SEC ISSUES SUPPLEMENTAL COVID-19 GUIDANCE ON DISCLOSURE CONSIDERATIONS RELATING TO OPERATIONS, LIQUIDITY, AND CAPITAL RESOURCES

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On June 23, the Division of Corporation Finance at the U.S. Securities and Exchange Commission (the *"SEC"*) released additional disclosure guidance with respect to operations, liquidity, and capital resources disclosures in light of the COVID-19 pandemic. The new guidance supplements CF Disclosure Guidance Topic 9 issued on March 25, 2020.

The initial guidance, issued while public registrants and the investing community were still absorbing the massive impact of the pandemic, was broad in tone and global in scope, providing a laundry list of disclosure items and probing questions of how those items might be affected by COVID-19. It makes sense, now that the impact has settled in for nearly three months, that the staff would narrow its sights to more targeted disclosure issues. The most recent guidance is aimed at what is arguably the heart of MD&A disclosure: operations, liquidity, and capital resources.[1] In a sense, the new guidance is a granular unpacking of the "known trends and uncertainties" aspect of MD&A disclosure – because the "known trend" of COVID-19 is ubiquitous, the staff has provided general guidance on how issuers might assess its impact on their public disclosures. There is a reason that these issues feature prominently in the SEC's overall disclosure regime: they comprise the core of most companies' operational success and ability to achieve and maintain profitability. We believe it is important, for legal and business reasons (and especially as the SEC shines its light on this area), for issuers to make an honest and earnest assessment of COVID-19's impact on operations, liquidity, and capital resources.

OPERATIONAL CHALLENGES

The staff notes its appreciation for the fact that most public issuers are still "in the process" of adjusting their operations to account for the impact of COVID-19. From the transition to telework, to supply chain and distribution adjustments, to the litany of health and safety guidelines companies have had to comply with, the staff reminds registrants to carefully consider these in light of their disclosure obligations. The key consideration, of course, is whether or not any of these matters would be material to an investment or voting decision, requiring disclosure to investors.

Our summary of the staff's thought questions with respect to potential disclosure of operations-related issues is below:

- What operational challenges have you faced and are you continuing to monitor?[2]
- What was the impact, if any, of implementing health and safety policies?
- What was the impact of having your employees absent and/or working remotely? What was or will be the impact of having your employees return to work?
- Have you altered payment terms with your customers? Are you relying on supplier financing in a way you were not before the pandemic?
- Are any of the above matters temporary? Permanent? What facts will you consider in deciding to extend or curtail them?

LIQUIDITY

Access to liquidity is nearly always a top-of-mind consideration for a business and its investors, and the uncertainty of liquid capital has been a particularly harrowing aspect of the pandemic for many. Thus it is natural and appropriate for the staff to emphasize the importance of effective disclosure in this area. The staff notes in the new guidance (and we have anecdotally observed) that companies have undertaken a diverse range of financing activities in response to the pandemic. Of course, appropriate consideration must be given to an issuer's disclosure obligations respecting such arrangements. We have summarized the key issues raised in the guidance and questions issuers should ask themselves below:

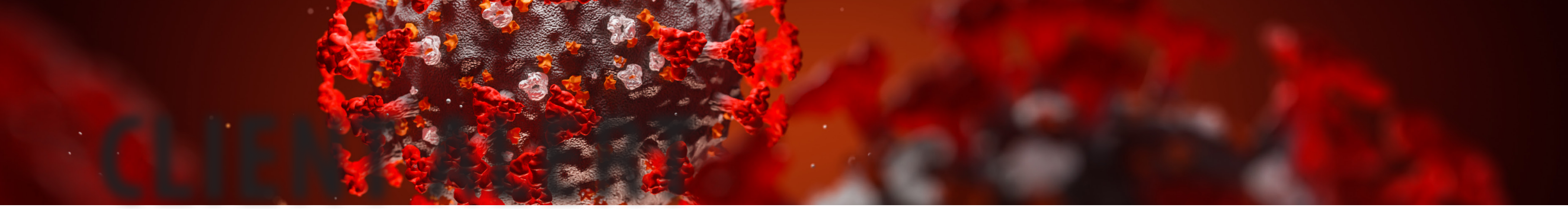
- How have your operational challenges impacted your financial condition and short- and long-term liquidity outlook? Have your revenues and/or cash flows been materially impacted? How are you currently situated, considering revenue and cash flow levels, in terms of your sources and uses of liquidity? How long do you expect this to last?
- If your assumptions regarding the duration and magnitude of COVID-19's impact are wrong, how might that impact your liquidity position and outlook?
- Do you disclose cash burn rate or daily cash use? If so, are you providing a clear definition of this metric and explaining how management uses it in assessing liquidity? Do you make material assumptions or estimates in calculating this metric?
- Do you have a credit facility? Are you able to service your debt? Are you at material risk of defaulting? Have you sought waivers and/or forbearances or amended your credit agreement? Has your credit been downgraded? Have you been required to post additional collateral and/or make additional guarantees?
- Are you able to access traditional funding sources on the same or reasonably similar terms?
- Have you suspended share (or bond) repurchase and/or dividend programs?
- Are any of the above matters temporary? Permanent? What facts will you consider in deciding to extend or curtail them?

CAPITAL RESOURCES

Capital resources provide a barometer of the health of companies in some industries. In light of the economy-wide impact on operations and liquidity, it is appropriate to assess the material current and expected impact on an issuer's capital resources. The substance of capital resources disclosure will vary across industries, but the principles emphasized in the recent guidance should be used as a guide for all issuers. We have provided our summary of the staff's guidance below:

- Have you reduced your capital expenditures generally and/or with respect to specific business lines? If so, how?
- Have you exited any material business lines and/or disposed of any material assets? Have you ceased any material business operations?

[1] See Regulation S-K, Item 303.
[2] We would suggest that a general frame of reference when assessing the materiality of operational challenges would be to consider the extent to which those challenges rose (or should have risen) to the level where executive management and/or the board of directors become aware of, assessed and discussed them.



- Have you materially reduced or increased your human capital resource expenditures?
- Are any of the above matters temporary? Permanent? What facts will you consider in deciding to extend or curtail them?

CARES ACT

The new guidance includes a discrete section concerning disclosure issues relating to the short- and long-term impacts of the loans and tax relief provided to eligible companies under The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). Issuers who received CARES Act loans, for example, should consider the impact of those loans on their financial condition, liquidity, and capital resources. These issuers should address the material terms, conditions, and restrictions associated with CARES Act loans and determine whether or not they will be able to comply with them. Likewise, such issuers should assess whether their repayment obligations will have a material impact on revenues. Issuers who received tax relief are instructed to assess how such relief impacted their short-and long-term liquidity and to consider whether to disclose any material tax refunds for prior periods. Finally, recipients of CARES Act relief are asked to assess whether or not their receipt of relief caused them to make any material accounting estimates or judgments that should be disclosed.

GOING CONCERN ISSUES

As the COVID-19 pandemic has caused massive disruption in the global economy and financial markets, it is not surprising that SEC staff would provide guidance concerning an issuer's assessment of whether conditions and events have conspired to raise substantial doubt about its ability to continue as a going concern. The staff indicates in the guidance that issuers should focus on the conditions and events that may have given rise to such substantial doubt. For example, issuers should assess whether work stoppages and or labor challenges have produced these conditions, and consider how to disclose their plans, if any, to address such issues.

As the pervasive impact of the COVID-19 pandemic continues to unfold, we understand that public company disclosure issues are only one in a constellation of concerns for executive management teams and boards of directors. We believe the new staff guidance is a timely and helpful tool to assist public registrants in navigating this unexpected and sometimes challenging new terrain.

For more information on this release, COVID-19-related public disclosure issues or other securities law matters, please contact Dickinson Wright, PLLC.

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