FRIED FRANK

To Our Clients and Friends

Memorandum

March 27, 2020

Division of Corporation Finance Publishes Guidance on Disclosure Obligations with Respect to COVID-19

On March 25, 2020, the staff of the SEC's Division of Corporation Finance published guidance on disclosure and other securities law obligations that companies should consider with respect to the COVID-19 pandemic and the related market disruptions[1]. Noting that the cornerstone of our principles-based disclosure system under the federal securities laws is disclosure of material information that is widely disseminated, the SEC staff encouraged companies to consider COVID-19 related risks in a broad range of disclosure matters, including 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 and Disclosing the Evolving Impact of COVID-19

The Division notes that each company's disclosure should be specifically tailored to such company's situation, as there is not a "one-size-fits-all" approach. In particular, the SEC staff encourages companies to "provide disclosures that allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management." To assist companies, the Division presents a set of questions companies should ask themselves when assessing how COVID-19 has already impacted and will continue to impact their business, operations and financial condition. These questions, set forth at the end of this memorandum, address the following themes:

Financial Condition and Results of Operations: Companies should assess both the historical and potential impact of COVID-19 on their financial condition and results of operations.

Capital and Financial Resources: Companies should evaluate how COVID-19 has impacted their overall liquidity position and outlook, including evaluating the cost of and access to capital and funding sources and ability to service debt and other obligations. Companies should also consider disclosing any material COVID-19-related contingencies.

Assets and Impairments: Companies should assess their balance sheet to determine whether there will be significant changes in judgments in determining the fair-value of assets or any potential material impairments.

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1 See SEC Division of Corporation Finance CF Disclosure Guidance: Topic No. 9.

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Operational Considerations and Business Continuity: Companies should evaluate the impact of COVID-19 on their business continuity plans, supply chains, financial reporting systems, human capital resources and productivity.

Insider Trading and Selective Disclosure

Insider Trading: Companies are reminded that they should strictly enforce policies and procedures on insider trading in light of the COVID-19 crisis. Directors, officers and other corporate insiders are encouraged to refrain from trading when in possession of any material non-public information relating to the impact of COVID-19 until such information is disclosed to the public. Separately, as we note in our memorandum, on March 23, 2020, the Co-Directors of the Division of Enforcement of the SEC issued a public statement in light of COVID-19 cautioning insiders to be mindful of their obligations to keep material non-public information confidential and avoid illegal securities trading, with a warning that the Enforcement Division is committing substantial resources in furtherance of this cause.

Selective Disclosure: The Division also reminds companies of their obligations under Regulation FD to avoid selectively disclosing material information related to COVID-19 when speaking to investors and analysts. In addition, the SEC staff notes that a company "should consider whether it may need to revisit, refresh, or update previous disclosure to the extent that the information becomes materially inaccurate."

Earnings and Financial Results

Early Discussion of Potential Financial Reporting Matters: As many companies approach the end of their fiscal quarter, the Division encourages that they proactively address any potential financial reporting matters with respect to novel or complex accounting issues that may be raised by the impact of COVID-19.

Non-GAAP Measures: The Division reminds companies that, in presenting a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19, they are encouraged to highlight why management finds the measure or metric useful and how it helps investors assess the impact of COVID-19 on the company's financial position and results of operations.

Reconciliation of a Non-GAAP Measure to a Provisional or Estimated GAAP Measure: In light of the continuing impact of COVID-19 on the results and operations for many companies (e.g., nonrecurring charges and expenses), they may wish to present non-GAAP financial measures that reflect the impact of COVID-19 in their earnings releases in advance of filing finalized financial statements. However, the Division notes that a comparable GAAP financial measure may not be available at the time of the earnings release because the measure may be impacted by COVID-19-related adjustments that may require additional information and analysis to complete. In such situations, the Division would not object to companies reconciling a non-GAAP financial measure to "preliminary GAAP results that either include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP results."

Furthermore, if a company reconciles non-GAAP financial measures to provisional or estimated GAAP financial measures, it should only present measures used to present financial results to the Board of Directors.

As the COVID-19 crisis continues, the Division calls for customized disclosure that provides material information about the impact of COVID-19 in a timely manner to investors and market participants. The Division also encourages companies to "proactively revise and update disclosures as facts and circumstances change."

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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SEC Division of Corporation Finance CF Disclosure Guidance: Topic No. 9

Suggested Questions to Consider as Companies Assess COVID-19 Related Effects

The Division presented the following questions that companies should ask themselves when assessing the impact of COVID-19 in light of their disclosure obligations:

- 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?
- 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? Consider the requirement to disclose known trends and uncertainties as it relates to your ability to service your debt or other financial obligations, access the debt markets, including commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, and counterparty or customer risk. Do you expect to disclose or incur any material COVID-19-related contingencies?
- 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?
- 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? What challenges do you anticipate in your ability to maintain these systems and controls?
- 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?

- Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?
- Are travel restrictions and border closures expected to have a material impact on your ability to operate and achieve your business goals?

The above list is illustrative but not exhaustive, and each company will need to carefully assess COVID-19's impact and related material disclosure obligations.