

# COVID-19 and Public Company D&O



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“ We also remind all 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. ”

— Jay Clayton, SEC Chairman

As we continue to realize the impact of the novel coronavirus, COVID-19, and its ripple effect on daily lives, businesses and the global economy, the predominant questions being posed are “Will we really see D&O claims arising from COVID-19?” and “How will D&O insurance respond?” The answer to the first question is “Yes,” and the answer to the second is “It depends.”

Even before COVID-19, the securities class-action plaintiffs’ bar was extremely active, breaking records in claims frequency for the last three years. It is not surprising that in an environment of increased claim frequency, COVID-19-related D&O claims have been filed in March 2020. One was against Norwegian Cruise Line Holdings, Ltd., for failing to disclose details surrounding the sales tactics they were taking with respect to COVID-19 cancellations and bookings.<sup>1</sup> The second COVID-19 D&O claim was filed against Inovio Pharmaceuticals relating to their statements about developing a COVID-19 vaccine.<sup>2</sup>

These two claims are very specific to industries at the COVID-19 epicenter. It is unclear, however, whether we will see more claims. Will companies in other industries see claims due to a stock drop when the entire stock market has plummeted at once? Or will companies see claims for inadequate or inaccurate representations about the impact that COVID-19 will have on their business?<sup>3</sup> The latter seems more likely, and all public companies must be cautious in disclosure content and in making any representations that are connected with COVID-19.

The Securities and Exchange Commission (SEC) recently announced the implementation of a 45-day grace period for disclosure filings.<sup>4</sup> It is not an automatic extension; rather, companies must explain why the extension is warranted in each case.<sup>5</sup> While the SEC’s order will likely be helpful to many companies, it requires transparency with investors. Along with the announcement of a grace period for disclosure filings, SEC Chairman Jay Clayton made the following comments:

We also remind all 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. How companies plan and respond to the events as they unfold can be material to an investment decision, and I urge companies to work with their audit committees and auditors to ensure that their financial reporting, auditing and review processes are as robust as practicable in light of the circumstances in meeting the applicable requirements. Companies providing forward-looking information in an effort to keep investors informed about material developments, including known trends or uncertainties regarding coronavirus, can take steps to avail themselves of the safe harbor in Section 21E of the Exchange Act for forward-looking statements.<sup>6</sup>

SEC Chairman Clayton also made reference to the forward-looking statement safe harbor under the Securities Exchange Act of 1934 granted by the Private Securities Litigation Reform Act of 1995 (PSLRA). We recommend that clients consult with outside counsel regarding preparation of their forward-looking statements relating to COVID-19.<sup>7</sup>

<sup>1</sup> <https://www.dandodiary.com/2020/03/articles/securities-litigation/cruise-line-shareholder-files-first-coronavirus-related-securities-suit/#more-19766>

<sup>2</sup> <https://www.dandodiary.com/2020/03/articles/securities-litigation/pharma-company-hit-with-securities-suit-over-covid-19-vaccine-claims/>

<sup>3</sup> For more analysis as to what future D&O claims might look like, see <https://www.dandodiary.com/2020/03/articles/director-and-officer-liability/the-risk-of-coronavirus-related-do-claims/>.

<sup>4</sup> <https://www.sec.gov/news/press-release/2020-53>

<sup>5</sup> <https://www.sec.gov/rules/other/2020/34-88318.pdf>

<sup>6</sup> <https://www.sec.gov/news/press-release/2020-53>

<sup>7</sup> For general information, see [https://www.goodwinlaw.com/publications/2020/03/03\\_11-faq-sec-covid-19](https://www.goodwinlaw.com/publications/2020/03/03_11-faq-sec-covid-19).

Because the COVID-19 pandemic is fluid and changing each day, so, too, are the implications of its spread. As always, Gallagher will continue to monitor this issue and advise our clients accordingly.



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D&O liability insurance may also respond to COVID-19-related D&O claims that allege inadequate or inaccurate disclosures relating to a stock drop or allegations of mismanagement in a derivative suit (among other allegations).<sup>9</sup> The defense of any claim should be supported by documented adequacy of disclosures under advice of counsel.

There is no standard D&O policy, and coverage terms, conditions and exclusions vary within the D&O market. It is essential to consult with legal counsel regarding your planned response to COVID-19 circumstances within your industry or business. Likewise, you should review the terms and conditions of your actual policy to determine how your coverage might respond to any allegations made against your company for actions taken regarding COVID-19. That said, certain generally relevant provisions to consider with respect to COVID-19 D&O claims include the following.

- **Bodily injury exclusion:** COVID-19 claims could include allegations involving bodily injury. Therefore, it should be noted that while most D&O policies contain bodily injury exclusions, the exclusions are typically limited to claims **for** bodily injury, and, thus, coverage could be available for resulting securities claims or derivative claims, subject to the policy's other terms and conditions.
- **Property damage exclusion:** COVID-19 claims could include allegations of loss of use of property due to the impact of quarantine, etc. Many property damage exclusions also exclude claims **for** property damage, rather than a broader exclusion applying to any claim arising out of property damage. With this "for" language, coverage could be available for resulting securities claims or derivative claims, subject to the policy's other terms and conditions.

Finally, we have been asked, "How will this global health crisis impact our renewal and/or the marketplace?" In a D&O insurance market already plagued with event-driven D&O claims that span many categories (opioids, cyber breaches and #MeToo, among many others), adding COVID-19 to the list of events could exacerbate the D&O rate firming that we have seen. A number of insurers have already begun asking COVID-19 underwriting questions that seek details about the company's business continuity plan, anticipated impact, quality of forward-looking statements, etc. During the next renewal cycle, all D&O insureds should be prepared to answer questions about their corporate response to a pandemic and the business continuity plans in place. It remains to be seen whether we will begin to see specific exclusions for COVID-19.

Because the COVID-19 pandemic is fluid and changing each day, so, too, are the implications of its spread. As always, Gallagher will continue to monitor this issue and advise our clients accordingly.

<sup>9</sup> See [https://www.goodwinlaw.com/publications/2020/03/03\\_13-insurance-considerations-in-light-of-covid19](https://www.goodwinlaw.com/publications/2020/03/03_13-insurance-considerations-in-light-of-covid19); and <https://www.dentons.com/en/insights/articles/2020/february/28/what-the-coronavirus-means-for-insurers-and-coverage>.

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