

SEC risk disclosure changes in light of COVID-19 and falling energy prices

By Trevor Pinkerton, Rishika Sengupta and Amelia Xu

March 2020

The following content was presented by Houston-based partner Trevor Pinkerton during our webinar, [“A twofold challenge to the energy industry: COVID-19 and low commodity prices”](#) on March 19, 2020.

The short update below highlights a few items that public companies should be considering regarding SEC disclosure and risk mitigation in connection with COVID-19 and falling energy prices. First, we address necessary updates to current risk disclosures. Second, we cover changes to cover developing risks, and finally, we briefly highlight some other disclosure items to think about going forward.

Update for current risks

1. Update risk factors in your coming 10-Q

- a. In the energy space, you likely have existing risk factors on falling commodity prices following the 2014 oil price crash and the slow recovery. You will want to pull that risk factor forward to address the current price drop and the geopolitical volatility that gave rise to it.
- b. Also, add language to your existing “force majeure” type risk factor to highlight COVID-19, the impending prolonged decrease in demand, and the strains to your supply chains. Use this as your general overarching risk factor on the pandemic.
- c. Then, consider adding a new risk factor specifically dealing with how COVID-19 may impact your operations in particular. The specificity of this risk factor is key to securing the PSLRA protections, as you will need to draw links between your forward-looking statements and your specific risks.

2. Consider filing a cleansing 8-K with these updated risk factors

- a. If you file under Item 8.01 of Form 8-K, you can incorporate these risk factors into the prospectuses of your effective shelf registration statements, including your Form S-8 and the awards issued to employees thereunder.

- b. A cleansing 8-K can also help make material non-public information related to your risks public so that the company or officers and directors can be in the market purchasing company securities. Whether a cleansing 8-K is advisable in your particular circumstances should be considered with your securities counsel.

3. Edit your forward-looking statement legends

- a. You will need to take a look at all of your forward-looking statement legends. This applies to your 10-Qs, 8-Ks, press releases, and investor decks.
- b. Remember that to gain the benefit of the safe harbor under the PSLRA, you need to identify the forward-looking statements, and then identify the specific risks that can make that forward-looking statement untrue. The more vague and general your forward-looking statements and risks, the weaker your PSLRA protection. Don't rely on the boilerplate to save you.
- c. Also, avoid forward-looking statements in your financial statements, as those do not have the same level of protection.
- d. Finally, check to make sure you disclaim any duty to update in your legend, and make clear that your statements only speak as of the date made.

4. Use caution with mitigating language

- a. The SEC has specifically stated that it doesn't view mitigating language in risk factors as appropriate. So, resist the urge to add softening language to your risk factors. Instead use your MD&A as the place for that mitigating language.

Address the future risks

1. Revise the MD&A for your 10-Q and revisit prior trends disclosure from the 10-K

- a. There is a good chance that the trend and uncertainties disclosure included in your 10-K is already out of date. You will need to update that for the 10-Q.
- b. Consider including language explaining the risks that will impact these trends (drawing them back to your risk factor disclosure), and also identifying specific ways that the trends may become quickly out of date going forward.

2. Review earnings releases with a critical eye

- a. Pay particular attention to your executive quotes in the earnings release, applying forward-looking statement identifier words where needed.
- b. You may also consider including some preview risk factor language as well, if you have not provided an 8-K with updated risk factors. Note however, that your earnings release won't update your shelf prospectuses, as they will be furnished rather than filed with the SEC.

3. Clarify assumptions in your disclosure

- a. One of the best ways to clarify and bolster your earnings disclosure is to identify the assumptions that you are using in giving any trend information or guidance. As all disclosure will be viewed in hindsight, the more that is clarified regarding assumptions, the better.

4. Updating past guidance

- a. While there is no generalized duty to update your past disclosure between your normal public filings, if the company or insiders are in the market or if your executives are going to need to speak around public events – which they will – material non-public info needs to be disclosed and material misstatements and omissions need to be avoided.
- b. In light of that, and to correct what might be viewed, with the benefit of hindsight, as material inaccuracies, especially in

forward-looking statements, consider either updating your guidance to reset it to the new circumstance (if you believe a reset is required) or consider withdrawing your guidance until things settle down.

- c. Also remember that confirming prior guidance is also guidance, and can be material non-public information at certain times during your quarter. Remember that selective confirmations can trigger FD issues.

5. Avoid selective disclosure

- a. Investors, shareholders, and analysts are almost certainly calling senior management looking for information on the state of the company's business and its prospects. It is a good idea to come up with a set point of communication regarding the company's outlook, to establish a script for responding to these questions, and to remind senior executives how Reg. FD and the selective disclosure rules work.

6. Monitor and review your website

- a. Companies often forget to revisit their website in the face of rapid changes.
- b. While the website should not be incorporated into the SEC-filed documents, it is a mode of communication with investors, and needs to be reviewed and edited to keep it in line with the company's SEC filings.

7. Exercise caution with social media

- a. This may be a good time to avoid social media. To the extent it is necessary, less is more, and remember that Reg. FD has extremely tight deadlines and often requires simultaneous disclosure. Finally, your social media may not be a Reg. FD compliant channel of communication. If that is the case, remind your executives to refrain from disclosing any material nonpublic information via social media.

Other reminders

1. Consider other 8-Ks

Think through other possible 8-Ks that might result from these events, such as:

- a. Changes to executive compensation under Item 5.02(e)
- b. Drawing down revolvers may trigger Item 2.03
- c. Material impairment of assets under Item 2.06

2. Virtual meetings

The SEC recently added guidance on virtual annual meetings and made it easier to change meeting dates after proxy materials have been mailed.

3. Extended filing deadlines

The SEC recently released guidance extending some filing times for reports due between March 1 and April 30. But keep in mind, there are 8-K requirements to use this extension.

4. Section 16 filings

Remember that amended equity awards often require compensation committee approval to be exempt from the short swing rules and can require Section 16 filings, which have a short two-day deadlines. HR and legal need to be talking.

5. Short-swing liability

Watch out for short-swing liability under Section 16. Many energy executives are looking to purchase their company's securities now due to historically low prices. Be mindful that Section 16 can match any non-exempt, opposite way transaction within six months. So, sales at higher prices either six months before or after low-price purchases may cause short-swing problems.

6. Volume limits

Finally, be aware of the volume limits for repurchases in any 10b5-1 plan and under Rule 10b-18.

This is a short overview, and the situation is evolving on a daily basis. We are here to help. If you have any questions, please do not hesitate to give us a call.



Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 3700 lawyers and other legal staff based in Europe, the United States, Canada, Latin America, Asia, Australia, Africa and the Middle East.

Law around the world

nortonrosefulbright.com

Norton Rose Fulbright Verein, a Swiss verein, helps coordinate the activities of Norton Rose Fulbright members but does not itself provide legal services to clients. Norton Rose Fulbright has offices in more than 50 cities worldwide, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg. For more information, see nortonrosefulbright.com/legal-notices. The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.

© Norton Rose Fulbright [Office entity]. Extracts may be copied provided their source is acknowledged.
US_22880 - 03/20