Buchalter
COVID-19 Alert

Corporate & Transactional

In the corporate and transactional arena, U.S. and global securities markets are experiencing volatility and declines of historic proportion, and as of this update on March 20, 2020, the markets make it difficult if not impossible for companies to remain on pace – or even to proceed – with mergers, acquisitions and capital markets that had not been reduced to final, binding agreements. The VIX, the volatility index calculated by the Chicago Board of Options Exchange as a measure of the expected market volatility, remains extraordinarily high, exceeded only by the records set during the financial crisis of 2008. These events have made it extremely difficult for businesses to plan for future strategic events, or even to anticipate their own liquidity and working capital risks. Recent developments with coronavirus and the related economic turmoil give rise to at least three additional areas of concern. First, businesses that have operational risks that arise with employees, customers, and vendors whose performance might be affected by the outbreak or related management concerns. This has proven particularly true with companies that depend on global commerce for manufacturing, supply chains, and customer relationships. As with the overall market tendency to react strongly to perceived threats before those threats materialize, there has been a particularly volatile reaction for electronics manufacturers based on the presumed risks COVID-19 poses to assembly and component manufacturers and have resulted in extraordinary declines in oil, metals and many other commodities. Likewise, U.S. companies whose operations have significant export concentration, have seen increasing volatility. Relating to these risks is the potential for securities litigation arising out of allegedly defective disclosures. Anticipating this exposure calls for working closely with counsel and with internal financial staff to develop thorough risk analyses and to assure the timely, accurate communication of known material events and risk factors. These companies also should adjust their investor relations and communications plans to help mitigate the potential for market overreactions, balancing the need for disclosure of operational and financial risks against investors' expectations that management is anticipating and planning for the potential impacts, if, for example, the severity or pervasiveness of COVID-19 were to cause more serious disruptions.

The second category of corona virus-related concerns, alluded to above, is the effect of a volatile securities market on M&A and capital markets transactions – including, but not limited to, those involving public companies. We have seen instances with a number of clients questioning whether COVID-19-related risks or the coinciding market volatility might trigger "material adverse change" or "MAC" clauses in pending agreements. The general market downturn and the public response to the pandemic have, in our experience, adversely affected buyers' perceptions of targets' values; is constraining lenders' willingness to extend new credit and, in some cases, to heavily scrutinize even undrawn capacity on existing credit lines; and has proven highly disruptive to planned capital transactions including both public and private securities offerings, buybacks, tender offers and dividend programs as issuers and underwriters adjust their plans to address the potential for longer-lasting effects on revenues and strategic plans. This development, has, in our clients experience, is adversely a buyer's perception of target value, are limiting lenders' willingness to extend credit, as well as capital markets transactions, tender offers, stock buybacks, and dividend programs as issuers and underwriters adjust their plans to address the potential for longer-lasting effects on revenues and strategic planning. Our attorneys are advising clients that are currently negotiating such transactions to consider these factors and are recommending thorough and careful review of closing conditions and operating covenants – with particular attention to MAC-related provisions – during the drafting process.

A third concern is specific to publicly traded companies. On Feb. 19, 2020, the Securities and Exchange Commission and the Public Company Accounting Oversight Board issued a joint statement addressing, among other items, the effects of the coronavirus on financial reporting, including the issuer's disclosures and the audit firm's audit quality (for example, audit firm access to information and company personnel). The joint statement acknowledges that the coronavirus is dynamic and the effects to any particular industry or issuer might not be known. However, users might need disclosure of how issuers plan for and respond to coronavirus events. The joint statement reminds public companies to work with their audit committees and auditors to "ensure that their financial reporting, auditing and review processes are as robust as practicable in light of the circumstances in meeting the applicable requirements." In this regard, public companies should carefully consider whether the following items in _lings should discuss the impact or potential future impact of the coronavirus:

- Risk Factors
- Management's Discussion and Analysis (including the requirements of Item 303 of Regulation S-K to discuss known trends and uncertainties on liquidity, capital resources, and results of operations)
- Description of Business
- Quantitative and Qualitative Disclosures about Market Risk
- Board risk oversight disclosures pursuant to Item 407(h) of Regulation S-K and Item 7 of Schedule 14A

The additional considerations for public companies come with an offsetting consideration: the SEC has announced conditional regulatory relief that affords public companies affected by the coronavirus an additional 45 days to _le certain disclosure reports due between

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March 1 and April 30, 2020. Companies relying on this relief must _le a Form 8-K explaining why the relief is needed in their specific circumstances, among other conditions. We also encourage public companies to consider filing a Form 8-K if the effects of the disease are likely to materially affect results of operation, financial condition, or the accuracy or reliability of financial statements.