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Hot Button Issues for Public Oil and Gas Companies During the Coronavirus and Oil Price Crises

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These are incredibly trying times for public companies engaged in the exploration and production (“E&P”) of crude oil—not only is the coronavirus severely disrupting life and work as we know it, but also crude oil prices have hit unprecedented lows. What should public E&P companies be doing now in terms of disclosure and managing significant risks?

The reality for most is that no one knows the potential impact of the current crisis or how long it will continue – and it is OK to acknowledge this uncertainty in public filings. Many public companies have already done this.

General Considerations for E&P Companies in Today’s Market

<p>What should you be thinking about with respect to your debt agreements?</p>	<p>If you haven’t done so already, you should take a close look at your debt agreements.</p> <ul style="list-style-type: none"> • Do you expect to be able to fund debt service this year? • Are there limitations on the ability to fully draw the revolving facility down, and if not, should you do that now? • Do you have any looming potential defaults or covenant breaches? • Are there any near-term maturities? Refinancing debt will be very tough for energy companies this year. Consider if you will be able to access financing through the Federal aid package. • Is it time to talk to the lender about a waiver or forbearance? Keep in mind that if default waivers are needed for debt securities such as senior notes issued under an indenture, a consent solicitation is generally required, which is more time consuming and expensive than the typical credit agreement waiver.
<p>Does your operating plan need to be modified?</p>	<ul style="list-style-type: none"> • Have your development plans changed materially in light of the current price of crude oil and/or because your labor force is largely unavailable or for other reasons (lack of funding)? • How will any curtailment of development impact cash flow from operations and the ability to fund debt payments, cap ex as well as G&A if you were expecting to fund these expenses through cash flow? • Will you be unable to sell your production at any price because storage is full and there are no buyers?

<p>Should you scale back your cap ex budget?</p>	<ul style="list-style-type: none"> • Consider updating your cap ex budget if your plans have materially changed or are likely to change. • Are there elements of your budget that are discretionary? • Do you still expect to be able to fund your cap ex—whether through cash on hand, cash flow from operations, debt facilities or capital raises? You may be limited in your ability to access your credit line if borrowing conditions cannot be met.
<p>How does your hedge position look in today's market?</p>	<ul style="list-style-type: none"> • How much of your production is hedged and for how long? • Do you hedge with a three-way collar such that your downside protection is limited in the current price environment? • What can you do to manage hedges to further protect your company without giving up too much upside? • Could your counterparties declare force majeure? Have you analyzed which of your contracts have a force majeure provision? • Have you declared force majeure in your commercial contracts?
<p>How is your liquidity?</p>	<ul style="list-style-type: none"> • What are your current liquidity sources? • How are your liquidity sources being impacted in today's market? • What options do you have available? Consider the availability of Federal assistance and other non-traditional financing sources.
<p>How have your A&D plans been impacted?</p>	<ul style="list-style-type: none"> • If you were planning to acquire properties this year, have your plans materially changed? • Do you have funding for acquisitions and, if not, will funding continue to be available? • What valuation will be used? "Market value" is less clear when the reserve report can be updated with new prices which remove "uneconomic" reserves. • Consider whether a corporate transaction might be more feasible than a property acquisition.
<p>Have you talked to a restructuring advisor?</p>	<ul style="list-style-type: none"> • While it's hard to think that energy companies are in another bankruptcy cycle (didn't we just get out of one?), understanding options and making plans now are prudent. • A large number of companies will experience a spring borrowing base redetermination that will result in a deficiency, followed by a default, or will breach their second quarter financial covenants. It is best to start planning now.

<p>Have you considered a virtual stockholder meeting for this year?</p>	<ul style="list-style-type: none"> • Many companies are considering whether they can have a virtual stockholder meeting in light of “social distancing” and “shelter at home” directives.
<p>Is your stock in danger of being suspended from trading on an exchange or delisted?</p>	<ul style="list-style-type: none"> • If your common stock is listed on the NYSE, Nasdaq or another national securities exchange, be aware of the continued listing requirements and the potential delisting triggers. • Below are a few of the NYSE delisting triggers that tend to be an issue in downcycles: <ul style="list-style-type: none"> ○ the average closing price of a security as reported on the consolidated tape is less than \$1.00 over a consecutive 30 trading-day period; ○ the average global market capitalization over a consecutive 30 trading-day period is less than \$50 million and, at the same time stockholders’ equity is less than \$50 million; ○ the average global market capitalization over a consecutive 30 trading-day period is less than \$15,000,000;¹ or ○ the stock price falls to \$0.16 at any time during trading. <p>Note that there are cure periods for noncompliance with certain requirements, but no cure period for others. For example, the NYSE provides a cure period if a company fails to meet the minimum stock price requirements and the \$50 million market capitalization/stockholders’ equity requirement. However, the NYSE may immediately suspend trading and begin delisting of a stock (without a cure period) if (1) the price goes down to \$0.16 at any time or (2) subject to the temporary suspension in effect, if a company fails to meet the \$15 million market capitalization standard.</p>
<p>Do you have a share repurchase program?</p>	<ul style="list-style-type: none"> • If you have an existing stock repurchase program, should you modify, suspend or terminate the program in light of current market volatility? • Consider whether the repurchase program could limit your ability to access Federal aid under the CARES Act or future related regulations • Is the company in possession of material non-public information that could result in potential liability under Rule 10b-5?

General Disclosure Guidelines

Many companies are wondering when they need to make public disclosures about the impact (or potential impact) of both the coronavirus and the crash of oil prices. What if the company has already published

guidance for 2020? What if the company's cap ex plans have now drastically changed? What if its labor force is unavailable? What if the company is concerned about being able to make its debt payments?

A critical takeaway in today's market is that it is imperative that companies read *very carefully* their prior earnings releases, other press releases and SEC disclosures to determine what statements have been made by the company but that should be modified given current circumstances. Then, if the company is choosing to issue a press release on one topic, the company should consider if there is additional disclosure warranted to make the proposed disclosure not materially misleading.

General Disclosure Guidelines for Public Companies

<p>When is public disclosure required under the federal securities laws?</p>	<ul style="list-style-type: none"> • Keep in mind that generally, the federal securities laws do not require public disclosure absent an affirmative duty to disclose, such as when: <ul style="list-style-type: none"> ○ a mandatory Form 8-K is triggered (for example, if triggered in connection with a material draw down on the credit facility or the receipt of a delisting notification); ○ a quarterly or annual report is due; or ○ the company is engaged in a capital raise; or ○ a company is repurchasing its securities.
<p>If you speak, speak truthfully and completely</p>	<ul style="list-style-type: none"> • If a company chooses to make a disclosure, the company must make sure the disclosure is not materially misleading.
<p>Be mindful of the limitations imposed by Regulation FD</p>	<ul style="list-style-type: none"> • Take care not to disclose material, non-public information <i>selectively</i> – all investors must have access to the same information at the same time. • Be especially vigilant not to confirm or deny guidance privately. Instead, respond with “our guidance speaks as of the date it was given, and we only update guidance publicly.”
<p>Is there a duty to update?</p>	<ul style="list-style-type: none"> • While as a general rule there is not a duty to update disclosures under the federal securities laws, note that some courts have imposed a duty to update. • Be sure to use the forward-looking statements disclaimer when appropriate (for example, it cannot be used in disclosures relating to a tender offer).
<p>What about the stock exchange disclosure requirements?</p>	<ul style="list-style-type: none"> • Don't forget that the stock exchanges may require prompt disclosure of material news that is likely to impact the trading in the company's securities.

**Practical Disclosure Tips
For Public E&P Companies**

<p>What should you do about 2020 guidance?</p>	<ul style="list-style-type: none"> • If you have historically provided guidance, consider whether it is appropriate to do so in today's market. • We would expect most E&P companies will not publish any further guidance for 2020. Some have already withdrawn guidance previously issued. • Companies do not necessarily need to rush to withdraw guidance unless there are other circumstances that might warrant withdrawal – such as if the company is drawing down its credit facility or incurring a payment default. • We expect that many companies will withdraw guidance on or before the issuance of the next earnings release.
<p>What new risk factors should you consider?</p>	<ul style="list-style-type: none"> • What new risk factors should be added? New risk factors may not be simply general references to the COVID-19 crisis but focus on specific risks resulting from the crisis, such as not having an available labor force due to quarantines or shelter at home directives, disruptions in the supply chain, disruptions based on having operations in a particular geographic region, etc. • Consider a specific risk factor regarding delisting if you anticipate noncompliance with stock exchange listing standards or a default under your debt agreements. • Also consider updating your bullet points in your forward-looking statements disclosure to add the concepts in new risk factors.
<p>What should you consider for your MD&A disclosure?</p>	<ul style="list-style-type: none"> • Are there any new “known trends” to disclose? • Many companies have already disclosed the potential impact of COVID-19 crisis in their Form 10-Ks – consider updating this in the next Form 10-Q. • Consider updates to the liquidity section in particular – have your sources of liquidity changed and what is your liquidity outlook? • Have your cap ex plans changed? • Do you expect lower cash flow from operations? • What disclosures should you include regarding potential defaults under your debt agreements, whether a covenant default for the failure to meet a financial ratio or a payment default?
<p>What do you need to do if you get a non-compliance notice from a stock exchange?</p>	<ul style="list-style-type: none"> • If you receive a notice of noncompliance from an exchange, review the Form 8-K and press release requirements, as well as the actions required by the exchange.



¹ The NYSE has suspended until June 30, 2020 the application of the requirement that companies must maintain an average global market capitalization of not less than \$15,000,000 over a consecutive 30 trading-day period.

As always, we are available to help you manage through these difficult times. Please contact any of the lawyers in the [Capital Markets Practice Group](#).