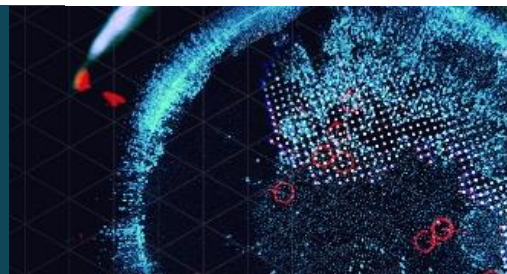


Managing Coronavirus/COVID-19 Illness in the C-Suite – Disclosure and Other Considerations for Public Companies



April 2, 2020

When an executive officer or director becomes seriously ill, including due to COVID-19, U.S. public companies and foreign private issuers must consider their disclosure obligations as well as governance and other key topics. This alert discusses these considerations.

1

General Disclosure Considerations

- Companies generally do not have a specific affirmative obligation to disclose the illness of an executive officer or director. In some cases a Form 8-K or other real time disclosure could be required (as discussed below), but even where it is not, the illness of an executive officer may be material to investors and a company's business. In such circumstances, a company could conclude that voluntary disclosure about the executive is appropriate.
- A company planning to engage in a securities offering or otherwise effect transactions in its securities (or permit its insiders to do so) will need to evaluate the materiality of an executive officer's illness and consider whether disclosure should be provided before any transactions occur. Further, a company that is planning to speak with analysts or investors, and deems an illness to be material, may also consider making a disclosure to facilitate compliance with Regulation FD.
- If the illness of an executive or director would present a material risk to the company's business, the company should include a key person risk factor in its periodic reports, or assess whether an existing key person risk factor sufficiently describes the risk. If the risk has been realized, the company will need to include disclosure to this effect in the risk factor and evaluate whether disclosure should be included in MD&A.
- As a general matter, a non-employee director's illness is less likely to be viewed as material than that of an executive officer, although a company may wish to prepare responses to inquiries if the situation arises.

2

Real Time Disclosure Requirements

- The illness of an executive officer or a director does not, by itself, trigger Form 8-K disclosure, and the staff of the SEC's Division of Corporation Finance (the "Staff") has provided guidance that a company is not required to report the death of an officer or director. However, the Staff has made clear that a Form 8-K is required in circumstances where an enumerated officer temporarily turns his or her duties over to another person, and a second Form 8-K would be required when the officer resumes his or her duties.

- Companies are required to disclose an interim officer's business experience and certain other information in the Form 8-K announcing the interim appointment, and would be required to include this information in other filings that require disclosure regarding a company's officers.
 - In addition, NYSE and Nasdaq rules require prompt public disclosure of information that would reasonably be expected to materially affect the value or trading in a company's securities. While there is no specific guidance on this issue, we would not expect these obligations to be triggered unless a company's operations depend critically on a certain officer or rumors about an illness are having a significant impact on the trading in a company's securities.
-

3

Whether to Voluntarily Disclose an Executive's Illness – More Considerations

- In addition to traditional materiality considerations, other factors may be relevant to public companies when considering whether to make voluntary disclosures regarding cases of COVID-19 or other illness. These include responding to or quelling market rumors, generating appropriate messaging, or displaying transparency to and maintaining credibility with investors, employees and other stakeholders.
 - For contagious diseases such as COVID-19, there is a risk that information regarding an executive officer or director illness may leak publicly, since other individuals (both internal and external to the company) may be informed of that condition for public health reasons. In these circumstances, a company may consider disclosing the illness to ensure consistency of messaging and broad distribution of information.
 - A company may also wish to announce an executive officer's illness if his or her duties could be significantly impeded by the condition, such as if he or she became unable to participate in corporate events like earnings calls or shareholder meetings.
-

4

SOX Certifications and Other Filing Considerations

- If the principal executive or financial officer is unable to provide the Sarbanes-Oxley certifications required to be included in a Form 10-Q or Form 10-K, the company would need to either delay the filing or designate a different executive to serve temporarily in the affected officer's capacity.
 - Under relief granted by the SEC, a company may defer the filing of a Form 10-K or Form 10-Q due on or before July 1, 2020 for a 45-day period, if it is unable to file in a timely manner due to COVID-19. Companies that defer a filing would be required to provide disclosure in a Form 8-K (or Form 6-K for foreign private issuers) disclosing, among other things, the reason it is unable to file in a timely manner and when it expects to be able to make the required filing.
- Officers signing periodic reports and SOX certifications have potential liability for material misstatements or omissions in such reports. Individuals being asked to step in temporarily might find this problematic, and this potential liability should be factored into the company's plans regarding who should serve in an interim capacity.

- A company should also consider the role and involvement of the ill executive officer in the company's disclosure controls and procedures and/or internal control over financial reporting, and whether any adjustments and disclosures will need to be made regarding those processes.
 - If a person who is not a Section 16 reporting officer temporarily assumes the functions of such an officer, this would trigger a Form 3 filing obligation for such person. Conversely, the individual who is being replaced would not be a Section 16 reporting officer while he or she is out of commission.
-

5

Board Considerations

- Boards of directors of public companies may find that they want to refresh their evaluation and discussion of regular and emergency succession planning, for both executive and board roles.
 - Relevant succession issues include the identification of candidates capable of serving in interim roles, delegation to and oversight of interim officers, board flexibility for subsequent changes, and communication plans to employees and to the public when succession takes place.
 - It may be helpful to prepare for scenarios in which more than one individual becomes sick. This would involve identifying multiple candidates for each role, particularly for “essential businesses” with continued in-person interactions at the executive level.
 - Precise details of succession plans are often kept confidential, other than to the board and certain key employees (though it is best to confirm in advance that candidates are willing to assume executive roles if needed). Proxy disclosure regarding the board's process of succession planning is not uncommon and is a focus for certain institutional investors.
 - If a director becomes ill, other board members should be notified. Depending on the company's governance documents, for instance, an ill board chair might mean that the CEO would preside over board meetings until the board designates an interim chair. Similarly, an ill committee chair might result in the remaining committee members or the board designating an interim committee chair.
 - If a company decides to make a public announcement regarding an officer with COVID-19, it may also decide to disclose certain information regarding its succession plan or other preparatory measures.
-

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Securities and Capital Markets practice:

<u>Kerry Burke</u>	+1 202 662 5297	kburke@cov.com
<u>Christopher DeCresce</u>	+1 212 841 1017	cdecresce@cov.com
<u>David Engvall</u>	+1 202 662 5307	dengvall@cov.com
<u>Brian Rosenzweig</u>	+1 212 841 1108	brosenzweig@cov.com
<u>David Martin</u>	+1 202 662 5128	dmartin@cov.com
<u>Matt Franker</u>	+1 202 662 5895	mfranker@cov.com
<u>Reid Hooper</u>	+1 202 662 5984	rhooper@cov.com
<u>Alicia Zhang</u>	+1 212 841 1092	azhang@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.