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Swiftly Accessing Capital Markets in Uncertain Times

In spite of the economic upheaval caused by the COVID-19 pandemic, the U.S. debt and equity capital markets, though volatile, have proven resilient and open for issuers. The month of May saw the largest common equity offering in recent history, in BlackRock's offering of shares held by PNC, as well as the largest common equity offering by a pharmaceutical company, in Regeneron Pharmaceuticals' offering of shares held by Sanofi—with each historic deal announced and completed in one week's time. Thus far in 2020, over $1 trillion worth of corporate debt offerings have taken place, including significant transactions by Raytheon Technologies, Gap, and Expedia Group, among many others. Recent experience has shown that this unprecedented moment calls for flexibility and creativity in capital raising, and that companies should prepare to act swiftly when the need and market opportunities arise, whether through registered public offerings, Rule 144A offerings or other private placements.

- Engage the Board. Management and the board of directors should be in regular communication about the company's cash flow imperatives—short-, medium- and long-term, in both a base-case and a downside scenario. Directors should regularly be apprised of market terms for different financing options, and made aware of the tailwinds and headwinds that may affect the timing of a successful offering. If an issuer is properly prepared, an offering can be conducted in a matter of days. In order to be ready to take advantage of markets that can change quickly and needs that can arise unexpectedly, it is particularly important to have board authorizations in place and pricing committees ready to act should the opportunity or need arise.

- Review Existing Agreements. It is critical for management to have a solid handle on the constraints of issuing equity or debt imposed by a company's existing agreements, be they debt documents, charters, shareholder agreements, acquisition agreements, joint venture agreements or other material agreements. This understanding will not only inform the size, structure and manner of a potential offering, but it will expedite the company's ability to give necessary representations, warranties and opinions to banks underwriting the offering and obtain any necessary consents from lenders, shareholders or other counterparties. Where a company has previously granted, or may be requested to grant, registration rights, preemptive rights or other governance rights, undertaking an offering may require complex coordination among different parties on a tight time frame.

- Refresh the Shelf. An eligible company should maintain an effective shelf registration statement covering multiple kinds of securities—e.g., common stock, preferred stock, depositary shares, warrants, debt securities, convertible securities—so that it may opportunistically conduct a registered offering through a prospectus supplement without further action by the Securities Exchange Commission. Even well-known seasoned issuers need time to prepare and file an effective shelf registration statement, including time to obtain required auditor consents. Issuers ineligible to file automatically effective shelf registration statements need considerably more time given the requirement that the SEC declare the shelf effective. Ultimately, having an effective shelf registration statement can be the difference between success and failure in taking advantage of market opportunities.

- Focus on Financial Presentation. The issuer and its auditors, lawyers and underwriters must coordinate with one another to make sure that the financial statements to be included in the offering document, whether because they are legally required or desired for marketing purposes, are not a gating item to a timely offering. For example, if a company has recently restated or changed the presentation of its financial statements in any material way, or if it has recently undertaken a sufficiently material acquisition or disposition, updated financial information (potentially including pro forma financial information) may be required either for legal or marketing purposes. Well-prepared issuers will have done this work in advance.

- Dust Off the Investor Deck. Management must have an updated investor presentation from which to prepare a road show to market the securities being offered. As the road show presentation may contain information about the company that is not readily tied to its financial statements, the company should regularly keep handy backup for any such factual statements, which the underwriters and their counsel will request. Because the road show presentation should not contain information that conflicts with the offering memorandum or prospectus, it is also important to identify which aspects of the presentation are not reflected in, or derivable from, the issuer's regular filings and make adjustments if needed. Of course, issuers should be alert to the potential applicability of Regulation FD depending on the context in which the road show is conducted, which if not properly managed, could give rise to the need to make public certain information disclosed to investors.

- Centralize Diligence. Due diligence can be time-intensive even in normal circumstances, and has been made more so by the remote working environment resulting from the COVID-19 pandemic. An issuer should therefore proactively

centralize the kinds of documents that underwriters or placement agents and their counsel will seek to review in connection with an offering—e.g., board minutes, material agreements, correspondence with auditors, summaries of material litigation and material regulatory correspondence, as well as backup for statements in the company's periodic reports and offering materials. Centralizing this information in a virtual data room or similar online medium that can be accessed by various parties remotely will allow a company to move expediently through diligence, even if certain persons at the company are not under the tent with respect to the offering.

- Wall-Cross with Care. Certain issuers have long had some level of ability to confidentially explore market interest prior to announcing a public offering through a "wall-cross" process. Through its recent adoption of new Rule 163B, the SEC has liberalized this process to allow any issuer to "test the waters" and gauge the interest of potential investors prior to having a registration statement on file. While the ability to wall-cross potential investors gives more visibility and control to an issuer in advance of the regular book-building process, it can also give rise to complex legal judgements, including if, how and when to cleanse wall-crossed investors should the offering not go forward. Advance planning and close coordination between management, counsel and underwriters is required for optimal execution.

Taking these foundational actions will position issuers to move quickly in a market where careful navigation in executing a capital markets transaction is more likely to be required than in normal times.

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