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Public Disclosures and Securities Compliance to Address in a Time of Crisis



The immediate and possibly severe financial and business impacts of the coronavirus (COVID-19) outbreak have resulted in public companies closely reviewing their public disclosures and related securities compliance. Many of these disclosure and compliance concerns may apply to any crisis.

To initiate the process, the company should gather a cross-functional team to assess all of the potentially material direct and indirect impacts of the crisis, and make sure it has gathered sufficient objective facts to assess the situation. This process may build on the company's existing approach to enterprise risk management (ERM) but may need to be accelerated and adapted for the crisis situation. The company can then assess the following issues.

On March 23, 2020, the co-directors of the SEC's Division of Enforcement made a [public statement](#) emphasizing to companies and their directors and officers the importance of disclosure controls and procedures and that, in these dynamic circumstances, corporate insiders are regularly learning new material nonpublic information that may hold an even greater value than under normal circumstances. The group of individuals with knowledge of material nonpublic information may also be larger than is typical. Public companies should be mindful of insider trading prohibitions, codes of ethics, and Regulation FD and selective disclosure prohibitions to ensure to the greatest extent possible that they protect against the improper dissemination and use of material nonpublic information. This public statement serves as an important backdrop for the discussion below.

Proactive Disclosures

Updating Guidance. Few companies have an obligation to update guidance if following appropriate protocols, and companies should be cautious about providing updates to guidance without having sufficient confidence in anticipated results. Many companies, however, may consider it prudent to warn the market when guidance is no longer valid or provide updated guidance ranges if the company has reasonable estimates. In any event, a company should be careful not to inadvertently imply that current guidance is still valid through other positive public disclosures.

If a company chooses to either suspend or update guidance, it should make clear that the announcement is due to the extreme situation and that the company is not undertaking an obligation to update its guidance on a more regular basis than is its usual or announced practice.

Market Communications. While not required, each company should consider whether to proactively update the market on the impacts of the crisis on the particular company, especially if the impact is not readily apparent to investors or has not been identified by the company's analysts. The update could include fairly neutral statements about uncertainty of the impacts. For example, a company may disclose that stores or manufacturing facilities have been temporarily closed, and that the company does not have sufficient information to disclose the impact on financial results. Proactive disclosure may help to calm investors, as uncertainty can be worse than the actual results.

Investor / Analyst and Other Discussions—Reg FD. A crisis such as that caused by the COVID-19 pandemic may result in many investors and analysts reaching out to the company, as well as other company-initiated communications with customers, suppliers, and business partners. Regulation FD prohibits the disclosure of material, nonpublic information to the investment community except through appropriate channels. Prohibited disclosures can include "body language" and soft signals about the potential impact of the crisis (positive or negative). If a company wants to communicate privately with the investment community, or, out of caution, its business partners, the company should make sure to then publicly disclose any material information discussed with them in a press release or on Form 8-K.

A company may also want to provide company representatives with standard language to respond to inquiries regarding the company's guidance, such as "we do not comment on previously issued guidance, which speaks as of the date of its issuance."

Required Reporting

In addition to addressing the specific impacts of the COVID-19 pandemic in periodic reports, companies should apply broader lessons learned from the current crisis—e.g., previously unidentified material risks or liquidity exposure that may not have been apparent before the crisis—and discuss those risks in their periodic reports. The following are typical areas that may need additional disclosure.

MD&A. MD&A disclosure will need to identify and analyze any current and anticipated material impacts of the crisis on the company's liquidity, financial condition, or operating results. In particular, management should disclose whether its liquidity needs, access to financing, or compliance with its debt covenants will be affected. Even if the effects of the current public health outbreak are not yet fully known, the company should consider disclosure of the reasonably possible effects of the COVID-19 pandemic on its future results of operations, cash flow, and balance sheet items. If it fails to do so and later reports adverse effects from the impact of the virus, it

could face claims that it failed to comply with MD&A disclosure requirements.

Risk Factors. Risk factors should take into account the types of impacts that a crisis such as COVID-19 could have on the business, such as disruptions to supply chains. The COVID-19 pandemic will affect each company differently, so every company should update its next periodic report to address any specific risks to its business and then continue to maintain and update the risk factor in any future reports if it is still relevant.

Accounting Disclosure. Companies should consider any accounting impacts and update their accounting conclusions and footnote disclosures accordingly. U.S. GAAP may require companies to provide subsequent-events disclosures related to the impact of the COVID-19 crisis in the notes to their financial statements under Accounting Standards Codification (ASC) 855-10, *Subsequent Events*. Under this standard, the company should evaluate events subsequent to the balance sheet date through the date the financial statements are issued.

Form 8-K Disclosure. Generally, the effects of COVID-19 and other crises will not require a specific Form 8-K disclosure. However, a company may wish to utilize a Form 8-K filing to disclose matters such as plant closures that result in a material charge or a material impairment charge, or to comply with Regulation FD.

Internal and Disclosure Controls

Companies should assess whether they need to implement new internal controls or modify existing ones to identify the actual and anticipated effects of the COVID-19 pandemic. Changes in internal controls may be necessary due to disruption in operations, inability to travel, or employee unavailability, and management may need to identify alternative, appropriately-designed controls if an existing control procedure cannot be performed. Any changes that have materially affected, or that are reasonably likely to materially affect, the company's internal controls must be disclosed in Item 4 of Form 10-Q or Item 9A of Form 10-K.

Trading and Buybacks

Buyback Restrictions and Rule 10b5-1 Plans. A public company is not allowed to repurchase shares while in possession of material, nonpublic information. For that reason, it is standard for companies to only continue to share repurchase programs during a blackout period under a Rule 10b5-1 plan. A Rule 10b5-1 plan, if properly put in place during an open window in good faith, protects a company from an accusation that it repurchased shares while in possession of material, nonpublic information.

Special Issues. The severe impact of a crisis such as the COVID-19 pandemic may result in the company having material, nonpublic information outside of the normal quarter end blackout period. Accordingly, companies should be cautious about either conducting discretionary repurchases or putting in place a 10b5-1 plan. Further, companies should consider whether to close insider trading plan employee trading windows beyond normal blackout periods. On the flip side, liquidity concerns may cause a company to terminate a 10b5-1 plan or otherwise suspend discretionary repurchases. A company should consult counsel prior to terminating a 10b5-1 trading plan as termination may call into question whether the plan was entered into in good faith and would need to be considered prior to entering into a subsequent 10b5-1 plan.

SEC Deadlines and Relief

The SEC recently issued an [order](#) granting relief for certain filing obligations under federal securities laws. Reporting companies will have an additional 45 days to file certain reports that would have been due between March 1 and April 30, 2020, subject to certain conditions.

To take advantage of the relief provided by the recent SEC order, a company must furnish a current report on Form 8-K (or, if eligible, Form 6-K) to the SEC by the later of March 16 or the original filing deadline stating that the company is relying on the SEC's order, a description of the reasons it could not file on a timely basis, the estimated date by which the filing is expected, and, if appropriate, a risk factor explaining the impact of the COVID-19 crisis on its business, among other conditions. Additionally, the SEC's order provides relief for companies required to furnish proxy statements, annual reports, and other soliciting materials when a security holder has a mailing address located in an area where, as a result of COVID-19, the common carrier has suspended delivery services and the company has made a good faith effort to furnish the applicable materials to the security holder.

A [recent statement](#) from SEC Chairman Jay Clayton noted that the SEC staff has worked pragmatically to address the current situation and will continue to work with federal and state authorities and market participants. The SEC has also provided an [overview](#) of its responses to COVID-19, which includes links to its guidance and orders.

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