



Securities Litigation ADVISORY ■

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Securities Litigation Risk Arising Out of the Coronavirus Pandemic

The spread of the coronavirus (COVID-19) across the world has rocked the global economy and led to a sudden U.S. stock market decline reminiscent of the 2008 recession. Because of this, companies and boards across industries face unexpected and unprecedented complex legal, business, and operational issues. Such market-impacting events often lead to stock-drop litigation, governmental agency investigations, books and records requests, and shareholder derivative actions regarding board oversight. It is important for boards and senior management to consider how to manage the risks associated with those potential actions.

No company could have predicted the coronavirus specifically. Nevertheless, an opportunistic plaintiffs' bar may argue that a company's disclosures more generally failed to warn of a company's risks related to a pandemic like the coronavirus (as plaintiffs did in the wake of Ebola and SARS). Companies that now face unforeseen major event cancellations, travel interruption, business continuity issues, customer losses, or product liability claims from this global health crisis are perhaps even more likely to face lawsuits or demands for information from shareholders.

In particular, in the coming days and months, the impact of the coronavirus will present unique challenges for companies required to provide disclosures to shareholders and the SEC. SEC Chairman Jay Clayton [recently asked companies](#) to "provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from the coronavirus to the fullest extent practicable to keep investors and markets informed of material developments." The SEC emphasized that the coronavirus is likely to impact companies beyond those with significant operations in China and reminded companies disclosing material information related to the coronavirus to "take the necessary steps to avoid selective disclosures and to disseminate such information broadly."

Plaintiffs' firms may also invoke Regulation S-K to bring claims for misstatements and omissions related to the impact of the coronavirus. Companies should pay special attention to Item 105, requiring disclosure in the Risk Factor section of the "most significant factors that make an investment in the registrant or offering speculative or risky," and to Item 303, requiring disclosure in the MD&A section of "known trends or uncertainties" expected to have a "material" impact on "net sales or revenues or income." Whether these regulations could successfully give rise to a private claim under Section 10(b) of the Securities Exchange Act of 1934 is jurisdiction-specific because of a split among the federal circuit courts of appeals.

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In response to these evolving risks, companies should consider whether their public filings appropriately disclose coronavirus-related risks. Thoughtfully drafted disclosures relating to performance, product safety, and projections will be critical to mitigate potential securities litigation risk. Boards should give deliberate thought to documenting their consideration of, and response to, the coronavirus. Shareholder plaintiffs can use investigative tools such as books and record requests to gain access to documents that reflect the board's consideration of these issues, and such documents—or lack thereof—may provide the basis for future shareholder derivative actions regarding the board's duties. Companies should also exercise particular caution with public statements concerning areas of their business that may be affected and will want to review their forward-looking guidance and risk factors for potential updates.

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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