

June 25, 2020

ADDITIONAL U.S. PUBLIC COMPANY DISCLOSURE CONSIDERATIONS RELATED TO THE IMPACT OF COVID-19

To Our Clients and Friends:

Due to the ongoing assessment of the impact of COVID-19 on companies' operations, liquidity and capital resources and overall economic and market conditions, companies should take special care in preparing for their quarterly reporting. To aid in this effort, the staff (the "Staff") of the Securities and Exchange Commission ("SEC") has posted a new set of questions that companies should consider in evaluating whether certain disclosures should be included in their earnings release and, in light of its potential materiality, in the management discussion and analysis ("MD&A") included in the periodic reports (*e.g.*, the upcoming Form 10-Q for the second quarter of 2020).

On June 23, 2020, the Division of Corporation Finance of the SEC issued disclosure guidance in the form of [CF Disclosure Guidance: Topic No. 9A](#) ("Topic 9A") providing additional views regarding operations, liquidity, and capital resources disclosures that companies should consider with respect to business and market disruptions related to COVID-19. This complements [CF Disclosure Guidance: Topic No. 9](#) ("Topic 9") published on March 25, 2020 (which was addressed on our previous post, [available here](#)).

Separately, on June 23, 2020, the SEC Chief Accountant issued a [Statement on the Continued Importance of High-Quality Financial Reporting for Investors in Light of COVID-19](#), highlighting the Office of the Chief Accountant's recent work to promote high-quality financial reporting, and its engagement with the Financial Accounting Standards Board, the Public Company Accounting Oversight Board, the International Accounting Standards Board, the International Organization of Securities Commissions, the International Federation of Accountants, and the Public Interest Oversight Board. This complements the Chief Accountant's previous [Statement on the Importance of High-Quality Financial Reporting in Light of the Significant Impacts of COVID-19](#) issued on April 3, 2020.

With many public companies now preparing for their next reporting cycle (*e.g.*, the upcoming Form 10-Q for the second quarter of 2020), the SEC continues to emphasize the important role the financial reporting system plays in the functioning of the markets and in the national effort to mitigate the COVID-19 pandemic (see, *e.g.*, [SEC Chairman Jay Clayton, Remarks to the Financial Stability Oversight Council](#)) and, consequently, the importance of disclosure controls and procedures and internal control over financial reporting. As Chairman Clayton recently stated in testimony before the House Committee on Financial Services:

A fundamental principle for the SEC and our capital markets has always been—and today is even more important than ever—the importance of issuers providing investors with financial and operational disclosures that are clear, high-quality and timely. Staff has been monitoring and

providing guidance with respect to corporate and municipal filings and disclosures of U.S. issuers, as well as foreign companies listed in the United States... I believe that the timely disclosure of high-quality information—be it positive, negative or neutral, and be it definitive or subject to uncertainty in light of the circumstances—increases credibility and has a generally calming value that contributes to market function, and in turn, reduces the potential for systemic risk.

Relatedly, the SEC announced a roundtable to be held on June 30, 2020: “Q2 Reporting: A Discussion of COVID-19 Related Disclosure Considerations.” Moderated by SEC Chair Jay Clayton, the roundtable’s participants will include National Economic Council former director Gary Cohn, Silver Lake Partners co-founder Glenn Hutchins, Advent Capital Management President Tracy Maitland, and BlackRock Vice Chair Barbara Novick. The roundtable will be webcast live on the SEC’s website.

Disclosure Considerations Raised in Topic 9A

As with Topic 9, Topic 9A includes questions companies can ask when considering their disclosure obligations. The Staff makes clear that Topic 9A represents the Staff’s views and does not change applicable law or add new disclosure obligations.

Topic 9A advises that companies consider how operational adjustments undertaken due to COVID-19 (e.g., transition to telework, supply chain and distribution adjustments, and suspending or modifying certain operations to comply with health and safety guidelines) and financing activities undertaken due to COVID-19 (e.g., obtaining and utilizing credit facilities, accessing public and private markets, implementing supplier finance programs, and negotiating new or modified customer payment terms) may be required to be disclosed in MD&A under Item 303 of Regulation S-K. While each company must consider its own specific facts and circumstances, the questions posed by the Staff can help a company identify factors that may need to be addressed as a result of their impact on the company’s operations, liquidity, and capital resources. The Staff encourages companies to consider a broad range of topics when preparing their disclosures, including:

Business Considerations

Operational Challenges

- operational challenges monitored and evaluated by management and the board;
- alterations to operations (g., implementation of health and safety policies);
- impact (or reasonable likelihood of future impact) of such changes to the financial condition and short- and long-term liquidity;

Expenditures

- the amount of any reduction in capital expenditures, and any suspension of share repurchase programs or dividend payments;

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- to termination of any material business operations or disposal of any material assets or line of business;
- any material reduction or increase in human capital resource expenditures;
- any expected timing of the implementation of any of the measures mentioned above;
- any factors considered in extending or curtailing any of these measures;
- the short- and long-term impact of these reductions on the ability to generate revenues and meet existing and future financial obligations

Customer Relationships

- any alteration of terms with customers (g., extension of payment terms or refund periods) and materiality of the impact of such actions on the financial condition or *liquidity*;
- any concessions or changes on terms of arrangements as a landlord or lender that will have a material impact;
- any modifications of other contractual arrangements in response to COVID-19 that could materially impact the financial condition, liquidity or capital resources;

Supplier Relationships

- reliance on any supplier finance programs, supply chain financing, structured trade payables, reverse factoring, or vendor financing, to manage cash flow;
- description of any material impact on balance sheet, statement of cash flows, or short- and long-term liquidity due to such arrangements;
- description of any material terms of the arrangements, including any guarantees provided by the company or any subsidiaries;
- any potential material risk in case of termination of any such arrangements;
- amount of amounts payable related to these arrangements at the end of the period, and portion of these amounts already settled by an intermediary;

Financing Considerations

Overall Liquidity Position and Outlook

- the development of the overall liquidity position and outlook due to the COVID-19's impact;

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- the materiality of any adverse impact of COVID-19 to revenues in sources and uses of funds, and assumptions made about the magnitude and duration of COVID-19's impact on revenues;
- any material impact in liquidity position and outlook due to a decrease in cash flow from operations;

Liquidity Sources

- whether revolving lines of credit were accessed or whether capital was raised in the public or private markets to address liquidity needs;
- disclosure of any actions related to access of lines of credit or capital raise and any unused liquidity sources provided with a complete discussion of the financial condition and liquidity;

Use of Specific Metrics by Management

- clear definitions of any performance metrics used (g., cash burn rate or daily cash use) and the explanation of how management uses such metrics in managing or monitoring liquidity (see the SEC's Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations, and our post about such SEC guidance);
- estimates or assumptions underlying such metrics necessary for such metrics not to be misleading;

Cost of Capital

- impact on the ability to access traditional funding sources on reasonably similar terms;
- need to provide additional collateral, guarantees, or equity to obtain funding;
- material changes in the cost of capital;
- impact on the ability to obtain additional funding due to any changes, or potential changes, in credit rating;
- terms in financial arrangements that limits the ability to obtain additional funding;
- the reasonable likelihood that any uncertainty of additional funding would result in liquidity decreasing in a way that would result in inability to maintain current operations;

Debt Obligations

- the ability to timely service the debt and other obligations;
- availability and use of any payment deferrals, forbearance periods, or other concessions;

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- description and expected extension of such concessions;
- foreseeability of any liquidity challenges once those accommodations end;

Covenant Maintenance

- material risk of not meeting covenants in existing credit and other agreements;

Financial Statements

Subsequent Events Since the End of the Reporting Period and Known Trends or Uncertainties

- discussion and assessment of any impact of material events since the end of the reporting period, but before the financial statements are issued; and
- consideration of disclosure of subsequent events in the financial statements and known trends or uncertainties in the MD&A.

CARES Act

In addition, Topic 9A notes that companies should consider addressing the short- and long-term impact of any government assistance (including under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (available [here](#))) on financial condition, results of operations, liquidity and capital resources. This includes:

- the material terms and conditions of any assistance received and anticipated ability to comply with such terms and conditions;
- any limitation on the ability to seek other sources of financing or impact on cost of capital due to such terms and conditions;
- impact of restrictions (g., maintaining certain employment levels) on revenues or income from continuing operations or in the relationship between costs and revenues;
- any expected material change to operations once restrictions lapse;
- the impact of any tax relief in short- and long-term liquidity;
- the description of any material tax refund for prior periods;
- a description of any new material accounting estimates or judgments or material changes to prior critical accounting estimates; and
- a description of accounting estimates made (g., probability of loan forgiveness); and
- any uncertainties involved in applying the related accounting guidance.

Going Concern

The Statement from the Chief Accountant and the Topic 9A guidance also each underscore that companies should pay particular attention to the going concern evaluation in connection with the issuance of the financial statements (see our client alert on [Key Considerations for Issuers and Auditors Regarding Going-Concern Analysis](#)). Considering all conditions and events (including those described above), taken as a whole, management should evaluate the company's ability to meet its obligations as they become due within one year after the issuance of the financial statements. If the financials will include a going concern qualification, then companies should include additional MD&A disclosure about:

- conditions and events that give rise to the substantial doubt about the company's ability to continue as a going concern (g., any default on outstanding obligations, any labor challenges or work stoppage); and
- management's plans to address these challenges and whether any portion of those plans have been implemented.



Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding developments related to the COVID-19 pandemic. For additional information, please contact the Gibson Dunn lawyer with whom you usually work, any lawyer in the firm's Securities Regulation and Corporate Governance and Capital Markets practice groups, or the authors:

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