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COVID-19: Canadian Public Disclosure Considerations During the Pandemic

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Canadian public issuers grappling with the impact of the COVID-19 pandemic on their businesses are rightly focusing on the health and safety of their workforce and customers, business continuity and risk management. However, while balancing these and the many other critical issues flowing from this pandemic, issuers must also contend with their public disclosure obligations.

At this stage, the uncertainty around the magnitude and duration of this pandemic may make it impractical for most issuers to quantify its impact on their businesses, even for issuers that have already suffered a direct, material impact. However, it is becoming increasingly likely that the impact ultimately will be material for most issuers. As a result of this uncertainty, Canadian public issuers will need to decide almost in real time what to disclose regarding the pandemic's implications for their businesses, and when to disclose it, in order to satisfy their disclosure obligations.¹ In making these decisions, issuers must also ensure that their disclosure controls and procedures and internal control over financial reporting remain effective, notwithstanding any limitations resulting from measures taken to reduce the spread of COVID-19.

Disclosure deadlines. Despite the disruption to all organizations stemming from the pandemic, a Canadian reporting issuer's obligation to make timely and periodic disclosure continues to apply – with one limited exception. On March 23, 2020, Canadian securities regulators gave issuers a 45-day extension for periodic filings otherwise required to be made with them on or before June 1, 2020.² These filings include financial statements, management's discussion and analysis (MD&A), annual information forms and technical reports. This extension may be welcome relief for issuers that will be challenged to make meaningful pandemic-related disclosures in their next periodic report; however, the extension comes with strings attached that may limit its utility (e.g., issuers must periodically disclose updates of any material business developments). Moreover, this extension does not excuse issuers from their continuing obligation to immediately disclose material changes or, in certain circumstances (including when selling or buying their securities), to disclose all material facts. Nor does it relieve issuers of the obligation to publicly disclose material implications of the pandemic before engaging on these issues with analysts or institutional investors or before insiders trade in the issuer's securities.

Material changes. A Canadian public issuer has a current (or timely) disclosure obligation to disclose by news release any material change in its affairs immediately following the occurrence of that change. A "material change" is any change in the issuer's business, operations or capital that constitutes a "material fact" (i.e., a fact that would reasonably be expected to have a significant effect on the market price or value of any of the issuer's securities).³ With the uncertainty and evolving developments surrounding the COVID-19 pandemic, it may be difficult to determine precisely when such a material change has occurred. Beyond its general economic impact, and resulting effect on commodity prices and consumer demand, the pandemic may have any number of material, issuer-specific implications. COVID-19 and governmental or other measures to reduce its spread may significantly disrupt an issuer's workforce and operations. These measures may also disrupt the issuer's suppliers and customers, increase its costs and limit or delay the issuer's access to supply chains, customers and markets critical to its business. An issuer's sources and cost of capital and liquidity may also be adversely affected, including as a result of the issuer's failure to comply with its financial covenants. Issuers should be particularly sensitive to any impact of the pandemic that may be more significant to them than to others in their industry.

Risk factors. Issuers should consider whether risk factors in their most recent filings need to be expanded or updated to address the new or more specific risks to their businesses resulting from the pandemic. Previously disclosed risks that were adequate at the time published may now be, or may soon become, too general, too narrow or otherwise stale due to the ever-evolving nature of the pandemic's impact. This is particularly important where these risks may result in an issuer's failure to achieve previously issued guidance or other material

forward-looking statements. Issuers should also make corresponding changes to their forward-looking statements disclaimer in order to have the benefit of statutory relief from liability in connection with misrepresentations in such statements. While the pandemic-related risk factors of peer issuers may be instructive for an issuer preparing or updating its own risk factors, each issuer needs to tailor its risk factors to its specific circumstances at the time, including through specific disclosure of any circumstances contemplated by disclosed risks that have, in fact, occurred.

Guidance. Dealing with existing financial or operational guidance is one of the most challenging disclosure issues posed by the pandemic. An issuer must discuss in its MD&A any events or circumstances resulting from COVID-19 in the reported period that are reasonably likely to cause actual results to differ materially from any previously disclosed material forward-looking information for a period not yet completed, together with the expected differences. However, in certain circumstances, it may be advisable or necessary to provide this update sooner by way of a news release. Whether such an earlier update should be provided is a fact-specific and complex determination to be made on a case-by-case basis. An update may not be a feasible option for issuers that, while uncertain about their existing guidance, do not have sufficient information to issue new guidance or are not ready to withdraw their guidance entirely. If so, these issuers should avoid statements that could be seen to reaffirm or adopt that guidance, including by incorporating the prior guidance without modification into a prospectus or other offering document. Notably, under Canadian securities legislation, issuers must not disclose financial guidance unless, among other things, it is based on assumptions that are reasonable in the circumstances. Accordingly, whether the update is disclosed in their MD&A or in an earlier news release, given the significant uncertainty surrounding the impact of the pandemic, some issuers may be required or choose to withdraw their prior guidance and indicate an intent to provide new guidance only after they have sufficient clarity to do so.

MD&A and financial statements. Issuers must address the impact of the pandemic in their next MD&A to the extent necessary for an understanding of their financial condition, financial performance and cash flow. In addition to actual impacts for the reported period, issuers must disclose the pandemic and any anticipated impact to the extent it is a trend, event or uncertainty that is reasonably likely to have an effect on their businesses. This is in addition to the obligation (noted above under “Guidance”) to update material forward-looking information. Issuers will also need to work with their auditors to ensure their MD&A and financial statements address the accounting and financial impact of the pandemic, including with respect to key assumptions underlying critical accounting estimates. Finally, issuers must consider the continuing efficacy of their disclosure controls and procedures and internal control over financial reporting. Issuers with significant disruptions to their operations, including impediments to physical site access due to travel limitations and social-distancing measures to reduce the spread of COVID-19, may need to modify or replace these controls and procedures for them to remain effective. Any changes to these controls and procedures, or material weakness or other failure in their effectiveness, will require disclosure.

Earlier disclosure/Selective disclosure and insider trading. Even in the absence of an issuer-specific material change, and prior to its next earnings release, an issuer may still be obligated, or may choose, to publicly disclose the implications of the pandemic to its business. While the global implications of the COVID-19 pandemic are common knowledge, the implications specific to an issuer at any given time may be a material fact that is not generally disclosed. Various circumstances may legally require earlier disclosure of these issuer-specific pandemic implications. Issuers must ensure that they have generally disclosed all material facts before they or any of their insiders can trade in their securities (to avoid misrepresentation claims and comply with insider trading prohibitions) and before engaging with analysts and institutional investors (to avoid selective disclosure and violating prohibitions on “tipping”).⁴ In these circumstances, issuers will need to address the actual and reasonably likely implications of the pandemic from various angles (including, if applicable, updating any current guidance). Even if not legally required, an issuer may volunteer early pandemic-related disclosure to maintain the confidence of the capital markets as to the currency of its disclosure record.

We all find ourselves in uncharted territory. No single approach to disclosure will apply to all issuers; each one will need to consider its own specific facts and circumstances and assess these in real time. Because of the unprecedented and uncertain implications of the COVID-19 pandemic on issuers' businesses, in circumstances where it is unclear, we encourage issuers to consult with their securities lawyers to help them assess when and how they should make a pandemic-related disclosure.

¹ This article is an overview of key Canadian public disclosure considerations. On May 6, 2020, staff of the Canadian Securities Administrators published a [presentation](#) that includes high-level guidance for Canadian public companies disclosing the impact of the COVID-19 pandemic on their businesses, financial

condition and results of operations. Canadian reporting issuers that are subject to U.S. reporting obligations will also need to be mindful of U.S. public disclosure considerations.

² Similar relief has been provided by the U.S. Securities and Exchange Commission for U.S. periodic reports that were due to be filed between March 1 and April 30, 2020. However, this relief is not applicable to Canadian issuers that file their U.S. reports using the multijurisdictional disclosure system because the due date for these filings is determined by the corresponding Canadian disclosure deadlines. Information about the SEC's relief can be found in [SEC Provides Temporary Relief for Filers Affected by COVID-19](#).

³ A decision to implement any such change, by the issuer's board or by its senior management (where board confirmation is probable), also constitutes a "material change."

⁴ In addition, the Toronto Stock Exchange requires that its listed issuers disclose material information on a timely basis.

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