CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: Public Company Disclosures Detailing the Impact of the CARES Act

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On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief and Economic Security Act (the "CARES Act"), a $2 trillion federal stimulus package intended to provide economic relief to individuals, large corporations, small businesses, state and local governments and public health institutions, among others. The CARES Act included a number of key provisions that are expected to impact businesses across the United States, including those relating to the extension of unemployment benefits, the deferral of employer payroll taxes (and the introduction of a number of other tax benefits designed to aid businesses impacted by COVID-19), low interest loans for businesses in certain industries particularly hard hit by COVID-19 and larger businesses, and the Paycheck Protection Program (a loan program designed to assist small businesses), to name a few.

In the two weeks since the adoption of the CARES Act, public companies are beginning to include disclosures detailing the impact of this legislation in filings submitted to the Securities and Exchange Commission (the "SEC"). As the impact of the CARES Act continues to materialize, public companies should consider adding disclosures to ensure that public filings take into account the impact that the CARES Act has had, or may at some point in the future have, on operations or financial performance. Specifically, public companies may consider addressing the following:

- **Paycheck Protection Program**: The Paycheck Protect Program (or “PPP”) is aimed at helping small businesses through the provision of low-interest (and potentially forgivable) loans that are administered through lenders and guaranteed by the Small Business Administration (the "SBA"). What constitutes a “small business" for purposes of these loans is largely driven by a company’s headcount. Businesses with fewer than 500 employees are deemed “small businesses” for purposes of the PPP, though a company can still qualify if its business meets either the employee number or revenue thresholds that the SBA has determined for the applicable industry.

  Public companies are not precluded from applying for or receiving loans under the PPP. Accordingly, to the extent a public company receives a loan under the PPP, the company will need to more immediately analyze whether the loan constitutes a direct financial obligation that is material to the company and whether the documentation evidencing the loan constitutes an entrance into a material definitive agreement made outside of the ordinary course of business, triggering 8-K disclosure under Items 2.03 and Item 1.01, respectively.

  In keeping with the SEC’s guidance to be proactive (and forward-looking, as described below), some companies (particularly in industries heavily impacted by the COVID-19 pandemic, such as the hospitality industry) are disclosing the actions they are taking to protect their businesses, including applying for (or receiving) loans under the PPP.

- **Impact of Tax Provisions of CARES Act**: Disclosures by public companies of the impact (or potential impact) of certain tax-related provisions of the CARES Act are becoming more common as companies are filing their quarterly and annual reports following the adoption of the legislation. Reporting companies are including disclosures in reports relating to provisions of the CARES Act that address the utilization of NOLs and the impact of modifications to the business interest expense deduction rules under Internal Revenue Code Section 163(j) for tax years beginning in 2019 and 2020. Reporting companies should carefully analyze the financial impact of the tax-centric provisions of the CARES Act on their businesses and whether further disclosure may be required.
- **Larger Business/Industry Loans under the CARES Act**: In addition to the PPP, the CARES Act also contemplates loan programs directed at certain industries (in particular, the airline industry) and mid-sized and larger companies. While these loan programs are not as developed as the PPP, the CARES Act contemplates certain limitations in connection with these loans that would impact corporate governance and public company disclosures. In particular, companies receiving loans under this program would be prohibited from paying dividends or repurchasing stock. Further, public companies seeking to avail themselves of assistance offered under the CARES Act may be obligated to disclose the impact of CARES Act assistance on current executive compensation arrangements. Executives of companies seeking a federal loan, loan guarantee, or other financial assistance may be obligated to agree to limitations or reductions with respect to compensation and/or severance pay that may be required under the CARES Act, which may give rise to additional disclosure obligations.

- **Financial Impact; Forward Looking Statements:** As the scope and extent of relief available to reporting companies under the CARES Act becomes clearer, public companies should continue to analyze whether operations or finances have been impacted in a manner that warrants additional disclosure in upcoming public filings. To the extent that the ultimate impact of the CARES Act is still unknown, public companies are incorporating general, forward-looking statements noting that it is difficult to ascertain the availability, extent or impact of relief sought under the CARES Act, or to conclude whether measures taken will be successful in mitigating difficulties resulting from the current global economic landscape.

  To that end, SEC Chairman Jay Clayton and Division of Corporation Finance Director William Hinman issued a joint statement on April 8, calling for "robust disclosure and engagement" by public companies relating to the impact of the COVID-19 pandemic, including forward-looking disclosure. Noting that upcoming earnings statements and calls "will not be routine" and that historical information about the prior quarter "may be substantially less relevant," the statement urges public companies "to provide as much information as is practicable regarding their current operating status and their future operating plans under various COVID-19-related mitigation conditions." The statement recognizes the challenges facing companies in providing such forward-looking information - particularly in these unprecedented times - but encourages public companies and their advisors to "make all reasonable efforts to convey meaningful information-information that provides investors a level of insight that allows them to see the key operational and financial considerations and challenges the company faces through the eyes of management."

If you have any questions regarding the above, please contact a member of Benesch's Corporate & Securities Practice Group.

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

