Amy Bowler

Partner
303.290.1086
Denver
abowler@hollandhart.com

Lucy Stark

Partner
303.295.8493
Denver
mlstark@hollandhart.com

Corporate Disclosures

Insight — March 15, 2020

What's the Problem? While many things have been suspended in the wake of the COVID-19 outbreak, robust enforcement of the securities laws has not. The Securities and Exchange Commission has made it clear that issuers need to be monitoring the impact, and potential impact, of COVID-19 on their financial results and operations and share that information with investors at the time and in the manner required under the securities laws.

Things to Consider:

Current and meaningful risk factors: The impact of COVID-19 on issuers is likely to vary significantly; so too should each issuer's risk factors. Issuers should assess the current and projected impact of COVID-19 on operations, employees, customers, suppliers, facilities, travel, supply-chain, security, logistics, financial results, and any other matters relevant to their business. Risk factors should be specifically tailored to reflect the actual risks identified by issuers and updated as each issuer's risk assessment evolves.

Tailored forward-looking statements: To maximize the protections of the Private Securities Litigation Reform Act safe harbor, cautionary forward-looking statements language, including language regarding the projected impacts caused by the COVID-19 outbreak, should be tailored to the issuer's facts and circumstances.

A thoughtful MD&A: Issuers are required to include in management's discussion and analysis all known trends and uncertainties that they reasonably expect to have a material effect on their financial condition or operating performance. If the impacts of the COVID-19 outbreak represent such a trend or uncertainty, it should be discussed in a manner that allows investors to see the issues through the eyes of management.

Board oversight of material risks: Boards have a duty of oversight and should be in regular communication with management regarding COVID-19 matters. Issuers are required to discuss matters relating to the board's oversight of material risks in their proxy statements filed in connection with annual shareholder meetings. Depending on the issuer, it may be appropriate to discuss board oversight of risks presented by COVID-19's impacts.

Enforcing trading and communications policies: Issuers should remind employees and directors of their obligations under trading, communications, and other policies that may be implicated by matters relating to the COVID-19 outbreak. Issuers should continue to guard against trading on the basis of, or selective disclosure of, material non-public information by employees or directors. Issuer's must continuously assess whether employees or directors are in possession of material non-

public information as a result of actual or anticipated COVID-19 impacts and enforce trading and communications policies that impose restrictions on the use or disclosure of such information.

Managing timely, fair, and accurate communications: SEC Chairman Clayton has admonished 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." In addition to ensuring that periodic reports contain appropriate disclosure, companies should consider whether interim updates are warranted on Form 8-K. Companies should anticipate a barrage of questions from investors and analysts regarding COVID-19 and should have a plan in place for maintaining open lines of communication, without violating Regulation FD's prohibition on selective disclosure.

Regardless of the degree of concern COVID-19 presents, and the pressure from various stakeholders to receive frequent updates, Regulation FD generally requires that all investors have access to the same material information. Despite the desire for guidance, many companies who regularly issue guidance may suspend providing guidance until they are able to more accurately quantify the anticipated impact of COVID-19.

Holding a virtual annual meeting: As state and local government officials continue to implement "social distancing" policies, it may not be desirable to hold a gathering of people for an in-person annual meeting. If virtual meetings are permitted by an issuer's state of incorporation, charter and bylaws, issuers should consider whether the annual meeting should be held virtually, or whether the proxy statement should reference a possible virtual annual meeting. If issuers decide to hold a virtual annual meeting, they must be sure to comply with SEC and state requirements relating to notice of the meeting, instructions regarding access to the meeting, and conduct of the meeting.

Extended filing deadlines: Public companies that are unable to meet filing deadlines for SEC reports to be filed between March 1 and April 30, 2020 due to the COVID-19 outbreak will have an additional 45 days to file these reports; provided that, among other things, such companies file a report on Form 8-K describing the reason for the delayed filing.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP.

Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.