

RECENT DEVELOPMENTS FOR DIRECTORS

A Quarterly Update for US Public Companies from the Public Company Representation Practice

April 2020

SEC Issues Filing Extension and Disclosure Guidance for COVID-19

In response to COVID-19, the SEC has offered new flexibility to extend filing deadlines and its leadership has issued detailed guidance for disclosure, including a lengthy statement calling for “timely, accurate and robust” discussion of the effects of COVID-19:

- The SEC issued an [order](#) providing a 45-day extension for company filings delayed by circumstances relating to COVID-19.
- The SEC’s Division of Corporation Finance issued [disclosure guidance](#) emphasizing the need for detailed, custom-tailored COVID-19 disclosure providing all material information, especially forward-looking information.
- The SEC Chairman and the Director of the Division of Corporation Finance issued a [joint public statement](#) on disclosure of COVID-19 impacts in upcoming earnings releases and conference calls, emphasizing robust discussion of current operational and financial status, responses to COVID-19 and the outlook for future operations and financial results.

Boards Take Defensive Steps for COVID-19 Activism

Depressed stock prices have led many boards to consider their defensive profile, including the possible adoption of shareholder rights plans, or so-called “poison pills,” as a means of addressing threats from activists and other parties. Poison pills of limited duration and subject to frequent board review may find support among institutional investors sympathetic to the need to provide a board more time to assess an unsolicited takeover offer in the current environment. Short of formally adopting a rights plan, many companies are advancing their preparedness by taking the steps necessary to put a plan on the shelf, completing most or nearly all of the legal steps and financial analysis relating to a plan without taking final board action to adopt the plan. Companies are also reviewing existing activism defenses and strategies and are continuing shareholder engagement.

Boards Increase Oversight Activity in COVID-19 Environment

As mandatory shelter-in-place orders remain in effect, boards are taking active steps to exercise their oversight responsibilities relating to COVID-19 risks and management efforts to respond to the crisis and address operational and financial issues. These include:

- Regular management updates on operational and financial metrics, including current and future COVID-19 impacts.
- Additional oversight of cybersecurity risk and secure videoconferencing as more operations are handled remotely.
- Updated action plans for business continuity, management compensation and capital access and allocation.
- Strategic external messaging, including review of content and timing of COVID-19 disclosures and stakeholder engagement.
- Monitoring activist investor efforts and, where appropriate, taking defensive steps as described above.
- Review of CARES Act issues and related legal topics such as those summarized on our [webcast](#) and [client alert](#).
- Review and oversight of internal controls, including controls for legal compliance in a highly dynamic regulatory environment.

Environmental, Social and Governance (ESG) Issues Remain Relevant During COVID-19 Crisis

Long-term ESG strategies remain top of mind for institutional investors during the COVID-19 crisis. ESG-minded investors are urging companies to address public safety, financial and healthcare support for employees and effective human capital management during the COVID-19 crisis. Boards are assessing and updating ESG efforts in light of COVID-19, and companies are working to communicate to investors how COVID-19 may affect future ESG priorities. Investors may view company responses to COVID-19 as an indicator of future ESG and financial effectiveness. Stock prices of companies with high ESG rankings have outperformed market averages during the COVID-19 crisis, according to a Bloomberg study.

Environmental Compliance Faces Rapidly Changing Regulatory Climate

Companies are tracking fast-moving changes to federal, state, and local regulatory stay-at-home orders and compliance guidance relating to their environmental obligations. Jurisdictions vary in whether businesses necessary to sustain environmental compliance obligations are deemed “essential,” and the EPA’s enforcement discretion [policy](#) is limited in scope. Companies are reviewing whether COVID-19 may impede compliance with permits, consent decrees, settlement agreements and whether to seek regulatory relief. Our recent [client alert](#) describes five questions for companies to consider in complying with their environmental obligations during the COVID-19 crisis.

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