

## SEC Staff Publishes Guidance Regarding Disclosure and New Tax Act

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Capital Markets and Securities

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On December 22, 2017, the President signed the Tax Cuts and Jobs Act of 2017 (the “2017 Tax Act”). On the same day, the staff of the SEC’s Office of the Chief Accountant and Division of Corporation Finance (the “Staff”) issued guidance regarding the 2017 Tax Act in Staff Accounting Bulletin No. 118 (“SAB 118”),<sup>1</sup> which addresses certain financial statement impacts of the 2017 Tax Act, and in a new Compliance and Disclosure Interpretation addressing the impact of the 2017 Tax Act on a company’s obligations under Form 8-K. This advisory summarizes that guidance.

### SAB 118

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In SAB 118, the Staff addressed certain fact patterns and the application of Financial Accounting Standards Board (“FASB”) Accounting Standards Codification Topic 740, Income Taxes (“ASC 740”), on the reporting period that includes the enactment of the 2017 Tax Act. ASC 740 requires that a public company recognize the effects of changes in tax laws or tax rates in the financial statements for the period in which such changes were enacted. Among other things, changes in tax laws or tax rates can affect the amount of taxes payable for the current period, as well as the amount and timing of deferred tax liabilities and deferred tax assets. Because the 2017 Tax Act became law in December 2017, fiscal year-end reporting companies would be required to account for the impacts related to the 2017 Tax Act in the financial statements included in their annual report on Form 10-K due in early 2018.

In the absence of relief from the SEC, ASC 740 could require that companies analyze the 2017 Tax Act in a compressed time frame with potentially insufficient information. To address this, SAB 118 provides companies with an extended “measurement period” in which they must report (i) the effects of changes from the 2017 Tax Act where the calculations are complete and (ii) provisional effects where the calculations are not complete but reasonable estimates can be determined. If a reasonable estimate cannot be made, the company should continue to apply ASC 740 based on the tax law in effect immediately prior to the enactment of the 2017 Tax Act. The SAB 118 “measurement period” ends when the company has obtained, prepared, and analyzed the information necessary to comply with ASC 740, and in any event may extend no later than December 22, 2018.

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<sup>1</sup> SAB 118 is available at <https://www.sec.gov/interps/account/staff-accounting-bulletin-118.htm>.

If a company accounts for certain tax effects of the 2017 Tax Act using the SAB 118 measurement period approach, it must also include disclosures in its financial statements to provide information about the material financial reporting impacts of the 2017 Tax Act for which the accounting under ASC 740 is not complete, including, for example, qualitative disclosures of the income tax effects of the 2017 Tax Act for which accounting is incomplete, disclosures of existing current or deferred tax amounts for which the income tax effects of the 2017 Tax Act have not been determined, the reason why the initial accounting is not complete, additional information that is needed to be obtained, prepared, or analyzed to complete the accounting, and the nature and amount of any measurement period adjustments recognized during the reporting period.

## Form 8-K Guidance

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Some companies have raised questions regarding whether the impact of the 2017 Tax Act, if material, triggers a Form 8-K reporting obligation. Two questions have come up frequently since the enactment of the 2017 Tax Act—whether the impact of the 2017 Tax Act would cause a company to recognize a material impairment that requires disclosure under Item 2.06 of Form 8-K, and whether companies should report under Item 7.01 of Form 8-K the material impacts of the 2017 Tax Act in order to allow companies to discuss such impacts with investors in compliance with Regulation FD.

The Staff has addressed the first question in newly issued Compliance and Disclosure Interpretation 110.02 to Form 8-K.<sup>2</sup> C&DI 110.02 clarifies that remeasuring a deferred tax asset because of the 2017 Tax Act will not be considered an impairment that triggers a requirement to file a Form 8-K under Item 2.06. C&DI 110.02 also indicates that if, during the “measurement period” discussed in SAB 118, a company concludes that an impairment has occurred as a result of the 2017 Tax Act, the company may rely on the Instruction to Item 2.06 and disclose the impairment amount, or a provisional amount with respect to a possible impairment, in the company’s next periodic report.

While the Staff has not provided new guidance regarding the second question, we think the same principles that have traditionally applied to Regulation FD and Form 8-K should govern. Form 8-K does not create an affirmative obligation to disclose material non-public information to comply with Regulation FD. Instead, companies may rely on Item 7.01 of Form 8-K to provide information in a sufficiently broad manner to allow them to have conversations with investors regarding material non-public information in compliance with Regulation FD. The impact of the 2017 Tax Act will vary dramatically among companies. Companies for which the 2017 Tax Act will have a material impact may desire to provide investors with information regarding that impact as soon as possible and could choose to file a report under Item 7.01 of Form 8-K to provide a path for them to have conversations regarding such tax impacts.

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<sup>2</sup> C&DI 110.02 is available at <https://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm>.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Capital Markets and Securities practice:

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