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SEC Issues Additional Disclosure Guidance in Response to COVID-19

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On June 23, 2020, the staff of the Division of Corporation Finance of the Securities and Exchange Commission (the "***SEC***") issued additional disclosure guidance ("***Topic No. 9A***") providing the staff's most recent views regarding operations, liquidity, and capital resources disclosures and other compliance obligations related to COVID-19 and its impacts on businesses and markets. Topic No. 9A supplements the Division's Disclosure Guidance Topic No. 9 issued on March 25, 2020. A link to new Topic No. 9A can be found here and a link to the earlier Topic No. 9 can be found here.

Disclosure Considerations Regarding Operations, Liquidity and Capital Resources

In issuing Topic No. 9A, the staff continues to encourage reporting companies to provide disclosures that allow investors to evaluate, through the eyes of management and the Board of Directors, the current and expected impact of COVID-19 on the company's operations and financial condition, including liquidity and capital resources, and to update disclosures as facts and circumstances change.

The staff further observed that reporting companies have generally made a wide range of operational adjustments in response to the effects of COVID-19 (such as transitioning to telework or implementing supply chain and distribution adjustments), the disclosure of which may be material to an investment or voting decision. Reporting companies have also undertaken a wide variety of increasingly sophisticated financing activities to address liquidity concerns arising from the effects of COVID-19, many of which have innovative terms and structures. The staff emphasized the importance of providing robust and transparent disclosures around these efforts to address short-term and long-term liquidity and funding risks in the current economic environment. Noting some companies have included these disclosures in earnings releases, the staff further encouraged companies to consider whether such disclosures, in light of their materiality, should be included in management's discussion and analysis ("***MD&A***") sections of periodic reports.

Under the staff's guidance articulated in Topic No. 9A, each reporting company should analyze the impact of COVID-19 on its financial condition, results of operations, liquidity and capital resources with a view to potential disclosures regarding a host of topics, including:

- Responses to operational challenges observed by management and the Board of Directors, such as the implementation of new health and safety policies in the workplace, and their impact on financial condition;
- Overall liquidity position and the impact of any decreases in cash flow, including examination of the company's sources and uses of funds and the materiality of assumptions regarding the impacts of COVID-19 on revenues;
- Use of revolving lines of credit or capital raised in public or private markets to address liquidity needs, as well as any unused sources of liquidity;
- Access to traditional funding sources, including any changes in customary terms, collateral or guarantee requirements, and any impact on the company's ability to maintain its current operations;
- Risks of material non-compliance with covenants in credit and other agreements;
- Use of cash burn rate, daily cash use or similar metrics, and the definitions, estimates and assumptions underlying these metrics;
- Reductions in or suspensions of capital expenditures, share repurchase programs and dividend payments; cessations of business operations or dispositions of material assets or business lines; and changes in human capital expenditures; and the impact of such adjustments on the company's ability to meet its financial obligations;
- Ability to timely service financial obligations, and any use of deferral periods, forbearance periods or other concessions;
- Alterations to customer agreements (including extended payment terms) that may impact the company's financial condition, liquidity or capital resources; and
- Impact of events occurring after the end of the reporting period but before financial statements are issued, and whether such events constitute known trends or uncertainties that should be discussed in MD&A.

Disclosing Government Assistance under the CARES Act

The staff noted its view that reporting companies receiving federal financial assistance under the CARES Act in the form of loans and tax relief in the form of deferred or reduced payments should consider the short-term and long-term impact of that assistance on their financial condition, results of operations, liquidity and capital resources, as well as the related disclosures and critical accounting estimates and assumptions.

Companies should consider disclosing:

- Impacts of such loans on financial condition, liquidity and capital resources;
- Anticipated ability to comply with the material terms and conditions of any such assistance;
- Limitations on ability to seek other financing sources;
- Whether requirements to maintain employment levels are reasonably expected to have a material impact on revenues or income;
- Impact of recent tax relief on short-term and long-term liquidity; and
- Whether financial assistance involves new or modified material accounting estimates or judgments that should be disclosed.

Continuing as a Going Concern

The staff encouraged reporting companies to consider whether conditions and events raise substantial doubt about the company's ability to meet its obligations as they become due within one year after the issuance of the financial statements. Where substantial doubt arises about a company's ability to continue as a going concern or management has addressed such substantial doubt, management should provide appropriate disclosures in the financial statements and MD&A.

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