

## Outlook 2021: Disclosure Obligations in the COVID-19 Era

*Lara Jackson, Robert Sniderman*

**November 30, 2021**

1

*Continuous Disclosure Obligations*

2

### Case Studies from the United States

#### 1. The Cheesecake Factory: Misleading Disclosure Through Omissions

3

4

5

6

7

#### 2. Parallax: Misleading Disclosure Through Over-Promotion

8

9

10

11

- Parallax never had the PPE it offered to sell;<sup>12</sup>
- Parallax was insolvent and lacked the necessary capital to develop the screening test;<sup>13</sup>

# Cassels

- even if Parallax had the capital needed to fund its promised products, the screening test would take over a year to develop, and several other factors prevented the company from acquiring the PPE (for example, the company lacked the FDA registrations required to import and sell PPE);<sup>14</sup>
- Parallax misled investors by falsely positioning itself as capitalizing on opportunities created by the pandemic;<sup>15</sup> and
- Parallax's CEO drafted the relevant press releases for the purpose of boosting the company's declining stock price (and the stock prices did in fact increase after the misleading press releases were published).<sup>16</sup>

17

18

## SN 51-362: Common Disclosure Deficiencies and the CSA's Recommendations

19

20

21

### Management Discussion and Analysis (MD&A)

#### Common Deficiencies

- Providing lists of responses and risks without necessary detail to address the anticipated impact to the issuer
- Using boilerplate language and disclosing generally-known trends rather than COVID-19 impacts specific to the industry or issuer
- Insufficient evidence showing that costs and other impacts are specifically attributable to COVID-19
- Inadequate detail regarding

#### CSA Guidance for Issuers

- Provide detailed, meaningful, and issuer-specific disclosure on how COVID-19 has impacted its industry and day-to-day operations
- Avoid boilerplate language and generic list-making
- Provide thorough descriptions of material impacts and liquidity risks of COVID-19, and where possible, quantify material factors and provide up-to-date risk factors

## Common Deficiencies

issuers' ability to meet working capital requirements, meet planned growth initiatives, or fund planned activities and expenditures

## CSA Guidance for Issuers

- Disclose methodology used in management's assessments and explain how link to COVID-19 is known

## Financial Statements

### Common Deficiencies

- Providing "lists" of generally known, non-entity-specific economic risks
- Failure to identify reasons for impairments of non-financial assets or only noting "negative economic impacts of COVID-19" as an impairment indicator for all cash generating units
- In some "close call" situations, failure to disclose mitigating actions that factored into the conclusion that an issuer will continue as a going concern
- Inadequate updates to early judgments and measurement uncertainties in interim financial statements
- Failure to provide corresponding disclosure in financial statements
- Failure to consider the impact of COVID-19 on associates and joint ventures in determining whether there is a "loss event"
- Failure to provide corresponding disclosure in financial statements where MD&As disclose increased liquidity, market risk, or credit risk

### CSA Guidance for Issuers

- Provide detailed disclosure of ability to meet working capital requirements, meet planned growth initiatives, or fund developmental activities and capital expenditures
- Disclose key assumptions management based its determination of recoverable amounts on
- Use probability weighted scenarios where possible, rather than providing a single best estimate
- Disclose all material uncertainties that management is aware of that may cast significant doubt on the issuer's ability to continue as a going concern.
- Disclose judgments and mitigating actions to support a determination that a "close call" was avoided
- Consider whether there have been changes to credit risk. Factors to consider include risk concentrations, risk to expected credit losses, and any significant assumptions being made

## Non-GAAP Financial Measures (NGMs)

### Common Deficiencies

- General failure to disclose, under 5% of issuers disclosed NGMs adjusted for COVID-19 impacts
- Inadequate explanation of how adjustments were attributable to the COVID-19 pandemic
- Misleading disclosures of NGMs where adjustments were made for COVID-19 expenses without adjusting for government subsidies

### CSA Guidance for Issuers

- Consider how NGMs adjusted for COVID-19 assist investors, how management uses the measure, and why management thinks it may be useful to explain the impact of COVID-19
- Be specific in describing adjustments and be wary before concluding that an adjustment is non-recurring, infrequent, or unusual
- Include balanced adjustments and consider the impacts of government subsidies, insurance recoveries, and tenancy relief

## Forward-Looking Information (FLI)

### Common Deficiencies

- Insufficient detail of assumptions related to FLI
- Failure to update MD&A to reflect updated FLI

### CSA Guidance for Issuers

- Provide a reasonable basis for providing FLI and provide sufficient detail as to how FLI was derived
- Update MD&A to consider what is reasonably likely to cause actual results and disclose what differs from previously provided FLI

## Material Change Reporting

### Common Deficiencies

- Failure to account for unique or significant impacts of COVID-19 based on issuer's industry or

### CSA Guidance for Issuers

- Provide detailed, entity and industry specific disclosure of the impact of COVID-19

# Cassels

## Common Deficiencies

business

## CSA Guidance for Issuers

- Definition of “material change” varies by jurisdiction, so understand how “material change” is defined by an issuer’s principal regulator

## Promotional Disclosures

### Common Deficiencies

- Overly promotional material that lacks specificity (particularly in the biotech or pharma industry)
- Overstating a positive impact of COVID-19 or making assumptions at too early a stage of the pandemic to understand the true impact

### CSA Guidance for Issuers

- Be complete, balanced, and focused on material information
- Avoid making any statements or omitting any facts that make a disclosure untrue or misleading

## Looking Forward

<sup>1</sup> CSA Staff Notice 51-362, “Staff Review of Covid-19 Disclosures and Guide for Disclosure improvements,” February 25, 2021, online: <[https://www.osc.ca/sites/default/files/2021-02/csa\\_20210225\\_51-362\\_staff-review-covid19.pdf](https://www.osc.ca/sites/default/files/2021-02/csa_20210225_51-362_staff-review-covid19.pdf)> at p. 1 (CSA Staff Notice 51-362).

<sup>2</sup> *Ibid* at p. 3.

<sup>3</sup> “SEC Charges The Cheesecake Factory For Misleading COVID-19 Disclosures,” *SEC Press Release*, December 4, 2020, online: <<https://www.sec.gov/news/press-release/2020-306>> at para. 1.

<sup>4</sup> *Ibid* at para 2.

<sup>5</sup> *Ibid* at para 2.

<sup>6</sup> *Ibid* at para 2.

<sup>7</sup> *Ibid* at para 5.

<sup>8</sup> “SEC Charges Company and Two Executives for Misleading COVID-19 Disclosures,” *SEC Press Release*, July 7, 2021, online: <<https://www.sec.gov/news/press-release/2021-120>> at para. 1.

<sup>9</sup> *Ibid* at para. 1.

<sup>10</sup> *Ibid* at para. 2.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*.

# Cassels

<sup>15</sup> *Ibid* at para. 3.

<sup>16</sup> *Ibid* at para. 2.

<sup>17</sup> *Ibid* at para. 4.

<sup>18</sup> *Ibid*.

<sup>19</sup> CSA Staff Notice 51-362, *supra* note 1, at p. 1.

<sup>20</sup> *Ibid* at p. 6.

<sup>21</sup> *Ibid* at Appendix A.

---

*This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.*