

Disclosure Obligations and Risks for Canadian Public Companies

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The considerable uncertainties about the geographic, social and economic impact of the global spread of the novel coronavirus (COVID-19) raise complex disclosure considerations for Canadian public companies and their directors and officers given the rapidly evolving situation and the potentially significant risks of disruption to business operations. Although it may be difficult to meaningfully assess the impact of COVID-19 pandemic, Canadian public companies should carefully consider the quality of their disclosure regarding any effects or reasonably anticipated effects on their business, prospects and the risks or uncertainties they face in the current environment.

Key Focus

- Canadian public companies should carefully monitor the evolving situation and consider the potential impacts to their business and operations related to emerging risks from COVID-19. There is no "one size fits all" disclosure - the specific risks and trends that will warrant disclosure will vary based on a company's specific circumstances.
- Canadian public companies should consider whether additional COVID-19 related disclosures are required and whether their existing risk factors adequately disclose the current risk environment. Canadian public companies must also carefully review any COVID-19 related disclosures for their subsequent filings to ensure such disclosure accurately reflects the rapidly changing circumstances.
- Canadian public companies should also review the effectiveness of their current disclosure controls and protocols to ensure such disclosure regime will address ongoing developments associated with COVID-19 in a timely manner.
- By proactively considering any effects of COVID-19 on operations, financial performance, business prospects and risks, Canadian public companies will be better prepared to adequately disclose material information, including anticipated material impacts, on a timely basis reducing the risk of external scrutiny – whether regulatory investigations/proceedings or civil class actions – relating to the quality of their disclosure.

Relevant Disclosure Obligations

Many Canadian public companies are in the process of issuing their annual filings¹ and many companies

that have completed annual filings have referenced COVID-19 in either risk factors or general outlook for the company.

On March 16, 2020, the Canadian Securities Administrators (CSA) issued guidance regarding COVID-19 related disclosure obligations.² The CSA encourages reporting issuers to contact their principal regulator to discuss any potential effect of the current COVID-19 outbreak on their ability to comply with their obligations under securities legislation, including filing deadlines or delivery of meeting materials. The CSA is advising that any issuers that foresee not being able to file their annual or interim financial statements by their prescribed deadline because of the current COVID-19 outbreak should consider applying for a management cease trade order (MCTO), rather than facing a failure-to-file cease-trade order issued by the regulator, and the CSA will work with issuers to accommodate an abridgement to the standard two week advanced filing requirement where necessary. An MCTO restricts certain officer and directors from trading in securities of the issuer and the issuer must comply with alternative information guidelines as provided in National Policy 12-203 until the required document are filed. The CSA has confirmed that MCTOs issued in these circumstances will not be considered required disclosure in future documents of the issuer. The CSA is continuing to monitor the impact of COVID-19 on Canadian capital markets and may issue further guidance in due course.

The Securities and Exchange Commission (SEC) in the US³ and the UK Financial Reporting Council (FRC)⁴ have made various statements on COVID-19 emphasizing the need for companies to assess the effects of COVID-19 on financial disclosures and audit quality, to monitor developments and to ensure they are providing timely and meaningful disclosure. The SEC also emphasized the need for public companies to work with their audit committees and auditor to ensure that their financial reporting, audit and review processes are as robust as practicable considering these dynamic circumstances. In addition, the SEC issued an order⁵ allowing certain public companies, subject to certain conditions, an additional 45 days to file certain disclosure documents that would otherwise have been due between March 1 and April 30, 2020, including, among others, annual and quarterly reports.⁶

1. MD&A Disclosure and Risk Factor Disclosure

In MD&A disclosures, reporting issuers are required to discuss important trends and risks that are reasonably likely to affect the financial statements in the future as well as events, risks or uncertainties that management reasonably believes will materially affect future performance. In the AIF and prospectus filings, reporting issuers are required to disclose risk factors relating to the company and its business.

Accordingly, Canadian public companies and their directors and officers should consider whether enhanced risk disclosure is necessary to address this rapidly developing situation. The specific risks and trends that will warrant disclosure will vary based on a company's specific circumstances and industry and may, for example, include risks related to:

- operations in affected regions;
- business dependence on aspects of international trade, including impact of possible restrictions on international shipping;
- operational and supply chain delays and disruptions;
- labour shortages and facility or premise shutdowns;
- social unrest;
- impacts of government regulation and prevention measures;
- business continuity, management contingency and emergency succession plans;
- impact of volatility in the capital markets, including ability to obtain necessary financing;
- insurance coverage;
- sudden increase or decrease in demand for goods and services; and
- increased costs.

2. Financial Results

Reporting issuers should consider any requirements for disclosure of subsequent events in the notes to the financial statements and should work with their audit committees and external auditors to ensure that their financial reporting, auditing and review processes remain robust in light of the evolving circumstances related to COVID-19.

Canadian securities regulators have demonstrated an increased focus on internal controls in financial reporting, disclosure controls and policies, and the importance of a culture of compliance through tone from the top. Recent securities enforcement matters relating to the adequacy of internal controls have involved unprecedented large financial penalties against companies and their directors and officers.⁷ In addition, allegations of inaccurate and misleading internal controls disclosure are commonly included in securities class actions.

3. Forward Looking Statements

Reporting issuers should also consider their obligations with respect to any forward-looking information, including future-oriented financial information and financial outlook. Issuers should consider the impact of COVID-19 on forward-looking information, including whether:

- the assumptions underlying such forward-looking information remain reasonable in the circumstances;
- the time period is limited to a period for which the forward-looking information can be reasonably estimated;
- the identified material risks factors that could cause actual results to differ materially from the forward-looking information are adequate; and
- there is a need to update any forward-looking information, including forecasts, projections and other

financial outlook information, through the issuance of a news release or in the company's next MD&A filing in accordance with securities law obligations, or cease providing new forward-looking information or financial outlook if such statements can no longer be supported by reasonable assumptions in the current environment.

Timely Disclosure of Material Information and Material Changes

Reporting issues are required, subject to very limited circumstances, to promptly disclose by way of news release material information that would reasonably be expected to have a significant effect on the market price or value of their securities and to file a material change report (Form 51-102F3) to the extent such information relates to a material change in the business operations or capital of the company.⁸

Although Canadian public companies are not generally required to interpret the impact of external political, economic and social developments on their affairs, in circumstances where an external development is anticipated to have or has had a material effect on their business and affairs that is uncharacteristic of the effect generally experienced by other companies engaged in the same business or industry, companies should provide disclosure of the particular impact(s) of the external development.⁹ Accordingly, Canadian public companies and their directors and officers should continue to stay abreast of and gather reasonably available information concerning the evolving status of COVID-19 in order to be able to properly understand the risks and consider any material impacts or anticipated material impacts of COVID-19 to their business and assess whether their current disclosure adequately provides security holders with a full, clear and plain understanding of the such material impacts.

Pending the disclosure of material information with respect to impacts of COVID-19, directors, officers and other insiders of the company in possession of any such material undisclosed information should refrain from trading in securities of the issuer, and issuers should consider implementing adequate blackout periods as may be necessary.

¹ TSX listed and other non-venture issuer companies with a December 31, 2019 fiscal year end have until March 30, 2020 to file their annual financial statements, MD&A and AIF. Venture issuers with a December 31, 2019, fiscal year end have until April 29, 2020 to complete their annual filings.

² https://www.bcsc.bc.ca/News/News_Releases/2020/21_Canadian_securities_regulators_provide_update_on_COVID-19_and_potential_filing_delays_by_reporting_issuers/

³ See, e.g., <https://www.sec.gov/news/public-statement/statement-audit-quality-china-2020-02-19>

⁴ <https://www.frc.org.uk/getattachment/34d2e9a7-b73e-41b6-a9ae-5f0a7a69dbc4/Coronavirus-draft-para-17-Feb.pdf>

⁵ <https://www.sec.gov/rules/other/2020/34-88318.pdf>

⁶ <https://www.sec.gov/news/press-release/2020-53>. In particular, the 45 day extension relates to certain *Exchange Act* filings, including Forms 10-K, 20-F and 10-Q)

⁷ See Cassels Canadian Securities Litigation Outlook 2019 Update p. 1 "Out of Control No More: Securities Regulators Focus on Adequacy of Internal Controls to Address Risk."

⁸ "Material change" means a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer; or a decision to implement such a change made by the board of directors or by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable. A material change report must be filed within 10 days of the occurrence of the material change.

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