



COVID-19 Checklist: 51 Issues for Public Company Directors and Officers to Consider

Blakes

The COVID-19 pandemic has grown into a health crisis with unique risks that are disrupting business operations and leaving public companies with many questions. While “known unknowns” need to be understood and managed, it is the “unknown unknowns” that need to be surfaced and considered.

Below, we set out 51 issues we have been addressing for Canadian public companies concerning the impact of COVID-19 on their financial results, operations and cash flows, as well as the price or value of their securities in public capital markets.

Many of the issues listed below have been referenced in recent *Blakes Bulletins*, while others will be addressed in further, pending publications. For more information on any of these matters, please get in touch with your usual Blakes contact or any member of our **Capital Markets** group.

Event-Driven Disclosure

- Determine if you need to file a material change report.
- Consider issuing any necessary press releases.
- Update or withdraw existing material forward-looking information, if needed, including financial or operational guidance.

(see our March 2020 *Blakes Bulletin: Coronavirus Disclosure: It's Contagious and Could Be Dangerous*)

Periodic Disclosure

- Ensure any risk factor disclosures are updated for the current and anticipated future environments (see our March 2020 *Blakes Bulletin: Coronavirus Disclosure: It's Contagious and Could Be Dangerous*).
- Establish if interim financial statements should be reviewed by your auditors.
- Consider the impact of your certifications under National Instrument 52-109 – *Certification of Disclosure in Issuers' Annual and Interim Filings* by the current environment and what you need to disclose as a result. For example, what if COVID-19-related circumstances, such as remote work arrangements, have adversely affected your ability to maintain financial reporting systems, internal control over financial reporting or disclosure controls and procedures? What if changes in the controls have occurred during the current period that materially affect or are reasonably likely to materially affect your internal control over financial reporting?

- Verify that your periodic continuous disclosure document (e.g., interim financial reporting) will be completed on time (see our March 2020 *Blakes Bulletin: CSA and TSX Publish Temporary Blanket Relief Due to COVID-19*). If not, what are the considerations you should be thinking about (e.g., the impact of COVID-19 on present novel or complex accounting issues that, depending on the particular facts and circumstances, may take time to resolve)?
- Gauge if your next management's discussion and analysis (MD&A) needs to include any specific new disclosure given COVID-19 and related matters (e.g., regarding the effects COVID-19 has had on the issuer, what management expects its future impact will be, how management is responding to evolving events and how it is planning for COVID-19-related uncertainties).
- Determine if you need to deliver financial statements, MD&A and related annual request forms to shareholders (see our March 2020 *Blakes Bulletin: CSA and TSX Publish Temporary Blanket Relief Due to COVID-19*).

Non-GAAP Financial Measures

- Ascertain if financial measure disclosures that are adjusted to be on an ex-COVID-19 basis are considered non-GAAP financial measures, and if so, what further accompanying disclosures you need to make.

Shareholder Meetings

- Determine whether to hold your annual shareholder meeting in person at a physical location, as a virtual meeting or as a hybrid of the foregoing and, in particular, if you need to switch the format of your meeting to virtual and have already given notice of a physical meeting.
- Identify when you need to make decisions about your annual shareholder meeting (see, in part, our March 2020 *Blakes Bulletin: CSA and TSX Publish Temporary Blanket Relief Due to COVID-19*).
- Determine if you can postpone your annual shareholders meeting (see, in part, our March 2020 *Blakes Bulletin: CSA and TSX Publish Temporary Blanket Relief Due to COVID-19* and our April 2020 *Blakes Bulletin: Canadian Governments Suspend Corporate Deadlines*).

Corporate Finance, Buybacks and Insider Trading

- Examine what, in particular, you should be considering when contemplating a prospectus offering in the current environment (e.g., what kind of additional risk factor and other disclosure should we be considering, and do we need to translate our disclosure to French if the offering is being extended to Québec?).
- Review your liquidity position and how you can maximize liquidity, particularly in scenarios in which you would be unable to meet your debts as they become due and if you qualify for any government assistance programs.
- Given the drop in the price of your public securities, evaluate whether you should be buying back such securities for cancellation, through a normal course issuer bid or otherwise (even if you have laid off your workforce).
- If you have a normal course issuer bid, determine how much you can repurchase under the terms thereof (see our March 2020 [*Blakes Bulletin: CSA and TSX Publish Temporary Blanket Relief Due to COVID-19*](#)).
- Consider if you should impose an irregular trading blackout on insiders (see our March 2020 [*Blakes Bulletin: Coronavirus Disclosure: It's Contagious and Could Be Dangerous*](#)).

Mergers and Acquisitions

- Assess the impact of the current environment on outstanding M&A transactions or potential opportunities (e.g., given depressed stock prices, you are either “reading the menu” or “are on the menu”) (see our March 2020 [*Blakes Bulletin: Navigating an M&A Deal Amid COVID-19*](#) and our April 2020 [*Blakes Bulletin: Regulatory Clearance of Transactions in Difficult Economic Times*](#)).
- Given your current stock price, determine how you can adopt a shareholder rights plan and on what terms (e.g., limited duration rights plans with triggering thresholds lower than 20 per cent similar to what certain companies in the United States are adopting).

Contractual Considerations

- Look at how your customer relationships and consumer contracts are impacted and the risks relating to compliance, payments or other contractual obligations.
- Find out if blanket relief orders by the Canadian Securities Administrators, the Toronto Stock Exchange and other regulatory bodies excuse you from complying with contractual requirements under trust indentures, credit agreements and other loan documentation and commercial arrangements (see our March 2020 [*Blakes Bulletin: CSA and TSX Publish Temporary Blanket Relief Due to COVID-19*](#)).
- Establish if a force majeure clause in your contract applies to COVID-19 situations (see our March 2020 [*Blakes Bulletin: COVID-19 and Your Contracts*](#) and our March 2020 [*Blakes Bulletin: COVID-19 and Force Majeure: A Quebec Law Perspective*](#)).

- Determine if your contract has been frustrated or rendered impossible to perform (see our March 2020 [*Blakes Bulletin: COVID-19 and Your Contracts*](#)).
- Learn what the contractual “duty to mitigate” means in the current context (see our March 2020 [*Blakes Bulletin: COVID-19 and Your Contracts*](#)).

Employment, Compensation, Pensions and Benefits

- Investigate if you can unilaterally reduce the compensation of your workforce or lay off employees without paying severance.
- Contemplate how the series of announcements and initiatives by various levels of government will impact your workforce and obligations in respect thereof (see, in part, our March 2020 [*Blakes Bulletin: Considerations for Pensions and Benefits During COVID-19*](#) and our April 2020 [*Blakes Bulletin: Parliament Enacts the Canada Emergency Wage Subsidy*](#))?
- Determine if an executive compensation disclosure still needs to be filed within 140 days of your most recently completed financial year-end (see our March 2020 [*Blakes Bulletin: CSA and TSX Publish Temporary Blanket Relief Due to COVID-19*](#)).
- Consider how to handle (and disclose, if required) 2020 compensation arrangements in the current environment.
- Your outstanding stock option grants are underwater and not expected to serve as motivation as initially intended. If permissible within applicable rules, determine if you should reprice them by cancelling and reissuing new options with lower strike prices (see our April 2020 [*Blakes Bulletin: COVID-19 Equity and Equity-Based Compensation Plan Considerations*](#)).
- Ascertain how your outstanding share-based compensation awards are impacted by changes in the employment status of plan participants (see our April 2020 [*Blakes Bulletin: COVID-19 Equity and Equity-Based Compensation Plan Considerations*](#)).
- Examine what you should do about performance metrics concerning share-based compensation awards (e.g., performance vesting of outstanding awards; see our April 2020 [*Blakes Bulletin: COVID-19 Equity and Equity-Based Compensation Plan Considerations*](#)).
- Determine how to handle your pension obligations and health and benefit plans in the current environment (see our March 2020 [*Blakes Bulletin: Considerations for Pensions and Benefits During COVID-19*](#)).
- Find out if you still need to have your rolling share-based compensation plan approved within three years of its last renewal (see our March 2020 [*Blakes Bulletin: CSA and TSX Publish Temporary Blanket Relief Due to COVID-19*](#) and April 2020 [*Blakes Bulletin: COVID-19: Employment and Labour Round-Up*](#)).
- Make sure your employee policies are sufficiently adaptable to maintain compliance with health and safety concerns, physical security, anxiety management and adequate organizational communication.

Executive Matters and Board Roles

- Determine if you are required to disclose the illness of any key personnel.
- Identify what you should be doing in respect of emergency and longer-term succession planning if you have not already done it adequately.
- Ensure you have the appropriate executive team to navigate the current environment and address what should be considered before having individual members of your board of directors effectively serve as interim or adjunct executive officers (e.g., the impact proxy advisory firm recommendations).
- Establish the role of your board of directors (as a whole) in the current environment (e.g., how involved should they be in the day-to-day operations of the corporation, how often should they meet, how should meeting fees be structured and what information should they be receiving).
- Consider how your board of directors should be evaluating what actions are in the best interest of the corporation, including a consideration of the potentially competing interests of your various stakeholders, in the current environment.
- Decide what role the chair of the board of directors will have in the current environment.

Compliance

- Identify any legislative/regulatory changes that may impact your operations and obligations (see, in part, our March 2020 *Blakes Bulletin: COVID-19 Update: Ontario, Quebec Order All Non-Essential Businesses to Shut Down* and our April 2020 *Blakes Bulletin: COVID-19: Employment and Labour Round-Up*).
- Review your crisis response plan to address material resource constraints or other challenges you are experiencing in order for the plan to operate appropriately to protect the best interests of the corporation.
- Ensure you remain “cyber-safe” during the pandemic, particularly with your workforce operating remotely (see our March 2020 *Blakes Bulletin: Keeping Cyber-Safe During the COVID-19 Outbreak*).
- Determine if you are still required to comply with the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and other privacy statutes (see our March 2020 *Blakes Bulletin: Keeping Cyber-Safe During the COVID-19 Outbreak*).
- Find out if there have been any changes to the administration of the tax system and if you still need to pay taxes (see our March 2020 *Blakes Bulletin: Canadian Tax Authorities Respond to COVID-19*).

Dispute-Related Matters

- Assess how the crisis has impacted available actions relating to dispute resolution (i.e., court closures), limitation period suspensions and alternative dispute resolution mechanics (see our March 2020 *Blakes Bulletin: Resolution of Commercial Disputes in the Age of COVID-19 Closures: The Arbitration Advantage*).
- Identify how limitation periods have been impacted by the current environment (see, in part, our March 2020 *Blakes Bulletin: Canadian Tax Authorities Respond to COVID-19* and our April 2020 *Blakes Bulletin: Alberta Suspends the Running of Limitations Periods and Procedural Timelines*).
- Determine what steps to take to protect privilege and preserve evidence in the current environment.

Manufacturing and Competition

- Consider what you would do if you were asked or wanted to volunteer to re-tool or otherwise assist in the manufacturing of personal protective equipment, ventilators or other medical equipment or supplies.
- Examine what you would need to consider before collaborating with a competitor to assist with resolving the current crisis (see our April 2020 *Blakes Bulletin: Additional Guidance for Businesses on Competitor Collaboration During COVID-19 Pandemic* and our April 2020 *Blakes Bulletin: Competition Law Considerations in Current Circumstances*).

The impacts of COVID-19 on public companies are widespread and deep, but the ultimate extent still remains unknown at this time. Issuers should consider the above points and be comfortable that the applicable matters have been or are being addressed. As circumstances remain fluid, such matters should continue to be monitored and revisited to ensure they are being managed in the best interests of the corporation.

Contacts:

For more information on any of these matters, please get in touch with the contacts below or any member of our **Capital Markets** group.



Jeff Bakker
Partner | Calgary
jeff.bakker@blakes.com
403-260-9682



Howard Levine
Partner | Montréal
howard.levine@blakes.com
514-982-4005



Matthew Merkley
Partner | Toronto
matthew.merkley@blakes.com
416-863-3328



Susan Tomaine
Partner | Vancouver
susan.tomaine@blakes.com
604-631-3384