

March 26, 2020

## **SEC Extends Conditional Reporting Relief; CorpFin Staff Issues COVID-19 Disclosure Guidance**

The SEC, in its ongoing effort to assist reporting companies and other market participants in meeting their reporting and other obligations under the federal securities laws, announced yesterday that it was extending the conditional relief granted on March 4, 2020 (the “Original Order”) in respect of certain SEC filing obligations (press release available [here](#)). The extension is set forth in an order (the “Updated Order”) (available [here](#)) that supersedes the Original Order. Concurrently, the Staff of the Division of Corporation Finance (the “Staff”) issued CF Disclosure Guidance Topic No. 9 (“CF-9”) (available [here](#)) setting forth its views regarding disclosure and securities law obligations that reporting companies should consider in respect of COVID-19 and related business and market disruptions.

### **The Updated Order**

The Updated Order provides reporting companies and others with SEC filing obligations with a 45-day extension to file reports<sup>1</sup> that otherwise would have been due between March 1 and July 1, 2020. The Original Order covered reports that would have been due between March 1 and April 30. Like the Original Order, the Updated Order requires any reporting company seeking to rely on the conditional relief to furnish a Form 8-K or, in the case of a foreign private issuer, a Form 6-K by the later of March 16 and the original filing deadline for the report:

- stating that it is relying on the Updated Order;
- providing a brief description of the reasons why it could not file such report, schedule or form on a timely basis;
- stating the estimated date by which the report, schedule or form is expected to be filed; and
- providing a company-specific risk factor or set of risk factors explaining the impact, if material, of COVID-19 on its business.

If the reason the subject report cannot be filed timely relates to the inability of any person, other than the reporting company, to furnish any required opinion, report or certification, the Form 8-K or Form 6-K is to

---

<sup>1</sup> The Original Order and the Updated Order cover materials (and amendments thereto) required by Sections 13(a), 13(f), 13(g), 14(a), 14(c), 14(f) and 15(d) and Regulations 13A, 13D-G (except for those provisions mandating the filing of Schedule 13D or amendments to Schedule 13D), 14A, 14C and 15D of the Securities Exchange of 1934, and Rules 13f-1 and 14f-1 thereunder, as applicable.

have attached as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the date such report must be filed.

A reporting company or any person required to make any SEC filings with respect to such reporting company must file with the SEC any report, schedule or form required to be filed no later than 45 days after the original due date. In any report, schedule or form filed by the applicable extended deadline, the reporting company or such other person must disclose that it is relying on the Updated Order and state the reasons why it could not file such report, schedule or form on a timely basis.

The Updated Order clarifies that a Form 8-K or Form 6-K must be provided for each filing that is delayed.

The Updated Order carries over the same relief as in the Original Order in respect of proxy statements, annual reports and other soliciting materials, as well as information statements, to the extent a good faith effort is made to furnish these materials to security holders located in areas where delivery services of the type customarily used for these documents have been suspended.

As it did on March 4, the Staff indicated it would take the following positions:

- For purposes of eligibility to use Form S-3 or Form F-3 (and for well-known seasoned issuer status, which is based in part on Form S-3 or Form F-3 eligibility), a reporting company relying on the Updated Order will be considered current and timely in its Securities Exchange Act of 1934 (“Exchange Act”) filing requirements if it was current and timely as of the first day of the relief period and it files any report due during the relief period within 45 days of the filing deadline for the report.
- For purposes of the Form S-8 eligibility requirements and the current public information eligibility requirements of Rule 144(c), a reporting company relying on the Updated Order will be considered current in its Exchange Act filing requirements if it was current as of the first day of the relief period and it files any report due during the relief period within 45 days of the filing deadline for the report.
- Reporting companies will be permitted to rely on Rule 12b-25 if they are unable to file the required reports on or before the extended due date.

### **CF Disclosure Guidance Topic No. 9**

The Staff has issued guidance in light of its view that the effects of COVID-19 and related business and market disruptions on reporting companies, management’s expectations as to future impacts, management’s responses to unfolding events and management’s planning for uncertainties can be material to investment and voting decisions. The Staff notes that its rules are, in effect, principles-based and that, notwithstanding the absence of specific line item requirements, discussion of COVID-19-related matters

may be necessary or appropriate in the MD&A, the business section, the risk factors, the description of legal proceedings, disclosures relating to disclosure controls and procedures and internal control over financial reporting, and the financial statements.

Disclosures need to be tailored to the specific facts of the reporting company, and they should enable investors to evaluate the current and expected impact of COVID-19 “through the eyes of management.” The Staff encourages reporting companies to proactively revise and update disclosures as facts and circumstances change. The Staff also recognizes that many COVID-19 disclosures will have forward-looking elements that may be based on assumptions and expectations regarding future events.

### *Questions to consider*

The Staff offers some questions for reporting companies to consider (as examples):

- How has COVID-19 impacted your financial condition and results of operations? In light of changing trends and the overall economic outlook, how do you expect COVID-19 to impact your future operating results and near- and long-term financial condition? Do you expect that COVID-19 will impact future operations differently than how it affected the current period?
- How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook? Has your cost of, or access to, capital and funding sources, such as revolving credit facilities or other sources, changed, or is it reasonably likely to change? Have your sources or uses of cash otherwise been materially impacted? Is there a material uncertainty about your ongoing ability to meet the covenants in your credit agreements? If a material liquidity deficiency has been identified, what course of action has the company taken or proposed to take to remedy the deficiency?<sup>2</sup> Do you expect to disclose or incur any material COVID-19-related contingencies?
- How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets? For example, will there be significant changes in judgments in determining the fair-value of assets measured in accordance with U.S. GAAP or IFRS?
- Do you anticipate any material impairments (e.g., with respect to goodwill, intangible assets, long-lived assets, right of use assets or investment securities), increases in allowances for credit losses,

---

<sup>2</sup> The Staff suggests that reporting companies consider the requirement to disclose known trends and uncertainties as they relate to the ability to service debt or other financial obligations, access the debt markets, including commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral, and counterparty or customer risk. See prior SEC guidance (available [here](#)).

---

restructuring charges, other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on your financial statements?

- Have COVID-19-related circumstances, such as remote work arrangements, adversely affected your ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures? If so, what changes in your controls have occurred during the current period that materially affect or are reasonably likely to materially affect your internal control over financial reporting? What challenges do you anticipate in your ability to maintain these systems and controls?
- Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so? Do you face any material resource constraints in implementing these plans?
- Do you expect COVID-19 to materially affect the demand for your products or services?
- Do you anticipate a material adverse impact of COVID-19 on your supply chain or the methods used to distribute your products or services? Do you expect the anticipated impact of COVID-19 to materially change the relationship between costs and revenues?
- Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?
- Are travel restrictions and border closures expected to have a material impact on your ability to operate and achieve your business goals?

### *Reporting considerations*

The Staff encourages reporting companies to proactively address financial reporting matters earlier than usual. The Staff cites the example of needing to consult with experts to determine how the evolving COVID-19 situation may impact assets, including impairment of goodwill or other assets.

The Staff also reminds reporting companies of their obligations in respect of non-GAAP/IFRS financial measures as well as the SEC's recent guidance relating to disclosures of performance metrics (available [here](#)). The Staff notes that, to the extent a reporting company presents a non-GAAP/IFRS financial measure or performance metric to adjust for or explain the impact of COVID-19, or changes the method by which it calculates a metric as a result of COVID-19, it would be appropriate to highlight why management finds the measure or metric useful and how it helps investors assess the impact of COVID-19 on the reporting company's financial position and results of operations.

Where GAAP/IFRS financial measures are not yet available at the time of an earnings release, the Staff has indicated that it would not object to reporting companies reconciling a non-GAAP/IFRS financial measure to preliminary GAAP/IFRS results that either include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP/IFRS results.<sup>3</sup> The Staff notes that this accommodation reflects the view that non-GAAP/IFRS financial measures and performance metrics can be a useful way for management to share with the market how it and the board of directors are assessing the current and potential impact of COVID-19 on operating results and financial condition.

The Staff cautions that, if a reporting company presents non-GAAP/IFRS financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP/IFRS financial measures in reliance on its accommodation, management should limit the measures in its presentation to those non-GAAP/IFRS financial measures it is using to report financial results to the board of directors. If a reporting company presents non-GAAP/IFRS financial measures that are reconciled to provisional amount(s) or an estimated range of GAAP/IFRS financial measures, it 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.

### **Other Reminders**

In yesterday's press release, the SEC and, in the CF-9 guidance, the Staff:

- Reminded reporting companies encountering administrative difficulties in the SEC filing process to contact the Staff, which will continue to address these and any other COVID-19-related issues on a case-by-case basis. Persons requiring general assistance can call +1 202 551-3500 or submit a request online (link available [here](#)). The Contact Information sheet (available [here](#)) is a useful guide as to whom to contact at the Staff with questions. Requests for interpretations or waivers of financial statement requirements can be submitted via email (address: [DCAOLetters@sec.gov](mailto:DCAOLetters@sec.gov)). Assistance can also be requested via email (address: [CFEmergency@sec.gov](mailto:CFEmergency@sec.gov)).
- Encouraged reporting companies to provide current and forward-looking information to the market and reminded reporting companies that they can take steps to avail themselves of the safe harbor for forward-looking statements available under Section 21E of the Exchange Act and Section 27A of the Securities Act of 1933.

---

<sup>3</sup> For example, if a reporting company intends to disclose on an earnings call its EBITDA, it could reconcile that measure to either its GAAP/IFRS earnings, a reasonable estimate of its GAAP/IFRS earnings that includes a provisional amount, or its reasonable estimate of a range of GAAP/IFRS earnings. The provisional amount or range should reflect a reasonable estimate of COVID-19-related charges not yet finalized, such as impairment charges.

- Reminded reporting companies to take steps necessary to avoid selective disclosure and to disseminate material information related to the impact of COVID-19 broadly.
- Reminded reporting companies that, depending on their particular circumstances, they should consider whether they need to revisit, refresh and update previous disclosures to the extent that the information has become materially inaccurate.
- Reminded reporting companies and their insiders to consider their respective activities in light of their disclosure obligations under the federal securities laws. Where the reporting company has become aware of material risks relating to COVID-19 that have not yet been disclosed to the market, it should refrain from trading and should discourage officers, directors and other insiders who are aware of the relevant matters from trading until the market is adequately informed about the material risks.
- Reminded all that health and safety are the first priority and should not be compromised to meet SEC reporting requirements.

\* \* \*

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Scott A. Barshay  
+1-212-373-3040  
[sbarshay@paulweiss.com](mailto:sbarshay@paulweiss.com)

Mark S. Bergman  
+44-20-7367-1601  
[mbergman@paulweiss.com](mailto:mbergman@paulweiss.com)

Christopher J. Cummings  
+1-212-373-3434  
[ccummings@paulweiss.com](mailto:ccummings@paulweiss.com)

Brad S. Karp  
+1-212-373-3316  
[bkarp@paulweiss.com](mailto:bkarp@paulweiss.com)

John C. Kennedy  
+1-212-373-3025  
[jkennedy@paulweiss.com](mailto:jkennedy@paulweiss.com)

Audra J. Soloway  
+1-212-373-3289  
[asoloway@paulweiss.com](mailto:asoloway@paulweiss.com)