

March 20, 2020

Disclosure Issues Relating to COVID-19

Among the many issues facing public companies as a result of the COVID-19 pandemic is how to handle disclosure. The pandemic is having a material impact on most companies. While in a few cases the crisis may actually be increasing demand for a company's products or services, in the overwhelming number of cases, the business impact is negative. The pandemic may affect operations, employees, customers, supply chains, outlook, stock trading, risk factors, and a variety of other aspects of a company's business, results and prospects. Internal disclosure controls should also be reviewed to ensure that the company is eliciting and assessing the right information in order to make the right decisions. Almost every company will need to decide what it is going to say about this impact and when it is going to say it. The right answers will be very company-specific, but factors to be considered include:

1. Substance of disclosures

- Risk Factors. A company should consider what are the primary risks to its business and operations presented by the COVID-19 pandemic. A number of companies have recently issued releases or made filings that have added one or more risk factors addressing the pandemic and its possible economic impact. While these may provide useful examples, each company should fully consider the risks that apply specifically to it and its situation in crafting such risk factor disclosure. In light of the unprecedented uncertainty, it may be appropriate to take a more conservative approach to risk factor disclosure.
- MD&A. To the extent COVID-19 has had an impact on a company's business and results by the time the company is filing its next periodic report, the impact should be discussed in sufficient detail in the MD&A. Similarly, any impact on trends and uncertainties may need to be discussed.
- Guidance. Given the rapidly evolving landscape of the COVID-19 pandemic, where information, impacts and even the regulatory environment can change in a matter of hours, the future is extremely uncertain. Companies may be considering what should be done about existing financial guidance. This is an extremely fact-specific and delicate question, especially because many issuers lack the clarity and visibility (including, for example, into such basic areas as how their business is doing, how their supply, channel and customer chain has been disrupted, and how long disruptions will continue) to draw conclusions. For companies that are uncertain about their prior guidance but are not ready to withdraw guidance or issue new guidance, it will be important to, at a minimum, not take actions or make statements that could be interpreted as "adopting" or re-affirming the prior guidance. Companies that choose to withdraw prior guidance, without issuing revised guidance, will usually focus on the uncertainty of the impact of COVID-19. Some may indicate that they intend to provide revised guidance at such time as the company is able to do so. Whether or not there is a "duty to update" is a fact-specific and complicated judgment that will be made by companies on a case-by-case basis and which depends, among other things, on what has previously been said, what is currently known,

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and whether the company is engaged in an activity, such as being in the market for shares, that have a heightened disclosure obligation.

## 2. Timing of disclosures

- Earnings Releases and Periodic Reports. A company will need to decide on appropriate disclosure to be included in its next earnings release and periodic report on 10-K or 10-Q. As noted, disclosure may be appropriate in the company's Risk Factors and MD&A sections, and potentially other sections, and the company should consider appropriate disclosure about its guidance in its earnings release.
- Earlier and Other Disclosures. Various circumstances may cause a company to consider disclosures relating to the impact of the COVID-19 pandemic prior to its next earnings release or periodic report, including if it wants to buy or sell its own securities. Similarly, if a company becomes aware of COVID-19 related information that could be deemed to be material to investors, it should consider whether to keep trading windows closed prior to disclosure of information to investors. Even if not legally required, a company may also want to consider whether early disclosure would be beneficial from an investor relations and credibility perspective. Some companies will also choose to address in the proxy statement and related materials (such as the CEO or Board letter) matters concerning the company's response and risk oversight processes.
- Selective Disclosure / Regulation FD. Companies need to continue to be vigilant on Regulation FD issues through training, coordination and approval of communications. As highlighted by the SEC in its March 2020 statement, "[w]hen companies do disclose material information related to the impacts of the coronavirus, they are reminded to take the necessary steps to avoid selective disclosures and to disseminate such information broadly." This cautionary note regarding ensuring continued compliance with Regulation FD will also apply to material non-public information concerning financial results, business impacts, guidance, and other material issues.

Because of the company-specific nature of both the substance of disclosures relating to the COVID-19 pandemic and the timing of those disclosures, it is not possible to provide generic advice that applies across the board on what a company should say and when it should say it. But all public companies should be considering these questions and consulting with counsel as appropriate.

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