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CRISIS MANAGEMENT & COVID-19 RESPONSE: PLAN NOW TO MITIGATE AGAINST THE RIPPLE EFFECTS OF COVID-19 CRISIS

To Our Clients and Friends:

The public health crisis caused by COVID-19 has already impacted companies' business operations, procurement lines, and staffing resources. These short-term effects will likely have long-term implications in terms of operational uncertainty, brand, and legal risk. Now is the time to *refresh and revise your existing emergency contingency plan* to prepare for and mitigate against these risks. Your plan will likely have included the establishment of a designated team to manage the crisis and communicate with relevant stakeholders. This is a time to exercise leadership, to communicate with stakeholders clearly and transparently, to build trust, and to continue to take and plan for concrete actions.

Below, we identify some of the key steps that companies with strong crisis management plans have taken, and considerations that all companies should keep in mind moving forward, to reduce business and legal exposure.

High Priority Items Taken to Mitigate Business and Legal Risk.

Companies are currently taking steps to protect the safety of their employees, ensure business continuity, and minimize losses caused by operational and supply chain disruption.

1. **Crisis Management Plan:** Review, refresh, and implement the company's crisis management plan.
2. **Response Team:** Response teams often have representatives from each business function with a direct line to the CEO. Designated response teams should include adequate regional/time-zone coverage taking into account the geographic spread of operations. To the extent they haven't already, companies should consider engaging outside experts, including external counsel, public relations firms, and subject matter experts, to assist and be on call as new developments unfold.
3. **Public Relations and Communications Plan:** Revise and modify as needed the communications plan for employees, vendors, customers, and the public. Companies frequently designate one or more specific people with the responsibility to deliver these messages.
4. **Safety and Welfare:** Employers have been responding to the crisis by taking precautions, such as instituting work-from-home policies where appropriate, to protect the health of their employees and clients. Employers should also consider whether to implement changes to their

HR policies. Please refer to our client alerts on U.S. and U.K. Employment Law Considerations for Companies Responding to COVID-19 for key considerations for businesses working to reduce the risk of employment exposure and steps to take when an employee tests positive for COVID-19 or must care for someone with the disease.

5. **Finance Stress Tests and Backup Plan:** Disruptions in cash flow and market volatility may contribute to covenant defaults under key lending agreements. Customers or borrowers may request accommodations, indicating that they may be distressed. Companies have been and should continue to conduct financial stress testing, modeling their financials under potential scenarios to identify events that might significantly impair liquidity. This may include evaluating current and future financial covenant compliance, the impact of a ratings downgrade, and the implications of a negative watch notice, and proactively seeking covenant relief/forbearance agreements from lenders. Companies are developing, as appropriate, contingencies designed to stabilize the organization in each scenario (e.g., seeking additional capital from external sources). Many companies are drawing on their available lines of credit to ensure liquidity. Additionally, if a company is nearing insolvency, the board should obtain a briefing on how they should take into account the interests of creditors in the exercise of the board's fiduciary duties. Please refer to the attached presentation on [fiduciary duties for financially stressed companies](#) for more details.
6. **Contractual Obligations:** Companies are currently evaluating potential supply chain disruptions, counterparty financial difficulties, and premises closures, which may affect abilities to meet contractual obligations. This involves assessing whether companies and their counterparties can continue to meet contractual obligations, adapting arrangements for procuring goods or services necessary to manage the ongoing business, and the potential application of *force majeure* provisions, other frustration-related contractual provisions, notification obligations, and provisions permitting suspension of performance. It also involves analyzing the implications of any suspension of performance, in particular the potential application of liquidated damages provisions and demand guarantees. These issues of course vary from one contract to another, depending on the governing law. For example, under the laws of some common law jurisdictions, *force majeure* provisions may be interpreted strictly and restrictively, whereas other systems may more freely permit suspension or non-performance on *force majeure* grounds, irrespective of whether the issue is specifically addressed in the contract.
7. **MAE/MAC Provisions:** Certain companies may evaluate whether the impact of COVID-19 constitutes a material adverse effect ("MAE") or material adverse change ("MAC") as a basis to terminate transactions. Whether the impact of the virus will be considered an MAE/MAC will depend upon the language of the agreement and what is known at the time execution of the agreement. Disputes regarding pre-crisis MAE/MAC provisions may focus on whether (1) definitional language that typically excludes general economic or market conditions and other broad-based factors impacting the business climate or the target's industry generally is sufficient to exclude the impact of COVID-19, (2) whether the potential impact of the virus was reasonably foreseeable, and/or (3) whether the impact of the virus is sufficiently long-lasting. Companies currently negotiating MAC/MAE provisions would be well-advised to negotiate explicit

language to address the COVID-19 risk-allocation. For more information on pre- and post-crisis MAE/MAC provisions and other M&A considerations, please refer to our client alert on [M&A Amid the Coronavirus \(COVID-19\) Crisis: A Checklist](#).

8. **Insurance Policies:** Companies are reviewing their insurance policies to determine whether losses and expenses incurred and/or anticipated might be covered, and to identify any notification requirements that must be satisfied.
9. **Disclosure Obligations for Listed Companies:** Listed companies are evaluating potential additional disclosures with respect to material risks, material disruptions or impairments to business operations or outlook, and/or material changes in plans or transactions.

Prepare Now for Ripple Effects.

1. Assess Material Risks.

Companies should consider (1) how the public health crisis has already impacted them – such as any effects on liquidity, earnings, and continuity of services – and (2) how the crisis may continue to affect them, factoring in the uncertainty of how long the effects of the crisis will last.

2. Engagement with Government Authorities.

Companies should have a clear plan regarding their engagement with all relevant regulators and other governmental authorities – within the U.S., at local, state and federal levels, and outside the U.S., at local, regional and national levels, as well as any relevant supranational authorities.

3. Understand the Impact of Varying Local Regulations.

Companies should have a clear plan in place to engage with key stakeholders at the corporate level, and consider how the COVID-19 public health crisis will likely affect the need for and practicalities surrounding board and shareholder communications. Each company should consider the implications of stakeholder engagement based on the laws of the country in which it is domiciled. For example, U.S. listed companies should consider how the crisis will likely affect each of the following:

4. Engagement with Stakeholders.

Local and state governments have implemented non-uniform response measures in efforts to curb the spread of the virus, including shelter-in-place orders restricting mobility within communities. Response plans should include working with counsel to understand and interpret how varying local measures impact their business operations. For multi-jurisdictional companies, this may require tailoring response plans based on the location of their operations.

- **Financial and Public Disclosures:** Companies should consider whether their disclosed risks adequately address how the COVID-19 crisis has impacted their earnings. Companies should consider the extent to which new risks – such as logistical and procurement delays and difficulties

meeting production timelines or continuing provision of services due to staff being forced to work from home – necessitate revision of previous disclosures.

- **Regulation Fair Disclosure:** Company executives should wisely consult with in-house and outside counsel in communicating with stakeholders regarding the current health care crisis and its impact on the company, to ensure compliance with Regulation FD by not disclosing material nonpublic information to select investors prior to any public announcement. *See* Final Rule: Selective Disclosure and Insider Trading, 17 C.F.R. 240, 243, 249, Release No. 33-7881 (2000), <https://www.sec.gov/rules/final/33-7881.htm>.
- **Earnings Guidance:** Companies should consider the extent to which they want to revise forward-looking statements based on how the crisis is likely to affect revenues and plans for future operations.
- **Board Meetings:** Boards should consider whether to meet (virtually, as appropriate) to assess and provide input on and monitor company management’s steps to address the crisis.
- **Annual Meetings:** On March 13, 2020, the Securities and Exchange Commission (“SEC”) issued guidance for companies conducting annual meetings amid the COVID-19 crisis (<https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns?auHash=zrsDVFen7QmUL6Xou7EIHyoV4Y6IfRTjW3KPSVukQs>). Companies that have already mailed and filed their proxy materials may consider changing the date, time, or location of their meeting. The SEC advised that it would take the position that these companies do not need to mail additional materials or amend their proxy materials if they: “issue[] a press release,” “file[] the announcement as definitive additional soliciting material on EDGAR,” and “take[] all reasonable steps necessary to inform other intermediaries in the proxy process . . . and other relevant market participants.” Companies may also consider holding virtual meetings. These companies should review with counsel their governing documents and applicable state law to confirm such meetings are permitted. If virtual meetings are permitted, the SEC has advised that companies should notify all participants in a timely manner and provide clear directions on logistics (including how to access, participate in, and vote at the meeting). Companies that have yet to mail proxy materials should include such information there; companies that have already mailed and filed proxy materials should take the same steps outlined above for companies changing the date, time, and location of their meeting. The SEC guidance also addresses issues relating to shareholder proposal presentations at these meetings.
- **10b5-1 Plans and Other Trading in Issuer Securities:** Executives should consider whether the COVID-19 crisis and its impact on the company requires the extension of blackout periods for stock trading by personnel with material nonpublic information in light of the public health crisis, and/or whether appropriate changes should be made to the blackout periods for those directors and officers who do not have possession of material, nonpublic information but wish to show support for companies in this time of need.

5. Assess and Monitor Regulatory Developments.

Companies should consider regulators' responses to the crisis, and assess whether their regulatory requirements are affected. In the U.S.:

- The SEC has already issued several orders providing regulatory relief for certain companies:
 - On March 4, the SEC announced that it is providing conditional regulatory relief for certain publicly traded company filing obligations under the federal securities laws, recognizing that the impacts of COVID-19 may present challenges for certain companies that are required to provide information to trading markets, shareholders, and the SEC (<https://www.sec.gov/news/press-release/2020-53>; <https://www.sec.gov/rules/other/2020/34-88318.pdf>).
 - On March 13, the SEC announced two additional orders for regulatory relief for registered investment companies, other funds, and investment advisers whose operations may be affected by the crisis, permitting virtual board meetings and easing document filing requirements if companies meet certain conditions (<https://www.sec.gov/news/press-release/2020-63>; <https://www.sec.gov/rules/other/2020/ia-5463.pdf>; <https://www.sec.gov/rules/other/2020/ic-33817.pdf>).
 - On March 22, the SEC announced that it is providing conditional regulatory relief for registered transfer agents and certain other persons affected by COVID-19, granting exemptions from certain regulatory obligations under the federal securities laws through May 30, 2020, if the transfer agents/persons meet certain conditions. Transfer agents, however, must continue to comply with Exchange Act Rule 17Ad-12, which requires adequate safeguarding of securities and funds in transfer agents' possession or custody (<https://www.sec.gov/news/press-release/2020-68>; <https://www.sec.gov/rules/exorders/2020/34-88448.pdf>).
- The Commodity Futures Trading Commission has issued several no-action letters providing temporary, targeted relief to futures commission merchants, introducing brokers, swap dealers, retail foreign exchange dealers, floor brokers, swap execution facilities, certain designated contract markets, a U.S. bank that helps finance the U.S.'s oil and gas sector, operators of CFTC-regulated commodity-focused investment funds, and other market participants (<https://www.cftc.gov/PressRoom/PressReleases/8132-20>; <https://www.cftc.gov/PressRoom/PressReleases/8133-20>; <https://www.cftc.gov/PressRoom/PressReleases/8136-20>).
- On March 20, the U.S. Treasury Department and Internal Revenue Service issued guidance extending the deadline to file and pay federal income taxes (including self-employment taxes) from April 15, 2020 to July 15, 2020, regardless of the amount owed, expanding on the relief that was announced on March 18 (<https://www.irs.gov/pub/irs-drop/n-20-18.pdf>).

Companies should consider whether they qualify for the relief announced under these orders, but not take them as indication that other regulatory agencies will offer similar relief from existing obligations. Companies should also proactively engage with regulators to communicate any anticipated inability to meet existing regulatory obligations.

6. Assess Ongoing Litigations and Investigations.

Companies need to account for the impact of COVID-19 on existing litigation and investigations, which may be affected by court closures and government agencies' institution of work-from-home policies.

- **Litigation:** Courts across the world have been restricting access, adjourning or continuing trials, and postponing hearings and arguments in light of COVID-19. Companies in litigation should anticipate that trials and other case deadlines may be delayed. Counsel on any ongoing matters should monitor court updates and proactively communicate with courts and counsel for other parties as appropriate to determine the impact on existing deadlines. Companies should also assess the risk that a litigation party may be distressed and could file for bankruptcy, and consider any proactive measures that can be taken to address this risk (including, for example, structuring settlements to mitigate bankruptcy risks).
- **Investigations:** The same holds for ongoing investigations by regulators and prosecuting authorities; government office closures or work-from-home policies will likely affect existing timelines for investigations, including document productions and witness interviews. Depending on the circumstances, companies may wish to consider whether to engage with responsible government officials on these issues. Under the right set of circumstances, proactive communication with regulators builds trust and may be helpful.

7. Down the Line: Regulatory Scrutiny, Shareholder Actions?

The risks posed by the COVID-19 crisis necessitate that companies plan now for the long-term financial, operational, and logistical effects of the crisis. Companies' reactions to the crisis – and whether they were adequately prepared – will likely be scrutinized by regulators and/or be the subject of future shareholder actions.

- **Upcoming Earnings Calls:** March/April Quarterly Earnings calls are right around the corner. Companies will be asked how the public health crisis impacted them, and how they responded.
- **Questions to Prepare for:** Were you prepared? Did you have the technological capabilities available to continue to offer services with staff working remotely? Did you act appropriately and in a timely manner when the risks – of supply-chain/procurement disruption, office closures, and need for remote working – became clear? Failing to take action to mitigate against these risks now and communicate your response plan to stakeholders may expose you to future shareholder actions.

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Demonstrate Leadership.

Given the prevailing climate of uncertainty and adversity posed by the COVID-19 crisis, it will be important for those in leadership positions within major companies to demonstrate clear, calm, and measured stewardship. By having an *adaptable* action plan to mitigate business and legal risks, address the needs of staff and customers, and proactively communicate with government authorities and key stakeholders, companies can demonstrate their reliability in a time of crisis.



*Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's **Coronavirus (COVID-19) Response Team**.*

*Gibson Dunn lawyers regularly counsel clients on the crisis management issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please also feel free to contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's **Crisis Management Group** or **Business Restructuring and Reorganization Group**, or the authors:*

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