

SEC Provides COVID-19 Disclosure Guidance

WRITTEN BY

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The SEC's Division of Corporation Finance issued new COVID-19 [disclosure guidance](#) on March 25, 2020. This follows earlier guidance and relief offered by the Staff. (See the links [here](#), [here](#) and [here](#), for example.) The SEC is encouraging thoughtful, tailored and widely disseminated disclosure by affected companies, even in the absence of a specific line item requirement.

Assessing and Disclosing the Evolving Impact of the Virus. The SEC urges companies to make disclosures relevant to their own facts and circumstances. The guidance includes an illustrative list of questions. In addition to some of the more obvious questions (about reduced demand for the company's products and services, interference with its supply chain, or adverse effects on financial results for example), the illustrative questions include the potential for adverse effects on the company's liquidity, internal financial reporting systems and accounting. These may include the impact on debt covenants, asset valuation and impairment analyses, and the logistical impact of remote working arrangements on operational and financial reporting processes. Companies evaluating their disclosure relating to these matters can review the full list of questions in the [guidance](#).

Market Activities and Selective Disclosure. The guidance reminds companies to avoid selective disclosure of material information, for example by complying with Regulation FD, and reminds corporate executives to avoid trading in their company's securities until the information has been broadly disseminated. This is nothing new, but it echoes the March 24 statement by the co-heads of the SEC's Enforcement Division (available [here](#)) that warned that corporate insiders may be regularly learning nonpublic information that "may hold an even greater value than under normal circumstances," and signaled that the Enforcement Division would be committing substantial resources to investigate insider trading during the market disruptions caused by the pandemic.

Reporting Earnings and Financial Results. The guidance also covered earnings releases, non-GAAP financial measures and key performance metrics. It provides a framework for applying the SEC's existing rules on the presentation of non-GAAP financial measures, and its recent guidance on the use of key performance metrics in MD&A (see the SEC guidance [here](#), and our summary [here](#)), all of which remain applicable, to the current unusual circumstances. The SEC suggests that a company may be able to provide a non-GAAP financial measure or a performance metric that adjusts for or explains the impact of COVID-19, provided that it highlights why management finds the presentation useful or how it helps investors assess the impact.

The SEC will not object to a company reconciling a non-GAAP measure in an earnings release to preliminary GAAP results that include either a provisional GAAP measure based on reasonable estimates, or to a range of reasonably estimable GAAP results, if the most comparable GAAP measurement is unavailable due to COVID-19 related adjustments that are incomplete at the time. As always, the non-GAAP financial measure should not be disclosed more prominently than the GAAP measure. In quarterly or annual reports, where GAAP financial

statements are required, companies should reconcile to GAAP numbers rather than provisional or estimated results.

The SEC also emphasized that it is inappropriate to present non-GAAP financial measures for the sole purpose of presenting a more favorable view of the company. To the extent such measures are presented based on provisional amounts or estimated ranges, they should be limited to measures being used to report financial results to the company's board of directors, and should be accompanied by an explanation of why the item is incomplete or provisional.

Finally, the SEC indicated a willingness to provide additional guidance as events warrant. It noted that health and safety should not be compromised to meet reporting requirements, and invited affected companies to reach out to the SEC staff if they believe there are additional areas where exemptive relief or other guidance may be helpful.

Your regular Locke Lord contact and any of the authors would be happy to discuss any of these matters with you. Visit our [COVID-19 Resource Center](#) for up-to-date information to help you stay informed of the legal issues related to COVID-19 and related market development.

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