Debevoise & Plimpton

Debevoise Update D&P

Debevoise Coronavirus Checklists—Coronavirus Disclosure

March 16, 2020

On March 4, 2020, SEC Chair Clayton reminded SEC reporting companies to "provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments. How companies plan and respond to the events as they unfold can be material to an investment decision, and I urge companies to work with their audit committees and auditors to ensure that their financial reporting, auditing and review processes are as robust as practicable in light of the circumstances in meeting the applicable requirements."

Although the impact on individual companies will vary by business, all SEC reporting companies need to be ready to make coronavirus-related disclosure if and when the obligation arises. The following checklist flags what we expect to be the most common triggers for making and updating coronavirus-related disclosure.

SEC REPORTING

As companies comply with their SEC reporting requirements, they should consider whether and where coronavirus-specific disclosure may be necessary. Recognizing potential compliance issues as a result of coronavirus, the SEC announced on March 4, 2020 that publicly traded companies would have an additional 45 days to file certain disclosure reports that would otherwise have been due between March 1 and April 30, 2020, subject to certain conditions, including furnishing a Form 8-K explaining the need for such relief.[1]

Quarterly and Annual Reports

- *Management's Discussion and Analysis (MD&A)*: Consider whether to discuss the impact of coronavirus in MD&A if a material impact on the business is likely. Item

[1] See March 4, 2020 press release "SEC Provides Conditional Regulatory Relief and Assistance for Companies Affected by the Coronavirus Disease 2019 (COVID-19)" at https://www.sec.gov/news/press-release/2020-53.

303 of Regulation S-K requires SEC reporting companies to describe in their Form 10-K "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations," as well as any known trends or uncertainties that could materially affect the company's liquidity and capital resources. Likewise, companies preparing next quarter's Form 10-Q should consider whether the impact to the business from the coronavirus has resulted in a material change in liquidity, financial condition or results of operations and make such necessary disclosures.

- *Risk Factors*: Consider addressing coronavirus in risk factor disclosure, including as a new stand-alone risk factor or integrated into (and expanding) already existing risk factors. Disclosure may include potential impacts on operations related to supply chain disruptions, employee quarantines, government measures, financial covenant compliance, availability of financing and market volatility. Companies with strong operating ties to heavily impacted geographic areas, such as China and Italy, should particularly consider appropriate risk factor disclosures. Per a January 30, 2020 statement by SEC Chair Clayton: "This is an uncertain issue where actual effects will depend on many factors beyond the control and knowledge of issuers. However, how issuers plan for that uncertainty and how they choose to respond to events as they unfold can nevertheless be material to an investment decision."

- *Forward-Looking Statements*: Consider whether coronavirus should specifically be included in the list of cautionary factors in forward-looking statement disclosure in order to provide the appropriate "meaningful cautionary" language needed to benefit from the safe harbor under the Private Securities Litigation Reform Act.

- *Financial Statements*: Confer with internal and external auditors to evaluate the impact of the coronavirus on financial statement reporting under US GAAP, including, among other things, subsequent event disclosure, the value of inventory, goodwill and intangible asset values, contingent liabilities and commitments, and the potential for financing defaults.

Proxy Statements

With proxy season approaching, consider whether to discuss the board's role in managing the risks to the business presented by coronavirus pursuant to Item 7 of Schedule 14A and Rule 407(h) of Regulation S-K. Issuers will also want to consider whether to provide for a virtual (or at least a hybrid) annual meeting to limit the need for a large in-person gathering at the annual general meeting. If the location of the meeting changes from a physical location to a virtual meeting, the issuer will need to ensure compliance with applicable notice requirements in the company's bylaws and the proxy rules, in addition to logistical and investor relations considerations. On March 13, 2020, the SEC issued guidance that an issuer that has already mailed and filed its definitive proxy materials to its shareholders can change the date, time or location of the annual shareholder meeting (including changing the meeting to a virtual one) without mailing additional materials or amending its proxy materials by 1) issuing a press release announcing the change, 2) filing such announcement as definitive additional soliciting materials and 3) taking all reasonably steps necessary to inform others involved in the proxy process and market participants of the change (such as a proxy service provider and the national securities exchange).[2]

Current Reports on Form 8-K

Companies should be mindful of the enumerated disclosure triggers in Form 8-K, including, for example, the termination of a material definitive agreement under Item 1.02 if the impact of coronavirus triggers *force majeure* or material adverse event clauses or if the impact of the coronavirus on the business results in a material charge for impairment to one of the company's assets under Item 2.06. In addition, companies should be aware of Item 2.02 when making coronavirus disclosure that includes historical financial information.

GUIDANCE

Given the uncertainty and potentially material impact of coronavirus, consider the advisability of issuing new financial guidance and evaluate the necessity of revising, or even rescinding, any already released quarterly, annual or other financial guidance.

MARKET TRANSACTIONS

In addition to regular and current SEC reporting, companies should evaluate carefully the need to update disclosure before engaging in any sale of securities, financing transaction or stock repurchases, specifically as to whether coronavirus-related impacts constitute material non-public information (MNPI).

Financing Transactions

Consider whether coronavirus-related updates are necessary in MD&A, risk factors, forward-looking statements and elsewhere in offering documentation. Also consider

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[2] See March 13, 2020 SEC guidance "Staff Guidance for Conducting Annual Meetings in Light of COVID-10 Concerns" at https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns?auHash=zrsDVFen7QmUL6Xou7EIHYov4Y6IfrRTjW3KPSVukQs.

whether the impact of the coronavirus implicates the ability of the company to make particular representations and warranties during the negotiation of underwriting agreements, purchase agreements or other transaction documents. Lastly, companies should be prepared for coronavirus to be of particular interest during the due diligence process and anticipate specific coronavirus-related questions during business due diligence calls.

Trading Activities

Evaluate whether the impact of coronavirus on the company's business constitutes MNPI before engaging in other trading activities, including trading by insiders during otherwise normal trading windows, share repurchases, exercise of employee stock options and entry into (or modification of) Rule 10b5-1 trading plans. Although market volatility as a result of the coronavirus may present otherwise attractive trading opportunities, companies should keep in mind that the risks and impact of coronavirus could constitute MNPI. The SEC emphasized this point in a March 4, 2020 press release, noting, "where a company has become aware of a risk related to the coronavirus that would be material to its investors, it should refrain from engaging in securities transactions with the public and to take steps to prevent directors and officers (and other corporate insiders who are aware of these matters) from initiating such transactions until investors have been appropriately informed about the risk."

INVESTOR RELATIONS

In addition to considering the logistical and public health concerns involved with holding large-scale presentations and meetings (for example, considering the advisability of holding virtual shareholder meetings), companies should also prepare for the inevitable focus on coronavirus during shareholder meetings, investor presentations, analyst calls and the like. In particular, companies must be careful not to make selective disclosure of material information about the impact of coronavirus that would violate Regulation FD.

INDUSTRY-SPECIFIC CONSIDERATIONS

Lastly, companies subject to regulatory reporting regimes in addition to the SEC (such as banking entities or insurance companies) should consider whether the coronavirus triggers disclosure requirements under specific reporting regimes. For example, on March 11, 2020, the New York Department of Financial Services required regulated insurance entities to submit details of their plans and preparation to manage the risks arising from the coronavirus.[3] Regulated businesses will want to ensure that regulatory disclosure is consistent with SEC and other reporting.

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Please do not hesitate to contact us with any questions.

[3] See our Debrief available here.

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