Market Trends 2019/20 COVID-19 from a Securities Law Perspective

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This market trends article discusses capital markets and securities law in the time of COVID-19, which started in late 2019 and impacted the whole world in a matter of months, and explains how the U.S. Securities and Exchange Commission (the SEC) responded to address the effects of the pandemic, particularly on public companies. The article also highlights key Form 10-K and Form 10-Q matters, including risk factors, MD&A and financial statement issues and examines various financing alternatives for companies considering their options to bolster their capital structure.

For further practical guidance on public company reporting, see Periodic and Current Reporting Resource Kit. For additional information on SEC's response to COVID-19, see COVID-19 Update: SEC and Nasdaq Response and Updated SEC C&DIs, SEC's Conditional Reporting Relief and COVID-19 Disclosure Guidance: First Analysis, SEC Reporting Companies: Considering the Impact of the Coronavirus on Public Disclosure and Other Obligations: First Analysis, and COVID-19 Ramifications for Public Companies—SEC Disclosures, SEC Filings and Shareholder Meeting Logistics: First Analysis. For an overview of practical guidance on COVID-19 covering various practice areas, including capital markets, see Coronavirus (COVID-19) Resource Kit.

We are experiencing an unprecedented event, the coronavirus, or COVID-19, pandemic, which, in addition to the terrible human toll, has also led to an economic crisis. Companies that are subject to U.S. securities reporting requirements are navigating the challenges posed by the pandemic. Addressing these developments may pose distinct issues for companies, depending on their industry, their regional focus, their supply chains, and their personnel. Nonetheless, all reporting companies must tackle their duties to report on a timely basis about their financial results, their business and operations, and their future prospects. Doing so is especially difficult when there are so many uncertainties.

The SEC and the staff of the SEC (the SECStaff) have responded to the pandemic by acting promptly and providing reporting companies and other market participants with relief in the form of extensions to certain filing deadlines, alternative approaches to meeting certain paper filing requirements, and guidance regarding the types of qualitative and quantitative disclosures that the SEC and the markets generally require regarding the effects of the pandemic. This article summarizes many of the key actions taken by the SEC to address the effectsof the pandemic as well as the guidance provided by the SEC and the SEC Staff regarding disclosures and accounting matters. In many respects, the guidance from the SEC serves to remind reporting companies and their advisers of fundamental and longstanding disclosure principles: the need for timely disclosures that provide some transparency in order to promote market integrity; the importance of providing investors with insights through well-crafted trend and forward-looking statements regarding the potential impact of material developments; and the need to avoid potentially misleading non-GAAP and key performance indicators in SEC filings and other investor-focused communications. While the events of the last few months are deeply unsettling, it should be a source of comfort that these underlying principles have served reporting companies well in providing a path forward as they communicate with stakeholders.

SEC Pronouncements

SEC Exemptive Order for Public Companies

On March 25, 2020, the SEC issued a new exemptive order (Public Company Order) under the Securities Exchange Act of 1934, as amended (Exchange Act) to provide relief to public companies and persons required to make filings with respect to public companies. The Public Company Order covers the period from March 1, 2020 to July 1, 2020 and superseded and extended an exemptive order that the SEC previously issued on March 4, 2020.

Under the Public Company Order, any public company that is unable to timely make a filing due to COVID-19 is given extra time, provided that the company otherwise complies with the order's provisions. Any company relying on the Public Company Order must furnish to the SEC a current report on Form 8-K or, if a foreign private issuer, on Form 6-K, no later than the original filing deadline for each filing that is delayed. This interim disclosure must state that the company is relying on the Public Company Order and briefly describe the reasons why the company could not file the report, schedule or form due during the relief period (Required Document) on a timely basis. In addition, the interim disclosure must state the estimated date by which the company expects to file the Required Document and include company-specific risk factors explaining the impact, if material, of COVID-19 on the company's business. If the Required Document cannot be timely filed because of the inability of a third person to furnish a necessary opinion, report or certification, the interim disclosure must attach as an exhibit a statement signed by the third person explaining the reason for the delay. The company relying on the Public Company Order must file the Required Document with the SEC no later than 45 days after its original due date and must disclose in the Required Document that the Public Company Order is being relied on and the reasons why it could not be filed on a timely basis.

Any company complying with the provisions of the Public Company Order will be considered current and timely in its Exchange Act filing requirements for purposes of eligibility to use Form S-3 or Form F-3 (and for purposes of well-known seasoned issuer status), if it was current and timely as of the first day of the relief period and it files the Required Document within 45 days of its original filing deadline. A company relying on the Public Company Order will also be deemed to satisfy Form S-8 and Rule 144(c) requirements if it was current as of the first day of the relief period and it files the Required Document within 45 days of its original filing deadline.

It is important to remember that companies taking advantage of the relief provided by the Public Company Order must furnish a separate Form 8-K or 6-K for each Required Document that will not be timely filed. In addition, companies should keep in mind that they can also rely on Rule 12b-25(17 CFR 240.12b-25) if they are unable to file a Form 10-K or 10-Q, or comparable reports filed by a foreign private issuer, on or before the extended due date.

The Public Company Order also provides relief relating to the obligations under the SEC's proxy rules to furnish materials to security holders when mail delivery is not possible, as long as certain conditions are satisfied. For this exemption to apply, those security holders must have a mailing address located in an area where the common carrier has suspended delivery of service of the type or class usually used for the solicitation as a result of COVID-19 and the company or other person making the solicitation must have made a good faith effort to furnish the soliciting materials to the security holder.

For detailed practical guidance on public company reporting, see Periodic and Current Reporting Resource Kit.

SEC Division of Corporation Finance Guidance

Also on March 25, 2019, the SEC's Division of Corporation Finance (Division) issued CF Disclosure Guidance: Topic No. 9 (CF#9) to provide guidance on disclosure and other securities law obligations that companies should consider with respect to COVID-19. CF#9 recognized that it may be difficult for companies to assess or predict with precision the broad effects of COVID-19 and that its actual impact will depend on many factors beyond a company's control and knowledge. At the same time, CF#9 observed that "the effects COVID-19 has had on a company, what management expects its future impact will be, how management is responding to evolving events, and how it is planning for COVID-19-related uncertainties can be material to investment and voting decisions."

CF#9 emphasized that under the SEC's principles-based disclosure framework, "disclosure requirements can apply to a broad range of evolving business risks even in the absence of a specific line item requirement that names the particular risk presented." As examples, CF#9 noted that COVID-19-related disclosures "may be necessary or appropriate in management's discussion and analysis, the business section, risk factors, legal proceedings, disclosure controls and procedures, internal control over financial reporting, and the financial statements."

For more information on disclosure and other securities law obligations that public companies should consider, see Public Company Periodic Reporting and Disclosure Obligations and Duties to Disclose and Update Disclosure.

Assessing and Disclosing the Evolving Impact of COVID-19

To illustrate the types of impacts COVID-19 may have that could give rise to disclosure obligations, CF#9 included a non-exhaustive series of questions for companies to consider with respect both to their present and future disclosure obligations, 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, restructuring charges, other expenses, or changes in accounting judgments?
- Have COVID-19-related circumstances such as remote work arrangements adversely affected your ability to maintain operations, including controls and procedures?
- Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so?
- 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 the methods used to distribute your products or services?
- 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?

CF#9 encourages disclosure that is tailored to the company's business, providing material information about the impact of COVID-19 through the eyes of management. In addition, CF#9 encourages companies to "proactively revise and update disclosures as facts and circumstances change." CF#9 further reminds companies that they can present forward-looking information in a manner that would be covered by the safe harbors in Section 27A of the Securities Act of 1933, as amended (Securities Act) and Section 21E of the Exchange Act.

Investors and the SEC are likely to review any COVID-19 disclosure carefully. Therefore, public companies should allow plenty of time prior to filing a periodic report for drafting and internal review of any proposed COVID-19 related disclosures. For example, it would be useful for companies to begin drafting more detailed risk factors, or updating existing risk factors, relating to COVID-19 for inclusion in their next SEC filing for which risk factor disclosure is required. As pointed out in CF#9, such disclosure should be specific and tailored to the specific impacts to the company's operations from the COVID-19 outbreak. Similarly, companies should also be preparing and revising their management's discussion and analysis COVID-19 related disclosures well in advance of their next SEC filing.

Because of the rapidly changing COVID-19 situation and related impacts on companies, it is especially important for companies to take into account all aspects of their business, including reaching out to business units that may not normally be part of their disclosure controls and procedures, to ascertain whether any developments could require disclosure.

Trading Before Dissemination of Material Non-Public Information

CF#9 reminded companies and related persons that they need to consider their federal securities law obligations when issuing or trading in their company's securities. CF#9 emphasized that when companies, directors, officers and other corporate insiders are aware of material COVID-19 impacts or risks to their company that have not been publicly disclosed, they "should refrain from trading in the company's securities until such information is disclosed to the public."

In addition, CF#9 warned companies to avoid selective disclosures regarding the impact of COVID-19 by broadly disseminating such material information. Companies should consider, depending on their particular circumstances, whether "they need to revisit, refresh, or update previous disclosure to the extent that the information becomes materially inaccurate." As discussed below, companies also should consider when they have a duty to disclose and ensure that they are not releasing positive news while in possession of negative news, and the need for any disclosure, if made, to be accurate in all material respects and not to contain a material omission.

Reporting Earnings and Financial Results

CF#9 also addressed earnings releases recognizing that the ongoing and evolving COVID-19 situation "may present a number of novel or complex accounting issues, that, depending on the particular facts and circumstances, may take time to resolve." Therefore, CF#9 encourages companies to address financial reporting matters earlier than usual, consulting with experts as needed.

CF#9 also reminded companies of their obligations with respect to non-GAAP financial measures, including the SEC's recent guidance with respect to disclosure of key performance indicators and metrics discussed below.

The SEC has expressed its willingness to discuss on a case-by-case basis issues that may arise in connection with COVID-19, in addition to the ones in the Public Company Order and CF#9 discussed above, for reporting companies. Companies that have particular concerns should reach out to the staff of the Division to discuss how to handle issues that may arise.

SEC Division of Corporation COVID-19 Related FAQs

On May 4, 2020, the Division issued four COVID-19 related FAQs. The first reiterated the disclosure requirements that must be satisfied when relying on the Public Company Order for an extension of a filing deadline of a Required Document. The Form 8-K (or Form 6-K, if applicable) must disclose: (1) reliance on the Public Company Order; (2) the reasons why the filing could not be made on a timely basis; (3) the estimated date by which the company expects the delayed filing to be made; and (4) company-specific risk factor(s) explaining the impact, if material, of COVID-19 on its business. If the reason that a filing cannot be timely made relates to the inability of a third party to furnish any required opinion, report or certification, the Form 8-K (or 6-K) must attach as an exhibit a statement signed by the third party stating the specific reasons why the required opinion, report or certification could not be provided by the original due date of the Required Document. When the delayed filing is made, it must disclose reliance on the Public Company Order and state the reasons the filing could not be made on a timely basis. This FAQ emphasizes that all of these disclosures are necessary in order to rely on the Public Company Order.

The COVID-19 related FAQs included three questions addressing Form S-3 implications of the Public Company Order, the first of which provided that a company may continue to conduct takedowns using an already-effective registration statement while relying on the Public Company Order, as long as the company determines that the prospectus used complies with Section 10(a) of the Securities Act. Although Section 10(a)(3) may permit companies relying on the Public Company Order to conduct a takedown using a prospectus that contains or incorporates information older than sixteen months in the event that updated information cannot be furnished without unreasonable effort or expense, companies and their legal advisers must determine when it is appropriate to update the prospectus. This FAQ reminded companies that they are responsible for the accuracy and completeness of their disclosure.

The second Form S-3 question addressed when a company must reassess its eligibility for remaining Form S-3 eligible if it has relied on the Public Company Order to delay filing a Form 10-K that will serve as a Section 10(a)(3) update to a registration statement on Form S-3. This FAQ explained that the form and content of an amendment to a registration statement and prospectus filed for the purpose of meeting the Section 10(a)(3) update requirements must conform to the applicable rules and forms as in effect on the filing date of such amendment. Therefore, when a company properly relies on the Public Company Order, it must reassess its Form S-3 eligibility when it files its Form 10-K. At such time it must have filed all material required to be filed pursuant to Section 13, 14 or 15(d) of the Exchange Act for a period of at least twelve calendar months immediately preceding the Section 10(a)(3) update. For the Form 10-K to be considered timely, all the conditions of the Public Company Order must met with respect to the filing.

The final Form S-3 question specified that between the original due date of a Required Document and the extended due date under the Public Company Order, a company may file a new Form S-3 registration statement even if it has not filed the Required Document prior to the filing of the registration statement. While the SEC Staff will consider the company to be current and timely in its Exchange Act reporting if the Form 8-K disclosing reliance on the Public Company Order is properly furnished, this FAQ reminded companies that they will lose eligibility to file new registration statements on Form S-3 if they fail to file the Required Document by the extended due date under the COVID-19 Order. This FAQ also specified that the SEC Staff is unlikely to accelerate the effective date of a Form S-3 until such time as any information required to be included in the Form S-3 is filed.

Joint Statement

On April 8, 2020, SEC Chair Jay Clayton and Division Director William Hinman issued a joint statement titled The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19 (the Statement). 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.

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.
- 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.

First, quarterly 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.

Second, 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 Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, and how such assistance has had or may have a material effect on the company.

Third, in requesting that companies 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, including the making of a variety of assumptions, 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.

Fourth, 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 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.

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 as discussed below.

Other Related SEC Pronouncements

In addition, to the Public Company Order, CF#9 and the Statement discussed above, the SEC and its various divisions and offices have issued a significant amount of COVID-19 driven or related guidance and relief in a relatively short period of time, including for public companies in dealing with their disclosure obligations, SEC filings, shareholders and the markets in general. Some of the other actions relate to:

Form 144 Paper Filings

On April 10, 2020, the Division announced that it was providing temporary relief with regard to the requirement to file paper copies of Form 144 during the period from April 10, 2020 through June 30, 2020. Specifically, the Staff said that it will not recommend enforcement action to the SEC if Forms 144 are submitted via email in lieu of mailing or delivering the paper form to the SEC if the filer attaches a complete Form 144 as a PDF attachment to an email sent to PaperForms144@SEC.gov.

In addition, if a filer is unable to provide a manual signature on the Form 144 submitted by email, the SEC Staff will not recommend enforcement action if the filer provides a typed form of signature in lieu of the manual signature and:

- The 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 submission and provides such document, as promptly as practicable, upon request by Division or other SEC Staff.
- Such document indicates the date and time when the signature was executed.
- The filer or submitter (with the exception of natural persons) establishes and maintains policies and procedures governing this process.

For additional information regarding Form 144, see Domestic Resales of Unregistered Securities: Rule 144, Section 4(a)(1½), and Section 4(a)(7).

Shareholder Meetings

On April 7, 2020 the Divisions of Corporation Finance and Investment Management announced that they were providing guidance to assist issuers, shareholder and other market participants affected by COVID-19 with meeting their obligations under the federal proxy rules. The guidance focused on the following matters:

- **Changing the date, time or location of a shareholder meeting.** In the guidance, the Staff took the position that an issuer that has already mailed and filed its definitive proxy materials can notify shareholders of a change in the date, time, or location of its shareholder meeting without mailing additional soliciting materials or amending its proxy materials if it: (i) issues a press release announcing such change; (ii) files the announcement as definitive additional soliciting material on EDGAR; and (iii) takes all reasonable steps necessary to inform other intermediaries in the proxy process (such as any proxy service provider) and other relevant market participants (such as the appropriate national securities exchanges) of such change.
- **Virtual shareholder meetings.** In recognition of the fact that many issuers were contemplating the possibility of conducting a "virtual" shareholder meeting through the internet or other electronic means in lieu of an in-person meeting, the Staff said that it expects the issuer to notify its shareholders, intermediaries in the proxy process, and other market participants of such plans in a timely manner and disclose clear directions as to the logistical details of the "virtual" or "hybrid" meeting, including how shareholders can remotely access, participate in, and vote at such meeting. Issuers that have already filed and mailed their definitive proxy materials would not need to mail additional soliciting materials (including new proxy cards) solely for the purpose of switching to a "virtual" or "hybrid" meeting if they follow the steps described above for announcing a change in the meeting date, time, or location.
- **Presentation of shareholder proposals.** In light of the possible difficulties for shareholder proponents to attend annual meetings in person to present their proposals, the Staff encourages issuers, to the extent feasible under state law, to provide shareholder proponents or their representatives with the ability to present their proposals through alternative means, such as by phone, during the 2020 proxy season. Furthermore, to the extent a shareholder proponent or representative is not able to attend the annual meeting and present the proposal due to the inability to travel or other hardships related to COVID-19, the staff would consider this to be "good cause" under Exchange Act Rule 14a-8(h)(17 CFR 240.14a-8(h)) should issuers assert the absence as a basis to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years.

- **Delays in printing and mailing of full set of proxy materials.** The Staff understands that some issuers in the current COVID-19 environment would like to furnish their proxy materials through the "notice-only" delivery option permitted by Exchange Act Rule 14a-16 (17 CFR 240.14a-16), but have concerns about their ability to comply with certain provisions of the rule. The Staff encouraged issuers affected by printing and mailing delays caused by COVID-19 to use all reasonable efforts to comply with the rule without putting the health or safety of anyone involved at risk. In circumstances where delays are unavoidable due to COVID-19 related difficulties, the staff would not object to an issuer using the "notice-only" delivery option in a manner that, while not meeting all aspects of the notice and timing requirements of Rule 14a-16, will nonetheless provide shareholders with proxy materials sufficiently in advance of the meeting to review these materials and exercise their voting rights under state law in an informed manner and so long as the issuer announces the change in the delivery method by following the steps described above for announcing a change in the meeting date, time, or location.

For further practical guidance on proxy materials and shareholder meetings, see Proxy Statement and Annual Meeting Resource Kit.

Notarization and Timing Requirements of Certain Filings

On March 25, 2020, the SEC adopted several temporary final rules. One provided relief from the notarization requirements of Form ID from March 26, 2020 through July 1, 2020 subject to certain conditions, including that the filer indicate that it could not provide the required notarization due to circumstances relating to COVID-19 and that the filer submit a PDF copy of the notarized manually signed document within 90 days of obtaining an EDGAR account. The others extended the filing deadlines for certain reports and forms due between March 26, 2020 and May 31, 2020 that companies must file pursuant to Regulation A and Regulation Crowdfunding, subject to certain conditions, including that the company promptly disclose to its investors reliance on the extension relief, and when a company files the required report or form, it must disclose that it is relying on the temporary final rules and state the reasons why, in good faith, it could not file the report or form on a timely basis.

Authentication Document Retention Requirements

On March 24, 2020, the SEC Staff from the Divisions of Corporation Finance, Investment Management, and Trading and Markets announced relief to certain of the manual signature and document retention requirements. Rule 302(b) of Regulation S-T requires that each signatory to documents electronically filed with the SEC "manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic filing." Such documents must be executed before or at the time the electronic filing is made. Further, electronic filers must retain such documents for a period of five years and furnish copies to the SEC or its staff upon request. Pursuant to this relief, the SEC Staff of the three divisions announced that they would not recommend the SEC take enforcement action:

- 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 pursuant to Rule 302(b).
- Such document indicates the date and time when the signature was executed.
- The filer establishes and maintains policies and procedures governing this process.

Finally, 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 the SEC for any further developments.

Materiality and Forward-Looking Statements

In light of the guidance from the SEC and SEC Staff, companies and their advisers have to review, reconsider, and discuss anew basic concepts, including materiality. Information is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. In terms of considering COVID-19 related disclosures, the concept of whether a fact is material or not is a mixed question of law and fact. The SEC has consistently noted that the issuer is in the best position to know what is likely to be material to investors. This is no different under these unusual circumstances. However, since 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, it is essential to consider closely whether disclosures relating to COVID-19 would be viewed as impacting the market. As discussed further below, 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.

As noted above, in connection with CF#9 and the Statement, the SEC and the SEC Staff has emphasized the importance of trend disclosures. In crafting its disclosures in Management's Discussion and Analysis of Financial Position and Results of Operations, or MD&A, to account for the effects of COVID-19, a reporting company will have to consider the objective of this section in periodic reports, which is intended to provide stockholders with a view through the eyes of company management of the business and financial results. MD&A also must have a forward-looking component. Management must discuss known trends. Disclosures may be required even when the likelihood of occurrence of a known trend or uncertainty is less than certain. In fact, in SEC guidance, the SEC has called for a discussion of 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. 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.

In considering MD&A trend disclosure, the 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. However, 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. In light of all the many unknowns related to the effects of COVID-19, government measures to address the pandemic, including economic and public health and safety measures, and the international reactions to the pandemic, the assessment outlined above may be particularly time-consuming.

There are a number of other sections of a periodic report, as well as other statements, such as earnings releases, in which a reporting company will need to consider the appropriateness of the inclusion of forward-looking statements. As noted above, in CF#9 and in the Statement, there is an emphasis placed on transparent disclosures. Transparency, to some extent, requires giving stakeholders a window into a company's expectations regarding its business and prospects. In order to encourage companies to provide additional forward-looking statements, there are safe harbors that may be helpful. The Private Securities Litigation Reform Act of 1995 (PSLRA) includes a safe harbor for forward-looking statements. In the context of a private action brought under the Securities Act or the Exchange Act that is based on an untrue statement of a material fact or an omission of a material fact necessary to make the statement not misleading, an issuer (covered by the PSLRA safe harbor) would not be liable for a forward-looking statement if the statement is identified as a forward-looking statement and is accompanied by meaningful cautionary statements that identify the factors that could cause actual results to differ materially from those in the forward-looking statement, or it is immaterial, or the plaintiff fails to prove that the forward-looking statement if made by a natural person was made with actual knowledge by that person that the statement was false or misleading or if made by a business entity was made by or with the approval of an executive officer and made or approved by such officer with actual knowledge that the statement was false or misleading.

In crafting disclosures, it is important to consider whether a statement constitutes a forward-looking statement. This will depend on the context and the facts and circumstances, but would include projections of future performance, plans for future operations, and assumptions regarding the projections and plans. Language that suggests that the statement is forward-looking—like "we expect," "we believe," "we intend," etc.—is helpful in making clear that the outcome that is discussed depends on future events. Often, there will be comments that may be mixed—meaning that part of the comment may speak to actual events, and part of the comment may refer to expectations regarding future occurrences. Drafting forward-looking disclosures relating to the potential COVID-19 effects on a company's business and financial results will require a careful review in this and future quarters.

The forward-looking statement also must be accompanied by meaningful cautionary language. This requires identifying the particular risks associated with the statement. Cautionary language and risks should be tailored to the projections, estimates, and opinions that are expressed, and issuers should take care not to default to generic or boilerplate statements. 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. An issuer's disclosure committee or other preparers of periodic reports should consider as well whether there is any actual knowledge that a forward-looking statement is misleading or that the risks described by the issuer in its filings already had manifested.

For this most recently concluded quarter and for upcoming quarters this year, in preparing for earnings announcements and periodic reports, 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–and–
- Reviewing carefully with counsel all forward-looking and trend disclosure in order to vet the cautionary language

Non-GAAP Financial Measures and Key Performance Indicators

Non-GAAP Financial Measures

The SEC provides two sources of guidance relating to non-GAAP financial measures. Item 10(e) of Regulation S-K applies to non-GAAP financial measures in SEC filings. Regulation G applies to all public statements made by SEC reporting companies that contain non-GAAP financial measures, including earnings releases, earnings calls and investor presentations as well as SEC filings.

Regulation G permits public companies to disclose material information that includes a non-GAAP financial measure, but only if that measure, whether or not in an SEC filing, is accompanied by a presentation of the most directly comparable GAAP financial measure and a reconciliation of the differences between the non-GAAP financial measure and the comparable GAAP financial measure. For oral public disclosure, like earnings calls, Regulation G permits the company to post the reconciliation simultaneously to its website and announce the location to investors. Rule 100(b) of Regulation G prohibits the use of "a non-GAAP financial measure that, taken together with the information accompanying that measure and any other accompanying discussion of that measure, contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the presentation of the non-GAAP financial measure, in light of the circumstances under which it is presented, not misleading."

Item 10(e) of Regulation S-K governs the use of non-GAAP financial measures included in SEC filings. It requires that a non-GAAP financial measure be accompanied by a presentation, of equal or greater prominence, of the most directly comparable GAAP financial measure, with a reconciliation to such measure. The filing must disclose the reasons why management believes that presentation of the non-GAAP financial measure provides useful information to investors. Also, there must be a statement disclosing the additional purposes, if any, for which management uses the non-GAAP financial measure. In addition, Item 10(e) also contains some express prohibitions on the calculation and presentation of non-GAAP financial measures.

The Division staff issued a series of compliance and disclosure interpretations (C&DIs) devoted to non-GAAP financial measures. Among other matters, these C&DIs provide guidance concerning what the Division staff considers to be misleading use of non-GAAP financial measures and what it considers to be unacceptable prominence of a non-GAAP financial measure presentation. These C&DIs also offer guidance in specialized areas.

As noted above, the Division staff issued CF#9 to provide guidance on disclosure and other securities law obligations that companies should consider with respect to the effect of COVID-19. According to CF#9, if a GAAP financial measure is not available at the time of the earnings release because COVID-19-related adjustments require additional information and analysis to complete, "the Division would not object to companies reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP results." The non-GAAP financial measure should not be disclosed more prominently than the most directly comparable GAAP financial measure or range of GAAP measures. However, for SEC filings, such as Form 10-K or Form 10-Q, where GAAP financial statements are required, companies should reconcile to GAAP results and not include provisional amounts or a range of estimated results.

CF#9 specifies that in a circumstance where a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures, the company must only include non-GAAP financial measures that it uses to report financial results to its Board of Directors. According to CF#9, companies should use non-GAAP financial measures and performance metrics "for the purpose of sharing with investors how management and the Board are analyzing the current and potential impact of COVID-19 on the company's financial condition and operating results," and not for the purpose of presenting a more favorable view of the company. When reconciling non-GAAP financial measures to provisional amount(s) or an estimated range of GAAP financial measures, companies should explain to the extent practicable why the line item(s) or accounting is not complete and what additional information or analysis may be needed.

As companies prepare to report their earnings, they should take into account the portion of CF#9 relating to non-GAAP financial measures, while also being mindful of the SEC's guidance in recent years regarding the limited and careful approach that companies must take when presenting non-GAAP financial measures.

Key Performance Indicators

On January 30, 2020, the SEC provided guidance (KPI Guidance) regarding the disclosure of key performance indicators (KPIs) and metrics used in the MD&A section of SEC filings. This guidance, which reflects the SEC's interpretation of existing MD&A requirements, became effective on February 25, 2020.

For some time now, SEC representatives have expressed concerns regarding the use of KPIs. These concerns are similar to those raised by the SEC with respect to the use of non-GAAP financial measures. See, for example, remarks by then-Commissioner Kara Stein addressing KPIs. The SEC's Division of Enforcement also has taken action in recent years against companies relating to the use of misleading KPIs. The KPI Guidance describe show Item 303(a) of Regulation S-K and comparable requirements of Forms 20-F and 1-A apply to KPIs and metrics. Item 303(a)not only specifies particular items for disclosure in the MD&A (such as liquidity, capital resources and results of operations), it also requires discussion of "such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations." In addition, Instruction 1 to Item 303(a) requires discussion of "statistical data that the registrant believes will enhance a reader's understanding of its financial condition, changes in financial condition, and results of operations."

Although the KPI Guidance came out before COVID-19 reached pandemic levels in the United States, as principles-based guidance, it is applicable to KPIs used in COVID-19 disclosures. CF#9 expressly reminded companies of their obligations with respect to non-GAAP financial measures, including the SEC's recent guidance with respect to disclosure of KPIs and metrics. For example, if a company presents a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19, "it would be appropriate to highlight why management finds the measure or metric useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations."

The KPI Guidance observes that some companies disclose non-financial and financial metrics when describing the performance or the status of their business. These metrics vary by company and industry, and some metrics include company- or industry-specific matters. These metrics may reflect external or macro-economic matters, or they may be a combination of external or internal information.

The KPI Guidance reminds each company that uses metrics in its MD&A that, under existing requirements, it "need[s] to include such further material information, if any, as may be necessary in order to make the presentation of the metric, in light of the circumstances under which it is presented, not misleading." According to the KPI Guidance, a company must consider whether an existing regulatory disclosure framework—such as GAAPor, for non-GAAP financial measures, Regulation G or Item 10 of Regulation S-K—applies in the context of the metrics it uses and assess what "additional information may be necessary to provide adequate context for an investor to understand the metric presented." The KPI Guidance states that, based on facts and circumstances, the SEC generally expects that a metric be accompanied by the following disclosure:

- A clear definition of the metric and how it is calculated
- A statement indicating the reasons why the metric provides useful information to investors–and–
- A statement indicating how management uses the metric in managing or monitoring the performance of the business

According to the KPI Guidance, a company needs to consider whether there are underlying estimates or assumptions for a metric or its calculation that need to be disclosed in order for the metric not to be materially misleading. If a company changes the calculation method or presentation of a metric from one period to another or otherwise, it should consider disclosing, to the extent material:

- The differences in the way the metric is calculated or presented compared to prior periods
- The reasons for the change
- The effects of the change on the amounts or other information being disclosed or previously reported–and–
- Other differences in methodology and results that would reasonably be expected to be relevant to an understanding of the company's performance or prospects

Depending on significance, following a change in methodology or presentation, it may be necessary to recast prior metrics to conform to the current presentation and place the current disclosure in the appropriate context.

The KPI Guidance emphasizes the importance of disclosure controls and procedures in the context of key performance indicators and metrics that are derived from the company's own information. If these indicators and metrics are material to either an investment decision or a voting decision, the KPI Guidance states that "the company should consider whether it has effective controls and procedures in place to process information related to the disclosure of such items to ensure consistency as well as accuracy."

The KPI Guidance contains the following non-exclusive list of examples of metrics to which this guidance applies:

- Operating margin
- Same store sales
- Sales per square foot
- Total customers/subscribers
- Average revenue per user
- Daily/monthly active users/usage
- Active customers
- Net customer additions
- Total impressions
- Number of memberships
- Traffic growth
- Comparable customer transactions increase
- Voluntary and/or involuntary employee turnover rate
- Percentage breakdown of workforce (e.g., active workforce covered under collective bargaining agreements)
- Total energy consumed–and–
- Data security measures (e.g., number of data breaches or number of account holders affected by data breaches)

Companies should assess whether they currently use, or plan to use, any key performance indicators or metrics. If the answer is yes, they should consider whether there is additional information that should be disclosed and develop the presentation for that new disclosure.

Because the KPI Guidance is already in effect, companies that will be using KPIs in their upcoming MD&A disclosures should promptly assess whether they need to make any changes to the MD&A to reflect the KPI Guidance. In particular, companies adjusting KPIs to give effect to the COVID-19 pandemic must take the KPI Guidance into account.

A company that discloses performance indicators and metrics in its MD&A section that are derived from the company's own information should review its disclosure controls and procedures to be sure these are effective with respect to the calculation of these indicators and metrics. The review should also include a discussion with the audit committee. The audit committee should understand the performance indicators that are used—what their purpose is, whether they are well-understood and well-defined, what the methodology is for their calculation and whether there have been any significant changes in the indicators presented by the company or in their calculation methodology. This review and any update of disclosure controls and procedures should be completed before the company files its next annual report on Form 10-K or quarterly report on Form 10-Q.

Often, a company will use KPIs in its investor presentations, including in its earnings releases. The same level of review and care should be undertaken in relation to the preparation of these presentations and the use of performance indicators in these materials.

Earnings Releases and Analyst Calls

During this period of uncertainty, many companies and their boards of directors may be struggling with competing desires to communicate with their stakeholders and to restrict or control their communications until such time as more complete information is available and the company and those speaking on its behalf can do so with greater certainty. It is useful to keep in mind that 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. Of course, there are certain periodic reporting obligations and the occurrence of certain events may trigger the mandatory filing of a Current Report on Form 8-K, but generally speaking, a failure to speak (an omission) is a violation of Rule 10b-5 under the Exchange Act only if there is a duty to speak. As a result, if there is no obligation under the securities laws to make a disclosure by a particular date, an issuer can remain silent. Of course, if an issuer decides to make positive announcements, it must ensure that it also discloses any additional information (which may be negative) that would be necessary in order to make the statement not misleading. During these unusual times, companies also should give thought to their usual pattern of communication. Many companies have set a precedent in terms of when and how and how frequently they communicate with the public. Similarly, companies should consider their disclosures, including the timing and content of these, in light of other events, such as their insider trading and blackout periods and any potential offerings of securities or other transactions in their securities.

In addition to considering their duties to disclose, companies will always want to be mindful of Regulation FD, which 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." 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 of fair disclosure intact.

During these uncertain times, companies may be more likely to be communicating more regularly with their lenders, their suppliers, their vendors, and their bankers and other advisers. 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, and 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. It also does not cover communications with attorneys, investment bankers, accountants and others who owe a duty of confidence to the company, including parties that have entered into an express undertaking to maintain confidential nonpublic information shared by the company with them (a temporary insider). That said, a company should be very careful to identify any material nonpublic information that is to be shared with a temporary insider and have formulated a clear view regarding when the company will make such information public or when such information will become stale or outdated as a result of the passage of time or otherwise.

Again during tumultuous times, representatives of a company may be called upon to respond to questions from stakeholders or to comment in the context of investor presentations or investor updates on the company's financial condition. It is important to keep in mind that whenever a public company, or any person acting on its behalf discloses material non-public information to certain enumerated persons (as discussed above), 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.

In connection with earnings releases and other investor calls, a reporting company will want to consider Section 10(b) and Rule 10b-5 of the Exchange Act, which prohibit material misstatements or omissions, compliance with Regulation FD, protecting forward-looking statements as discussed above, compliance with the non-GAAP measure rules and the KPI Guidance. Balancing all of these regulatory considerations, while striking the right balance between providing some insights into the company's results and prospects is challenging. In the course of reviewing periodic filings, the SEC Staff has been increasingly focused on information communicated in earnings releases and earnings calls and the consistency of those messages with the disclosures contained in periodic reports.

In addition, the SEC has paid particular attention to the practice of providing guidance (and subsequent confirmation of guidance) to analysts and others. 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. Of course, as a result of the pandemic, many companies have chosen to withdraw prior guidance and provide adjusted guidance or not provide any guidance given the many unknowns. Nonetheless, it is useful to remind management teams that no earnings guidance can be shared in discussions with analysts or others without simultaneous public disclosure. The same cautionary notes apply to the affirmation of prior guidance. It is also useful for in-house legal and investor relations teams to remind those speaking on behalf of the company to the market of the company's Regulation FD and other communications policies. There may be pressure on management teams at this time to be more forthcoming or to provide more insights to the investment community regarding their views of the company's future results. Investor calls should be scripted, if possible, and attended by at least two representatives of the company. All communications should be closely tracked to ensure that consistent messages are communicated and to react promptly if an inadvertent disclosure has occurred.

Form 10-K and Form 10-Q Matters

In order to allow time for drafting and internal review of appropriate language, public companies should begin preparing COVID-19 disclosures in advance, given heightened investor and SEC scrutiny. Such disclosure should be specific and must be tailored to the specific impacts to the company's operations from the COVID-19 outbreak.

SEC disclosure requirements are principles-based to a large degree and there are many areas where existing SEC rules, while not expressly mentioning pandemics, could require disclosure. Areas in which COVID-19 may give rise to disclosure or other securities law considerations are elaborated upon below.

Risk Factors

Item 105 of Regulation S-K requires risk factors to discuss the most significant factors that make an investment in a company speculative or risky, as opposed to presenting risks that could apply generically to any company. As the impact from COVID-19 has intensified, companies may become increasingly aware of additional ways in which the pandemic poses specific risks beyond what they may have previously disclosed. As the situation persists and evolves, it may be necessary to continue to assess COVID-19 risk factor disclosures throughout the year. It would be useful for companies to begin drafting more detailed risk factors relating to COVID-19 for inclusion in their next SEC filing that requires risk factor disclosure and then to re-evaluate these throughout the year to determine if they need to be supplemented or re-evaluated. Although there is no requirement to include risk factors in a quarterly filing or on a current report, a company may consider doing so if it believes that it may be likely that it will seek to undertake a securities offering in the near-term and would like to ensure that its filings present an accurate picture of the company.

There are many ways in which COVID-19 may pose risks for a company. Revenues may decline in some lines of business. Some companies may face liquidity challenges and credit may be less expensive and/or more expensive. To the extent that a company maintains an investment portfolio, it may be exposed to greater market volatility. Remote working might give rise to greater cybersecurity concerns. There could be increased litigation risk. Uncertainties with respect to the ultimate scope and duration of the pandemic may itself be a risk. The list of questions for assessing and disclosing the impact of COVID-19that the Division staff provided in CF#9 is a helpful starting place for such analysis, but companies need to reflect on how the pandemic has impacted their own particular circumstances. It is possible that various segments of a company may be affected in different matters. For example, some segments might be having supply chain or distribution issues as a result of government shutdown orders or while others may be more susceptible to a decline in discretionary spending arising from economic turbulence.

If a company determines that a particular risk or development relating to COVID-19 is sufficiently material that it should be disclosed prior to its next periodic report or registration statement filed with the SEC, such as might be the case if it is currently in the market buying or selling its securities, it may decide to disclose a new COVID-19 risk factor through a current report filing.

Management's Discussion and Analysis

MD&A must include information that a company "believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations." With COVID-19 impacting so many companies, often negatively, but in some cases providing opportunities, it is important for the MD&A to not only disclose COVID-19 as a known trend or uncertainty but also management's perspective on the type and extent of COVID-19's effect on the company, to the extent material. There are many possible questions for companies to assess for materiality in the COVID-19 context as they prepare their MD&A. For example, has the company experienced problems within its supply chain or distribution network and if so are such issues anticipated to be ongoing? How has COVID-19 affected liquidity? Has the company drawn down on bank facilities for any reason, including because it has not been able to finance in the capital markets? Has the company needed to close any locations? Does the company operate any facilities where there has been a significant outbreak of COVID-19? If the company switched its workforce to telecommuting, has there been any reduction in productivity? Is the company party to contracts with force majeure provisions that are or may be triggered by the COVID-19 pandemic, and if so, is that having a material impact on the company's business? Is the company having a dispute with its insurance carrier regarding business continuity coverage?

For additional practical guidance, see Management's Discussion and Analysis of Financial Condition and Results of Operations.

Financial Statement Issues

Companies should discuss with their accountants whether COVID-19 disclosure is needed as part of their financial statement footnotes, including a subsequent event footnote. Contingency disclosures is another area that should be carefully assessed, particularly from the perspective is whether a contingent COVID-related loss is remote, reasonably possible or probable. Companies will also need to determinations from an accounting perspective whether COVID-19 has led to any impairment of various types of assets. Among other financial statement concerns to be considered with respect to COVID-19 in extreme cases are going concern issues.

Controls and Procedures

Item 307 of Regulation S-K requires a company to disclose the conclusions of its principal executive officer and principal financial officer regarding the effectiveness of its disclosure controls and procedures as of the end of each quarterly period. Similarly Item 308(c) of Regulation S-K requires a company to disclose any change in its internal control over financial reporting that occurred during each quarter that has materially affected, or is reasonably likely to materially affect, its internal control over financial reporting.

"Disclosure controls and procedures" is defined in Exchange Act Rule 13a-5 and 15d-15 to mean controls and other procedures of a company that are designed to ensure that information required to be disclosed by the company in the reports that it files or submits under the Exchange Act is recorded, processed, summarized and reported, within the time periods specified in the SEC's rules and forms. "Internal control over financial reporting" is defined in each rule as a process designed by, or under the supervision of, a company's principal executive and principal financial officers and effected by the company's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that:

- Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the company.
- Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors.
- Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the company's assets that could have a material effect on the financial statements.

Because the COVID-19 pandemic is affecting so many aspects of business, and many employees are now working from home rather than their usual work location, companies should continually monitor and evaluate their disclosure controls and procedures and internal control over reporting to make sure that they remain effective in the current environment, as well as to consider whether changes need to be made to ensure that they remain effective in gathering and reporting all required information. Companies may also want to consider making the potential impacts of COVID-19 an express part of their applicable controls and procedures in light of the fact that many disclosure decisions for the foreseeable future will be made with regard to COVID-19 and its impacts.

In addition, because of the swiftly moving changes in the COVID-19 situation and its related impacts, it is especially important for companies to take into account all aspects of their business, including reaching out to areas that may not normally be part of their controls and procedures processes, to ascertain whether anything is happening that could require disclosure.

Litigation

Item 103 of Regulation S-K requires a company to briefly describe material pending legal proceedings, other than in the ordinary routine litigation incidental to the business, to which the company or its subsidiaries is subject. Companies are beginning to be subject to litigation arising out of the impacts of COVID-19. It does not matter whether the company is a plaintiff or a defendant. For example, some companies are suing their insurers for failure to cover damages under an insurance policy due to a loss of business income. While other companies are being sued by employees who have contracted COVID-19 allegedly in the workplace. Just as COVID-19 has been rapidly expanding, the number of lawsuits filed because of it will likely continue to grow.

Description of Business

Item 101 of Regulation S-K requires a company to provide a narrative description of the business, including the business done and intended to be done by the company. Among the things that should be addressed as part of this disclosure are: the principal products produced and services rendered by the company, the sources and availability of raw materials, the dependence on a single customer, the amount of backlog orders, competitive conditions in the business and the number of employees. Each of these items could be changing as the impacts of COVID-19 evolve.

To the extent a company is filing a report or registration statement with the SEC that requires a business description, the company will need to consider whether additional or revised disclosure is need to the extent that COVID-19 has materially changed, or is expected to materially change, its business. When looking at its disclosure, a company should start by asking a series of questions that will help inform its disclosures. For example:

- Did the company exit any business line?
- Did the company close any facility?
- Is the company having difficulty sourcing inventory and considering alternative sources to those previously used?
- Are some segments of the company's business impacted more than others?
- Did the company lay off workers as a result of a business slowdown?
- Were there any acquisitions or previously disclosed organic growth initiatives put on hold?

Financing Alternatives

Many companies may be considering their financing alternatives at this time in order to bolster their capital, to provide third parties with confidence regarding the company's ability to weather continued volatility, to continue to comply with bank or other contractual covenants, or simply for opportunistic reasons. The financing alternatives may be quite dependent on whether the company is undergoing financial distress or merely wants to strengthen its financial position. For many companies, the best alternative may be a private investment in public equity or PIPE transaction. In a PIPE transaction, a placement agent, acting as the company's financial intermediary, will engage potential institutional investors confidentially and gauge their interest in participating in a financing transaction. The company is not required to disclose the potential financing until definitive securities purchase agreements are entered into with the investors. Some companies may not be able to use their shelf registration statements (to the extent that these are effective) unless or until they update their disclosures for the effects of COVID-19. Others may prefer to share material nonpublic information to investors that have committed to keep such information confidential and negotiate financing terms with investors that have been able to consider this data. A number of companies may need significant capital injections. Venture capital funds, private equity funds and other financial sponsors may be interested in participating in a financing round and negotiating financial or other ongoing affirmative or negative covenants with the company. In addition, from time to time, these financial sponsors may negotiate for themselves governance rights, such as board seats or observer rights. Given that these transactions led by financial sponsors may involve highly structured securities, and the negotiation of other ongoing rights, a private placement may be the most appropriate financing alternative. The rules of the securities exchanges, which require a shareholder vote in the case of certain private placement transactions completed at a discount, upon the consummation of a transaction that will result in a change of control, or in connection with a transaction that involves related parties, should be considered in connection with a proposed PIPE transaction.

To the extent that a company has an effective shelf registration statement and its disclosures are current, it may consider as an alternative to a PIPE transaction, conducting a shelf takedown that may be structured as a registered direct, or agency best efforts, public offering, or as a firm commitment confidentially marketed public offering. A registered direct offering may be a practical alternative, especially for a company that will offer its securities to a small number of institutional investors through a placement agent. In a registered direct offering, investors introduced to the company by the placement agent purchase securities directly from the company. Investors that may not want to hold restricted securities (such as those sold in a PIPE transaction) will prefer a registered direct or confidentially marketed public offering.

In connection with any financing transaction, the company and its advisers will have to consider closely whether all of the company's disclosures, including risk factors, business, and MD&A disclosures, are current. While, during more stable markets, it may be quite common to undertake a financing transaction after the release of quarterly earnings and before the filing of that quarter's Form 10-Q, there may be some reluctance to do so in this environment. A company may want to minimize the gap in time between its earnings announcement and the filing of its Form 10-Q, and placement agents and underwriters may wish to see the quarterly report prior to undertaking an offering. All of the questions raised by the SEC in CF#9 and in the Statement are highlighted in the context of a securities offering.

Market Outlook

As discussed above, these are unusual and uncertain times and reporting companies and their advisers will have to consider the very fundamental principles of securities laws as they consider when and how to make disclosures relating to the effects of COVID-19 on their businesses, results of operations and future prospects. The relief provided by the SEC has been timely and provides much-needed flexibility for issuers struggling to operate amidst stay-at-home and similar orders. Additional SEC guidance, whether in the form of CF#9 or the Statement, provide useful reminders for interpreting and applying longstanding principles to an unprecedented pandemic.

Michael Hermsen, Partner, Mayer Brown LLP

Mike Hermsen is a partner in Mayer Brown's Corporate & Securities Group. Mike has an extensive practice that focuses on securities matters, including the representation of issuers in securities offerings and liability management transactions, corporate clients in connection with compliance, reporting and stock exchange matters and companies, boards of directors and management on, among other things, corporate governance matters and executive compensation disclosures and reporting. Mike has been included in *The Best Lawyers in America* in the practice areas of Securities/Capital Markets Law and Securities Regulation for over a decade and *Legal 500* recommends Mike in "Capital Markets – Equity Offerings" noting Mike has "unsurpassed knowledge of SEC rules." In addition, Mike is frequently cited in the media regarding new regulatory initiatives.

Anna Pinedo, Partner, Mayer Brown LLP

Anna Pinedo is a partner in Mayer Brown's New York office and a member of the Corporate & Securities practice. She concentrates her practice on securities and derivatives. Anna represents issuers, investment banks/financial intermediaries and investors in financing transactions, including public offerings and private placements of equity and debt securities, as well as structured notes and other hybrid and structured products.

She works closely with financial institutions to create and structure innovative financing techniques, including new securities distribution methodologies and financial products. She has particular financing experience in certain industries, including technology, telecommunications, healthcare, financial institutions, REITs and consumer finance. Anna has worked closely with foreign private issuers in their securities offerings in the United States and in the Euro markets. She also works with financial institutions in connection with international offerings of equity and debt securities, equity- and credit-linked notes, and hybrid and structured products, as well as medium term note and other continuous offering programs.

In the derivatives area, Anna counsels a number of major financial institutions acting as dealers and participants in the commodities and derivatives markets. She advises on structuring issues as well as on regulatory issues, including those arising under the Dodd-Frank Act. Her work focuses on foreign exchange, equity and credit derivatives products, and structured derivatives transactions. Anna has experience with a wide range of transactions and structures, including collars, swaps, forward and accelerated repurchases, forward sales, hybrid preferred stock and off-balance sheet structures. She also has advised derivatives dealers regarding their Internet sites and other Internet and electronic signature/delivery issues, as well as on compliance matters.

Laura Richman, Counsel, Mayer Brown LLP

Laura Richman's wide-ranging corporate and securities practice has a strong focus on corporate governance issues and public disclosure obligations. Laura's practice includes Securities and Exchange Commission reports, such as proxy statements and annual, quarterly and current reports. She advises on executive compensation disclosure, insider trading regulation and Dodd-Frank and Sarbanes-Oxley compliance. Laura represents listed company clients with respect to stock exchange compliance matters. She advises clients on governance policies and other board and shareholder matters. In addition, her practice includes representing clients on transactions such as securities offerings and mergers and acquisitions, as well as providing general securities, corporate, limited liability company and contract advice. Laura has practiced with Mayer Brown since 1981.

With regard to securities transactions, Laura represents issuers and underwriters in public and private offerings of debt and equity securities (both initial public offerings and offerings of seasoned, public companies), including guidance on federal and state securities law compliance. She also advises issuers in connection with the securities law aspects of employee benefit plans and dividend reinvestment plans. Other transactional matters in which Laura represents corporate clients include acquisitions and dispositions of assets or stock, restructurings (such as holding company formation) and going-private transactions. She also advises investors in leveraged buyout transactions, and represents financial institutions that take equity positions in companies. Laura advises clients on shareholder rights plans and anti-takeover protection provisions.