

# CORONAVIRUS

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## Disclosure and Other Securities Law Obligations during COVID-19 Pandemic

On March 25, 2020, the Securities and Exchange Commission (“SEC”) issued [guidance](#) regarding disclosure and securities law obligations companies should consider in connection with the COVID-19 pandemic. The SEC made it clear that it is monitoring how companies are reporting the effects and risks of COVID-19 on their business, financial condition, and results of operations. The same day, the SEC also issued an [order](#) extending conditional relief for public company reporting and proxy delivery requirements to filings due on or before July 1, 2020.

### COVID-19 RELATED DISCLOSURES AND OTHER SECURITIES LAW OBLIGATIONS

While the SEC recognized that it may be difficult for a company to assess or predict the precise effects of COVID-19 on its industry in general or the company’s business in particular, the SEC emphasized that the following information may be material for investment and voting decisions: (i) the effects COVID-19 has had on the company; (ii) what management expects its future impacts will be; (iii) how management is responding to evolving events; and (iv) how management is planning to address COVID-19-related

uncertainties. Accordingly, disclosure of COVID-19-related risks and effects may be necessary or appropriate in the management’s discussion and analysis section (“MD&A”), the business section, risk factors, legal proceedings, disclosure controls and procedures, internal control over financial reporting, and the financial statements.

### COVID-19 Disclosures

The guidance includes an “illustrative but not exhaustive” [list](#) of questions intended to aid companies in analyzing COVID-19-related risks and effects with respect to their present and future operations. The SEC encourages companies to disclose material information about the current and expected impact of COVID-19 on their business and to proactively revise and update such disclosures as facts and circumstances related to the impact of COVID-19 change. The SEC reminded companies that forward-looking disclosures based on management’s assumptions and expectations regarding the impact of COVID-19 can be undertaken by availing themselves of the safe harbors in Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934.

## **Insider Trading and Regulation FD Considerations**

The SEC reminded companies about insider trading and Regulation FD prohibitions related to COVID-19. As with any material non-public information, the company, its directors and officers, and other corporate insiders who are aware of material information related to the impact of COVID-19 on the company and related risks that have not been publicly disclosed yet, should refrain from trading in the company's securities until such information is disclosed to the public. Companies should also avoid selective disclosure of information related to the impact of COVID-19 on the company and should disseminate such information broadly to the public in compliance with Regulation FD.

## **Non-GAAP Financial Measures**

If a company uses non-GAAP financial measures or performance metrics to adjust or explain the impact of COVID-19, the SEC emphasized that it would be appropriate to highlight why management finds such 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.

If a GAAP financial measure is not available when a company issues an earnings release because the GAAP measure may be impacted by COVID-19-related adjustments, the SEC would not object to the company reconciling a non-GAAP financial measure to preliminary GAAP results that include provisional amount(s) based on a reasonable estimate or a range of reasonably estimable GAAP results (for example, earnings before interest, taxes, depreciation, and amortization ("EBITDA") can be reconciled to either the company's GAAP earnings, a reasonable estimate of GAAP earnings that includes a provisional amount, or reasonable estimate of a range of GAAP earnings, provided such provisional amount or range reflects a reasonable estimate of COVID-19 related charges not yet finalized, such as impairment charges). However, this guidance applies only to earnings releases, and Forms 10-K, 10-Q and other filings where GAAP financial statements are required should include a reconciliation of non-GAAP financial measures to GAAP results and should not include provisional amounts or a range of estimated results.

In addition, if a company presents non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures in its earnings

release, the company should (i) explain, to the extent practicable, why the line item(s) or accounting is incomplete, and what additional information or analysis may be needed to complete the accounting and (ii) disclose only those non-GAAP financial measures that the company uses to report its financial results to the Board of Directors. The SEC believes that if companies use non-GAAP financial measures in their earnings releases, it should be done not to present a more favorable view of the company's results, but to share with investors how management and the Board are analyzing the impact of COVID-19 on the company's financial condition and operating results.

## **EXTENSION OF EXEMPTIONS FROM REPORTING AND PROXY DELIVERY REQUIREMENTS**

A public company, and any person required to make filings due on or before July 1, 2020, with respect to such company, is exempt from the requirements to make filings (and amendments to filings) under Exchange Act Sections 13(a), 13(f), 13(g), 14(a), 14(c), 14(f), 15(d) and Regulations 13A, 13D-G (except for those provisions mandating the filing of Schedule 13D or amendments to Schedule 13D), 14A, 14C and 15D, and Exchange Act Rules 13f-1, and 14f-1, if they meet the following conditions:

- (a) The company or any person required to make a filing is unable to meet the filing deadline due to circumstances related to COVID-19;
- (b) The company must file a Form 8-K (or Form 6-K for foreign private issuers) by the original deadline of each filing that is delayed stating: (1) that it is relying on the order; (2) why it could not file its report, schedule or form on a timely basis; (3) the estimated date by which the report, schedule, or form is expected to be filed; (4) its specific risk factor or factors explaining the impact, if material, of COVID-19 on its business; and (5) if the subject report cannot be filed timely because of the inability of any person, other than the registrant, to furnish any required opinion, report or certification, the Form 8-K or Form 6-K must include an exhibit with a statement signed by such person stating why they were unable to furnish the required opinion, report or certification on or before the required date; and

- (c) The company or any person required to make the filing files the required report, schedule, or form within 45 days of the original due date and discloses in any such filing its reliance on the order and why it could not timely file. Any company relying on this order would not need to file a Form 12b-25 so long as the report, schedule or form is filed within such 45-day period.

In addition, a company that meets the following conditions is also exempt from their requirements under the Exchange Act to furnish proxy statements, information statements, annual reports and other soliciting materials, as applicable:

- (a) The company's security holder has a mailing address located in an area where, as a result of COVID-19, the common carrier has suspended delivery service of the type or class customarily used by the registrant; and
- (b) The company has made a "good faith effort" to furnish the soliciting materials or information materials, as applicable, to the security holder in accordance with applicable rules.

**Blank Rome's Coronavirus ("COVID-19") Task Force is continuing to monitor the COVID-19 crisis and will provide further updates as they become available.**

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