

SEC Reporting & Compliance Alert

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One Manhattan West
New York, NY 10001
212.735.3000

SEC Chairman and Division of Corporation Finance Director Urge Robust Disclosure Amid COVID-19 Uncertainty

As public companies approach an unprecedented earnings season due to the COVID-19 outbreak, U.S. Securities and Exchange Commission (SEC) Chairman Jay Clayton and Division of Corporation Finance Director William Hinman issued a joint statement (the statement) on April 8, 2020, emphasizing the importance to investors and markets of public company disclosures in light of the pandemic. Anticipating that upcoming earnings releases and calls will deviate from their often routine nature, the statement predicts that historical information may be relatively less significant than current and forward-looking information. As a result, the statement largely focuses on encouraging companies to provide information about not only their historical results but also their current financial and operating status, as well as how their operations and financial conditions may change due to COVID-19. The statement highlights investors' particular interest in information concerning:

- where a 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 as collective efforts progress in the fight against COVID-19.

The statement also indicates that Chairman Clayton and Director Hinman would not expect to second guess good-faith attempts to provide investors and other market participants with appropriately framed, forward-looking information.

The statement's key takeaways are summarized below.

Increased Importance of Current and Forward-Looking Information

Citing the limited informational benefit historical results may have during the COVID-19 crisis, the statement encourages companies to satisfy the "thirst" of investors and analysts to know where companies stand today and how they have adjusted and plan to adjust their operational and financial affairs to work through the crisis.

The statement also recognizes the difficulties companies face in attempting to provide meaningful disclosures amid the uncertainty brought about by the pandemic. In this regard, the statement acknowledges that the requested estimates unavoidably will be based on a mix of assumptions, including regarding matters beyond a company's

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control. Nevertheless, the statement encourages companies and their advisers to resist generic, boilerplate disclosures and instead make all reasonable efforts to convey information about company-specific status, operational strategies and risks. This includes information that provides investors a level of insight allowing them to see the key operational and financial considerations and challenges the company faces through the eyes of the company's management.¹ The statement refers companies to the recently issued CF Disclosure Guidance: Topic No. 9, which, among other things, provides an illustrative (but non-exhaustive) list of considerations that companies should take into account when making disclosure determinations in light of COVID-19.²

Additionally, the statement urges companies — in their earnings releases and analyst calls and in subsequent communications to the marketplace — to provide as much information as practicable regarding their current operating status and future operating plans under various COVID-19-related mitigation conditions. The statement identifies the following examples of information that would be particularly helpful to investors and markets:

- details concerning a company's current liquidity positions and expected financial resource needs;
- company actions and policies related to efforts that protect worker health and well-being and customer safety in light of COVID-19, to the extent material; and
- the nature, amounts and effects of any CARES Act or other similar federal or state assistance that have materially affected, or are reasonably likely to have a material future effect on, a company's financial condition or results of operations.

¹ The statement notes that the request for robust, forward-looking disclosures is driven by three primary considerations: (i) the information will benefit investors; (ii) market digestion of the information will benefit the company; and (iii) the broad dissemination and exchange of firm-specific plans for addressing the effects of COVID-19 under various scenarios will substantially contribute to the nation's collective effort to fight and recover from COVID-19.

² See "SEC Extends Relief, Staff Offers Further Guidance and Flexibility to Companies Affected by COVID-19," Skadden client alert, Mar. 27, 2020.

Safe Harbor Protections and SEC Enforcement Priorities

The statement acknowledges that companies often are cautioned to limit forward-looking statements, particularly specific estimates, to those required by SEC rules, in order to reduce legal risk in the event those estimates prove to be incorrect. As a result, Chairman Clayton and Director Hinman encourage companies to avail themselves of the forward-looking statements safe harbors of the Private Securities Litigation Reform Act of 1995.³ Recognizing that, in many cases, actual financial and operational results may differ substantially from what would now appear to be reasonable estimates, and given the uncertainty in the current business environment, Chairman Clayton and Director Hinman indicate they would not expect to second guess good-faith attempts to provide investors and other market participants with appropriately framed, forward-looking information.

In addition, the statement reminds companies that they — and their investors — are well-served when information of the type outlined above is held closely until disclosed in a broadly disseminated fashion. In issuing this reminder, Chairman Clayton and Director Hinman reference the recent statement by the Division of Enforcement Co-Directors, which observes that, in these "dynamic circumstances," corporate insiders are regularly learning new material nonpublic information that may hold an even greater value than under normal circumstances, and that a larger number of people may have access to material nonpublic information than in less uncertain times. As a result, the co-directors cautioned those with such access — including, for example, directors, officers, employees, and consultants and other outside professionals — to be mindful of their obligations to keep such information confidential and to comply with prohibitions on illegal securities trading. In their statement, the co-directors also indicated that the Enforcement Division is committing substantial resources to ensuring that investors are not victims of fraud or illegal practices in these unprecedented market and economic conditions.

³ The safe harbors are set forth in Securities Act Section 27A and Exchange Act Section 21E.

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Contacts

Brian V. Breheny

Partner / Washington, D.C.
202.371.7180
brian.breheny@skadden.com

Andrew J. Brady

Of Counsel / Washington, D.C.
202.371.7513
andrew.brady@skadden.com

Hagen J. Ganem

Counsel / Washington, D.C.
202.371.7503
hagen.ganem@skadden.com

Josh LaGrange

Counsel / Palo Alto
650.470.4575
josh.lagrang@skadden.com

Ryan J. Adams

Associate / Washington, D.C.
202.371.7526
ryan.adams@skadden.com

Andrew T. Bond

Washington, D.C.
202.371.7244
andrew.bond@skadden.com

Jeongu Gim

Washington, D.C.
202.371.7223
jeongu.gim@skadden.com

Blake M. Grady

Associate / Washington, D.C.
202.371.7591
blake.grady@skadden.com

Caroline S. Kim

Associate / Washington, D.C.
202.371.7555
caroline.kim@skadden.com

Justin A. Kisner

Associate / Washington, D.C.
202.371.7367
justin.kisner@skadden.com