Alert

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COZEN O'CONNOR

Public Company COVID-19 Disclosures and Mitigating Securities Litigation Risks

The global outbreak of the coronavirus disease (COVID-19) will impact public companies in numerous ways, including their required disclosures to shareholders. On March 4, 2020, the U.S. Securities and Exchange Commission (SEC or commission) announced that it was providing limited exemptive relief for publicly traded companies to allow for an additional 45 days (subject to conditions) to file their periodic reports that were previously due to be filed between March 1 and April 30, 2020. The SEC's announcement can be found here.

In that same announcement, the SEC addressed public company "disclosure considerations" in the periodic reports (Forms 10-Q and 10-K) in light of the COVID-19 outbreak. Specifically, the commission reminded public reporting companies that they should be thinking carefully about their COVID-19 disclosure obligations to shareholders and the market and cautioned them "to take the necessary steps to avoid selective disclosures and to disseminate such information broadly." The SEC also noted that a public reporting company "should consider whether it may need to revisit, refresh, or update previous disclosure to the extent that the information becomes materially inaccurate."

Public reporting companies should pay careful attention to the SEC's recent guidance on COVID-19 related disclosures and should draft their disclosure language accordingly. Careful thought should be given not only to what companies affirmatively say in their disclosures about the impact of COVID-19 to their business, but also to what they don't say about it. To that end, public companies should avoid general, boilerplate disclosures discussing COVID-19, and instead tailor their disclosures with the purpose of educating their shareholders and the market about how COVID-19 has impacted, and is likely to impact, the company's business operations and financial performance. Such tailored disclosures will help public companies ensure that they are taking into account the commission's recent cautionary guidance, which SEC Chairman Jay Clayton characterized as "provid[ing] 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."

There is no doubt that the COVID-19 outbreak has been a direct hit on our capital markets. We are witnessing in real time impressive market volatility (bear market territory) that has rattled even the most diehard "buy-and-hold" investors. If history is any guide, such extreme market volatility will have plaintiffs' class action securities attorneys reading through public company COVID-19 disclosures looking for opportunities to file securities fraud cases.

Public companies and their officers and directors are subject to liability under the anti-fraud provisions of the federal securities laws for making false and misleading statements in, among other things, their quarterly and annual reports filed with the SEC. The primary anti-fraud provisions that serve as the basis for most securities fraud cases are Section 10(b) of the Securities and Exchange Act of 1934 and Exchange Act Rule 10b-5. While it is true that the standards are high for holding public companies (and their officers and directors) liable under these anti-fraud provisions (they must have *intended* to deceive), there are other securities laws that do not impose such a high burden. For example, false or misleading COVID-19 related disclosures found in SEC registration statements and prospectuses for companies engaged in securities offerings to the public may expose companies (and officers and directors) to liability under Sections 11 and 12 of the Securities Act of 1933. Unlike Section 10(b) and Rule 10b-5 above, Sections 11 and 12 do not require proof that the false and misleading disclosures were made intentionally. Rather, liability under Sections 11 and 12 may be proven with the lesser state of mind of negligence (they *should have known* the disclosures were false and misleading).

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Related Practice Areas

- Capital Markets & Securities
- White Collar Defense & Investigations

Therefore, high among the list of items public companies should be considering during these uncertain and anxious times is the securities litigation risk that might arise from disclosures about the impact of COVID-19 on business operations and financial performance. To mitigate this litigation risk — for both class action securities fraud cases and SEC enforcement investigations — public companies should avoid general, boilerplate disclosure language. Cutting-and-pasting generic news articles discussing the health risks of the COVID-19 virus, where it originated, and where it is spreading will not qualify as a helpful disclosure. It may also invite the filing of a securities fraud complaint if the company's stock price has recently declined. Instead, public companies should be aware of and follow the SEC's recent guidance on the topic, paying special attention to tailor their COVID-19 disclosures about the virus's impact (actual or likely) to the company's specific business operations and financial performance.