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ALERT MEMORANDUM

Leading Disclosure Issues for U.S. Public Companies in the COVID-19 Era:

Earnings Guidance, Share Repurchases and Additional Disclosure Considerations

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Earnings Guidance—Overview

Earnings guidance has been the leading-edge disclosure issue for U.S. public companies in connection with COVID-19. A minority of public companies whose businesses were impacted in the January or February timeframe withdrew or modified guidance and disclosed the possibility of a material impact on future earnings. But many companies filed their 10-Ks and announced 2020 guidance before the impact of the virus on their business was a factor, and will have to consider this question at the latest for the next periodic report or earnings announcement.

A company that is not currently in the market with a securities offering, engaging in stock buybacks or speaking to the market has no obligation to update its disclosure or guidance. Typical guidance disclosures are designed to come within the forward-looking statements safe harbor and to disclaim any duty to update, and companies should feel confident in those protections. However, some companies are choosing to provide additional disclosures as the scope and intensity of COVID-19, and its effects on their businesses worldwide, continue to grow. Companies may determine such disclosures are needed to update research analysts, address vendors or suppliers, or to communicate broadly with employees, investors and other stakeholders. Additionally, companies that have affirmatively stated that they will update their guidance may have an obligation to do so outside the regular calendar Q1 earnings cycle, depending on when business conditions sufficiently crystallize.

Evolution

As COVID-19 initially began to spread in China and southeast Asia, some U.S. public companies with significant exposure to Asia disclosed the impact COVID-19 was having on their business and revised or withdrew guidance, or gave guidance explicitly excluding the virus' impact. Others with less visibility into the impact took a wait-and-see approach; rather than withdrawing guidance, these companies stated in earnings materials that it was simply too early to tell what the effect of COVID-19 would be on their business.

As COVID-19 has spread to and affected additional geographic customer bases and supply chains, a growing number of U.S. public companies across industries have withdrawn previously-issued 2020 guidance.

Approaches

Companies that are determining whether and when to update their previously-issued guidance should consider the following approaches:

— Preemptively withdraw guidance ahead of the next earnings announcement without giving additional commentary. This may make it more difficult for investors and analysts to calibrate where the stock should be trading, resulting in a stock price that inaccurately reflects the condition of the business.

— Withdraw or revise guidance with an explanation of the actual and/or anticipated business impact of COVID-19, including messaging that:

  - earnings for the quarter or year would likely or will be materially impacted and/or
  - cash management steps are being taken, such as cutting a dividend, drawing on or entering into a credit facility, or suspending share repurchases.

— Disclose that the company is maintaining its guidance for the time being, excluding the impact of continuing COVID-19 developments. A company that takes this approach should ensure its disclosure avoids any implication it will provide frequent updates.

— Stay silent.

For public companies without significant exposure to Asian and European markets, during calendar Q1 it may have been premature to estimate the effects of COVID-19 on their business. We expect a number of those companies will withdraw previously-issued guidance as part of their announcement of calendar Q1 earnings in light of the broadening impact on the U.S. economy. The decision to wait until the Q1 earnings process to make such an announcement will buy those companies additional time to more accurately project Q2 in light of additional governmental and economic developments; however, the lack of any communication with the market prior to Q1 earnings may leave investors skittish and analysts in the dark. Moreover, if a company waits to update its guidance until Q1 earnings, but knows its previously-issued guidance is no longer accurate, it may need to close its trading window (or selectively restrict individuals from trading) if it determines this knowledge is material non-public information (MNPI).

As a legal matter (Regulation FD, Rule 10b-5), management should avoid reiterating guidance in calendar Q1 earnings materials without careful consideration of the facts. As a practical matter, existing guidance may have to be withdrawn, revised or qualified to adequately address live questions following the calendar Q1 earnings call.

Additionally, as a result of stock price volatility, some companies are considering issuing short-term, single quarter guidance to level-set the market. While this is a somewhat unusual measure, these are extremely unusual times. This information may help provide analysts with a better indication of company performance than they can otherwise divine amidst the current market noise.

Companies that choose to issue short-term guidance should ensure that any statements are verifiable and caveated in case they prove to be inaccurate (which is likely in today's environment but can be an acceptable risk). Disconnects between the stock price and management's view of the business can also be addressed by Regulation FD-compliant discussions with analysts, or disclosures on Form 8-K, ahead of the upcoming earnings process.

In order to best advise clients on market practice as it adapts, we are compiling a database of these announcements.

Share Repurchases and 10b5-1 Plans

To preserve liquidity and optionality, many companies have or are considering suspending or terminating share repurchase activities conducted via 10b-18 or 10b5-1 plans. For companies that have not previously disclosed details about specific buyback plans, a suspension should not trigger a disclosure obligation.

However, as noted above, companies may choose to proactively let investors know that the company has taken this step. A company that chooses not to disclose the termination or suspension of its share repurchase activity may need to disclose revised expectations about amounts to be repurchased in 2020 during this quarter's earnings.

Companies considering repurchasing shares outside of a 10b-18 or 10b5-1 plan should carefully assess if they are in possession of MNPI, as well as the public perception of conducting buybacks at this time. Companies that choose to proceed with buybacks may appear to be taking advantage of the crisis or mismanaging cash in a time of deep uncertainty.

A 10b-18 or 10b5-1 plan can be suspended or terminated prior to its end date, even when a trading window is closed. Companies (and individuals) generally refrain from suspending or terminating 10b-18 or 10b5-1 plans and quickly restarting them, to avoid the appearance of manipulation or endangering the future successful use of an affirmative defense. However, one termination (particularly under the current circumstances) would not raise these concerns.

A company that decides to terminate its 10b-18 or 10b5-1 plan may be restricted as to when it can enter into a new plan. The company will need to wait until it is not in possession of MNPI, and may also need to accommodate any cooling-off period mandated by its broker.

Additional Disclosure Considerations

As part of their calendar Q1 reporting process, U.S. public companies should ensure that they are adhering to rigorous best practices in their disclosure controls and procedures. We expect many companies will include additional, targeted risk factors in their Q1 Form 10-Q to account for updates to their business and industry. We encourage companies to create a sufficiently detailed record that accurately reflects the responsible and thorough nature of their disclosure review process, including the assessment of all information available at the time of filing. It will be key for companies to keep their board and audit committee fully engaged throughout this process.

Takeaways

— Previously issued guidance may need to be withdrawn or revised. Alternatively, the guidance could be qualified by saying it does not take the impact of the virus into account.

— There is no obligation to update disclosure or guidance outside the context of an offering, share buyback or other market communication.

— Companies may want to consider providing short-term guidance or conducting Regulation FD-compliant investor outreach to level-set the market.

— The withdrawal of guidance may be coupled with positive messaging about cash management or operational measures, including the cutting of a dividend or suspension of share repurchase activities.

— A company that chooses to suspend its share repurchase program likely does not have a disclosure obligation, though it may need to discuss revised expectations for share repurchases in 2020 in calendar Q1 earnings materials.

— The termination or suspension of a 10b-18 or 10b5-1 plan, even when the trading window is closed, does not raise any manipulation concerns.

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