

## U.S. Capital Markets FAQs for Foreign Private Issuers

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This memorandum focuses on foreign private issuers (FPIs), which are companies organized in foreign jurisdictions that file reports with the U.S. Securities and Exchange Commission (SEC), generally because they have equity or debt securities (such as American Depositary Receipts) listed on a U.S. national securities exchange, such as the New York Stock Exchange or NASDAQ, or they have made a public offering of securities in the U.S. that was registered with the SEC.

### How will the coronavirus affect the economy or my company?

COVID-19 (coronavirus) has severely disrupted business patterns and trade worldwide. There have been major supply chain disruptions, leading to shortages in everything from medical supplies to car parts. International travel has ground to a halt as travelers grow wary of the risks of exposure in using planes, trains, buses, or other transportation. Some countries have been forced to implement very restrictive "social distancing" regimes that prevent businesses, schools, and governments from functioning normally, further disrupting normal consumption and production habits. Markets around the world have suffered severe declines in response to the coronavirus, as it

is difficult to predict how the coronavirus will continue to affect individuals, companies, and countries in the coming weeks and months.

## How will the coronavirus affect my company's SEC disclosures?

The SEC continues to encourage companies to make timely disclosures of the effects of the coronavirus on their business while recognizing that it may be difficult to assess or predict with precision and may depend on factors beyond the company's knowledge or control. However, the SEC believes that the effects that the coronavirus has had on the company, what management expects its future impact will be, how management is responding to evolving events, and how the company is planning for coronavirus-related uncertainties can be material to investment and voting decisions.

On March 25, 2020, the SEC's Division of Corporation Finance issued guidance on disclosure and other securities law obligations that companies should consider with respect to the coronavirus and related business and market disruptions.<sup>[1]</sup> The guidance includes an illustrative and non-exhaustive list of questions that companies should consider in assessing the coronavirus-related effects on their present and future operations in connection with complying with their disclosure obligations under the U.S. federal securities laws. The guidance also reminds companies that the disclosure of the coronavirus-related risks and effects, including how the company and management are responding to them, should be specific to the company's situation.

### **MD&A**

When filing annual reports on Forms 20-F with the SEC, foreign private issuers must comply with Items 5.A. and 5.D. of Form 20-F, which require disclosure of the company's operating and financial review and prospects and trend information, similar to the Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") required in filings by domestic U.S. issuers. The SEC has indicated that these MD&A-type disclosures should include discussions of "of known trends or uncertainties that have had or that the [company] reasonably expects to have a material favorable or unfavorable impact on net sales or revenues."<sup>[2]</sup> In particular, the SEC has stated that the purpose of MD&A is to enable investors to see the company and its risks and prospects "through the eyes of management."<sup>[3]</sup> Accordingly, disclosure committees and others in charge of ensuring that SEC disclosures are correct and complete should be aware of what uncertainties and contingency plans their management teams are considering with respect to the coronavirus and consider whether such uncertainties and plans should be disclosed in the MD&A sections of their SEC reports.

### **Risk Factors**

For companies highly impacted, the coronavirus will likely require disclosure in the "Risk Factors" sections of reports on Forms 20-F. SEC guidance requires Risk Factor disclosure to be specific and "tailored" to the particular facts and circumstances of the reporting company. The disclosure of specific facts about the past and the likely future effect of the virus is preferable to general observations about what impact those issues may or may not have in the future. Accordingly, companies should closely review their operations in geographic areas highly affected by the coronavirus, and the effect on supply chains and logistical considerations involving those areas. It is quite unlikely that the coronavirus will impact any two companies in exactly the same way and companies should avoid making general disclosures that fail to reflect specific factual considerations.

### **Safe-Harbor Disclosure Regarding Forward-Looking Statements**

Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934 allow companies to include in SEC disclosure documents "safe harbor" language to reduce their potential liability for "forward looking statements" if they identify the cautionary factors that might cause the forward-looking statements not to be accurate in material respects. All too often, when preparing press releases, annual reports on Forms 20-F, or reports on Form 6-K, companies copy the cautionary factors they previously used without assessing whether they need to be updated and revised. Reporting companies should carefully consider whether the coronavirus, which obviously is unlikely to have been mentioned in prior reports, should be included as a cautionary factor in their safe-harbor language in their next press releases and SEC reports.

# How should a company handle analyst conference calls and communications?

Questions about the effect of the coronavirus may be expected to be commonplace during conference calls with analysts. Accordingly, careful preparation and rehearsal are advisable to avoid missteps that could give rise to the need for embarrassing corrections. One-on-one calls with analysts should always be handled with care, and especially so when the discussion turns to the coronavirus, because statements on this topic may be accorded unusual weight by the trading markets. If statements are made during the calls about the coronavirus impact on the company that are material under the federal securities laws and not otherwise previously publicly disclosed, or are not in line with the company's prior statements, the company should consider whether public disclosure of the new or changed information should be made immediately on a Form 6-K or other widely disseminated means of communication, such as a press release. Although foreign private issuers are not technically subject to the public disclosure obligations with respect to material non-public information under Regulation FD, they may be subject to stock exchange or similar home-country requirements (which would trigger a corresponding Form 6-K disclosure obligation) or they may want to voluntarily follow Regulation FD guidelines as a matter of good corporate practice to keep the markets and investors informed.

The March 25, 2020, disclosure guidance reminds companies that, to the extent they present a non-GAAP or non-IFRS financial measure or performance metric to adjust for or explain the impact of the coronavirus, companies should highlight why management finds the measure or metric useful and how it helps investors assess the impact of the coronavirus on the company's financial position and results of operations, consistent with the requirements of existing SEC rules, including Regulation G. In addition, the guidance indicates that if, at the time of a company's earnings release, a GAAP or IFRS measure is not available because it may be impacted by coronavirus-related adjustments requiring additional information and analysis to complete, the Division of Corporation Finance would not object if companies reconcile a non-GAAP or non-IFRS measure in the earnings release to a preliminary GAAP or IFRS result that either includes provisional amounts based on a reasonable estimate or a range of reasonably estimable GAAP or IFRS results. However, in any filings where GAAP or IFRS financial statements are required, such as a Form 20-F, companies should reconcile to actual GAAP or IFRS results and should not include provisional amounts or ranges of estimated results. Any non-GAAP or non-IFRS financial measure presented that relies on this accommodation should be limited to those non-GAAP or non-IFRS measures used by the company's management and presented to the company's Board, which provide investors with insight on how management and the Board are analyzing the current and potential impact of the coronavirus on the company's financial condition and results of operation.

# What should a company do to revise its earnings guidance or outlook?

Companies must consider whether recent developments regarding the coronavirus should cause them to revise their guidance as to future financial results. When the 2007 recession broke out, many companies decided that the effect of the recession on their future was so uncertain and unpredictable that the better course of action was to withdraw—rather than revise—previously issued estimates.

If a company deems it appropriate to withdraw or revise its earnings guidance, it should furnish this information in a Form 6-K and issue a press release stating the withdrawal or revised guidance (likely for the first quarter and full year (if previously provided)) based on the impact of the coronavirus to its business. In the press release, if the company provides updated guidance, the company should state that it is based on the current situation and that there are many unknowns as to the duration and severity of the situation.

# Has the SEC granted any relief to companies affected by the coronavirus?

On March 4, 2020, the SEC advised all public companies to assess what the coronavirus means for their future operations and financial results and to make appropriate disclosures to their shareholders and other members of the investment community. In addition, the SEC is allowing these companies to delay SEC filings if necessary to develop the information required to make accurate and complete disclosures of the impact of the coronavirus on their operations and financial conditions. Specifically, the SEC issued an order stating that public companies that are unable, because of the coronavirus, to meet filing deadlines for SEC reports due to be filed during the period from March 1 to July 1, 2020 (encompassing the period when annual reports for calendar-year SEC reporting companies are due), will have 45 additional days to file these reports so long as, among other things, they file reports on Form 6-K describing the reasons why the report may not be filed on a timely basis.<sup>[4]</sup> For issuers with a calendar fiscal year that take advantage of this relief, the Form 20-F would be due by June 15, 2020, since the 45th day after the April 30, 2020, deadline falls on Sunday, June 14, 2020.

## What should my company expect with respect to public and private securities offerings?

### **Enhanced Due Diligence**

Issuers should expect enhanced or heightened due diligence with respect to any public or private securities offerings. The due diligence customarily performed at a preliminary stage in the underwriting, structuring, and arranging of a securities offering will likely be expanded to address the potential legal and financial impact of the outbreak on the issuer of the securities. For example, if the issuer relies on a country that has been directly impacted by the outbreak as a significant market for its goods and services or as a manufacturing or supply center, that aspect of the issuer's business will draw additional attention, including the terms of sales contracts, supply contracts, and other relevant contracts entered into with parties in the affected areas. Issuers whose business is highly concentrated in specific geographic areas of the United States or other countries will also draw special attention even if the outbreak has not yet affected those areas.

### **Changes to Offering Materials, Especially MD&A**

Issuers should include an analysis of the actual and prospective financial impact of a coronavirus outbreak in their management discussion and analysis section, as well as their plan of action for addressing consequences of an outbreak. It would also be appropriate for issuers to include this information as a part of the description of the business of the issuer or in a section of the offering materials describing "recent developments." Any quantitative or qualitative financial data available could be included, especially if it is materially different than the most recently filed financial statements.

### **Different Closing Conditions**

#### *Material Adverse Change Conditions/Force Majeure*

Issuers should be aware of "material adverse change" (MAC) closing conditions where underwriters, initial purchasers, or placement agents can elect not to close a transaction upon the occurrence of some events, like a material disruption or suspension of trading in securities on the NYSE or NASDAQ, a moratorium on commercial banking activities declared by federal or state authorities, or a material adverse change in general economic, political, or financial conditions that makes it impracticable or inadvisable to proceed with the offering. Typically, these provisions are written broadly and do not define what a material disruption or suspension in trading of securities would be, or how long such a disruption would have to last to qualify. Issuers should negotiate these terms before signing, to minimize the risk of dispute among the parties as to if and how these provisions would apply, but market practice is still evolving in this area.

#### *Absence of Change Representations*

Most offerings include representations that there have not been adverse changes since the most recently audited financial statements, including events like fires, explosions, floods, labor disturbances, or disputes except as noted

in the offering materials. Issuers should review their offering materials to ensure that they are not inadvertently breaching in light of recent events.

\* \* \*

View all of our COVID-19 perspectives [here](#). Contact a member of our COVID-19 Legal Task Force [here](#).

<sup>[1]</sup> See [CF Disclosure Guidance: Topic No. 9, SEC Division of Corporation Finance \(Mar. 25, 2020\)](#).

<sup>[2]</sup> See [Form 20-F](#), Items 5.A. and 5.D.

<sup>[3]</sup> See [SEC Release No. 33-8350, Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations \(Dec. 29, 2003\)](#) (stating that one of the objectives of MD&A is "to provide a narrative explanation of a company's financial statements that enables investors to see the company through the eyes of management").

<sup>[4]</sup> See [SEC Provides Conditional Regulatory Relief and Assistance for Companies Affected by the Coronavirus Disease \(COVID-19\), SEC \(Mar. 4, 2020\)](#) (to qualify for relief, companies must (1) be unable to make required filings due to circumstances related to COVID-19; (2) file a current report on Form 6-K or Form 8-K, as applicable, stating (a) that the filer is relying on this order; (b) a brief description of the reasons why it could not file such report, schedule, or form on a timely basis; (c) the estimated date by which the report, schedule, or form is expected to be filed; (d) if appropriate, a risk factor explaining, if material, the impact of COVID-19 on its business; and (e) if the reason the subject report cannot be filed on a timely basis relates to the inability of any person, other than the registrant, to furnish any required opinion, report, or certification, the Form 6-K or Form 8-K must 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 by the date such report must be filed; (3) file the report, schedule, or form required to be filed no later than 45 days after the original due date; and (4) include in any filed report, schedule, or form a statement that the registrant was relying on this order and the reasons why it could not make the original deadline) and [SEC Extends Conditional Exemptions From Reporting and Proxy Delivery Requirements for Public Companies, Funds, and Investment Advisers Affected By Coronavirus Disease 2019 \(COVID-19\), SEC \(Mar. 25, 2020\)](#).

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