

## CLIENT ALERT

### Watch Those Portion Sizes: The Cheesecake Factory Settles with SEC for Misleading, Optimistic Statements Regarding Its Financial Outlook Amid the Pandemic

Dec.08.2020

On December 4, 2020, the Securities and Exchange Commission (SEC) announced its first charges against a public company for misleading statements regarding the financial impact of the COVID-19 pandemic. As part of the settlement, The Cheesecake Factory agreed to pay \$125,000 and to cease-and-desist from any further violations of Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-11 thereunder, which collectively require that issuers' Form 8-K disclosures contain accurate, current reports that contain material information necessary to make the reports not misleading.

According to the allegations, The Cheesecake Factory found itself facing pandemic-related challenges in mid-March 2020 and issued several disclosures regarding these challenges and the company's response. In its Form 8-K filings on March 23 and April 3, 2020, The Cheesecake Factory submitted press releases that projected an optimistic picture of its business in the face of the pandemic, stating that it was transitioning to an "off-premise model" (*i.e.*, to-go and delivery) that was "enabling the Company's restaurants to operate sustainably at present . . ." The March 23 filing also disclosed a \$90 million draw down on its revolving credit facility, that the company had paused some of its planned growth, and that it was considering additional measures to "further preserve financial flexibility."

At the same time, however, The Cheesecake Factory did not disclose the full impact of the pandemic on its operations and financial state and failed to report that it had told its landlords (on March 18) that it would not be paying its April rent. The March 23 and April 3 public disclosures also omitted the fact that the company was losing approximately \$6 million in cash per week and had estimated that it only had approximately 16 weeks of cash remaining despite its \$90 million draw on its revolving credit line. While The Cheesecake Factory failed to include this information in its March 23 and April 3 public disclosures, it did disclose this information to potential private equity investors and lenders when it sought additional liquidity. The Cheesecake Factory filed an intervening Form 8-K on March 27 which disclosed (after media reports) that it was not planning to pay its April rent and was in the midst of discussions with its landlords, that it had reduced compensation for its executive officers, Board of Directors, and certain employees, and that it had furloughed approximately 41,000 employees. Nevertheless, its April 3 disclosure again provided a much rosier picture, asserting that the company's restaurants were operating "sustainably..." under its off-premise model.

The charges are a reminder to provide fully forthcoming and timely disclosures regarding the financial impact of the pandemic during this challenging time. Stephanie Avakian, Director of the Division of Enforcement, warned in the SEC's press release that the Enforcement Division and its Coronavirus Steering Committee will "continue to scrutinize COVID-related disclosures to ensure that investors receive accurate, timely information, while also giving appropriate credit for prompt and substantial cooperation in investigations."

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Daniel L. Zelenko**

Partner – New York

Phone: +1 212.895.4266

Email: [dzelenko@crowell.com](mailto:dzelenko@crowell.com)

**Arlen Pyenson**

Counsel – New York

Phone: +1 212.803.4057

Email: [apyenson@crowell.com](mailto:apyenson@crowell.com)

**Gabrielle Trujillo**

Associate – Los Angeles

Phone: +1 213.310.7992

Email: [gtrujillo@crowell.com](mailto:gtrujillo@crowell.com)