COVID-19 Ramifications for Public Companies—SEC Disclosures, SEC Filings and Shareholder Meeting Logistics: First Analysis

A Lexis Practice Advisor® Article by
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Introduction

This First Analysis article discusses some key ramifications of coronavirus outbreak for public companies. In addition to a host of significant general business concerns, such as those relating to liquidity and financing opportunities, revenues, supply chain and employee and community health and welfare, the novel coronavirus known as COVID-19 has raised a number of issues specific to public companies that file reports with the US Securities and Exchange Commission (SEC). These matters include the application of SEC disclosure requirements, logistics for upcoming shareholder meetings and administrative challenges in complying with SEC requirements.

Initial Guidance

SEC Disclosures and Related Requirements

To a large degree, SEC disclosure requirements are principles-based. Applying the concept of materiality to the impact of COVID-19, there are many areas where existing SEC rules, while not expressly mentioning pandemics, could require disclosure. Such disclosure considerations could arise in the context of a regularly scheduled periodic report, such as an annual or quarterly report. Or, there could be an issue that requires more immediate disclosure through a current report on Form 8-K, Form 6-K, or in a press release. Depending on the circumstance, COVID-19 disclosures also may need to be discussed in registration statements, prospectuses, proxy statements or information statements. However, as discussed further below, disclosures should be specific, not generic, and should be tailored to the particular facts and circumstances applicable to the issuer.

For additional disclosure and reporting considerations, see Periodic and Current Reporting Resource Kit and Financial Statements and Reporting Resource Kit.

Risk Factors. With the impact from COVID-19 intensifying rapidly, companies may become increasingly aware of additional ways in which the pandemic poses specific risks beyond what they may have previously disclosed. It would be useful for companies to begin drafting more detailed risk factors relating to COVID-19 for inclusion in their next SEC filing that requires risk factor disclosure. If a company determines that a particular risk or development relating to COVID-19 is sufficiently material that it should be disclosed prior to its next periodic report or registration statement filed with the SEC, such as might be the case if it is currently in the market buying or selling its securities, it may decide to disclose a new COVID-19 risk factor through a current report filing. For additional information on drafting risk factors, see Risk Factor Drafting for a Registration Statement and Top 10 Practice Tips: Risk Factors.

Forward-Looking Statements. Companies disclosing how COVID-19 may affect their future performance should consider framing their discussions to take advantage of the safe harbor for forward-looking statements set forth in Section 21E of the Securities Exchange Act of 1934, as amended (Exchange Act). For example, when discussing COVID-19 matters, companies may want to include an explanation regarding the use of forward-looking statements, indicating that actual results of the impact of COVID-19 may be materially different and identifying forward-looking remarks with words such as "believes," "expects," or "hopes." Companies may also want to expressly include the impact of COVID-19 as a factor that could impact actual results in their more general discussions of forward-looking information. For additional information on forward-looking statements, see Safe Harbors for Forward-Looking Statements and Forward-Looking Statements Safe Harbor Checklist.

Management's Discussion and Analysis. Management's discussion and analysis (MD&A) must include information that a company "believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations." With COVID-19 impacting so many companies, often negatively, but in some cases providing opportunities, it is important for the MD&A to not only disclose COVID-19 as a known trend or uncertainty but also management's perspective on the type and extent of COVID-19's effect on the company, to the extent material. There are many possible questions for companies to assess for materiality in the COVID-19 context as they prepare their MD&A. For example, has the company experienced supply chain issues? Are these supply chain issues anticipated to be ongoing? How has COVID-19 affected liquidity? Has the company drawn down on bank facilities for any reason, including because it has not been able to finance in the capital markets? Has the company needed to close any locations? If the company switched its workforce to telecommuting, has there been any reduction in productivity? Is the company party to contracts with force majeure provisions that are or may be triggered by the COVID-19 pandemic, and if so, is that having a material impact on the company's business? Is the company having a dispute with its insurance carrier regarding business continuity coverage? For additional information, see Management's Discussion and Analysis of Financial Condition and Results of Operations.

Financial Statement Footnotes. Companies should discuss with their accountants whether COVID-19 disclosure is needed as part of their financial statement footnotes. This could include a subsequent event footnote.

Business. To the extent a company is filing a report or registration statement with the SEC that requires a business description, the company will need to consider whether additional or revised disclosure is needed to the extent that COVID-19 has materially changed its business. For example, did the company exit any business line? Did the company close any facility? Is the company having difficulty sourcing inventory and considering alternative sources than those previously used? Are some segments of the company's business impacted more than others? Did the company lay off workers as a result of a business slowdown? Were any acquisitions or organic growth initiatives put on hold?

Litigation. Litigation arising out of COVID-19 may also require disclosure. For instance, it is possible that some companies might face class action lawsuits alleging failure to protect customers or workers from the virus.

Earnings Releases, Earnings Calls and Guidance. Because of the widespread impact of COVID-19, companies should consider addressing, to the extent material, the impact of COVID-19 in upcoming earnings releases. They should also be prepared to answer analysts' questions about the effect of COVID-19 on their earnings calls. It may be useful to script and practice answers to such questions in advance.

Although the federal securities laws do not mandate a specific duty to update prior statements, including guidance, some courts have recognized a duty to update in certain situations. Consequently, companies that have provided guidance to investors should consider updating that guidance, or advising investors to no longer rely on that guidance, to the extent their guidance has materially changed.

Regulation FD. Companies may be fielding many questions regarding COVID-19 because of its pervasive effect on the global economy. Public companies must be careful to avoid selective disclosure of material non-public information about how COVID-19 is affecting them by disseminating such information in a Regulation FD-compliant manner, such as a press release or an Item 7.01 Form 8-K. For further information on Regulation FD, see Regulation FD and Regulation FD Training Presentation Materials.

Insider Trading; Stock Repurchases. Directors, officers and employees of public companies should not be trading in securities while in possession of material, non-public information. The COVID-19 pandemic is a rapidly evolving situation. If a company becomes aware of a COVID-19 development that may have material ramifications to the company, the company, as well as its directors, officers and employees should avoid trading in the company's securities until that development has been publicly disclosed, unless

such trading is accomplished pursuant to a Rule 10b5-1 trading plan entered into while not in possession of material non-public information regarding the company. Companies may need to consider whether any special black-out period should be implemented to prevent insider trading when there is material information that has not been disclosed to the public. Given recent stock price deterioration as a result of generalized market volatility, some companies may be considering effecting stock repurchases. Careful consideration should be given to the company's quarterly blackout period, as well as to whether all information material to the company has been disclosed.

Controls and Procedures. Because the COVID-19 pandemic is affecting so many aspects of business, companies should consider what changes should be made to their disclosure controls and procedures, including making the potential impacts of COVID-19 an express part of their disclosure controls and procedures. Companies may also need to assess whether COVID-19 is having any impact on their internal controls over financial reporting.

Effecting Securities Offerings. All of the considerations discussed above become particularly timely should a company be contemplating issuing securities.

Shareholder Meeting Logistics

Companies planning for shareholder meetings should consider whether they should change the date or location of their annual meeting in response to COVID-19, either as a precautionary measure or as a result of local prohibitions on large gatherings. In addition to concerns about the ability of officers, directors and shareholders to attend annual meetings in person, a number of service providers that are part of the annual meeting process, including inspectors of election, already have sent notices alerting companies that their personnel will not travel to be present physically at annual meetings.

If the law of the jurisdiction of formation permits a company to conduct a virtual meeting, it may want to replace or supplement an in-person meeting with an online meeting that shareholders may attend remotely. Companies considering a virtual meeting should also confirm that nothing in their governing documents restricts their ability to convene a virtual meeting.

On March 13, 2020, the SEC staff issued guidance (Guidance) for conducting annual meetings in light of COVID-19 concerns. According to the Guidance, the staff takes the position that if a company has already mailed and filed its definitive proxy materials, it may notify shareholders of a changed date, time or location for its annual meeting without mailing additional soliciting materials or amending its proxy materials if, promptly after making its decision, the company:

- Issues a press release announcing the change
- Files the announcement as definitive additional soliciting material on EDGAR -and-
- Takes all reasonable steps necessary to inform other intermediaries in the proxy process (such as proxy service providers) and other relevant market participants (such as appropriate securities exchanges) of such change

The Guidance also suggests that companies that have not yet mailed and filed their definitive proxy materials should consider, based on their particular facts and circumstances, whether to include disclosure regarding the possibility that the date, time, or location of the annual meeting may change due to COVID-19.

The Guidance indicates that if a company plans to conduct its shareholder meeting either as a virtual meeting (conducted solely through the Internet or other electronic means) or as hybrid meeting (allowing shareholders to participate either in person or through electronic means), the company should notify shareholders, intermediaries and other market participants of such plans in a timely manner. Companies need to provide clear directions as to the logistical details of the virtual or the hybrid meeting, specifying how shareholders can remotely access, participate in, and vote at the annual meeting. To the extent that the company has not yet filed and delivered its definitive proxy materials, such disclosures should be in the definitive proxy statement and other soliciting materials. Companies that have already filed and mailed their definitive proxy materials would not need to mail additional soliciting materials (including new proxy cards) solely for the purpose of switching to a virtual or hybrid meeting if they follow the steps specified for announcing a change in the meeting date, time, or location.

Some companies are already including disclosures in proxy statements advising of the possibility of changes from in-person meetings and where information about any such changes will be made available so precedent language is available to review as a starting place for such disclosures.

Companies that use e-proxy to make proxy materials available through the Internet, must post definitive additional proxy solicitation materials, including those addressing changes in meeting logistics, on their proxy voting websites. Companies making such changes after

filing and mailing their definitive proxy statements should also consider whether their governing documents or the laws of their jurisdictions of formation have any additional notice requirements.

With respect to the presentation of shareholder proposals, the Guidance also encourages companies to permit the proponents or their representatives to present their proposals through alternative means, such as by phone, during the 2020 proxy season if feasible under governing law. In addition, if the proponent or representative is unable to attend the annual meeting and present the proposal as a result of COVID-19, the SEC staff would consider this failure to appear and present the shareholder proposal to be "good cause" for the purposes of Rule 14a-8(h). This means companies would not be able to assert Rule 14a-8(h)(3) as a basis to exclude a proposal submitted by the shareholder proponent for any meetings held in the following two calendar years.

SEC Exemptive Order

On March 4, 2020, the SEC issued an exemptive order (Order) under the Exchange Act to provide relief to public companies and persons required to make filings with respect to public companies that are unable to meet an SEC filing deadline as a result of circumstances related to COVID-19. The Order covers the period from March 1, 2020, to April 30, 2020, and the SEC indicated that it may extend the time period if necessary, with any additional conditions it deems appropriate.

Any company relying on the Order must furnish to the SEC a current report on Form 8-K or, if eligible, a Form 6-K, by the later of March 16, 2020, or the original filing deadline for the report. This interim disclosure must state that the company is relying on the Order and briefly describe the reasons why the company could not file the report, schedule or form (Required Document) on a timely basis. In addition, the Form 8-K or Form 6-K must state the estimated date by which the company expects to file the Required Document and, if material, include a risk factor explaining the impact of COVID-19 on the company's business. If the Required Document cannot be filed on time because of the inability of a third person to furnish a necessary opinion, report or certification, the Form 8-K or Form 6-K must attach as an exhibit a statement signed by such person explaining the reason for the delay. The company or the person relying on the Order must file the Required Document with the SEC no later than 45 days after its original due date and must disclose that the Order is being relied on and the reasons why the Required Document could not be filed on a timely basis.

Any company meeting the requirements of the Order will be considered current and timely in its Exchange Act filing requirements, and therefore eligible to use Form S-3, if it was current and timely as of the first day of the relief period and it files the Required Document that was due during the relief period within 45 days of its original filing deadline. A company relying on the Order will be deemed to satisfy Form S-8 and Rule 144(c) requirements if it was current as of the first day of the relief period and it files the Required Document that was due during the relief period within 45 days of its original filing deadline. 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.

The Order also provides relief relating to the obligations under the SEC's proxy rules to furnish materials to security holders when mail delivery is not possible, as long as certain conditions are satisfied. For this exemption to apply, the company's security holder must have a mailing address located in an area where the common carrier has suspended delivery of service of the type or class usually used for the solicitation as a result of COVID-19 and the company or other person making the solicitation must have made a good faith effort to furnish the soliciting materials to the security holder.

Looking Ahead

Investors and the SEC are likely to review COVID-19 disclosure carefully. Therefore, public companies should start thinking now about upcoming COVID-19 disclosures in order to allow time for drafting and internal review of appropriate language. For example, it would be useful for companies to begin drafting more detailed risk factors relating to COVID-19 for inclusion in their next SEC filing for which risk factor disclosure is required or otherwise appropriate. Similarly, companies may want to start preparing and discussing the COVID-19 disclosure for their MD&A in advance of their next SEC filing requiring it.

Companies should also coordinate responses they are providing when responding to COVID-19 inquiries. It is important not to selectively disclose material non-public information to any investor. To the extent a company has material information to disclose relating to COVID-19, that information should be disclosed in a Regulation FD compliant method. If there has been an inadvertent selective material disclosure regarding COVID-19, the company must promptly disseminate such information by a press release or a Form 8-K.

Because of the swiftly moving changes in the COVID-19 situation and related impacts on companies, it is especially important for companies to take into account all aspects of their business, including reaching out to areas that may not normally be part of their disclosure controls and procedures, to ascertain whether anything is happening that could require disclosure.

Companies for which virtual meetings are permissible statutorily and by governing documents and that are considering switching in-person annual meetings to virtual meetings should be familiarizing themselves with the necessary technical logistics as far in advance of the meeting as practical, especially if this would be their first experience conducting a virtual shareholder meeting. It would be worthwhile to reach out to third-party providers that have experience hosting virtual meetings to get their input and to check their availability. Companies that are not planning to conduct virtual annual meetings may want to investigate the technical requirements, and applicable legal constraints from their jurisdiction of formation or their governing documents, for telephonic participation by officers and directors who may not be able to attend the shareholder meeting in person. Companies not conducting virtual meetings may also want to consider making their annual meetings available for shareholders to listen to via telephone or webcast, even if voting is only available through proxy or in-person attendance. In these situations, companies that are using technology for their annual meetings should be familiarizing themselves in advance with the tools to be used at the meeting.

Companies that decide to host a virtual meeting after filing their definitive proxy statement must file definitive additional proxy solicitation materials with the SEC, providing the details for participation in the virtual meeting, no later than the date first used. Similarly, companies using e-proxy must also post such material on their proxy voting website no later than the date such materials are first made public.

The SEC has publicized its willingness to discuss on a case-by-case basis administrative issues in complying with federal securities laws that may arise in connection with COVID-19 in addition to the ones addressed in the Order. Companies that have particular concerns should reach out to the SEC staff to discuss how to handle issues that may arise.

As the COVID-19 pandemic continues and governments and companies take additional precautionary measures that may impact business, more disclosure-related and filing or compliance issues may arise. It is possible that the SEC may issue additional guidance or orders in this area, so companies should monitor any further SEC developments.

The Order and Guidance are part of an evolving COVID-19 response that is moving across regulatory agencies. Companies might find the SEC's COVID-19 Response webpage to be a helpful resource.

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Laura Richman's wide-ranging corporate and securities practice has a strong focus on corporate governance issues and public disclosure obligations. Laura's practice includes Securities and Exchange Commission reports, such as proxy statements and annual, quarterly and current reports. She advises on executive compensation disclosure, insider trading regulation and Dodd-Frank and Sarbanes-Oxley compliance. Laura represents listed company clients with respect to stock exchange compliance matters. She advises clients on governance policies and other board and shareholder matters. In addition, her practice includes representing clients on transactions such as securities offerings and mergers and acquisitions, as well as providing general securities, corporate, limited liability company and contract advice. Laura has practiced with Mayer Brown since 1981.

With regard to securities transactions, Laura represents issuers and underwriters in public and private offerings of debt and equity securities (both initial public offerings and offerings of seasoned, public companies), including guidance on federal and state securities law compliance. She also advises issuers in connection with the securities law aspects of employee benefit plans and dividend reinvestment plans.

Other transactional matters in which Laura represents corporate clients include acquisitions and dispositions of assets or stock, restructurings (such as holding company formation) and going-private transactions. She also advises investors in leveraged buyout transactions, and represents financial institutions that take equity positions in companies. Laura advises clients on shareholder rights plans and anti-takeover protection provisions.

In addition to her governance and transactional practice, Laura counsels clients on day-to-day corporate questions. She drafts and reviews contracts and other corporate documentation, prepares terms and conditions of sale, provides guidance on limited liability company and other limited liability entity issues, and assists clients with various regulatory issues. Laura was named an Illinois Super Lawyer for Business/Corporate in 2006 and 2008.

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Mike Hermsen has an extensive practice that focuses on securities matters. He represents issuers, investment banking firms and security holders in connection with issuances of equity and debt securities. Mike also represents corporate clients in connection with compliance and reporting matters and counsels companies, boards of directors and management on stock purchases, liability management, executive compensation reporting and corporate governance matters.

Before Mike joined Mayer Brown in 1994, he had extensive senior administrative experience with the US Securities and Exchange Commission in Washington, DC. In the SEC's Division of Corporation Finance he served as Assistant Director (1992-1994), Special Counsel (1990-1992) and Attorney/Advisor (1986-1990). He also has accounting and audit experience with a then-Fortune 500 manufacturing corporation.

Mike has been included in The Best Lawyers in America in the practice areas of Securities/Capital Markets Law and Securities Regulation for over a decade and Legal 500 recommends Mike in "Capital Markets - Equity Offerings," noting Mike has "unsurpassed knowledge of SEC rules." In addition, Mike is frequently cited in the media regarding new regulatory initiatives.