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CRAVATH, SWAINE & MOORE LLP

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# COVID-19: SEC Reporting and Filing Matters

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# Overview

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- **Disruptions caused by COVID-19 have created numerous SEC reporting and filing challenges for companies**
- **The economic uncertainty resulting from the COVID-19 outbreak is exacerbating existing risks and/or creating new risks for companies; new information regarding the impact of the pandemic is coming to light daily; and companies are taking significant corporate actions to respond to the global health and financial crises in real time**
- **Like many companies, the SEC remains fully operational through remote working**
- **This presentation is intended to serve as a resource for companies evaluating their SEC reporting and filing obligations in light of COVID-19 by:**
  - analyzing recent SEC orders and guidance relating to COVID-19;
  - presenting examples of, and best practices with respect to, COVID-19-related risk factors; and
  - examining Form 8-K disclosure requirements relating to certain COVID-19-related events

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# Recent SEC Orders and Guidance

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# Exemptions from Filing and Proxy Requirements

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- **In orders dated March 4 and March 25, the SEC provided an extension for filing periodic reports and an exemption from certain proxy delivery requirements for companies affected by COVID-19**
  
- **Filing Requirements:** Companies or other persons may receive a 45-day extension to filing deadlines
  - **Eligible Filings:** Certain Exchange Act filings that have a filing deadline from March 1, 2020 to July 1, 2020
    - Covers filings pursuant to Sections 13(a), 13(f), 13(g), 14(a), 14(c), 14(f), and 15(d); Regulations 13A, 13D-G (except those mandating the filing or amendment of Schedule 13D), 14A, 14C and 15D; and Rules 13f-1 and 14f-1
    - Includes Form 10-Qs due in early May
  - **Hardship:** Could not meet the filing deadline “due to circumstances related to COVID-19”
  - **Explanation of Delay:** Must file a Form 8-K or 6-K by the original filing deadline that sets forth:
    - a statement that the filer is relying on the SEC order;
    - a brief description of the reasons why the filer could not make the required filing on a timely basis;
    - the estimated date by which the filing is expected to be made;
      - many filers have stated that the filing is expected to be made “as soon as practicable” before the deadline
    - a risk factor or factors explaining the impact, if material, of COVID-19 on the company’s business; and
    - if the reason the filing cannot be made when due relates to the inability to furnish any required opinion, report or certification from a person other than the company (such as the company’s auditor), a statement signed by such person stating the specific reasons why it could not furnish the opinion, report or certification in a timely manner
  - **Delayed Filing:** Must be made no later than 45 days after the original due date
    - The delayed filing must (1) state that the filer is relying on the SEC order and (2) state the reasons why the filer could not make the filing on a timely basis
  
- **Delivery of Proxy Materials:** Soliciting persons may receive an exemption from requirements to furnish their proxy or information statements and related materials to certain security holders where:
  - the security holder’s mailing address is located in an area where the common carrier has suspended delivery service of the type or class customarily used by the soliciting person; and
  - the soliciting person has made a good faith effort to deliver the proxy or information statement under the applicable rules

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# Exemptions from Filing and Proxy Requirements

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- **C&DI Regarding Filing Extension:** In a Compliance and Disclosure Interpretation released on March 31, 2020, the SEC's Division of Corporate Finance (the "Division") stated that companies cannot utilize the 45-day extension if they only file a Form 12b-25 by the original filing deadline. A Form 8-K or 6-K meeting the above requirements must be filed by the original filing deadline
  - If a Company utilizes the 45-day extension under the SEC order and it is unable to file a report on or before the extended due date a further extension may be available under Rule 12b-25

# Material Information Relating to COVID-19

- **On March 25, 2020, the Division issued guidance recommending that companies consider the need for COVID-19-related disclosures in their Risk Factors, MD&A, financial statements and elsewhere as applicable**
- **Appropriate disclosure turns on a facts-and-circumstances analysis specific to each company**
  - Good disclosure is “tailored and provides material information about the impact of COVID-19” and equips investors to “evaluate the current and expected impact of COVID-19 through the eyes of management”
- **The Division provided the following illustrative list of topics that companies should consider when assessing COVID-19’s impact and related disclosure obligations**

Financial condition and results of operations	Capital and financial resources, including liquidity position and outlook
Assets on the balance sheet and ability to timely account for those assets	Material impairments, increases in allowances for credit losses, restructuring charges, other expenses or changes in accounting judgments
Ability to maintain internal control over financial reporting	Challenges in implementing business continuity plans
Impact on demand for products or services	Impact on supply chain and distribution
Impact on human capital resources and productivity	Impact of travel restrictions or border closures on operations

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# Material Information Relating to COVID-19

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- **Undisclosed risks and effects of COVID-19 may constitute material non-public information**
- **Implications for Insider Trading:** In the March 25 guidance, the Division reiterated that companies and corporate insiders must refrain from trading in the company's securities if material information regarding the risks posed by COVID-19 has not been disclosed
- **Compliance with Regulation FD:** The Division further stated that companies should take the necessary steps to avoid selective disclosures of material information related to the impacts of COVID-19

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# Impact of COVID-19 on Presentation of Financial Results

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- **The March 25 guidance confirmed that presentations of financial measures adjusted for the impact of COVID-19 must comply with existing requirements for presentation of non-GAAP measures, and emphasized the following:**
  
- **Use of Preliminary GAAP Measures:** In earnings releases, companies may present reconciliations of non-GAAP measures to preliminary GAAP measures if the final measures require COVID-19-related adjustments based on information or analysis that is unavailable at the time of the release
  - Preliminary GAAP measures may include:
    - provisional amounts based on reasonable estimates; or
    - a range of reasonable estimates
  - Companies should explain what is missing from the preliminary GAAP measure and what additional information or analysis is needed to complete it
  - If a company presents non-GAAP measures that are reconciled to preliminary GAAP measures, it should limit the measures in its presentation to those non-GAAP measures used to report financial results to the Board of Directors
  - Preliminary GAAP measures may not be used where GAAP financial statements are required (e.g., Form 10-K or 10-Q)
  
- **Usefulness to Investors:** Companies should explain how non-GAAP financial measures help investors assess the impact of COVID-19 on the company's financial position and results of operations



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# Risk Factor Considerations

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# Basic Legal Framework

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- **Companies should consider whether incremental risk factor disclosure is appropriate to address material risks exacerbated or introduced in connection with COVID-19**
- **As always, risk factors should identify actual and potential risks that are material to an investment in the company**
  - Disclosure should include company-specific facts about the actual and anticipated impact of COVID-19
  - Where COVID-19 has caused or is causing a specific impact, disclosure should avoid generalities or hypotheticals
- **Companies should update risk factors in light of changed circumstances**

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# What Are We Seeing and Hearing?

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- **Many Form 10-Ks filed in January and February discussed COVID-19 briefly in existing risk factors (such as regarding disasters) and often focused on potential supply chain disruption or general uncertainties**
- **Since February, companies have increasingly included standalone risk factors highlighting COVID-19 risks, while also integrating potential impacts into relevant existing risk factors**
- **Recently filed risk factors have moved away from general observations and towards more detailed, company-specific risks and impacts**
- **A number of companies have filed supplemental risk factors regarding COVID-19 on Form 8-K. These are often filed:**
  - to comply with the requirements of the SEC's recently announced 45-day extension for certain filings;
  - with other COVID-19-related disclosure; or
  - concurrently with a securities offering
- **These risk factors generally fall into one of four categories:**
  1. Risks relating to supply chains, manufacturing and distribution
  2. Risks relating to changes in demand
  3. Risks relating to workforce disruption
  4. Risks relating to financial markets and economic conditions
- **The following slides discuss these four categories, with illustrative excerpts from recently filed risk factors. Although these are common topics in recent filings, companies should tailor their risk factors to their particular circumstances**

# Risks Relating to Supply Chains, Manufacturing and Distribution

Risk	Illustrative Risk Factor Excerpt
<b>Drivers of General Disruptions</b>	“Our third-party manufacturers, suppliers, third-party distributors, sub-contractors and customers have been and will be disrupted by worker absenteeism, quarantines and restrictions on our employees’ ability to work, office and factory closures, disruptions to ports and other shipping infrastructure, border closures, or other travel or health-related restrictions.”
<b>Reductions to Store Hours and Non-Essential Services</b>	“We have shortened our customer-facing hours in all of our stores...and we may need to restrict access to or close certain of, or face labor shortages in, other stores or facilities.... In certain jurisdictions, we have had to cease sales of or delay commencement of certain services deemed ‘non-life-sustaining,’ and other jurisdictions may impose similar requirements.”
<b>Reduced Workforce Availability</b>	“[G]overnmental mandates or illness or absence of a substantial number of distribution center employees could require that we temporarily close one or more of our distribution centers, which would complicate or prevent our fulfilling on-line orders....”
<b>Current Status of Facility Closures</b>	“Effective March 17, 2020, we announced the temporary closure of our stores in the U.S. and Canada.... We have also temporarily closed one of our distribution centers to comply with a shelter-in-place order.”
<b>Current Status of Supply Backlog</b>	“[T]he operations of our Chinese suppliers have been significantly disrupted and they are late in filling a significant number of orders that were scheduled to be delivered to the Company in early fiscal 2021.”

# Risks Relating to Changes in Demand

Risk	Illustrative Risk Factor Excerpt
<b>“Social Distancing” from Mandates or Public Sentiment</b>	“[I]f customers’ concerns over potential exposure to COVID-19 or social distancing measures imposed by governments cause customers to avoid shopping centers and other retail locations, our store revenue could be adversely impacted.”
<b>Restrictions on Sales and Service</b>	“We have shifted certain of our customer events to virtual-only experiences and we may deem it advisable to similarly alter, postpone or cancel entirely additional customer, employee or industry events in the future.”
<b>Adverse Economic Conditions for Customers</b>	“[A]s our potential customers face layoffs and other negative economic impact from the COVID-19 outbreak, their disposable income for discretionary purchases and their actual or perceived wealth may be negatively impacted, potentially having a material and adverse impact on our net sales.”
<b>Atypically High Demand</b>	“In addition, unpredictable increases in demand for certain of our products could exceed our capacity to meet such demand, which could adversely affect our financial results and customer relationships and result in negative publicity.”
<b>Current Status of Demand</b>	“COVID-19 has already begun to significantly impact consumer traffic and the Company’s retail sales.”

# Risks Relating to Workforce Disruption

Risk	Illustrative Risk Factor Excerpt
<b>Cyber and Privacy Risks from Remote Working</b>	<p>“We have transitioned a significant subset of our employee population to a remote work environment in an effort to mitigate the spread of COVID-19...which may exacerbate certain risks to our business, including an increased demand for information technology resources, increased risk of phishing and other cybersecurity attacks, and increased risk of unauthorized dissemination of sensitive personal information or proprietary or confidential information about us or our members or other third-parties.”</p>
<b>Reduced Productivity from Remote Working</b>	<p>“[W]e have experienced and will experience disruptions to our business operations resulting from quarantines, self-isolations, or other movement and restrictions on the ability of our employees to perform their jobs that may impact our ability to develop and design our products in a timely manner or meet required milestones or customer commitments.”</p>
<b>Increased Labor Costs</b>	<p>“We have also expanded our paid time off policy to help alleviate some of the challenges our associates may be facing as a result of COVID-19, and we may face additional health insurance and labor-related costs.”</p>
<b>Disruption at Management and Board Levels</b>	<p>“[T]he outbreak of the coronavirus (‘COVID-19’) could disrupt our operations due to absenteeism by infected or ill members of management or other employees, or absenteeism by members of management and other employees who elect not to come to work due to the illness affecting others in our office or laboratory facilities, or due to quarantines. COVID-19 illness could also impact members of our Board of Directors resulting in absenteeism from meetings of the directors or committees of directors, and making it more difficult to convene the quorums of the full Board of Directors or its committees needed to conduct meetings for the management of our affairs.”</p>
<b>Employee Absenteeism</b>	<p>“There is significant uncertainty around...employee willingness to staff our stores once they re-open.”</p>

# Risks Relating to Financial Markets and Economic Conditions

Risk	Illustrative Risk Factor Excerpt
<b>Access to and Cost of Capital</b>	“In recent weeks, the continued, global spread of COVID-19 has led to disruption and volatility in the global capital markets, which has increased the cost of, and adversely impacted access to, capital (including the commercial paper markets) and increased economic uncertainty.”
<b>Access to, Cost and Terms of Debt Financing</b>	“If the impacts of the pandemic create disruptions or turmoil in the financial markets, or if rating agencies lower our credit ratings, it could adversely affect our ability to access the debt markets, our cost of funds, and other terms for new debt.”
<b>Counterparty Payment Risk</b>	“The outbreak of COVID-19 has severely impacted global economic activity, including the businesses of some of our commercial customers, and caused significant volatility and negative pressure in the financial markets.... [T]hese developments may adversely affect the timing of commercial customer premium collections....”
<b>Contractual Non-Performance</b>	“[I]f the spread of the coronavirus continues and the Company’s operations are impacted, [the Company] risks a delay, default and/or nonperformance under existing agreements arising from force majeure.”

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# 8-K Considerations

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# Basic Legal Framework

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- **SEC reporting companies are required to disclose the occurrence of specified significant events on Form 8-K**
- **Form 8-K sets forth the events that trigger a filing obligation**
  - Form 8-K provides instructions that can assist companies in determining whether a filing requirement has been triggered
  - An event may be reportable under more than one Item of Form 8-K, and multiple items may be included on a single filing
- **Even if no mandatory filing obligation has been triggered, companies can make voluntary disclosures using Form 8-K**
- **Generally, a Form 8-K must be filed or furnished with the SEC within four business days after the occurrence of the triggering event**
- **The following slides address a variety of COVID-19-related events that could trigger an 8-K filing requirement or that have resulted in voluntary filings by listed companies**

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# What Are We Seeing and Hearing?

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- **Companies have taken a range of actions in response to the COVID-19 outbreak to protect employees and customers, communicate with stakeholders and position their businesses for an extended period of uncertainty**
- **SEC reporting companies are disclosing many of these actions on Form 8-K**
- **Generally, the COVID-19-related 8-Ks we are seeing fall into one of ten broad categories, each of which is described in more detail on the following slides:**
  1. The impact of COVID-19 on a company's stakeholders and business operations
  2. Changes to a company's previously issued earnings guidance
  3. Financing events to increase a company's cash position
  4. Changes to a company's dividend or stock repurchase plans to preserve financial flexibility
  5. Entry by a company into a material agreement
  6. Changes to the timing of performance under a company's contracts
  7. Changes to director or officer compensation
  8. Updates to a company's risk factors
  9. Amendments to a company's bylaws
  10. Other COVID-19-related 8-Ks
- **Although these categories represent common COVID-19-related 8-K topics, companies should consider all of the Form 8-K triggers and continuously assess their disclosure obligations given the rapidly-changing business environment**

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# 8-Ks Relating to COVID-19

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## ▪ (1) The Impact of COVID-19 on a company's stakeholders and business operations

- Companies are using Form 8-K to disclose the impact of the pandemic on their stakeholders and business operations, including, for example:
  - closing of stores or facilities;
  - furlough or layoff of employees; and
  - suspension of operations at certain divisions or business lines
- Generally, companies are disclosing this information on Items 7.01 or 8.01 of Form 8-K
- Item 7.01 is used to disclose information pursuant to Regulation FD
  - Regulation FD prohibits selective disclosure of material non-public information by an SEC reporting company in certain circumstances unless it publicly discloses such information
- Item 8.01 is used to voluntarily disclose events that a company deems of importance to its security holders and are not covered by other items of Form 8-K
  - Many calendar year-end companies that have already filed 10-Ks and will not be filing first quarter 10-Qs for some time are filing COVID-19-related updates using Item 8.01
  - Companies may also use Item 8.01 to disclose non-public information required to be disclosed by Regulation FD
- A report under Item 7.01 or Item 8.01 is not deemed to be an admission as to the materiality of the information in the report that is required to be disclosed solely by Regulation FD

## ▪ (2) Changes to a company's previously issued earnings guidance

- Companies are using Form 8-K to withdraw or revise downward previously issued earnings guidance
- Companies are generally using Items 7.01 or 8.01 for this disclosure

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# 8-Ks Relating to COVID-19

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## ▪ (3) Financing events to increase a company's cash position

- Companies are using Form 8-K to disclose financing events undertaken to increase their cash position in light of recent market uncertainty
- Many of these reports are being made pursuant to Item 2.03 of Form 8-K, which is triggered by, among other things, a company becoming obligated on a direct financial obligation that is material to the company
- Even where a credit agreement or other debt facility has been previously disclosed, a company should consider whether a borrowing under the facility constitutes a financial obligation that is material to the company that requires disclosure under Item 2.03 of Form 8-K (including when a series of previously undisclosed individually immaterial borrowings become material in the aggregate)
  - A relevant factor to whether such a borrowing constitutes a financial obligation that is material to the company might include whether the company is making the borrowing because it anticipates being unable to satisfy the borrowing conditions in the future (e.g., bringing down representations and warranties)
- Note that Item 2.03 disclosure is not required when the direct financial obligation is a security sold pursuant to an effective registration statement and the prospectus contains the required information

## ▪ (4) Changes to a company's dividend or stock repurchase plans to preserve financial flexibility

- Companies are using Form 8-K to provide updates regarding their dividend or stock repurchase plans, including, for example, to disclose:
  - the evaluation of future dividends in light of COVID-19;
  - the suspension of dividend payments in order to manage a company's cash position in light of COVID-19;
  - the suspension of a share repurchase program in light of uncertainty related to COVID-19; and
  - the declaration of a dividend lower than previous levels in order to preserve cash resources in light of COVID-19
- Generally, companies are making disclosures relating to dividends or stock repurchase plans on Item 7.01 or Item 8.01 of Form 8-K

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# 8-Ks Relating to COVID-19

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## ▪ (5) Entry by a company into a material agreement

- Companies are using Form 8-K to disclose the entry into material agreements related to the COVID-19 outbreak, including, for example:
  - entry into a credit agreement to secure additional liquidity;
  - entry into other capital raising arrangements; and
  - for companies in the healthcare industry, entry into agreements to develop therapeutics for COVID-19
- These disclosures are made pursuant to Item 1.01 of Form 8-K, which is triggered, among other things, when a company enters into a material definitive agreement not made in the ordinary course of business

## ▪ (6) Changes to the timing of performance under a company's contracts

- Companies are using Form 8-K to disclose amendments to material agreements that change the timing of performance due to uncertainty surrounding COVID-19, including, for example:
  - the extension of deadlines under an agreement due to restrictions on travel and the infeasibility of in-person meetings
- Item 1.01 of Form 8-K requires the disclosure of any amendment of a material agreement that is material to a company. In practice, companies generally file all amendments of such agreements, unless the amendment is truly trivial
  - Voluntary disclosure with respect to amendments to immaterial agreements may be made under Item 8.01 of Form 8-K

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# 8-Ks Relating to COVID-19

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## ▪ (7) Changes to director or officer compensation

- Companies are using Form 8-K to disclose changes to director and officer compensation, including, for example:
  - reducing or delaying officer compensation as part of expense-reduction measures;
  - revising fees paid to independent directors for board meetings that are held telephonically in light of COVID-19;
  - deferring previously announced salary increases for officers;
  - changing officer bonuses from cash to equity;
  - reducing board fees; and
  - announcing that an officer is delaying retirement to help address COVID-19 issues
- These disclosures are made pursuant to Item 5.02 of Form 8-K, which is triggered by, among other things, a company materially amending a material compensatory plan for certain executive officers

## ▪ (8) Updates to a company's risk factors

- A number of companies are using Form 8-K to disclose new risk factors related to COVID-19
- Generally, companies are disclosing new risk factors on Item 8.01 of Form 8-K

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# 8-Ks Relating to COVID-19

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## ▪ (9) Amendments to a company's bylaws

- A number of companies have filed 8-Ks in connection with COVID-19-related amendments to their bylaws, including, for example:
  - amending bylaws to allow the company to hold virtual shareholder meetings;
  - amending bylaws so that someone other than the Chairman, CEO or President can preside over an annual or special shareholder meeting, in case such individuals are unable to attend due to COVID-19; and
  - amending bylaws to allow for increased flexibility in setting the location of shareholder meetings
- Disclosures relating to bylaw amendments are made pursuant to Item 5.03 of Form 8-K, which is triggered by, among other things, charter and bylaw amendments for which no proposal was disclosed in a proxy statement or information statement filed by the company

## ▪ (10) Other COVID-19-related 8-Ks

- Companies are using Form 8-K to disclose a range of other events and actions relating to COVID-19, including:
  - a director or officer testing positive for COVID-19 and taking a temporary medical leave of absence;
  - a material impairment of goodwill due to reduced revenue and cash flows from a reporting segment;
  - taking advantage of the SEC's recently announced 45-day extension for certain filings;
  - the receipt of a delisting notice for failure to meet a continuing listing standard due to COVID-19 (e.g., for failure to make timely filings with the SEC); and
  - an anticipated inability to fund the anticipated volume of future margin calls under a company's financing arrangements, which would trigger the acceleration of a direct financial obligation
- Companies should carefully review all items of Form 8-K and consult with counsel to determine whether events or actions relating to COVID-19 trigger an 8-K filing requirement

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