

Thinking Ahead to First Quarter Reporting—Some Tips and Recommendations

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As we've noted [elsewhere](#), the perfect storm of COVID-19-related operational disruption, financial-market turmoil and business-model threat throws a complex mix of questions at public company legal and governance officers. With the end of the first quarter upon us, we've summarized below some practical tips and recommendations as you think about first quarter reporting in the current climate. These observations are neither comprehensive nor exhaustive, and are not focused on any particular industry sector. As always, we welcome the opportunity to discuss questions specific to your industry sector or company directly. Please contact any of the lawyers listed in the sidebar or your regular Davis Polk contact.

Timing

Timing of announcement of earnings call. As some companies may be unsure about when they will be able to hold their earnings call and want to announce the date as late as possible, it's important to remember that adequate notice of the call must be given for Regulation FD purposes. The SEC staff's guidance suggests that notice of several days would be reasonable, but that the notice period may be shorter when unexpected events occur and the information is critical or time sensitive. We believe that two business days' notice should suffice in the current environment.

Timing of filing of Form 10-Q. Public companies must file their Form 10-Q 40 or 45 days after the end of the quarter, depending on filer status. This rule still applies. However, the SEC has issued an [order](#) that, subject to conditions, provides companies with a 45-day extension to file most reports, including Form 10-Qs, that would otherwise have been due between March 1 and July 1, 2020. To rely on the SEC's order, companies must publish a Form 8-K no later than the original filing deadline that includes a brief description of the reasons why it could not file the report, the estimated date by which the report is expected to be filed and a company-specific risk factor or factors explaining the impact, if material, of COVID-19 on its business. Apart from the SEC's order, Exchange Act Rule 12b-25 is also available to a company that is unable to file its Form 10-Q in a timely manner without unreasonable effort or expense, though this route only offers a 5-day extension.

Content

Guidance. The most difficult near-term reporting question likely to be faced is how to address previously issued 2020 guidance or projections, even if recently updated to address the developing impact of COVID-19. A few points are worth keeping in mind as you work through this question:

- If, like many companies, you are unable to reasonably estimate the impact of COVID-19 on your 2020 results, consider saying just that, and withdraw your earlier guidance.
- If you plan to revise your guidance, then you need to have a reasonable basis for your new guidance.
- If your revised guidance relies on material assumptions (which should be objectively reasonable), consider describing those assumptions so that investors understand the basis for your guidance and will understand the impact when the public becomes aware that those assumptions have changed.
- Take care to use “we estimate” or “we expect” and identify your guidance statements as those to which your forward-looking statements safe harbor statement applies.
- Importantly, ensure that your earnings release, earnings call materials, and any conversations subsequent to the earnings call are aligned.

MD&A. In addition to describing, in the period-on-period discussion, any material impact of the COVID-19 crisis on results of operations, you will need to focus more acutely than usual on the requirement to disclose observed “trends or uncertainties” that are expected to have a material impact on results of operations or capital resources going forward. Even if such trends did not materially impact the company in the first quarter, consider if they portend a material impact in the future.

Risk factors. Many companies have published some form of COVID-19 disclosure during the first quarter, often using language customarily found in risk factors. We expect that those companies will repeat that disclosure (updated as necessary) in their Form 10-Qs. Indeed, we recommend that all companies review their Form 10-K risk factors and consider if one or more risk factors should be updated to take account of the impact of COVID-19. As you think about writing or updating risk factors to take account of COVID-19, remember that if something has already occurred, you should no longer speak about the hypothetical “risk” of it occurring. Instead, you should describe what has occurred, and then write about what the risk now is, such as the potential for an already-observed situation to worsen.

Non-GAAP measures. We expect that some companies may consider presenting financial measures adjusted for the impact of unexpected charges and expenses arising as a result of COVID-19. To the extent a company presents a non-GAAP financial measure to adjust for or explain the impact of COVID-19, the SEC staff has noted that it would be appropriate to highlight why management finds the measure useful and how it helps investors assess the impact of COVID-19 on the company’s financial position and results of operations. The SEC staff has also addressed a problem which may come up in the earnings call, where the related GAAP measure required for a reconciliation may not yet be available. Please see our [March 26 memo](#) for a discussion.

A few other reminders. Consider if you should add COVID-19-related text to your forward-looking statements safe harbor statement. Consider also if, as a result of new or temporary working conditions or otherwise, there has been a change to your internal control over financial reporting that should be disclosed. And be prepared for a question about the health of your executives.

Process

Allow more time. Put simply, everything is taking longer so allow more time. In designing this quarter's reporting calendar, remember that everyone involved in the process will have been impacted by COVID-19: your internal teams, your independent auditor, your financial printer/EDGAR services provider and even your lawyer may be working remotely or, unfortunately, may be ill. We recommend that you start the reporting process earlier, consider allocating additional resources and, most importantly, identify back-up resources in case they are needed. In addition, given the potential additional disclosures that may be required as a result of the impact of COVID-19, ensure that your calendar allows for your disclosure committee, board/board committees and certifying officers to have adequate time to consider and discuss any new disclosures.

Regulation FD ... again. As you prepare your first quarter reports, take extra care to ensure that those involved in the process are mindful of the company's obligations under Regulation FD. In particular, as you consider potential disclosure on the impact of COVID-19, keep in mind that you may not selectively discuss such disclosure with market participants, such as investors or analysts, unless you do so in manner consistent with Regulation FD.