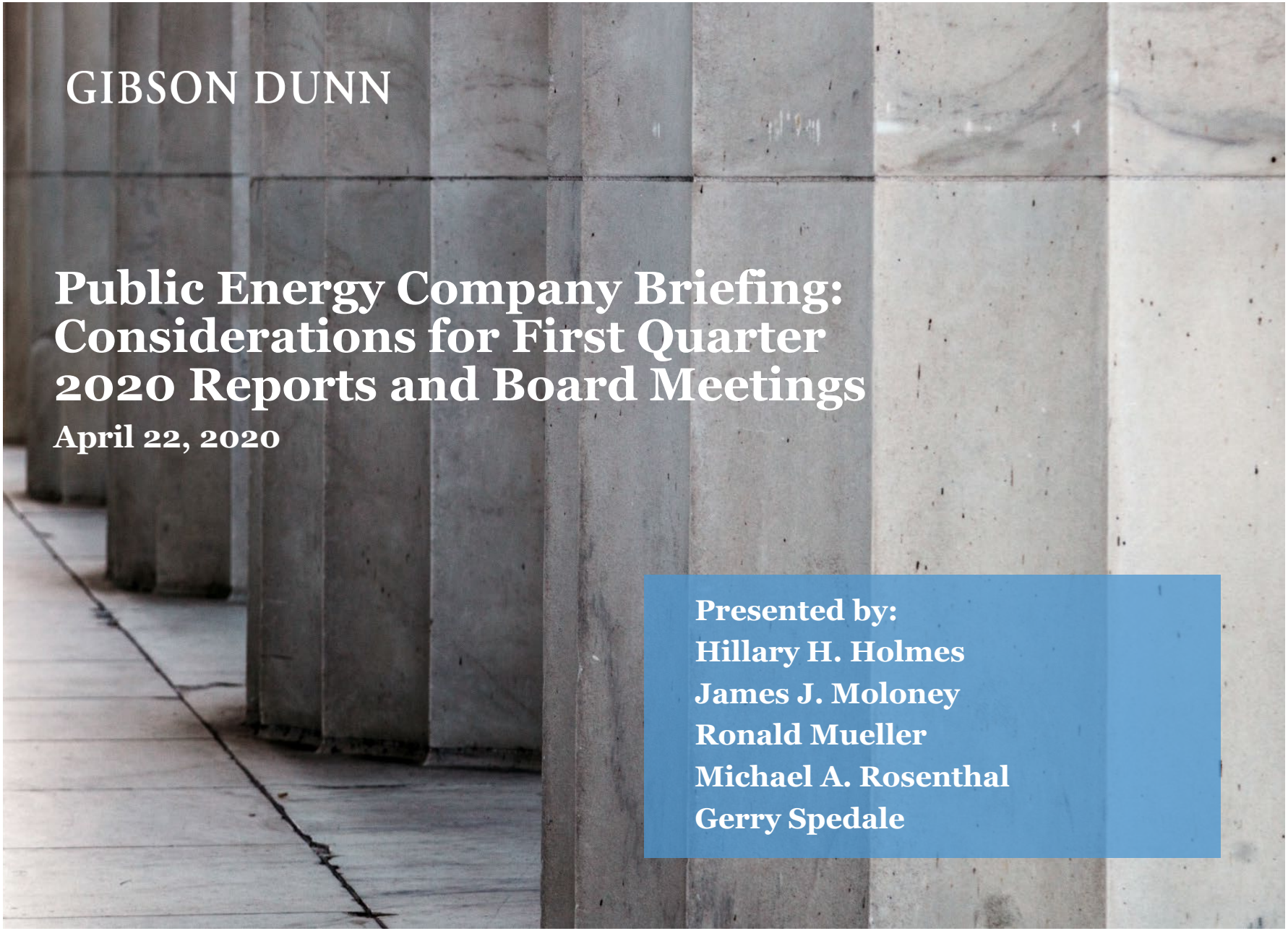

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Public Energy Company Briefing: Considerations for First Quarter 2020 Reports and Board Meetings

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Presented by:
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MCLE Information
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- Most participants should anticipate receiving their certificate of attendance in 4-6 weeks following the webcast
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Today's Panelists

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James J. Moloney is a partner in the Orange County office of Gibson Dunn and serves as Co-Chair of the firm's SRCG practice group. His practice focuses primarily on securities offerings, mergers & acquisitions, friendly and hostile tender offers, proxy contests, going-private transactions and other corporate matters. Mr. Moloney was with the SEC in Washington, D.C. for six years before joining Gibson Dunn. He served his last three years at the Commission as Special Counsel in the Office of Mergers & Acquisitions in the Division of Corporation Finance. In addition to reviewing merger transactions, Mr. Moloney was the principal draftsman of *Regulation M-A,* the comprehensive set of rules relating to takeovers and shareholder communications.

Ronald Mueller is a partner in the Washington, D.C. office of Gibson Dunn and a founding member of the firm's SRCG practice group. He advises public companies on a broad range of SEC disclosure and regulatory matters, executive and equity-based compensation issues, and corporate governance and compliance issues and practices. He advises some of the largest U.S. public companies on SEC reporting, proxy disclosures and proxy contests, shareholder engagement and shareholder proposals, and insider trading and Section 16 reporting and compliance. He also advises on many corporate governance matters, including governing documents for companies, boards, and board committees, such as bylaws and committee charters, director independence and related party transaction issues, and corporate social responsibility.

Michael A. Rosenthal is a partner in the New York office of Gibson, Dunn & Crutcher and Co-Chair of Gibson Dunn's Business Restructuring and Reorganization Practice Group. Mr. Rosenthal has extensive experience in reorganizing distressed businesses and related corporate reorganization and debt restructuring matters. He has represented complex, financially distressed companies, both in out-of-court restructurings and in pre-packaged, pre-negotiated and freefall chapter 11 cases, acquirors of distressed assets and investors in distressed businesses. Mr. Rosenthal's representations have spanned a variety of business sectors, including investment banking, private equity, energy, retail, shipping, manufacturing, real estate, engineering, construction, medical, airlines, media, telecommunications and banking.

Gerry Spedale is a partner in the Houston office of Gibson, Dunn & Crutcher. He has a broad corporate practice, advising on mergers and acquisitions, joint ventures, capital markets transactions and corporate governance. He has extensive experience advising public companies, private companies, investment banks and private equity groups actively engaging or investing in the energy industry. His over 20 years of experience covers a broad range of the energy industry, including upstream, midstream, downstream, oilfield services and utilities.

Agenda

- Part One: Disclosure Considerations Relating to Q1 earnings release and Form 10-Q
- Part Two: Navigating Securities Laws and Good Governance During a Crisis
- Part Three: Planning for Hostile Bids, Shareholder Activism and Related Defense
- Part Four: Fulfilling Fiduciary Duties in the Financially Distressed Context
- Annex A: Gibson Dunn Resources
- Annex B: Conditions for Relief from Filing Requirements
- Annex C: Overview of Rights Plan Mechanics

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Disclosure Considerations Relating to Q1 Earnings Release and Form 10-Q

Significant Areas of Disclosure

- Significant areas of disclosure that public companies should continuously consider during the course of the COVID-19 outbreak and the oil and gas industry downturn include the following:
  - SEC Guidance and Questions to Ask
  - Earnings Guidance
  - Disclosure in Periodic Reports
  - Non-GAAP Supplemental Measures
  - Forward-Looking Statement Disclaimers
  - Regulation FD and Insider Trading Laws
  - Capital Markets Disclosure

SEC Guidance and Questions to Ask

- To help guide a company's disclosures related to COVID-19 and the oil and gas industry downturn, the SEC has set forth a non-exhaustive list of questions companies should consider:
  - How has COVID-19 and the oil and gas industry downturn impacted the company's financial condition and results of operations?
  - How has this challenging environment impacted the company's capital and financial resources, including its overall liquidity position and outlook?
  - How does that environment affect the company's balance sheet assets and its ability to timely account for those assets?
  - Whether the company anticipates any material impairments, expenses or changes in accounting judgments that have had or are reasonably likely to have a material impact on the company's financial statements?
  - Whether COVID-19-related circumstances such as remote work arrangements adversely affected the company's ability to maintain operations, including financial reporting systems, internal control over financial reporting and disclosure controls and procedures?

SEC Guidance and Questions to Ask *(Cont.)*

- Questions continued:
  - Whether the company has experienced challenges in implementing its business continuity plans or whether it foresees requiring material expenditures or material resource constraints to do so?
  - Whether the current challenging environment is expected to materially affect demand for the company's products and services?
  - Whether that environment is anticipated to have a material adverse impact on the company's supply chain or the methods used to distribute its products or services?
  - Whether the company's operations will be materially impacted by any constraints or other impacts on the company's human capital resources and productivity?
  - Whether travel restrictions and border closures are expected to have a material impact on the company's ability to operate and achieve its business goals?

SEC Guidance and Questions to Ask *(Cont.)*

- The SEC recently issued a joint statement stressing the importance of COVID-19 disclosures, including:
  - The current state of affairs and outlook and plans for addressing the effects of COVID-19;
  - How outbreak response plans, including efforts to protect the health and well-being of their workforce and customers, are progressing; and
  - Financial assistance received under the CARES Act or similar COVID-19 related programs
- Such disclosures may need to be subsequently updated or supplemented, which should become less difficult over time
- Companies should address their specific statuses, operational strategies and risks and resist the temptation to resort to generic or boilerplate disclosures

SEC Guidance and Questions to Ask *(Cont.)*

- The SEC has issued two orders (March 4, March 25) that provide relief to companies that are unable to meet a filing deadline due to circumstances related to the COVID-19 outbreak
  - Exemption covers Annual Reports on Form 10-K, Quarterly Reports on Form 10-Q and Current Reports on Form 8-K, among others
  - Also includes proxy statements that are required to be filed within 120 days after fiscal year-end by companies relying on General Instruction G(3) of Form 10-K to incorporate Part III information by reference to the proxy statement
- The relief applies for the period from and including March 1, 2020 to July 1, 2020
- See Annex B for a description of the conditions required to rely on exemption

Earnings Guidance

- COVID-19 and the oil and gas industry downturn have made it difficult, if not impossible, to forecast future results
- Whether publicly issued guidance should be updated or withdrawn in light of recent developments is a very company-specific determination
- Questions companies should ask themselves when deciding whether guidance should be updated or withdrawn include:
  - Did the company explicitly say its guidance excluded any impact of the coronavirus?
  - Did the company state assumptions about the coronavirus impact that are no longer reasonable given new developments?
  - Did the company commit to providing updates (e.g., by stating "we are monitoring the situation and will keep you updated")?
  - Is the company meeting with investors or analysts where questions about the impact of the outbreak may be discussed such that updating the guidance through a Reg. FD-compliant method might make sense?

Earnings Guidance *(Cont.)*

- Additional considerations in withdrawing previously issued guidance:
  - Should the company make a statement that it is not, at this time, prepared to issue new guidance?
  - Will the market expect the company to preview when new guidance is expected to be issued?
  - Should the company make an affirmative public statement that it is suspending guidance?

Earnings Guidance *(Cont.)*

- Augment company disclaimers regarding guidance to incorporate factors related to the current challenging environment
- Make clear that the information and assumptions underlying guidance are based on information available at the time, and information and assumptions underlying the guidance could change or emerge as the situation evolves
- Companies also should consider the following questions, among others:
  - Are there key assumptions about the outbreak that underlie the guidance?
  - Has the company made clear the tentative nature of such assumptions?
  - Would it be prudent to shorten the period of time covered by guidance, citing the lack of visibility into future conditions?
- If a company does not have an established practice of issuing periodic guidance, it is under no legal obligation to commence the practice

Non-GAAP Supplemental Measures

- Companies may consider presenting non-GAAP financial measures for historical periods impacted by the outbreak and industry downturn that reflect adjustments from the required GAAP measures
  - Management may articulate the position that these adjustments are critical in order for investors to be able to compare the performance of the business period over period
  - For example, a company might quantify the impact of events related to the current challenging environment on both its GAAP net income and its non-GAAP Adjusted EBITDA (as historically presented)
- Companies should be mindful of the rules relating to non-GAAP supplemental measures under Regulation G and Item 10(e) of Regulation S-K
  - In its recent guidance, the SEC Division of Corporate Finance reminded companies that "we do not believe it is appropriate for a company to present non-GAAP financial measures or metrics for the sole purpose of presenting a more favorable view of the company"
- To the extent a company discloses any key performance metrics and changes have been made to such metrics to exclude items related to the crises or address such items in a different manner, the company should be clear to call out such changes and provide updated comparable prior period information to the extent practicable

Disclosures in Periodic Reports: MD&A

- Companies should discuss how the COVID-19 outbreak or actions taken by governments, companies and individuals in response to the outbreak impacted results of operations
  - Includes impact on revenue and operating expenses, and how they compare to the comparable prior period's results
- Even if results of operations have not yet been materially impacted, disclosure may be appropriate if reasonably likely to have a material effect
- Companies should carefully evaluate whether to revise their liquidity and capital resources section to reflect the historical and expected impact of the current challenging environment
  - May include the impact on budgets, access to capital and cost of financing
  - If there has been an impact on liquidity based on additional company action between the end of the fiscal period and the filing date (e.g., covenant compliance issues or material borrowings), companies should consider providing this update

Disclosures in Periodic Reports: MD&A *(Cont.)*

- It may be difficult for a company to clearly identify trends and outlook for its business, as there are too many unknown variables
- Consider statements regarding the fluidity of the current market situation and the uncertainty with respect to the impact that the outbreak and industry downturn may have or is expected to have on future results
- For the benefit of investors, discuss macro factors that drive the company's results
    - For example, a company might describe the potential impact of the outbreak on the industry, supply and demand trends or the global or local economy in which the company operates

Disclosures in Periodic Reports: MD&A *(Cont.)*

- While each company's situation will be different, companies should ask themselves:
  - Do the operational disruptions caused by the outbreak indicate a change in circumstances that might trigger asset impairment?
  - Does the company need to revisit its accounting estimates, such as the amount of variable consideration it expects to be entitled to?
  - What effect might the outbreak have on the company's hedging relationships, compensation agreements, leases and income taxes?

Disclosures in Periodic Reports: Risk Factors

- Current risk disclosures relating to the COVID-19 outbreak fall predominately into three baskets:
  - Risks that directly impact a company;
  - Risks that impact a company's suppliers or customers; and
  - Ancillary risks, including a decline in the capital markets, a recession, a decline in employee relations or performance, governmental regulations, an inability to complete transactions, and litigation
- Companies should consider:
  - Not focusing on only one or two specific impacts caused by the COVID-19 outbreak or the oil and gas industry downturn, as there are likely many other impacts that may become material;
  - Noting that the unpredictable and unprecedented nature of the current situation makes it impractical to identify all potential risks and estimate the ultimate adverse impact on the business; and
  - Adding a broad statement that all risk factors disclosed in the Form 10-K may be amplified by the current challenging environment and its unpredictable nature
- Include language that makes clear that the risk factor disclosure speaks only as of the filing date and is subject to change without notice as the company cannot predict all risks relating to this quickly evolving set of events

Disclosures in Periodic Reports: Forward-Looking Statements

- Companies providing forward-looking disclosures should avail themselves of the safe-harbors for such statements
    - Mention the impact of pandemics (including the COVID-19 outbreak) in the forward-looking statement disclaimers
- In recent guidance, the SEC encouraged companies to make use of this safe harbor stating that it "would not expect to second guess good faith attempts to provide investors and other market participants appropriately framed forward-looking information"

Capital Markets Disclosure

- When preparing the prospectus or offering memorandum, the issuer and underwriters should review any existing disclosures made before the offering and supplement or amend them as necessary
- Issuers should consider whether it is necessary to file an Item 8.01 Form 8-K with amendments or supplements to the MD&A and Risk Factors included in the most recent periodic reports, which Form 8-K is then incorporated into the offering document
- Companies should supplement disclosure to the “Recent Developments” section in the prospectus
- For private placements, a supplemental Item 7.01 or 8.01 Form 8-K is likely necessary to make FD-compliant disclosure of updated information provided in connection with the exempt offering
- In addition to public disclosures, issuers should be prepared to respond to novel diligence questions from underwriters and investors centered around the COVID-19 outbreak

Benchmarking COVID-19 disclosures

- Gibson Dunn is benchmarking COVID-19 disclosure among S&P 100 companies and oil and gas companies and maintaining a catalogue of SEC and other regulatory guidance
- Contact your Gibson Dunn lawyer for more information

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Navigating Securities Laws and Good Governance During a Crisis

Insider Trading Laws and Regulation FD

- The unprecedented and unpredictable nature of the current situation creates a trap for the unwary
- SEC has issued recent cautionary statements about insider trading and Reg FD compliance
- A risk or development related to the challenging environment may be material to a company's investors
    - Analysis may be more complex than in a normalized environment
- Companies should refrain from engaging in securities transactions with the public and discourage directors and officers (and other corporate insiders who are aware of these matters) from trading until investors have been appropriately informed about the risk
    - Compliance officers may need to close windows or deny preclearance of trading in the company's securities under the company's insider trading policy in light of new developments or changes in the company's plans or outlook as a result of the impact of the outbreak
    - Companies should also evaluate their ability to implement new stock buyback programs or continue buyback programs outside of a previously established 10b5-1 plan

Insider Trading Laws and Regulation FD *(Cont.)*

- When making disclosures, management must avoid making selective disclosures that could violate Regulation FD
  - Includes statements about historical impact or developments *and* outlook, prospects and expectations
  - Given the fast pace of change, analysts may ask about revisions to models more frequently
- Regular updates to employees and other stakeholders can create disclosure issues, even if exempt from Reg FD.
- Trading activity and selective disclosures will be judged with the benefit of hindsight
- Companies should implement additional protective controls relating to trading and the content of management meetings with covered persons under Regulation FD

Directors Duties: What Has Changed?

- Duties have not changed but exercise of the duties has become more complex
  - Despite a crisis, duties are not enhanced short of insolvency
  - Duty of care and duty of loyalty are core duties with business judgment rule available
  - Board must be fully informed
- Key to Current Climate: Board of directors serves a critical oversight function (but not a management function)
  - *Caremark* liability attaches only when a board "utterly fails" to monitor corporate risk or intentionally ignores a "red flag" that a risk has ripened
    - While current market crisis is likely not the type of "enterprise risk" outlined in *Caremark*, a board should pay special attention to "hot-button" issues and document that it was well informed
    - Board should memorialize pandemic and oil and gas sector-related discussions and actions in ways that can become part of a pleadings-stage litigation record

Exercising Directors' Duties

- Process Questions to Ask:
  - (1) What are the risks to the company – now and in the next couple years?
  - (2) Does the company have controls and systems in place to identify and manage the risks?
  - (3) Is management reporting to the board on the risk and effectiveness of the controls and systems?
- Key risks include liquidity, employee safety and counterparty status
- Being Fully Informed Requires More Engagement Than Ever
  - Meet formally as a board and/or receive information from management more frequently
  - Receive historical information promptly
  - Receive forecasts with sensitivities *and* understand assumptions
  - Ask questions and challenge management
  - Engage financial advisor
  - Make hard decisions to proactively protect the business

Governance Action Items for in Response to Oil & Gas Industry Downturn

- Ensure safety of employees
- Evaluate liquidity and financial position
- Understand potential problem areas in debt instruments and other material contracts
- Understand challenges facing customers, suppliers and employees
- Explore all financing options, including capital raising and commodity protection derivatives
- Evaluate defensive measures
- Examine strategic opportunities
- Understand applicable regulatory developments
- Ensure continued compliance with laws, including those relating to workforce reductions or changes in operations
- Plan for restructuring alternatives with advice tailored to that context, including with respect to conflicts and duties of directors of a distressed company

Governance Action Items in Response to COVID-19

- Ensure board continuity
  - Boards should consider whether to take action now to adopt emergency bylaws and/or appoint executive committees in order to ensure the continued ability of the board to operate
- Reinforce emergency executive succession plan
  - A key duty of the board is to engage in succession planning for the CEO and management team, both for the long term and in the case of an emergency
- Consider if updates are needed to delegations of authority
  - Companies should review delegations of authority and consider whether the nature and scope of these delegations remain appropriate and provide flexibility to pivot as needed and the board can continue to play an appropriate oversight role

Governance Action Items in Response to COVID-19 *(Cont.)*

- Evaluate impacts on internal controls and internal audit function
  - Changes to internal controls, and the implementation of new controls may be warranted, and changes must be disclosed in Forms 10-Q and 10-K to the extent those changes have materially affected, or are reasonably likely to materially affect, the company's internal controls
  - Companies may wish to revisit the internal audit plan and determine whether it is appropriate to shift priorities reflected in the plan and whether it is feasible to conduct planned audits without in-person access to certain locations
- Consider how to proceed with the annual shareholders meeting
  - Companies that determine to hold a virtual meeting should carefully evaluate the experience and workload of key virtual meeting providers
- Re-examine incentive arrangements
  - Long-term goals based on total shareholder return (TSR) at a time of extreme stock price volatility may not create adequate incentives, and some executive compensation decisions may be better delayed until situations improve or at least stabilize

What Will Happen to ESG?

- Environmental, social and governance investing is growing in popularity as investors flocked to companies that have taken steps to manage nonfinancial risks related to matters such as climate change, board diversity or human rights issues in the supply chain
- According to The Wall Street Journal, a group of 300 mutual funds that integrate ESG factors into their investment decisions attracted $21.4 billion in new money in 2019, compared with $5.4 billion a year earlier (data from Morningstar Inc.)
- Companies should expect more investors to ask questions about resilience and contingency planning, viewing the issues in light of the challenging landscape as relevant to a company's long-term performance

Current ESG Consideration

- The challenging landscape has demonstrated on a large scale the importance of other factors that are paramount to ESG investors, including:
  - Disaster preparedness
  - Continuity planning and employee treatment through benefits such as paid sick leave
- Human Capital Issues
  - Where appropriate, soliciting employee input and keeping employees informed of challenges may help management make better informed decisions and inspire employee confidence
  - Companies should think about whether their retained workforces have sufficient talent and skills to meet business demands as the economy recovers
  - Corporate action will be judged in hindsight by employees, customers, and shareholders, particularly shareholders that increasingly consider ESG issues as part of their investment and engagement process

ESG Considerations for the Future

- Board oversight of risk management will be important
  - Directors should maintain regular contact with management to receive timely updates on the well-being of employees, customers and the communities in which the company operates
- ESG disclosures remain important
  - Major institutional investors, including State Street and Vanguard, have indicated that while management and boards should be given flexibility to respond to the immediate needs of their companies, longer-term considerations such as addressing climate change risk, remain important
- ESG initiatives that do not require capital appeal to companies that are financially challenged
  - Diversity initiatives may take center stage as companies benefit from multiple perspectives and investors require compliance
  - Social and community contributions will build on the human-connection element of this crisis

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Planning for Hostile Bids, Shareholder Activism and Related Defense

Shareholder Rights Plans: Overview

- Over the past several years, rights plans have come under increased scrutiny and pushback by institutional investors, the CII and proxy advisory firms (*e.g.,* ISS and Glass Lewis)
  - Rights plans requiring shareholder approval (before adoption or ratifying)
- Criticisms of rights plans include the potential for dilution of ownership, used to protect poorly performing incumbent board and management, potential for entrenchment, deterrent effect on bidders that might make offers for the company thus precluding shareholders from receiving potential premium offers for their shares
  - At the end of 2019, approximately 160 companies had rights plans
    - 25 companies in the S&P 1500 / 8 in the S&P 500 (< 1%)
  - Compared to 60% of the S&P 500 two decades years earlier

Shareholder Rights Plans: Overview *(Cont.)*

- In light of recent developments, including the global COVID-19 pandemic and the related depression in the stock markets, exacerbated by conditions in certain industries such as travel, hotel, restaurant, gaming and energy, companies most impacted are now reconsidering the need for a rights plan ("poison pill")
  - Since January 1st, some 36+ public companies adopted rights plans, including:
    - (3/12) Occidental Petroleum
    - (3/17) Dave & Buster's Entertainment, Inc.
    - (3/19) Williams Companies
    - (3/20) Delek U.S. Holdings
    - (3/25) Fluor Corporation
    - (3/25) Barnes & Noble Education
    - (3/27) Whiting Petroleum
    - (3/30) AAR Corporation
    - (3/31) Six Flags Entertainment Corp
    - (4/16) Hilton Grand Vacations, Inc.

Shareholder Rights Plans – Types of Poison Pills / Common Terms

- There are different types of rights plans (e.g., long-term, short-term, NOL)
  - Historically, most rights plans had a 10-year term
  - Today, most rights plans are short term (1 year or less)
  - Companies with significant NOLs often adopt a rights plan to preserve their tax attributes that could be lost as a result of ownership changes under Section 382

Shareholder Rights Plans – Types of Poison Pills / Common Terms *(Cont.)*

- The specific terms in rights plans vary, but generally contain provisions that fall within a certain bandwidth, including:
  - Ownership triggers ranging in between 10% and 20%
  - With some plans distinguishing between passive investors and activist investors
    - 10% - 15% triggers for activist investors and
    - 20% triggers for passive institutional investors (13G filers)
  - Section 382 / NOL plans frequently have a much lower threshold (e.g., 4.9%)
  - "Flip-in" and "flip-over" provisions that provide shareholders with the right to acquire shares at a steep discount to market (from the company or the person(s) triggering the plan), causing significant dilution to the latter
  - Duration – most plans today are of the short-term variety to address an imminent concern
  - Timing of shareholder approval (if any)
  - The board's right to terminate plan early / commitment to terminate by a certain date

Purpose of Rights Plan

- Provide the board with adequate time to consider and respond to unsolicited takeover proposals or creeping accumulations of control
  - Increase the board's bargaining power and flexibility when dealing with potential acquirors or those seeking creeping accumulation of control
  - Assess a bidder's proposed offer terms and evaluate strength of financing
  - Consider alternative transactions that may be available to the company
  - Negotiate with the bidder for a higher price (control premium)
- Prevent the acquisition of a controlling interest that may preempt the board's consideration of alternatives

Purpose of Rights Plan *(Cont.)*

- Limit the use of abusive takeover tactics
  - Prevent the acquisition of positions from uninformed shareholders who might cash out before recognizing the true value of their shares
  - Provide an incentive for bidders and other persons seeking control to negotiate with the board
- Protect the company and its shareholders from efforts to obtain control that are inconsistent with the best interests of the company and its shareholders
  - Protect against offers that under-value the company
- Address the use of derivatives / 10-day filing deadline for 13D / HSR limits
- Protect tax attributes (NOLs) that may be lost due to ownership changes
- An overview of rights plan mechanics is included in Annex C

Other Considerations: COVID-19 and Challenges in the Oil and Gas Sector

- In today's environment, there may be additional considerations a board may take into account when weighing the need for a rights plan, such as:
  - The company's stock price may be significantly and adversely affected by the market-wide sell-off prompted earlier this year by COVID-19 as well as other uncertainties facing the oil and gas industry – causing a temporary depression in the company's stock price and increased trading volumes that can facilitate a rapid accumulation of shares
  - Current stock prices may not adequately reflect the board's view of the *intrinsic value* of the company or long-term fundamental value for the business
  - Offers may come at a time when investors don't have all the information they need to adequately assess the offer and the value of their shares
  - The company's inability to quickly respond to an activist due to limitations on company personnel, resources and other business matters stemming from the current pandemic

Other Considerations: COVID-19 and Challenges in the Oil and Gas Sector *(Cont.)*

- The presence of well-financed (activist) investors in the stock that may seek to capitalize on current market conditions, targeting companies most impacted, with the ability to accumulate significant stakes in a short time
  - Possible in < 10 days before a 13D is filed
  - Reduced market values making it less likely an HSR reporting notice is triggered ($94m)
- Challenges in communicating with shareholders during the ongoing crisis where in person meetings may not be feasible due to local regulations and impact of crisis on investors
- The potential for general market and/or industry recovery as a result of rapidly changing facts, including potential funding under federal initiatives such as the CARES Act and the effectiveness of global efforts to contain the COVID-19 pandemic and its impact on the company's business

Other Considerations: Disadvantages

- Opposed by many institutional investors, shareholder activists and proxy advisory firms
  - Increased pressure for companies to terminate Rights Plans
  - ISS has historically recommended against re-election of all directors on an annual basis (except new director nominees, who will be evaluated on a case-by-case basis) if the company has a rights plan with a term > 12 months that was not approved by shareholders, or if the company makes a material adverse modification to an existing rights plan, including extension, renewal or lowering the triggering threshold without shareholder approval
  - ISS will recommend on a case-by-case basis if the board adopts an initial rights plan with a term of 12 months or less (subject to updated views in light of COVID-19)
- As a result, many companies opted to follow an "on-the-shelf" rights plan strategy
  - Rights Plan is kept ready for quick implementation at such time as the company faces the actual threat of a hostile bidder

Shareholder Rights Plans: Updated Guidance on Voting Policies

- In April 2020, ISS and Glass Lewis both issued reports updating their stance on rights plans in the current market environment
- ISS and Glass Lewis intend to continue taking a case-by-case approach to the implementation of rights plans, but recognize the concern of public boards, and have validated the credibility of rights plans that are shorter in duration
    - Adoption of a rights plan in light of severe stock price declines due to the COVID-19 pandemic are likely to be considered a valid justification and reasonable approach in most cases

Shareholder Rights Plans: Updated Guidance on Voting Policies *(Cont.)*

- Both ISS and Glass Lewis benchmark policies encourage boards to put rights plans to a shareholder vote, but provide companies with latitude in adopting short-term rights plans with reasonable triggers in response to active threats
  - Upon implementation of a rights plan, ISS will examine whether directors sought to appropriately protect shareholders from abusive bidders without inappropriately entrenching the existing board and management team
  - Glass Lewis considers reasonable conditions for adoption of a rights plan to be a duration of < 1 year and company disclosure of a sound rationale for implementing the plan
  - If the rights plan does not meet these conditions, Glass Lewis will recommend opposing the re-election of all directors who served on the board at the time the rights plan was adopted

Shareholder Rights Plans: Proxy Advisor Commentary

- ISS: A severe stock price decline as a result of the COVID-19 pandemic is likely to be considered valid justification in most cases for adopting a pill of less than one year in duration; however, boards should provide detailed disclosure regarding their choice of duration, or on any decisions to delay or avoid putting plans to a shareholder vote beyond that period. The triggers for such plans will continue to be closely assessed within the context of the rationale provided and the length of the plan adopted, among other factors.
- Glass Lewis: [W]ill support poison pills that are limited to one year or less and supported by a sound rationale for adoption of the pill because of COVID-19. If the pill doesn't meet those conditions, Glass Lewis will recommend against the re-election of all directors who served at the time of the pill's adoption. Companies that also disclose a commitment to seek shareholder approval for any pill renewal will provide greater comfort to shareholders; however, this isn't a condition to securing Glass Lewis's support in the COVID-19 context.

Source: ISS Global Policy Board, "ISS Policy Guidance for Impacts of the COVID-19 Pandemic (April 2020)";
Glass, Lewis & Co., "Poison Pills and Coronavirus: Understanding Glass Lewis' Contextual Policy Approach".

Final Takeaways

- Take inventory of your anti-takeover protections / defenses
- Monitor company stock price, trading activity and investors accumulating positions
    - Set up a stock watch service if necessary
- Dust off any “on-the-shelf” rights plan, or get a plan on the shelf (if needed)
    - Be prepared to move quickly if necessary
- If potential for insolvency / bankruptcy / restructuring appears on the horizon
    - Watch for investors buying up company debt to get a role in the restructuring

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Fulfilling Fiduciary Duties in the Financially Distressed Context

Overview of Fiduciary Duties of Directors

- Directors of a financially stressed company may be asked to approve certain transactions, financings, payments or restructuring strategies that could be attacked (with the benefit of 20/20 hindsight) if the company were subsequently to falter or if stakeholders perceive that they were harmed by the transaction or restructuring or perceive a strategic advantage to asserting such claims
- When a company is financially distressed, the fiduciary duties of its directors may expand to include stakeholders other than the company and its equity stockholders, such as lenders and other creditors
- The environment in which directors of a financially stressed company operate has become much more difficult. Courts, regulatory agencies, lenders, bondholders and other stakeholders have become more aggressive and willing to second-guess directors' decisions

Fiduciary Duties

- The business affairs of a company are to be managed by its officers under the direction of the board of directors
- The law of the state of organization of the company determines the scope and extent of management's and the board's fiduciary duties*

* *This presentation focuses on Delaware law*

Application of Fiduciary Duties for a Solvent Company

Stockholders	Creditors
• General Rule: Directors of a solvent company owe their fiduciary duties to the company and derivatively to its stockholders • Stockholders have no contractual protections. Accordingly, they are entitled to a high degree of protection from mismanagement as a matter of law	• Creditor Rights Are Contractual: Creditors are afforded protection through contractual agreements, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, general commercial law, and other sources of creditor rights

Application of Fiduciary Duties in an Insolvency Context

- At all times, directors owe a fiduciary duty to the entire "corporate enterprise" or the "community of interests that [sustain] the corporation"
  - When a company is insolvent, however, the community grows to *include creditors*
  - Case law has clarified that directors do not owe direct fiduciary duties to creditors in an insolvent context. Rather, as with its shareholders, all duties to creditors are derivative: They flow through the directors' duties to the company

- <u>When It Is Unclear if the Company Is Solvent</u>:
  - Often it is prudent for directors to assume when making decisions that in hindsight a court might find the corporation was insolvent
  - Directors should act in a manner that preserves and maximizes the value of the company

The Duty of Care

- Duty of Care
  - The actions and conduct of directors must be informed and considered, and decisions must be made with "requisite care"
  - Directors are entitled to rely in good faith on reports prepared by officers of the company or outside experts
- To establish that a board has acted with requisite care, it is important to create and follow a decision making process and maintain good records to demonstrate that the board's decision was informed after consideration of all relevant factors associated with the ultimate decision made
  - For example, prior to decision with respect to an interest payment, the board should be presented with information regarding current liquidity and near term projections

The Duty of Loyalty

- Duty of Loyalty
  - Directors must act in the best interests of the company
    - Traditionally this has applied to self-dealing and corporate usurpation transactions
    - The duty of loyalty analysis addresses the director's personal interest, if any, in the corporate decision such as when an interested director (a) appears on both sides of the transaction, (b) receives a benefit from the transaction that is not received by stockholders generally, or (c) is beholden to a party involved in the proposed transaction such that the director is unable to exercise independent business judgment

The Duty of Loyalty *(Cont.)*

- Case law has expanded the duty of loyalty beyond self-dealing and corporate usurpation to include a failure to act in good faith, which incorporates a duty of oversight
    - The **duty of oversight** includes a duty to monitor the company's operations
    - Under ***Caremark***, a board breaches its duty of loyalty if either (i) the directors completely fail to implement any reporting or information system or controls, or (ii) having implemented such a system or controls, consciously fail to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention
    - Duty of oversight also implicated where directors wait too long to respond to a liquidity crisis or abdicate too much responsibility to advisors

The Duty of Loyalty *(Cont.)*

- To receive the benefit of the presumption of the "business judgment rule" (discussed below), directors must not have breached their duty of loyalty
    - Where there may be questions regarding disinterestedness with respect to a specific decision, disinterested directors may choose to consider the issue without interested directors present, and then make a recommendation to the full board for a vote
        - Consider subcommittee of independent directors to address issues where interests of creditors and equityholders may diverge
    - In insolvency, the family of interests protected by fiduciary duties includes creditors. Individuals affiliated with the controlling shareholders may be seen as acting at the direction of the controlling shareholders, which could lead to questions of conflict or interestedness (i.e., putting the interests of the sponsor ahead of the stakeholders)
        - Case law suggests that where a director designee breaches the duty of loyalty at the direction of the controlling shareholder(s), the controlling shareholder(s) may be financially liable

Standards of Review of a Board's Decision Making (1) The Business Judgment Rule

- The business judgment rule creates a legal presumption whereby courts are deferential to a decision of the board, even if the decision was ultimately unprofitable or a mistake in hindsight
- Directors are presumed to have acted in good faith and in the best interests of the company
- Directors must fulfill the duty of care and avoid conflicts of interest to receive the protection of this presumption
- The following acts, for example, could result in the loss of such presumption:
    - conflicts of interests or failure to disclose material aspects of a transaction
    - failure to exercise proper oversight
    - preferential treatment of certain creditors and other stakeholders (including insiders)
    - failure of a director to disclose material aspects of a transaction
    - acting without requisite information or deliberation (i.e., breach of the duty of care)
- Even where some directors are "interested," the protections of the business judgment rule can be preserved if a special committee of non-interested members of the board separately approves the transaction

Standards of Review of a Board's Decision Making (2) Entire Fairness

- If the business judgment rule does not apply, a stricter "entire fairness" standard will be applied to evaluate the transaction
  - For a distressed company, it typically is prudent for the directors to put in place a process to defend all actions under the entire fairness standard
  - The standard consists of two inquiries: (a) fair price and (b) fair dealing
    - Fair price means a price that a reasonable seller, under all of the circumstances, would regard as within a range of fair value
    - Fair dealing considers both the process that the board followed and the quality of the result achieved
  - When the entire fairness standard applies, a court will not be bound by the judgment of the board but can conduct its own evaluation of the transaction with the benefit of hindsight

Additional Factors Criticized By Courts

- In evaluating breach of fiduciary duty claims, the following are factors that courts have mentioned in criticizing the actions of a director:
  - acting too quickly
  - passive or sole reliance on outside advisors or management
  - utilizing advisors that are not independent and disinterested
  - failure to negotiate aggressively
  - failure to understand key documents or fundamental aspects of a transaction
  - failure to review reasonably available information
  - failure to ask questions
  - failure to consider reasonable alternatives
  - failure to understand the scope of the assignment
  - failure to take into account different factual circumstances (i.e., one size does not fit all)
  - failure to document key decisions
  - falling victim to a controlled mindset and allowing a controlling party to dictate alternatives or terms

Considerations – No Duty to Liquidate or Continue Operating

- Assuming that decisions are made on an informed, good-faith, disinterested basis, "directors are not liable for decisions they make and actions they take in an effort to prolong the corporation's viability, even in the face of bankruptcy." *In re Midway Games*, 428 B.R. 303, 315 (Bankr. D. Del. 2010).
- Delaware law gives protection against challenges to a board's decision on when/whether to file for bankruptcy if the board's decision was informed, in good-faith, and disinterested. See *In re Troll Commc'ns, LLC.,* 385 B.R. 110, 122 (Bankr. D. Del. 2008) ("Deepening insolvency has been rejected as a valid cause of action or a theory of damages under Delaware law.").

Strategies to Minimize Risk of Director Liability

Key Steps to Avoiding Director Liability in Decision-Making:

- Avoid interested director transaction issues and the application of the Entire Fairness standard (e.g. through the formation of a subcommittee of independent directors to review and approve transactions or restructuring alternatives where there is a potential conflict of interest between equity holders and creditors)
- Analyze the company's financial condition before and after the proposed transaction or restructuring
- Retain restructuring advisors and counsel to analyze proposed transactions and associated risks
- Document any decisions made, including any supporting advice
- Take actions designed to maximize value of the enterprise, rather than the interests of a particular stakeholder
- Take affirmative steps to comply with your oversight responsibility

Strategies to Minimize Risk of Director Liability *(Cont.)*

Directors should evaluate and consider a distressed company's alternatives with the following questions in mind:

- "Assuming the company is now insolvent, what is the best course of action that will maximize value?"
- "Given our relationship with our equity investors, would our decision making process be subject to challenge?"
- Caution: A "home run" strategy that would benefit stockholders if successful, but which imposes significant risk of loss to other stakeholders if not successful, is an action that requires careful scrutiny

Alternative Entity Considerations

- Delaware law allows LLCs and LPs to include a waiver of fiduciary duties in the operating or partnership agreement (but it cannot waive implied contractual covenant of good faith and fair dealing) (6 Del. Code § 17-1101(d)-(f), § 18-1101(c)-(e)).
    - A bankruptcy court has upheld this waiver in an LLC Agreement to deny a creditor's request to sue derivatively for breach of fiduciary duties and aiding and abetting breach of fiduciary duties.
- Delaware law also prevents creditors from derivatively asserting fiduciary duty claims as to LLCs and LPs (6 Del. Code § 17-1002, § 18-1002).
    - In *CML V LLC v. Bax*, 28 A.3d 1037 (Del. 2011), the Delaware Supreme Court held that creditors of an insolvent Delaware limited liability company do not have standing under Delaware law to sue derivatively for breach of fiduciary duty. According to the court, § 18-1002 of Delaware's LLC Act limits standing to pursue such claims to members or assignees of the LLC's interests in the LLC. Creditors do not qualify as either a member or an assignee.

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Annex A: Gibson Dunn Resources

Gibson Dunn Resources: Overview

- Oil and Gas Restructuring Support Team
- Coronavirus (COVID-19) Resource Center
- Securities Regulation and Corporate Governance Monitor Blog
- Director Education Opportunities
- 2020 SEC Filing Deadlines

Gibson Dunn Resources: COVID-19 Resources for Public Companies

I. Securities and Exchange Commission

A. Division of Corporation Finance Guidance

- CF Disclosure Guidance: Topic No. 9: Coronavirus (COVID-19) (March 25, 2020)

  Includes: (1) questions to ask when assessing and disclosing the impact of COVID-19; (2) discussion of considerations for insider trading; and (3) selective disclosure and the use of non-GAAP financial measures.

  Related GDC Publication: Perspectives from One Month into the COVID-19 U.S. Outbreak: Public Company Disclosure Considerations (April 9, 2020)

B. Announcements

- Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns (Updated April 7, 2020)

  Includes guidance on: (1) changing the date, time or location of shareholder meetings; (2) conducting virtual meetings; (3) presentation of shareholder proposals; and (4) delays in printing and mailing of full set proxy materials.

Gibson Dunn Resources: COVID-19 Resources for Public Companies *(Cont.)*

C. New Compliance & Disclosure Interpretations

- Staff Guidance: Exchange Act Forms, Section 104 (Form 10-K (Question 104.18)) (April 6, 2020)

  Addresses whether information required on Part III of a 10-K may be incorporated by reference from a proxy statement when the registration is unable to file the Part III information within the required 120-day deadline.

- Staff Guidance: Staff Interpretations Regarding Rule 12b-25 (Question 135.12) (March 31, 2020)

  Addresses whether a registration should use Rule 12b-25 or the COVID-19 Order when unable to file a report on a timely basis without incurring an unreasonable effort or expense.

D. Relief

- SEC Provides Additional Temporary Regulatory Relief and Assistance to Market Participants Affected by COVID-19 (March 26, 2020)

  (1) Temporary relief from the Form ID notarization requirement (through July 1, 2020); (2) additional 45 days to file certain disclosure reports otherwise due between march 26, 2020 and May 31, 2020 under Regulation A and Regulation Crowdfunding; and (3) annual update to Form MA for municipal advisors.

- Order Under Section 36 of the Securities Exchange Act of 1934 Modifying Exemptions from the Reporting and Proxy Delivery Requirements for Public Companies (March 25, 2020)

  Extends the relief from reporting requirements under the federal securities laws due to COVID-19 to 45 days after the original due date.

  Related GDC Publications: SEC Extends Conditional Exemptions From Reporting and Proxy Delivery Requirements for Public Companies Affected By COVID-19 For Reports due on or before July 1, 2020 (April 1, 2020); SEC Provides Conditional Regulatory Relief and Additional Disclosure Guidance for Companies Affected by the Coronavirus Disease 2019 (COVID-19) (March 8, 2020)

Gibson Dunn Resources: COVID-19 Resources for Public Companies *(Cont.)*

E. Public Statements

- Chairman Jay Clayton and Director Bill Hinman, "The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19" (April 8, 2020)

  Related GDC Publication: SEC Chairman and Division of Corporation Finance Director Issue Joint Statement on COVID-19 Disclosures (April 13, 2020)

- Office of the Chief Accountant, "Statement on the Importance of High-Quality Financial Reporting in Light of the Significant Impacts of COVID-19" (April 3, 2020)

- "Statement from Stephanie Avakian and Steven Peikin, Co-Directors of the SEC's Division of Enforcement, Regarding Market Integrity"(March 23, 2020)

  Emphasizes the importance of maintaining market integrity and following corporate controls and procedures, particularly with regards to insider trading.

  Related GDC Publication: SEC Enforcement Focus on Fallout from COVID-19: Insights for Public Companies and Investment Advisers During a Crisis (March 26, 2020)

F. Other Useful Links

- SEC Coronavirus (COVID-19) Response

  General SEC landing page for COVID-19 information.

- COVID-19 Quick Reference Guide for Investors and Market Participants

- COVID-19 Resources for Small Businesses

Gibson Dunn Resources: COVID-19 Resources for Public Companies *(Cont.)*

II. Public Company Accounting Oversight Board

- PCAOB Spotlight, "COVID-19 Reminders for Audits Nearing Completion" (April 2, 2020)

  Related GDC Publication: COVID-19 Update: Financial Reporting and Auditing Considerations for Corporate Management, Audit Committees, and Audit Firms (April 13, 2020)

- In Light of COVID-19, PCAOB Provides Audit Firms with Opportunity for Relief from Inspections (March 23, 2020)

III. Financial Accounting Standards Board

- Staff Q&A, "Topic 842 and Topic 840: Accounting for Lease Concessions Related to the Effects of the COVID-19 Pandemic" (Undated)

  Related GDC Publication: COVID-19 Update: Financial Reporting and Auditing Considerations for Corporate Management, Audit Committees, and Audit Firms (April 13, 2020)

Gibson Dunn Resources: COVID-19 Resources for Public Companies *(Cont.)*

IV. Stock Exchanges

A. NYSE

- The National Law Review, "NYSE Provides Temporary Relief from Certain Continued Listing Standards During COVID-19 Pandemic" (April 15, 2020)

  On April 3, 2020, NYSE requested that the SEC allow suspension of the $50 million market capitalization and $1.00 price continuing listing requirements. The SEC denied the proposal, but NYSE is in further discussions with the SEC.

- SEC Release, "Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Waive the Application of Certain Shareholder Approval Requirements in Section 312.03 of the NYSE Listed Company Manual Through June 30, 2020 Subject to Certain Conditions" (April 6, 2020)

  Waives through June 30, 2020 the application of shareholder approval requirements, including (1) issuance of securities to a related party; and (2) transactions relating to 20% or more of the company's outstanding common stock or 20% of the voting power outstanding.

- SEC Release, "Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Suspend Until June 30, 2020 the Application of Its Continued Listing Requirement with Respect to Global Market Capitalization" (March 20, 2020)

  Suspends until June 30, 2020, the requirement for a $15 million average global market cap over a consecutive 30 trading-day period.

Gibson Dunn Resources: COVID-19 Resources for Public Companies *(Cont.)*

B. Nasdaq

- Nasdaq COVID-19 Center
- Nasdaq Listing Center COVID-19 FAQs (Updated as of April 10, 2020)

  Addresses topics including: (1) SEC extension of periodic reporting deadlines; (2) annual meetings; (3) shareholder approval rules; (4) violation of other listing rules; (5) exchange-traded funds; (6) hearings panels; (7) and other resources.

- Nasdaq Issuer Alert 2020-1, "Impact under Nasdaq Rules of SEC Relief to Companies Affected by Coronavirus" (Undated)

  Discusses the interaction between Nasdaq Rule 5250 and the SEC's 45-day relief.

  Related GDC Publication: Coronavirus Disease 2019 Update: Impact under Nasdaq Rules of SEC Relief to Affected Companies (March 12, 2020)

Gibson Dunn Resources: COVID-19 Resources for Public Companies *(Cont.)*

V. Proxy Advisory Firms

A. Institutional Shareholder Services (ISS)

- ISS Provides Policy Application Guidance in Light of Covid-19 Pandemic (April 8, 2020)

  (1) Addresses annual meeting issues including postponements and virtual-only meetings; (2) covers ISS' approach to defensive measures and board considerations, including the adoption of poison pills and director attendance; (3) addresses compensation issues such as changes in metrics and shifts in goals or targets and option repricing; and (4) discusses capital structure and payouts, dividends, share repurchases, and capital raisings.

  Related GDC Publication: ISS Provides Policy Guidance in Light of COVID-19 Pandemic (April 9, 2020)

Gibson Dunn Resources: COVID-19 Resources for Public Companies *(Cont.)*

B. Glass Lewis

- Glass Lewis Blog, "Coronavirus Fears Impacting Annual Shareholder Meetings (Updated)" (Updated April 14, 2020)

  Broad overview of worldwide changes to annual meetings, broken down by country.

- Glass Lewis Blog, "AGM and Shareholder Meeting Tracker – Date Changes Due to Coronavirus Pandemic" (Updated April 13, 2020)

  List of date changes of annual meetings by company.

- Glass Lewis Blog, "Poison Pills and Coronavirus: Understanding Glass Lewis' Contextual Policy Approach" (April 8, 2020)

  Overview of Glass Lewis' policy view on poison pills generally and in response to COVID-19.

- Glass Lewis Blog, "Everything in Governance is Affected by the Coronavirus Pandemic. This is Glass Lewis' Approach." (March 26, 2020)

  Guidance on (1) compensation and balance sheets; (2) board composition and effectiveness; (3) activism and M&A; (4) oil and gas; and (5) shareholder proposals and ESG.

- Glass Lewis Blog, "Immediate Glass Lewis Guidelines Update on Virtual-Only Meetings due to COVID-19 (Coronavirus)" (March 19, 2020)

  Relaxation of policy on virtual-only shareholder meetings due to COVID-19.

Gibson Dunn Resources: COVID-19 Resources for Public Companies *(Cont.)*

VI. Institutional Shareholders

A. Blackrock

- News Article, "BlackRock unveils impact fund with Covid-19 focus" (April 16, 2020)
- Press Release, "BlackRock's COVID-19 Response: Our Commitment to People and Communities" (March 23, 2020)

B. Vanguard

- Research & commentary, "Our experts on COVID-19, the economy, and markets" (March 25, 2020)
- A message from Vanguard's CEO on the coronavirus (March 3, 2020)

C. State Street

- COVID-19 Resource Center
- COVID-19 Response and Preparedness Frequently Asked Questions
- Operational Certainty in Uncertain Times

  State Street's four priorities during the COVID-19 pandemic: (1) Communication is Key; (2) Prioritize Your People; (3) Building Resilient Operations; and (4) Providing Liquidity.

Gibson Dunn Resources: COVID-19 Resources for Public Companies *(Cont.)*

VII. State Law

A. Delaware

- "Tenth Modification of the Declaration of A State of Emergency for the State of Delaware Due to a Public Health Threat" (April 6, 2020)

  Allows boards of directors to notify shareholders of a change from in-person to virtual annual meeting solely by filing a notice with the SEC; further allows corporations to adjourn a physical meeting to a meeting held by remote communication at another date or time by filing a notice with the SEC.

  Related GDC Publications: Delaware Governor Issues Limited Relief for Public Company Shareholder Meetings Impacted by COVID-19 (April 6, 2020)

B. California

- Executive Order N-40-20 (March 30, 2020)

  Suspends the state law requirement for all shareholders to consent to the holding of virtual meetings.

C. New York

- Executive Order No. 202.8 (March 20, 2020)

  Enables New York corporations to hold virtual annual meetings.

Gibson Dunn Resources: COVID-19 Resources for Public Companies *(Cont.)*

VIII. Other Gibson Dunn Publications

- Key Governance Action Items in Response to COVID-19 (April 7, 2020)
- Fiduciary Duties and Board Options in a Time of Pandemic (April 6, 2020)
- COVID-19: the UK Financial Conduct Authority's expectations under the Senior Managers and Certification Regime (April 6, 2020)
- COVID 19: ESMA Suggests Regulatory Forbearance in Relation to Best Execution Reporting Deadlines (April 1, 2020)
- COVID-19: UK Financial Conduct Authority's Short Selling Notification Thresholds Amended (April 1, 2020)
- Reconsidering Poison Pills (March 26, 2020)

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Annex B: Conditions for Relief from Filing Requirements

Conditions for Relief from Filing Requirements

- The company is unable to meet a filing deadline due to circumstances related to COVID-19;
- The company furnishes to the Commission a Form 8-K or, if eligible, a Form 6-K, by the later of March 16, 2020 or the original filing deadline of the report stating:
  - that it is relying on the SEC Order;
  - a brief description of the reasons why it could not file such report, schedule or form on a timely basis;
  - the estimated date by which the report, schedule, or form is expected to be filed;
  - a company specific risk factor explaining the impact, if material, of COVID-19 on its business; and
  - if the reason the subject report cannot be filed timely relates to the inability of any person, other than the company, to furnish any required opinion, report or certification, the Form 8-K or Form 6-K must attach as an exhibit a statement signed by such person stating the specific reasons why such person is unable to furnish the required opinion, report or certification on or before the date such report must be filed.
- The subject report, schedule, or form is filed with the Commission no later than 45 days after the original due date; and
- In the subject report, schedule, or form filed by the applicable deadline under the bullet-point above, the filer must disclose that it is relying on the Order and state the reasons why it could not file such report, schedule or form on a timely basis.

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Annex C: Overview of Rights Plan Mechanics

Mechanics of Rights Plan

- The Company issues to shareholders a dividend distribution of one purchase right for each outstanding share of common stock
  - Initially, the purchase right entitles a shareholder to purchase one one-thousandth of a share of a new series of preferred stock
  - One one-thousandth of a share of such preferred stock is the functional equivalent to one share of common stock
  - Rights initially trade with shares of common stock and are not evidenced by a separate certificate
  - Rights generally not exercisable until the Rights Plan has been triggered

Mechanics of Rights Plan (cont'd)

- "Exercise Price" initially set at a multiple of current market price of common stock
  - Set by the board when the Rights Plan is adopted
  - The higher the exercise price, the more dilutive the Rights Plan
- Rights Plan triggered when a person crosses specified ownership threshold
  - Usually between 10-20% for a traditional rights plans
  - Once a person or group acquires beneficial ownership of shares in excess of trigger threshold, the rights may be exercised
- If the Rights Plan is triggered, all Rights owned by the triggering person are automatically voided
- The accumulation of derivative instruments will often count towards determining whether a person or group has reached the 10-20% threshold

Mechanics of Rights Plan (cont'd)

- Once triggered, rights turn into the right to acquire shares of common stock of the company (a "flip-in") or of the acquiring company (a "flip-over")
  - "Flip-in"
    - Holders of purchase rights can buy common stock of the company at a 50% discount to current market price
  - "Flip-over"
    - Occurs if, after the Rights Plan is triggered:
      - there is a merger with a third party or
      - more than 50% of the company's assets or earning power is sold or transferred
    - Holders of purchase rights can buy common stock of the acquiring company at a 50% discount to current market price
- In both the "flip-in" and "flip-over" scenarios, the triggering shareholder's purchase rights are voided, resulting in significant economic dilution
- Threat of significant dilution provides the deterrent effect intended by the Rights Plan

Additional Features of Rights Plans

- Exchange
  - Instead of implementing the "flip-in," the board may cause the company to exchange one share of the company's common stock for each purchase right
  - Triggering shareholder does not participate because its rights are void
  - Exchange results in fewer shares being issued than via "flip-in" and, as a result, less dilution
  - Dilution is not dependent on cash exercise of rights and therefore more certainty is present
- Redemption
  - Board may redeem rights prior to a person crossing the specified ownership threshold
  - Redemption price set at a nominal amount ($0.01 per purchase right)

Timing of Implementation of Rights Plan

- Day 1
  - Adoption of plan by the board
  - The Company enters into rights agreement with rights agent
  - Notify Exchange (Nasdaq / NYSE)
  - File an amendment to the company's Articles of Incorporation related to the new series of preferred stock
  - Press release announcing adoption, record date and distribution date
  - Filing of Form 8-K (along with copy of the Rights Plan)
  - Filing of Form 8-A
- Day 11 (or thereafter)
  - Record date for determination of shareholders entitled to receive rights
- After record date
  - Rights agent mails to rights holders a summary of the rights, along with a letter from the CEO or chairman of the board

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