ISSUES CONFRONTING PUBLIC REITS TODAY

We have been fielding calls from our public REIT clients on a number of topics stemming from the COVID-19 outbreak. We have summarized below a short list of key topics and our high-level thoughts on them. Each of these items involves nuances, and we encourage you to reach out to your regular Clifford Chance contact or any of the contacts named below to discuss your specific circumstances.

1. Can a company's existing 10b5-1 purchase plan be terminated in order to preserve cash?

As a general rule, 10b5-1 plans should not be terminated prior to their scheduled expiration because an early termination may call into question whether the plan was implemented in good faith and/or being terminated based on material non-public information (MNPI). That said, in extraordinary circumstances, like those we are facing now, we believe that a company can reasonably conclude that it is in the company's best interests to conserve cash and take a number of steps in furtherance of this goal, including terminating a 10b5-1 plan. Of course, a company should not terminate a plan on the basis of MNPI. There should be supportive evidence that the company is taking a number of steps to preserve cash.

2. We have just gone into our blackout period. Can we still buy back our securities if we don't already have a 10b5-1 plan in place?

With the end of the first quarter approaching, many REITs have gone into blackout under their corporate trading policies. This would ordinarily mean that the company and corporate insiders are restricted from buying the companies securities in the market. While corporate trading policies are sound and important prophylactic measures, the law allows a company/corporate insider to buy the company's securities so long as the company/insider does not have MNPI. We believe that the company may reasonably conclude that it is not aware of MNPI during an initial period into Q2 when it is gathering information and beginning its quarterly close process. Alternatively, a company may voluntarily issue a press release disclosing MNPI to allow for an additional short

window for the company/insiders to buy the company's securities, including potentially flash earnings and other trends around revenues, earnings and reserves.

All that said, many companies are gathering real time information more quickly in this environment, so it is imperative that companies and insiders proceed cautiously, pre-clear any such trading activity with internal legal and governance personnel and monitor compliance with the Rule 10b-18 "safe harbor" for purchases of the company's securities. Additional measures such as cooling off periods before purchases are actually made under a 10b5-1 plan should be considered. Companies should also be aware that some of the government programs being implemented now may prohibit buyback activity.

3. We approved quarterly dividends, but now we want to rescind them because we want to preserve cash. Can we do that?

Under Maryland law (the law that applies to most public REITs), a company can rescind a dividend that has been approved, but not yet publicly announced (i.e. "declared"). It is the declaration (i.e. public announcement) that creates an arguably binding obligation between the REIT and the common stockholders. Thus, if you have not yet publicly announced the dividend, the board can simply vote to rescind the approval.

If the dividend has already been publicly announced, it may still be possible to take action such as deferring the dividend, converting it to a stock dividend or revoke it entirely; however, we recommend that you discuss the circumstances with counsel prior to taking this action. Close coordination with the NYSE will also be needed.

Companies may also be considering suspending dividends on preferred stock. Under the terms of typical REIT perpetual preferred stock, the REIT may determine not to declare and pay quarterly dividends. The undeclared dividends will continue to accrue until paid. Preferred stockholders do not have typical creditors rights, meaning that the company is not in "default" and preferred stockholders cannot accelerate repayment of the preferred stock. However, companies should be mindful that ceasing payment of preferred dividends is not without consequences. In particular:

- the terms of the preferred stock usually say that the company cannot repurchase common stock while preferred dividends are in arrears.
- after six quarters of arrears, holders of the preferred stock may have the right to appoint two directors; and
- the company may lose its S-3 eligibility.

4. Do I have to file an 8-K to report . . .

a. that the company has drawn down its revolver?

- a drawdown of a revolver is reportable under Item 2.03 of Form 8-K if it is a material incurrence of debt. Factors to consider when analyzing materiality include: amount of drawdown; use of proceeds – is it for cash on hand to make

attractive investments or needed to meet a liquidity crunch; is it normal course for the company to draw the revolver to fulfill a short term need and then repay it with term debt?

- Outside of the Item 2.03 requirement, consideration needs to be given to how this drawdown affects potential covenant compliance under the company's debt facilities, how it may affect the company's credit ratings and how it may impact previously issued guidance.

b. that one of our NEOs may have the coronavirus?

- the illness of an NEO is not itself a reportable event under Form 8-K. If the illness results in the NEO stepping away from his or her duties for a period of time and the appointment of someone else to perform the duties of a CEO, CFO or principal accounting officer, then this would be reportable under Item 5.02

c. the non-payment of rent/interest by a tenant or borrower under a material lease or mortgage, or of multiple non-payments?

- the non-payment of rent or interest in and of itself does not trigger current reporting under Form 8-K. However, non-payments may give rise to one or more of the other 8-K trigger events described herein.

d. a pre-release of new earnings guidance or the withdrawal of prior guidance will generally trigger an 8-K under Items 2.02 and 7.01 or 8.01.

e. a material asset impairment that is taken other than in connection with the preparation of the company's next set of quarterly financials will trigger an 8-K under Item 2.06.

f. the amendment of a material lease or loan is reportable under Item 1.01 and the termination of a material lease or loan is reportable under Item 1.02.

g. the entry into a forbearance agreement with lenders may be reportable if the forbearance agreement is material (Item 1.01); receipt of a covenant waiver is not a specific 8-K trigger event and would usually be reported in the company's MD&A in its next 10-Q, but there may be other reasons for the company to proactively announce it to address market questions and rumors.

Reg FD Obligations: During these times of uncertainty and fast moving events, it is worth reminding companies, executives and IR personnel of their Reg FD obligations. Companies cannot engage in selective disclosure of MNPI to investors or analysts. If any such disclosure is made inadvertently, the company should file an 8-K as required under Reg FD. Knowing that the market will be hungry for information, companies may consider making proactive disclosures even if they are not technically required to be reported an a Form 8-K. The leaders of the SEC's enforcement division reminded companies of

their obligations in this regard yesterday. https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity

5. We are about to file our proxy statement and are planning for an in-person meeting, but we may need to change later to a virtual meeting. Can we preserve the optionality?

Yes. If a REIT wishes to file its proxy on the assumption that its annual meeting will be in person, but preserve the ability to switch to a virtual meeting after mailing the proxy, we recommend that the company include language in its proxy stating that it may change the format and notifying stockholders as to how the change will be communicated to them (i.e., press release and 8-K, as well as website posting).

6. We already filed our proxy statement but did not include any language about a possible change in format. Can we still switch to a virtual meeting?

Yes. The SEC has published guidance that a company can publicly announce a change in the meeting format to a virtual (or hybrid in person and virtual) format without having to mail a new notice to the stockholders. https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns?auHash=zrsDVFen7QmUL6Xou7EIHYov4Y6IfrRTjW3KPSVukQs.

The SEC's guidance is very helpful; however it is not entirely clear that it trumps state law notice requirements. The initial feedback that we have received from Maryland counsel is that Maryland law likely would require that at least 10 days' notice of a change to a virtual meeting be given to stockholders in the same way that the original notice was given. If the only matters being considered at the meeting relate to director elections (who would hold over if not duly elected), say on pay (an advisory vote) and auditor ratification, there is less concern with a possible violation of the Maryland notice requirements. The same is probably not true for votes on extraordinary or non-routine corporate transactions.

Another option, if the company has concerns about a virtual meeting, is to move the location of the meeting to a place that is unlikely to be disrupted by COVID-19 concerns. The same notice issues discussed above would equally apply to such a change.

If a company is considering a virtual format, we encourage you to contact a third party virtual meeting provider soon. We have heard from some of our clients that the providers' calendars for meetings are getting filled rather quickly.

7. Should we address COVID-19 in our CD&A?

Many public REITs are putting the finishing touches on their 2020 CD&As. As part of the CD&A, they may discuss the 2020 performance goals that have been set for NEOs. No doubt those goals were set before the COVID-19 outbreak and they may feel stale in some respects. We have been recommending that clients include language noting that the CD&A was prepared before the outbreak and/or that performance goals were set before the outbreak and that the committee retains discretion to adjust them. Companies may also wish to re-look at the CEO letter that accompanies the annual report to assess the tone

of the letter and any forward looking statements made in it. If the proxy statement has already been filed, we do not think it needs to be supplemented with this disclaimer, unless the company also wishes to make a substantive, material change to the original disclosure.

8. Does a material drop in stock price trigger a revaluation of outstanding LTIP units?

Many REITs use profits interests issued by their operating partnerships (referred to as "LTIP units") as a form of executive compensation. In very general terms, LTIP units have no value when granted because they would receive no proceeds of a liquidation if one occurred at the date of grant. The LTIPs accrete to the value of a regular operating partnership unit as the REIT generates profits. When certain eligible "bookup" events occur, the LTIP units are revalued (accrued profits are "booked"), and the LTIPs can be converted to a regular OP unit once their capital accounts are equivalent to those of regular OP Units.

Some of our clients have asked whether a significant drop in stock price causes LTIPs to be revalued down. The answer is no, a drop in the stock price does not on its own trigger a "book down" event. A book down could be triggered by certain eligible events, such as new issuances of common stock or OP units and certain stock repurchases. In that case, the LTIPs would be revalued down and the new value would be the threshold at which the LTIPs would convert to OP units once the book capital account of the LTIPs reached that threshold and a second eligible event occurred, allowing the accrued profits at the time to crystallize and trigger a conversion of the LTIPs to regular OP units.

There are a lot of complexities to LTIPs and we recommend that you reach out to a CC tax professional with specific questions.

9. Does the SEC's COVID-19 filing extension apply to first quarter 10-Qs?

Yes, on March 25, 2020, the SEC extended the 45 day conditional extension relief it had previously announced for filings with deadlines before April 30, 2020 to filings with deadlines on or before July 1, 2020. The SEC's order can be found here. https://www.sec.gov/rules/exorders/2020/34-88465.pdf This extension will cover first quarter 10-Qs.

10. What considerations should be given to the timing of a company's next quarterly earnings call?

Given the current work from home complexities for company personnel and auditors, we expect that many companies will be reporting earnings and filing 10-Qs later than usual. We also anticipate that companies will have to work through the proper accounting treatment for missed rent and interest payments by tenants and borrowers with the auditors. Keep these items in mind when setting expectations for the timing of reporting. It is better to be right than to rush. Company CFOs and CAOs should be speaking to audit committee chairs more frequently than is typical both so that the chairs can fulfill their duties and so that directors are not caught off guard, which can turn into more delays and disruption.

11. I need new EDGAR codes, but I cannot satisfy the notarization requirement for Form ID right now. What should I do?

The SEC is aware of this issue and has said that it is exploring options. In the meantime, the SEC has said that if you are having issues, you should contact EDGAR filer support at 202-551-8900 option 3.

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