SEC Staff Issues Additional COVID-19 Disclosure Guidance

I. Background

On June 23, 2020, the staff of the Division of Corporate Finance (the "Staff") of the Securities and Exchange Commission (the "SEC") issued non-binding guidance (the "Guidance") containing additional disclosure considerations to further assist companies with reporting the risks and effects of COVID-19 on their businesses, financial condition and results of operations.[1] The Guidance supplements the Staff guidance issued on March 25, 2020,[2] which covers general disclosure and other securities law obligations that companies should consider with respect to COVID-19.

II. Disclosure Considerations Regarding Operations, Liquidity and Capital Resources

A. General Disclosure Considerations

In response to the effects of COVID-19, companies have pursued a variety of operational adjustments and financing activities to address operational challenges and liquidity needs, and, in the Guidance, the Staff advises companies to carefully consider their obligations to disclose these types of adjustments and activities to investors. The Staff encourages companies to provide disclosures that would allow investors to understand how management and the board of directors are analyzing the current and expected impact of COVID-19 on the company's operations, liquidity, and capital resources. The Staff explains that it is important for companies to provide "robust and transparent disclosures about how they are dealing with short- and long-term liquidity and funding risks in the current economic environment, particularly to the extent efforts present new risks or uncertainties to their businesses." The Staff also encourages companies to proactively update and revise their disclosures as facts and circumstances change.

While the specific facts and circumstances will vary for each company, companies should look to the following factors as they consider their disclosure obligations:

- Any changes made to the company's operations, including transitioning back to the workplace, and the effect, or reasonably likely effect, of such changes on the company's financial condition and short- and long-term liquidity;
- The evolution of the company's liquidity position and outlook;
- Any credit facilities utilized and capital raised in the public or private markets to address liquidity needs;
- The ability to access traditional funding sources on the same or reasonably similar terms as those prior to COVID-19, whether any additional collateral, guarantees or equity has been required to obtain funding, and any material change to cost of capital or change or potential change in credit rating;
- Any material risk of default under the company's credit agreement or other agreements;

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[1] For the full text of the Guidance, see CF Disclosure Guidance: Topic No. 9A, available here. Unless otherwise specified, quoted statements in this memorandum are taken from the Guidance.

[2] CF Disclosure Guidance: Topic No. 9, available here. We discussed the prior guidance in our Firm Memorandum – SEC Staff Issues COVID-19 Disclosure Guidance and SEC Further Extends Certain Filing Deadlines (March 30, 2020), available here.

- The use of any metrics, such as cash burn rate or daily cash use, to manage and monitor liquidity, which should be clearly defined and explained in the disclosures;
- Any reduction or suspension in capital expenditures, dividend payments, material business operations, or human capital resource expenditures, and the short- and long-term impact on the company's ability to generate revenue and fulfill its existing and future financial obligations;
- The company's ability to timely service its debt and other obligations and any foreseeable liquidity challenges once any current payment deferrals or other concessions end;
- Any modified contractual terms, such as an extended refund period for customers, in response to COVID-19 that have materially impacted the company's financial condition or liquidity;
- The effect of supply chain financing on the company's balance sheet, statement of cash flows and short- and long-term liquidity; and
- Any material events that have occurred between the end of the company's reporting period and the date that the financial statements are issued, and the potential impact such events have on the company's liquidity and capital resources.

The foregoing should not be considered an exhaustive list of disclosure considerations as the Staff continues to assess the impact of COVID-19. The Staff states that it has observed companies making some of these disclosures in their earnings releases and encouraged companies to assess whether disclosure of these risks and COVID-19-related effects should also be included in management's discussion and analysis ("MD&A") in light of their potential materiality.

B. Going Concern Disclosure Considerations

In the Guidance, the Staff also mentions that management should evaluate whether conditions and events, in the aggregate, raise substantial doubt about the company's ability to meet its obligations as they become due one year after the financial statements are issued. If there is substantial doubt about the company's ability to continue as a going concern, the Staff encourages management to consider including the following information in the MD&A disclosure:

- The conditions and events that give rise to the substantial doubt about the company's ability to continue as a going concern; and
- Any plans to alleviate such doubt and whether any portion of those plans have been implemented.

C. Disclosure Considerations for Companies Receiving Assistance Under the CARES Act

The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") provides loans and tax relief to certain companies to mitigate the economic impact of the COVID-19 pandemic. In the Guidance, the Staff encourages companies receiving federal assistance to consider the short- and long-term impact of that assistance on their financial condition, results of operations, liquidity, and capital resources and the related disclosures. Companies receiving assistance under the CARES Act should look to the following factors as they consider their disclosure obligations:

- The impact of the loan on the company's financial condition, liquidity and capital resources;
- Any terms or conditions that limit the company's ability to seek other financing sources or affect the company's cost of capital;

- Any potential material impact of restrictions, such as maintaining certain employment levels, on revenues or income from continuing operations;
- Any recent tax relief and the effect of such relief on the company's short- and long-term liquidity;
- Any expected material tax refund for prior periods; and
- New material accounting estimates or judgments or any material changes to prior critical accounting estimates as a result of the financial assistance.

III. Conclusion

The SEC Staff continues to monitor how companies are disclosing the risks and effects of COVID-19 on their businesses, financial condition and results of operations. Although non-binding, the Guidance provides helpful insight into the Staff's views regarding operations, liquidity and capital resources disclosures with respect to COVID-19.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com or Sara E. Johnson at 212.701.3156 or sejohnson@cahill.com; or email publications@cahill.com.