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**Leaving Lockdown: A Transition
Guide for You and Your Fund
(From Home to Office)**

Presented by: Mylan Denerstein,
Mark Schonfeld, and Greta Williams
Moderated by: Mary Beth Maloney

Introductions

Governor Cuomo's New York Reopening Advisory Board

- Mylan Denerstein, Member, Governor Cuomo NY Forward Advisory Board & Co-Chair of Public Policy Practice Group and litigation partner at Gibson Dunn

Employment Law Concerns

- Greta Williams, Partner at Gibson Dunn

Minimizing Regulatory Exposure & Litigation Risk

- Mark Schonfeld, Partner at Gibson Dunn, Former Director of the New York Regional Office of the Securities and Exchange Commission

Maximizing Fundraising and Investing Opportunities

- Mary Beth Maloney, Partner at Gibson Dunn

When do you expect your Firm to return to the office at pre-COVID levels?

a. This month

b. Q3 2020

c. Q4 2020

d. Q1 2021

e. Once a vaccine is widely available

“Today we are announcing an advisory board of statewide business leaders, academic leaders, civic leaders who are advising us on just this and they have been for weeks.”
- Governor Cuomo 4/28/20

NY Projection Models: Total COVID BEDS

Columbia University as of Mar 29
~136,000 NYC Only

Gates-funded IHME (as of Apr 1)
~73,000 Statewide

McKinsey severe scenario
~110,000 Statewide

McKinsey moderate scenario
~55,000 Statewide

Today 18,279

03/01 03/08 03/15 03/22 03/29 04/05 04/12 04/19 04/26 05/03 05/10 05/17

“The phased reopening of businesses must be based on a risk versus reward analysis (see above).”

--Governor Cuomo 5/4/20 press conference

Phased Reopening of Businesses

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Risk v. Reward Analysis

	Greater Economic Impact	Lower Economic Impact
Low Infection Risk	Industry <u>greater economic impact</u> , <u>low risk</u> of workplace or customer infection spread	Industry <u>less economic impact</u> , <u>low risk</u> of workplace or customer infection spread
Higher Infection Risk	Industry <u>greater economic impact</u> , <u>higher risk</u> of workplace or customer infection spread	Industry <u>less economic impact</u> , <u>higher risk</u> of workplace or customer infection spread

Funds Fall Within Phase 2 For Re-Opening

Phased Reopening of Businesses

Phase 1

- Construction
- Manufacturing and wholesale supply chain
- Retail – curbside pickup
- Agriculture, Forestry, and Fishing

Phase 2

- Professional Services
- Finance and Insurance
- Retail
- Administrative Support
- Real Estate/Rental Leasing

Phase 3

- Restaurants/Food Services
- Hotels/Accommodations

Phase 4

- Arts/Entertainment/Recreation
- Education

“Businesses must implement new safety precautions.”

--Governor Cuomo's 5/4/20 press conference

Business Safety Precautions

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People

- Adjusted workplace hours and shift design
- Social distancing
- Non-essential travel restricted



Places

- Masks required if in frequent contact with others
- Strict cleaning and sanitation standards



Processes

- Continuous health screening to enter workplace
- Continuous tracing, tracking and reporting
- Liability

Returning to the Office

<https://forward.ny.gov/>

What is the anticipated timing of a return to work for funds, relative to other businesses?

How much guidance and support can funds—which are generally well capitalized but really function as small businesses—expect from the government?

Do we have a sense of what will happen in the event of a resurgence?

Return to Work Employment Law Considerations

Do you have a return to work plan in place?

a. Yes

b. No

c. We are working on it!

Workplace Safety Lawsuits

Failure to properly screen employees

Failure to properly protect employees from other symptomatic people

Failure to cleanse and sanitize the workplace

Failure to provide personal protective equipment

Failure to implement a social distance policy

Failure to implement a telework or WFH policy

Failure to implement various government guidelines

Enhancing Workplace Safety: Potential Options

Strong, detailed, and well-publicized policies

Employee health screening

Temperature checks

Use of PPE and accommodations

Social distance monitoring

Operational changes: Staggered shifts, expanded entrance and exit opportunities, etc.



Enhancing Workplace Safety: Employment Law Considerations, Cont'd

OSHA Standards and Reporting

Employee screening and testing

ADA, Title VII, ADEA and related considerations

Wage and hour considerations

Responding to Employee Concerns



Employee resistance to screening or testing

Permitting employees to return to work from quarantine

Responding to employee reluctance to return to work

Minimizing Regulatory Exposure & Litigation Risk

Investigative Risk Increases In A Volatile Market and Remote Work Environment

- Historically, unprecedented market volatility, fast moving economic events, and dislocations create substantial challenges for compliance.
- Prior periods of market volatility have been typically followed or accompanied by heightened SEC investigative risk.

Today, this heightened investigative risk is compounded by unique challenges of remote work arrangements, including the diminished ability for direct oversight and interaction.

Have you conducted a remote refresher on insider trading?

a. Yes

b. No

c. It is on the calendar!

The SEC Enforcement Division Has Given Fair Warning...

In a warning of things to come, the Co-Directors of the SEC Enforcement Division took the unusual step of issuing a cautionary statement on March 24, 2020, emphasizing **“the importance of maintaining market integrity and following corporate controls and procedures”** during this crisis.

The SEC cited as examples the heightened risk of insider trading (“in these dynamic circumstances, corporate insiders are regularly learning new material nonpublic information that may hold an even greater value than under normal circumstances”) and the need to be mindful of disclosure controls (“protect against the improper dissemination and use of material nonpublic information”).

The SEC Enforcement Division Has Given Fair Warning...

In a speech on May 12, 2020, one of the Enforcement Division Co-Directors gave a speech providing insight to the Division's enforcement priorities in light of the pandemic.

In response to the pandemic, the Enforcement Division formed a Coronavirus Steering Committee, comprised of leadership from the Home and Regional Offices, the specialized units and the Office of Market Intelligence, to identify areas of potential misconduct and coordinate the Division's response to COVID-19 related issues.

SEC Enforcement Division Focus

Areas of Enforcement focus include:

- ***Insider Trading and Market Manipulation***: The rapid and dramatic impact of the pandemic on the financial performance of companies increases the potential for trading that could be perceived as attributable to material non-public information. The Steering Committee is working with the Division's Market Abuse Unit to monitor announcements in industries particularly impacted by COVID-19 and to identify potentially suspicious market movements.
- ***Accounting Fraud***: As with other financial crises, the pandemic is likely to expose previously undisclosed financial reporting issues, as well as give rise to rapidly evolving financial reporting and disclosure challenges. The Steering Committee is looking for indications of potential disclosure and reporting misconduct and reviewing public filings for disclosures that appear out of step to companies in similar industries or that attempt to inaccurately characterize preexisting financial statement issues as coronavirus related.

SEC Enforcement Division Focus

Areas of Enforcement focus include:

- ***Asset Management***: Asset managers confront unique challenges created by the pandemic, including with respect to valuations, liquidity, disclosures, and the management of potential conflicts among clients and between clients and the manager. The Steering Committee is working with the Division's Asset Management Unit to monitor these issues, including failures to honor redemption requests, which could reveal other underlying asset management issues.
- ***Complex Financial Instruments***: As with prior financial crises, the pandemic may reveal risks inherent in various structured investment products. The Steering Committee is working with the Division's Complex Financial Instruments Unit to monitor complex structured products and the marketing of those products to investors.

Heightened Whistleblower Risks

The ever-present risk of whistleblowers is heightened during a crisis.

- In the first three months of lockdown, the Enforcement Division triaged more than 4,000 whistleblower tips, a 35% increase over the same period last year.
- Thus far this year, the SEC has granted more than a dozen whistleblower awards, including an award of \$50 million, the highest single award to date.
- Total awards to date exceed \$500 million to 85 individuals.

Navigating the Heightened Regulatory Risks

Insider Trading

- Remind investment professionals about the policies and procedures to prevent insider and the importance of consulting with legal and compliance.
- Otherwise routine communications will be reviewed in hindsight for the appearance of disclosures of material, nonpublic information.
 - Communications with issuers' management and investor relations
 - Communications with political intelligence experts, members of federal and state executives and legislators and their staff
 - Communications with companies in an issuer's chain of supply or distribution
 - Communications with other asset managers regarding their analyses of the impact of COVID-19
 - Communications with sell-side analysts

Navigating the Heightened Regulatory Risks

Investment Strategy Changes and Allocations of Unique Opportunities or Expenses

- Certain investment strategies may be materially impaired by the crisis or advisers may find unique opportunities outside of their traditional strategies.
- Review the documents governing the strategies to identify what changes fall within and outside such strategies, and what steps, if any, should be taken to modify those strategies.
- When considering a unique investment opportunity consider and manage potential conflicts that may be implicated by the allocation of such opportunities among client funds, accounts and potential co-investors.
- As with other expense allocation decisions, prior to allocating crisis-related expenses between funds or between a fund and an adviser, carefully consider the language in the operative fund documents.

Navigating the Heightened Regulatory Risks

Portfolio Valuation and Liquidity Management

- Maintain consistency and adherence to valuation policies and practices. Consider reassessing valuation assumptions and methodologies in light of the current environment. Decisions about the relevance of market dislocations to asset valuations should be made in consultation with experts and compliance.
- In the event of increased redemptions and meeting liquidity demands, carefully assess options under the applicable fund or account documents, including the possibility of imposing redemption gates, side pockets or suspensions. Implementing such measures may draw regulatory scrutiny and should be handled with care.
- If considering providing liquidity through a related party transaction or forced sale, carefully consider potential conflicts and other the legal and regulatory issues that can be raised by these actions.

Navigating the Heightened Regulatory Risks

General Guidelines to Mitigate Regulatory Risk During Remote Operations

- Reinforce use of firm-approved communications media.
- Encourage investment professionals to consult with legal and compliance and to refrain from making judgment calls on their own.
- Memorialize consultations with, and judgments by, legal and compliance and outside counsel.
- Participate in virtual meetings of investment and trading professionals.
- Consider the appearance risks in the event of a subsequent examination or investigation by regulators.
- Address potential whistleblower complaints through investigation and recordkeeping.

Maximizing Fundraising and Investing Opportunities

Is your fund manager considering new investment opportunities the fund has not previously pursued?

- a. Yes—we are looking to take advantage of new opportunities (distressed, PIPEs)**
- b. No—we are sticking with the same type of investments.**
- c. Not sure. We haven't discussed it.**

Pursuing Investment Opportunities During Lockdown

COVID-19 has created a tremendous amount of uncertainty in the global economy, causing many private equity fund managers to pursue new, attractive opportunities outside of their traditional investment objectives. Such managers should carefully review their funds' governing documents and disclosure materials to determine whether and to what extent it is possible to pursue such opportunities. Sponsors should also maintain an open dialogue with limited partners and clearly communicate the desired strategy in a concise, focused manner, including a consideration of the various tools at the sponsor's disposal.

Before Pursuing New PIPE or Debt Opportunities, Fund Managers Must Consider Their Existing Funds Primary Investment Focus

Pursuing Investment Opportunities During Lockdown: Assessing Your Fund's Investment Program

Do you have a mandate? Can you get a waiver? Can you open a new fund?

- (1) **Investment Objective:** Is the relevant disclosure and partnership agreement language is flexible enough to permit alternative investment types (e.g., is there a carve out to allow investment in “other assets”)?
- (2) **Investment Restrictions:** Does the partnership agreement or investor side letters allow for a waiver and does it make sense to request one?
- (3) **Alternative Vehicles:** Would a newly formed co-investment vehicle give the fund the flexibility to pursue a strategy otherwise limited by its LPs or LPAC? Would an annex fund or Independent Investment Vehicle be appropriate.
- (4) **Supplemental Fundraises:** Is a supplemental fundraise within the existing fund an option?

An independent investment vehicle focused on alternative investments may be the best option to allow the manager to achieve economics that are not obtainable in the co-investment or annex fund contexts.

But this approach also presents the most risk, particularly in the current uncertain fundraising climate where travel and the ability to conduct onsite due-diligence may be drastically curtailed.

Investment Opportunities During Lockdown: Do Your Diligence Differently

Known Relationships: Can you check the box on a personal, Pre-COVID relationship.

Known Industry: Do you have Pre-COVID knowledge or experience investing in this industry?

Valuations: Disclose your methodology, assumptions, and projections.

Investor Communications: Over-Communicate In This Environment

Presenters



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Mylan is a Litigation partner and Co-Chair of Gibson Dunn's Public Policy Practice Group. From 2010 to 2014 she served as Counsel to Governor Cuomo. From 2007-2010, she was executive deputy attorney general for social justice under Mr. Cuomo. She has also served as the top lawyer for the New York Fire Department and as a federal prosecutor in Manhattan.



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Mary Beth is a partner and a member of the firm's Litigation Department. She focuses on high-stakes business litigation, especially involving complex financial products. She is a trusted advisor to various alternative asset funds, managers, and portfolio companies and defends such clients in SEC investigations. Her trial experience includes federal civil, state civil, Delaware Chancery, and Delaware Bankruptcy courts.



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Mark is a partner and the Co-Chair of the Securities Enforcement Practice and a member of the Crisis Management and White Collar Defense and Investigations Practices. His practice focuses on the representation of financial institutions, public companies, hedge funds, accounting firms and private equity firms in investigations conducted by the SEC, DOJ, States Attorneys General, FINRA and other regulatory organizations.



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Greta is a partner and member of the firm's Litigation and Labor & Employment Departments. In 2018, Law360 named Gibson Dunn one of its five [Employment Practice Groups of the Year](#), and selected Ms. Williams as one of five ["Rising Star"](#) employment attorneys under 40 to watch nationwide. In 2019, Ms. Williams was also recognized as a "Labor & Employment Star" by Benchmark Litigation.

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Thank You