

The Impact of COVID-19 on Disclosure and Filing Deadlines: Regulator Relief and Other Considerations for Canadian Public Companies

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Timely Disclosure Obligations

As COVID-19 continues to spread, the number of reporting issuers impacted by COVID-19 will continue to grow. Regardless of the industry a company is in, COVID-19 will likely impact all aspects of a reporting issuer's business, including its revenues, operations, cost of goods sold, commodity prices, supply chain, human resources, general and administrative expenses, business and leisure travel, contingency plans and consumer confidence, amongst others. In light of the spread of COVID-19 and the social distancing measures put in place in our communities, many companies will need to consider how to run their businesses in this new environment, and how to properly allocate resources to manage the risks involved.

A reporting issuer will have to consider whether changes made to its business trigger any timely disclosure obligations under Canadian securities laws. A "material change" can be determined based on a two-part market impact test, which examines: (i) whether the material change significantly affects the market price or value of the issuer's security; and (ii) whether the material change is reasonably expected to have a significant effect on the market price or value of the issuer's security. This test is not a bright line test, and must be determined based on the facts and circumstances relating to the issuer. If there is a material change to the affairs of a reporting issuer, Canadian securities laws require that the issuer: (i) immediately issue and file a news release disclosing the nature and substance of the change; and (ii) within 10 days of the date on which the change occurred, file a material change report.

It is important to keep in mind that a "material fact" is different from a "material change". A reporting issuer is not required to continually disclose material facts, which are defined as facts that significantly affect or would reasonably be expected to have a significant effect on the market price or value of any securities of the reporting issuer. While COVID-19 may trigger new material facts applicable to an issuer's business (for example, if an issuer relied primarily on a supplier in a country heavily impacted by COVID-19 for its inventory, and had to switch suppliers), such material facts do not have to be disclosed unless they result in a material change to the business and affairs of the issuer (for example, if such change in supplier was easily and efficiently achieved with minimal impact and disruption on the issuer's business and affairs).

Notably however, Canadian stock exchanges require immediate disclosure of "material information" of an issuer, which includes both "material changes" and "material facts". A separate analysis must be done to determine whether there is in fact "material information" to disclose as per the rules of the stock exchanges, notwithstanding that there may not be a material change to the business and affairs of an issuer.

Canadian securities laws do have limited exceptions to allow issuers to delay disclosure of a material change and keep such material change confidential temporarily, if the issuer can show that the immediate release of information would be unduly detrimental to the interests of the issuer. The issuer must prove that the harm to its business from disclosing the material change outweighs the general benefit to the market of immediate disclosure. If the issuer seeks to rely on this exception, it must file a confidential material change report, and renew such filing every 10 days, for as long as it seeks to keep the material change confidential.

Risk Factor Considerations

Aside from the timing of disclosure, the content of timely disclosure documents must also be considered in light of the current global pandemic. An issuer's management's discussion and analysis is required to disclose "trends and risks that are reasonably likely to affect [the financial statements] in the future," as well as commitments, events, risks or uncertainties that management reasonably believes will materially affect the issuer's future performance. Similarly, an issuer is required to disclose risk factors relating to the company and its business in its annual information forms.

Many companies, regardless of the industry, expect to experience some short- to medium-term negative impacts from the COVID-19 outbreak; however, the extent of such impacts is currently unquantifiable, and may have a significant impact on a company's future performance and results. While the effects of COVID-19 are pervasive and have affected a wide variety of industries and jurisdictions, the Canadian Securities Administrators ("**CSA**") cautions issuers to avoid generic, boiler-plate risk factors. Instead, in preparing risk factor disclosure, public companies should carefully consider how this novel and ever-evolving threat could impact their business specifically.

The risk analysis for each company will differ, but the following are some of the high-level areas of potential impact for consideration:

Operational interruptions - Potential interruptions due to social distancing and the avoidance of public spaces, temporary business closures (mandatory or government-imposed), increased illness of employees, risks to employee health and safety and a slowdown or temporary suspension of operations.

Shifts in Consumer Demand - Potential shifts in consumer demand, including decline in household discretionary spending and potentially intense decline in purchases of non-essential and luxury items. Certain distribution channels (including grocery and pharmacy) may conversely face increasing demand (and potential stretching of supply chain capacity due to panic buying), as may operators of online channels as consumers attempt to purchase items while decreasing social exposure.

Supply Chain Disruptions - Many companies, and consumer products companies in particular, will face disruptions to their supply chains. Wholesalers and distributors may face extreme liquidity concerns and travel restrictions, with many already facing potential closure/bankruptcy. For companies who rely on suppliers of raw materials located in the areas most heavily affected by COVID-19, these challenges may be felt even more intensely and quickly.

Regulator Relief Relating to Filing Obligations

In light of the evolving COVID-19 crisis, the CSA has announced that it is taking several steps to provide temporary relief to reporting issuers under securities legislation. This relief applies to certain filing deadlines and the delivery of meeting materials to shareholders.

On March 16, 2020, the CSA issued a notice (the "**March 16 Notice**") announcing that a reporting issuer should consider applying for a management cease-trade order ("**MCTO**") if it anticipates not being able to file its annual or interim financial statements by the prescribed deadline under securities legislation.

However, on March 18, 2020, the CSA issued a notice (the "**March 18 Notice**") stating that securities regulators will be providing coordinated relief consisting of a 45-day extension for periodic filings required to be made on or prior to June 1, 2020. This blanket relief applies to reporting issuers, investment funds, registrants, certain regulated entities and designated rating organizations, and would cover financial statements, management's discussion and analysis, management reports of fund performance, annual information forms, technical reports, and other ancillary documents normally required to be filed in a timely manner under securities legislation.

The March 18 Notice confirmed that issuers relying on this exemption need not apply for an MCTO, notwithstanding the March 16 Notice. Furthermore, all CSA proposals currently out for comment will have their comment periods extended by 45 days.

The March 18 Notice further confirmed that CSA staff are in dialogue with the Investment Industry Regulatory Organization of Canada ("**IIROC**"), and that the CSA is adapting its approach to ensure that market participants have the flexibility required to make decisions in the evolving economic environment,

including by supporting measures such as virtual securityholder meetings. For further details regarding virtual meetings, please see our March 20 bulletin. Further details relating to the blanket relief included in the March 18 Notice are expected to be published shortly.

Additionally, the Toronto Stock Exchange (“**TSX**”) and the TSX Venture Exchange (“**TSXV**”) announced further relief measures for reporting issuers, discussed below.

TSX Relief Relating to Filing Obligations

TSX Staff Notice 2020-002 dated March 23, 2020 (the “**TSX Notice**”) confirms that issuers may avail temporary blanket relief from the following provisions of the TSX Company Manual:

- Section 442 and Section 451 - Financial Statements;
- Section 464 and Section 465 - Annual Meeting;
- Section 613 - Security Based Compensation Arrangements;
- Section 628 - Normal Course Issuer Bids; and
- Section 712 - Delisting Criteria - Market Value.

Issuers will not be required to apply to the TSX to take advantage of the relief from the provisions listed above.

The TSX Notice states that the following additional relief will be available to issuers:

- Discretionary, case-by-case relief that may be available to issuers when applying the definition of “market price” in Part I of the Manual. The TSX is not providing blanket relief in this regard;
- Issuers that must hold an annual meeting of security holders during 2020 may hold their 2020 annual meeting on any date in 2020 up to and including December 31, 2020, regardless of the issuer’s fiscal year end. Issuers are not required to submit a Form 9 in connection with this temporary relief;
- The timeframe within which issuers must obtain security holder approval of all unallocated options, rights or other entitlements under security-based compensation plans is modified to permit issuers to continue to grant awards under such plans until the earlier of the issuer’s annual meeting and December 31, 2020. Awards granted during this timeframe may be exercised prior to ratification by security holders;
- Issuers making a normal course issuer bid (“**NCIB**”) pursuant to Section 628 of the TSX Company Manual will be permitted to acquire listed securities pursuant to an NCIB where the purchases do not, when aggregated with all other purchases by the issuer during the same trading day on TSX, aggregate more than the greater of (i) 50% of the average daily trading volume of the listed securities of that class. This temporary relief is also available to participating organizations of TSX acting on behalf of issuers or NCIB purchasers, and is available up to and including June 30, 2020; and
- The TSX will not be applying the delisting criteria in Section 712(a) and Section 712(b) of the TSX Company Manual, which criteria permit the TSX to delist securities if the market value of the issuer’s securities is less than \$3,000,000 over any period of 30 consecutive trading days, or if the market value of the issuer’s freely-tradeable, publicly held securities is less than \$2,000,000 over any period of 30 consecutive trading days.

TSXV Relief Relating to Filing Obligations

Pursuant to TSXV Notice to Issuers dated March 23, 2020 (the “**TSXV Notice**”), the TSXV has announced that issuers will be able to rely on temporary blanket relief from the following provisions of the TSXV Company Manual:

- Policy 3.2 - *Filing Requirements and Continuous Disclosure*, section 4.1 - Shareholder Meetings; and

- Policy 4.4 - *Incentive Stock Options*, section 3.9(b) - Shareholder Approval for Plans, Grants and Amendments.

Issuers are not required to apply to the TSXV to take advantage of the temporary relief detailed above.

Furthermore, the TSXV Notice announced the following forms of relief:

- Issuers required to hold an annual meeting of shareholders in 2020 will be permitted to hold such meeting on any date up to and including December 31, 2020; and
- Issuers required to obtain shareholder approval of rolling stock option plans in 2020 may obtain such shareholder approval at the annual meeting of shareholders, which may be held on any date up to and including December 31, 2020, subject to compliance with applicable legislation.

The Capital Markets Group at Aird & Berlis has the expertise to assist you as you navigate your disclosure obligations during this challenging time. If you have any questions, please reach out to Melanie Cole or Adria Leung Lim.

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