



The Impact of Coronavirus on SEC Disclosures

MARCH 10, 2020

Introduction

International events, such as Brexit and the 2007 global recession, often drive SEC disclosures by public companies, and the disease known as COVID-19 (the “Coronavirus”) is proving to be no exception. On March 4, the SEC advised all public companies to assess what the Coronavirus means for their future operations and financial results and to make appropriate disclosures to their shareholders and other members of the investment community. In addition, the SEC allowed these companies to delay SEC filings if necessary to develop the information required to make accurate and complete disclosures of the impact of the Coronavirus on its operations and financial conditions. Specifically, the SEC issued an order stating that public companies that are unable, because of the Coronavirus, to meet filing deadlines for SEC reports due to be filed March 1 to April 30, 2020, will have 45 additional days to file these reports so long as, among other things, they file reports on Form 8-K describing the reasons why the report may not be filed on a timely basis.^[1]

All public companies should consider the impact of the Coronavirus on their SEC filings and shareholder communications. It is important to note that, because estimates of the extent and severity of the Coronavirus are rapidly evolving, public companies, and particularly their boards of directors and disclosure professionals, must be constantly attentive to the need to modify their thinking, and possibly their SEC and investor disclosures, in light of the latest developments. In short, it is not a “one and done” exercise but rather an ongoing challenge.

Key areas of attention and analysis include:

1. **Board communication and awareness:** All directors of public companies should be thinking and asking management about the effect of the Coronavirus on their companies’ operations and disclosure. Conversely, all management teams should be thinking aggressively about what directors need to know about the effect of the Coronavirus on their companies. The Coronavirus could reach areas far beyond SEC disclosure, including executive compensation and operational issues such as back-up supply lines.
2. **MD&A:** When filing reports on Form 10-K and 10-Q, SEC reporting companies must comply with Rule 303 of Regulation S-K, which requires disclosure “of known trends or uncertainties that have had or that the [company] reasonably expects to have a material favorable or unfavorable impact on net sales or revenues.”^[2] In particular, the SEC has stated that the purpose of MD&A is to enable investors to see the company and its risks and prospects “through the eyes of management.”^[3] Accordingly, disclosure committees and others in charge of

ensuring that SEC disclosures are correct and complete should find out what uncertainties and contingency plans their management teams are considering with respect to the Coronavirus and consider whether such uncertainties and plans should be disclosed in the MD&A sections of their SEC reports.

3. **Risk factors:** For companies highly impacted, the Coronavirus will likely require disclosure in the “Risk Factors” sections of reports on Form 10-K and Form 10-Q. SEC guidance requires Risk Factor disclosure to be specific and “tailored” to the particular facts and circumstances of the reporting company. The disclosure of specific facts about the past and the likely future effect of the virus is preferable to general observations about what impact those issues may or may not have in the future. Accordingly, companies should closely review their operations in geographic areas highly affected by the virus, such as China, and the effect on supply chains and logistical consideration involving China. It is quite unlikely that the Coronavirus will impact any two companies in exactly the same way and companies should avoid offering up general disclosures that fail to reflect specific factual considerations.
4. **Safe harbor disclosure regarding forward-looking statements:** Section 27A of the Securities Act and Section 21E of the Securities Exchange Act of 1934 allow companies to include in SEC disclosure documents “safe harbor” language to reduce their potential liability for “forward looking statements” if they identify the cautionary factors that might cause the forward-looking statements not to be accurate in material respects. All too often, when preparing press releases or reports on Form 10-K or Form 10-Q, companies uncritically copy the cautionary factors they used before without assessing whether the cautionary factors used the last time need to be updated and revised. A company should be careful to consider whether the Coronavirus, which obviously is unlikely to have been mentioned in prior reports, should be included as a cautionary factor in its safe harbor language in its next press release and SEC report.
5. **Analyst conference calls and communications:** Questions about the effect of the Coronavirus may be expected to be commonplace during conference calls with analysts. Accordingly, careful preparation and rehearsal are advisable to avoid missteps that give rise to the need for embarrassing corrections. One-on-one calls with analysts should always be handled with care, and especially so when the discussion turns to the Coronavirus because statements on this topic may be accorded unusual weight by the trading markets. Statements made during the calls about the Coronavirus, if material under the federal securities laws, can give rise to an immediate public disclosure obligation under Regulation FD. All statements made during these calls about the Coronavirus should be in line with the company’s prior statements. If not, the company should consider whether public disclosure is required under Regulation FD.
6. **Earnings guidance:** Companies must consider whether recent developments regarding the Coronavirus should cause them to revise their guidance as to future financial results. When the 2007 recession broke out, many companies decided that the effect of the recession on their future was so uncertain and unpredictable that the better course of action was to withdraw—rather than revise—previously issued estimates.

Please reach out to the Winston & Strawn team listed here to discuss strategies and options available to public companies that are looking to respond to the Coronavirus.

[1] See SEC Provides Conditional Regulatory Relief and Assistance for Companies Affected by the Coronavirus Disease (COVID-19), SEC (Mar. 4, 2020) (to qualify for relief, companies must (1) be unable to make required filings due to circumstances related to COVID-19; (2) file a current report on Form 8-K or Form 6-K, as applicable, stating (a) that the filer is relying on this order; (b) a brief description of the reasons why it could not file such report, schedule, or form on a timely basis; (c) the estimated date by which the report, schedule, or form is expected to be filed; (d) if appropriate, a risk factor explaining, if material, the impact of COVID-19 on its business; and (e) if the reason the subject report cannot be filed on a timely basis relates to the inability of any person, other than the registrant, to furnish any required opinion, report, or certification, the Form 8-K or Form 6-K must have attached as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report, or certification by the date such report must be filed; (3) file the report, schedule, or form required to be filed no later than 45 days after the original due date; and (4) include in any filed report, schedule, or form a statement that the registrant was relying on this order and the reasons why it could not make the original deadline).

[2] See Regulation S-K Item 303(a)(3)(ii).

[3] See SEC Release No. 33-8350, Interpretation: Committee Guidance on Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations (Dec. 19, 2003) (stating that one of the objectives of MD&A is “to provide a narrative explanation of a company’s financial statements that enables investors to see the company through the eyes of management”).

5 Min Read

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