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No "Pandemic Pass" – Regulators Remain Focused on Financial Reporting, Disclosure, and Auditing Enforcement

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Despite COVID-19 and concurrent situations, recent releases from the U.S. Securities and Exchange Commission (SEC) and Public Company Accounting Oversight Board (PCAOB) demonstrate their keen focus on financial reporting, disclosure, and auditing issues. Both regulators are uniform in their message – there is no "pandemic pass." The rules and obligations still must be complied with in all circumstances. And the implicit consequence is apparent – enforcement for alleged transgressions will follow. Several key considerations for companies and audit firms thus include:

1. **Current special circumstances warrant special attention.** The SEC and PCAOB recently issued multiple reminders about issues that may warrant particular consideration in light of COVID-19. These announcements provide helpful insights, as well as a forewarning of areas that SEC and PCAOB enforcement will likely be closely watching in the weeks and months to come. These announcements include:
 - a. On March 25, the SEC's Division of Corporate Finance issued Disclosure Guidance Topic No. 9 summarizing CorpFin's current views on a litany of disclosure and other securities law obligations to consider in light of COVID-19 and related business and market disruptions. Among other things, the guidance refers to potential effects on current and future operations, financial results, capital and financial resources, and personnel, and the implications of each for disclosures (e.g., risk factors, MD&A, forward-looking information, etc.) and financial reporting (including any presentations of non-GAAP measures).
 - b. On April 2, the PCAOB Staff released a Spotlight document providing important reminders to auditors of their obligation to comply with applicable standards and rules regardless of current conditions and pressures. Due to current conditions, the PCAOB encourages "continual and iterative" risk assessments – which may impact audit evidence, substantive procedures, and controls assessments – and awareness of challenges in timing, practicalities (e.g., travel restrictions prevent physical observations), and ensuring sufficient supervision. Substantive areas of particular

concern flagged by the PCAOB may include valuation, estimates, revenue recognition, leases, going concern/liquidity, subsequent events, hedging, taxes, provisions/allowances/loss contingencies, and debt matters. The PCAOB also stressed the need to make the full slate of required communications to the Audit Committee, including CAMs (which COVID-19 may influence).

- c. On April 3, the SEC's Chief Accountant issued a statement recognizing the difficult accounting and financial reporting implications of current conditions, but also stressing the importance of making "well-reasoned" judgments and estimates, as well as required disclosures, at all times. Areas identified in this statement include those flagged by the PCAOB and auditor independence.
2. **Individuals remain in the spotlight, particularly in the current rapidly changing climate.** A significant volume of cases in this space has consistently included actions against individual officers, directors, auditors, and other personnel. The rapid evolution of current events may mean that new information becomes available to various groups, and to the market, asynchronously. Selective disclosure of such information may raise Regulation FD questions and trading on the basis of material non-public information may create insider trading concerns. On March 23, the SEC's co-directors of the Division of Enforcement issued a statement warning about these very risks. A reminder to personnel of their obligations with respect to non-public information may help avoid costly issues later. And generally, if issues arise, individuals may benefit from having separate counsel early in the process.
3. **Appropriately investigate and address potential red flags.** Companies, firms, and their respective personnel can often most efficiently identify and appropriately remediate potential concerns. Entities should encourage employees to first report concerns through internal avenues; and should avoid any retaliation against whistleblowers, lest they create new potential liability. Upon receiving a report or potential red-flag, entities should promptly undertake an appropriate investigation; and implement appropriate remediation. There are certain challenges to conducting internal investigations in an era of "stay-at-home" orders, but experienced outside enforcement counsel is well-equipped to navigate such issues. Triaging issues to investigate some matters in the near term while deferring other topics that present more logistical hurdles – carefully documenting any such determinations and their rationale – may make sense. Whether to self-report to the regulators also includes added considerations now. One hopes that current events lead regulators to defer to self-policing by providing more robust cooperation credit and benefits to entities that self-remediate, even including non-public resolutions.
4. **The SEC's whistleblower bounty program remains a critical component of its Enforcement.** Under this program, individuals who voluntarily provide original, timely, and credible information

that leads to a successful enforcement action may be eligible for a sizable monetary bounty award. For example, between March 23 and April 3, the SEC issued four separate announcements of awards to five whistleblowers for their assistance with enforcement matters. The awards ranged from \$450,000 to \$2 million. (See [here](#), [here](#), [here](#), and [here](#).) These announcements, particularly since issued amidst these turbulent times, provide important reminders that the SEC may soon know, if they don't already know, of potential issues.

5. **Enforcement efforts will also continue to focus on auditors and their personnel.** The SEC has repeatedly reaffirmed its focus on the auditors in virtually every financial reporting investigation. And the PCAOB likewise has highlighted its continued close focus on auditor conduct during this chaotic time. Moreover, at least in the near term, 10A situations may present particular complexities. Just like for public companies, many audit firms wisely engage separate outside counsel to assist the firm, and/or individual audit team members, navigate these processes.
6. **Mind the legal budget, while looking for beneficial adjustments.** Although regulators have provided little leniency in disclosure, financial reporting, and auditing obligations, the economic fallout of the current situation may result in tighter legal budgets. GCs and their teams must find creative ways to "do more with less." For example, upgrading and streamlining information technology; adopting creative approaches to appropriately triage and accomplish important investigations and litigated proceedings; and engaging value-oriented outside counsel (appropriately experienced, and with affordability and efficiency benefits) all may prove helpful. Indeed, some adjustments may ultimately provide lasting benefits.

Navigating the current environment presents many challenges for companies and audit firms, as well as their respective personnel. And entities and individuals should be prepared for a wave of rigorous SEC and PCAOB enforcement for transgressions (likely both real and perceived) over the following months. Yet the "COVID-crisis" may also present opportunities for entities, counsel, and regulators to reformulate and improve on the *status quo*.

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