to non-GAAP financial measures in SEC-filed documents
  - Requires reconciliation to most comparable GAAP measure, which must receive equal or greater prominence
- Regulation G
  - Applies to all public disclosures that contain non-GAAP financial measures, including press releases, investor presentations, and conference calls
  - Also requires prominence for, and reconciliation to, most comparable GAAP measure
  - For oral public disclosure, an issuer may post the reconciliation simultaneously to its website and announce the location to investors

# Examples of inherently misleading non-GAAP measures

- Question 100.01 – A performance measure that excludes normal, recurring, cash operating expenses
- Question 100.02 – A non-GAAP measure that adjusts a particular charge or gain in the current period when other, similar charges or gains were not also adjusted in prior periods
- Question 100.03 – A non-GAAP measure that is adjusted only for nonrecurring charges when there were nonrecurring gains that occurred during the same period
- Question 100.04 – A non-GAAP revenue measure that backs out the effect of GAAP revenue recognition and measurement principles

# Equal or greater prominence

- Question 102.10 – Examples of non-GAAP presentations that fail to give “equal or greater prominence” to the comparable GAAP measure include:
  - Omitting comparable GAAP measures from an earnings release headline or caption that includes non-GAAP measures
  - Presenting a non-GAAP measure using a style of presentation (e.g., bold, larger font) that emphasizes the non-GAAP measure over the comparable GAAP measure
  - A non-GAAP measure that precedes the most directly comparable GAAP measure (including in an earnings release headline or caption)
  - Describing a non-GAAP measure as, for example, “record performance” or “exceptional” without a prominent characterization of the comparable GAAP measure
  - Providing tabular disclosure of non-GAAP financial measures without including the comparable GAAP measures in the same or a prior table

# Specialized non-GAAP guidance

- Question 102.10 – Forward-Looking non-GAAP information
  - More prominence is given to a non-GAAP measure when an issuer excludes a quantitative reconciliation with respect to a forward-looking non-GAAP measure in reliance on the “unreasonable efforts” exception without disclosing that fact and identifying the information that is unavailable and its probable significance in a location of equal or greater prominence
- Question 102.11 - Disclosure of tax effects of non-GAAP measures
  - If a liquidity measure includes income taxes, it “might be acceptable” to adjust GAAP taxes to show taxes paid in cash. If a measure is a performance measure, the disclosure should include current and deferred income tax expense commensurate with the non-GAAP measure of profitability
  - Adjustments to arrive at a non-GAAP measure should not be presented “net of tax.” Rather, income taxes should be shown as a separate adjustment and clearly explained

# Other frequent non-GAAP staff comments

- Reasons for non-GAAP measures
  - Additional details about usefulness and uses of non-GAAP measures
  - No boilerplate
- Non-GAAP financial measure titles
  - Titles may not accurately reflect amounts reported
  - Confusingly similar (or the same as) GAAP measures or common accepted non-GAAP measures (e.g., free cash flow, EBIT, EBITDA)
- Reconciliation to most directly comparable GAAP measure
  - Reconciling to wrong GAAP measure
- Characterization of adjustments
  - Whether characterization of adjustments as “nonrecurring,” “unusual” or “infrequent” is consistent with definitions of those terms in Item 10(e)(1)(ii)(B)

# What's new this earnings season?

- Issuers may want to present financial results while giving effect to the consequences of the coronavirus
- SEC has addressed in Disclosure Guidance: Topic No. 9, which we will address later
  - Include non-GAAP measures that have been provided to management and that are being used by the management team in order to assess the effects of the pandemic on financial results
  - “Estimated” or “provisional” items may be reflected
  - However, items should be directly related to the effects of the pandemic; these can be based on a reasonable estimate if COVID charges are not yet finalized

# Key Performance Indicators

# SEC guidance on KPIs

- The SEC issued guidance relating to the use of key performance indicators, or KPIs, in MD&A
- The guidance is similar in principle to the guidance that the SEC and SEC Staff have provided regarding the use of non-GAAP measures
- An issuer that uses metrics like KPIs should consider:
  - The metrics used in the MD&A section and other filings in order to ensure that metrics used by management in running or assessing the business are discussed and explained
  - What additional disclosures are needed in order to make sure that the use of metrics is not misleading?
    - Defining the metric
    - Explaining how the metric is calculated
    - Disclosing any assumptions or estimates underlying the metric
    - Explaining any changes to the KPI, when it was made, why it was made, etc.
    - Explaining how the management uses the metric

## SEC guidance on KPIs *(cont'd)*

- If KPIs are disclosed in earnings releases or investor presentations, the presumption is that they should be included in MD&A
- Setting aside disclosure issues, companies also should consider whether they use metrics that are well understood or whether their metrics are highly customized, what the metrics seek to measure or illustrate, and whether there is a documented process for calculating the metric
- Certifying officers and the audit committee would want to consider as well whether there are appropriate controls in place relating to the metric
- In light of the pandemic, an issuer may want to present an adjusted performance metric, which will require additional vetting by management and the audit committee, as well as discussions with counsel

# Forward-looking Statements Safe Harbor

# Forward-looking statements

- The Private Securities Litigation Reform Act of 1995 (“PSLRA”) includes a safe harbor for forward-looking statements
- Important to understand the parameters of the safe harbor, which would apply in an action brought under the Securities Act or Exchange Act based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, for the issuer and certain other persons for forward-looking statements IF
  - The statement is identified as forward-looking
  - It is accompanied by meaningful cautionary statements identifying the facts that could cause results to differ materially from those in the forward-looking statement
  - Or, the statement is immaterial

# Forward-looking statements *(cont'd)*

- What's a forward-looking statement?
  - It will depend on the context and the facts and circumstances, but would include projections of future performance, plans for future operations, assumptions regarding the projections and plans
  - Language that suggests that the statement is forward-looking—like “we expect,” “we believe,” “we intend,” etc.
- Is that statement accompanied by meaningful cautionary language?
  - Helpful to identify the particular risks associated with the statement
  - “Substantive” statements that are tailored to the projections, estimates, opinions
  - Not boilerplate
  - To the extent that the language warns against something that already has happened, the warning would be inadequate—that may be the case for many companies this quarter

# Forward-looking statements *(cont'd)*

- Was there actual knowledge that the statement was misleading or that the risks described already had manifested?
- In preparing for upcoming earnings and the upcoming 10-Q, the issuer should consider:
  - Updating its forward-looking statements disclosure
  - Ensuring that its risk factors are updated
  - Not referencing an occurrence in a risk factor as a hypothetical if the event has actually come to pass
  - Eliminating boilerplate disclaimers and disclosures regarding trends since these are unlikely to reflect current events
  - Reviewing carefully with counsel all forward-looking and trend disclosure in order to vet the cautionary language

# SEC Guidance for Issuers

# CF Disclosure Guidance Topic #9

- Division of Corporation Finance issued CF Disclosure Guidance Topic #9 (“CF #9”) on March 25, 2020
  - Views on disclosures and securities law obligations impacted by COVID-19
- Three key topics
  - Assessing and disclosing the evolving impact of COVID-19
  - Trading prior to dissemination of material non-public information
  - Reporting earnings and financial results

# Possible Areas for Disclosure

- Principles-based disclosure may require an issuer to address the actual and potential impacts of COVID-19 on the issuer's business, results of operations and prospects in various areas, including:
  - Management's discussion and analysis
  - Business
  - Risk factors
  - Legal proceedings
  - Disclosure controls and procedures
  - Internal control over financial reporting
  - Financial statements

# Assessing and Disclosing COVID-19 Impacts

- CF #9 posed a series of questions for an issuer to consider, including:
  - How has COVID-19 impacted your financial condition and results of operations?
  - How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook?
  - How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets?
  - Do you anticipate any material impairments, increases in allowances for credit losses, or changes in accounting judgments?
  - Have COVID-19-related circumstances adversely affected your ability to maintain operations, including controls and procedures?

# Assessing and Disclosing COVID-19 Impacts

*(cont'd)*

- Have you experienced challenges in implementing your business continuity 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 distribution methods?
- 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?

# Earnings Releases and Earnings Calls

- To the extent that it is, or is expected to be material, companies should address the impact of COVID-19 in upcoming earnings releases and be prepared to answer related questions on the earnings calls
- It may be difficult for companies to assess or predict with precision the broad effects of COVID-19 and its actual impact will depend on many factors beyond a company's control and knowledge, which will make it more challenging to be comfortable with the disclosures being made

# Earnings Releases and Earnings Calls *(cont'd)*

- Takeaways from CF#9
  - Companies presenting a non-GAAP financial measure adjusted for or explaining the impact of COVID-19 should highlight why management finds it useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations
  - Companies will be permitted to reconcile provisional amounts based on a reasonable estimate, or a range of reasonably estimable GAAP results, provided an appropriate explanation is provided
  - Companies should use non-GAAP financial measures for the purpose of sharing how management and the Board of Directors are analyzing the current and potential impact of COVID-19 and not for the purpose of presenting a more favorable view of the company

# COVID-19: Forward-Looking Disclosure

- On April 8, 2020, SEC Chair Jay Clayton and the Director of the SEC's Division of Corporation Finance issued a joint statement providing guidance for the upcoming earnings release season
- Statement urged companies to provide as much information as is practicable regarding their current financial and operational status, as well as their future operational and financial planning
- Company disclosures should reflect the current state of COVID-19 affairs and outlook
  - Historical information may be relatively less significant

# COVID-19: Forward-Looking Disclosure *(cont'd)*

- Good faith attempts to provide appropriately framed forward-looking statements would not be second-guessed by the SEC
- Statement noted that investors may be particularly interested in detailed discussions of current liquidity positions and expected financing needs, whether the company is receiving or intends to apply for financial assistance under various COVID-19 related federal and state programs, including the CARES Act, and how such assistance has had or may have a material effect on the company
- Companies are advised to take advantage of the safe harbor provisions of the U.S. federal securities laws

# Undertaking Securities Offerings Post-Earnings Announcements

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- Companies typically have “blackout” policies that prohibit, among other things, the issuance of securities from a specified period of time before or after the end of the companies’ fiscal quarter until at or after the time of the related quarterly earnings release
  - The beginning of the blackout period varies from company to company, depending on when results for the completed fiscal quarter are known to management
  - Some companies pushed back the beginning of their blackout periods recently to allow for COVID-19 related funding
- Many December 31 fiscal year end companies have now gone into blackout following the end of the March 31 fiscal quarter, and some will be seeking funding opportunities in the near future and may not want to wait until their 1Q 2020 Form 10-Q is filed

# Undertaking Securities Offerings Post-Earnings Announcements *(cont'd)*

- Filing vs. furnishing earnings release
  - SEC registrants are required to furnish their earnings release on an Item 2.02 Form 8-K
  - Some companies “file” their earnings releases, which means the earnings release will be incorporated by reference in the offering documents
    - Incorporating the earnings release by reference can have unintended consequences (e.g., incorporation of earnings guidance)
    - If the earnings release is incorporated by reference, the underwriters will want comfort on the entire release (see below)

# Undertaking Securities Offerings Post-Earnings Announcements *(cont'd)*

- Disclosure
  - It may be appropriate to include in the offering document some highlights from the earnings release
  - Highlights are often limited to a few income statement and balance sheet line items
    - Underwriters should be consulted as to what metrics are important for the particular company
  - Disclosure may include some disclaimers about how numbers may change between earnings release and Form 10-Q

# Undertaking Securities Offerings Post-Earnings Announcements *(cont'd)*

- Sample Disclosure
  - From an April 2020 offering document – “The financial results included in the Q3 2020 Form 8-K are preliminary and may change as a result of the completion of our financial closing procedures. Accordingly, these preliminary unaudited results may materially differ from the actual results that will be reflected in our consolidated financial statements . . . for the three and nine months ended February 29, 2020 when they are completed and publicly filed with the SEC on our Quarterly Report on Form 10-Q for the quarter ended February 29, 2020. . . The preliminary financial data included in the Q3 2020 Form 8-K has been prepared by, and is the responsibility of, our management. PricewaterhouseCoopers LLP has not audited, reviewed, compiled, or applied agreed-upon procedures with respect to the preliminary financial data. Accordingly, PricewaterhouseCoopers LLP does not express an opinion or any other form of assurance with respect thereto.”
- Don't forget COVID-19 specific disclosures, including risk factors

# Undertaking Securities Offerings Post-Earnings Announcements *(cont'd)*

- Diligence
  - Underwriters will want to undertake “due diligence” regarding
    - What quarterly procedures have yet to be completed and how significant these procedures may be
    - What procedures the company’s independent auditors have yet to complete
    - What factors could result in changes to the company’s results
    - How often have the company’s results changed between an earnings release and the filing of the related Form 10-Q
    - Extraordinary items in the completed quarter and anticipated in the subsequent quarter
    - Negative trends from the completed quarter that are anticipated to continue in the subsequent quarter
    - Any other information in the 10-Q that will likely be a negative surprise to the market
      - Guidance changes
      - Confirmation of ratings

# Undertaking Securities Offerings Post-Earnings Announcements *(cont'd)*

- Comfort
  - Whatever quarterly numbers are included or incorporated by reference in the offering document should be “ticked and tied” by the issuer’s independent auditors
    - Some accounting firms will not “tick and tie” quarterly numbers until the Form 10-Q is filed
    - Where the issuer’s independent auditors will not provide “tick and tie” comfort, a company CFO certificate may provide adequate assurance
  - Some accounting firms will also not provide “negative assurance” on changes in specified line items after an earnings release and before the related Form 10-Q is filed
    - A company CFO certificate may provide adequate assurance in this regard as well

# Undertaking Securities Offerings Post-Earnings Announcements *(cont'd)*

- A word about pre-releasing earnings
  - Some companies, especially in the current environment, may need to raise capital even before they are ready to release their quarterly earnings
  - In these cases, some companies choose to “pre-release” either preliminary results or even estimates
    - These are often disclosed as ranges
  - If a company pre-releases preliminary results or estimates, there is increased risk that the company’s final results will differ materially from the pre-released figures which may require enhanced disclosure and due diligence
    - “The estimates and statements above are unaudited and represent the most current information available to management. These estimates and statements are *preliminary*. There can be no assurance that our final quarterly *results* will not differ *materially* from these *estimated results*. Accordingly, readers should not place undue reliance on these estimates and statements. In addition, during the course of closing our financial statements for the quarter, there may be items that would require adjustments that may be material to the results described above. As a result, this discussion is subject to risks and uncertainties inherent in forward-looking statements.”

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