

# COVID-19 Update: Key questions to consider in preparing your Q1 2020 Form 10-Q and earnings release

By Alice Hsu, Esq., Cynthia Mabry, Esq., Paul Monsour, Esq., Kevin Schott, Esq., and Tyler Conte, Esq., *Akin Gump Strauss Hauer & Feld\**

MAY 12, 2020

Public companies are considering key questions as they prepare first quarter 2020 disclosures in the COVID-19 era.

In light of the April 8, 2020 joint public statement<sup>1</sup> issued by the Chairman of the Securities and Exchange Commission (SEC) and the Director of the SEC's Division of Corporate Finance (the Division) highlighting the importance of forward-looking COVID-19 disclosures for investors and markets (the Joint Statement), as well as the March 25, 2020 Division CF Disclosure Topic No. 9 providing guidance<sup>2</sup> on the importance of assessing and disclosing the evolving impact of the COVID-19 pandemic (the Disclosure Guidance), U.S. reporting companies should evaluate these pronouncements and determine the appropriate scope and detail of their disclosures impacted by COVID-19 and related economic developments.

Several key questions follow for U.S. reporting companies to consider when preparing and issuing the first quarter 2020 Form 10-Q and earnings season.

## 1. HOW HAS COVID-19 IMPACTED YOUR CONTINUING OPERATIONS, AND WHAT SHOULD BE DISCLOSED IN YOUR MD&A DUE TO SUCH IMPACT?

The World Health Organization declared COVID-19 a global health emergency in January 2020, and elevated it to a global pandemic in March 2020.

By mid-March 2020, a national emergency was declared in the United States, and social distancing guidelines announced, and by March 31st, the substantial majority of states had implemented stay at home orders and "non-essential" companies transitioned to work-from-home policies and temporarily closed their offices, facilities and retail stores, creating a profound ripple effect on the economy and society.

In this environment, investors and analysts are expecting a material negative impact to the results of operations of many companies in the first quarter of 2020 and in the months and potentially years ahead.

The impact of COVID-19 to a company's operations and operational adjustments in response to the outbreak are critical for a fair understanding of a company's business. Companies should include this disclosure in their Management Discussion and Analysis (MD&A), as well as a discussion on how they expect their operations to be impacted in the future as a result of the COVID-19 pandemic.

---

The impact of COVID-19 to a company's operations and operational adjustments in response to the outbreak are critical for a fair understanding of a company's business.

---

Additionally, companies should consider the need to disclose any benefits they expect to request or have received under the Paycheck Protection Program (PPP), contained within the Coronavirus Aid, Relief and Economic Security (CARES) Act,<sup>3</sup> or other similar COVID-19-related federal and state aid. The Joint Statement and Disclosure Guidance advised companies to focus their attention on providing detailed and meaningful insight.

### JOINT STATEMENT ON FORWARD-LOOKING STATEMENTS:

For many companies, providing forward-looking information, particularly detailed information regarding future operating conditions and resource needs, may present difficulties because any shift to a forward-looking health and welfare strategy is at a preliminary stage. As time passes, and strategies come into greater focus, making and refining these estimates should become less difficult.

Estimates of the type being requested are unavoidably based on a mix of assumptions, including assumptions regarding matters beyond the control of the company. In light of these forecasting challenges, it may be tempting to resort



to generic, or boilerplate, disclosures that do little to inform investors of company-specific status, operational strategies and risks.

Companies and their advisers are encouraged to make all reasonable efforts to convey meaningful information — information that provides investors a level of insight that allows them to see the key operational and financial considerations and challenges the company faces through the eyes of management. In this regard, companies are encouraged to consider the broad frameworks of some of the strategies that have been suggested, how following those strategies may affect their operations and whether that analysis would be of material interest to investors.

**DISCLOSURE GUIDANCE — QUESTIONS TO CONSIDER:**

- How has COVID-19 impacted your financial condition and results of operations?
- In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near-and-long-term financial condition?
- Do you expect that COVID-19 will impact future operations differently than how it affected the current period?

**JOINT STATEMENT ON FEDERAL ASSISTANCE UNDER PPP OR CARES ACT:**

Companies and financial institutions may be receiving financial assistance under the CARES Act or other similar COVID-19 related federal and state programs. Such assistance may take various forms and is intended to mitigate COVID-19 effects for companies and their workers. If these or other types of financial assistance have materially affected, or are reasonably likely to have a material future effect upon, financial condition or results of operations, the affected companies should provide disclosure of the nature, amounts and effects of such assistance.

**2.HOW HAS COVID-19 IMPACTED YOUR LIQUIDITY AND ACCESS TO CAPITAL, AND WHAT SHOULD BE DISCLOSED IN YOUR MD&A DUE TO SUCH IMPACT?**

Companies should disclose known trends and uncertainties due to the effects of the pandemic on liquidity and access to capital under the “Liquidity and Capital Resources” section of MD&A, taking into account the following questions from the Disclosure Guidance.

**DISCLOSURE GUIDANCE — QUESTIONS TO CONSIDER:**

- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook?
- Has your cost of or access to capital and funding sources, such as revolving credit facilities or other sources changed, or is it reasonably likely to change?
- Have your sources or uses of cash otherwise been materially impacted?
- Is there a material uncertainty about your ongoing ability to meet the covenants of your credit agreements?
- If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency?

**3.IF THE EFFECTS OF COVID-19 HAVE TRIGGERED AN IMPAIRMENT, WHAT TYPE OF DISCLOSURES ARE REQUIRED?**

The swift reduction in global economic activity caused by COVID-19 has triggered the need for many companies to evaluate the recoverability of their goodwill, intangible assets, property, plant and equipment and lease right-of-use (ROU) assets. Many of the triggering events provided as examples by the Financial Accounting Standards Board (FASB), such as a significant decrease in the market price of an asset, a significant adverse change in the extent or manner in which an asset is being used or a significant adverse change in the business climate, are present today.

*It may be tempting to resort to generic, or boilerplate, disclosures that do little to inform investors of company-specific status, operational strategies and risks.*

If a company has incurred an impairment, separate from the financial statement impacts, it should consider disclosing the facts and circumstances that led to the impairment and how the impairment charge might alter the future expectations of earnings and cash flows related to the business.

In determining what disclosures to make about an impairment, the following questions from the Disclosure Guidance may be helpful.

**DISCLOSURE GUIDANCE – QUESTIONS TO CONSIDER:**

- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets? For example, will there be significant changes in judgments in determining the fair-value of assets measured in accordance with U.S. GAAP or IFRS?
- Do you anticipate any material impairments (e.g., with respect to goodwill, intangible assets, long-lived assets, right of use assets, investment securities), increases in allowances for credit losses, restructuring charges, other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on your financial statements?

**4. ARE THERE ANY MATTERS RELATED TO COVID-19 THAT SHOULD BE DISCLOSED IN ‘SUBSEQUENT EVENTS’?**

Companies whose operations or finances have been affected by events related to COVID-19 subsequent to the close of their financial reporting process should consider discussing the impact of such events in the “Subsequent Events” section of their Form 10-Qs. In determining if a subsequent event needs to be disclosed, a company should consider the accounting disclosure rules related to subsequent events.

**5. SHOULD YOU ADD A RISK FACTOR ADDRESSING COVID-19?**

Companies should consider reviewing the risk factors included in their last Form 10-K and evaluate whether to expand on existing risk factors and/or whether to include an additional COVID-19 risk factor to address the rapidly evolving situation.

Detailed discussions of current liquidity positions and expected financial resource needs would be particularly helpful to investors and our capital markets.

In thinking about what kind of new or modified risk factor disclosure is warranted, companies may want to review the following considerations, which have led to other companies disclosing risk factors regarding COVID-19.

- Has your company or your company’s key customers and suppliers had to close brick-and-mortar locations or otherwise cut back on operations due to government regulations, worker illness, labor shortage or otherwise?

- Has your company’s liquidity been significantly reduced or limited as a result of the market environment caused by COVID-19?
- Has your industry been adversely affected by price volatility due to COVID-19, and is there a risk that it could substantially impact your business?
- Is your company relying on federal assistance received under the PPP or CARES Act or other government assistance which will subject the company to additional restrictions or conditions?
- Is your business particularly exposed to macroeconomic conditions, which have been severely impacted by COVID-19?

**JOINT STATEMENT ON RISK FACTORS:**

The SEC has made clear that its 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. In addition, a number of existing rules or regulations require disclosure about the known or reasonably likely effects of and the types of risks presented by COVID-19.

As a result, disclosure of these risks and COVID-19-related effects 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. Assessing the evolving effects of COVID-19 and related risks will be a facts and circumstances analysis. Disclosure about these risks and effects, including how the company and management are responding to them, should be specific to a company’s situation (i.e., not generic to any company).

For more information, please read 2020 Filing Season Survey: Coronavirus (COVID-19) Disclosures So Far.<sup>4</sup>

**6. HAVE YOU BEEN NAMED PARTY TO A LAWSUIT OR INCURRED ANY LOSS CONTINGENCIES DUE TO COVID-19?**

Because of the abrupt shutdown of economic activity caused by COVID-19, many companies have been unable or unwilling to honor their contractual obligations in many of their material agreements and may have already incurred or will incur a material loss related to their or their counterparty’s non-performance. As such, a company should assess its existing disclosures related to legal proceedings and loss contingencies and consider the related disclosure rules to determine if additional disclosure is needed.

**7. IF YOUR COMPANY'S DISCLOSURE CONTROLS AND PROCEDURES AND/OR INTERNAL CONTROLS OVER FINANCIAL REPORTING HAVE BEEN IMPACTED BY COVID-19, WHEN ARE DISCLOSURES REQUIRED?**

Evaluating the effectiveness of disclosure controls and procedures (DCP) and/or whether there have been changes in the effectiveness of internal controls over financial reporting (ICFR) has been particularly challenging for companies this quarter, especially if a company has been impacted by reductions in workforce, work from home policies, restrictions on travel, social distancing guidelines, and the availability of services provided by third parties. Such challenges may have included barriers to obtaining information, changed roles and responsibilities and greater reliance on alternative procedures or controls for tasks typically performed in person, among others.

If a company's conclusion regarding its DCP or assessment as to whether there has been a material change in its ICFR has changed because of COVID-19, it will need to make the appropriate disclosures in its first quarter 2020 Form 10-Q in accordance with SEC rules.

Audit committees should be particularly attentive to any changes in internal controls or related processes that occurred during the first quarter of 2020 and rigorously assess whether they agree with the company's conclusion regarding its DCP and assessment as to whether there has been a material change in its ICFR. Audit committees should carefully consider the consistency of proposed disclosure with the information the board has received about risks, impacts and mitigation efforts.

**DISCLOSURE GUIDANCE – QUESTIONS TO CONSIDER:**

- Have COVID-19-related circumstances such as remote work arrangements adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures?
- If so, what changes in your controls have occurred during the current period that materially affect or are reasonably likely to materially affect your internal control over financial reporting?

**8. WHAT DISCUSSION OF COVID-19 SHOULD YOU INCLUDE IN YOUR EARNINGS RELEASE AND EARNINGS CALLS?**

Earnings releases and calls will not be routine this quarter. In many cases, historical information may be substantially less relevant. Investors and analysts are eager to know where companies stand today and, importantly, how they have adjusted, and expect to adjust in the future, their operational and financial affairs to most effectively work through the COVID-19 pandemic.

The Disclosure Guidance addressed non-GAAP financial measures. Companies should be mindful of prior SEC guidance on the use of non-GAAP financial measures and determine whether the Disclosure Guidance contains newly-relevant information for purposes of reconciliation of non-GAAP financial measures.

**JOINT STATEMENT ON EARNINGS RELEASES AND EARNINGS CALLS:**

Recognizing the challenges inherent in the request, public companies are urged, in their earnings releases and earnings calls, as well as in subsequent communications to the marketplace, to provide as much information as is practicable regarding their current operating status and their future operating plans under various COVID-19-related mitigation conditions. Detailed discussions of current liquidity positions and expected financial resource needs would be particularly helpful to investors and our capital markets.

**DISCLOSURE GUIDANCE ON NON-GAAP FINANCIAL MEASURES:**

Companies may reconcile a non-GAAP financial measure to preliminary GAAP results that either include provisional amounts based on a reasonable estimate of GAAP results or a range of reasonably estimable GAAP results. This will help companies holding their earnings calls before they have finalized their financial statements. For example, under the Disclosure Guidance, a company that discloses EBITDA may reconcile that measure to any of the following: its GAAP earnings, a reasonable estimate of its GAAP earnings that includes a provisional amount, or a reasonable estimate of a range of GAAP earnings that include provisional amounts.

**DISCLOSURE GUIDANCE – QUESTIONS TO CONSIDER:**

- Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so? Do you face any material resource constraints in implementing these plans?
- Do you expect COVID-19 to materially affect the demand for your products or services?
- Do you anticipate a material adverse impact of COVID-19 on your supply chain or the methods used to distribute your products or services?
- Do you expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?

### 9. SHOULD YOU INCLUDE COVID-19 IMPACTS IN YOUR DISCLAIMER REGARDING FORWARD-LOOKING STATEMENTS?

The forward-looking statements companies will make in their Form 10-Q regarding COVID-19 will be inherently uncertain in nature given the unpredictable nature of the crisis. As such, companies should consider providing coverage for such statements in the forward-looking statements safe harbor language in an effort to protect the company from potential liability for such statements. Companies across industries have already taken this approach in Form 10-Ks and other SEC filings made subsequent to the spread of the disease.

In deciding whether to add a reference to COVID-19 or related impacts in its safe harbor language and in assessing its other forward-looking information, companies should consider the following observations from the Joint Statement.

#### JOINT STATEMENT ON FORWARD-LOOKING INFORMATION:

The SEC staff recognizes that companies are often cautioned to limit their forward-looking disclosures, and particularly specific estimates, to those required by SEC rules in order to limit legal risk in the event the forward-looking estimates prove to be incorrect. In this regard, the staff encourage companies to avail themselves of the safe-harbors for forward-looking statements in Section 27A of the Securities Act and Section 21E of the Exchange Act.

They appreciate that in many cases actual financial and operational results may differ substantially from what would now appear to be reasonable estimates.

Given the uncertainty in our current business environment, companies should expect that the staff would not second guess good faith attempts to provide appropriately framed forward-looking information.

### 10. ARE YOU ELIGIBLE TO TAKE ADVANTAGE OF THE EXTENDED FILING DEADLINE FOR YOUR 10-Q?

By way of an order<sup>5</sup> issued on March 25, 2020 (the COVID-19 Order), the SEC has conditionally extended the original filing deadline by 45 days for public companies that have been particularly impacted by COVID-19.

If eligible, a company should consider whether to take advantage of this temporary filing relief.

#### COVID-19 ORDER — CONDITIONS AND RELATED SEC GUIDANCE:

- The company is unable to meet a filing deadline due to circumstances related to COVID-19;
- The company must file a Form 8-K by the later of March 16 or the original filing deadline stating:
  - (1) that it is relying on the COVID-19 Order;
  - (2) the reasons why it could not file such report, schedule or form on a timely basis;
  - (3) the estimated date by which the report, schedule or form is expected to be filed;
  - (4) a company specific risk factor or factors explaining the impact, if material, of COVID-19 on its business; and
  - (5) if the reason the subject report cannot be filed timely relates to the inability of any person, other than the registrant, to furnish any required opinion, report or certification, the Form 8-K shall have attached as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the due date.
- The company must make the required filing no later than 45 days after the original due date; and
- In any filing pursuant to paragraph above, the company must disclose that it is relying on the COVID-19 Order and state the reasons why it could not make such filing on a timely basis.

For more information on the COVID-19 Order, please read 2020 Filing Season: SEC Announces that Public Companies Affected by the Novel Coronavirus (COVID-19) May Seek Regulatory Relief from Periodic Reporting Deadlines.<sup>6</sup>

The SEC has also issued two CD&I's interpreting the COVID-19 Order; for more information on these CD&I's, please read SEC Extends COVID-19 Regulatory Relief for Public Companies, Funds and Investment Advisers and Issues Additional Guidance<sup>7</sup> and SEC Issues COVID-19 Guidance that Clarifies Filing Relief Related to Form 10-K Part III Information and Addresses Relief for Form 40-F.<sup>8</sup>

NOTES

- <sup>1</sup> <https://bit.ly/2SGIO64>
- <sup>2</sup> <https://bit.ly/3baHwp8>
- <sup>3</sup> <https://bit.ly/2Lwy1GB>
- <sup>4</sup> <https://bit.ly/3cmnlk8>
- <sup>5</sup> <https://bit.ly/3dmupm7>
- <sup>6</sup> <https://bit.ly/3cnBIKt>

<sup>7</sup> <https://bit.ly/3dNcbuz>

<sup>8</sup> <https://bit.ly/2AkEcuX>

*This article appeared on the Westlaw Practitioner Insights Commentaries web page on May 12, 2020.*

\* © 2020 Alice Hsu, Esq., Cynthia Mabry, Esq., Paul Monsour, Esq., Kevin Schott, Esq., and Tyler Conte, Esq., Akin Gump Strauss Hauer & Feld

ABOUT THE AUTHORS



(L-R) **Alice Hsu** is a partner at **Akin Gump Strauss Hauer & Feld** in New York, where she focuses on capital markets and corporate transactions. She advises issuers — including SPACs, underwriters and stockholders in public offerings and private placements of equity and debt securities — and counsels boards and companies on corporate governance and fiduciary issues, including shareholder activism. She can be reached at [ahsu@akingump.com](mailto:ahsu@akingump.com). **Cynthia Mabry**, a partner in the firm’s Houston office, focuses on transactions across the energy industry, including capital markets, mergers and acquisitions and general corporate matters. She represents public and private entities, investors and underwriters in a variety of capital markets and finance transactions. Mabry also provides counsel on joint ventures, corporate governance and compliance matters. She can be reached at [cmabry@akingump.com](mailto:cmabry@akingump.com). **Paul Monsour** is a counsel at Akin Gump Strauss Hauer & Feld in Houston, where he advises energy industry clients through securities regulation matters, capital markets transactions, corporate governance, mergers and acquisitions and general corporate issues. He can be reached at [pmonsour@akingump.com](mailto:pmonsour@akingump.com). **Kevin Schott** is a counsel at Akin Gump Strauss Hauer & Feld, also based in Houston. He represents public and private companies in a range of corporate and transactional matters, including capital markets, mergers and acquisitions, and corporate and securities law. He can be reached at [kschott@akingump.com](mailto:kschott@akingump.com). **Tyler Conte** is an associate at Akin Gump Strauss Hauer & Feld in Houston. He assists public and private companies with mergers and acquisitions, joint ventures, project and corporate financings, securities regulation matters, and general corporate matters, with a focus on the energy and private equity industries. He can be reached at [tconte@akingump.com](mailto:tconte@akingump.com). This article was first published April 28, 2020, on the firm’s website and reflects the situation at the time it was written based on the rapidly changing nature of the COVID-19 pandemic. Republished with permission.

**Thomson Reuters** develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world’s most trusted news organization.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit [legalsolutions.thomsonreuters.com](https://legalsolutions.thomsonreuters.com).