Novel coronavirus and the impact on public disclosure requirements

March 10, 2020

As the novel coronavirus (or COVID-19) continues to spread worldwide, its impact on international business operations, supply chains, travel, commodity prices, consumer confidence and business forecasts is becoming increasingly acute.

The extent of its impact, however, remains difficult to assess or predict in a meaningful way. Issuers need to consider both the impact of COVID-19 on their operations from a business continuity and risk management perspective and how it affects their public disclosure obligations. As annual disclosure deadlines approach, reporting issuers in Canada are faced with the challenge of providing investors with accurate information about the future of their businesses when the scope of risk posed by COVID-19 is changing daily.

Public disclosure

COVID-19 will impact continuous disclosure documents, including an issuer's Management's Discussion and Analysis (MD&A), Annual Information Form (AIF), Management Information Circular and financial statements, disclosure controls and procedures, internal controls over financial reporting and public statements made by reporting issuers generally (including quarterly and/or annual earnings releases and news releases). This will require the attention of an issuer's board of directors, audit committee and senior management, as well as its financial reporting function, legal/compliance function and internal audit and accounting teams.

Risk factors

Risk disclosure in continuous disclosure filings must contain information on factors that could materially affect issuers' business, financial condition and results of operations. Management, together with boards of directors, audit committees, legal counsel and external auditors, should actively monitor the potential effects of COVID-19. They should also evaluate whether existing risk factors adequately address the risks presented by the virus, or if additional disclosure should be included to address the outbreak.

To the extent that COVID-19 has caused or may reasonably cause material changes to an issuer's business, updates to existing risk factors should be made. The question of how to disclose risks related to the outbreak is context specific and issuer-dependent. The level of detail for such disclosure will largely depend on a particular issuer's industry, geographic footprint and the extent of affected operations, including on personnel, suppliers and customers in any impacted areas.

If the risks presented by COVID-19 relate to consumer confidence, market instability and other economy-wide factors in an issuer's business, issuers can likely incorporate disclosure related to coronavirus developments within existing risk factors related to natural disasters, *force majeure* events, public health or uncertainty regarding global macroeconomic conditions.

Where risks presented by COVID-19 are integral to an issuer's business model, supply chain or industry, issuers should draft separate risk factors with language explaining how COVID-19 could specifically affect their future operations and results. Risk factors should not consist of boilerplate language or present risks as hypothetical if they have occurred. Issuers should ensure that risk factor disclosure related to the novel coronavirus speaks to the specific risks to their business, rather than merely offer a broad account of recent events and general economic impacts.

Concurrent with its review of risk factors, management should also review its cautionary disclosure with respect to forward-looking information, and ensure that any updates to risk factors and underlying assumptions are also reflected.

MD&A

MD&As provide a narrative explanation of an issuer's financial condition and future prospects by discussing known trends, demands, commitments, events or uncertainties that are reasonably likely to have an effect on the issuer's business. Trends and risks that have affected issuers' financial statements, and trends and risks that are reasonably likely to affect them in the future, are discussed. If applicable, issuers should discuss how the spread of COVID-19, and possible responses to it, could materially impact results of operations, as well as balance sheet items and cash flow projections. Issuers should consider and explicitly discuss any projected impact of COVID-19 specifically related to their business. Management should also consider whether unexpected cash needs could result in a stress on liquidity and, to the extent access to the capital markets may be impaired, whether liquidity could become a significant issue.

Accounting impact and financial statements

Issuers should work with their audit committees and external auditors to ensure that their accounting and financial reporting, auditing and review processes take into account current uncertainties and market volatility. Key assumptions and sensitivities should be re-evaluated and issuers should consider the adequacy of their disclosure regarding potential inventory write-downs and impairment losses; loan defaults or covenant breaches; changes in credit risk of customers or others negatively impacted by current developments; changes in business or economic circumstances that affect the fair value of financial and nonfinancial assets and liabilities; changes in growth forecasts that may impact impairment evaluations (*e.g.*, goodwill, other intangible assets and fixed assets); and strategies and policies to manage evolving developments.

Issuers should also consider how COVID-19 should be incorporated into their disclosure of subsequent events in the notes to their financial statements, in light of the fact that its spread has accelerated post year-end. Finally, issuers should consult with their external auditors as to whether deadlines for issuing financial statements can be met, or if there are possible scope limitations on external auditors' reports.

Market updates

In addition to periodic continuous disclosure, reporting issuers are also subject to the ongoing obligation to disclose material information and make timely disclosure of material changes to their business, operations, and capital. Issuers that have already issued earnings releases (as part of regularly scheduled earnings updates) or have already commented about the effects of COVID-19 should assess whether previously issued guidance needs to be revised to the extent that prior disclosure has become materially inaccurate.

Issuers must ensure, where such material information exists and until it is generally disclosed and broadly disseminated, that appropriate protocols are in place and implemented to prevent selective disclosure of material non-public information, as well as trading or other improper use of that information. Given the uncertainties about the geographic dispersion, severity and ultimate consequences of COVID-19, management should exercise caution if they choose to comment on how the virus might affect their business. As with any public statement about possible future events, issuers should ensure that appropriate cautionary language is included.

Risk management and corporate governance

Directors and officers of Canadian companies are subject to a duty of care and fiduciary duties that require they act in the best interests of the issuer and relevant stakeholders, and act with the care, skill and diligence of a reasonably prudent person. Directors and management should be especially cognizant of these duties when responding to COVID-19 and developing risk management strategies. Doing so will require keeping up to date with reasonably available information in order to have an accurate understanding of potential risks, and reassessing decisions as new information is obtained. Given the rapidly evolving and uncertain nature of this outbreak, keeping informed and updated is crucial to ensuring that business risks related to COVID-19 are appropriately addressed and managed.

Issuers that have formal business continuity plans and procedures should follow those plans, making adjustments as new information becomes available or the impact evolves. Issuers should also review their board of directors and committee mandates to confirm who will be responsible for oversight and support of management's efforts in assessing and acting on the risks as they emerge. In many cases, issuers' human resources or health and safety committees will also be involved.

While the long-term effects of COVID-19 on business operations, financial and share performance, strategy, capital allocation and risk mitigation remains to be seen, how issuers manage their exposure to risks stemming from the virus could be material to investors when making investment decisions. Issuers should consider if and how to disclose to investors their risk management strategies related to COVID-19. Such

disclosure may include how issuers plan to address short-, mid-, and long-term risks and contingencies.

BLG's national corporate and securities teams can advise Canadian companies and their boards on legal issues related to the coronavirus, particularly, with their public disclosure, risk management and corporate governance obligations. BLG has also created a COVID-19 Resource Centre to assist businesses on a variety of topics, including contractual risks, public disclosure requirements, education and criminal law.

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