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The Coronavirus: Certain Considerations for Public Companies

As the coronavirus (COVID-19) pandemic continues to slow commerce, most companies face serious challenges in almost all areas of their businesses. The recent turmoil and volatility of public financial markets has resulted in many companies facing significant decreases in their share prices. We highlight below certain key areas for boards of directors and senior management teams to consider in light of the rapidly changing landscape.

Board Duties and Responsiveness

Board Preparedness. Boards should be kept apprised of developments by management and, as appropriate, third party advisors. Given the rapidly developing landscape, boards should work with management to identify ways in which they can provide the strategic support and quick decision-making needed at this time. Among the options that boards may consider is to set more frequent, standing meetings of the full board or a committee focused on these matters.

Board Duties. While the current circumstances are extreme, state laws will continue to apply a deferential business judgment standard of review to the vast majority of board decisions. For Delaware companies, this means that so long as the board acts in good faith, in the honest belief that its decisions are in the best interests of the company and are made on an informed basis with due care, board actions generally will not be second-guessed by courts if attributable to a rational business purpose.

Senior Management and Employee Considerations

Continuity Planning. Boards and management teams should update or develop clear decision-making processes that take into account travel, communications and other disruptions already being felt and that are anticipated to result from the continuing spread of COVID-19. Additionally, preparations should be made for the potential absence of key personnel through redundancy and a broader-than-typical level of emergency succession planning.

As part of contingency planning, boards should be prepared to address a scenario in which the CEO becomes ill and tests positive for COVID-19. Boards can mitigate this risk by having in place a CEO succession plan and coordinating with investor relations, human resources and counsel. Companies have taken a range of disclosure positions when a CEO is ill, balancing how material it is to investors, how much it impacts the business and privacy concerns.

Employment Laws and Workforce Disruptions. The COVID-19 outbreak has forced companies to reconsider some long-standing and fundamental aspects of their employees' activities, including limiting travel and introducing social-distancing measures. Even as employers focus on enhancing workplace health and safety, it is critical to remember that employers must continue to comply with laws regarding compensation and absences, privacy (e.g., HIPAA) and anti-discrimination, all of which must be considered in the context of increased monitoring of, and information-gathering from, employees. In addition, companies will have to navigate the burgeoning number of governmental and health regulations and recommendations on promoting hygiene throughout their facilities and best practices to slow the spread of COVID-19. For more information regarding employment law considerations and workforce disruption mitigation strategies, please see [here](#).

Executive Compensation. With senior management compensation often weighted towards equity-based awards, boards may wish to review compensation packages to ensure they continue to fairly compensate and properly incentivize key members of management as they navigate this challenging environment. For some companies, adjusting performance targets (or building in flexibility to make subsequent adjustments to newly set targets) may be appropriate.

Equity-based awards made in the near-term at lower share-price values can reduce the capacity for future grants (without obtaining shareholder approval), as more shares will be needed to deliver the same value to employees. For companies that have upcoming regularly scheduled equity grants, either as part of their annual equity grant program or that have been committed to new hires in offer letters, boards should consider whether to keep grants on cycle or delay them. Note that boards are not required to delay previously committed equity grants. Because options are typically set using the share price at the time of grant and the number of equity grants is larger when share prices fall, other issues to consider include whether a company's plans have share capacity, the appropriate share price to use to determine the number of shares underlying a dollar-denominated award and exercise prices (spot price vs. average over a specified period), applicable accounting treatment, taxes (note that options must have a fair-market-value exercise price in order to comply with Code Section 409A), equitable treatment among employees and investor and proxy advisory firm reactions.

For additional information regarding equity-based compensation considerations, please see [here](#).

Public Disclosure and Investor Relations

Financial Reporting and Disclosure Operations. Companies will likely need to consider disclosure issues more often and rapidly than usual, and boards should consider how best to convene their board and disclosure committees under these circumstances, including through the increased use of virtual meeting technologies. For example, some companies have already withdrawn their prior earnings guidance and, in some cases, updating of company risk factors in public disclosures may also be appropriate. Boards and

management teams should remain in close contact with their legal advisors to ensure continuing compliance with disclosure obligations.

Internal Controls and Audit Procedures. Audit teams will also need to coordinate with their independent auditors to prepare for potential audit difficulties, such as the possibility that personnel may be restricted from accessing physical facilities, such as records repositories, which may be required by auditing procedures. Accordingly, it may be appropriate to update audit committees on the progress of financial reporting more frequently during this time.

Trading Considerations. Recent market conditions have presented opportunities for corporate share and debt buybacks (as discussed below) and individual purchases by officers and directors. While the COVID-19 illness is common knowledge, its evolving impact on a particular company may constitute material non-public information. As a result, any trading activity (including in the case of employees following option exercises, and whether or not occurring during an open trading window) should be carefully evaluated to ensure that the company or individual is not in possession of material non-public information (and otherwise complies with applicable rules).

Investor Outreach. Given market volatility, boards and management teams should prepare extensively for increased investor and analyst outreach. Extra coordination among the company's investor relations and other internal teams and related external advisors will be needed. Companies should be sure to maintain their disclosure controls and procedures and be mindful about compliance with Regulation FD as company spokespersons field questions from investors, analysts, customers and suppliers.

For additional information regarding public disclosure and investor relations considerations, please see [here](#).

Liquidity and Financing Considerations

Debt Financing. With the proliferation of corporate credit over the past decade, many companies have drawn or are expected to draw upon available credit facilities, either to bridge liquidity shortfalls or to fund short-term opportunities. Prior to drawing, companies should review their existing debt posture and the key provisions of their debt financing agreements (e.g., scheduled payments coming due, leverage covenants, events of default and cross-linked provisions) and the impact of making such a draw, giving particular attention to ensuring current and future compliance with applicable covenants and the ability to make or "bring down" required representations and warranties. Boards should be involved in deciding whether a company will make any substantial borrowings, and may need to familiarize themselves with any conditions and potential alternatives to borrowing. Also note that certain borrowings may give rise to disclosure obligations.

Liquidity Headwinds. In addition to borrowing challenges that companies may face, boards and management teams should prepare for the loss (or continuing loss) of customers or suppliers, both in the short term and long term, and the related liquidity management difficulties. Boards and senior management will benefit from reviewing thorough financial sensitivity and liquidity forecast analyses and regularly revisiting projected cash flows and related models.

Dividends, Buyback Programs and Cash Management.

- Dividends. For those companies with liquidity concerns, boards may wish to reconsider dividend programs in light of liquidity constraints. The implications of any changes to dividend programs should be reviewed with the company's investor relations team and appropriate third-party advisors.
- Share Buyback Programs. For companies with adequate liquidity, widespread share-price declines may present an opportunity to implement or broaden share buyback programs, for example, to offer liquidity to shareholders and support the company's share price. Ensuring that the company will have sufficient capacity to continue operations following a buyback, particularly if economic conditions continue to decline, should be given serious consideration. And as with decisions to borrow under credit facilities, debt financing agreements must be reviewed to ensure continuing compliance through and following a buyback program.
- Debt Buyback Programs. Similarly, companies with sufficient liquidity may be considering debt buyback programs. As with share buyback programs, boards should consider the company's post-buyback liquidity needs and available resources prior to implementation. For additional information regarding debt buybacks, please see [here](#).
- Insider Trading. As noted above, securities laws regarding insider trading, which include a general prohibition on trading while in possession of material non-public information, govern transactions in both equity and debt securities.
- Tax Considerations. Companies should also consider the tax implications of any buyback program and consult with their tax advisors accordingly.

Operational Considerations

Supply Chain or Logistics Disruptions. As part of a broader operational assessment of supply chains and logistics, companies should review their commercial agreements for force majeure clauses, exclusivity provisions and termination rights, among other provisions, that may be implicated by COVID-19's disruptive effects (e.g., a company's or one of its suppliers' inability to fully perform and associated restrictions and remedies). Additional information about force majeure clauses, which excuse a party's failure to perform resulting from "acts of God" or other extraordinary events, may be found [here](#).

Situational Awareness. Companies may wish to establish or enhance legislative and regulatory monitoring functions, as public responses (e.g., restrictions on public gatherings and travel) have evolved and changed frequently and unevenly across the world and new or expanded restraints on commerce, such as trade bans, are possible. At the same time, governmental agencies, trade groups, labor organizations or other public or private entities may make available additional resources, such as financial aid or other forms of economic relief, to businesses and individuals, and an effective monitoring function can facilitate a company availing itself of such resources (including communicating the availability of certain resources to employees).

Risk Management and Cybersecurity Considerations

Insurance. Companies should review their insurance portfolios and consult with their insurance advisors to determine the extent of coverage available to them with respect to COVID-19 related losses (e.g., disruptions in supply chains or logistics or trade restrictions) or mitigation efforts (e.g., quarantines), and to analyze the costs and benefits of additional coverage, if available. To the extent a company is covered for any such losses, notice will need to be provided to the carrier(s) at the appropriate time.

Warnings and Disclaimers. Certain businesses, including those in industries where customers are hosted in a company facility or vehicle (e.g., hospitality and travel), may wish to consider adding COVID-19 specific warnings or disclaimers to their marketing materials and/or contracts, as such businesses face a greater risk of customers claiming that they contracted COVID-19 on or in the company's property (which may include claims for failure to provide adequate warning). Companies should consult with their legal advisors regarding the nature of potential claims customers may allege and the crafting of appropriate warnings and disclaimers.

Cybersecurity; Technology Systems Checks. With many companies implementing, and others still considering, expanded work-from-home and other social-distancing policies, careful monitoring and planning is necessary to protect operations and security, including in the following areas:

- **System Capacity and Integrity.** Increased technology-systems testing and monitoring may be recommended to ensure that capacity keeps pace with the increasing demand on remote access systems. Back-up and redundancy systems should be tested and reviewed to confirm they continue to meet company needs in this changing environment. Communication with third-party vendors will be critical in ensuring that essential systems and services remain available.
- **Data Breaches.** With more personnel using remote-access systems, the risk of data breaches or other cybersecurity incidents will continue to increase. In addition to the greater likelihood of an inadvertent data breach or security compromise, cybercriminals are likely to seek to take advantage of more users accessing systems from offsite and to step up phishing attacks targeted at employees' COVID-19 fears. While there is no way to definitively prevent such incidents, additional security measures (e.g., two-

factor authentication and increased employee training and education) should be considered as part of a broader risk-mitigation effort.

- **Data Loss.** As employees increasingly work offsite, it is more likely that data (electronic or otherwise) will be brought outside companies' physical facilities or protected data systems. For example, written materials may be brought out of offices, or business emails may be forwarded to personal email accounts. Disclosure, inadvertent or otherwise, of sensitive data to unauthorized parties could have serious consequences for businesses and data-security policies should be reviewed and disseminated to employees to mitigate the risk.

For additional information regarding cybersecurity and data risk mitigation, please see [here](#).

Monitoring Accumulation and Defensive Tools

The significant market decline leaves companies vulnerable to activist hedge funds and other opportunists who may accumulate significant equity positions in publicly listed firms at a significant discount. Companies should examine their vulnerabilities in light of current events.

Companies should be more vigilant in monitoring their shareholder base through coordination with investor relations and watch firms, and continue to monitor beneficial ownership reports (including those on Schedules 13D, 13G and 13F). But companies should understand that the current U.S. disclosure regime (even taking into account securities regulations and antitrust filing obligations) is wholly inadequate as an early warning sign of accumulation. In the event of a rapid accumulation of shares by an activist or hostile acquirer, boards will need to act quickly, including potentially by adoption of a shareholder rights plan (a "poison pill"). Many companies now have stock monitoring firms watch for significant share accumulations (including through derivative instruments written by banks) and keep a pill "on-the-shelf;" in other words, they engage (and work with) outside advisors in advance of any known accumulation to prepare for and to streamline the pill adoption process, if it becomes appropriate.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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