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COVID-19: The Shift to a More "Flexible" Securities Market

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It is no surprise that COVID-19 has created unprecedented challenges to companies of all sizes. This new "normal" has taught us many lessons, including the importance of being agile in the market, as well as the need for businesses and stakeholders to effectively prioritize many demands at once. Among the demands that companies have been faced with include cash flow challenges, inventory demands, customer and stakeholder relations, and continuing to meet their continuous disclosure obligations, operations and future prospects. The purpose of this article is to discuss some of the approaches that have been taken in response to COVID-19 by securities regulators and issuers. Looking at the different approaches taken in response to COVID-19 can help market participants be more prepared the next time an "unprecedented event" arises.

Guiding Securities Principles

It is important to consider regulations in light of market practice and conditions. In particular, Canadian securities laws are grounded on the following objectives:

(a) to provide protection to investors from unfair, improper, or fraudulent practices;

(b) to foster fair and efficient capital markets and confidence in capital markets; and

(c) to contribute to the stability of the financial system and the reduction of system risk.

These grounding principles have remained steady throughout COVID-19.

The Stringent Approach Does Not Work: Guidance Regarding a Management Imposed Cease Trade Order Compared to the 45-Day Blanket Relief

The Canadian Securities Administrators (the "**CSA**") first approached the pandemic with a more stringent response. This is suggested in the CSA's article dated March 16, 2020, which encouraged issuers who anticipated that they would not be able to file their annual or interim financial statements on time to apply for a management cease-trade order. The negative impact of imposing a management cease trade order on an issuer may include that it could become more difficult to attract new directors and officers, as well as it may be poorly received by current or potential investors. As such, market participants were relieved to learn that only two days later (on March 18, 2020) the CSA announced that it would provide blanket relief for a 45-day extension for periodic filings that issuers are normally required to make (including financial statements, management's discussion and analysis, management reports of fund performance, annual information forms, etc.). Issuers who chose to rely on this exemption and

that complied with the conditions would not need to file applications for management cease trade orders, as they would not be noted in default. This reflects both the ongoing impact that COVID-19 is having on businesses, as well as the adaptive and flexible approach that regulators have taken throughout the pandemic.

Although the relief was temporary, it is expected that the flexible approach taken by the securities regulators throughout COVID-19 will last. In particular, and even before COVID-19, there was significant attention being focused upon reducing the regulatory burden. It is expected that this will continue, as the marketplace continues to adapt and transition from its stringent approach to better balance the needs of securityholders and issuers.

The More Flexible Approach: Companies Adapt to Virtual Meetings

Another practice that has erupted as a result of COVID-19 is the adoption of virtual shareholder meetings. In particular, Broadridge reported that over 80% of the companies who hosted virtual shareholder meetings this year did so for the first time. Further, Broadridge reported that of the virtual shareholder meetings held in the first half of 2020, 20% were held by large-cap companies, 27% were mid-cap companies, and 53% were small-cap companies. This suggests that companies of all sizes are transitioning to virtual meetings, with a disproportionate number being small cap-entities.

It is expected that virtual meetings will become more commonplace, even after circumstances revert back from the new "normal". This can be attributed to the benefits that issuers have experienced, including that virtual meetings are generally more cost-effective, attendance has generally increased (as securityholders can login irrespective of location), and that technology can facilitate shareholder engagement (*i.e.*, demonstrations and diagrams, etc.). Despite this, there are drawbacks to virtual meetings, many of which may depend on the form of meeting (*i.e.*, whether the meeting is audio-only or hybrid), including that it may be difficult to determine who is speaking or to engage or interact with others during the meeting. It is expected that as the market continues to develop and individuals continue to work from home, the ability to attend and participate in meetings virtually will become more commonplace. The quick shift to virtual meetings in the market at large also suggests that companies are open to new alternatives and more flexible approaches when engaging with shareholders.

Combining the Approaches: Forward-Looking Statements Reflect the Specific Needs of the Issuer with the Market

Securities laws require that reporting issuers who disclose forward-looking information must identify material risk factors that could cause actual results to differ materially from the forward-looking results. Such statements should not be "boilerplate" and should be presented in a user-friendly manner. Risk factors that we have seen as a result of COVID-19 include mention about how an issuer's actual results and financial condition could differ materially from the statements, including as a result of the pandemic, the impact of the pandemic on the

issuer's employees, governmental restrictions and orders, and market and liquidity risk, among others.

It is important to recognize the approach that is taken when drafting such statements to help ensure that issuers properly assess the circumstances applicable to the issuer's business. Issuers are therefore encouraged to start by focusing on the considerations that may impact upon forward-looking information, rather than the statements themselves. Such considerations include: (1) how might the issuer's day-to-day operations be impacted and by what; (2) how might disruptions and volatility in the global capital markets adversely impact the issuer's capital; (3) how might the issuer's supply chains be impacted; (4) how might customers respond and can a customer fulfill its obligations to the issuer; and (5) how the action or inaction of major customers or service providers can impact the issuer's business. By focusing on the methods used to arrive at forward-looking information, rather than the statements themselves, issuers will be able to apply these principles to other unprecedented events if and when they arise and help arrive at more meaningful disclosure.

Next Steps

Reflecting on the various approaches taken by market participants and how they were received during COVID-19 can provide insight to current and future trends. Among those anticipated trends is a more "flexible" securities environment, whereby market participants will be more likely to test out new mechanisms and techniques, while still adhering to the guiding principles of securities laws. Understanding this can also better prepare market participants for future "unprecedented" events if and when they arise.