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U.S. COMPANIES WEIGH PROS AND CONS OF PAYING QUARTERLY DIVIDENDS DURING COVID-19 PANDEMIC

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As COVID-19 moves across the U.S. decimating revenue sources, companies in severely impacted industries, including hospitality, retail and travel, among others, rushed to announce that quarterly dividend payments would be deferred, delayed, suspended or revoked, as the case may be. Many simultaneously announced drawdowns on credit facilities, employee furloughs or layoffs and salary reductions, presumably as justification for the dividend change.

Companies with strong cash reserves, on the other hand, so far generally appear to be moving forward with regular dividend payments. Their decision to continue to pay dividends as they are able despite the pandemic helps project stability in the U.S. securities markets and arguably strengthens investor relations, especially among retirees who depend on dividend income.

As economic fallout from the pandemic continues and the ripple effect of stay-at-home orders begins to impact nearly all businesses in some manner, companies may want to include disclosure forewarning that the board of directors continually monitors market conditions and will continually evaluate the company's quarterly cash dividend program, balancing it with the company's capital and financial strength needs.

In recent ISS Guidance regarding COVID-19 issues, ISS stated that this year it will support broad discretion for boards that change customary dividend practices and consider whether boards disclose plans to use any preserved cash from dividend reductions to support and protect their business and workforce.

Glass Lewis also recently recognized the need for flexibility during the pandemic, noting the reality of dividend suspensions or reductions, which must be balanced against the impact on shareholders and employees. "Thankfully, no company has yet dared to entertain shareholder fury by arguing that they need to conserve capital by reducing shareholder returns even further than the crisis already has, while simultaneously arguing for paying large bonuses, repricing grants, adjusting hurdles and increasing the cost and dilution of future compensation. On the contrary, responsible companies hit hard by the crisis have taken early and decisive action to roll back planned salary increases or above-target bonus outcomes, sharing the pain felt by employees and shareholders."

Aside from economic and investor relations considerations described above, if a company has not declared a dividend, it generally can decide not to do so, although the board should consider its contractual obligations (such as the certificate of designation for preferred stock) when making the decision whether to declare a dividend or not.

If a dividend has already been declared, a company needs to comply with state corporate law requirements and stock exchange rules when deciding on its course of action. Revoking an already declared dividend is not permitted in many states, including Delaware, as shareholders may be deemed to have contractual rights to the dividend payment as of the record date. Companies should consider whether they have sufficient legally available funds under state corporate law (or any other applicable law relative to the company) for dividend payments before making the actual payment. Under some circumstances, it may be possible to delay the record and payment dates on ordinary dividends, depending on the applicable state law and charter provisions.

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