

CORPORATE AND SECURITIES LAW

Alert

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Disclosure Considerations for Companies Suspending Earnings Guidance

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The current economic recession and ongoing volatility in the financial markets has caused an increasing number of public companies to suspend earnings guidance, as results of operations become increasingly difficult to predict. In a sense, the recession has accelerated an existing trend in which many public companies have moved from annual to quarterly guidance, or eliminated the practice of giving earnings per share guidance altogether.

A company that has decided to suspend earnings guidance should take into account a number of issues, including the following:

- ***Announcement of suspension or discontinuation of guidance.*** Typically, companies suspending guidance do so in conjunction with a quarterly or annual earnings release. In the announcement, companies commonly refer to the uncertainty created by the current economic environment and do not give an indication whether or when EPS guidance will resume. In general, statements that bind the company to resume guidance or give any indication of when it will be resumed should be avoided. And, if guidance is being eliminated due to concerns broader than the current economic environment—for instance, because the company has concluded quarterly guidance creates too much of an emphasis on short-term performance—then the announcement should make clear that the discontinuation is permanent.
- ***Metrics that will be provided in lieu of EPS.*** Companies in the process of eliminating guidance will want to consider what, if any, forward-looking metrics they will provide in future earnings releases and communications with analysts. The company's disclosure committee will need to deliberate with an eye toward providing forward-looking metrics that will be useful to analysts, as analysts will continue to publish earnings estimates even in the absence of company-provided EPS guidance. Practices here vary significantly by company and industry. For instance, some companies that have eliminated guidance still provide revenue, same-store sales or operating margin projections. Others focus on metrics between the top and bottom lines, such as projected SG&A expenses or capital expenditures. Analysts will expect that the substitute metrics (if any) that are initially provided in lieu of EPS projections will continue to be provided in future periods. Therefore, although not legally obligated to continue providing such forward-looking information, it is important for the company's

disclosure committee to determine whether substitute metrics can comfortably be provided on an ongoing basis.

- **Regulatory considerations.** Because of their need to produce earnings estimates, analysts will continue to probe for color as to the company's future outlook. Thus, the company and its spokespersons should keep in mind Regulation FD's restriction against selective disclosure of material, non-public information. Additionally, even if EPS guidance is suspended, companies should continue to include appropriately tailored forward-looking statement disclaimers in both their earnings releases and analyst presentations.

If you have any questions regarding this Corporate & Securities Law Alert please feel free to contact any of your regular contacts in the Corporate and Securities Group or any of the attorneys listed below.

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