

SEC Issues Guidance on COVID-19 Disclosures and Other Matters

March 25, 2020 – Cross-Border Counselor

On March 25, the SEC issued CF Disclosure Guidance Topic No. 9 that provides the Division of Corporation Finance's current views regarding disclosure and other securities law obligations that companies should consider with respect to COVID-19 and related business and market disruptions. In the guidance, the SEC recognizes that it may be difficult to assess or predict with precision the broad effects of COVID-19 on industries or individual companies. Never the less, the guidance is clear that the SEC considers COVID-19 developments to be material and that public companies have an obligation to address these risks even as the business risks are evolving and impacts on a specific company are uncertain. As a result, disclosure of these risks and COVID-19-related effects may be necessary or appropriate in management's discussion and analysis, the business section, risk factors, legal proceedings, disclosure controls and procedures, internal control over financial reporting, and the financial statements.

The guidance provides a checklist of topics related to COVID-19 to be considered by public companies as they prepare their periodic reports and other public disclosures:

- The impact of on the company's financial condition and results of operations in the near term and longer term.
- The impact of on the company's capital and financial resources, including liquidity, cost and access to capital (such as access to revolving credit facilities), sources and uses of cash, the company's ability to meet financial covenants, new material expenditures in response to COVID-19 and other matters.
- The impact on the company's balance sheet and assets, including any impairment charges.
- The impact on operations, including remote work, productivity, human resources, supply chain, product distribution and travel restrictions.
- The impact on demand for the company's goods and services.
- The impact on internal controls, disclosure controls, accounting judgments or financial statements.

The guidance highlights public companies' obligations to address management's expectations for future periods and to discuss trends and uncertainties. The guidance

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notes that these statements are likely to be forward looking information, based on assumptions and expectations regarding future events, which may be covered by the safe harbor protections. The guidance further notes that the disclosure should be tailored for the specific company and allow investors to see the impact of COVID-19 through the eyes of management.

The guidance reminds companies that as they consider the impacts of COVID-19 on their financial condition and operations, their directors and officers, and other corporate insiders, who are aware that COVID-19 has affected their companies in ways that would be material to investors, should refrain from trading in the companies' securities until such information is disclosed to the public. The guidance also reminds companies to take the necessary steps to avoid selective disclosures by disseminating material information related to the impacts of COVID-19 broadly to the public.

In addition, the guidance addressed earnings releases and non-GAAP financial measures. As to earnings releases the guidance is primarily a caution to prepare early to address novel issues and accounting judgments that may arise from COVID-19. To the extent a company presents a non-GAAP financial measure or performance metric to adjust for or explain the impact of COVID-19, the guidance is that 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 company's financial position and results of operations.

The guidance also states that if a GAAP financial measure is not available at the time of the earnings release because the measure may be impacted by COVID-19-related adjustments, requiring additional information and analysis to complete, the staff would not object to companies reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amount(s) based on reasonable estimates, or a range of reasonably estimable GAAP results. The provisional amount or range should reflect a reasonable estimate of COVID-19 related charges not yet finalized, such as impairment charges. Under the guidance, a company presenting non-GAAP financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP financial measures, should explain, to the extent practicable, why the line item(s) or accounting is incomplete, and what additional information or analysis may be needed to complete the accounting.

The guidance is clear that the other rules for disclosure of non-GAAP financial measures continue to apply, including that companies should avoid "cherry-picking". In addition, companies should limit the measures they present to those non-GAAP financial measures they are using to report financial results to their Boards of Directors.