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COVID-19: Withdrawing or Revising Earnings Guidance

As the COVID-19 pandemic continues to shock economies around the world, many public companies have determined that their previously issued guidance is no longer accurate. As of the date of this memorandum, more than 70 public companies across industries, including airline, retail, manufacturing, financial services, technology, communications, real estate, hospitality and agriculture, have either withdrawn or revised downward previously issued guidance, with the large majority opting to withdraw.

On March 4, 2020, the SEC issued conditional relief for public companies affected by COVID-19 that have SEC filings due between March 1 and April 30, 2020. The press release (the “Conditional Relief Release”) is available [here](#). In the Conditional Relief Release, the SEC suggests that public companies may need to consider whether previous disclosure should be revisited, refreshed or updated to the extent that prior disclosures have become materially inaccurate. We highlight below some key areas of focus for public companies in considering whether to withdraw or revise guidance in light of the COVID-19 pandemic.

For more information regarding the impact of COVID-19 on public disclosure and other obligations of SEC reporting companies, please see [here](#).

Previously Issued Guidance

SEC reporting companies generally do not have an affirmative obligation under U.S. federal securities law to update previously issued guidance unless, for some reason, they affirmatively indicate that they will update guidance. Furthermore, if earnings guidance was accompanied by a meaningful cautionary statement regarding forward-looking statements, the guidance should be broadly protected by the safe harbor for forward-looking statements found in the Private Securities Litigation Reform Act of 1995. Nevertheless, as a general matter, a public company that has determined that previously issued guidance is no longer accurate will need to consider whether any future statement by the company could be viewed as an affirmation of such previously issued guidance. In addition, investors may have an expectation that companies that know they will miss guidance by a wide margin will not wait too long before providing an update to the market in some manner. Accordingly, for investor relations and other reasons, public companies that have issued 2020 guidance may want to reconsider their public disclosure in light of the COVID-19 pandemic and the Conditional Relief Release.

Revisiting Previously Issued Guidance

Since the SEC issued the Conditional Relief Release, a large number of public companies have withdrawn or revised previously issued guidance. As the crisis has deepened, and the effects of the COVID-19 pandemic

have become more serious and uncertain, we have seen most public companies opt to withdraw previously issued guidance in its entirety rather than revising it.

In determining whether to retain, withdraw or revise guidance, public companies should evaluate whether they are in a position to produce reliable guidance at the moment given market conditions and the degree of uncertainty in respect of COVID-19. Additionally, public companies should consider the implications of disclosing revisions to previously issued guidance on their future public disclosure obligations. If a public company issues revised guidance, plaintiffs firms may later argue that the company has assumed a duty to provide further revisions as a result of changing circumstances relating to COVID-19 or otherwise. Therefore, a public company that issues revised guidance should include an explicit disclaimer to updating such guidance.

A public company may also consider whether it is necessary and prudent to withdraw or revise previously issued guidance in the context of any other update the company is providing about its business. For example, a number of public companies have made announcements regarding draws on their credit facilities and provided other comments on liquidity. These other statements may offer an opportunity or create a requirement to include a statement regarding previously issued guidance. Further, public companies should address any change in previously issued guidance in their next earnings release or quarterly or annual report, or in any prospectus or offering memorandum used in connection with an offering of securities if not previously publicly addressed.

Considering Whether to Issue Guidance in the Future

Public companies that historically issue guidance on an annual or quarterly basis may wish, or feel compelled by market expectations, to continue doing so. However, in light of the economic and business uncertainties caused by COVID-19, it may very well be prudent for public companies to forego issuing guidance until they are better able to produce reliable guidance.

Trading Considerations

While the health and general economic issues associated with the COVID-19 pandemic are common knowledge, its evolving impact on a particular company may constitute material nonpublic information. If a public company is aware that its previously issued guidance is no longer accurate, it should consider whether such knowledge constitutes material nonpublic information, in which case any trading activity by the company or individuals at the company with knowledge should be carefully evaluated, including in the case of employees selling shares following an option exercise. As a general matter, if a public company has knowledge that its results will be materially lower than its previously published (and not withdrawn) guidance, the company and individuals with such knowledge at the company should refrain from trading securities of the company until information about the company's results is publicly disclosed.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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