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Key Corporate Governance Points for the Board of a Privately Held Company Relating to the COVID-19 Pandemic

The following is a summary of key corporate governance points that the board of directors (or the manager or the board of managers of a limited liability company) of a privately held company should consider in connection with the ongoing COVID-19 pandemic. In evaluating the appropriate actions to take in response to the pandemic, the board should consider consulting with the company's management and outside financial and legal advisers, and other advisers (such as cybersecurity consultants) as the board deems appropriate. However, the board should be mindful that it is the ultimate authority in connection with responding to the pandemic – the board is the ultimate decision-making and goal-setting body of the company, charged with the protection of the interests of the shareholders and other constituents of the company.

The Board's Role in a Crisis

As a general matter, the board is charged with overseeing the business and affairs of the company. This includes setting the goals, policies and objectives for the company and overseeing the management's execution of the company's business plan. During times of crisis, including a pandemic, the board may need to adjust its level of oversight over the company and its business to ensure that the board is properly monitoring the risks facing the company and to evaluate, on an ongoing basis, the effect the pandemic has on the company's business, its ability to continue as a going concern, and its strategic and business plans.

To assist the board in monitoring the effect of the pandemic on the business or to assess or address one or more risks to the business posed by the pandemic, the board may form one or more committees of the board – composed of a subset of the members of the board – to oversee certain aspects of the pandemic. A committee composed of a select number of board members may be more efficient in evaluating, overseeing or addressing certain risks to the company caused by the pandemic.

In discharging its responsibilities, the board must implement measures to ensure that it is reasonably informed of the business and operations of the company, including the risks facing the company and its business as a result of the pandemic. This requires that the board receive relevant information from the company's management and outside advisers on a timely basis. In times of heightened risk, the board should evaluate whether more frequent updates from the company's management and outside advisers are necessary, and whether the board should implement additional policies and procedures to ensure that the necessary information is reported to the board in a timely and complete manner.

Crisis Response Team and Plan

If the company has a crisis response plan in place, the board, together with the company's management and outside advisers, should evaluate whether the plan is sufficient to address the risks posed by the pandemic and whether the plan or the crisis response team should be modified to address the specific risks to the business caused by the pandemic. If the company does not have a crisis response plan, the board should consider whether to implement a plan and whether a crisis response team – composed of members of the board, members of management and outside advisers – should be formed to

assess and respond to the pandemic. The crisis response team should include individuals with diverse backgrounds and expertise to ensure that all aspects of the pandemic and its effect on the business are covered.

Evaluating the Financial Position of the Company

The board should understand and evaluate the impact of the pandemic on the financial strength of the company. For instance, the board should monitor the company's cash flow and anticipated cash needs for (i) working capital, (ii) future debt payments, and (iii) maintenance of financial covenants in loan documents, and consider whether changes to the business or policies of the company are necessary in response to such anticipated cash needs. The board should consider whether it is appropriate to delay declaring a dividend or, if the dividend has already been declared, whether the payment of such dividend can be delayed under applicable law. It is important to note that if the company becomes insolvent or enters the "zone of insolvency," the obligations and duties of the members of the board may shift or broaden to include creditors and other constituents of the company.

Meetings of the Board of Directors

The board should consider whether it is advisable for it (or a duly constituted committee of the board), for the duration of the pandemic, to meet on a more frequent basis to ensure that the board is properly overseeing the business and affairs of the company.

Due to social distancing and other measures imposed by many states and the federal government, it may not be possible for the board or a board committee to meet at a physical location. The corporate laws of many states expressly permit boards and board committees to meet telephonically or by other means of electronic transmission. Prior to holding a telephonic meeting or a meeting by other means of electronic transmission, the company must ensure that the laws of the company's state of formation and the organizational and governance documents of the company permit the board or board committee to meet telephonically or by electronic transmission.

The board should also be mindful of notice and quorum requirements imposed on meetings of the board and board committees. The need for the board or committee to assemble quickly to address issues relating to the pandemic may come into conflict with notice requirements for board or committee meetings. In many instances, members of the board or board committee may waive notice requirements by attendance at the meeting or by signing a written waiver. However, it is generally not possible to waive a quorum requirement for board or board committee meetings.

Annual Meetings of Shareholders

Due to social distancing and other measures imposed by many states and the federal government, it may not be possible for the company to hold its annual meeting of shareholders at a physical location. In response, a company may change its meeting date or, if the applicable law allows, hold a virtual meeting of shareholders.

Prior to holding a virtual meeting of shareholders, the company must ensure that the laws of the company's state of formation and the organizational and governance documents of the company permit a shareholder meeting to be held virtually. Note that the corporate laws of many states have been amended in response to the pandemic to expressly permit companies to hold virtual shareholder meetings. If a company that desires to hold a meeting of shareholders virtually already has provided notice for an annual meeting of shareholders, careful consideration should be given to the notice and corporate laws of the company's state of formation to ensure that the virtual meeting is properly noticed, perhaps with a supplement to the original notice. However, in many instances, it will be necessary for the company to provide a new notice of the meeting.

Instead of holding a virtual meeting, a company may elect to push out the meeting date. A change in meeting date may require a new notice obligation under applicable state law, or an adjournment process could be used.

Instead of holding a shareholders meeting at all, most jurisdictions permit shareholders to act by written consent. However, some jurisdictions impose restrictions on the ability of shareholders to act by written consent in connection with the election of directors and/or impose a higher voting standard on actions taken by written consent of shareholders. Applicable state laws and governing documents of the company should be reviewed to ensure that shareholders are permitted to act by written consent and to determine the minimum voting requirements.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our [COVID-19 Resource Center](#).

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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