CLIENT ALERTS & INSIGHTS

COVID-19 Outbreak: Practice Tips for Public Companies

MARCH 16, 2020

Below are some brief practice tips for public companies in light of the ongoing COVID-19 outbreak. While this is a constantly-evolving situation, the following are a few disclosure and other considerations for public companies to keep in mind.

SEC Disclosure Considerations

Public companies should evaluate their public disclosures to ensure they appropriately capture the impact of the COVID-19 outbreak on their respective businesses - while not exhaustive, public companies should review the following:

Risk Factors: Public companies should review their existing risk factors and evaluate whether those risk factors are adequate, or if they need updating to reflect the risks of the COVID-19 outbreak and related disruptions that could impact their businesses.

Public companies should also review their risk factor language regarding the COVID-19 outbreak and/or similar outbreaks to ensure that the language is not (A) overly generic and (B) does not refer to only hypothetical risks when such risks have actually been experienced. With respect to the latter, in the COVID-19 context, if a business has suffered a material disruption to operations, the risk factor should not state merely that the COVID-19 outbreak "may" cause such disruption; rather, the risk factor should address the fact that it has caused such a disruption.

Public companies should also update their forward-looking statement language, as applicable, in connection with any changes to their risk factors.

Management's Discussion and Analysis ("MD&A"): As the outbreak commenced late in 2019 and in most cases, did not fully impact companies' operations for the period ending December 31, 2019, we are expecting MD&A disclosures to evolve as companies see the outbreak impact the results of their quarters ending in the upcoming months. At this stage, companies should consider, among other things, whether the outbreak will cause liquidity impairment and identify trends/concerns that will or are reasonably likely to impact the company's financial condition and results of operations.

Accounting Disclosures: Reporting companies should evaluate whether their current accounting and financial reporting takes into account the potential impact of the outbreak and that various assumptions in place remain appropriate.

Earnings Releases: Public companies with upcoming earnings releases should consider a number of factors:

- If they have traditionally provided an earnings outlook, whether to do so or suspend providing guidance.

- If they do continue to provide earnings outlook guidance, whether to affirmatively state that they will not be providing updates to such guidance unless required or stating that they will provide updates to their guidance.
- Preparation for questions regarding the impact of the COVID-19 outbreak on their business during earnings calls.

Public companies that have already gone through an earnings reporting cycle and previously provided earnings guidance for 2020 should consider whether providing any update to that guidance would be prudent.

Regulation FD: Public companies should be particularly careful about selective disclosures as they look to respond to stockholders and analysts about the impact of the COVID-19 outbreak on their businesses.

Insider Trading: Similarly, public companies should be aware of heightened insider trading risks as they are assessing the impact of the COVID-19 outbreak on their businesses and operations, and should consider whether it is appropriate to institute a share purchase blackout period if the company is currently in an open trading window.

SEC Order regarding Filing Extensions

On March 4, 2020, the SEC announced that it was providing conditional regulatory relief for certain public company filing obligations that would have been due between March 1 and April 30, 2020. This order provides conditional relief for public companies that have been impacted by the COVID-19 outbreak. A copy of the order can be found here.

Relief Provided: A 45-day filing deadlines extension for certain Securities Exchange Act of 1934, as amended, filings that would have been due between March 1 and April 30, 2020.

Conditions: Public companies looking to avail themselves of the filing extension are required to:

- File a Form 8-K (or a Form 6-K, for foreign private issuers), by the later of March 16, 2020 or the original filing deadline of the report.
- The 8-K must contain a summary including the following information: that the company is relying on the SEC order, explaining why the filing deadline cannot be met, and also when the company expects to make the filing.
- The order also advises that companies should include a risk factor about the impact of COVID-19 on its business, as applicable.
- Finally, if the company's filing delay is caused by a third party's inability to furnish a required opinion, report or certification, the 8-K (or 6-K, as applicable) must have as an exhibit a statement signed by such person with the specific reasons as to why the third party was not able to provide the required opinion, report or certification.

Companies relying on this order will not need to file a Form 12b-25 so long as the filing occurs within the time period provided under the order.

The order also provides relief around the delivery of proxy materials where stockholders have mailing addresses located in an area where delivery has been suspended as a result of the COVID-19 outbreak and the public company has made a good faith effort to furnish the proxy materials to the stockholders.

On March 6, 2020, Nasdaq issued an alert stating that Nasdaq-listed companies that satisfy the conditions under the SEC order will not be deemed to be deficient under the Nasdaq rules regarding timely filings.

Annual Meetings

As we approach the peak of annual meeting season, public companies that do not currently offer virtual attendance may want to consider changing an already scheduled annual meeting or offering stockholders the ability to attend the meetings virtually. On March 13, 2020, the Staff of the Division of Corporation Finance and the Division of Investment Management provided guidance regarding conducting annual meetings in light of the COVID-19 outbreak, which can be found here.

With respect to changing the date, time, or location of a scheduled annual meeting, the Staff has taken the position that public companies that have already mailed and filed definitive proxy materials can notify stockholders of a change in the date, time, or location of its annual meeting without mailing additional soliciting materials or amending its proxy materials if the company:

- issues a press release announcing such 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 any proxy service provider) and other relevant market participants (such as the appropriate national securities exchanges) of such change.

Companies should take these actions promptly after making a determination to change the date, time, or location of the annual meeting.

With respect to virtual annual meetings, the Staff reiterated that the ability to conduct a virtual meeting is governed by state law and a company's governing documents. The Staff further noted that, to the extent public companies are planning to hold a virtual meeting (be it entirely virtual or a combination virtual and in-person meeting), companies must disclose to their stockholders, intermediaries in the proxy process, and other market participants of such plans in a timely manner and disclose clear directions as to the logistical details of the "virtual" or "hybrid" meeting, including how stockholders can remotely access, participate in, and vote at such meeting.

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.

