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# IS IT SAFE TO OPEN OUR TRADING WINDOW IN THE MIDST OF A PANDEMIC?

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Toward the end of the first quarter of 2020, many public companies imposed a blackout period, during which directors and specific employees deemed insiders could not trade the company's stock. The obvious purpose of these blackout periods is to prevent insiders from trading at a time when they are likely to have material nonpublic information about the soon to be completed quarter.  This year, insiders were also likely to have material nonpublic information about the early impact of the coronavirus on their business, including demand, supply chain, cancelled orders and the costs of complying with stay-at-home orders.  In an earlier alert, we noted that trading while in possession of early visibility into the impact of the coronavirus on the business could be deemed insider trading, and that the SEC expressed concerns about trading under these circumstances.

Typically, public companies plan to open the trading window to permit insiders to trade within a day or two of issuing their earnings release for the quarter.  Even in these uncertain times, many public companies may be able to maintain their normal protocols.  As they consider this issue, public companies should be sure that their earnings release contains sufficient disclosure around the impact of coronavirus on the business and management's expectations of the impact going forward.  For some companies, waiting until the Form 10-Q is filed to open the window may be advisable.  For others, including an expanded earnings release that provides more fulsome analysis to the market about the coronavirus impact and then setting out updated risk factors, and potentially a "mini-MD&A" in the Item 2.02 Form 8-K may provide sufficient disclosure.

It may be, however, that companies should delay permitting insiders to trade and not reopen the window at this time.  Many companies are understandably reluctant to provide guidance when circumstances are changing so rapidly and the future is unpredictable.  Nonetheless, insiders who have access to daily information about demand, the supply chain, pricing and other information may be better able to assess the trend of the business, and may therefore be better able to predict how well the company will be able to withstand and bounce back from the pandemic.  Although this daily information might not ordinarily be deemed material nonpublic information for insider trading purposes, in the current environment and with the benefit of hindsight, the SEC could take a different position.

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