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Senior Executive Illness Due to COVID-19

Disclosure Considerations for U.S. Public Companies

SUMMARY

The COVID-19 crisis may require certain public companies to address a long-standing challenge: whether to disclose that a senior executive is experiencing a serious health issue.

The news that a senior executive has been diagnosed with (or is suspected of having) a serious illness can be disruptive to a company's operations and unsettling for its shareholders. However, the news can be substantially more disruptive if it is leaked and therefore incomplete or unmanaged or if its disclosure is delayed such that the company's disclosure processes and its transparency with investors is called into question. Because there is no specific rule or duty that requires disclosure of a senior executive's health issues, companies facing this situation in the context of COVID-19 will likely be called upon to evaluate the specific circumstances and determine the best course among the available disclosure options (while taking into account the executive's own privacy rights and personal concerns).

DISCUSSION

U.S. federal securities laws do not specifically require disclosure when a senior executive becomes ill. Disclosure is only required if the information is material and the company has a duty to disclose it. Although investors may have a keen interest in a senior executive's health and disclosure has in cases meaningfully affected a company's stock price, market practice has weighed against finding senior executive health information material and neither the SEC nor the courts previously have found that a senior executive's health was sufficiently material to require disclosure. Accordingly, in most cases involving a key executive

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with a serious and/or unpredictable health issue, companies have been able to choose whether and, if so, when to make a voluntary disclosure.¹

We note, however, that this history was not developed in the context of communicable diseases and that considerations may be different in circumstances where multiple members of senior management are affected. Similarly, although companies have had significant leeway in public disclosure of executive health issues, considerations also may be different in circumstances where insiders transact in the company's securities with knowledge of such undisclosed issues.

In considering whether to disclose a senior executive's illness, companies often begin with an assessment of the impact of the executive's illness on the company, taking into account the duties of the executive, the seriousness and likely course of the illness, the ability of the executive to function during treatment, the projected length of any absence, whether other members of senior management have been affected and whether any previous disclosure (including in connection with a strategic transaction or securities offerings) may give rise to a duty to update, among other factors. The next consideration often relates to the likelihood of the information otherwise becoming public, and the reputational, operational and market risks associated with such a leak. Final considerations often include the desirability of transparent investor relations and factors relating to corporate governance best practices.

Due to the nature of COVID-19, including the recommended public health measures for containing its spread, there is a significant likelihood that a senior executive's actual or presumed positive COVID-19 diagnosis will leak. Under the current public health recommendations, and pursuant to the COVID-19-related policies adopted by many companies, if an individual tests positive for the virus (or is presenting serious symptoms or has been in contact with someone who is diagnosed), the number of people both within and outside the company who will be aware of an executive's actual or suspected illness is likely to be much higher than for another type of illness. Combined with the current public interest relating to COVID-19 infections, the likelihood of public dissemination is meaningfully increased.

If a leak is likely or has already occurred in the context of a senior executive's COVID-19-related illness, voluntary disclosure may be particularly important. Making a voluntary disclosure provides the company with an opportunity to present its assessment of the impact of an executive's illness and plans in place for mitigating such impact, including implementation of any interim officer roles or succession planning and the potential impact on the rest of the company's executive team and its board of directors to the extent they have come into contact with the affected executive, while framing the narrative in a way that is reassuring to the company's shareholders, employees and other stakeholders – and as respectful to the individual and his or her family – consistent with the circumstances.

¹ However, if an illness is so significant that a senior executive has effectively ceased serving in one of a set of identified roles, current disclosure on Form 8-K is required.

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The decision to make a voluntary disclosure can also be impacted by approaching scheduled corporate events – namely, most U.S.-listed companies will have their annual shareholder meeting and first quarter earnings call in April or May. If a senior executive is unable to participate due to illness, for the reasons noted above, companies may want to make a voluntary disclosure in front of those events (rather than announcing at the event).

If a company decides to make a voluntary disclosure, however, it is important to understand the associated legal and practical issues. The company should consider the format of the disclosure. Often, when a company discloses the illness of a senior executive, the company will issue a press release that is subsequently filed or furnished on a Form 8-K, although, in some instances, the executive has announced his or her illness through a personal social media account (without an accompanying press release from the company). The format of the disclosure can have legal implications that should be further discussed with counsel. The company should also consider the obligation to include all information necessary to make any statements made not misleading. In the context of COVID-19, this implicates questions relating to whether other executives have been diagnosed or exposed. A third consideration is under what circumstances and to what extent the company intends to provide updates on the executive's or others' condition once it has made an initial disclosure and if it intends to forego further comment, so indicate in the initial announcement. The company should also consider whether it would be appropriate or advisable to disclose its succession planning in the event that the executive's condition worsens.

In addition, the company should consider the timing of the disclosure, including whether there is any reason (including due to a leak) to make a disclosure before a diagnosis is confirmed. The company will wish to act rapidly to make disclosures before the information disseminates publicly (or respond in a timely manner thereafter), but also must make sure it crafts an appropriate message and complies with relevant legal requirements. Among other things, the company will need to be mindful of its obligations under applicable privacy laws, including the American with Disabilities Act, which generally requires an employer to maintain the confidentiality of employee health information.

Finally, while companies may have leeway in deciding whether to make public disclosure of the personal health issues of its executives, the prohibitions on insiders trading on material nonpublic information continue to apply to both the company and to individuals who are aware of undisclosed material information.

We are available to discuss any of the foregoing at your convenience and provide assistance in this uncertain time.

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