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# COVID-19 Legal Exposure for Public Companies and Their Directors & Officers

*The spread of this global pandemic is presenting public companies, management and boards with unprecedented and complex legal, business, financial and operational challenges. Securities class action cases related to COVID-19 have already been filed and it is likely that more will be filed as the COVID-19 outbreak progresses. These COVID-19 related lawsuits can result from allegations of inadequate disclosures and breaches of fiduciary duty. What steps can public companies take to avoid or minimize exposure to these lawsuits?*

**This is a summary only; please contact a Seyfarth attorney for any legal advice or guidance needed.**

## Disclosure Related Lawsuits

On March 25, 2020, the SEC released guidance indicating that disclosures for public companies affected by COVID-19 are required under the securities laws and recommending that companies proactively revise and update disclosures as facts and circumstances change. To mitigate risks associated with disclosures, companies should use language that clearly identifies predictions or forecasts in financial statements and indicate that they are uncertain, particularly in the context of the current and ongoing crisis.

Forward looking statements should be carefully identified and should include appropriate and specific cautionary language and identify specific company risks and contingencies. General expressions of confidence in your company's ability to manage this crisis is acceptable as long as the company is not aware of information that is inconsistent with such statements. It is important to make sure that information is properly brought to the attention of the board so that public statements can be carefully considered and expressed to the public.

Statements of opinion should be identified as such, supported by the facts, and not omit or conflict with information that may render the opinion misleading.

## Breach of Fiduciary Duty Claims

Board oversight duties include:

- Adopting reasonable and appropriate internal reporting systems such that relevant operational, risk and financial information will come to the board's attention in a timely manner.
- Implementing and monitoring a reasonable system of internal and security controls.

Boards need to carefully and regularly assess the company's risks, analysing contingencies and current and future actual and potential risks. These may include cybersecurity protections, worker protections, active liquidity/debt-management, succession planning, operational and supply chain changes/challenges, and insurance coverage. It is important for boards to not only implement internal oversight and reporting systems, but to closely monitor and test them to ensure that significant risks and

red and yellow flags are appropriately and timely addressed. All of these corporate actions should be appropriately documented.

## Best Practices

In this era of COVID-19 there are proactive steps that management and boards can take to help mitigate claims and lawsuits and to evaluate risks, including:

- Create committees to address COVID-19 risks and their potential manifestations.
- Establish protocols requiring management to keep the board apprised of compliance practices, risks, and reports.
- Increase the frequency of regularly scheduled board meetings where appropriate.
- Create succession/continuity plans.
- See that the CTO and CIO develop plans to protect confidential information for remote work and conduct regular cybersecurity evaluations, which are reported to the board.
- Assess and implement compensation and operational changes to protect company health.
- Assess liquidity/debt-management concerns.
- Adopt protections for employees, internal controls and processes.
- Closely monitor corporate disclosures, potential insider trading, and financial risks.
- Carefully document all efforts.

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