adopted a rights plan without shareholder approval. However, with sufficient justification from the company and a commitment to put any renewal to a shareholder vote, both ISS and Glass Lewis can be amenable to plans with a duration of less than one year.

Whether or not proxy advisors will recommend for or against a rights plan without a commitment to put it to a shareholder vote will depend on the particular circumstances at hand—whether the company has an accumulator, how long a period until the company's annual shareholder meeting, and the terms of the plan. In this regard, messaging is critical. Accompanying press releases and Form 8-Ks must emphasize the company's intent to prevent an abusive or coercive takeover, not an intent to prevent an activist from accumulating a stake. Furthermore, the short duration of the plan should be emphasized, and, if applicable, a commitment to put the plan to a vote at the upcoming annual meeting or prior to any renewal should be made.

Two Key Takeaways

- Shareholder rights plans may be effective for certain companies in light of current market conditions, but companies also have other steps that should be considered available to them.
- Companies adopting shareholder rights plans should be purposeful and customize their plans according to their current circumstances, specifically with respect to duration, trigger, and shareholder approval.

COVID-19: ONGOING M&A/PE ISSUES AND DEVELOPMENTS

By Gail Weinstein, Philip Richter, Steven Epstein, and Warren S. de Wied

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Level of activity. Business and market disruption and uncertainty is expected to lead to a marked slowdown in M&A activity. Depressed stock prices and general dislocation may lead to an increase in unsolicited bids for companies; and supply chain disruptions may increase restructuring activity. As of late March, we see most pending deals moving forward. One reported exception has been Xerox's postponement of its $34 billion unsolicited pursuit of HP, with Xerox stating that all of its focus right now will be on the health and safety of its various stakeholders. On the activism front, there may be new activism-focused funds formed to take advantage of the business and market dislocations, and activists may take advantage of depressed prices to accumulate shares and offer plans for recovery.

Due diligence. Due diligence protocols are being updated to seek to assess the potential impact of the pandemic on target companies. There has been a focus on target company contingency planning, business interruption insurance, supply

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chain issues, the status of existing contracts and business relationships, and pandemic-related vulnerabilities concerning restrictions on travel and gatherings, ability to work remotely, and the like.

Banker valuations. Banker valuations and fairness committee processes are being updated to take into account the potential impact of the pandemic. One issue of note is that, with declining interest rates resulting in a lower discount rate input to a discounted cash flow (DCF) analysis, the DCF result is higher than it would be if the interest rate were higher—even though the company's value has declined. Bankers need to take into account and explain this anomalous result.

Definition of a MAC. In pending deals, parties are considering whether the pandemic, or the government's response to it, is potentially covered by the definition of a MAC; how to value the potential impact; and whether the durational significance of the impact would or would not trigger the MAC-based condition or right to terminate. An area of focus has been the standard exclusion from most MAC clauses of changes that do not disproportionately affect the company from others in its industry. We have seen in some very recently executed merger agreements a specific exclusion from the MAC definition of the impact of the pandemic.

Other merger agreement issues. Other merger agreement issues include the potential impact of the pandemic (and the governmental responses to it) on (i) the bring-down at closing of representations and warranties; (ii) operation of the business pending closing; (iii) the availability (and cost) of acquisition financing (and remedies for a failure to obtain financing if related to the pandemic); (iv) protection of key executives and continuation of employee-related policies and benefits adopted in light of the pandemic; (v) impact on the timing of the "end date" for closing; and (vi) in the private company context, inclusions or carve-outs from post-closing indemnification. Companies will have to consider when and how to communicate coronavirus-related developments at the company to their merger agreement counterparty.

Logistics. Logistics will be a challenge requiring significant planning and adaptation, including with respect to conducting due diligence, negotiations, board meetings, litigation, regulatory filings, etc. Health safety concerns, widespread and extended school and daycare closings, government-imposed or recommended travel or other restrictions, and the counterparty's views and policies all will have to be taken into account. Backup plans should be in place in the event key persons involved become unavailable and delays may be inevitable. Of note, the Department of Justice and the Federal Trade Commission have announced that, due to health concerns relating to the pandemic, they will not be accepting hard copies of any premerger notification documents and have put in place a temporary e-filing system. With respect to litigation, we note that in many cases court appearances have been delayed or moved to conference calls. The Delaware Court of Chancery has set guidelines for how trials will proceed if there are issues about personal appearances.

Also, citing concerns about the large number of spectators expected for a trial that was to begin relating to stockholder claims against Elon Musk in connection with Tesla's acquisition of Solar City, Vice Chancellor Slights postponed the trial until after pandemic concerns have resolved.

Sponsors' ongoing and new fundraising. Most

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major sponsors are continuing closings in ongoing offerings and, to the extent possible, accelerating timing to close where they have final investor documents in hand, rather than holding documents to aggregate them for a larger close. For sponsors ramping up to launch new funds, generally activity has not slowed. However, given the anxiety in the markets and around the overall impacts of the pandemic, many are revising their anticipated timing for first closings to the summer or early in the fall. In limited circumstances, sponsors are seeking to accelerate new fundraising for mandates for which there is a view that there may be buying opportunities in this period of uncertainty or as we emerge from it. In other cases, where their mandates are particularly challenged by the current environment, we have seen sponsors take a pause on current fundraising or delay plans to launch new products.

Fund agreements. *Force majeure* or similar contract avoidance clauses are not broadly incorporated into fund agreements. We have not seen investors seeking to incorporate such triggers into documents being negotiated now. Where such provisions do appear, an examination of their relevance is fact-specific and depends on the application of the relevant governing law.

Financial contracts. Market participants need to evaluate how events stemming from the pandemic are dealt with under trading agreements governing derivatives and other financial instruments. In addition to force majeure clauses, market disruption provisions and fallbacks in those contracts may be triggered. Scheduled valuation dates or dates for making payments and deliveries may be postponed due to business interruption and unscheduled holidays. In addition, large and sudden fluctuations in financial markets may trigger demands for collateral. Parties to OTC derivatives and other similar transactions need to monitor and manage their liquidity to ensure they are prepared to meet such collateral posting requirements.

Liquidity concerns. In light of the tremendous turmoil in global markets during the last month resulting from the pandemic and the plunge in oil prices, many companies are focused on ensuring that they have sufficient liquidity to support their operations during a potentially prolonged economic downturn. Major corporate borrowers have been upsizing revolvers and some companies have considered drawing down under existing revolving or term credit facilities and "banking" the funds to ensure that cash remains available to them. Each borrower will need to make a business judgment and weigh the additional costs of borrowing prophylactically against macroeconomic market risks and risks that may affect the particular borrower differently from the overall market because of its industry or particular situation.

Credit agreements. When considering additional borrowing, it should be kept in mind that borrowers are generally required to bring down credit agreement representations and warranties (in all material respects) in connection with a revolving credit facility borrowing. Borrowers should focus in particular on the language of their "no material adverse change" and solvency representations, including whether the MAC rep covers a material adverse change in the Borrower's business "prospects," and whether the solvency representation is limited to historical solvency (at the time of an LBO, for example) or pro forma for the borrowing being made. Borrowers should review their credit agreements for *force majeure* or similar provisions that might excuse a revolving lender's obligation to lend in bad economic

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environments. (Generally in our experience, committed facilities do not include such provisions.)

Counterparty credit risk. Borrowers should remember that, notwithstanding the language of their respective contracts, they remain subject to counterparty credit risk. For the time being, the risk is even greater for lenders in China, Italy, and other countries with severe travel and work restrictions.

Financial covenants. Many sponsor-backed borrowers have financial covenants applicable only to their revolving credit facility that are triggered when the revolving credit facility is drawn in excess of certain thresholds (generally between 30-40%). Often, certain items (*e.g.*, undrawn letters of credit) are excluded subject to a cap. Borrowers should refamiliarize themselves with these covenants (what the levels are, when the covenant is tested, updated compliance projections, etc.).

Oversight responsibility. A board must exercise appropriate oversight with respect to material risks facing the company. COVID-19 may well constitute such a risk for many companies given the global scale, novelty, and potential direct impact on numerous business areas (personnel, supply chain, customers, financing, and so on). We note that the SEC recently has emphasized the need for disclosure of material risks and the extent of the board-level oversight. A board should ensure that it receives relevant and timely updates from management to understand how the company is being affected, as well as the most recent guidance from health organizations.

Meetings. Companies are considering whether to make changes to hold virtual-only or virtual-and-in-person meetings (including annual shareholder meetings) and events. Staples, Inc. has announced that its annual meeting this year will be virtual. Before changing to a virtual annual meeting, companies should consider the company's corporate governance documents, state corporate law, stock exchange requirements, proxy advisory firm policies, and proxy statement disclosure. Companies also should take into account the investor relations impact and should consider engaging with major shareholders about making the change.

Contingency planning. Many companies are forming task forces comprised of senior management to coordinate COVID-19-related issues. A company should develop a comprehensive communications plan to provide consistent messaging to all corporate constituents, including shareholders, lenders and employees. Companies should assess the existing and potential impact of the pandemic on their existing commercial agreements—including whether the pandemic would trigger: a material adverse change or *force majeure* provision or another provision relating to a right to delay performance; a right to revise the terms or terminate the agreement; or a notice requirement. In addition, the potential of an inability to perform by the company or the counterparty should be considered, the potential impact assessed, and next steps considered. When entering into new contracts or business arrangements, the company should evaluate whatever pandemic-related risks are foreseen at that time and consider whether and how those (and unknown) risks should be addressed.

Insurance. Companies should consider whether their insurance policies cover the effects of the pandemic, including any business interruption. Business interruption due to the pandemic may not be covered under a company's classic business interruption policy (which often

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covers only damages that result from physical damage to the insured's property). Business interruption losses may, however, be covered as an add-on to the company's property or umbrella insurance (although typically there is a force majeure exception to the coverage). It is important to be aware of the specific conditions or exclusions, and the usually strict notice requirements, under these policies. Many current business interruption policies exclude bacterial and/ or viral events from coverage. Companies should consider whether to expand their business interruption insurance going forward to cover losses resulting from epidemics or public health emergencies.

REFLECTIONS ON THE 2020 DRAFT VERTICAL MERGER GUIDELINES AND COMMENTS FROM STAKEHOLDERS

By Christine Wilson

Christine Wilson is the Commissioner of the Federal Trade Commission. The following is excerpted and edited from remarks that she gave at the DOJ Workshop on Draft Vertical Merger Guidelines in Washington, D.C., on March 11, 2020.

Any time the subject of new guidelines comes up, it is natural to wonder what the Agencies hope to accomplish by issuing guidelines. My own views on guidelines are shaped by excellent papers written by Greg Werden and Paul Yde.[1] My reading of their papers suggests at least four reasons why the antitrust agencies issue guidelines. First, the agencies may use guidelines as a way to summarize the law, just as the American Law Institute issues Restatements of the laws of contracts, property, and other topics.

Second, the agencies may use guidelines to clarify how they intend to approach topics on which there is no clear binding precedent. For example, Werden explains that the 1968 Horizontal Merger Guidelines "were a measured response" designed to address the "cloud of uncertainty" that hung over federal merger law following the Supreme Court decisions in Vons Grocery, Pabst Brewing, and Procter & Gamble.[2]

Third, guidelines may disclose and formalize an approach the agencies have heretofore used informally. For example, Werden notes that the 1992 Horizontal Merger Guidelines formally "codified" several unilateral effects analyses the Antitrust Division of the Department of Justice had been using for years.[3] Fourth, the agencies may use guidelines to advance new analytic techniques. For example, the 1982 Horizontal Merger Guidelines adopted, and subsequently popularized, the hypothetical monopolist test. The 2010 Guidelines likewise sought to popularize GUPPIs.[4]

I was prompted to reflect on these potential rationales for issuing guidelines by Professor Michael A. Salinger's submission that asked if the DVMGs are intended to announce a shift in policy towards challenging more vertical mergers.[5] Given that vertical merger competitive effects modelling is still more art than science, and given that vertical merger case law is scant, I believe that Vertical Merger Guidelines will be most effective if they codify existing enforcement practices. On average, the Agencies closely review roughly two or three vertical mergers, and challenge one vertical merger, each year.[6]

With respect to the specific issue raised in Salinger's submission, I would note the following. To be sure, our understanding of vertical mergers

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