Market Trends 2021: COVID-19 from a Securities Law Perspective

A Practical Guidance® Practice Note by
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This practice note discusses market trends in capital markets and securities related considerations during the COVID-19 pandemic, which began in late 2019 and has continued for more than two years. It describes how the U.S. Securities and Exchange Commission (SEC) addressed the effects of the pandemic through exemptive orders and guidance and discusses key disclosure matters, including risk factors, management's discussion and analysis of financial position and results of operations (MD&A), and financial statement issues that companies have had to address during this time.

The COVID-19 pandemic has taken a terrible human toll and caused considerable economic damage to the U.S. and world economies. In addition to confronting economic and financial challenges, publicly held companies in the United States are also expected to continue to timely comply with their disclosure and other obligations under the U.S. federal securities laws. Doing so has been especially difficult given the duration and the impact of the pandemic, and many uncertainties remain.

The SEC and the SEC staff (Staff) responded promptly to the pandemic by providing reporting companies and other market participants with temporary relief from certain requirements, some of which has since expired. The SEC and the Staff also issued guidance regarding the types of qualitative and quantitative disclosures that the SEC and the markets would generally require regarding the effects of the pandemic. This practice note summarizes that guidance as well as related disclosure and filing developments.

In many respects, the guidance from the SEC and the Staff serves to remind reporting companies and their advisors of fundamental and longstanding disclosure principles: the need for timely disclosures that provide transparency to promote market integrity; the importance of providing investors with insights through well-crafted trend disclosure and forward-looking statements regarding the potential impact of material developments; and the need to avoid potentially misleading non-GAAP financial measures and key performance indicators (KPIs) in SEC filings and other public communications. While the pandemic has been 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.

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, COVID-19 Update: The SEC's Temporary Relief from Certain Requirements of Regulation Crowdfunding, COVID-19 Update: Q&A for Public Companies, 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.

SEC Pronouncements

As noted above, the SEC has provided certain temporary relief to reporting companies and the Staff has issued substantial disclosure guidance during the COVID-19 pandemic. As the pandemic continues and governments and companies take additional precautionary measures that may impact businesses, more disclosure-related and filing or compliance issues may arise. Accordingly, companies should monitor the SEC website for any subsequent SEC orders or guidance.

SEC Exemptive Order for Public Companies

In March 2020 the SEC provided temporary extensions for certain public company filing obligations that could not be timely met due to COVID-19. However, that relief, which applied only to filings that would otherwise have been due on or before July 1, 2020, expired and was not extended.

The SEC also provided relief from the obligation under the SEC's proxy rules to furnish materials to securityholders when mail delivery is not possible if certain conditions are satisfied. The exemptive relief applied to delivery to any securityholder with a mailing address in an area where the common carrier had 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 had made a good faith effort to furnish the soliciting materials to the securityholder. According to an SEC update on targeted COVID-19 relief, although this relief does not have a specified expiration date, few registrants are expected to need to avail themselves of this relief with respect to proxy materials sent to domestic mailing addresses. The relief remains available to registrants needing to send proxy materials to international addresses if the common carrier has suspended delivery service as a result of COVID-19.

For additional information about the SEC exemptive order, see SEC's Conditional Reporting Relief and COVID-19 Disclosure Guidance: First Analysis.

SEC Division of Corporation Finance Guidance

On March 25, 2020, 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 "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."

On June 23, 2020, the Division supplemented CF#9 by issuing CF Disclosure Guidance: Topic No. 9A (CF#9A). This guidance provides additional views on companies' ongoing assessment of the impact of COVID-19, including operations, liquidity, and capital resources disclosures that companies should consider related to COVID-19-related disruptions. CF #9A notes that companies are making a diverse range of operational adjustments to respond to the pandemic, such as the transition to telework, supply chain and distribution adjustments, and suspension or modification of certain operations to comply with health and safety guidelines. CF #9A indicates that these types of adjustments could impact a company in a way that would be material to an investment or voting decision, triggering disclosure obligations.

CF #9A also recognized that companies have been undertaking a diverse and sometimes complex range of financing activities in response to the pandemic—including, for example, entering into or amending credit facilities and public and private financings—each of which may have novel terms and structures. CF #9A reminds companies to provide robust and transparent disclosure regarding short- and long-term liquidity and funding risks, especially new risks or

uncertainties. The Division noted that companies have made some of these disclosures in their earnings releases and encouraged companies to evaluate whether such information, in light of its potential materiality, should also be discussed in MD&A.

For additional information about CF#9 and CF #9A, see COVID-19 Update: SEC Staff Issues Additional Disclosure Guidance.

Assessing and Disclosing the Evolving Impact of COVID-19

To illustrate the potential impacts COVID-19 that could give rise to disclosure obligations, CF#9 included the following non-exhaustive series of questions for companies to consider with respect both to their present and future disclosure obligations:

- 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 from 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 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 (15 U.S.C. § 77z-2) of the Securities Act of 1933, as amended (Securities Act), and Section 21E (15 U.S.C. § 78u-5) of the Securities Exchange Act of 1934, as amended (Exchange Act).

CF #9A also suggests that companies consider a broad range of questions as they evaluate the impacts of COVID-19, including:

- What are the material operational challenges that management and the board of directors are monitoring and evaluating?
- How is the company's overall liquidity position and outlook evolving?
- Have you accessed revolving lines of credit or raised capital in the public or private markets to address your liquidity needs?
- Have COVID-19-related impacts affected the company's ability to access traditional funding sources on the same or reasonably similar terms as were available to it in recent periods?
- Is the company at material risk of not meeting covenants in its credit and other agreements?
- If the company includes metrics, such as cash burn rate or daily cash use, in its disclosures, is it providing a clear definition of the metric and explaining how management uses the metric in managing or monitoring liquidity?
- Is the company able to timely service its debt and other obligations?
- Have capital expenditures been reduced and if so, how?
- Have terms with customers been altered?
- Is the company relying on supplier finance programs to manage its cash flow?
- Has the company considered whether disclosure is required of subsequent events in the financial statements and known trends or uncertainties in MD&A?

In addition, CF #9A reminds management to consider whether conditions and events, taken as a whole, raise substantial doubt about the company's ability to meet its obligations as they become due within one year after the issuance of the financial statements and whether there is substantial doubt about the company's ability to continue as a going concern. As it relates to MD&A disclosure, CF #9A notes that the following questions should be considered:

- Are there conditions and events that give rise to the substantial doubt about the company's ability to continue as a going concern? For example, have you defaulted on outstanding obligations? Have you faced labor challenges or a work stoppage?
- What are your plans to address these challenges? Have you implemented any portion of those plans?

Investors and the SEC are likely to review any COVID-19 disclosure carefully. Accordingly, public companies should allow sufficient time before filing periodic reports for drafting, reviewing, and revising any proposed COVID-19-related disclosures. For example, companies should consider 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 noted in CF#9, such disclosure must be specific and tailored to the specific impacts to the company's operations from the COVID-19 outbreak. Similarly, companies should update their MD&A COVID-19-related disclosures well in advance of their next SEC filing and should discuss with their accountants whether financial statement footnote disclosure of the effects of COVID-19 is appropriate, including as a subsequent event footnote.

Accounting for the effects of the COVID-19 pandemic in preparing MD&A is discussed below under "Management's Discussion and Analysis."

Because of the rapidly changing COVID-19 situation and related impacts on companies, it is especially important for companies to consider all aspects of their business, including communicating with business units that may not normally be part of their disclosure controls and procedures, to determine whether any additional information should be disclosed.

Trading before Dissemination of Material Nonpublic Information

CF#9 reminds companies and related persons to consider their federal securities law obligations when issuing or trading in their company's securities. CF#9 emphasizes 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 warns 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 should also consider when they have a duty to disclose material information and ensure that they are not releasing positive news while in possession of undisclosed negative news, and the need for any disclosure, if made, to be complete and accurate in all material respects.

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" and 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 KPIs and metrics, as 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 discussed above, for reporting companies. Companies should discuss any such concerns with the Staff of the Division.

SEC Division of Corporation Finance COVID-19-Related Perk C&DI

Companies that have offered new or modified benefits to executive officers because of the COVID-19 pandemic should consider Regulation S-K compliance and disclosure interpretation (C&DI) 219.05, which the Staff of the Division issued in September 2020 to assess whether those benefits constitute perquisites or personal benefits for purposes of executive compensation disclosure and determination of a company's named executive officers. According to C&DI 219.05 an item is not a perquisite or personal benefit if it is integrally and directly related to the performance of the executive's duties. On the other hand, if an item that confers a direct or indirect benefit has a personal aspect, without regard to whether it may be provided for a business reason or for the company's convenience, it is a perquisite or personal benefit unless it is generally available on a nondiscriminatory basis to all employees.

C&DI 219.05 recognizes that the COVID-19 pandemic can be considered when assessing whether an item is integrally and directly related to the performance of an executive's duties. This C&DI notes that providing enhanced technology needed to make the executive's home the primary workplace upon imposition of local stay-at-home orders would generally not

be a perquisite or personal benefit but provides that new health-related or personal transportation benefits provided to address new risks arising because of COVID-19 may be perquisites or personal benefits even if the company provided such benefits because of the COVID-19 pandemic, unless they are generally available to all employees.

Joint Statement

On April 8, 2020, former SEC Chairman Jay Clayton and former Division Director William Hinman issued a joint statement titled The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19 (Statement). In the Statement, Chairman 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," and 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. While the SEC has a new chair and new director of the Division, much of this guidance is still relevant and provides a helpful way to continue the company's narrative as the pandemic continues.

In short, Chairman 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 but will also 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.

Although the Statement provides 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 the disclosures. Investors, and more particularly the U.S. securities class action bar, will have the benefit of hindsight when assessing the adequacy of these disclosures. Since these persons will not be bound by the SEC's views, companies should satisfy the conditions necessary to take advantage of the safe harbor provisions of the U.S. federal securities laws to provide a defense against any lawsuits if actual results differ from the forward-looking information, as discussed below under Materiality and Forward-Looking Statements.

For more information about forward-looking statements generally, see Safe Harbors for Forward-Looking Statements and Forward-Looking Statements Safe Harbor Checklist.

Other Related SEC Pronouncements

In addition to the items discussed above, the SEC and its various divisions and offices have issued a significant amount of COVID-19-driven or -related guidance and relief for public companies in a relatively short time, covering their disclosure obligations, SEC filings, shareholder meetings, and the markets generally.

Form 144 Paper Filings

On April 10, 2020, the Division announced that it was providing temporary relief from 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 a June 25, 2020, announcement, the Division extended the temporary relief period for those who submit Forms 144 until the Division provides public notice that it no longer will be in effect; that notice will be published at least two weeks before the announced termination date.

In addition, if a filer is unable to provide a manual signature on a Form 144 submitted by email, the 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 Staff

- Such document indicates the date and time when the signature was executed
- The filer or submitter (except for natural persons) establishes and maintains policies and procedures governing this process

On December 22, 2020, the SEC proposed amendments to Rule 144 that, if adopted, would mandate electronic filing of all Form 144 notices for Rule 144 resales of the securities of issuers that are subject to the reporting requirements of Section 13 (15 U.S.C. § 78m) or Section 15(d) (15 U.S.C. § 78o) of the Exchange Act, and would eliminate the paper filing option. The Rule 144 and Form 144 rule proposals were included in the SEC's Fall 2021 rulemaking agenda but the timing and substance of any SEC action on these matters is not yet known.

See Rule 144 Holding Period and Form 144 Filings, 2020 SEC LEXIS 5310.

For additional information regarding Form 144 and the proposed amendments, see Domestic Resales of Unregistered Securities: Rule 144, Section 4(a)(1½), and Section 4(a)(7) and Rule 144: SEC's Proposed Amendments.

Shareholder Meetings

On April 7, 2020 (and updated on January 19, 2022), the Staff of the Divisions of Corporation Finance and Investment Management provided updated guidance to assist issuers, shareholders, 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.** 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 (1) issues a press release announcing such change, (2) files the announcement as definitive additional soliciting material on EDGAR, and (3) 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 exchange) of such change.

  The Staff expects issuers to take these actions promptly after deciding to change the date, time, or location of the meeting and sufficiently in advance of the meeting to alert the market to the change in a timely manner. If issuers have not yet mailed and filed their definitive proxy materials, they should consider whether to include disclosures regarding the possibility that the date, time, or location of the meeting will change due to COVID-19. Such determination should be made based on each issuer's particular facts and circumstances and the reasonable likelihood of such a change.

- **Virtual shareholder meetings.** Recognizing that many issuers were contemplating conducting "virtual" shareholder meetings through the internet or other electronic means in lieu of in-person meetings, the Staff said that it expects issuers to notify their 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" meetings, including how shareholders can remotely access, participate in, and vote at such meetings. Issuers that have already filed and mailed their definitive proxy materials would not need to mail additional soliciting materials (including new proxy cards) solely to switch to a "virtual" or "hybrid" meeting if they follow the steps described above for announcing a change in the meeting date, time, or location.

  In light of this Staff guidance, the proxy statement disclosure for a virtual meeting must disclose all necessary information for shareholders to attend and vote their shares, including what information and documentation is needed to vote at the meeting and differences in procedures for record shareholders and beneficial shareholders to participate. It is helpful to indicate when the virtual meeting website will be opened to log in, ideally at least 15 minutes before the meeting is scheduled to begin, and whether there is a telephone number, email address, or chat feature available to report and resolve technical problems.

- **Presentation of shareholder proposals.** Considering the potential difficulties involved in attending annual meetings in person, the Staff encouraged 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 and 2021 proxy seasons. 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 C.F.R. § 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 C.F.R. § 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 if 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.

Authentication Document Retention Requirements

On March 24, 2020, the Staff of the Divisions of Corporation Finance, Investment Management, and Trading and Markets announced relief from certain of the manual signature and document retention requirements of Rule 302(b) of Regulation S-T (17 C.F.R. § 232.302(b)). Rule 302(b) 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 the Staff upon request. The Staff statement provided that electronic filers who cannot comply with Rule 302(b) may establish policies and procedures that allow them to retain a manually signed signature page or other authentication document, indicating the date and time of signing, to be provided to the filer "as promptly as reasonably practicable" to allow the filer to retain the document in accordance with the rules.

In November 2020, the SEC amended Rule 302 of Regulation S-T to allow for manual signatures or electronic signatures on EDGAR filings provided certain procedures are followed. Companies planning to use electronic signatures on their annual report or other filings with the SEC should be sure they implement procedures to comply with the SEC's electronic signature requirements sufficiently in advance of the filing date to the extent they have not already done so.

For more information about amended Rule 302(b), see SEC to Permit Electronic Signatures. For information about document submission to the SEC generally, see Document Submission to the SEC.

Materiality and Forward-Looking Statements

In light of the above-discussed guidance from the SEC and the Staff, companies and their advisors should review, reconsider, and discuss anew basic concepts, including that of "materiality" under the federal securities laws and the use of forward-looking statements, in preparing periodic reports and other filings with the SEC and other public disclosures.

Material Information

Information is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. Materiality determinations, including those concerning COVID-19-related disclosures, are often difficult and can involve mixed questions of law and fact. The SEC has consistently noted that the company is in the best position to know what is likely to be material to investors, and this is no different under the unusual circumstances occasioned by the pandemic. However, since materiality is often judged with the benefit of hindsight, and the SEC has often looked to trading volume and stock 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 an affirmative duty to disclose the information.

For more information about the definition of materiality under the federal securities laws, see Materiality: Relevant Laws, Guidance, and Determination Guidelines, Liability under the Federal Securities Laws for Securities Offerings, Materiality in Securities Fraud Actions, and Materiality Determination for Disclosure Checklist.

Forward-Looking Statements

There are a number of sections of a periodic report, including MD&A (discussed in more detail below under Form 10-K and Form 10-Q Matters) and the business section, as well as other public disclosures, such as earnings releases, in which reporting companies customarily include forward-

looking statements. Forward-looking statements can provide insight into a company's expectations regarding its business and prospects and thus enhance the disclosure available to shareholders and other market participants. To encourage companies to provide additional forward-looking statements, the Private Securities Litigation Reform Act of 1995 (PSLRA) created two safe harbors for forward-looking statements—Section 27A of the Securities Act and Section 21E of the Exchange Act.

The safe harbors provide that in a private action brought under the Securities Act or the Exchange Act 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 (if covered by the safe harbor) would not be liable for a forward-looking statement if the statement is identified as a forward-looking statement and (1) 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 is immaterial, or (2) the plaintiff fails to prove that the forward-looking statement (a) if made by a natural person was made with actual knowledge by that person that the statement was false or misleading or (b) 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.

It is important to consider whether a statement constitutes a forward-looking statement, and to accompany any forward-looking statements with meaningful cautionary language to be eligible for the protection of the safe harbor. 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. 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.

For more information about forward-looking statement and the statutory safe harbors, see Safe Harbors for Forward-Looking Statements and Forward-Looking Statements Safe Harbor Checklist.

As noted above, forward-looking statements must be accompanied by meaningful cautionary language to qualify for the safe harbor. 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 (e.g., COVID-19 may affect X without giving specific reasons why that may occur). To the extent that the language warns against something that has already happened, the warning would be inadequate. 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 previous filings already had manifested.

In preparing earnings announcements, periodic reports, and other public disclosures, issuers should consider:

- Updating their forward-looking statements disclosure
- Ensuring that risk factors are updated or expanded to include the anticipated effects of the COVID-19 pandemic
- Not referencing an occurrence in a risk factor as a hypothetical if it has actually come to pass
- Eliminating boilerplate disclaimers and disclosures regarding trends as these are disfavored by the SEC – and–
- Reviewing carefully with counsel all forward-looking and trend disclosure to vet the cautionary language

Non-GAAP Financial Measures and KPIs

Two other related disclosure topics that may be affected by the pandemic include non-GAAP financial measures and KPIs.

Non-GAAP Financial Measures

Non-GAAP financial performance measures are measures of performance that do not comply with the U.S. generally accepted accounting principles (GAAP). The SEC regulates the use of non-GAAP financial measures as follows: Item 10(e) of Regulation S-K (17 C.F.R. § 229.10(e)) applies to non-GAAP financial measures in SEC filings and 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.

As noted above, the Staff of the Division 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 an 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 the non-GAAP financial measures 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 to present 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 consider the CF#9 guidance regarding non-GAAP financial measures, while also being mindful of the Staff's guidance in recent years regarding the limited and careful approach that companies must take when presenting non-GAAP financial measures generally. At this point in the pandemic, companies that have been using COVID-19-related non-GAAP financial measures should consider whether it remains appropriate to do so to the extent that adjustments originally envisioned as temporary have become recurring.

For more information about the use of non-GAAP financial measures, see SEC Regulation of Non-GAAP Financial Measures and Earnings Releases: Regulatory Framework and Disclosure Process.

KPIs

On January 30, 2020, the SEC provided guidance (KPI Guidance) regarding the disclosure of KPIs and other 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. The KPI Guidance describes how Item 303(a) of Regulation S-K (17 C.F.R. § 229.303(a)) and comparable requirements of Forms 20-F and 1-A apply to KPIs and other metrics. 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 for the metric not to be materially misleading. 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."

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. COVID-19 may have impacted the KPIs or metrics that some companies had been using, in which case adjustments may be appropriate in the underlying assumptions and related disclosure. In addition, some companies may determine that alternative KPIs and metrics have become more meaningful as assessments of performance. When presenting new KPIs to reflect the pandemic, companies should review and apply the KPI Guidance to their disclosures. Examples of KPIs and metrics that may have been affected by the pandemic include employee turnover, total subscribers, monthly/daily active users, traffic growth, product volumes, same store sales, store openings and closings, and number of data breaches and holders affected by such breaches.

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 emphasizes the importance of disclosure controls and procedures in including KPIs and metrics derived from the company's own information. If these indicators and metrics are material to an investment or 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."

A company that discloses performance indicators and metrics in its MD&A derived from the company's own information should thus review its disclosure controls and procedures to ensure they are effective in calculating these indicators and metrics and should discuss them with the audit committee. The audit committee should understand the performance indicators used—their purpose, whether they are well-understood and well-defined, the methodology 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.

Earnings Releases and Analyst Calls

Core securities law principals continue to apply to preparing for earnings releases and analyst calls during the pandemic. For example, 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. As a result, if there is no obligation under the securities laws to make a disclosure, an issuer can remain silent. If, however, 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 to make the statement not misleading.

In addition to considering their duties to disclose, companies should be mindful of Regulation FD and avoid selective disclosure of material information. 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. If in so doing they disclose material nonpublic information, the company generally 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 issuing earnings releases and conducting investor calls, a reporting company should consider Exchange Act Section 10(b) (15 U.S.C. § 78j) and Rule 10b-5 (17 C.F.R. § 240.10b-5) thereunder, which prohibit material misstatements or omissions, compliance with Regulation FD, accompanying forward-looking statements with appropriate cautionary language, and compliance with the rules for using non-GAAP measure rules and the KPI Guidance. Balancing all of these regulatory considerations while striking the right balance between providing insights into the company's results and prospects is challenging. In reviewing periodic filings, the Staff has been increasingly focused on information communicated in earnings releases and earnings calls, particularly its consistency with the disclosures in the issuer's 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. 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.

For more information about the duty to disclose and update information under the federal securities laws, see Duties to Disclose and Update Material Information and Disclosure of Material Nonpublic Information.

For more information about Regulation FD, see Regulation FD, Regulation FD Applicability Checklist, and Regulation FD Training Presentation Materials. For a Regulation FD policy template, see Regulation FD Policy.

For more information about earnings guidance and analyst calls, see Earnings Guidance, Earnings Releases: Regulatory Framework and Disclosure Process, and Memorandum to Board of Directors on Earnings Releases.

Form 10-K and Form 10-Q Matters

SEC disclosure requirements for periodic reports as well as proxy statements, registration statements, and other documents filed with the SEC are largely principles-based and, although not specifically mentioning pandemics, may nonetheless require disclosure of the effects on reporting companies of the COVID-19 pandemic. As is the case with other SEC disclosures, material misstatements in or omissions from COVID-19-related disclosures may give rise to SEC enforcement actions or private civil litigation. Areas

in which the effects of the COVID-19 pandemic may give rise to disclosure or other securities law considerations are as follows.

Risk Factors

Item 105 of Regulation S-K (17 C.F.R. § 229.105) requires disclosure of material factors that make an investment in a company or an offering speculative or risky, as opposed to risks that could apply generically to any company. As the impact from COVID-19 has intensified, companies may be more aware of additional ways in which the pandemic poses specific risks beyond what they may have previously disclosed. And, as the pandemic persists and evolves, it may be necessary to continue to assess COVID-19 risk factor disclosures throughout the year. Consequently, companies should consider drafting more detailed risk factors relating to COVID-19 for inclusion in their next SEC filing that requires risk factor disclosure and evaluating them throughout the year to determine if they should be supplemented or revised. A company that usually incorporates risk factors by reference into its quarterly reports may instead consider updating and including additional risk factors in a Form 10-Q, or in a current report on Form 8-K, to reflect the anticipated effects of the continuing pandemic on its business and operations, particularly if the company intends to conduct a securities offering or stock repurchases in the near-term, to ensure that its filings present the most up-to-date disclosures about 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 become more or less expensive to obtain. The current inflation attributed to the pandemic could pose a risk to the company. 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 and return to in-person work plans may give rise to human capital management concerns. There could be increased litigation risk. Uncertainty with respect to the ultimate scope and duration of the pandemic may itself be a risk.

The questions for assessing and disclosing the impact of COVID-19 provided by the Staff of the Division in CF#9 and CF#9A are a helpful starting place for such analysis, but companies should consider how the pandemic has impacted their own circumstances, including that various segments of a company may be affected in different ways or degrees. For example, some segments might be having supply chain or distribution issues as a result of government shutdown orders while others may be more susceptible to a decline in discretionary spending arising from economic turbulence.

Management's Discussion and Analysis

In crafting its MD&A to disclose the effects of COVID-19, a reporting company should consider the objective of this section, which is to provide shareholders with a view of the company's business and financial results through management's eyes. MD&A also may have a forward-looking component because the MD&A requires discussion of material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or future financial condition. Known trends include both (1) matters that would have an impact on future operations and have not had an impact in the past and (2) matters that have had an impact on reported operations and are not expected to have an impact upon future operations.

The analysis for MD&A trend disclosure differs from traditional materiality analysis and involves an arguably lower disclosure threshold: Is the known trend, demand, commitment, event, or uncertainty reasonably 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, this assessment may be particularly time-consuming. MD&A must also 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, MD&A should not only discuss COVID-19 as a known trend or uncertainty but should also provide management's perspective on the scope and extent of COVID-19s effect on the company, to the extent material.

There are many possible questions for companies in assessing the materiality of the COVID-19 pandemic as they prepare their MD&As. 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? How has inflation resulting from the pandemic impacted the company? Has the company drawn down on bank facilities for any reason,

including because it has not been able to access 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? Are vaccine mandates impacting the company's business? Are COVID-19 variants affecting the company's business?

In addition to these questions, companies should consider the effect of the COVID-19 pandemic on their use of non-GAAP financial measures and KPIs and other metrics in their MD&A disclosures, as discussed above under Non-GAAP Financial Measures and KPIs.

For a comprehensive collection of resources for MD&A, see Management's Discussion and Analysis (MD&A) Resource Kit.

Financial Statement Issues

Companies should discuss with their accountants whether disclosure of the effects of the pandemic is required in their financial statement footnotes, including a subsequent event footnote. Companies should also carefully assess the need for contingency disclosures, based on whether a contingent COVID-19-related loss is remote, reasonably possible, or probable. Companies will also need to determine whether, for financial statement reporting purposes, COVID-19 has caused any impairment of various types of assets. And, in extreme cases, companies may also have to consider going concern issues.

Controls and Procedures

Item 307 of Regulation S-K (17 C.F.R. § 229.307) 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. Item 308(c) of Regulation S-K (17 C.F.R. § 229.308) 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" are defined in Exchange Act Rules 13a-5 (17 C.F.R. § 240.13a-5) and 15d-15 (17 C.F.R. § 240.15d-15) to mean a company's controls and other procedures 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 these rules 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 GAAP 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 GAAP, 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 has been affecting so many aspects of business, and many employees are working from home rather than their usual work location all or some of the time, companies should continually monitor and evaluate their disclosure controls and procedures and internal controls to make sure that they remain effective in the current environment, as well as consider whether changes should 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 because many disclosure decisions for the foreseeable future will be made with regard to continuing effect of the pandemic on companies and the U.S. and world economies.

In addition, because of the swiftly changing nature and impact of the COVID-19 pandemic, it is especially important for companies to consider all aspects of their business, including areas that may not normally be part of their controls and procedures processes, to determine whether any additional information could require disclosure.

For additional information about internal controls, see Internal Control over Financial Reporting.

Litigation

Item 103 of Regulation S-K (17 C.F.R. § 229.103) requires a company to briefly describe material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the company or its subsidiaries is subject.

Companies may be subject to litigation related to the COVID-19 pandemic, either as plaintiffs or defendants. For example, some companies have sued their insurers to recover lost income under business income insurance policies. Other companies may be sued by employees alleging they have contracted COVID-19 in the workplace or objecting to company-imposed vaccine mandates. As the effects of COVID-19 proliferate the amount of related litigation is likely to continue to increase.

Description of Business

Item 101(c) of Regulation S-K (17 C.F.R. § 229.101) requires a company to describe the business done and intended to be done by the company. Among the things that should be included in this disclosure are:

- Revenue-generating activities, products and/or services, and any dependence on revenue-generating activities, key products, services, product families, or customers, including governmental customers
- Status of development efforts for new or enhanced products, trends in market demand, and competitive conditions
- Sources and availability of raw materials and the duration and effect of all patents, trademarks, licenses, franchises, and concessions held
- A description of any material portion of the business that may be subject to renegotiation of profits or termination of contracts or subcontracts at the election of the government
- The extent to which the business is or may be seasonal

Each of these items could be affected as the impacts of the COVID-19 pandemic continue to evolve.

A company filing a periodic report or registration statement with the SEC that requires a business description should consider whether additional or revised disclosure is needed to reflect whether COVID-19 has materially changed, or is expected to materially change, its business. A company should start by asking questions that will help inform its disclosures, including:

- 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?
- How have aspects of the COVID-19 pandemic, including remote working, return to in-person working, vaccine mandates, and COVID-19 variants, impacted human capital management?

For an overview of reporting companies' periodic reporting obligations under the Exchange Act, as well as a collection of detailed practice notes, templates, and checklists on this topic, see Periodic and Current Reporting Resource Kit.

Financing Alternatives

Many companies may currently be considering obtaining financing for various reasons, including bolstering their capital resources, providing stakeholders (e.g., shareholders, customers, suppliers, and lenders) with confidence regarding the company's ability to weather continued volatility, complying with bank or other contractual covenants, or simply for opportunistic reasons. The available financing alternatives will, as usual, depend on whether the company is in financial distress or merely wants to strengthen its financial position.

A company and its advisors in any financing transaction will have to consider closely whether all the company's public disclosures, including risk factors, business, and MD&A disclosures, are complete and up to date. Companies may consider minimizing the time between issuing earnings announcements and filing their periodic reports to ensure the reports are current, as financial intermediaries such as placement agents and underwriters will likely review all their periodic reports before agreeing to undertake any capital-raising transaction. Questions raised by the Division in CF#9 and CF#9A (discussed above) are relevant to the disclosure that will be required of the issuer in a capital-raising transaction.

Market Outlook

As discussed above, these are unusual and uncertain times, and reporting companies and their advisors will have to consider the fundamental principles of the federal securities laws in determining 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 was timely and offered much-needed flexibility for issuers struggling to operate amidst stay-at-home and similar orders. SEC and Staff guidance has provided useful reminders for interpreting and applying longstanding principles during an unprecedented pandemic, and companies and the lawyers who represent them should monitor the SEC's website for any additional guidance that may be forthcoming during the pandemic and its aftermath.

Anna Pinedo, Partner, Mayer Brown LLP

Anna Pinedo is a partner in Mayer Brown's New York office and co-leader of the Global Capital Markets 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 and specialty 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.

Anna regularly speaks at conferences and participates in panel discussions addressing securities law issues, as well as the securities issues arising in connection with derivatives and other financial products. She is the co-author of the leading capital markets treatise, Corporate Finance and the Securities Laws, published by Wolters Kluwer (6th Ed., updated 2020); co-author of A Deep Dive Into Capital Raising Transactions, published by the International Financial Law Review (2020); co-author of JOBS Act Quick Start (International Financial Law Review, 2013; updated 2014, 2016); contributor to OTC Derivatives Regulation Under Dodd-Frank: A Guide to Registration, Reporting, Business Conduct, and Clearing (Thomson Reuters, first ed. 2014, second ed. 2015, third ed. 2016, fourth ed. 2017); co-author of Considerations for Foreign Banks Financing in the US (International Financial Law Review, 2012; updated 2014, 2016); co-author of Liability Management: An Overview (International Financial Law Review, 2011, updated 2015); co-author of Structuring Liability Management Transactions (International Financial Law Review, 2018); co-author of Covered Bonds Handbook, published by Practising Law Institute (2010, updated 2012-2014); co-author of the treatise Exempt and Hybrid Securities Offerings, published by Practising Law Institute (2009, second ed. 2011, updated 2014, third ed. 2017); and co-author of BNA Tax and Accounting Portfolio: SEC Reporting Issues for Foreign Private Issuers (BNA Accounting Policy and Practice Series, 2009, second ed. 2012, third ed. 2016, fourth ed. 2020). Anna is also a contributing author to Broker-Dealer Regulation (2011, second ed. 2012, updated 2020), published by Practising Law Institute. She co-authored "The Approaches to Bank Resolution," a chapter in Bank Resolution: The European Regime (Oxford University Press, 2016). Anna contributed to The Future of Bank Funding and Capital: Solutions for Issuers, Opportunities for Investors (IFR Market Intelligence, 2009). Additionally, Anna co-authored "The Ties that Bind: The Prime-Brokerage Regulation," a chapter in Global Financial Crisis (Globe Law and Business, 2009); "The Law: Legal and Regulatory Framework," a chapter in PIPEs: A Guide to Private Investments in Public Equity (Bloomberg, 2006); and "The Impact Security: Reimagining the Nonprofit Capital Market," a chapter in What Matters: Investing in Results to Build Strong, Vibrant Communities (Federal Reserve Bank of San Francisco and Nonprofit Finance Fund, 2017). Anna is a contributor to Practising Law Institute's "BD/IA: Regulation in Focus" blog.

Anna is a member of the American Bar Association's (ABA) Committee on the Federal Regulation of Securities, a member of the subcommittee on Disclosure and Continuous Reporting, chair of the subcommittee on Securities Registration, chair of the subcommittee on Annual Review, and a member of the task force on the future of securities regulation.

She has participated in the drafting committee for the ABA's comment letters on such topics as securities offering reform, revisions to the definition of accelerated filer and smaller reporting company, amendments to the accredited investor definition; amendments to the exempt offering framework; and various JOBS Act-related and disclosure effectiveness related matters. Anna also is a member of the ABA Committee on the Regulation of Futures and Derivatives Instruments. Anna is a chair of the Structured Products Association Legal, Regulatory and Compliance Executive Committee. She is a member of the Mortgage Bankers Association's Mortgage REIT Council and a member of the MBA's Secondary & Capital Markets Committee.

Anna is an adjunct professor at the George Washington University School of Law and member of the George Washington University Center for Law, Economics & Finance Advisory Board. She is a member of the Visiting Committee of the Law School of the University of Chicago. Anna was a member of the University of Chicago Legal Forum during her time at the University of Chicago Law School.

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.

In addition to her governance and transactional practice, Laura counsels clients on day-to-day corporate questions. She drafts and reviews contracts and other corporate documentation, prepares terms and conditions of sale, provides guidance on limited liability company and other limited liability entity issues, and assists clients with various regulatory issues. Laura was named an Illinois Super Lawyer for Business/Corporate in 2006 and 2008.

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Christina Thomas is a partner in Mayer Brown's Washington DC and New York offices and a member of the Capital Markets practice. Christina represents US and foreign companies, investment banks and sponsors on securities offerings, mergers and acquisitions, US Securities and Exchange Commission (SEC) disclosure requirements, shareholder proposals, and ESG matters.

Christina is a former senior advisor at the SEC, serving most recently as Counsel to SEC Commissioner Elad L. Roisman. In that role, she provided legal counsel to the Commissioner on his consideration of policy, regulatory, and enforcement matters.

She advised on SEC proposed and final rule amendments, interpretations, and guidance relating to, among other things, public company disclosure, the proxy voting process, and capital formation. Christina advised on major rulemakings, including modernization of Regulation S-K disclosure requirements, the update of statistical disclosures for bank and savings and loan registrants, amendments to financial disclosure requirements for acquired and disposed businesses, exemptions from the proxy rules for proxy voting advice, amendments to the shareholder proposal rule, extension of the "test-the-waters" accommodation to all issuers, amendments to the "accredited investor" definition, and harmonization of the exempt offering framework.

She also served as lead advisor on international securities law and policy. Prior to serving as counsel to the Commissioner, Christina was detailed to the US Department of the Treasury to advise on international securities law matters. She received the Secretary's Honor Award in recognition of her contributions. Christina began her career at the SEC in its Division of Corporation Finance in the Office of Healthcare and Insurance (now Life Sciences). She also served as a reviewer on the SEC's Shareholder Proposal Task Force and in the Office of Mergers and Acquisitions.