

## **SEC PENALIZES PUBLIC COMPANY FOR MISLEADING DISCLOSURES OF COVID-19 IMPACT**

Dec 07, 2020

In its first enforcement action against a public company for misleading disclosures regarding COVID-19's business impact, the SEC released a December 4 [Order Instituting Proceedings against The Cheesecake Factory Inc.](#) and accepted its offer of settlement for a civil penalty of \$125,000. The charges arose from conduct in the period as the COVID-19 pandemic was first spreading across the United States.

As recounted in the SEC's Order, Cheesecake Factory repeatedly made 8-K current report filings in March and April 2020. Those disclosures presented a misleading optimistic assessment that its restaurants were "operating sustainably at present" under an off-premises (takeout and delivery) dining model. The Order further detailed that the restaurant chain's "operating sustainably" assessment failed to account for corporate expenses, and its misleadingly positive portrayal was contrary to the reality that Cheesecake Factory was losing \$6 million cash per week and its cash on hand could support only a few more months of operations. Finally, in the latest iteration of "you cannot characterize as a possibility that which has already occurred," Cheesecake Factory was penalized for the March disclosure that it was "evaluating additional measures to further preserve financial flexibility." This omitted that the company had already determined to take some measures, as exemplified by its late March notification to landlords that it would not be making April rent payments.

While just the first of its kind, this action is consistent with the Division of Corporation Finance's [March 25, 2020 Disclosure Guidance](#) that cautioned reporting companies regarding disclosure of both COVID-19's risks and impacts on their businesses. It is unknown if more such actions may be forthcoming, whether from the March-April 2020 timeframe or thereafter, but issuers should heed the Cheesecake Factory action as a warning shot when crafting their own disclosures of the pandemic's impact.

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