COVID-19: SEC EXTENDS CONDITIONAL RELIEF AND PROVIDES DISCLOSURE GUIDANCE

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SEC EXTENDS CONDITIONAL RELIEF FOR REPORTING COMPANIES.

On March 25, 2020, the Securities and Exchange Commission ("SEC") issued an order (the "Order") extending conditional relief to reporting companies affected by the novel coronavirus disease ("COVID-19"). The Order supersedes a previous order, issued on March 4, 2020 (the "Initial Order"), that provided reporting companies with an additional 45 days to file certain disclosure reports that would otherwise have been due between March 1 and April 30, 2020.

The Order extends the time period during which reporting companies with operations affected by the COVID-19 crisis may delay their SEC filings to cover filings due on or before July 1, 2020. All other details of the Order are essentially the same as the Initial Order. For more information about this conditional relief, including the types of reports covered by the relief and the conditions that must be met for a reporting company to avail itself of the relief, see our alert SEC Announces Conditional Relief for Companies Affected by Coronavirus issued on March 5, 2020.

SEC PROVIDES DISCLOSURE GUIDANCE RELATING TO THE COVID-19 CRISIS.

On March 25, 2020, the SEC Division of Corporate Finance also issued

CF Disclosure Guidance Topic No. 9

(the "Guidance"), which provides the SEC staff's views regarding disclosure and other securities law obligations that reporting companies should consider with respect to the COVID-19 crisis. In the Guidance, the SEC staff recognizes that reporting companies may have difficulties assessing or predicting with precision the broad effects of COVID-19 on themselves and their industries, but encourages reporting companies to consider the need for COVID-19-related disclosures within the context of federal securities laws and the SEC's principles-based disclosure system. The Guidance states that risks and known or reasonably likely effects to reporting companies related to COVID-19 may be necessary or appropriate to address in a reporting company's MD&A, business section, risk factors, legal proceedings, disclosure controls and procedures, internal control over financial reporting, and financial statements. We previously analyzed many of these disclosure items in our client alert

COVID-19: Securities Law Considerations for U.S. Public Companies

issued on March 16, 2020.

Disclosing the Impact of COVID-19

The Guidance includes the following list of instructive questions that reporting companies should consider when preparing disclosures related to the COVID-19 impact:

- How has COVID-19 impacted your financial condition and results of operations? In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near- and long-term financial condition? Do you expect that COVID-19 will impact future operations differently than how it affected the current period?
- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook? Has your cost of or access to capital and funding sources, such as revolving credit facilities or other sources changed, or is it reasonably likely to change? Have your sources or uses of cash otherwise been materially impacted? Is there a material uncertainty about your ongoing ability to meet the covenants of your credit agreements? If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency? Consider the requirement to disclose known trends and uncertainties as it relates to your ability to service your debt or other financial obligations, access the debt markets, including commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, and counterparty or customer risk. Do you expect to disclose or incur any material COVID-19-related contingencies?
- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets? For example, will there be significant changes in judgments in determining the fair-value of assets measured in accordance with U.S GAAP or IFRS?
- Do you anticipate any material impairments (e.g., with respect to goodwill, intangible assets, long-lived assets, right of use assets, investment securities), increases in allowances for credit losses, restructuring charges, other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on your financial statements?
- Have COVID-19-related circumstances such as remote work arrangements adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures? If so, what changes in your controls have occurred during the current period that materially affect or are reasonably likely to materially affect your internal control over financial reporting? What challenges do you anticipate in your ability to maintain these systems and controls?
- Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so? Do you face any material resource constraints in implementing these plans?
- Do you expect COVID-19 to materially affect the demand for your products or services?

- Do you anticipate a material adverse impact of COVID-19 on your supply chain or the methods used to distribute your products or services? Do you expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?
- Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?
- Are travel restrictions and border closures expected to have a material impact on your ability to operate and achieve your business goals?

Refraining From Trading Prior to Dissemination of Material Non-Public Information

The Guidance reminds reporting companies to refrain from issuing, and to directors, officers, and other insiders to refrain from engaging in transactions in, company securities when the impacts or risks related to COVID-19 have not been widely disseminated to the investing public. The SEC staff also cautions reporting companies to take the necessary steps to avoid selective disclosures.

Reporting Earnings and Financial Results

The Guidance acknowledges that the ongoing and evolving impact of COVID-19 may make it more difficult for reporting companies to complete their filings in a timely fashion and further recognizes that the impact of COVID-19 on businesses may present novel or complex accounting issues that may take time to resolve. As a result, the SEC staff encourages reporting companies to proactively address financial reporting matters earlier than usual.

The Guidance reminds reporting companies of their obligations under Item 10 of Regulation S-K and Regulation G with respect to the presentation of non-GAAP financial measures and the SEC's recent guidance with respect to performance metrics disclosure. The Guidance provides that to the extent a reporting company presents a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19, the disclosure should highlight why management finds the measure or metric useful, and how it helps investors assess the impact of COVID-19 on the reporting company's financial position and results of operations.

In circumstances where a GAAP financial measure is not available at the time of an earnings release because the measure may be impacted by COVID-19-related adjustments that may require additional information and analysis to complete, the Guidance states that the SEC staff will not object to reporting companies reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amounts based on a reasonable estimate or a range of reasonably estimable GAAP results. As an example, the Guidance provides that if a reporting company intends to disclose its EBITDA on an earnings call, it could reconcile that measure to either its GAAP earnings, a reasonable estimate of its GAAP earnings that includes a provisional amount, or its reasonable estimate of a range of GAAP earnings.

However, if a reporting company presents non-GAAP financial measures that are reconciled to provisional amounts or an estimated range of GAAP financial measures, the company should limit the measures in its presentation to those non-GAAP financial measures used to report financial results to the Board of Directors. The Guidance reminds reporting companies that it is not appropriate to present non-GAAP financial measures or metrics for the sole purpose of presenting a more favorable view of the company. Rather, the SEC staff notes that it believes reporting companies should use non-GAAP financial measures and performance metrics for the purpose of sharing with investors how a reporting company's management and board are analyzing the current and potential impact of COVID-19 on the company's financial condition and operating results. Finally, if non-GAAP financial measures that are reconciled to a provisional amount(s) or an estimated range of GAAP financial measures are presented, a reporting company should explain, to the extent practicable, why the line item(s) or accounting is incomplete, and what additional information or analysis is needed to complete the accounting.

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