

COVID-19: Certain Issues to Consider for Listed Indian Companies

While corporations across the globe brace for the full impact of the coronavirus disease 2019 (COVID-19) pandemic on their business, operations and financial results, listed companies need to be mindful of additional compliance requirements and responsibilities.

Set out below are certain considerations which are relevant for listed Indian companies in the current COVID -19 scenario.

PERIODIC DISCLOSURES AND REPORTING

Under the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (the “**Listing Regulations**”), a listed company is required to disclose events or information which are material or which may have a material effect on the company.

In addition to disclosure of material events on an ongoing basis, the Listing Regulations and various other circulars issued by the Securities and Exchange Board of India (“**SEBI**”) prescribe annual, quarterly and other periodic disclosures of certain information including financial results, annual reports, shareholding pattern and statement of investor complaints. The SEBI has issued circulars extending timelines for submission of such information for the year ended March 31, 2020 and providing temporary relaxations in relation to, among other things, requirements for fund-raising and prior notice for board meetings to the stock exchanges. The SEBI has also included a separate section on its website in relation to COVID-19 measures (available at <https://www.sebi.gov.in/sebiweb/home/HomeAction.do?doListingAll=yes&cid=71>>).

BOARD AND SHAREHOLDER MEETINGS

The Ministry of Corporate Affairs, Government of India (“**MCA**”) has relaxed its requirements on the conduct of board meetings and permitted such meetings to be

held entirely through video-conferencing until June 30, 2020. The MCA has also mandated that companies should use e-voting or postal ballot for shareholder approval on all decisions requiring approval (other than ordinary business or business where the person has a right to be heard). If a shareholder meeting is unavoidable, then a procedure has been prescribed for conducting such meetings on or prior to June 30, 2020 using video conferencing or other audio visual means. Companies and compliance officers should ensure that they have adequate infrastructure and protocols in place for the conduct of such meetings. As part of disaster management protocols, all companies have been strongly advised to put in place an immediate plan to implement a “work from home” policy as a temporary measure. The work from home policy is required to be implemented at the head and field offices, to the extent possible, including by conduct of meetings through video conference or other electronic, telephonic or computerized means. Further, listed companies could consider constituting a committee of the board to make urgent decisions on behalf of the board to respond to emergency situations.

The Listing Regulations mandate listed companies to have in place a succession plan for the board and management. In addition, business continuity plans are required for banks and market infrastructure institutions such as stock exchanges as they provide essential services. Other companies should also consider voluntarily adopting a business continuity plan.

Companies should also consider adopting a specific policy on dealing with COVID-19. For instance, a company may choose to continue social distancing, “work from home” and other precautionary measures in the interest of the safety and security of employees. This will avoid ambiguity and facilitate resumption of normal operations.

IMPACT ON FINANCIAL RESULTS AND ANNUAL REPORT

While certain short-term effects of a shut-down of operations and lower liquidity may be reflected in the results for the financial year ending March 31, 2020, the mid to long-term impact will be better reflected in the financial results for subsequent periods, including the first quarter of the financial year 2021. Under the Listing Regulations, companies have a period of 60 days from the end of the financial year to publish their annual audited financial results. The SEBI has extended this deadline by one month, until June 30, 2020. Since the financial year end date has not been changed, listed companies have time to prepare and announce their year-end results while also being aware of additional adverse factors which will impact the current quarter results which will be announced subsequently.

While the SEBI has not yet issued any guidance to listed companies on the manner of

disclosure in the financial results, the U.S. Securities and Exchange Commission's Division of Corporation Finance ("**CF Division**") has issued a helpful guidance on how companies listed in the U.S. should fulfill their obligation to disclose material changes to their business, financial condition and results of operations in the context of the unprecedented uncertainty created by the COVID-19 pandemic.¹ Further, a recent public statement issued by the Chairman and the Director of the CF Division, stated that "*historical information may be relatively less significant*" and called upon listed companies in the U.S. to provide and supplement as much forward-looking information as practicable to investors in light of COVID-19.² Companies are typically cautioned to limit their forward-looking disclosures; however, good faith attempts to provide appropriately framed forward-looking information with the relevant disclaimers may be more helpful to investors than information about the company's actual performance during past periods in the present market scenario.

Companies should assess the potential effects of the pandemic on their current and future financial condition and results of operations. If possible, the impact on major line items should be quantified. Certain considerations are listed below.

- **Financial condition and results of operations:** The impact of COVID-19 on the company's financial condition and results of operations, including expected impact on future operating results and near-and-long-term financial condition and whether the company expects that COVID-19 will impact future operations differently than how it affected the current period should be considered.
- **Capital and financial results:** The impact of COVID-19 on the company's capital and financial resources, including its overall liquidity position and outlook, any change or reasonable expectation of change in cost of or access to capital and funding sources (such as revolving credit facilities or other sources), material impact on sources or uses of cash and any material uncertainty about the company's ongoing ability to meet the covenants of its credit agreements should be considered. If a material liquidity deficiency has been identified, the course of action taken or proposed to be taken by the company to remedy the deficiency should also be considered.
- **Disclosure of trends:** The disclosure of known trends and uncertainties as it relates to the company's ability to service its debt or other financial obligations, access the debt markets, including commercial papers or other short-term financing

¹ CF Disclosure Guidance: Topic No. 9 dated March 25, 2020 available at <<https://www.sec.gov/corpfin/coronavirus-covid-19>>

² Public Statement: The Importance of Disclosure – For Investors, Markets and Our Fight against COVID-19 dated April 8, 2020 available at <<https://www.sec.gov/news/public-statement/statement-clayton-hinman>>.

arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral and counterparty or customer risk should be considered.

- **Contingencies:** Any expectation of or incurring of any material COVID-19-related contingencies should be considered.
- **Balance sheet:** The impact of COVID-19 on assets on the company's balance sheet and its ability to timely account for such assets, including any significant changes in judgments in determining the fair-value of assets measured in accordance with applicable accounting standards should be considered.
- **Impairment:** Anticipation of any material impairments (for instance, with respect to goodwill, intangible assets, long-lived assets, right of use assets and investment securities), increases in allowances for credit losses, restructuring charges, other expenses, or changes in accounting judgments that have had or are reasonably likely to have a material impact on the company's financial statements should be considered.
- **Reporting and internal controls:** Any adverse impact of COVID-19-related circumstances such as remote work arrangements on the company's ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures should be considered. In case of such impact, the changes in the company's controls that have occurred during the current period that materially affect or are reasonably likely to materially affect its internal control over financial reporting and any anticipated challenges in the company's ability to maintain such systems and controls should also be considered.
- **Business continuity:** Any challenges in implementing business continuity plans and any expected material expenditures or resource constraints to implement business continuity measures should be considered.
- **Demand, supply chains and distribution:** The company should consider whether COVID-19 is expected to materially impact the demand for the company's products or services. The company should also consider whether any material adverse impact is expected on its supply chain and distribution methods. Any expectation of material change in the relationship between costs and revenues due to COVID-19 should also be considered.

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- **Human resources:** Any material impact on operations due to constraints or other impacts on the company's human capital resources and productivity should be considered.
 - **Travel restrictions:** Any material impact of travel restrictions and border closures on the company's ability to operate and achieve its business goals should be considered.

Based on discussions with its auditors, companies may also consider presenting additional metrics related to COVID-19 or changing the method by which they calculate a metric as a result of COVID-19. Any such changes should be explained in the financial statements disclosures.

In terms of the annual report, listed companies should consider including specific risks in relation to COVID-19 and the potential impact on the company. Any known impact on trends or uncertainties for subsequent financial periods should be discussed in the section on management's discussion and analysis of financial results.

TRADING WHEN IN POSSESSION OF UNPUBLISHED PRICE SENSITIVE INFORMATION ("UPSI")

Listed companies and insiders should be aware that the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 (the "**Insider Trading Regulations**") prohibit trading in securities of a listed company when in possession of UPSI. The communication of UPSI is permitted only under limited circumstances, including if such communication is in furtherance of legitimate purposes, performance of duties or discharge of legal obligations.

Listed companies, in particular, are forced to grapple with challenges in relation to disclosure, compliance and managing the flow of information outside the traditional workplace. In such a situation, particular care must be taken by companies and insiders to ensure compliance with the Insider Trading Regulations. Companies could consider sending employees periodic bulletins reminding them to ensure compliance with the Insider Trading Regulations and other relevant corporate policies.

TRADING WINDOW CLOSURE

Under the Insider Trading Regulations, a notional trading window is used to monitor trading in securities of a listed company by designated persons. The Insider Trading Regulations mandate that the trading window should be closed no later than the end of every quarter until 48 hours after the announcement of financial results by the listed company. During the period of trading window closure, designated persons (which

include the promoters or controlling shareholders) and their immediate relatives are not permitted to trade, subject to certain exceptions. Transactions undertaken in accordance with SEBI regulations such as conversion of warrants or debentures, subscription to rights issues, further public offerings, preferential allotments and tendering of shares in buy-back offers, open offers and delisting offers are permitted during the trading window closure.

Ordinarily, the trading window for listed companies in relation to declaration of results for the financial year ended March 31, 2020 would have reopened within 48 hours after May 30, 2020. However, since the last date for submission of annual financial results for the financial year ended March 31, 2020 has now been extended to June 30, 2020, listed companies should note that the last date for reopening of the trading window stands correspondingly extended. Designated persons and their immediate relatives will not be permitted to trade during such extended trading window closure period.

This has been further reiterated by clarifications issued on March 31, 2020 by the Indian stock exchanges which state that the SEBI has not acceded to requests received for relaxation from compliance with the trading window restriction with regard to the financial results for the period ended March 31, 2020.

FUND-RAISING BY LISTED COMPANIES

Listed companies and investors undertaking or proposing to undertake any fund-raising activities should note the following:

- ***Regulatory and other third-party approvals:*** The implementation of “work from home” policies and the reduced functioning in government offices will likely impact the processing time for applications for regulatory approvals required for transactions. Similarly, while banks are permitted to continue functioning with social distancing measures, timelines for lender and other third party consents are also likely to be extended.
- ***Electronic filing of offer documents and other reports:*** In an effort to facilitate operational matters, the SEBI has issued instructions for electronic submission of exemption applications, public announcements, draft letters of offer and other documents or applications required to be submitted under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the Securities and Exchange Board of India (Buy-back of Securities) Regulations, 2018, the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 and the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

Fees are also required to be paid only through electronic transfer.

- **Presence of UPSI:** Investors and listed companies should ensure that trading in securities is not undertaken while in possession of UPSI. If the board of directors determines that it is in the interests of the company to share UPSI with investors for a potential transaction, appropriate non-disclosure agreements should be executed and the UPSI should be made generally available at least two trading days prior to the execution of definitive agreements, in compliance with the Insider Trading Regulations.
- **Promoter/promoter group participation in fund-raising:** In case of any fund-raising prior to the announcement of the financial results, i.e., during the period the trading window is closed, the restrictions discussed above will apply.
- **Due diligence:** Listed companies should ensure that adequate systems are place to set up virtual data rooms and be prepared to share electronic copies of documents for diligence. Practically, this may be a challenge for matters such as minutes of board and shareholder meetings and legal proceedings, since these are bulky documents that may be maintained primarily in physical form.
- **Payment of stamp duty:** In India, stamp duty is typically required to be paid before or at the time of execution of a document. Therefore, businesses should procure sufficient stamp papers for documents to be executed in the ordinary course of business. E-stamping facility is available only in certain states. Certain states also specify a validity period for stamp paper; for instance, stamp paper purchased in Maharashtra is valid for a period of six months from the date of purchase. Note that the implementation of electronic collection of uniform stamp duty on securities market transactions has been extended to July 1, 2020.
- **Electronic execution:** Under the Information Technology Act, 2000, documents may be executed by affixing digital signatures. Accordingly, digital signatures could be used for execution of documents, with the consent of the counterparty. Alternatively, a provision for execution of the document in counterparts electronically with original pages being provided at a later stage could be considered.

DUTIES OF DIRECTORS

Indian company law casts an obligation on directors of a company to act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders and

the community and for the protection of environment. The Listing Regulations also require the board of directors to act on a fully informed basis, in good faith, with due diligence and care, and in the best interests of the listed entity and the shareholders. The duty of care owed by the directors to the shareholders and to act in the best interests of the company, the employees and the shareholders in good faith assumes greater significance in the face of current market conditions.

CONCLUSION

As a practical matter, even if the country-wide lock-down is lifted in the near future, normal operations are not expected to be restored overnight. Accordingly, the considerations discussed above will continue to be relevant even in the future while tackling the aftermath of the COVID-19 pandemic or other crisis situations.

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