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## Cooley's keeping its business clients from fumbling SEC compliance

By **Nicole Tyau**

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Even in uncertain times, Cooley LLP's attorneys insist it would be a major mistake for public companies to disregard a recent U.S. Securities and Exchange Commission directive outlining companies' roles in maintaining market integrity.

"My own view of what they are saying in this public statement is that ... unprecedented times are no excuse for dropping the ball on compliance, and in fact, it's quite the opposite," said public companies practice co-chair Chadwick L. Mills.

Mills and Cooley's other public companies co-chair Nicole C. Brookshire said they're working with companies on disclosures to the SEC and investors. Part of those disclosures are management discussion and analysis (MDNA), which Mills said are necessary to explain what factors could be affecting public companies, even if they seem obvious.

"Even if you have something like COVID-19 as broadly known to be an industry-wide or broad economic factor, you still have an affirmative obligation in your MDNA disclosure to disclose known trends, events and uncertainties that are reasonably likely to have a material impact on the company's financial condition or operating performance — even if those trends and uncertainties are well known," Mills said.

Risks stemming from the coronavirus pandemic, even if theoretical, still must be disclosed because not doing so can create big problems in the courts or with regulatory agencies, Mills said. He is advising companies to clearly state the uncertainties COVID-19 creates.

"It's important when companies, and particularly in risk factors disclosure, say things like, 'COVID-19 could have a material adverse effect on our ability to meet guidance,' for example, or 'To meet our clinical trial guidelines,' or 'To enroll patients in clinical trials,'" Mills explained, referring to his life sciences clients. "To the extent that companies are actually experiencing those effects, it's important that they disclose that because if they don't, and



**Nicole C. Brookshire**

they later get sued, or there's a regulatory look at their disclosure, that can put them in some trouble."

Companies in the healthcare space must be diligent about disclosures as their businesses move forward and continue working on projects like clinical development programs, according to Mills and Brookshire. Brookshire explained companies could have a harder time completing medical trials on time, and that's something that could affect deals these companies are trying to make.

"As this pandemic continues to strain our health care and hospitals across the world, that ultimately is ... going to continue to unfold in terms of a moment- by-moment, day-by-day, week-by-week thing in terms of how it impacts our life sciences clients on their clinical development programs," Brookshire said.

The delay coronavirus is causing on clinical development could affect how companies are financed down the line, Mills added.

"Life sciences companies, especially ones that are just in the R&D or in development phase, are considering what that delay means — both in terms of the next milestone for financing as well as ... how they're going to get from here to there if there's a delay without a milestone event from which they could finance," he said.

Before the pandemic upended business-as-usual operations, companies were already facing what Brookshire called a "robust" but compressed market in 2020, due to the presidential election in November.



**Chadwick L. Mills**

"There was a lot of, I would say, heads-down activity to get deals done in the pipeline with the SEC and to get moving because of what was already a compressed year from a capital markets perspective," Brookshire said. "Then you layer on top of that what has happened [with coronavirus], and it really changed the face of the capital markets in the last three weeks."

Brookshire said her clients now turn to the question of whether deals that are in the works should move forward. The answers remain industry-specific, with technology clients largely opting to postpone deals and life sciences clients moving forward, though she said it's still undetermined how those deals will ultimately play out.

The only constant in this situation, the Cooley partners said, is change. The issues are changing week by week, but Brookshire noted she's advising clients to ask themselves how to conduct and manage their business and how they can anticipate and respond to future changes.

"I think what you're seeing more of is more interaction at the management team level on this particular issue in terms of the frequency of meeting together," Brookshire said. "I counsel clients and say 'Meet with your management to make sure that you are being good stewards and fiduciaries of this business and make certain that you're real-time digesting information about how to run and conduct yourself.'"

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