Gibson Dunn Webcast Briefing:

Raising Capital in the Current Environment VII: Going Private and Going Dark

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Today's Panelists

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Courtney C. Haseley is of counsel in Gibson, Dunn & Crutcher's Washington, D.C. office, where she is a member of the firm's Securities Regulation and Corporate Governance Practice Group. Ms. Haseley focuses her practice on governance matters and securities regulatory issues. Prior to joining Gibson Dunn, Ms. Haseley served as Special Counsel in the Division of Corporation Finance's Office of Chief Counsel at the U.S. Securities and Exchange Commission, where she provided interpretive advice on a variety of matters under the Securities Act, Exchange Act, Trust Indenture Act, and associated rules and forms. Ms. Haseley also co-managed the 2019 and 2017 Shareholder Proposal Task Force. Before joining the SEC, Ms. Haseley was a corporate associate at two leading international law firms, advising clients on securities transactions, public offerings, private placements, mergers and acquisitions and governance matters.

Tull Florey is a partner in the Houston office of Gibson, Dunn & Crutcher and a member of the firm's Mergers & Acquisitions, Capital Markets, Oil & Gas and Securities Regulation and Corporate Governance practice groups. He has an extensive corporate and securities law practice, emphasizing transactional and governance matters. His practice focuses on mergers and acquisitions and securities offerings for companies in the energy industry. He has particular experience with clients engaged in oilfield service, oil and gas exploration and production, oilfield equipment manufacturing, midstream and seismic activities. He also assists clients on an ongoing basis with general corporate concerns, including Exchange Act reporting, corporate governance and Section 16 matters. Mr. Florey has been widely recognized, including *Chambers USA, The Legal 500 U.S., The Best Lawyers in America®,* and *Texas Super Lawyer*.

Hillary H. Holmes is a partner in the Houston office of Gibson, Dunn & Crutcher, Co-Chair of the firm's Capital Markets practice group, and a member of the firm's Securities Regulation and Corporate Governance, Energy, M&A and Private Equity practice groups. Ms. Holmes advises companies in all sectors of the energy industry on long-term and strategic capital planning, disclosure and reporting obligations under U.S. federal securities laws and corporate governance issues. She has deep experience representing all parties in a wide array of equity and debt capital markets transactions, as well as going dark processes and going private transactions. Among other recognitions, Ms. Holmes is *Chambers* Band 1 ranked for Capital Markets Central U.S. and ranked for Energy Transactional Nationwide and Corporate/M&A Texas. Ms. Holmes also regularly advises boards of directors, special committees and financial advisors in M&A transactions and situations involving complex issues and conflicts of interest.

MCLE Information (0.5 Hour Credit)

- Most participants should anticipate receiving their certificate of attendance in 4-6 weeks following the webcast

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Table of Contents

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Overview of "Going Dark"

Overview of "Going Dark"

- "Going dark" is the process by which a company ceases to be a public reporting company
  - The company's obligations to file reports with the SEC are suspended or terminated
    - The company must satisfy certain requirements to suspend or terminate its reporting obligations under the Exchange Act
  - The company's securities are delisted from applicable stock exchanges
    - Securities may be quoted or traded on the over the counter markets

Illustrative Benefits and Costs of "Going Dark"

Benefits	Costs
Elimination of expenses related to ongoing SEC reporting requirements and Sarbanes-Oxley Act compliance	Potential reduction in the frequency and attractiveness of outside offers from third parties due to a lack of publicly available information
Reduction in outside legal expenses as well as D&O insurance costs	Decreased liquidity and access to capital in the public markets (depending on market conditions)
Reduction in accounting expenses and compliance with certain accounting requirements	Potential negative inference by the market regarding the company's future prospects
Reduction in investor relations expenses and obligations/expectations	Potential difficulty attracting and retaining talent at employee and board levels
Reduction in disclosure of the company's proprietary contracts and dealings, as well as outlook	Potential litigation exposure, as some equity holders may determine that deregistering is not in their best interest
Current senior management continues to operate the company and increases focus on core business operations	Loss of potential access to public equity as acquisition currency

Delisting and Deregistration: Climbing Down the Ladder

- An issuer's reporting obligations arise under Sections 12(b), 12(g) and/or 15(d) of the Exchange Act
- To go dark, an issuer must climb down the ladder one reporting-rung at a time based on each particular class of securities and respective reporting obligations
  - Only 1 reporting obligation is operative at a time
  - When you step down the ladder, reporting obligations which had been suspended may revive
  - For example, if an issuer's registration under Section 12(b) terminates, any prior registration under Section 12(g) would resume. As is the case with Section 12(b) and Section 12(g), an issuer's reporting obligation under Section 15(d) could resume when both its Section 12(b) and Section 12(g) registrations terminate

Delisting and Deregistration: Terminating Registration for Listed Securities

Terminating Section 12(b) Registration

- Delisting can be initiated by the issuer or the Exchange and requires a filing of a Form 25 with the SEC in order to delist and deregister each class of securities
- Delisting is effective 10 days following Form 25 filing
  - 90 days following the filing of the Form 25, the class of securities will be deregistered under Section 12(b) and the issuer's reporting obligations under this Section will be terminated
  - The issuer will remain subject to the SEC proxy rules and certain provisions of the Williams Act, and shareholders will be required to file reports under Section 13(d) and Section 16 during the 90 day period referenced above

Delisting and Deregistration: Terminating Registration for Widely Held Securities

Terminating Section 12(g) Registration

- Section 12(g) reporting requirements revive if securities are originally registered under Section 12(g) or if the issuer would be required to report under Section 12(g)
- A company's obligations to file Exchange Act reports under Sections 12(g) will be terminated upon the filing of a Form 15 with the SEC if three conditions are satisfied:
  - The issuer has filed all Exchange Act reports for the current year and the three preceding fiscal years;
  - The company has fewer than 300 holders of record for each class of securities (or 500 holders of record if the issuer has less than $10 million in assets for the last 3 fiscal years); and
  - No registration statement has become effective or was updated pursuant to Section 10(a)(3) of the Securities Act (including through filing of Form 10-K) during the fiscal year in which the issuer proposes to deregister

Delisting and Deregistration: Terminating Registration for Widely Held Securities (cont.)

Terminating Section 12(g) Registration (cont.)

- Reporting obligations immediately terminate upon filing a Form 15
  - No periodic or current reports due but still subject to proxy rules, Section 16 and certain provisions of Williams Act for 90 days
- Timing considerations: Cannot file a Form 15 less than 10 days after filing a Form 25

Delisting and Deregistration: Suspending Registration for Securities Act Registration Statements

Suspending Section 15(d) Reporting

- Automatic statutory suspension under Section 15(d) or Rule 12h-3
  - Statutory Suspension: Eligible as of first day of fiscal year following the fiscal year where a registration statement that triggered a Section 15(d) reporting obligation was declared effective (or required to be updated) if company has fewer than 300 record holders on the first day of the fiscal year

Delisting and Deregistration: Suspending Registration for Securities Act Registration Statements

Suspending Section 15(d) Reporting (cont.)

- Reliance on Rule 12h-3: If the company meets conditions of Rule 12h-3, it may file a Form 15 at any point during the year
  - Conditions: fewer than 300 record holders (or 500 if under $10M assets for last 3 fiscal years); must be current (filed all Exchange Act reports for the current year and three preceding fiscal years); must not have had any registration statement go effective or be updated during the fiscal year in which company proposes to deregister
  - Must file Form 15 as a condition to suspension

SEC Guidance on Early Suspension of 15(d) Registration

- In SLB No. 18 (March 2010), the SEC clarified that a company may suspend its Section 15(d) reporting obligations during a fiscal year in which it was acquired or in which an IPO was abandoned, even though a Securities Act registration statement became effective
  - Such reports no longer serve the purpose of reporting because there are no public shareholders of the class of securities for which there is a reporting obligation, thereby making the benefits of periodic reporting not commensurate with the burdens imposed
- If outside of SLB 18, consider whether to seek no-action relief from Staff
- There is an extensive body of no-action letters regarding going dark
  - Consider Staff timing (no-action process takes +/- 45-90 days)
  - Current Staff Position: No sales

Note: No-action relief is not always necessary or advisable. Where company facts do not present a new or novel issue, Staff may not weigh-in

Overview of Steps to Deregistration

1. Company board considers the benefits/costs to deregistration and approves the deregistration process
2. Company satisfies SEC requirements to suspend Exchange Act reporting obligations
3. Company files Item 3.01 Form 8-K disclosing delisting of its securities
4. Company issues press release contemporaneously with providing notice the Exchange
   - Announces the company's plan to delist and deregister and reasons why
   - Must remain on company website for 10 days prior to Form 25 filing
5. Company files Form 25 with the SEC in order to delist and deregister under Section 12(b) each class of securities listed on the Exchange and delivers a copy of such Form 25 to the Exchange
   - Delisting is effective 10 days following Form 25 filing

Overview of Steps to Deregistration (cont.)

6. Company files Form 15 with the SEC upon delisting of securities from the Exchange in order to deregister under Section 12(g) and/or suspend reporting obligations under Section 15(d)
   - Company's obligation to file periodic and current reports is suspended upon filing
7. Until deregistration is fully effective (90 days after Form 15 filing):
   - The issuer will remain subject to the SEC proxy rules and certain provisions of the Williams Act, and shareholders will be required to file reports under Section 13(d) and Section 16 during the 90 day period referenced above

Illustrative Timeline for "Going Dark"

Date	Action
On or Prior to Day 1	• Board of directors approves delisting and deregistration
Day 1	• Company provides written notice to Exchange of intent to voluntarily delist all securities • Company issues press release and posts notice on its website announcing voluntarily delisting • Company files Item 3.01 Form 8-K (within 4 business days of board action)
Day 10	• Company files Form 25 with SEC • File post-effective amendments to registration statements to deregister shares
Day 20	• Form 25 is effective • Company files Form 15 with SEC • Company no longer required to file periodic/current reports with the SEC
Day 100	• Section 12(b) registration is terminated
Day 110	• Section 12(g) registration is terminated and 15(d) registration is suspended • All Exchange Act obligations are terminated or suspended

Standard for Board Action

- The Delaware Chancery Court has confirmed that a board's decision to "go dark" is subject to the "business judgment rule"
- The board decision is not likely to be overturned if directors have diligently sought all relevant information reasonably available and have made the decision in good faith and absent any self-dealing using an independent decision making process
- For the business judgment rule to apply, two pre-conditions must be met:
  - Duty of Care: Directors give thoughtful consideration to what methods of inquiry and sources of information are practical and useful in the circumstances
  - Duty of Loyalty: Directors do not act to the benefit of their personal interest at the expense of the interests of the company and its stockholders

Resurrection of Reporting Requirements

Broker "Kick-Outs"

- Brokers who hold shares in street name may not want to or be permitted to hold stock that is no longer publicly traded and will send stock certificates (or transfer book-entry shares) to the beneficial owners, who will thus become "record" holders
- If the number of record holders equals or exceeds 300 on the first day of any fiscal year, the company would be required to resume reporting under the Exchange Act
  - This is due to the fact that reporting obligations under Sections 12(g) and 15(d) are only suspended and not terminated
  - Must resume reporting by filing an annual report on Form 10-K for the preceding fiscal year within 120 days of the end of such fiscal year

Resurrection of Reporting Requirements (cont.)

Actions by the Company or its Stockholders

- The number of record holders could also increase inadvertently through distribution of outstanding shares by existing stockholders or through issuance of stock as consideration in acquisitions
- Large stockholders may intentionally trade their shares to a wide group of individuals thus increasing the amount of record holders
- A company may potentially remain obligated to prepare financials and MD&A under bonds or credit agreements and for Rule144 purposes

Note: Practically speaking, a company that goes dark should periodically monitor share ownership to determine whether reporting obligations under Sections 12(g) or 15(d) have been revived

OTC Trading Activity

- A company's common stock could trade in the OTC Markets Group whether or not such trading has been approved by the board
- Trading on the OTC can be done without subjecting the company to Exchange Act reporting requirements
- There are three different market tiers to denote the level of information that is available about a company trading on the OTC.
    - OTCQX: The most stringent listing requirements and was designed to meet Rule 144 reporting requirements
    - OTCQB: Companies that are not yet able to qualify for the OTCQX. Must be current in reporting, undergo an annual verification, management certification, meet a $0.01 bid test, and may not be in bankruptcy to meet eligibility standards
    - OTC Pink or "Pink Sheets": Lowest level and most speculative tier of the three marketplaces for the trading of OTC stocks with no disclosure requirements. Typically accounts for about 70% of the daily trading volume of the OTC Markets
        - Generally, companies that have previously gone dark will trade on the pink sheets since they do not meet the reporting requirements for other tiers

Additional Considerations

Material Agreements

- Conduct detailed review of material contracts in order to determine if any need to be amended or terminated in order to facilitate the delisting process, and if such amendment or termination would require the consent of any counterparties
- Examine indenture covenants to file reports
- Consider registration rights agreements that remain in force

Confidentiality

- Unless specifically authorized for a particular reason, information concerning facts and developments related to a "going dark" proposal should be provided only through the company's approved channels of communication
  - Any statements made by directors or officers could inadvertently lead to insider trading, Reg FD or public relations issues

Additional Considerations (cont.)

Trading Activity

- Any trading by officers, directors or affiliated stockholders during the pendency of discussions relating to deregistration may be viewed as extremely suspect
  - Any person trading or sharing information may be subject to insider trading considerations
  - Trading and information sharing will be evaluated in hindsight

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Overview of "Going Private" Transactions

Overview of "Going Private"

- Generally refers to transaction in which affiliated persons (*e.g.*, a controlling equity holder or a private equity firm working with management) acquire a publicly held corporation and convert it to private ownership
  - Can be structured as a merger or tender offer
- Under federal securities laws, a "going private" transaction is a transaction meeting the tests of Rule 13e-3 under the Exchange Act:
  - the transaction is a (i) purchase of any equity security by the target or its affiliate, (ii) tender offer of any equity security by the target or its affiliate or (iii) proxy or consent solicitation by the target or an affiliate in connection with a merger or similar corporate reorganization, an asset sale or a reverse stock split involving a repurchase of fractional interests;
  - the transaction is "engaged" by the target or affiliate; and
  - the transaction has a "reasonable likelihood or a purpose" of causing any class of public equity securities of the target to be either eligible for termination from registration or reporting obligations under the Exchange Act or removed from listing on an Exchange
- Resulting company is no longer publicly-held and therefore delists/deregisters and ceases to be subject to ongoing securities law reporting obligations

Potential Benefits of Going Private

Potential Benefits of Going Private

- Greater operational and business flexibility than for a company subject to public company constraints
- Allow management to focus on long-term goals and objectives, free from public stockholder and market considerations
- Allow for greater leverage than acceptable for public companies
- Avoid burden of compliance with SEC rules, Sarbanes-Oxley, liability statutes and disclosure / reporting obligations

Regulation of Going Private Transactions

Regulation of Going Private Transactions

- Generally, "going private" transactions are subject to more stringent regulations than "going dark" as a result of:
  - Lack of arms-length negotiation between related parties and the company
  - Significant judicial concern about incentives and motives of participants
  - Potential for coercion
  - Elimination of public ownership

Overview of Legal Considerations

Federal Securities Laws

- Rule 13e-3 requires enhanced disclosures regarding purpose of transaction, fairness of transaction, reports, opinions and appraisals received (including fairness opinion)
- Disclosure document to shareholders (proxy statement, information statement or offer to purchase)
- Schedule 13D may impose disclosure obligations on potential acquirors (holding > 5% ownership threshold) regarding going private proposal even before transaction is agreed with the company

Disclosure Issues

- Additional significant SEC filing disclosure requirements apply to going private transactions, including detailed summary of events and financial advisor presentations
- Must carefully consider timing of actions in going private transaction to prevent need for premature disclosure
- No matter what is disclosed or not disclosed, litigation concerning the disclosure is likely
- Materials should be prepared with the knowledge that they will be required to be publicly disclosed

Litigation

- Going private transactions are likely to face legal challenge (challenging process / breach of duties and disclosure), with the company and participating affiliates named as defendants

Overview of Legal Considerations (cont.)

Insider Trading

- Critical for the company to impose ban on trading of securities by insiders with knowledge of proposed transaction
- Trading will be reviewed post-transaction with the benefit of hindsight

State Law

- Board must comply with fiduciary duties; heightened judicial standard of review
- State anti-takeover statutes can impose restrictions on business combinations with "interested stockholders" for a specified period
  - Companies may redomesticate to rewrite interested stockholder limitations
- Board should authorize an independent committee to negotiate and approve transaction
- In going private transactions, the use of a properly functioning special committee can (i) shift the burden of proof to plaintiffs of proving that the transaction was not entirely fair, (ii) in conjunction with approval by an uncoerced, fully informed vote or tender of a majority of the minority of company stockholders, allow for application of business judgment rule and (iii) assist in shielding directors from conflict of interest accusations from corporate governance groups and activist stockholders

Illustrative Timeline of Going Private Transaction

Date	Action
2-4 Months Prior to Signing	• Perform due diligence • Consider offer price and conditions • Consider consortium/co-bidding/sponsor agreement • Consider financing options • May file Schedule 13D/A to update Item 4 disclosure with potential for plan or proposal
2-4 Weeks Prior to Signing	• Submit proposal to company board • File Schedule 13D/A; company issues press release • Board appoints special committee • Special committee retains legal and financial advisors • Special committee considers offer, responds, and negotiates deal terms • Acquiror financing arrangements finalized
Signing	• Sign and announce acquisition agreement
4-12 Weeks After Signing	• File proxy or information statement/Schedule 13E-3 (merger) or Schedule TO/Schedule 14D-9 (tender offer) • Hold stockholder meeting, if applicable • Obtain other third-party consents and regulatory approvals, as applicable • Tender offer allows for potentially shorter timeframe than long-form merger
Closing	• Acquiror pays cash consideration to company stockholders • Execute employment agreements, rollover investment documentation and other ancillary agreements, as applicable • Company delists and deregisters

Disclosure Obligations for the Registrant and Participating Affiliates

- Company and each affiliate engaged in going private transaction must file Schedule 13E-3
  - Must also file amendments to Schedule 13E-3 to report material changes to information previously filed, and final amendment reporting final results
  - Subject to SEC review and clearance
  - Combine with proxy statement / information statement / Schedule TO
  - Schedule 13E-3 requires disclosure regarding:
    - Purpose of transaction
    - Substantive and procedural fairness of transaction

Disclosure Obligations for the Registrant and Participating Affiliates (cont.)

- Description of all final reports (including oral), opinions and appraisals from outside persons that are "materially related" to transaction, including any reports, opinions or appraisals related to price or fairness
  - Includes any board books or analyses (whether written or not) which may contain confidential, proprietary information (*e.g.*, internal forecasts, projections and presentations received from financial advisor)
  - Includes information that the company may not typically wish to disclose publicly
  - Confidential treatment generally not available for these materials
  - All such documents must be filed as exhibits (including each banker book presented to the board)
  - Important to identify documents as preliminary drafts until the final version is available

Disclosure Obligations for Participating Security Holders

Schedule 13D Disclosure Obligations

- Controlling stockholder or 5% beneficial owner who intends to participate in going private transaction and did not disclose intent on previously-filed Schedule 13G or 13D must file/amend Schedule 13D
  - Agreement among stockholders, hiring of financial advisor or obtaining financing commitment may trigger filing obligation (even if to disclose only the potential for a change in intentions with respect to the issuer)
  - Delivery of an offer triggers filing obligation, and written proposal must be filed as exhibit to Schedule 13D
- SEC can bring enforcement action for failure to file a fully accurate Schedule 13D

Sample SEC Staff Comments

"Item 1014(a) of Regulation M-A requires filing persons to state whether they believe that the Rule 13e-3 transaction is fair or unfair to unaffiliated security holders. Your definition of the term Unaffiliated Unitholders appears to inappropriately include directors and officers of the company. Be advised that the staff views officers and directors of an issuer as affiliates of the issuer. Please revise the filing to more clearly articulate whether the Rule 13e-3 transaction is fair or unfair to unaffiliated security holders."

"We continue to believe that it is inappropriate to state that a transaction with affiliates, such as one subject to Rule 13e-3, was negotiated at arm's length. While affiliates may attempt to minimize any potential for undue influence, we do not believe that disclosure should represent that this potential was eliminated. Please revise."

Sample SEC Staff Comments (cont.)

"Rule 13e-3 applies to any transaction "or series of transactions" that has a reasonable likelihood or purposes of producing one of the effects enumerated in Rule 13e-3(a)(3)(i). This is currently the fifth successive issuer tender offer conducted by [company] [in the last X months]. Please be aware that, while each offer has included a condition premised on the non-applicability of Rule 13e- 3 to that particular offer, if a succession of transactions results in a going private effect, Rule 13e-3 may be implicated. In that case, we will analyze whether the transaction that ultimately has the going private effect as outlined in Rule 13e-3(a)(3)(i) is part of a series of transactions within the meaning of the Rule. If so, Schedule 13E-3 must be filed at the first step."

"You state that cash will be issued in lieu of fractional shares. Please provide your analysis regarding the applicability of Rule 13e-3 to the transaction given that the exception in Rule 13e-3(g)(2) requires that security holders are offered or receive only an equity security. In your response, please address with respect to [companies], respectively: (i) the number of security holders who, giving effect to the exchange ratio, would be subject to cash disposition of fractional interests; (ii) the estimated aggregate amount of cash payable to dispose of fractional interests; and (iii) the number of security holders, if any, who would be effectively cashed out after giving effect to the cash disposition of fractional interests."

Sample SEC Staff Comments (cont.)

"We note your response to comment 10. We are unable to agree with your conclusion that the reports issued by the financial advisors of the Directors' Committees of [companies] and the reports issued by the independent appraisers of [companies] referenced on page [x] are not materially related to this Rule 13e-3 transaction. In this regard, we note that these materials were considered by the Boards of Directors in determining the preliminary exchange ratios which were announced publicly, and that the exchange ratio applicable to [company's] common stock is unchanged from the preliminary ratio proposed. Please provide the information required by Item 1015(b) of Regulation M-A for these materials."

"Each presentation, discussion or report held with or presented by an outside party that is materially related to the Rule 13e-3 transaction is a separate report that requires a reasonably detailed description meeting the requirements of Item 1015 of Regulation M- A. Please revise the disclosure to provide such descriptions for [financial advisor's] presentations."

"As a related matter, we note the reference here to a preliminary analysis by [financial advisor], and similar references throughout this section. Please revise to provide the disclosures required by Item 4(b) to Form S-4 and file the reports, opinions or appraisals as exhibits, as required by Item 21(c) to Form S-4. Please also provide us with copies of any board books prepared by the financial advisors and related to the transaction."

Best Practices in Going Private Transactions

- If a controlling stockholder decides to approach another stockholder or the company regarding potential going private transaction, such controlling stockholder should make clear that is only studying the matter and no firm proposal exists (and no internal decision has been made) with respect to any transaction
- Appoint special committee comprised solely of disinterested outside directors with no interest, past or present, in transaction or proponents
  - Special committee will take center stage in negotiating and approving transaction
- Before market opens, the company should issue press release advising of proposal and appointment of special committee
- Special committee should retain independent, well-qualified financial advisor and legal counsel
- Do not allow proponents to attend special committee meetings or improperly influence decisions of special committee regarding appointment of independent advisors or evaluation of proposal itself
- Keep good record of negotiations and of informed and careful decision-making at committee meetings evaluating transaction to ensure reasoning is adequately and correctly presented in disclosure document

Best Practices in Going Private Transactions (cont.)

- Obtain fairness opinion from independent financial advisor to support transaction price
- Have financial advisor conduct market check where advisable
- Board and management should remain open at all times to alternatives that will maximize stockholder value
- Representatives of acquiring parties should negotiate terms of transaction only with special committee
  - Management should avoid or limit discussion of equity participation and compensation issues with potential buyers until material terms of deal for the company are agreed
- Consider including neutralized voting as a non-waivable condition in the acquisition agreement
  - Requirement that the going private transaction be approved by a majority of minority stockholders (in order to shift burden of proof to plaintiffs challenging transaction)
- Ensure adequate director and officer liability insurance
- Confidentiality and restrictions on trading are critical; FINRA will conduct a review of trading