

## **SEC Staff Issues COVID-19 Disclosure Guidance and SEC Further Extends Certain Filing Deadlines**

### **I. Overview & Background**

In response to the continued spread of COVID-19, the staff of the Division of Corporation Finance (the “Staff”) of the Securities and Exchange Commission (the “SEC”) has provided non-binding guidance to assist public companies in disclosing COVID-19 related risks and effects in their reporting. Additionally, the SEC has further extended filing periods and provided other relief measures for certain public company obligations under the federal securities laws.

### **II. Disclosure Considerations for Public Companies**

On March 25, 2020, the Staff issued guidance (the “Guidance”) on appropriate disclosure concerning COVID-19 related risks.<sup>1</sup> In the Guidance, the Staff acknowledges that the ever-evolving nature of the pandemic makes it difficult to accurately predict all risks and effects and that the actual impact of COVID-19 may depend on outside factors beyond the company’s control. Nevertheless, the Staff encourages timely disclosure of the effects that COVID-19 has already had on the company’s business, management’s response, and the plan to address any future effects.

The Guidance notes that the details of any COVID-19 related disclosure will be fact- and circumstance-specific and differ from company to company. Broadly, companies should look to the following factors while considering their disclosure obligations:

- The effect on the company’s overall financial condition and results of operations, including any potential future impacts over the near- and long-term;
- The effect on the company’s capital and financial resources, liquidity and access to capital and funding sources;
- Any potential effects on the company’s balance sheet, particularly in determining the fair value of assets;
- Material impairments on line items in the company’s financial statements;
- Any effects of remote work arrangements or similar arrangements on the company’s operations or ability to maintain proper internal financial reporting;
- Challenges in implementing business continuity plans;
- Material changes in demand of company’s products or services;
- Material adverse impacts on the company’s supply chain;
- Material constraints on human capital and productivity; and
- The effect of travel restrictions and border closures on the company’s business.

The foregoing should not be considered an exclusive list as there may be other factors not previously considered by the Staff. Additionally, in encouraging companies to consider the above factors broadly, the Staff observes that disclosure may be required in other sections beyond just the risk factors, including management’s

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<sup>1</sup> CF Disclosure Guidance: Topic No. 9, available at <https://www.sec.gov/corpfin/coronavirus-covid-19>.

discussion and analysis, the business section, legal proceedings, disclosure controls and procedures, internal control over financial reporting, and financial statements.

The Staff also recommends in the Guidance that companies consider the disclosure of COVID-19 related risks or effects in conjunction with their obligations under the federal securities laws, particularly insider trading-related laws. If COVID-19 has had a material effect on a company's outlook, the company should consider its own activities in the securities markets as well as take measures to ensure that corporate insiders refrain from trading company securities until such material information is disclosed to the public. Companies also may need to consider whether prior disclosures need to be refreshed or updated in light of material COVID-19 related effects. The Staff recognizes that many of these considerations may require the inclusion of forward looking information, which can be disclosed in such a manner as to comply with the safe harbor provisions of Section 27A of the Securities Act and Section 21E of the Securities Exchange Act of 1934, as amended (the "Exchange Act").

In the Guidance, the Staff encourages companies to engage experts promptly and to be proactive in reporting financial information earlier than usual. Regarding the use of non-GAAP financial measures for the purpose of analyzing the impact of COVID-19 on the company's financial condition and operating results, the Staff recommends that the company disclose specifically how the measure aids investors in assessing COVID-19's impact. Regarding the reconciliation of non-GAAP measures to GAAP financial measures, the Staff states that in situations where a GAAP financial measure is not yet available at the time of an earnings release because the impact of COVID-19 on it requires additional analysis, the Staff would not object to reconciliation to preliminary GAAP results that include reasonably estimated amounts or a range of reasonably estimated results. If reconciled to estimated amounts or a range, the disclosure should include an explanation of the additional analysis to be completed. The Staff explains, however, that non-GAAP financial measures nonetheless should not be utilized for the sole purpose to make a company's financial position look more favorable and should be limited to those measures reported to the company's board of directors. The Staff also states that any such estimated amounts or ranges should not be included in the reconciliation to the GAAP financial measure in any filing, such as a Form 10-K or 10-Q, where GAAP financials are required.

### III. Commission Relief for Public Companies

Previously, the SEC issued an order extending deadlines for reporting companies to file reports that were due between March 1 and April 30, 2020 by 45 days.<sup>2</sup> In light of the continued effects of COVID-19, on March 25, 2020, the SEC issued an additional order (the "Order") extending this 45-day extension to cover all filings due on or before July 1, 2020.<sup>3</sup> Any company relying on this extension must (1) be unable to meet the filing deadline for reasons related to COVID-19 and (2) furnish a Form 8-K (or Form 6-K, if eligible), by the original filing deadline, stating the following:

- The company's reliance on the Order and its reasons for not being able to file timely;
- The estimated date the report is expected to be filed; and
- A company-specific risk factor explaining the impact, if material, of COVID-19 on the company.

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<sup>2</sup> Order Under Section 36 of the Securities Exchange Act of 1934 Granting Exemptions from Specified Provisions of the Exchange Act and Certain Rules Thereunder, available at <https://www.sec.gov/rules/other/2020/34-88318.pdf>.

<sup>3</sup> Order Under Section 36 of the Securities Exchange Act of 1934 Modifying Exemptions from the Reporting and Proxy Delivery Requirements for Public Companies, available at <https://www.sec.gov/rules/exorders/2020/34-88465.pdf>

In addition, to the extent the failure to timely file is due to the inability of a third party to provide a required report or opinion, the filing must attach as an exhibit a signed statement of such third party stating the reasons for such party's inability to provide the report or opinion.

The press release accompanying the Order<sup>4</sup> indicates that, for purposes of determining eligibility to use Forms S-3 or F-3, Form S-8 or Rule 144(c), as well as for determining well-known seasoned issuer status, a company relying on the Order will be considered current and timely in its Exchange Act filings so long as (1) it was current and timely with respect to its filing requirements as of the first day of the relief period and (2) it files any report due during the relief period within 45 days of its original deadline.

Further, in response to uncertainties regarding delivery service during the COVID-19 outbreak, the Order provides additional relief measures regarding the delivery of proxy statements, annual reports and other information statements. Should a security holder have a mailing address where typical delivery service has been suspended as a result of COVID-19 and the company has made a good faith effort to furnish materials to the security holder, the company is exempt from the requirements to deliver these materials.

## IV. Conclusion

The Guidance and the Order reflect the SEC's and the Staff's recognition of the impact that COVID-19 is having on the ability of public companies to meet their reporting and disclosure obligations under the federal securities laws.

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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, please do not hesitate to call or email authors Bradley J. Bondi at 202.862.8910 or [bbondi@cahill.com](mailto:bbondi@cahill.com); Geoffrey E. Liebmann at 212.701.3313 or [gliebmann@cahill.com](mailto:gliebmann@cahill.com); Kimberly Petillo-Décosard at 212.701.3265 or [kpetillo-decosard@cahill.com](mailto:kpetillo-decosard@cahill.com); or Emma O'Hara at 212.701.3150 or [eohara@cahill.com](mailto:eohara@cahill.com), or email [publications@cahill.com](mailto:publications@cahill.com).

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<sup>4</sup> The full text of the press release is available at <https://www.sec.gov/news/press-release/2020-73>.