

Legal Update

Chair Clayton and Division Director Hinman Issue Public Statement on the Importance of Disclosure in the Current COVID-19 Environment

On April 8, 2020, the Chair of the U.S. Securities and Exchange Commission (the "SEC") – Jay Clayton – and the Director of the SEC's Division of Corporation Finance – William Hinman – issued a joint statement titled The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19 (the "Statement").¹

In the Statement, Chair Clayton and Division Director Hinman noted that "[i]n the coming weeks, our public companies will be issuing earnings releases and conducting analyst and investor calls." They 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." Finally, they provided several observations and requests for companies to consider as they prepare their disclosures, focusing primarily on forward-looking statements. These observations and requests build upon previous guidance issued by the Division of Corporation Finance.²

In short, Chair Clayton and Division Director Hinman highlighted several disclosure points, including:

- Company disclosures should reflect the current state of COVID-19 affairs and outlook and, in particular, respond to investor interest in:
 - Where the company stands today, operationally and financially,
 - How the company's COVID-19 response, including its efforts to protect the health and well-being of its workforce and customers, is progressing, and
 - How the company's operations and financial condition may change;
- Historical information may be relatively less significant;
- Providing detailed information regarding future operating conditions and resource needs is challenging, but important;
- High quality disclosure will not only benefit investors and companies, it will promote valuable communication and coordination across the economy;
- Companies that respond to the call for forward-looking disclosure should avail themselves of the forward-looking safe harbors in the U.S. federal securities laws; and

- Good faith attempts to provide appropriately framed forward-looking statements would not be second-guessed by the SEC.

There are four important takeaways for public companies to consider as they plan their upcoming earnings calls and quarterly disclosures.

1. First quarter earnings reports and related investor and analyst calls will not be routine. Historical information may be substantially less relevant as shareholders want to know where companies stand today, and how they have adjusted and expect to adjust in the future as they continue to deal with COVID-19. While recognizing that producing comprehensive financial and operational reports, both historical and forward-looking, may present challenges for public companies, the SEC continues to encourage earnings and related disclosures to be as timely, accurate and robust as practicable under the circumstances.
2. Chair Clayton and Division Director Hinman request that companies provide as much information as practicable regarding their current status and plans for addressing the effects of COVID-19, including information regarding their current operating status and their future operating plans under various COVID-19-related mitigation conditions. They noted that investors and the markets may be particularly interested in, among other things, 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.

3. In requesting companies to produce more forward-looking information under the current circumstances, the SEC recognizes the particular challenges companies will face to produce forward-looking information in light of the unknowns that still exist. The SEC recognizes that companies will have to make a variety of assumptions, including some that relate to factors that are beyond their control. Nonetheless, they encouraged companies to consider the broad frameworks that have been proposed to have the economy move forward and discuss how following those frameworks may affect their operations if it would be of material interest to investors, while avoiding generic or boilerplate discussions.
4. As is always the case, companies providing forward-looking information are encouraged to avail themselves of the safe harbors for forward-looking statements in the U.S. federal securities laws. The SEC recognizes that in many cases actual results may differ substantially from what were reasonable estimates when the forward-looking statements were made. In light of this, they would not expect to second guess good faith attempts to provide investors and other market participants appropriately framed forward-looking information.

Practical Considerations

Companies considering providing enhanced forward-looking information should take all appropriate steps to make sure that any such disclosure is based on reasonable estimates and assumptions and to disclose them. Companies should allow sufficient time for drafting and internal review of any new disclosures and ensure that any such disclosure is tailored to their own situation.

Although the Statement says that the SEC would not expect to second-guess good faith attempts at providing forward-looking information, the SEC will not be the only interested party reviewing disclosures. Investors, and more particularly the U.S. plaintiff's bar, will have the benefit of hindsight when deciding how to view the adequacy of disclosure previously made. Since these parties will not be bound by the views of the SEC, it is important to follow the conditions necessary to take advantage of the safe harbor provisions of the U.S. federal securities laws to provide a defense against any future lawsuits in the event actual results differ from the forward-looking information.

It is still important not to selectively disclose material non-public information, including forward-looking information, to any investor. To the extent a company is ready to disclose material non-public information relating to COVID-19, that information should be disclosed in a Regulation FD compliant method. If there has been an inadvertent selective material disclosure regarding COVID-19, the company must promptly disseminate such information by a press release, a Form 8-K or another accepted method. Given the Statement's warning regarding safeguarding material non-public information and the recent statement by the co-directors of the SEC's Division of Enforcement on market integrity,³ companies should also consider reviewing their insider trading policies and reminding employees of their obligations thereunder.

The Statement repeats previous statements that the SEC is willing to discuss on a case-by-case basis issues in complying with U.S. federal securities laws that may arise in connection with COVID-19. Companies that have particular concerns should reach out to the SEC staff to discuss how to handle issues that may arise.

As the COVID-19 pandemic continues and governments and companies take additional precautionary measures that may impact businesses, more disclosure-related and filing or compliance issues may arise. Therefore, companies should monitor SEC announcements for any further developments.

The Statement is part of an evolving COVID-19 response that is moving across regulatory agencies. Please visit our website⁴ to learn more. In addition, companies might find the SEC's COVID-19 Response webpage⁵ to be a helpful resource.

For more information about the topics raised in this Legal Update, please contact the author Michael L. Hermsen, any of the following lawyers or any other member of our Corporate & Securities practice.

John P. Berkery

+1 212 506 2552

jberkery@mayerbrown.com

Jennifer J. Carlson

+1 650 331 2065

jennifer.carlson@mayerbrown.com

Jason T. Elder

+852 2843 2394

+1 212 506 2566

jason.elder@mayerbrown.com

Robert F. Gray, Jr.

+1 713 238 2600

rgray@mayerbrown.com

Michael L. Hermsen

+1 312 701 7960

mhermsen@mayerbrown.com

Thomas Kollar

+852 2843 4260

thomas.kollar@mayerbrown.com

Anna T. Pinedo

+1 212 506 2275

apinedo@mayerbrown.com

Elizabeth A. Raymond
+1 312 701 7322
eraymond@mayerbrown.com

Laura D. Richman
+1 312 701 7304
lrichman@mayerbrown.com

Endnotes

- ¹ Available at <https://www.sec.gov/news/public-statement/statement-clayton-hinman>
- ² For example, see our Legal Update “SEC Extends Conditional Reporting Relief and Issues COVID-19 Guidance for Public Companies,” dated March 26, 2020, available at https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2020/03/sec-extends-conditional-reporting-relief-and-issues-covid19-guidance-for-public-companies_3.pdf and “SEC Disclosure and Related Ramifications,” dated March 17, 2020, available at <https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2020/03/covid19secdisclosuresandrelatedramifications.pdf>
- ³ Available at <https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity>.
- ⁴ Available at <https://www.mayerbrown.com/en/capabilities/key-issues/coronavirus-covid-19?tab=overview>
- ⁵ Available at <https://www.sec.gov/sec-coronavirus-covid-19-response>

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world’s leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world with approximately 200 lawyers in each of the world’s three largest financial centers—New York, London and Hong Kong—the backbone of the global economy. We have deep experience in high-stakes litigation and complex transactions across industry sectors, including our signature strength, the global financial services industry. Our diverse teams of lawyers are recognized by our clients as strategic partners with deep commercial instincts and a commitment to creatively anticipating their needs and delivering excellence in everything we do. Our “one-firm” culture—seamless and integrated across all practices and regions—ensures that our clients receive the best of our knowledge and experience.

Please visit mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

Any tax advice expressed above by Mayer Brown LLP was not intended or written to be used, and cannot be used, by any taxpayer to avoid U.S. federal tax penalties. If such advice was written or used to support the promotion or marketing of the matter addressed above, then each offeree should seek advice from an independent tax advisor.

This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein.

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the “Mayer Brown Practices”) and non-legal service providers, which provide consultancy services (the “Mayer Brown Consultancies”). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website.

“Mayer Brown” and the Mayer Brown logo are the trademarks of Mayer Brown.

© 2020 Mayer Brown. All rights reserved.