BCLP. Client Intelligent

BCLPSecCorpGov.com

REGISTERED U.S. SECURITIES OFFERINGS IN THE COVID-19 PANDEMIC

May 19, 2020

Despite the ongoing COVID-19 pandemic, companies continue to access the capital markets. In fact, liquidity concerns have put even greater emphasis on securities offerings for some companies. But there can be no question that COVID-19 has affected capital market transactions and companies should be mindful of the new environment.

Companies should consider a variety of offering issues that have been affected by the ongoing health crisis. These include:

Access to the market. Companies should consult with financial advisors as to the feasibility of offerings during this turbulent time. Companies may need to be much more flexible in timing and pricing their offerings.

Disclosure. As always, companies must evaluate the sufficiency of their disclosures. The difference now is that there may be a higher risk than usual as to whether all material nonpublic information has been disclosed. The SEC staff has encouraged disclosure to be as timely, accurate and as robust as practicable under the circumstances created by the COVID-19 pandemic. The Chairman of the SEC and the Director of the Division of Corporation Finance have pressed publicly for these robust disclosures to include management's expectations about the effects of the pandemic going forward as well as the effects thus far. They suggested that detailed discussions of current liquidity positions and expected financial resource needs, as well as company actions to protect worker health and well-being and customer safety, could all be material to investors and encouraged disclosure. As we have previously discussed, companies need to give special attention to risk factors – particularly to assess whether new risks have emerged or hypothetical ones have become real.

In the offering context, concerns about disclosures being current are even greater. Many companies have provided significant COVID-19 related disclosures in their quarterly reports and Form 8-Ks prior to going to market. In some cases, though, underwriters or their counsel are asking issuers to include fulsome disclosure in the offering documents regarding COVID-19's effects on the company's business in a separate recent developments section and/or to provide related risk factor disclosure, even if similar or identical disclosure was provided in the company's recently filed Form

10-Q or Form 10-K incorporated into the prospectus. As companies have more visibility into the impact of the pandemic on their businesses and their business partners, it becomes more likely that such information may need to be disclosed and updated disclosure provided. Companies that access capital frequently, or through at-the-market offerings or similar programs, should consider more frequent updates.

Virtual Marketing. Companies and their financial advisors should consider the types of additional marketing efforts that will be necessary for a successful offering. Many companies are shifting to electronic road shows, virtual meetings and telephone calls in lieu of the more typical in-person meetings.

Due Diligence. Companies should be prepared for additional COVID-19-related due diligence. Questions may include:

- The current and expected impact on the business and prospects, including any recent material trends or uncertainties not yet disclosed in quarterly reports;
- Impacts on a company's supply chain, customers, business partners and other related parties;
- Anticipated impact on guidance previously issued by the company;
- Impact of remote work arrangements on the company's ability to maintain operations, including IT, financial reporting, internal controls and disclosure controls;
- Any disruption to the company's employees, including whether there has been an outbreak among employees, work arrangements and productivity; and
- Contingency plans if a material facility is impacted and any plans to reopen.

Period between Pricing and Closing. Companies and underwriters may have some discretion with respect to the date for the closing of an offering, subject to disclosure obligations. However, issuers may wish to consider staying closer to the default two business day settlement cycle to avoid heightened risk of a transaction not closing due to intervening material adverse effects caused directly or indirectly by COVID-19.

Filing Deadline Relief. On March 25, 2019, the SEC issued an order extending filing relief for public companies unable to meet a filing deadline as a result of circumstances related to COVID-19. Pursuant to recently issued COVID-19 FAQs published the SEC staff, the staff made clear that under certain circumstances, companies may file an S-3 Registration Statement and engage in a shelf takedowns of securities while availing themselves of the delayed filing deadlines.

In light of the effect of COVID-19 on the capital raising process, companies should give consideration to the above items when preparing for an offering, especially whether updated COVID-

19-related disclosures are necessary as companies gain visibility on how the pandemic may impact the business and its prospects.

RELATED PRACTICE AREAS

- Securities & Corporate Governance

MEET THE TEAM

William L. Cole

St. Louis

bill.cole@bclplaw.com
+1 314 259 2711

Andrew S. Rodman

New York

andrew.rodman@bclplaw.com
+1 212 541 1197