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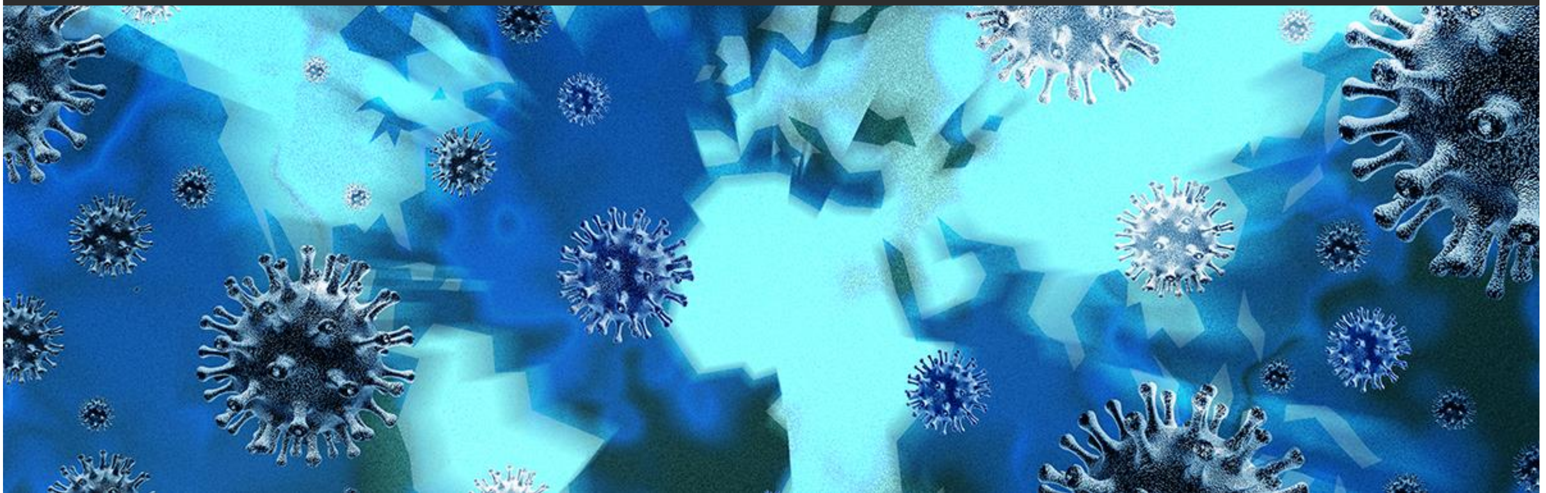
Alert | Health Emergency Preparedness Task Force: Coronavirus Disease 2019/Corporate



March 2020

The Evolving Impact of COVID-19 on Public M&A Dealmaking

Capital markets abhor uncertainty. M&A deal principals and transaction planners abhor market volatility. Indeed, the global equity markets have reacted to the Coronavirus Disease 2019 ("COVID-19") pandemic with unprecedented sell-side declines in a scramble to convert investments to cash while the market attempts to price the current and anticipated future adverse economic impacts of COVID-19 on corporate earnings, business shutdowns, consumer spending, credit availability, and the like. In the U.S., market indices have tumbled as much as 35% in just the past five weeks, and companies in certain industries have suffered 50% or greater declines from their trailing 52-week high.

Thus, it's not surprising that, to date, M&A activity for Q1 2020 is down substantially from the corresponding period of 2019. While activity was already somewhat slower due to uncertainty about future fiscal, tax, trade, regulatory, environmental and other policies at issue in the U.S. federal elections in November, the COVID-19 pandemic has had a pronounced negative impact on deal making and poses significant threats to near and medium-term corporate earnings performance and the global economy. Industries such as travel, tourism, hospitality, sporting events, motion picture exhibition, live entertainment, consumer retail, home construction, auto manufacturing and financial services are being hit hard by the sharp reduction in demand as well

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as state and local government directives to cease operations at least for the near-term. Several industries will have to continue to contend with significant disruptions in their supply chains.

Until the Coronavirus infection spread curve flattens significantly, successful treatments for recovery are introduced, workforces return and business productivity resumes, U.S. domestic and global M&A deal activity will likely remain soft -- at least when measured against deal volume norms over the past few years.

This does not mean that deal planning will cease, that attractive and opportune strategic and financial transactions will not continue, or that announced deals will not be consummated. If there is an economic justification for combining, buying and selling a particular business or company, COVID-19 and its consequent economic impacts should not alter the underlying rationale for pursuing and executing deals. Indeed, the significant decrease in equity market values may align sellers' price expectations with what able buyers are willing to pay, creating a larger pool of attractive targets.

However, in the current environment, buyers and sellers (at least in the near- to medium-term) should weigh deal benefits and risks more closely; and deal principals and their professional advisors should pay closer attention to emerging trends, new considerations and prevailing (i.e., what constitutes "market") deal terms when structuring and negotiating transactions.

Deal Structures and Form of M&A Consideration

In recent years (due, in part, to the just-ended 11-year bull market and record high stock values that could be used as potent deal currency) there has been an increase in transactions structured as true business combinations and no-premium mergers of equals (MOEs), especially among the large and mega cap issuers. Of course, many business, tax, accounting and other drivers for such transactions are unrelated to prevailing stock prices and market capitalizations. Structurally, in such transactions, stock is the exclusive (or a substantial) form of consideration, typically with fixed exchange ratios set at signing to lock in accretion/dilution and to establish, in respect of the pro forma combined company ("CombinedCo"), the aggregate percentage ownership of the stockholder base of each formerly stand-alone constituent corporation. The rationale for the deal and the equity split is determined, among other things, by the relative contribution of each constituent corporation to the assets, revenues and earnings of CombinedCo and the resulting synergies to be achieved in the combination.

Except in cases of unusual, historical issuer-specific stock price volatility (where collars, price protection mechanisms and possibly walkaway rights might be requested, but are seldom agreed to), concerns about diminution of the issuer's stock price between signing and closing are mitigated because, assuming the rationale for a synergistic business combination is sound and accepted by investors and analysts, macroeconomic impacts should affect the stock price of each merger constituent approximately equally and their stock prices should trade in tandem between signing and closing. Accordingly, three-year low stock values occasioned by the COVID-19 pandemic and associated macroeconomic factors should not influence the business decision of strategic deal principals whether to pursue and proceed with true business combinations or MOEs.

By contrast, in a sale of control transaction involving 100% (or substantially all) cash consideration, the headline price and market-based premia to the seller's unaffected stock price is significant to target company investors, even though the target's intrinsic value is the measuring rod against which the fairness of the consideration is measured and whether the best price reasonably available was sought and is being paid. In a pure exit transaction, investors have a weighted average cost basis against which they measure the cash out price being offered and asset managers, funds and other institutions desire to show outsized premiums and returns to their own investors.

For companies that are "for sale," cash represents certain value in a volatile and bearish stock market and certain targets may be less willing to accept the risks of stock consideration that could diminish by more than a certain percentage before closing. In these circumstances, value collars may be negotiated; but they are not automatically agreed to by buyers who want certainty of dilution/accretion when the deal is signed and announced -- especially in cases where the market cap, earnings and financial breadth of the stock consideration buyer is significantly larger than the seller.

In general, once the equity markets stabilize, a floor is established, and trailing 52-week highs become more distant, to the extent monetary policy is successful in creating a low borrowing cost environment, there may be a spike in opportunistic acquisitions for cash. To the extent certain would-be buyers abstained from deal activity in recent years due to perceived overvaluations and unrealistic sale price expectations, some of the "steam" that has now been expelled from the market should engender renewed interest in pursuing target companies that are now more affordable and accretive.

Unsolicited Bids & Activism

Due to the sharp decline in the public equity markets over the past five weeks, the most vulnerable companies may experience an uptick in unsolicited offers (made via traditional expressions of interest, proposals or "bear hugs" letters submitted to target company boards of directors, or made directly to stockholders via the commencement an unsolicited tender offer). These companies also may experience increased stockholder activism initiatives to, among other things, engage in M&A transactions, divest underperforming (non-core) businesses, return dormant cash to stockholders in the form of dividends and buybacks, make certain attractive investments, and reconstitute management and the board of directors. Issuers that have suffered disproportionate declines vis-a-vis their industry peers and broad market indices may be particularly vulnerable.

Companies should closely monitor unusual trading patterns and changes in the make-up of their institutional stockholders. This is also an opportunity for companies to reexamine their takeover and activism defense profile and preparedness (including "shark repellents", rights plans -- poison pills -- on the shelf and other structural defenses) and invigorate outreach and communication programs with their largest institutional stockholders.

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Moreover, for those companies that are most vulnerable, it would be prudent to consider organizing a nimble internal response (or "swat") team and to consult with external legal and financial advisors and external communications firm professionals to enhance their preparedness in case an overt takeover or activist threat surfaces. If a legitimate, perceived threat to corporate policies and effectiveness arises (e.g., large open-market stock accumulations, suspicious "wolf pack" activity, the sudden emergence of activist hedge funds and private equity investors, the receipt of "bear hug" letters, aggressive Schedule 13D/Item 4 filings, the commencement of an unsolicited tender offer, and the like), the "live adoption" of a stockholder rights plan may be a reasonable and proportionate response to such threat.

Live adoption of a pill, among other things, requires: careful deliberation by the company's board of directors and management, crafting the right messaging campaign to investors, customers, suppliers, employees and other stakeholders; preparing and filing requisite SEC filings on Forms 8-A and 8-K; notifying the NYSE or Nasdaq, as applicable; coordinating with and notifying Cede & Co. and Broadridge; engaging a financial advisor to assist with establishing the exercise price of the rights and other market-based analyses; engaging a rights plan trustee (typically a division or affiliate of the company's stock transfer agent); and engaging experienced counsel to draft all rights agreement documentation, announcements and filings, review the company's takeover arsenal, recommend the appropriate features of the rights plan and assist with a range of related corporate governance matters.

Also, widespread open-market accumulations of now-lower price stock can present other company risks. For those companies having valuable net operating loss carry forwards ("NOLs") which can be used to offset taxable income in future periods, they should consider the adoption of an NOL pill to protect, under Section 382 of the Internal Revenue Code, against an "ownership change" (i.e., generally an ownership change of 50% or more by 5% stockholders during a three-year measurement period) and the consequent loss or limitation of the ability to utilize such NOLs.

The key here is to get out in front of the situation with proactive measures so the company is not 100% in reactionary mode if an unwanted suitor, aggressive activist, market accumulation or other similar event arises quickly.

Due Diligence

Uncertainty about demand, supply chains, manufacturing costs, business relationships, operating strategies, workforce productivity and availability, cybersecurity and the adequacy of IT systems and the prospects of any given business, can lead buyer candidates to seek a more detailed and protracted review and analyses of these areas (and others). Diligence teams may be expanded to include more special experts, consultants and local advisors -- especially in geographic locations to which travel is currently restricted or feared.

These evaluations will be an important factor in determining how to price transactions in an environment of uncertainty. Management's financial forecasts and underlying assumptions should be refreshed and adjusted and may undergo close scrutiny by buyers. Some important diligence issues, however, may only start to come into focus with the passage of time to permit a

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more reliable assessment of the duration and magnitude of the COVID-19 impact (e.g., of changes and disruption in both supply and demand) on business operations, cash flows and revenues.

With respect to business diligence, if site visits are delayed or cancelled and in-person management presentations become "virtual," this may cause the deal process to slow down which could increase leak, rumor and overall execution risks.

For pending deal discussions, pre-signing price renegotiations may ensue if continuing business and financial due diligence uncovers material risks (or potential risks) from COVID-19 that necessarily impact integration models, estimated revenue and cost synergies, EPS accretion/dilution analyses and overall target valuations. Timetables for auctions and other procedural elements of the transaction process may become more protracted. Certain pending deals may be "put on hold" to await the results of another fiscal quarter or two.

Drafting and Negotiated Terms

Carefully negotiated and documented representations and warranties, closing conditions, termination provisions and MAE clauses are integral to risk allocation and fleshing out material areas of concern for all parties. Representations and warranties, depending on their scope and content, also fulfill a due diligence (i.e., discovery) function. This may lead to more specificity and robust negotiation of representations and warranties covering employee and labor matters, occupational safety matters, internal financial and disclosure controls., regulatory compliance, veracity of SEC periodic reports, adequacy of business interruption insurance, information technology, inventories, customer base and supply chain matters, material contracts and the absence of undisclosed liabilities, to name just a few. That written, contractual provisions are not a substitute for conducting a reasonable, yet comprehensive, business, financial and legal due diligence investigation.

Material Adverse Effect/Force Majeure

Generally, a Material Adverse Effect (an "MAE") is defined as an event, state of facts, development or condition arising after signing that, individually or in the aggregate, has, or reasonably may be expected to have, a material adverse effect on the seller's consolidated business, condition (financial or otherwise) or results of operations. Sometimes where any of the foregoing exists at signing, buyers insist that an MAE be defined to include a material worsening of such pre-existing condition.

Although there are many permutations that are negotiated, MAEs typically exclude a range of so-called "force majeure" or acts of God events, industry-wide events and macroeconomic events. Included in the litany of exceptions are: epidemics, pandemics and similar public health emergencies; lending moratoriums; industry downturns, changes in the interest rate environment; wars, civil insurrections and armed hostilities; acts of God and natural disasters and calamities; changes in tax, accounting, financial reporting laws, regulations and policies; and a range of other non-seller-specific (systematic) events. Buyers often carve out from the foregoing exceptions (and, thus, reinstate as an MAE) an adverse effect that disproportionately affects the seller's business relative to its peers in the relevant industry and/or geographic location. By

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design, MAE definitions and the lengthy suite of exceptions thereto are drafted in categorical terms and not with detailed illustrations or monetary thresholds.

Successfully invoking an MAE as a basis for contract termination remains rare in the wake of Delaware's IBP, Frontier Oil, Hexion, Akorn and Boston Scientific, decisions.). Judicial precedent to date demonstrates (with the Akorn case being the notable, fact-specific exception), that the buyer's assertion of an MAE generally will not result in a judicial order permitting termination of a merger agreement, and instead, will more likely result in a price renegotiation by the parties and settlement.

For companies most vulnerable to the impacts of the Coronavirus, we may see more focus on the negotiation of what, previously, may have been considered de rigeur or "boilerplate" provisions. Depending on the relative bargaining power of the parties, buyers may seek greater breadth and specificity with respect to those items constituting an MAE and sellers may look to expand the litany of exceptions to an MAE and to precisely define what constitutes a "disproportionality carve out" to the exceptions.

The judicial precedent referred to above generally requires an MAE to be durationally significant. An adverse short-term "blip" or "hiccup" generally will not constitute an MAE. An MAE is assessed by looking through the lens of a long-term strategic buyer or investor (and not from the perspective of a financial buyer or short-term investor). That generally means there must be a substantial adverse impact on the long-term earnings power of the seller's business -- measured in years, not months.

Also, by definition, a purported MAE should not be something that was readily foreseeable or expected by the parties at signing. As a risk allocation matter, all else being equal (and, of course, depending on how the MAE definition and exceptions thereto were drafted) the courts generally start from the premise that purely adverse macroeconomic events are more of a systematic buyer risk and that seller-specific adverse (microeconomic) events are more of a seller risk. These are potentially important considerations in the context of a pandemic whose consequences have yet to peak and, therefore, are indeterminate at the time a deal is being negotiated, signed and announced.

Conditions to Closing; Termination/Remedies; Ordinary Course Operating Covenants

In lieu of relying on MAE clauses as a basis for termination, including in an agreement the occurrence or worsening of certain potential Coronavirus-related impacts as express conditions to closing or as an automatic right of termination is a more direct, unequivocal and effective way for buyers to mitigate and allocate risk -- especially where there are viable threats to the uninterrupted sourcing of resources, raw materials, supplies and product inventory -- as well as to protect against the possibility of significant workforce disruption, customer loss and reduced consumer demand. The foregoing, at a minimum, could have substantial negative impacts on the seller's cash flows, revenues and long-term profitability.

However, as a practical matter, if transaction principals believe these risks are so inherently foreseeable (i.e., not meeting the standard for MAE status) and material enough that they

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required a robust negotiation of provisions excusing the buyer from closing or enabling it to walk away, a buyer may not assume these risks at any price, and a seller may refuse to expose itself to the substantial damage from a conditional (or buyer- option) deal that did not close after being publicly announced. At some point, the parties may simply suspend transaction discussions and "wait and see."

Sellers could seek a significant reverse break-up fee ("RBUF") to protect themselves in much the same way RBUFs and "hell or high water" provisions are sometimes used to protect sellers from the risk of the buyer failing to use its best efforts to obtain requisite regulatory approvals to consummate a deal. But, that remains to be seen.

"Ordinary course operating covenants" (covering the pre-closing period after signing) generally are written as prohibitions (i.e., negative covenants) against deviations from past ordinary course business practices. Those covenants typically include prohibitions on the company's ability to: incur additional debt, issue additional stock or alter its capital structure, change its organic instruments, make certain capital expenditures, modify its tax and accounting policies, amend or adopt existing executive compensation programs and awards, make changes to labor contracts and workforce policies, modify material contracts, settle or compromise certain litigation, alter certain vendor and supplier payment practices and schedules, and modify budgets, as well as other restrictions with respect to the modification of business plans and operations.

Specific exceptions (with monetary limitations and "baskets") are negotiated to achieve carve outs and of provisions which, if breached, could cause the failure of a closing condition. In the current environment, such provisions should be thought through and negotiated carefully. COVID-19 may cause a seller (or both business combination partners in a stock deal) to adopt new operating norms and procedures and take affirmative measures to prevent or mitigate the adverse impacts of the pandemic on the company's business -- whether on a prudent voluntary basis or in response to governmental directives.

Regulatory and Third-Party Approvals

Deal principals who require governmental approvals or third-party consents, such as the expiration of waiting periods under the Hart-Scott-Rodino Act ("HSR"), and obtaining regulated industry approvals, senior lender waivers, consents-to-assignment by IP counterparties and lessor waivers, should factor into deal timetables the possibility of delays from shutdowns, limited operations, backlogs and virtual workforces.

To assist the processing of filings, on March 13, 2020, the Federal Trade Commission announced that it adopted an electronic system for HSR filings for the duration of the COVID-19 emergency. However, no early termination of the HSR waiting period will be granted while the e-filing system is in use. Moreover, the timeline for SEC staff processing (i.e., review and comment periods) of transaction filings (e.g., merger proxy statements, registration statements, tender/exchange offer documents, etc.) may slow down to the extent staff examiners continue to work remotely; but, to date, the SEC has been proactive in seeking to mitigate any delays.

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In view of the foregoing, transaction parties should consider realistic “drop dead” dates, regulatory approval timelines and related covenants and other contract deadlines.

Financing

Senior lenders and deal financing sources should pay closer attention to the credit risks associated with industries and borrower vulnerable to adverse COVID-19 impacts, and adjust the structure and terms of their commitment letters and facilities accordingly. Transactions involving issuers and businesses in the travel, tourism, hospitality, live entertainment, sporting events, motion picture exhibition, retail, home construction, auto manufacturing, financial services, consumer goods and other industries may undergo close scrutiny with respect to the percentage of debt in the deal, management’s financial forecasts and underlying assumptions, EBITDA ratios, financial maintenance covenants, and the like. The pace of financing of such transactions (especially large deals with multiple layers of senior and subordinated financing) may slow down and lenders may require a larger percentage of equity, which could impact the maximum price buyers are willing to pay in transactions. That may have a somewhat more disproportionate impact on financial buyers who seek a minimum internal rate of return on their investment. Lenders may be more conservative about the period in which they keep their financing commitments open and seek to broaden market flex provisions and “syndication outs.”

Stockholder Meetings

The corporate laws of various states (including Delaware) and, in turn, the organic instruments of many companies permit stockholder meetings to be conducted on a virtual-only or hybrid (combined in-person/virtual) basis. Some states have taken extraordinary action to address previously imposed social distancing directives during the COVID-19 pandemic. For example, on March 20, 2020, New York Governor Andrew Cuomo issued an executive order permitting New York corporations to convene virtual-only stockholder meetings through April 20, 2020, to work around provisions of New York’s Business Corporation Law requiring New York corporations to convene stockholder meetings at physical locations.

A significant number of S&P 500 issuers have utilized the hybrid method in recent years and have ensured sufficient advance notice and allowing on-line attendees to pre-submit and engage in Q&A with management after the polls are closed.

Due to concerns as to possible COVID-19 transmission in venues with a significant number of attendees, we may see an increase in virtual-only meetings.

But, many institutional stockholders and corporate governance advocacy groups do not regard virtual-only meetings (and the resulting isolation of management from stockholders before “social distancing” was mandated) as a sound corporate governance practice, and certain dissident stockholders have submitted Rule 14a-8 proposals opposing that practice. Hybrid meetings with amply disclosed procedures for stockholder participation in Q&A sessions and clear instructions regarding on-line voting and webcast attendance have generally mitigated their concerns, but, in the case of virtual-only meetings, many institutions vote to “withhold authority” with respect to corporate governance committee members and other incumbent

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directors up for election in accordance with the recommendations of the leading proxy advisory firms (i.e., ISS and Glass-Lewis).

However, these positions, including the recommendations of the leading proxy advisory firms have softened to accommodate the realities of the COVID-19 pandemic. For example, Glass-Lewis recently announced that for the remainder of the 2020 proxy season (i.e, through June 30, 2020) it will consider, on a case-by-case basis, the extenuating circumstances of the COVID-19 pandemic when making voting recommendations for issuers who intend to convene virtual-only meetings and refrain from recommending against the election of corporate governance committee members so long as the issuer discloses it's rationale for utilizing the virtual-only method and, in so doing, makes express reference to COVID-19.

Moreover, the SEC recently announced guidance to assist reporting companies, stockholders and other market participants affected by COVID-19 with meeting on a virtual-only and hybrid basis. Although such SEC guidance was offered generally in the context of upcoming 2020 annual meetings, we may see during the pendency of the COVID-19 pandemic more creative methods of convening special meetings for M&A transactions where there is statutory and organic authority for the use of such alternative methods. In some respects, this may be seen as simply a further extension of on-line voting for transactions already used by many registrants.

Impact on Disclosure

For some time, the SEC has increased its focus on the adequacy of disclosure of known trends and uncertainties in MD&A, risk factors, management projections and financial statement footnotes. In late January 2020, SEC Chairman Jay Clayton announced that the SEC's staff has been tasked with monitoring and providing guidance regarding issuer and registrant disclosures of the current and potential effects of COVID-19. While acknowledging that the actual impact will depend on factors beyond the control and knowledge of issuers, Chairman Clayton observed that "how issuers plan for that uncertainty and how they choose to respond to events as they unfold can nevertheless be material to an investment decision."

On March 25, 2020, the SEC issued further detailed topical guidance for more timely and comprehensive assessment and issuer disclosure of evolving known and anticipated COVID-19 impacts on the issuer's assets, earnings, financial condition liquidity and capital resources, debt service ability, non-GAAP financial measurements, internal controls and reporting systems, business continuity, customer demand, supply chain continuity, human capital and workforce productivity, and operations in jurisdictions subject to travel restrictions and moratoriums.

Registrants and issuers impacted by COVID-19 should, therefore, carefully consider upgrading their disclosure of known, anticipated and forseeable affects on their business and all of the foregoing items listed in the SEC's topical guidance. . Forward-looking statements and disclaimers should also be reassessed in view of potential COVID-19 and other market disruption impacts. Various industries already hard hit by the impacts of COVID-19 may also have to reexamine potential securities litigation risks and related disclosures about those risks.

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Accordingly, the topical scope and breadth of disclosures to stockholders in merger proxy statements, tender/exchange offer documents and registration statements on Form S-4 by issuers and registrants impacted by COVID-19 should become more comprehensive.

The SEC's further extension on March 25, 2020 of its March 4, 2020 order relaxing the time periods for issuers impacted by COVID-19 to file their period reports may also slow the pace of public M&A transactions to the extent delays in audit completion and public reporting ensues. Buyers may defer pulling the trigger on transactions in progress to see 2019 annual (year-end) and Q1 2020 quarterly results and amendments to management's forecasts and assumptions shared during the due diligence process which may now include "down market" or negative case projections.

Stock Buybacks

After the equity markets stabilize, there may be an uptick in issuer open-market purchase programs conducted under Rule 10b-18, as well as issuer tender offers (whether structured normal way or as modified dutch auctions). Depending on the intended size of the buyback, issuers may want to assess the risks and benefits of investment in their stock, the financial impact of increasing leverage in their capital structure if a transaction requires significant external borrowing, and public disclosure regarding the reasons for, purpose and impact on non-tendering holders of the buyback (including pro forma ownership and anticipated EPS impacts). But once enacted in final form by Congress, federal relief programs including loans and other subsidies to certain public companies, especially in industries most adversely affected by COVID-19, will contain limitations and restrictions on the use of such federal funding for equity buybacks.

Looking Ahead

Hopefully, we will soon turn the corner as to early detection, arrest, prevention and, ultimately, eradication, of COVID-19. If so, we all hope and trust that, in time, the need for extreme social distancing measures will abate, consumer confidence will be restored, businesses will reopen and employees will return to work, corporate and household liquidity issues will subside, corporate earnings prospects will improve, supply chains will reopen, business credit will be readily available, the equity markets will stabilize and capital investment will surge, and M&A transaction activity eventually will be restored to pre-pandemic norms.

For more information and updates on the developing COVID-19 situation, visit GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019.

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