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

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MCLE Information

(45 Minutes Credit)

- Most participants should anticipate receiving their certificate of attendance in 4-6 weeks following the webcast (6-8 weeks for Virginia)
- **All questions regarding MCLE Information should be directed to Victoria Chan at (650) 849-5378 or vchan@gibsondunn.com**

Today's Panelists



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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.



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.



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 Q2 Earnings Release and Form 10-Q
- Part Two: Navigating Securities Laws and Good Governance During a Crisis
- Part Three: Fulfilling Fiduciary Duties in the Financially Distressed Context
- Part Four: Capital Raising Trends and Outlook
- Annex A: Gibson Dunn Resources

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Disclosure Considerations Relating to
Q2 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
 - Disclosure Practices Used in Q1 Earnings Releases and 10-Q
 - Preparing Disclosures in Q2 Earnings Releases and 10-Q
 - Non-GAAP Supplemental Measures
 - Forward-Looking Statement Disclaimers
 - Insider Trading Considerations
 - Regulation FD
 - Capital Markets Opportunities

SEC Guidance and Questions to Ask

- SEC Disclosure Guidance in June 2020:
 - June 22 (updated June 25) – SEC Staff issued a [statement](#) that provides relief from manual signature requirements for electronically filed documents
 - June 23 – Division of Corporation Finance issued disclosure guidance ([Topic 9A](#)) providing additional views regarding operations, liquidity and capital resources disclosure
 - June 23 – The Office of the Chief Accountant (OCA) issued a [statement](#) on the continued importance of high-quality financial reporting for investors in light of COVID-19
 - June 25 – Chairman Clayton gave [testimony](#) on the importance of disclosure controls and procedures and internal control over financial reporting
 - June 26 – SEC [declined](#) to extend COVID-19 filing deadline relief for filings after July 1
 - June 30 – SEC held [roundtable](#) on Q2 reporting and COVID-19 related disclosure considerations

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

- What's new for Q2?
 - Topic 9A specifically notes that the effect of COVID-19 and related risks will be specific to each company's facts and circumstances and provides additional guidance specifically related to operations, liquidity and capital resources, as well as guidance on two additional topics: financial assistance under the CARES Act and the Company's ability to continue as a going concern.
 - The OCA statement on the continued importance of high-quality financial reporting specifically recognized:
 - Companies are having to make significant estimates and judgments, and the OCA will continue to not object to well-reasoned judgments and estimates disclosed in a manner that is understandable and useful to investors
 - The importance of disclosure controls and procedures and internal control over financial reporting
 - The OCA also reminded companies of the importance of auditor independence and audit committees, and urged companies to consult with the OCA when necessary.

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

- What's new for Q2? (*Contd.*)
 - The SEC issued a joint statement ([April 8](#)) 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 status, operational strategies and risks and resist the temptation to resort to generic or boilerplate disclosures

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

- Topic 9A – Financial Assistance Under the CARES Act
 - Companies receiving federal assistance, including through the CARES Act, should consider the short- and long-term impact of that assistance on their financial condition, results of operations, liquidity and capital resources. Such companies should ask themselves:
 - What are the material terms and conditions of any assistance that the company has received, including any limitation on the ability to seek other sources of financing and maintain employment levels? Does the company anticipate being able to comply with them?
 - Whether the company is taking advantage of any recent tax relief, and if so, how does that relief impact its short- and long-term liquidity? Does the company expect a material tax refund for prior periods?
 - Whether the assistance involves new material accounting estimates or judgments that should be disclosed or that materially change a prior critical accounting estimate?

SEC Guidance and Questions to Ask (Contd.)

- Topic 9A – Company’s Ability to Continue as a Going Concern
 - Companies should consider whether there is substantial doubt about the company’s ability to continue as a going concern. Where that substantial doubt is alleviated by management’s plans, management should provide the appropriate respective disclosures in the financial statements and consider the following questions regarding the MD&A disclosure:
 - Whether there are conditions and events that give rise to the substantial doubt about the company’s ability to continue as a going concern? For example, has the company defaulted on outstanding obligations? Has the company faced labor challenges or a work stoppage?
 - What are the company’s plans to address these challenges? Has the company implemented any portion of those plans?

SEC Guidance and Questions to Ask (Contd.)

- 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](#) that 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 is the company's overall liquidity position and outlook evolving?
 - Has the company accessed revolving lines of credit or raised capital in the public or private markets to address its liquidity needs?
 - Have COVID-19 related impacts affected the company's ability to access its traditional funding sources on the same or reasonably similar terms as in recent periods?
 - How does that environment affect the company's balance sheet assets and its ability to timely account for those assets?

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

- Non-Exhaustive List of Questions (*Contd.*)
 - Does the company anticipate 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?
 - Have 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?
 - Has the company experienced challenges in implementing its business continuity plans or does it foresee requiring material expenditures or material resource constraints to do so?
 - Is the current challenging environment expected to materially affect demand for the company's products and services?
 - Is that environment anticipated to have a material adverse impact on the company's supply chain or the methods used to distribute its products or services?
 - Will the company's operations be materially impacted by any constraints or other impacts on the company's human capital resources and productivity?

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

- Non-Exhaustive List of Questions (*Contd.*)
 - Are travel restrictions and border closures expected to have a material impact on the company's ability to operate and achieve its business goals?
 - What material operational challenges are the company's management and board monitoring and evaluating?
 - Have COVID-19 related impacts affected the company's ability to access its traditional funding sources on the same or reasonably similar terms as in recent periods?
 - Is the company at material risk of not meeting covenants in its credit and other agreements?
 - Is the company providing a clear definition of metrics such as cash burn rate or daily cash use, if included in its disclosures, and explaining how management uses the metric in managing or monitoring liquidity?

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

- Non-Exhaustive List of Questions (*Contd.*)
 - Has the company reduced capital expenditures, and if so, how?
 - Is the company able to timely service its debt and other obligations?
 - Has the company altered terms with its customers, such as extended payment terms or refund periods, and if so, how have those actions materially affected its financial condition or liquidity?
 - Is the company relying on supplier finance programs, otherwise referred to as supply chain financing, structured trade payables, reverse factoring or vendor financing, to manage its cash flow?
 - Has the company assessed the impact that material events that occurred after the end of the reporting period, but before the financial statements were issued, have had or are reasonably likely to have on its liquidity and capital resources and considered whether disclosure of subsequent events in the financial statements and known trends or uncertainties in MD&A is required?

Disclosures in Q1 Earnings Releases

- Key Topics:
 - COVID-19 pandemic, OPEC-plus actions, the widespread shutdown of the U.S. economy and the impact on commodity prices
 - Actions to protect employees and their families
 - Changes to operation of business/assets
 - Reductions in capital spending
 - Changes in expenses (furloughs, increased costs of PPE, modifications to operations)
 - Financial situation (past actions taken to strengthen a company's balance sheet, upcoming issues)
 - Non-cash impairments of assets and goodwill
 - Cautionary factors in the forward-looking statement legend specifically reference the impact of the challenging environment
 - Earnings guidance

Disclosures in Q1 10-Q: Risk Factors

- Uncertainty surrounding current crisis and the extent of the negative impact that the current crisis is expected to have on future results
 - “At this time, we cannot estimate the magnitude and duration of potential social, economic and labor instability as a direct result of COVID-19, or of potential industry disruption as a direct result of geopolitical developments in the oil market. Should any of these potential impacts continue for an extended period of time, it will have a negative impact on the demand for our services and an adverse effect on our financial position and results of operations. To the extent these factors adversely affect our business and financial results, they may also have the effect of heightening many of the other risks described in this ‘Risk Factors’ section and the ‘Risk Factors’ section of our Annual Report on Form 10-K for the year ended December 31, 2019, such as those relating to our indebtedness, our need to generate sufficient cash flows to service our indebtedness and our ability to comply with the covenants contained in the agreements that govern our indebtedness.”

Disclosures in Q1 10-Q: Risk Factors (*Contd.*)

- Disruptions to business operations whether from travel restrictions, mandated quarantines or voluntary social distancing that affects employees, customers and suppliers, production delays, closures of manufacturing facilities, warehouses and logistics supply and distribution chains and staffing shortages
 - “The COVID-19 pandemic has negatively impacted the global economy, disrupted global supply chains and created significant volatility and disruption of financial and commodity markets. In addition, the pandemic has resulted in travel restrictions, business closures and the institution of quarantining and other restrictions on movement in many communities. As a result, there has been a significant reduction in demand for and prices of oil and natural gas.”

Disclosures in Q1 10-Q: Risk Factors (*Contd.*)

- Disruptions to business operations...(*Contd.*)
 - “The Company’s operations rely on its workforce being able to access its wells, platforms, structures, and facilities located upon or used in connection with its oil and gas leases. Additionally, because the Company has implemented remote working procedures for a significant portion of its workforce for health and safety reasons and/or to comply with applicable national, state, and/or local government requirements, the Company relies on such persons having sufficient access to its information technology systems, including through telecommunication hardware, software, and networks. If the Company’s workforce cannot effectively perform their responsibilities, whether resulting from a lack of physical or virtual access, quarantines, illnesses, governmental actions or restrictions, information technology or telecommunication failures, or other restrictions or adverse impacts resulting from the pandemic, the Company’s business, financial condition, cash flows, and results of operations may be materially adversely affected.”
 - “. . . the operations of our midstream service providers, on whom we rely for the transmission, gathering and processing of a significant portion of our produced natural gas, NGLs and oil, may be disrupted or suspended in response to containing the outbreak, and/or the difficult economic environment may lead to the bankruptcy or closing of the facilities and infrastructure of our midstream service providers, which may result in substantial discounts in the prices we receive for our produced natural gas, NGLs and oil or result in the shut-in of producing wells or the delay or discontinuance of development plans for our properties”

Disclosures in Q1 10-Q: Risk Factors (*Contd.*)

- Credit and liquidity risk, loan defaults and covenant breaches
 - “Based on current and anticipated levels of operations, we believe we have adequate committed financial resources to conduct our ongoing business, although deterioration in our operating environment could limit our borrowing capacity, impact our credit ratings, raise our financing costs, as well as impact our compliance with the financial covenants contained in the Credit Agreement and other debt instruments.”
 - “Current macroeconomic and geopolitical conditions including the collapse of oil prices driven by both the decrease in demand caused by the COVID-19 pandemic and excess supply has caused liquidity issues impacting many energy companies; however, we believe that we have, and will continue to have, the ability to access the commercial paper program and credit facilities, which we use to meet our short-term cash needs. Extended disruptions in the financial markets and/or energy price volatility that adversely affect our business may have a materially adverse effect on our financial condition, results of operations or cash flows. In addition, usage of our credit facilities, which provide the financial backstop for our commercial paper program, is subject to ongoing compliance with covenants. As of March 31, 2020, we were in compliance with all such covenants.”

Disclosures in Q1 10-Q: Risk Factors (*Contd.*)

- Inventory write-downs and impairment losses
 - “If we are forced to shut in additional production, we will likely incur greater costs to bring the associated production back online, and such costs may be significant enough that such wells may become non-economic at low commodity price levels, which may lead to decreases in our proved reserve estimates and potential impairments and associated charges to our earnings. If we are able to bring wells back online, there is no assurance that such wells will be as productive following recommencement as they were prior to being shut in.”
 - “Concerns over the negative effects of COVID-19 on economic and business prospects across the world have contributed to increased market and oil price volatility and have diminished expectations for the global economy. These factors, coupled with the emergence of decreasing business and consumer confidence and increasing unemployment resulting from the COVID-19 outbreak and the recent abrupt oil price decline, may precipitate a prolonged economic slowdown and recession. Any such prolonged period of economic slowdown or recession, or a protracted period of depressed prices for crude oil or refined petroleum products could have significant adverse consequences for our financial condition and the financial condition of our customers, suppliers and other counterparties, and could diminish our liquidity or trigger additional impairments.”

Disclosures in Q1 10-Q: MD&A

- Including a business environment section at the beginning of MD&A describing trends related to the effects of the current crisis and the actions taken by governments and customers/suppliers in response, how they impact the outlook for the company's business and the actions taken by the company (or to be taken) in response
 - “In March 2020, the World Health Organization categorized the recent outbreak of COVID-19 as a pandemic. The COVID-19 pandemic has led to significant economic disruption globally, including in the areas of the United States in which we operate. Governmental authorities have taken action to limit the spread of COVID-19 through social distancing guidelines, travel restrictions, and stay-at-home orders, which have caused many businesses to adjust, reduce or suspend activities. Concerns about global economic growth, as well as uncertainty regarding the timing, pace and extent of an economic recovery in the United States and abroad, have had a significant adverse impact on commodity prices and financial markets.

Disclosures in Q1 10-Q: MD&A

- Including a business environment...(Contd.)

Our gathering and processing and our transportation and storage assets have continued to operate as critical infrastructure necessary to support the supply of natural gas, NGLs and crude oil. We have taken action to protect the health and safety of our workers, while continuing to operate, and to maintain the safety and integrity of, our assets. Where possible, our employees have worked remotely to support our business. Where continuous remote work is not possible, we have enlisted strategies to reduce the likelihood of spreading the disease. These strategies include social distancing, discontinuing nonessential travel, routinely disinfecting and cleaning workspaces, promoting frequent and thorough handwashing, encouraging employees to stay home if they are sick, urging employees to wear cloth face coverings, and educating employees to self-monitor for signs and symptoms of COVID-19.

Prior to the COVID-19 pandemic, the price of natural gas, NGLs and crude oil began to decline due to oversupply. The price of, and global demand for, these commodities have declined significantly as a result of the ongoing spread and economic effects of the COVID-19 pandemic and the significant governmental measures being implemented to control the spread of the virus. In addition, the recent dispute over crude oil production levels between Russia and members of OPEC led by Saudi Arabia have exacerbated the decline in the price of NGLs and crude oil. Despite the subsequent agreement in April 2020 by a coalition of nations including Russia and Saudi Arabia to reduce production of crude oil, the price of NGLs and crude oil have remained depressed.

Disclosures in Q1 10-Q: MD&A (*Contd.*)

- Including a business environment...(*Contd.*)

Financial markets have experienced sharp declines and extreme volatility as a result of the economic uncertainty arising out of the COVID-19 pandemic. The financial market declines and volatility, together with deteriorating credit, liquidity concerns, decreasing production, and increasing inventories, are conditions that are associated with a general economic downturn. Producers have announced and begun to implement plans to reduce production and decrease the drilling and completion of wells in response to these conditions. The plans include reductions in the exploration, development and production activity of producers across our areas of operation. As a result, the effects of the COVID-19 pandemic have begun, and may continue to negatively impact the demand for midstream services. The effects of the COVID-19 pandemic may also increase counterparty credit risk. Some customers may encounter severe financial problems that could limit our ability to collect amounts owed to us or to enforce performance of other obligations under contractual arrangements. During the first quarter of 2020 as compared to the first quarter of 2019, our gathered volumes and gross margin increased, and our processed volumes, transported volumes, and revenue decreased. Because of the uncertainty in the production of natural gas, NGLs and crude oil and in the demand for midstream services, as well as uncertainty regarding the financial impact of the current economic situation on the creditworthiness of our customers, these results may not be indicative of our future results.

Disclosures in Q1 10-Q: MD&A (*Contd.*)

- Including a business environment...(*Contd.*)

We are actively responding to the impacts of these developments on our business. On April 1, 2020, we announced distribution, capital and cost reductions intended to fortify our financial position, protect our balance sheet and ensure our liquidity....We cannot currently predict the duration and extent of the impact of the COVID-19 pandemic on the financial markets, the commodity markets, the production of natural gas, NGLs and crude oil or the demand for midstream services.”

Disclosures in Q2 Earnings Guidance

- COVID-19 and the oil and gas industry downturn have made it difficult, if not impossible, to forecast future results
- Most companies decided in Q1 whether their publicly issued guidance should be updated or withdrawn
- If you withdrew your guidance, consider whether you are better positioned to provide it now
- For Q2, review the questions companies asked themselves when deciding whether guidance should be updated or withdrawn, which 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?

Disclosures in Q2 Earnings Guidance (*Contd.*)

- 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? Are they clearly explained?
 - 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

Disclosures in Q2 Earnings Guidance (*Contd.*)

- Additional considerations if not issuing 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 and previous guidance should not be relied upon?

Disclosures in Q2 10-Q: 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 in Q2
 - Operational adjustments (e.g., transition to telework, supply chain and distribution adjustments, and suspending or modifying certain operations to comply with health and safety guidelines) and impact of same on financial condition and liquidity
 - Impact on revenue and operating expenses, and how they compare to the comparable prior period's results

Disclosures in Q2 10-Q: MD&A (*Contd.*)

- 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
 - Financing activities (e.g., obtaining and utilizing credit facilities, accessing public and private markets, implementing supplier finance programs, and negotiating new or modified customer payment terms)
 - 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
 - MD&A's trends and outlook discussion does not end at June 30

Disclosures in Q2 10-Q: MD&A (*Contd.*)

- 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 Q2 10-Q: 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
- For Q2:
 - Build out specifics if Q1 risk factors are too generic
 - Add new risks that have developed or become material

Disclosures in Q2 10-Q: Risk Factors (*Contd.*)

- Companies should consider:
 - Specific risks that have come to light given time operating during the shutdown;
 - 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

Non-GAAP Supplemental Measures

- Although adjustments to non-GAAP measures related to the effects of COVID-19 were not common in Q1 filings, we believe that they may become more widely used as the effects of COVID-19 and the associated economic conditions persist and become more pronounced
- 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)
 - A reasonable basis is needed for a company's estimates of the impacts of COVID-19 and its calculation methodology

Non-GAAP Supplemental Measures *(Contd.)*

- 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 guidance ([March 25](#)), 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
- The impact of an event with far-reaching implications such as COVID-19, which has many direct and indirect effects on both revenue and cost, may not be susceptible to easy, or easily explainable, quantification
 - To the extent assumptions underlying these estimates are material and would be unfamiliar or not obvious to the reader, these should also be disclosed to reduce the risk of a claim of inaccuracy, as the reasonableness of both the estimates and the underlying assumptions will be judged in hindsight

Disclosures in Q2 10-Q: Forward-Looking Statements

- Companies providing forward-looking disclosures should avail themselves of the safe harbors for such statements
 - As most companies did in Q1 disclaimers, continue to mention the impact of pandemics (including the COVID-19 outbreak) in the forward-looking statement disclaimers
- [In 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”
- The SEC also requested that companies strive to provide, and update and supplement, as much forward-looking information as is practicable, driven by three primary considerations:
 - Will the information benefit investors?
 - Will market digestion of the information benefit the company?
 - Will the broad dissemination and exchange of company-specific plans for addressing COVID-19 contribute to the nation’s collective effort to fight and recover from COVID-19?

Benchmarking COVID-19 disclosures

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

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Navigating Securities Laws and Good
Governance During a Crisis

Insider Trading

- Corporate insiders must beware of trading in a company's securities prior to the company's full disclosure of financial difficulties, insolvency or material changes to operations
 - Those who improperly trade may face civil and criminal liability
 - Investigations involve costs of defending against allegations
- In a warning of things to come, the co-directors of the SEC Enforcement Division took the unusual step of issuing a [cautionary statement](#) on March 23, 2020, emphasizing "the importance of maintaining market integrity and following corporate controls and procedures"
- Corporate insiders are receiving MNPI that "may hold an even greater value than under normal circumstances" given the impact on the market
 - Multiple public officials have faced [scrutiny](#) by DOJ and SEC regarding trading of stock prior to disclosure of the extent of the COVID-19 crisis
 - Corporate insiders who engage in significant or uncharacteristic securities transactions will face heightened scrutiny with the benefit of hindsight

Insider Trading (*Contd.*)

- Companies should refrain from engaging in securities transactions with the public and discourage insiders from trading until investors have been appropriately informed about material developments, risks and outlook
 - Material information may be evolving faster or more unpredictability than in a normal environment
 - 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
 - Companies should also evaluate their ability to implement new stock buyback programs or continue buyback programs outside of a previously established 10b5-1 plan
- Corporate updates to employees and other stakeholders can create issues
- Bottom line: Insiders and companies should be more thoughtful and engage in advance planning for capital raising, liability management transactions and trading by insiders

Regulation FD

- 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
 - Investor and analysts meetings may pose new risks – remote nature, revisions to models
 - Selective disclosures will be judged with the benefit of hindsight
- SEC recently issued cautionary statements about Reg. FD compliance, noting that companies should reexamine their established disclosure controls and procedures “to ensure to the greatest extent possible” that they do not improperly disseminate or use MNPI
- Companies should implement (and document) additional protective controls relating to the content of management meetings with covered persons under Regulation FD
 - E.g., supervisor attends; scripted in advance; no comments on guidance

Directors' Duties Remain Same

- 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 still the core duties
 - Business judgment rule remains available
 - Board must be fully informed
 - Board must fulfill oversight function
- 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

Board Oversight as Start H2 2020

- Process Questions to Ask:
 - (1) What are the key risks to the company?
 - Review H1 2020, particularly since early March
 - Identify potential future risks
 - (2) Does the company have controls and systems in place to identify and manage these new risks?
 - Review new controls implemented in H1 2020
 - Evaluate effectiveness and make adjustments
 - Identify newly needed controls
 - (3) Is management reporting to the board on the risk and effectiveness of the controls and systems?
 - Likely company has established a system by end of H1 2020
 - Evaluate and refine
 - (4) Has the board further refined its oversight function given the availability of new information on the impact of COVID-19 and the evolving industry risks?
 - Document efforts and informed nature of review of risks
 - Given unpredictability and unknown duration of current situation, do not lighten efforts

Board Oversight (*Contd.*)

- Board engagement must be tailored to the current climate and reflect preparedness
 - Audit Committee should evaluate whether to conduct a reassessment of audit risk in light of COVID-19
 - Engage with auditors regarding Q1 and future process
 - Companies may see an uptick in complaints as they reopen offices
 - E.g., review whistleblower processes
 - Liquidity runway or credit compliance risk may have changed
 - E.g., hedges rolling off; reserves based lending challenges in H1 2021
 - Survival strategies may have evolved as attempts have been completed
 - E.g., failed M&A requires pivoting
- Ask questions and document responses
 - Use independent advisors thoughtfully

Governance Action Items in Response to Oil & Gas Industry Downturn

- Evaluate liquidity and financial position in near term and long term
- Understand potential problem areas in debt instruments and other material contracts
- Understand challenges facing customers, suppliers and employees
- Test assumptions in models
 - Run multiple scenarios if deemed appropriate
- Explore all financing options, including capital raising and commodity protection derivatives
- Evaluate defensive measures
- Examine strategic opportunities
- Manage reductions in workforce responsibly

Governance Action Items in Response to Oil & Gas Industry Downturn (*Contd.*)

- 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
- Recognize uptick in governance litigation, particularly around *Caremark* claims attacking directors for a failure of oversight when a corporation suffers a financial trauma or bad publicity
 - Protect privilege
 - Review D&O policies and indemnification agreements

Governance Action Items in Response to Impact of Pandemic and Eventual New Normal

- Ensure safety of employees
- Evaluate remote working and its impact on productivity and workforce risk management
- Consider supply chain or service provider issues and adjustments
- Consider opportunities for innovation
- Evaluate balance of long-term strategy and short-term necessity
- Evaluate the tone at the top
- Consider culture of inclusiveness and diversity issues
- Develop an adaptable leadership function with fact-based governance

Governance Action Items in Response to Continuation of Pandemic

- Review effectiveness of governance adjustments made in H1 and take deferred actions
- Evaluate impacts on internal controls and internal audit function
 - Review any concerns with ICFR or disclosure controls in connection with 10-K and Q1 10-Q, even if not giving rise to a significant deficiency
 - Changes to internal controls and the implementation of new controls may be warranted, and changes must be disclosed in Form 10-Q 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 feasible to conduct planned audits without in-person access to certain locations
- Re-examine incentive compensation arrangements
- Ensure board continuity (e.g., emergency bylaws or executive committee)
- Reinforce emergency executive succession plan
- Consider if updates are needed to delegations of authority

ESG Considerations

- Pandemic and industry downturn have refreshed discussion of stakeholderism and the role of ESG in proper functioning of public companies
- As investors focus with greater scrutiny on board oversight, directors will be expected to be actively involved with ESG matters
 - Where ESG issues relate to material company risks, courts will expect closer oversight from directors
 - Independent of disclosure practices
- ESG is increasingly an issue of access to capital
 - Look for readily available opportunities *within each category*
 - Thoughtfully develop long-term plans and fact-based modeling
 - Use caution with aspirational goals

Current ESG Disclosure Landscape

- No line item requirements for ESG disclosure in public company reports
 - May 21 – Commissioner Peirce delivered [remarks](#) that:
 - “A new SEC disclosure framework for ESG information...seems an unnecessary response”
 - “[The current] disclosure framework...is flexible enough to accommodate a wide range of issuers”
 - May 27 – Chairman Clayton [stated](#) that:
 - “I have not seen circumstances where combining an analysis of E, S and G together... for example with a ‘rating’ or ‘score,’ particularly a single rating or score, would facilitate meaningful investment analysis that was not significantly over-inclusive and imprecise”
- May 21 - SEC’s Investor Advisory Committee approved a recommendation to consider whether principles-based ESG disclosure should be folded into the existing disclosure regime
- Many public companies choose to voluntarily disclose various ESG policies and initiatives via their corporate social responsibility website or sustainability report

Current ESG Disclosure Landscape

- Use of disclosure frameworks:
 - 80% of Nasdaq companies disclose some ESG metrics regularly
 - According to a survey of members of the Society for Corporate Governance, slightly less than 30% of a total of 85 respondents use SASB in their ESG reporting, and slightly less than 20% use TCFD
 - International Business Council of the World Economic Forum recently produced a consultation draft that draws from existing frameworks to propose a common set of metrics and disclosures that could form the basis for generally accepted standards that are akin to an ESG version of GAAP
 - Given BlackRock's recent endorsement of industry-specific [SASB standards](#) and climate-specific [TCFD recommendations](#), there may be some convergence of disclosures towards these frameworks
 - State Street measures the performance of the business operations and governance as it relates to financially material ESG issues facing the industry
 - Both announced that it will go beyond engagement and may deploy its voting power in director elections to accelerate corporate action on ESG
- Tailor disclosure and metrics to particular company and break up E, S & G

Implementing ESG Disclosure *(Contd.)*

- In July 2020, the Society for Corporate Governance also issued a [guide](#) for ESG issues, including a five-step approach to ESG implementation:
 - conduct a readiness assessment;
 - establish a governance structure;
 - conduct inventory and assess data collection and governance practices;
 - decide what to disclose; and
 - determine communications channels

ESG Disclosure (*Contd.*)

- Companies need to be careful in drafting their ESG disclosures and should take appropriate steps to reduce liability risk
- Litigation filings over ESG matters will likely increase in the future
 - Disclosure must be complete and accurate (e.g., 10b-5 liability applies)
 - ESG disclosure and related issues can lead to investigations, enforcement actions or civil suits at local, state and federal level
 - Investor lawsuits
- Ideally ESG disclosures are subject to same disclosure controls as SEC reports

ESG Disclosure (*Contd.*)

- In June 2020, the Society for Corporate Governance and Gibson Dunn issued a legal update including the following steps to reduce ESG disclosure risk:
 - include disclaimers;
 - check the facts;
 - consider using aspirational language and estimates;
 - understand that location matters;
 - educate internally on litigation and related trends;
 - encourage appropriate internal collaboration; and
 - evaluate board practices

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Fulfilling Fiduciary Duties in the
Financially Distressed Context

Overview of Fiduciary Duties if Company is Financially Distressed

- As a general matter, the environment in which directors of a financially stressed company operate has become much more difficult
 - Courts, regulatory agencies, lenders and other stakeholders have become more aggressive and willing to second-guess directors' decisions
 - Bankruptcy provides a ready forum to challenge (with the benefit of 20/20 hindsight) decisions made by the directors if stakeholders perceive that they were harmed by such decisions or perceive a strategic advantage to asserting claims
- The fiduciary duties of a solvent and an insolvent company are identical and are always owed to the entire corporate enterprise, not to a particular constituency
- The critical difference is that, when a company is insolvent, the stakeholders entitled derivatively to enforce the fiduciary duties of the directors expand to include creditors in addition to the company and its stockholders

Fiduciary Duties

- Fiduciary duties of directors of a Delaware corporation are governed by the Delaware state corporate code and its common law
- Officers are responsible for the management and operations of the corporation, under the oversight of the board of directors
- Directors are bound by (1) the duty of care and (2) the duty of loyalty

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
 - This underscores the importance of engaging qualified advisors, including legal and financial advisors who can assist the board to (i) identify and evaluate alternatives available to the company and associated risks and (ii) implement the business strategies of the company
- 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

The Duty of Care: Best Practices

- In assessing information, directors must proceed with a critical eye
 - Always feel free to ask questions of meeting participants
 - Actively participate in decision-making process
 - Establish adequate record of deliberation process

The Duty of Care: Best Practices *(Contd.)*

- Actions that will help directors meet duty of care
 - Be fully informed as to developments which led up to framing of proposed course of action
 - Thoroughly review facts and circumstances before taking action
 - Engage in full discussions with independent advisors
 - Receive full and candid evaluation of proposal's strengths and weaknesses
 - Review relevant documentation (or accurate summaries thereof)
 - Critically examine available information
 - Take sufficient time to evaluate proposed course of action in deliberate manner

The Duty of Loyalty

- Duty of Loyalty
 - Directors must act in the best interests of the company
 - Traditionally, this has applied to self-dealing transactions
 - The duty of loyalty is implicated where a director is not disinterested, e.g., (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
 - Even where some directors are “interested,” the protections of the business judgment rule may be preserved if a special committee of disinterested members of the board separately approves the transaction and, if a stockholder vote is required, a majority of the minority stockholders vote in favor of the special committee’s decision
 - If a court determines that the standard review of the business judgment rule is not warranted, the court will review the process and the transaction under the stricter “entire fairness” standard (discussed below)

The Duty of Loyalty (*Contd.*)

- Case law has expanded the duty of loyalty beyond self-dealing 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
- In the context of financial distress, duty of oversight has also been implicated where directors
 - fail to place corporate assets up for sale prior to a liquidity crisis;
 - fail to hire restructuring advisors in a timely manner; and/or
 - abdicate all responsibility to the restructuring advisor when one is hired

Application of Fiduciary Duties for a Solvent Company

Stockholders	Creditors
<ul style="list-style-type: none">• <u>General Rule</u>: 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	<ul style="list-style-type: none">• <u>Creditor Rights Are Contractual</u>: 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

Fiduciary Duties in an Insolvent Company 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 entitled to enforce fiduciary duties 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 stockholders, all duties to creditors are derivative: They flow through the directors’ duties to the company
- 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

Fiduciary Duties in an Insolvent Company Context (*Contd.*)

- When it is unclear if the company is solvent:
 - Often it is prudent for directors to assume when making decisions that in hindsight a court might find the company was insolvent
 - Act in good faith and in a thoughtful, deliberate manner that preserves and maximizes the value of the company without taking undue risks

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 or a properly empowered committee 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 loyalty to receive the protection of this presumption
- The following acts, for example, could result in the loss of such presumption:
 - conflicts of interest;
 - 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; and
 - acting without requisite information or deliberation (i.e., breach of the duty of care)

Standards of Review of a Board's Decision-Making

(2) Entire Fairness

- The entire fairness standard applies where a board may be conflicted
 - Often arises in interested director transactions
- 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
 - Examines economic and financial considerations
 - Fair dealing considers both the process that the board followed and the quality of the result achieved
 - Initiation, timing, structure, disclosure, negotiation and approval
- Fair dealing and fair price are considered in conjunction with one another, not as separate inquiries
- Company has burden of proof to show entire fairness but can shift burden to plaintiff through use of an independent committee
- 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 (discussed below)

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;
 - delay in engaging outside advisors;
 - 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;
 - failure to document key decisions; and
 - falling victim to a controlled mindset and allowing a controlling party to dictate alternatives or terms

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;
- analyze the company's financial condition before and after the proposed transaction or restructuring;
- retain restructuring financial advisors and counsel to analyze proposed transactions and associated risks and advise the directors;
- document any decisions made, including any supporting advice; and
- take actions designed to maximize value of the enterprise, rather than the interests of a particular stakeholder

Strategies to Minimize Risk of Director Liability (Contd.)

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
 - Similarly, a decision that benefits some stockholders to the detriment of others 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)).
 - In *Burtch v. Opus, LLC (In re Opus E., LLC)*, 528 B.R. 30, 67-70 (Bankr. D. Del. 2015), *aff'd*, 698 F. App'x 711 (3d Cir. 2017), the court recognized that waivers in an LLC Agreement can limit a bankruptcy trustee's ability to sue derivatively for breach of fiduciary duty.
- 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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Capital Raising Trends and Outlook

State of the SEC Process

- More efficient SEC review process
 - Historical trend of fewer public companies
 - Registrants are more effective in their disclosure – review of comment letters and related literature enables issuers to preemptively address hot topics
 - SEC is more focused on facilitating capital raising and increasing the numbers of U.S. public companies, leading it to be more judicious in making public company comments
 - Number of comments and the period it takes the SEC and issuers to resolve comments is shrinking
 - Encouraged dialogue between issuers and the SEC (Division of Corporation Finance and Office of Chief Counsel)
- During pandemic, expect more comments about disclosure relating to the crisis and related risk management

State of the Capital Markets – Equity

- The outbreak of COVID-19 and its effects caused a “bottoming out” of the market in March 2020, but the recent rally in equity prices has encouraged cash-strapped companies to re-explore the public equity markets
- Disruption in the capital markets in the spring was due to uncertainty and lack of visibility
 - The current situation is different than 2009 – does not involve a credit crunch
 - Companies which have benefited from the pandemic have seen strong stock price performance
 - Even companies who have faced challenges in the downturn (e.g., entertainment, travel and energy) have accessed the capital markets
 - The IPO market came to a halt in March but now shows signs of having a healthy year
- Issuers are open to a wider array of capital raising techniques than in recent years
- Investors have continued to tighten investment in the industry

State of the Capital Markets – Debt

- The investment grade bond market is active
 - U.S. non-financial corporations issued twice the amount of investment-grade bonds through May 2020 than over the same time period in 2019 - 85% was issued in March, April and May
 - The bonds were issued at meaningfully lower average rates
- The high-yield bond markets were frozen in March
 - Although the broader market rebounded strongly, market remains closed for the industry
 - U.S. companies issued nearly \$44 billion of high-yield bonds in May – the third-highest amount of issuances in any month on record; June issuance through June 12 was \$23.7 billion and is on track to be the highest for any June on record
 - Defaults and downgrades may increase in the short and medium term, which could lead to higher average rates
- Convertible bonds have come back - offering potential for recovery upside
- In light of lower interest rates and depressed debt trading prices, there has been an increase in liability management transactions and debt repurchases

Trend in the Energy Capital Markets – Private Placements

- We have seen an uptick in the use of private investment in public equity (“PIPE”) transactions, which offer a number of benefits in the current environment
 - PIPES are a quick, discrete and flexible source of liquidity on customized terms
 - As M&A activity continues to be relatively slow, PIPE transactions allow private equity sponsors and other investors to invest in markets that are currently challenging for buyouts and other investment strategies
- Securities can be tailored to investment profile and leverage metrics
 - Preferred stock, common stock, convertible notes
- Depending on security, investor may have registration rights, which can increase cost
- Shareholder approval requirements under NYSE and Nasdaq rules can complicate process
 - Structure around approval if issuing greater than 20% shares outstanding or affiliate purchaser involved
 - Note the stock exchanges’ temporary exemptions from shareholder approval requirements ended June 30

What Else to Watch in Energy Capital Markets

- ATM programs
 - Allow for small opportunistic capital raising at market prices
 - Monitor disclosure issues
- Rights offering
 - Allow for a “fair” opportunity for all shareholders to invest and avoid dilution
 - Backstop provides certainty of proceeds
 - No shareholder vote if no compensation for the backstop by nonmanagement
- Preparing for IPOs (with virtual roadshows)
 - Tee up the process for post-election and post-pandemic
 - Confidential submissions allow for discretion
 - Tool employed in the M&A strategy

What Else to Watch in Energy Capital Markets

- Debt Exchanges and Tender Offers
 - Exchanging debt trading at a low price for other securities with better leverage or maturity impact
 - Monitor 3(a)(9) compliance and creeping tender offers
- SPACs
 - Financing M&A with public equity
- Going Dark and Take Private
 - Some companies see more cost than benefit in being publicly traded
 - Going dark can be done unilaterally and at low cost, but there can be limitations on ability to execute during the fiscal year
 - Take private involves full M&A process, which can be costly (particularly if affiliate involved)

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Annex A: Gibson Dunn Resources

Gibson Dunn Resources: Overview

- [Oil and Gas Restructuring Support Team](#)
- [COVID-19 Resource Center](#)
- [All COVID-19 GDC Publications](#)
- [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. 9A: Coronavirus \(COVID-19\) -- Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources](#) (June 23, 2020)

Includes: (1) additional questions to ask when assessing and disclosing the impact of COVID-19; (2) discussion of considerations for federal assistance, including through the CARES Act; and (3) management considerations in evaluating a company's ability to operate as a going concern.

Related GDC Publications: [Additional U.S. Public Company Disclosure Considerations Related to the Impact of COVID-19](#) (June 25, 2020); [SEC Staff Provides Additional Disclosure Guidance Related to COVID-19 Impact](#) (June 25, 2020)

- 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)

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

B. Announcements

- [Staff Statement Regarding Rule 302\(b\) of Regulation S-T in Light of COVID-19 Concerns](#) (June 25, 2020)
Provides temporary relief from certain aspects of the manual signature requirements for SEC filings found in Rule 302(b) of Regulation S-T.
- [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.

C. New Compliance & Disclosure Interpretations

- [COVID-Related FAQs](#)
Provides guidance on required disclosures under the SEC's COVID-19 Order and the application of such order to Form S-3 filings.

[*Related GDC Publication: SEC Releases COVID-19 FAQs to Provide Guidance on Disclosure Requirements and Form S-3 \(May 11, 2020\)*](#)

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

C. New Compliance & Disclosure Interpretations *(Contd.)*

- [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.

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

D. Relief *(Contd.)*

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 \(COVID-19\) \(March 8, 2020\)](#)

E. Public Statements

- Office of the Chief Accountant Sagar Teotia, “[Statement on the Continued Importance of High-Quality Financial Reporting for Investors in Light of COVID-19](#)” (June 23, 2020)

Related GDC Publications: [Additional U.S. Public Company Disclosure Considerations Related to the Impact of COVID-19 \(June 25, 2020\)](#); [SEC Staff Provides Additional Disclosure Guidance Related to COVID-19 Impact \(June 25, 2020\)](#)

- 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 \(April 13, 2020\)](#)

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

E. Public Statements *(Contd.)*

- 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 *(Contd.)*

II. Public Company Accounting Oversight Board

- GDC Publication, “[Key Considerations for Issuers and Auditors Regarding Going-Concern Analysis](#)” (May 27, 2020)
- 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

- GDC Publication, “[Key Considerations for Issuers and Auditors Regarding Going-Concern Analysis](#)” (May 27, 2020)
- 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 *(Contd.)*

IV. Stock Exchanges

A. NYSE

- SEC Release, “[Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Extend its Waiver of the Application of Certain of the Shareholder Approval Requirements in Section 312.03 of the NYSE Listed Company Manual Through September 30, 2020 Subject to Certain Conditions](#)” (July 2, 2020)
- SEC Release, “[Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt New Section 312.03T of the NYSE Listed Company Manual to Provide a Temporary Exception Through June 30, 2020 From the Application of Certain Shareholder Approval Requirements Set Forth in Sections 312.03 and 303A.08 of the Manual](#)” (May 14, 2020)

In certain circumstances related to COVID-19, temporarily suspends through June 30, 2020 the shareholder approval requirement for (i) issuance of common stock, or securities convertible into or exercisable for common stock when such issuance will represent 20% or more of the voting power or number of shares outstanding before the issuance, (ii) issuance of common stock, or securities convertible into or exercisable for common stock, to a related party, and (iii) issuance of securities when a stock option or purchase plan is to be established or materially amended, pursuant to which employees, officers, directors, or consultants may acquire stock.

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

A. NYSE *(Contd.)*

- 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.

Related GDC Publication: [NYSE and Nasdaq Propose Temporary Waivers of Certain Market Capitalization and Trading Price Listing Requirements](#) (April 23, 2020)

- 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.

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

A. NYSE *(Contd.)*

- 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 *(Contd.)*

B. Nasdaq

- SEC Release, “[Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Provide Listed Companies with a Temporary Limited Exception from Certain Shareholder Approval Requirements in Nasdaq Rules 5635\(c\) and \(d\)](#)” (May 4, 2020)

In certain circumstances related to COVID-19, temporarily suspends the requirement for shareholder approval of (1) an issuance of common stock representing 20% or more of the outstanding common stock or voting power in a transaction other than a public offering at a price that is less than the Minimum Price and (2) an issuance of securities when an employee or director stock option or purchase plan is to be established or amended.

Related GDC Publication: [Nasdaq Provides Temporary Exemption from Certain Shareholder Approval Requirements in Response to COVID-19](#) (May 11, 2020)

- SEC Release, “[Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Permit a Longer Period of Time for Companies to Regain Compliance with the Bid Price and Market Value of Publicly Held Shares Continued Listing Requirements by Tolling the Compliance Periods Through and Including June 30, 2020](#)” (April 17, 2020)

Related GDC Publication: [NYSE and Nasdaq Propose Temporary Waivers of Certain Market Capitalization and Trading Price Listing Requirements](#) (April 23, 2020)

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

B. Nasdaq *(Contd.)*

- [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 *(Contd.)*

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's 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 *(Contd.)*

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’s 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 *(Contd.)*

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 *(Contd.)*

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 *(Contd.)*

VIII. Other Gibson Dunn Publications

- Society for Corporate Governance ESG Legal Update: What Corporate Governance and ESG Professionals Need to Know (June 2020)
- [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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