

COVID-19 NEWS OF INTEREST

SEC Issues Supplemental COVID-19 Disclosure Guidance

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With the continuing uncertainty surrounding the duration and effects of the ongoing COVID-19 pandemic, the SEC Division of Corporation Finance issued new guidance regarding various operational, liquidity and capital resource issues related to COVID-19 that issuers should consider in their public disclosures.¹ This guidance supplements the SEC’s guidance issued in March² and reinforces the joint statement from SEC Chairman Jay Clayton and Director of the Division of Corporation Finance, William Hinman, made in April that covered similar matters.³ The guidance emphasizes the SEC’s principles-based disclosure regime,⁴ providing a timely reminder of a reporting company’s obligations to provide tailored disclosure material to investors so that they can view the company, including both its historical results and, particularly important in this context, future trends, “through the eyes of management” in order to make informed investment decisions.

¹ See SEC Division of Corporation Finance, *CF Disclosure Guidance: Topic No. 9A, Coronavirus (COVID-19) -- Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources* (June 23, 2020), available [here](#).

² See SEC Division of Corporation Finance, *CF Disclosure Guidance: Topic No. 9, Coronavirus (COVID-19)* (March 25, 2020), available [here](#), and our related client memorandum, *SEC Issues COVID-19 Disclosure Guidance* (March 26, 2020), available [here](#).

³ See SEC Public Statement, *The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19* (April 8, 2020), available [here](#), and our related client memorandum, *SEC Encourages COVID-19 Disclosures in Upcoming Quarterly Communications* (April 14, 2020), available [here](#).

⁴ For more information on recent SEC proposals and guidance related to principles-based disclosure, see our client memorandum, *SEC Proposes MD&A Amendments that Continue Shift to Principles-Based Disclosure* (February 6, 2020), available [here](#).

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With the passage of now several months of the COVID-19 pandemic significantly impacting the United States, the SEC has observed companies making a wide range of operational and other adjustments. These adjustments include a transition to telework; supply chain and distribution adjustments; and suspending or modifying certain operations to comply with health and safety guidelines to protect employees, contractors and customers, including, more recently, in connection with a transition back to the workplace. Similarly, companies have been undertaking a diverse and sometimes complex range of financing activities in response to the effects of COVID-19 on their businesses and markets. These activities may involve obtaining and drawing down credit facilities, accessing public and private markets, implementing supplier finance programs and negotiating new or modified customer payment terms. The guidance reminds issuers of their obligations to include “robust and transparent” disclosure, in Management’s Discussion and Analysis (“MD&A”) and elsewhere, regarding these operational and financing changes, and related risks and uncertainties, to the extent material.

The guidance also discusses the Coronavirus Aid, Relief and Economic Security Act (the “CARES Act”) and prompts registrants to consider the short- and long-term impact of taking assistance thereunder. In addition, in light of potential liquidity and capital resource issues, the guidance reminds issuers to consider their ability to meet their obligations when they come due within one year after the issuance of financial statements and, consequently, their ability to continue as a going concern.

Accordingly, the guidance provides additional questions that should be considered when preparing and updating disclosures, including:

- *Liquidity and Capital Resources*
 - How is your overall liquidity position and outlook evolving? To the extent COVID-19 is adversely impacting your revenues, consider whether such impacts are material to your sources and uses of funds, as well as the materiality of any assumptions you make about the magnitude and duration of COVID-19’s impact on your revenues. Are any decreases in cash flow from operations having a material impact on your liquidity position and outlook? Has your cost of or access to capital and funding sources, such as revolving credit facilities or other sources, including from your current operations, changed, or is it reasonably likely to change?
 - Have you accessed revolving lines of credit or raised capital in the public or private markets to address your liquidity needs? Are your disclosures regarding these actions and any unused liquidity sources providing investors with a complete discussion of your financial condition and liquidity? Is there a material uncertainty about your ongoing ability to meet the covenants of your credit agreements?
 - Have COVID-19-related impacts affected your ability to access your traditional funding sources on the same or reasonably similar terms as were available to you in recent periods? Have you provided additional collateral, guarantees, or equity to obtain funding? Have there been material changes in your cost of capital? How has a change, or a potential change, to your credit rating impacted your ability to access funding? Do your financing arrangements contain terms that limit your ability to obtain additional funding?

- Have you reduced your capital expenditures and if so, how? Have you reduced or suspended share repurchase programs or dividend payments? Have you ceased any material business operations or disposed of a material asset or line of business? Have you materially reduced or increased your human capital resource expenditures? Are any of these measures temporary in nature, and if so, how long do you expect to maintain them? What factors will you consider in deciding to extend or curtail these measures? What is the short- and long-term impact of these reductions on your ability to generate revenues and meet existing and future financial obligations?
- Are you able to timely service your debt and other obligations? Have you taken advantage of available payment deferrals, forbearance periods, or other concessions? What are those concessions and how long will they last? Do you foresee any liquidity challenges once those accommodations end?
- Have you altered terms with your customers, such as extended payment terms or refund periods, and if so, how have those actions materially affected your financial condition or liquidity? Did you provide concessions or modify terms of arrangements as a landlord or lender that will have a material impact? Have you modified other contractual arrangements in response to COVID-19 in such a way that the revised terms may materially impact your financial condition, liquidity and capital resources?
- Are you relying on supplier finance programs, otherwise referred to as supply chain financing, structured trade payables, reverse factoring, or vendor financing, to manage your cash flow? Have these arrangements had a material impact on your balance sheet, statement of cash flows, or short- and long-term liquidity and if so, how? What are the material terms of the arrangements? Did you or any of your subsidiaries provide guarantees related to these programs? Do you face a material risk if a party to the arrangement terminates it?
- *Business Operations and Controls*
 - What are the material operational challenges that management and the board of directors are monitoring and evaluating? How and to what extent have you altered your operations, such as implementing health and safety policies for employees, contractors and customers, to deal with these challenges, including challenges related to employees returning to the workplace? How are the changes impacting or reasonably likely to impact your financial condition and short- and long-term liquidity?
 - Have you assessed the impact that material events that occurred after the end of the reporting period, but before the financial statements were issued, have had or are reasonably likely to have on your liquidity and capital resources? Have you considered whether disclosure of subsequent events in the financial statements and known trends or uncertainties in MD&A is required?

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- *CARES Act*
 - Have you taken a CARES Act loan and, if so, how does it impact your financial condition, liquidity and capital resources? What are the material terms and conditions of any assistance you received, and do you anticipate being able to comply with them? Do those terms and conditions limit your ability to seek other sources of financing or affect your cost of capital? Do you reasonably expect restrictions resulting from the loan, such as maintaining certain employment levels, to have a material impact on your revenues or income from continuing operations or to cause a material change in the relationship between costs and revenues? Once any such restrictions lapse, do you expect to change your operations in a material way?
 - Are you taking advantage of any recent tax relief, and if so, how does that relief impact your short- and long-term liquidity? Do you expect a material tax refund for prior periods?
 - Does the assistance involve new material accounting estimates or judgments that should be disclosed or that materially change a prior critical accounting estimate? What accounting estimates were made, such as the probability a loan will be forgiven, and what uncertainties are involved in applying the related accounting guidance?
- *Going Concern Considerations*
 - Are there conditions and events that give rise to the substantial doubt about your company's ability to continue as a going concern? For example, have you defaulted on outstanding obligations? Have you faced labor challenges or a work stoppage?
 - What are your plans to address these challenges? Have you implemented any portion of those plans?

Statement of the SEC's Chief Accountant

At the same time the supplemental guidance was issued by the Division of Corporation Finance, the SEC's Chief Accountant, Sagar Teotia, issued a public statement discussing various reporting matters related to COVID-19 and the Office of the Chief Accountant's engagement with the FASB, PCAOB and other accounting standard-setters.⁵ Among other things, Mr. Teotia noted the importance of registrants' audit committees and the critical role that they play in the oversight of issuers and their financial reporting, especially during the current uncertain times. He noted the need for many companies to make significant judgments and estimates in their accounting and financial reporting, stating that the Office of the Chief Accountant has not objected to well-reasoned judgments. Companies should ensure that these

⁵ See SEC Public Statement, *Statement on the Continued Importance of High-Quality Financial Reporting for Investors in Light of COVID-19* (June 23, 2020), available [here](#).

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significant judgments and estimates are disclosed in a manner that is understandable and useful to investors, and that the resulting financial reporting reflects and is consistent with the specific facts and circumstances.

Mr. Teotia further emphasized the importance of robust internal control over financial reporting, particularly in a telework environment, and reminded issuers of the need to disclose in quarterly reports any material change in such control. Like the new CF guidance, he reiterated the need each reporting period for management to consider, in the current environment, their company's ability to continue as a going concern, i.e., whether relevant conditions and events raise substantial doubt about the entity's ability to meet its obligations as they become due within one year after the issuance of the relevant financial statements.

Willkie has multidisciplinary teams working with clients to address COVID-19-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters, and CFTC and bank regulation. Please click [here](#) to access our publications addressing issues raised by COVID-19. For advice regarding COVID-19, please do not hesitate to reach out to your primary Willkie contacts.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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